THIS PHOTOGRAPHIC
REPRINT EDITION
IS PUBLISHED BY
DENNIS & CO., INC. (Publishers), Buffalo, N. Y., U. S. A.
BUTTERWORTH & CO. (Publishers) LTD., London, England

Reprinted by photolitho in the U.S.A.
by Cushing-Malloy, Inc., of Ann Arbor, Michigan

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

JAMES P. ASPINALL, Barrister-at-Law.

VOL. V.,

New Series, from 1882 to 1886.

(VOL. VIII., O.S.)

LONDON: HORACE COX, 10, WELLINGTON STREET, STRAND, W.C.

1887.

LONDON:
PRINTED BY HORACE COX, WELLINGTON-STREET, STRAND, W.C.

INDEX

TO

NAMES OF THE CASES

REPORTED IN THIS VOLUME.

AGAMEMNON, THE..... *page* 92
ALEXANDER, THE 89
ALFRED, THE 214
ALLEN *v.* COLTART 104
ALSTON, R. L., THE 43
ANDERSON, TRITTON, AND CO., *v.* THE OCEAN STEAMSHIP COMPANY 202, 401
ANNA HELENA, THE..... 61, 142
ARDANDHU, THE 573, 594
ARKLOW, THE 219
ASTE *v.* STRUMORE 175
AVENIR, THE..... 218

BARROW-IN-FURNESS MUTUAL SHIP INSURANCE COMPANY LIMITED, THE, *v.* ASHBURNER 443, 527
BEESWING, THE 335, 484
BELFORT, THE 291
BELLCAIRN, THE..... 503, 582
BENARES, THE 53, 171
BERNINA, THE 577
BERWICK HARBOUR COMMISSIONERS, THE (apps.) *v.* THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF TWEEDMOUTH (resps.) 532
BERYL, THE 193, 321
BETA, THE 276
BIANCA, THE 60
BIBBELL *v.* DEYER 267
BJORN, THE..... 212 n.
BLACKBURN, LOW, AND CO. *v.* VIGORS 597
BLENHEIM, THE..... 522
BOLCKOW, VAUGHAN, AND CO. *v.* FISHER AND OTHERS 20
BOWESFIELD, THE..... 265
BRITISH COMMERCE, THE 335
BROWN, SHIPLEY, AND CO. *v.* KOUGH 433
BURDICK *v.* SEWELL 79, 298, 376
BURT AND OTHERS *v.* LIVINGSTONE 482
BURTON *v.* ENGLISH..... 84, 187
BUSHIRE, THE 416

CAIED *v.* MOSS 565
CAMELLIA, THE..... 197
CARDIFF STEAMSHIP COMPANY, THE, *v.* JOHN BAEWICK AND OTHERS 473
CAYZER AND OTHERS *v.* THE CARRON COMPANY; THE MARGARET..... 371
CHARLES JACKSON, THE 399
CHARTERED MERCANTILE BANK OF INDIA, ETC., THE, *v.* THE NETHERLANDS INDIA STEAM NAVIGATION COMPANY LIMITED 65
CHEERFUL, THE..... 525
CHINA MERCHANTS STEAM NAVIGATION COMPANY, THE, *v.* BIGNOLD; THE LAPWING 39
CHRISTIANSBORG, THE..... 491
CHUSAN, THE..... 476
CITY OF CHESTER, THE..... 311
CITY OF LUCKNOW, THE 340
CLAN MACDONALD, THE 148
CLARKE *v.* THE MILWALL DOCK COMPANY 462
CLYDACH, THE 336
COLLINGROVE, THE 483
COLONSAY, THE..... 545
CONSETT, THE ..... 34 n.
CORY *v.* BURR 109
COSMOPOLITAN, THE ..... 212 n.
COVERDALE, TODD, AND CO. *v.* GRANT AND CO. 74, 353
CREADON, THE 585
CRICKET, THE 53

DE BAY, THE 156
DICK AND PAGE *v.* BADART FRÈRES 49
DIONE, THE 347
DORA TULLY, THE..... *page* 550
DORDOGNE, THE 328
DORMONT *v.* THE FURNESS RAILWAY COMPANY ... 127
DOUGLAS, THE 15
DUNELM, THE 304

EARL OF DUMFRIES, THE ..... 329 n. 342
EBOR, THE 560
EDWARDS AND OTHERS *v.* THE FALMOUTH HARBOUR COMMISSIONERS; THE RHOSINA 350, 460
EILEAN DUBH, THE 154
ELIN, THE 120
ELLIOTT *v.* LORD 63
EMERY *v.* CICHERO; THE ARKLOW 219
EMMY HAASE, THE 216
ENDEAVOUR, THE 53
EPPOS, THE..... 180
EUROPEAN, THE..... 417

FAIRPORT, THE..... 62, 348
FAMENOTH, THE 35
FANNY, THE 75
FERRET, THE 94
FOSCOLINO, THE 420
FRIEDEBERG, THE..... 426

GARDNER AND SON *v.* TRECHMANN 558
GEORGE GORDON, THE..... 216
GEORGE ROPER, THE 134
GETTYSBURG, THE 347
GIBBS AND SON *v.* LAMPORT AND ANOTHER ... 543, 593
GLENFRUIN, THE 413
GODIVA, THE 524
GOLDEN SEA, THE..... 23
GOWAN *v.* SPROTT..... 288
GRANT *v.* COVERDALE AND CO. 74, 353
GREAT EASTERN STEAMSHIP COMPANY, THE, *Re*; CLAIM OF WILLIAMS AND OTHERS 511
GREAT INDIAN PENINSULA RAILWAY COMPANY, THE, *v.* TURNBULL 465
GRUMBRECHT *v.* PARRY 176
GULLICHSEN *v.* STEWART BROTHERS 130, 200

HAIGH *v.* THE ROYAL MAIL STEAM PACKET COMPANY 47, 189
HALL *v.* BILLINGHAM AND SONS..... 538
HARDWICK, THE 199
HARRIS AND DICKSON *v.* MARCUS, JACOBS, AND CO. 530
HARTON, THE..... 213
HARVEST, THE 546
HECTOR, THE..... 101
HEDGES AND SON (apps.) *v.* THE LONDON AND ST. KATHARINE DOCK COMPANY (resps.)..... 539
HEINRICH BJORN, THE 145, 391
HERCULES, THE 545
HOCHUNG, THE 39
HOPE, THE 126
HORACE, THE..... 218
HORSLEY *v.* PRICE AND CO..... 106
HOUGH AND CO. *v.* HEAD 447, 505
HUMBER, THE 181
HUTH AND CO. *v.* LAMPORT AND ANOTHER ... 543, 593

IMMACOLATA CONCEZIONE, THE 208
INGLIS *v.* STOCK 294, 422
INMAN STEAMSHIP COMPANY *v.* BISCHOFF 6
ISIS, THE..... 155

JAMES BURNESS AND SONS *v.* PERSIAN GULF STEAMSHIP COMPANY LIMITED; THE BUSHIRE 416
JOHN MCINTYRE, THE 278
JOHNSTON AND CO. *v.* HOGG AND OTHERS..... 51

NAMES OF CASES.

KEMP *v.* FALK 1
KENMURE CASTLE, THE 27
KIRBY HALL, THE 90

LANCASTER, THE 58, 174
LAPWING, THE 39
LAWS *v.* SMITH; THE RIO TINTO 224
LEDUC AND CO. *v.* WARD AND OTHERS 571
LEON XIII., THE 25, 73
LEPTIR, THE 411
LEVY AND CO. *v.* THE MERCHANTS' MARINE INSURANCE COMPANY 407
LIVIETTA, THE 132, 151

MAMMOTH, THE 289
MARGARET, THE 137, 204, 371
MARIE, THE 27
MARION, THE 339
MARY, THE 33
MARZETTI *v.* SMITH 166
MATHILDA, THE 75
MATWIEF *v.* WHITOCK 458
MERCANTILE STEAMSHIP COMPANY LIMITED, THE, *v.* TYSER ..... 6 n.
MERCHANT PRINCE, THE 520
MEREDITH, THE 400
MERSEY DOCKS AND HARBOUR BOARD *v.* THE OVERSEERS OF LLANEILIAN 248, 358
MERSEY STEAMSHIP COMPANY LIMITED, THE, *v.* SHUTTLEWORTH AND CO. 48
MILDRED, GOYENOCHE, AND CO. *v.* MASPONS Y HERMANO 182
MOGUL STEAMSHIP COMPANY LIMITED, THE, *v.* MCGREGOR, GOW, AND CO. 467
MURPHY *v.* COFFIN AND CO. ..... 531 n.

NASMYTH, THE 364
NEVER DESPAIR, THE 211
NEWBATTLE, THE 356
NIELSEN AND CO. *v.* WAIT, JAMES, AND CO. 553
NOTTING HILL, THE 241
NUMIDA, THE 483

OAKFIELD, THE 575
OCEAN STEAMSHIP COMPANY, THE, *v.* ANDERSON, TRITTON AND CO. 202, 401
OWNERS OF THE S.S. WELLFIELD, THE, *v.* ADAMSON AND SHORT; THE ALFRED 214

PACIFIC, THE 263
PALERMO, THE 165, 369
PALOMARES, THE 343
PANDORF AND CO. *v.* HAMILTON, FRASER, AND CO. 568
PERUVIAN GUANO COMPANY LIMITED *v.* BOCKWOLDT 29
PESHAWUR, THE 89
PETER GRAHAM, THE 276
PHELPS, STOKES, AND CO. *v.* COMBER 245, 428
PLANET, THE 144
PONTIDA, THE 284, 330
PRICE *v.* LIVINGSTONE 13
PRINCESS, THE 451

R. L. ALSTON, THE 43
RAINBOW, THE 479
RAISBY, THE 473
REGALIA, THE 338
REG. *v.* THE JUDGE OF THE CITY OF LONDON COURT 283
RENPOR, THE 98
REW *v.* PAYNE, DOUTHWAITE, AND CO. 515
RHONDDA, THE 114
RHOSINA, THE 350, 460
RIGBORGS MINDE, THE 123
RIO TINTO, THE 224
RIPON, THE 365
RISOLUTO, THE 93
ROBERT DICKINSON, THE 341
ROBINSONS, THE, AND THE SATELLITE 338
RONA, THE 259

SAILING SHIP GARSTON COMPANY, THE, *v.* HICKIE AND CO. ..... *page* 499
SAINT AUDRIES, THE 552
SANDERS BROTHERS *v.* MACLEAN AND CO. 160
SAVERNAKE, THE ..... 34 n.
SCARAMANGA AND OTHERS *v.* MARTIN MARQUAND AND CO. 410, 506
SEA INSURANCE COMPANY, THE, *v.* HADDEN 230
SEATH AND CO. *v.* MOORE 586
SEATON, THE 191
SERAGLIO, THE 421
SEWARD *v.* THE OWNER OF THE VERA CRUZ 254, 270, 386
SEWELL *v.* BURDICK 79, 298, 376
SHERBRO', THE 88
SMITH *v.* DART 360
SOLIS, THE 368
SOLWAY, THE 482
SPEARMAN, THE 458
SPERO EXPECTO, THE 197
SPILLER *v.* THE BRISTOL STEAM NAVIGATION COMPANY 228
STANMORE, THE 441
STEAMSHIP BENTINCK COMPANY LIMITED, THE, *v.* W. H. POTTER AND SON 134
STEAMSHIP THANEMORE LIMITED, THE, *v.* THOMPSON 398
STEWART AND CO. *v.* THE MERCHANTS' MARINE INSURANCE COMPANY LIMITED 506
STOCK *v.* INGLIS 294, 422
STORK, THE 211
STORMCOCK, THE 470
SUNNISIDE, THE 140
SVENDSEN *v.* WALLACE 87, 232, 453

TATE AND SONS *v.* HYSLOP 487
TATTERSALL *v.* THE NATIONAL STEAMSHIP COMPANY LIMITED 206
TEMPLE BAR, THE 509
THOMPSON *v.* THE ROYAL MAIL STEAM PACKET COMPANY ..... 190 n.
THORMAN *v.* BURT, BOULTON, AND CO. 563
THYATIRA, THE 147, 178
TURGOT, THE 548
TYNE STEAM SHIPPING COMPANY LIMITED THE, *v.* THE BRITISH SHIPOWNERS' COMPANY LIMITED 194

UNDAUNTED, THE 580
UNION STEAMSHIP COMPANY OF NEW ZEALAND THE, *v.* THE MELBOURNE HARBOUR COMMISSIONERS 222
UNITED SERVICE, THE 55, 170
UZIELLI AND CO. *v.* THE BOSTON MARINE INSURANCE COMPANY 405

VALLANCE *v.* FALLE 280
VANDYCK, THE 17
VERA CRUZ, THE 254, 270, 386
VICTOR COVACEVICH, THE 417

WARKWORTH, THE 194, 326
WEBSTER *v.* THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY ..... 256 n.
WHICKHAM, THE 479
WHITE *v.* DITCHFIELD 400
WILLIAM SYMINGTON, THE 293
WINSTON, THE 143, 274
WOODLEY AND CO. *v.* MITCHELL AND CO. 71

YAN YEAN 135
YOURRI, THE 458

ZADOK, THE 252
ZOE, THE 583

CASES SINCE REVERSED ON APPEAL.

CAIRD *v.* MOSS 565
PANDORF AND CO. *v.* HAMILTON AND CO. 568

SUBJECTS OF CASES.

ABANDONMENT.

See *Collision*, No. 93—*Marine Insurance*, Nos. 1, 14, 15, 18—*Wages*, No. 1.

ACTION IN REM.

See *Collision*, Nos. 31, 32, 39—*Jurisdiction*, Nos. 2, 3, —*Practice*, Nos. 1, 10, 22, 28, 29, 30, 31.

ADMIRALTY CHARTER.

See *Marine Insurance*, No. 10.

ADMIRALTY COURT.

See *Carriage of Goods*, No. 29.—*Collision*, No. 12

ADMIRALTY COURT ACT 1861.

See *Collision*, Nos. 35, 43, 48—*Jurisdiction*, Nos. 1, 2, —*Master's Wages and Disbursements*, No. 4—*Practice*, No. 18.

ADMIRALTY STORES.

See *Limitation of Liability*, No. 2.

ADMIRALTY SUITS ACT 1868.

See *Limitation of Liability*, No. 2.

ADMISSION OF FACTS.

See *Salvage*, No. 33.

ADVANCES.

See *Bills of Lading Act*—*Bottomry*, No. 1—*Necessaries*, Nos. 1, 2, 5.

AFFIDAVIT.

See *Bottomry*, No. 3—*Collision*, No. 39—*Limitation of Liability*, No. 9—*Practice*, No. 20.

AGREEMENT.

See *Bottomry*, No. 1—*Collision*, No. 91—*Master's Wages and Disbursements*, No. 5—*Salvage*, Nos. 1, 2, 14, 25, 26—*Towage*, Nos. 1 to 4.

ANCHOR.

See *Collision*, No. 2—*Damage*, No. 1.

APPEAL.

See *Collision*, No. 10—*Practice*, Nos. 4, 5, 6, 19—*Salvage*, Nos. 3, 8, 9—*Wrecks and Casualties*, Nos. 1, 2, 3.

APPORTIONMENT.

See *Salvage*, Nos. 6, 7.

APPRAISEMENT.

See *Practice*, No. 39.

APPROPRIATION.

See *Marine Insurance*, No. 12—*Sale of Goods*, Nos. 3, 4, 5—*Sale of Ship*, No. 2.

ARREST BY TELEGRAM.

See *Practice*, No. 7.

ARREST OF SHIP.

See *Practice*, No. 7—*Salvage*, No. 1.

AVERAGE.

See *Marine Insurance*. No. 5.

AVERAGE BOND.

See *General Average*, Nos. 5, 6—*Salvage*, No. 11.

BAIL.

See *Collision*, Nos. 20, 35—*Practice*, Nos. 10, 22—*Salvage*, No. 10.

BAILIFF.

See *Collision*, No. 37.

BALLAST.

See *Wrecks and Casualties* Nos. 4, 5.

BARGE.

See *St. Katherine's Dock Act* 1864.

BARRATRY.

See *Marine Insurance*, Nos. 6, 16, 17.

BELLIGERENTS.

See *Marine Insurance*, No. 6,

BERWICK HARBOUR.

See *Poor Rate*, No. 1.

BILL OF EXCHANGE.

See *Master's Wages and Disbursements*, Nos. 6, 7—*Sale of Goods*, Nos. 3, 4, 5, 6.

BILLS OF LADING.

See *Bills of Lading Act* —*Carriage of Goods*, Nos. 1, 2, 7, 11, 19, 24, 26, 27, 33—*Collision*, Nos. 11, 16 —*Sale of Goods*, Nos. 1, 2, 4, 5, 6.

BILLS OF LADING ACT.

1. *Indorsement by way of security only—Passing of property—Liability for freight.*—A shipper of goods, who has indorsed a bill of lading in blank and delivered it to the indorsee simply by way of security for money advanced, does not thereby pass the property in the goods to the indorsee, so as to transfer to him all liabilities in respect of

them within the meaning of sect. 1 of the Bills of Lading Act (18 & 19 Vict. c. 111), and consequently such an indorsee cannot be made liable in an action by the shipowner for freight. (H. of L. reversing Ct. of App.) *Sewell* v. *Bendick* *page* 79, 298, 376

2. *Indorsement to repay advances—Passing of property—Liability for freight, &c.*—Where bills of lading are indorsed for the purpose of enabling the indorsees to sell the goods named therein, and so recoup themselves for advances made by them to the indorsers, but with no intention of further passing the property, such indorsees do not incur any liability under the Bills of Lading Act (18 & 19 Vict. c. 111). (Cave, J.) *Allen* v. *Coltart and Co.* 104

See *Carriage of Goods*, No. 2.

BLACKWALL POINT.

See *Collision*, Nos. 86 to 90.

BOARD OF TRADE.

See *Collision*, Nos. 15, 30—*Wrecks and Casualties*, Nos. 1, 4.

BOND FOR SAFE RETURN.

See *Restraint*.

BOTTOMRY.

1. *Bottomry bond—Essentials of—No maritime risk expressed—Advance for necessaries—Intention of parties.*—A written agreement, made between the managing owner of a ship and another party, by which it is agreed that, in consideration of an advance for necessaries supplied to and for the use of the vessel, the managing owner undertakes to return the amount advanced "on the return of the said barque from her present voyage," and authorises the lender to cover the amount advanced by insurance on the barque, but which is silent as to maritime interest, is not a contract of bottomry, there being no words in the contract purporting to pledge the ship as security for the loan, and it not appearing that the parties ever had any intention of creating a bottomry bond (Ct. of App.) *The Heinrich Bjorn* *page* 391

2. *Extent of master's authority—cargo owners—Amount of loan—Necessity.*—The authority of a master to raise money on bottomry is limited as against the owners of cargo to such an amount as is necessary to enable the ship to complete her voyage with safety, and even where the money is advanced by a person who is not the ship's agent and has no interest in the repairs effected on the ship, and honestly believes from inquiries made that the money is necessary, he cannot recover as against the cargo owner anything in respect of items other than those which are in fact necessary. (Ct. of App., affirming Adm. Div.) *The Pontida* 284, 330

3. *Practice—Default action—Affidavit of service—Writ—Order XIII. r. 2.*—A plaintiff in an undefended bottomry action must, before he can obtain judgment by default, in addition to filing an affidavit of service in the Registry, as provided by Order XIII., r. 2, annex thereto the original writ. (Adm.) *The Eppos* 180

4. *Registrar and merchants—Amount of claim—Reduction in—Commissions and premium*—The registrar and merchants have a discretionary power to reduce items claimed for commissions and premium under a bottomry bond, should they deem them unnecessary or exorbitant, and the court will not interfere with this discretion, unless it be shown that the registrar and merchants have exercised it on an erroneous principle. (Ct. of App., affirming Adm. Div.) *The Pontida* ..... *page* 284, 330

BRITISH SHIP.

See *Chains, Cables, and Anchors Act* 1874—*Collision*, No. 36—*Necessaries*, No. 3—*Shipowners*, No. 1.

BROKER.

See *Charter-party*, Nos. 2, 4.

CANCELLATION CLAUSE.

See *Charter-party*, No. 5; *Marine Insurance*, Nos. 8, 10.

CARDIFF DRAIN.

See *Collision*, No. 74.

CARGO.

See *Bottomry*, No 2—*Collision*, Nos. 11, 16, 17, 49—*General Average*, Nos. 3, 4—*Salvage*, Nos. 11 to 14—*Wages*, No. 1.

CARRIAGE OF GOODS.

1. *Bill of lading—Holder's liability for freight, demurrage, &c.—Presentation.*—Where the holder of a bill of lading, under which he is entitled to the delivery of goods on certain terms as to freight, demurrage, and taking delivery, presents that bill of lading and demands delivery of the goods, he thereby *primâ facie* offers to perform those terms of the bill of lading on which alone the goods are deliverable to him. (Cave, J.) *Allen* v. *Coltart and Co.* ..... *page* 104

2. *Bill of lading—Signature by agent for master—Short delivery—Estoppel—Bills of Lading Act.*—The signature of a master's agent to a bill of lading does not estop the shipowner, and hence where a master's agent signs a bill of lading for more goods than had actually been put on board the ship, the shipowner is not liable to the assignees of the bill of lading, for not delivering all the goods named in the bill of lading, although all the goods had been floated alongside the ship, and mate's receipts given for them, but some were lost before they were shipped. (Ct. of App.) *Thorman* v. *Burt, Boulton and Co.* 563

3. *Damage to cargo—General ship—Stranding—Duty of master as to repairs*—If a vessel carrying a cargo belonging to different shippers after she has started on her voyage receive damage, the master, in considering what steps he shall take in regard to carrying on the cargo or first repairing the ship, is bound to consider not one individual interest, but the interests of all concerned, and to do that which a prudent master would do under the circumstances, whether it be to return to his port of loading and repair, or repair at the nearest possible place before proceeding, or go on without repairing; and if it be in his power to effect the repairs without any great delay or expense to the interests intrusted to his charge it is his duty to repair before proceeding. (Adm. Div.) *The Rona* 259

4. *Damage to cargo—General ship—Stranding—Duty of master as to repairs*—The R., a wooden vessel under charter-party from the port of New York to London with a cargo of grain and flour, whilst being towed down the New York river stranded on the Craven Shoal, about ten miles below New York. A tug towed at her for an hour and three-quarters before she was got off, during which time her decks and waterways were much

strained, and she was then found to be making five inches of water per hour; but the master did not examine her or cause any repairs or caulking to be done, but proceeded on the voyage and encountered very severe weather. On arrival in London the flour of the plaintiff, which was immediately beneath the deck, was found to have been damaged by the sea water making its way through the deck, the grain at the bottom of the ship being uninjured. Held, that the master was negligent in not repairing; that is, in not caulking the deck before he proceeded on his voyage, that the ship was more liable thereby to sustain damage and to injure the cargo, and that the defendants were liable for the damage occasioned thereby. (Adm. Div.) *The Rona*..... *page* 259

5. *Damage to cargo—Measure of damages—Delay—Discharge of cargo—Right to reship and carry on—Lien of shipowner—Freight.*—The steamship K., having just started on a voyage from C. to B. with a cargo of coals, carried under charter for the plaintiffs, came into collision with the B. at the port of loading. The K. put back and discharged her cargo for the purpose of repairs. The coal was found to be damaged, and its owners (the plaintiffs) were advised that it was unfit for reshipment, and that, for the good of all parties interested, it should be sold at C., and not carried on to B. The owners of the K. refused to part with the cargo or to take any other cargo except upon fresh terms as to freight The plaintiffs made no inquiry as to these terms, and the coals were reshipped and carried on to B., where, being useless for the purposes of the plaintiffs' locomotives, for which they had been originally intended, they were used in the plaintiffs' smithies. The owners of the B. having admitted liability, and the damages being referred to the registrar, he reported that in his opinion the shipowner was not entitled to insist upon reshipment of the damaged cargo, and that the plaintiffs' damages were the loss they would have sustained if the coals had been sold at the port of lading. Held, on objection to the report, that the cargo, though damaged, was capable of being carried on, and that, therefore, the shipowner having a lien upon it for freight to be earned, was entitled to insist upon carrying it on, or to exact fresh terms as to freight for another cargo, and that the damages were the loss to the plaintiffs at B., and not at C.; but that it was the duty of the cargo owner to have inquired what the fresh terms as to freight were, so as to diminish the loss as far as possible, and that in ascertaining this loss the saving which could have been effected by shipping a fresh cargo on new terms must be taken into consideration by the registrar, and that the report must go back to the registrar to ascertain the damages upon this basis. Held, also, that the fact that the coal was used in the plaintiffs' smithies at B. did not necessarily show that the difference between the value of locomotive and smithy coals was the measure of the plaintiffs' loss, but the actual reduction in its value occasioned by the collision must be ascertained. (Adm. Div.) *The Blenheim* 522

6. *Damage to cargo—Ship stranded—Salvage expenses—Liability of shipowners.*—Where, owing to negligent navigation, a ship is cast ashore and her cargo thereby suffers damage and loss, money paid by the underwriters of the cargo to a salvage association, who are employed with the assent of the shipowners, for saving a portion of the cargo, is not a voluntary payment, and is recoverable by the cargo owners from the shipowners, being money paid on behalf of the cargo owners to avert a loss which would have fallen on the shipowners if the portion of the cargo had not been salved and sent on to its destination. (Ct. of App., affirming Huddleston, B.) *Scaramanga and others* v. *Martin, Marquand, and Co.* ...*page* 410, 506

7. *Delivery of cargo—Bill of lading—To discharge in dock always afloat—Duty and right of shipowner.*—Where a bill of lading incorporates a clause in the charter-party to the effect that "the ship shall proceed to a port to discharge in a dock as ordered on arriving, if sufficient water, or so near thereunto as she may safely get, always afloat," such clause is introduced in the interest of the shipowner, and restricts the generality of the power to name a dock; and while the obligation of the shipowner is to proceed to the dock named, if there is sufficient water to enter the dock when the order is given, on the other hand, if there is not then sufficient water, the ship is not bound to discharge in the dock named. (Cave, J.) *Allen* v. *Coltart and Co.* ... 104

8. *Delivery of cargo—Landing—Merchant Shipping Act Amendment Act* 1862 (25 & 26 *Vict. c.* 63), *s.* 67—*Notice of readiness to deliver.*—The 7th subsection of the Merchant Shipping Act Amendment Act 1862, s. 67, entitling the owner of goods to twenty-four hours' notice in writing of the shipowner's readiness to deliver the goods does not apply where the goods are landed under subsect. 6 of the same section for the purpose of convenience in assorting the same. (Adm.) *The Clan Macdonald* 148

9. *Delivery of cargo—Landing—Merchant Shipping Act Amendment Act* 1862 (25 & 26 *Vict. c.* 63), *s.* 67,—*Notice of readiness to deliver—Duty of consignee—Liability for charges.*—It is the duty of the owner of goods who receives notice that his goods are landed under the provisions of sect. 67, sub-sect. 6, of the Merchant Shipping Act Amendment Act 1862, and are ready for delivery, to take them within a reasonable time after the notice, and if he fails to do so, he will be liable for the charges occasioned by his delay. (Adm.) *The Clan Macdonald* 148

10. *Delivery of cargo — Merchant Shipping Act Amendment Act* 1862 (25 & 26 *Vict. c.* 63), *s.* 67—*Notice of readiness to deliver.*—The notice required by sect. 67 of the Merchant Shipping Act Amendment Act 1862 is sufficiently given to the owner of the goods if given to a lighterman employed by him to take delivery of the goods. (Adm.) *The Clan Macdonald* 148

11. *Delivery of goods from ship's tackles—Discharge on to quay—Customs of port of London—Bill of lading.*—Goods were shipped under a bill of lading at Calcutta to be delivered in like good order and condition from the ship's tackles (where the ship's responsibility shall cease) at the port of London, &c. On arrival in the port of London the consignee demanded overside delivery into lighters immediately from the ship's tackles. The shipowner landed them on the dock wharf, and was ready to deliver them thence into the consignee's lighters, but the consignee carted them away, thereby becoming liable to and paying certain dock charges. In an action by the consignee against the shipowner to recover the amount so paid, the jury found that there was a custom for steamships with a general cargo (the defendants' ships being such) coming into the port of London, and using the docks, to discharge the goods on to the quay and thence into lighters. Held, that the custom found was not inconsistent with the terms of the bill of lading, and that the shipowner was entitled to discharge

the goods on to the quay, and was not liable for the charges sought to be recovered. (Ct. of App.) *Marzetti* v. *Smith and Son* ..... *page* 166

12. *Demurrage—Charter-party—Prevention by frost—Goods not in dock or ready.*—Where it is agreed by charter-party that a ship shall proceed to a certain dock and there load in the customary manner, an exception that the charterer is not to be liable for demurrage if the loading is prevented by frost is confined to such frost as prevents the actual loading on board of the goods which are in the dock ready to be loaded, and does not cover frost which prevents the shipper getting his goods to the dock. (H. of L., affirming Ct. of App.) *Grant* v. *Coverdale and others* 74, 353

13. *Demurrage—Charter-party—"Prompt despatch in loading"—Cargo not produced fast enough.*—Charterers are liable for delay under a charter-party providing that the ship shall receive prompt despatch in loading where the facilities of the port are greater than the production of the cargo from the mines, and in consequence of want of facilities in getting the cargo from the mines the ship is delayed in loading. (P. C.) *Elliot* v. *Lord* 63

14. *Demurrage—Charter-party—Running days—Lay days—Custom of port—Removal of ship.*—"Running days" in a charter-party, in the absence of custom, are consecutive days, but a custom of a port by which days occupied in moving the ship from one part of the port to another, are not counted as lay days is consistent with a charter-party providing for so many running days as lay days, and it is a reasonable custom. (Ct. of App.) *Nielsen and Co.* v. *Wait, James, and Co.* 553

15. *Demurrage—Charter-party—Ship to discharge always afloat—Custom of port of Gloucester—Partial discharge at Sharpness—Time occupied going to and from Gloucester basin.*—By charter-party it was agreed that the plaintiffs' steamship, having loaded a grain cargo, should therewith proceed to a port in the Bristol Channel as ordered, "or so near thereto as she may safely get at all times of tide and always afloat, eight running days, Sundays excepted, to be allowed the merchants if the ship be not sooner despatched for loading and discharging." The ship was ordered to discharge at Gloucester, and having arrived at Sharpness dock, which is within the port of Gloucester, but some miles from the basin where grain cargoes are discharged if the ship's burthen will admit, partial delivery was there made owing to the ship not being able to get to the basin till part of her cargo was discharged. The consignees then required the ship to be taken to the basin where the discharge was completed, when the vessel returned to Sharpness. In an action for demurrage, the following custom of the port of Gloucester was proved, viz., that the customary place for discharging grain cargoes was at the basin; that when vessels laden therewith were of too heavy a burthen to get there, they were lightened at Sharpness; that during the discharge at Sharpness the lay days counted, but that the time occupied in going up to the basin and returning to Sharpness was not counted. Held, that the custom was reasonable, and that it was not inconsistent with the express terms of the charter as to "running days," and that therefore the time occupied by the ship in going from Sharpness to the basin and in returning, ought to be excluded from the lay days. (Ct. of App.) *Nielsen and Co.* v. *Wait, James, and Co.* 553

16. *Demurrage—Charter-party—Ship to proceed to and deliver at a port or as near as she can safely get at all times of tide and always afloat—End of voyage—Commencement of running days.*—Where a ship, in pursuance of a charter-party providing that she shall load a cargo and being so loaded proceed to a port named, "or so near thereto as she may safely get at all times of the tide and always afloat," proceeds as near thereto as she can get in the then state of the tide with her full cargo always afloat, and then is ready and offers to deliver sufficient to enable her to get to the port named, the shipowner is entitled from the date of his readiness to deliver to demurrage as the words "at all times of the tide" relieve him from any liability to wait a reasonable time for the tide, and the voyage is therefore terminated on the ship's arrival at the nearest place to the port named, which she could reach with a full cargo in the state of the tides then prevailing. (North, J.) *Horsley* v. *Price and Co.* ..... *page* 106

17. *Demurrage—Charter-party—To discharge alongside wharf or into lighter—End of voyage—Commencement of running days.*—Where by the terms of a charter-party a ship was to load a cargo "and therewith proceed to D. and deliver the same alongside consignee's or railway wharf, or into lighters or any vessel or wharf where she may safely deliver, as ordered;" and upon her arrival at D. she was ordered to discharge at the railway wharf, but, owing to all the discharging berths being occupied, she was not berthed till twenty-four hours after her arrival in dock, the Court, in an action for demurrage, held that the voyage was not completed until the ship was berthed at the railway wharf, and therefore the defendants were not liable for demurrage for the period between the ship's arrival in dock at D. and her being berthed at the railway wharf. (Q. B. Div.) *Murphy* v. *Coffin and Co.* .....531 n.

18. *Demurrage—Charter-party—To discharge at such "ready quay berth as ordered"—End of voyage—Commencement of discharging days.*—Where by a charter-party it was agreed that the plaintiffs' vessel, after loading a cargo, should proceed "to London or Tyne Dock to such ready quay berth as ordered by the charterers," demurrage at an agreed rate per day, and the captain or owners to have an absolute lien on the cargo for all freight, dead freight, and demurrage, and the vessel was ordered by the charterers to a London dock, but upon her arrival there there was no quay berth ready for her reception, and a delay of one day was thereby caused in discharging her cargo, the court held, in an action by the shipowner claiming a lien upon the cargo for demurrage, that, on the true construction of the charter-party, the charterers were bound to name and provide a ready quay berth, and that for a delay caused by their neglecting to do so the plaintiffs were entitled to a lien on the cargo for demurrage, the damages being sufficiently in the nature of demurrage to come within the demurrage clause in the charter-party. (Ct. of App.) *Harris and Dixon* v. *Marcus, Jacobs, and Co.* 530

19. *Excepted perils—Bill of lading—Collision—Negligence—Perils of the sea.*—A collision between two ships caused by the negligence of either, without the elements contributing to the accident, is not a peril of the seas within the meaning of those words in a bill of lading. (Ct. of App., reversing Hawkins, J.)—*Woodley and Co.* v. *Michell and Co.* 71

20. *Excepted perils—Bill of lading—Collision—Negligence—Perils of the sea.*—The plaintiffs were the owners of a cargo of barley, shipped at Caen on board the defendants' schooner *Kate* for delivery in London. The bill of lading was in

the usual form, the only exception contained in it being the exception of "perils of the sea." The *Kate*, while sailing up the Thames, collided with a steamer, and was sunk, and the cargo lost. In an action to recover the value of the cargo the jury found that the collision was caused by the *Kate* starboarding her helm, but that there was no negligence on her part. There was no finding as to the steamer. Held, that the loss was not occasioned by a peril of the sea. (Ct. of App., reversing Hawkins, J.) *Woodley and Co.* v. *Michell and Co.* ..... *page* 71

21. *Excepted perils—Bill of lading—Damage to cargo—Unseaworthiness.*—The excepted perils in a bill of lading have no application to the case of a ship sailing in an unseaworthy condition; and hence they are no defence to an action brought for loss or damage to the charterer's goods occasioned by such unseaworthiness. (Adm. Div.) *The Glenfruin* 413

22. *Excepted perils—Bill of lading—Liability for damage to cattle—Foot-and-mouth disease—Unseaworthy ship.*—A clause in a bill of lading exempting shipowners from responsibility for cattle, whether arising from "their escape from the steamer, or for accidents, disease, or mortality," and limiting their liability to 5*l.* per head, does not exempt them from liability for loss occasioned by their failing to provide a fit ship, as the clause applies only to things occurring during the voyage, and the shipowners are therefore liable for injury by foot-and-mouth disease caused by their negligence in not cleansing the ship before the commencement of the voyage. (Q. B. Div.) *Tattersall* v. *The National Steamship Company Limited* 206

23. *Excepted perils—Bill of lading—Negligence of master and crew—Collision between ships belonging to same owners—Both ships to blame—Division of damages.*—Where a vessel carrying cargo under a bill of lading providing against loss and damage from collision and loss or damage from any act, neglect, or default whatsoever of the pilots, master, mariners, or other servants of the owners in navigating the ship, collides with another vessel belonging to the same owners by reason of the joint negligence of both vessels and the cargo is lost, there is no liability under the contract of carriage, as such loss is covered by the above exceptions, but the owners are liable in tort for the negligence of their servants on board the vessel not carrying the cargo, and in such circumstances the Admiralty Court rule as to the division of damages applies, and the shipowners are liable for half of the loss. (Ct. of App.) *The Chartered Mercantile Bank of India, &c.* v. *The Netherlands India Steam Navigation Company Limited* 65

24. *Excepted perils—Dangers and accidents of the sea — Charter-party — Bill of lading—Rats.*—Damage to cargo caused by sea water entering through a pipe which has been gnawed through by rats, where there is no negligence on the part of the master and crew, and all reasonable precautions have been taken to keep down rats, is "a danger or accident of the seas" within the meaning of a charter-party and bill of lading. (Lopes, L.J. Since reversed by the Court of Appeal. See next volume.) *Pandorf and Co.* v. *Hamilton, Fraser, and Co.* 568

25. *Freight—Advance of — Charter-party — Final sailing from port—Limits of port—Commercial or fiscal.*—Where a charter-party provides for an advance of freight within a specified time from final sailing of the vessel from her last port in the United Kingdom, and the vessel is towed outside the limits of the port, as understood in its ordinary commercial sense, for the purpose of proceeding on her voyage, but is driven back by stress of weather, she is to be taken as having finally sailed from her last port, and her owners are entitled to the freight. (Ct. of App.) *Price* v. *Livingstone* ..... *page* 13

26. *Freight—Lien—Bill of lading—Incorporation of charter-party—Rights of consignees.*—Where by a bill of lading freight is payable at a certain rate and "other conditions as per charter-party," and by the charter-party freight is payable at a higher rate, and the shipowner is given an absolute lien on the cargo for freight, the shipowner has no right as against the consignees, who were not the charterers, to detain the cargo to enforce payment of freight at the rate mentioned in the charter-party, the conditions as to freight mentioned in the charter not being incorporated in the bill of lading, and the consignees being entitled to delivery upon payment of the freight mentioned in the bill of lading. (Ct. of App.) *Gardner and Son* v. *Trechmann* 558

27. *Freight and demurrage—Bill of lading—Incorporation of charter—Inconsistent clause—Cesser of liability clause.*—The words in a bill of lading "paying freight and all other conditions as per charter-party so far as they are consistent with the bill of lading, and therefore a charterer and shipper who is also the consignee and receiver of a cargo under a bill of lading containing the above words is not exempted from liability for demurrage at the port of discharge by reason of a clause in the charter-party stating that the responsibility of the charterer is to cease as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage. (Ct. of App., affirming Q. B. Div.) *Gullichsen* v. *Stewart Brothers* 130, 200

28. *Lien of shipowner—Delay by negligence of shipowner—Discharge—Reshipment—Right to carry on—Freight.*—When a cargo has been shipped, and the voyage is delayed by an accident not within the perils excepted in the contract of affreightment (to wit, a collision caused by the negligence of the carrying ship), in consequence of which the cargo has to be discharged, the shipowner has a lien on the cargo for the purpose of enabling him to earn his freight, and the cargo owner is not entitled to insist on delivery of the cargo without payment of freight before the completion of the voyage on which the freight is to be earned, but the shipowner may insist upon reshipping the original cargo if it is capable of being carried on. (Adm. Div.) *The Blenheim* ... 522

29. *Loss of cargo—Measure of damage—Collision—Both ships to blame—Admiralty Court rule.*—The Admiralty Court rule that in cases of collision the damages are to be equally divided where both ships are to blame, does not apply to actions for breach of contract of carriage brought by owners of cargo against the carrying ship to recover damages for loss of, or injury to, their goods, and hence the plaintiffs in such actions are entitled to recover their full damages from the owners of the carrying ship. (Adm. Div.) *The Bushire* ... 416

30. *Loss of cargo—Negligence of shipowner—Measure of damages—Advance freight—Premium of insurance.*—Where goods are shipped under a charter-party providing for an advance of freight within a month of the ship sailing "lost or not lost," and the advance is duly paid, but the ship and cargo on the voyage are lost by the negligence of the shipowners or their servants, the damages recoverable being the value of the cargo at its point of destination, the cargo owners are en-

titled to recover from the shipowner, as part of such value, the advance of freight and premiums of insurance paid on the cargo. (Denman, J.) *Great Indian Peninsula Railway Company* v. *Turnbull* .....*page* 465

31. *Practice—Interrogatories—Damage to cargo—Anticipation of defendant's case—Inadmissibility.*—Where, in an action by the shipper of goods against the shipowner for non-delivery, the defendant admits that the goods were not delivered, and alleges that he was prevented from delivering them by the perils excepted in the bill of lading, interrogatories for the purpose of showing that the ship was unseaworthy when she left port, and sank soon afterwards in consequence of a cock being left open, are inadmissible, the interrogatories not being based upon facts which must inevitably occur in the ordinary course of the voyage, and there being nothing to show that they were not purely hypothetical, as well as being objectionable, on the ground that the plaintiff's case was complete on the admission of non-delivery, and that they were administered merely for the purpose of anticipating the defendant's case. (Q. B. Div.) *Grumbrecht and others* v. *Parry* 176

32. *Practice—Interrogatories—Damage to cargo—Details of navigation—Duty to inquire from agents.*—In an action for damage to cargo the plaintiffs are entitled to answers to interrogatories respecting the details of the navigation of the vessel at the time the loss occurred, if the shipowners' servants or agents possess the necessary information and it would come to their knowledge in the ordinary course of business; and they are not excused from answering on the ground of want of personal knowledge of the facts inquired about. (Ct. of App., reversing Q. B. Div.) *Bolckow, Vaughan, and Co.* v. *Fisher and others*..... 20

33. *Warranty of seaworthiness—Bill of lading—Latent defect—Breaking of screw-shaft.*—The warranty of seaworthiness implied in a bill of lading is an absolute warranty that the ship shall be in fact fit for the voyage, and not merely that the shipowner shall take all reasonable care to make her so fit; and hence a latent effect in the screw-shaft existing prior to the commencement of the voyage, and resulting in the breaking of the shaft, is a breach of the shipowner's warranty of seaworthiness, although the shipowner may have taken all reasonable precaution in the selection of the shaft. (Adm. Div.) *The Glenfruin*... 413

See *County Courts Admiralty Jurisdiction.*

CARRIAGE OF PASSENGER.

1. *Passenger's ticket—Exceptions from liability—Loss of life—Collision—Negligence.*—Under a contract by ticket for the carriage of a passenger by sea containing a notice that the shipowners will not be responsible for any loss, damage, or detention of luggage under any circumstances; nor for the maintenance or loss of time of a passenger during any detention of their vessels, nor for any delay arising out of accidents, nor for any loss or damage arising from perils of the seas, or from machinery, boilers, or steam, or from any act, neglect, or default whatsoever of the pilot, master, or mariners, the shipowners are not liable in an action for the loss of life of a passenger caused by the negligence of their servants in a collision with another ship. (Ct. of App., affirming Q. B. Div.) *Haigh* v. *The Royal Mail Steam Packet Company* 47, 189

2. *Passenger's ticket—Exceptions from liability—Loss of luggage—Negligence.*—Under a contract by ticket for the carriage of a passenger containing (*inter alia*) a condition that the shipowners will not be responsible for any loss or damage to luggage "in any circumstances" the shipowners are not liable for the loss of a passenger's luggage, even though occasioned by negligence. (Ct. of Ex.) *Thompson* v. *Royal Mail Steam Packet Company* .....*page* 190 n.

See *County Courts Admiralty Jurisdiction.*

CATTLE.

See *Carriage of Goods*, No. 22.

CAUSA PROXIMA.

See *Marine Insurance*, Nos. 10, 16, 17.

CESSER CLAUSE.

See *Carriage of Goods*, No. 27.

CHAIN CABLES AND ANCHORS ACT 1874.

Warranty—Application—British and foreign ships.—The 4th section of the Chain Cables and Anchors Act 1874 providing that contracts for the sales of chain cables shall, in the absence of an express stipulation to the contrary, be deemed to imply a warranty that the chain cable has been tested and stamped in accordance with the Chain Cables and Anchors Act 1864 to 1874 applies to all contracts for the sale of chain cables, and is not confined by the provisions of sect. 3 to contracts for the sale of chain cables for the use of British ships. (Q. B. Div.) *Hall* v. *Billingham and Sons* 538

CHARTER-PARTY.

1. *Authority to charter — Master — Absence of owners.*—The authority of a master to bind his owners by charter-party arises when he is in a foreign port, and his owners are not there, and there is difficulty in communicating with them. (Ct. of App.) *The Fanny; The Mathilda*..... 75

2. *Authority to charter—Master—Broker—Foreign port.*—A master has no authority to bind his owners by writing forward to a broker in a foreign port, prior to the ship's arrival therein, authorising the broker to charter his ship. (Ct. of App.) *The Fanny; The Mathilda* 75

3. *Authority to charter — Master — Holding-out agent—Owners.*—A master is not the agent for his owners to hold out a person as authorised to charter his ship, so as to bind the owners. (Ct. of App.) *The Fanny; The Mathilda* 75

4. *Authority to charter—Master—Broker—Foreign port—Ratification.*—G., a shipbroker at G. G., chartered the Finnish vessels *F.* and *M.* prior to their arrival at G. G., and without communication with the owners. G. had on several previous occasions chartered the *F.* and *M.* under similar circumstances, and all of these charter-parties had been carried into effect. After the arrival of the *F.* and *M.* at G. G., their masters were on several occasions at G.'s office, and were shown their charter-parties. A fortnight after the vessels' arrival at G. G., during which time freight had risen, the masters refused to take up the charter-parties. Held, that the masters by their conduct had not ratified the charter-parties in such a way as to make them binding. (Ct. of App., reversing Adm.) *The Fanny*; *The Mathilda*..... 75

5. *Cancellation clause — Port of loading — Non-arrival of ship—Excepted perils.*—The cancellation clause in a charter-party being for the benefit of the charterers, and the arrival of the ship on a date therein named being a condition precedent to the duty of the shipowner to load, the excepted perils mentioned in the charter-

party have no application to such a clause, and hence, where the ship is prevented by these perils from arriving at the port of loading by the date mentioned, the charterers have the right to cancel. (Q. B. Div.) *Smith* v. *Dart* .....*page* 360

6. *Port—Limits of—Commercial or fiscal.*—In construing a charter-party, the word "port" is to be understood in its ordinary commercial sense, and not as defined for fiscal purposes. (Ct. of App.) *Price* v. *Livingstone* 13
Sailing Ship Garston Company v. *Hickie and Co.* 499

7. *Practice—Evidence—Stamp Act* 1870 (33 & 34 *Vict. c.* 97), *ss.* 15, 67, 68—*Execution abroad.*—A charter-party wholly executed by both parties thereto abroad, is duly stamped so as to be admissible in evidence if it has been stamped within two months after it has been first received in the United Kingdom as provided by sect. 15 of the Stamp Act 1870, and it is not necessary that such a charter-party should be stamped under sect. 68 of the same Act. (Adm. Div.) *The Belfort* 291

8. *Practice—Evidence—Stamp Act* 1870—*Form of Stamp.*—*Semble*, that a charter-party wholly executed by both parties thereto abroad must be stamped with an impressed stamp, and not with an adhesive stamp. (Adm. Div.) *The Belfort*... 291

9. *Practice — Misdirection — Construction — Safe loading place.*—In an action for breach of charter-party, an expression of opinion by the judge that certain port is a "safe loading place" is not a misdirection if he leaves the question to the jury. (Q. B. Div.) *Smith* v. *Dart*..... 360

See *Carriage of Goods*, Nos. 12 to 18, 24 to 27—*Collision*, No. 13—*Marine Insurance*, Nos. 1, 8, 9, 10, 11—*Master's Wages and Disbursements*, Nos. 8, 9, 10—*Salvage*, No. 24—*Shipowner*, No. 9—*Wages*, No. 5.

COALING.

See *Collision*, No. 3.

COLLISION.

1. *Compulsory pilotage—Duty of master to interfere—Fog—Liability of owners.*—Although the pilot in charge of a ship by compulsion of law is under ordinary circumstances solely responsible for getting the ship under way, yet, if the weather is so bad by reason of fog or other circumstances as to make navigation manifestly perilous and to give rise to a plain prospect of danger, it is the duty of the master to interfere, and he is to blame if he permits his vessel to get under way in such circumstances. (Adm. Div.) *The Oakfield* 575

2. *Compulsory pilotage—Duty and power of pilot—Position of anchor.*—The position of an anchor, which is required for letting go in a port, is within the discretion of the pilot in charge, and if damage is occasioned to another vessel by reason of the anchor so being placed with a compulsory pilot's consent or directions, the owners are exempted from liability for such damage. (Ct. of App.) *The Rigborgs Minde*..... 123

3. *Compulsory pilotage — Exemption — Passing through limits of pilotage district—Coaling—Merchant Shipping Act Amendment Act* 1862 (25 & 26 *Vict. c.* 63) *s.* 41.—Where a steamship is passing through the limits of any pilotage district in the United Kingdom, on a voyage between two places, both situate out of such district, but stops at a port within that district for the purpose of coaling only, the provisions of sect. 41 of the Merchant Shipping Act Amendment Act 1862 do not exempt her from compulsory pilotage, the words "loading or discharging" therein mentioned not being confined to cargo. (Ct. of App., affirming Adm.) *The Winston* .....*page* 143, 274

4. *Compulsory pilotage—Lights—Breach of regulations—Duties of master and pilot.*—The exhibition of an improper light, or the failure to carry the regulation lights, is not excused by the fact that it was done in obedience to the orders of a compulsory pilot, it being the duty of the master to see that the lights required by the regulations are carried. (Adm. Div.) *The Ripon* 365

5. *Compulsory pilotage—Order by pilot on suggestion of master.—Exemption of owners.*—Where a pilot in charge of a vessel by compulsion of law gives at the suggestion of the master an improper order which brings about a collision, such interference by the master does not transfer the responsibility of the pilot to the master so as to deprive the shipowners of the defence of compulsory pilotage to an action to recover the damages occasioned by the collision. (Adm. Div.) *The Oakfield* 575

6. *Compulsory pilotage—Port of Hull—Change of pilots—Hull pilot Act* (2 & 3 *Will.* 4, *c.* 105, *Local and Personal*), *ss.* 22, 36, 41.—Pilotage is compulsory on vessels coming into the port of Hull, and, where the vessel is going into dock, remains compulsory until she reaches her ultimate destination in the dock, and does not cease because the vessel anchors in the river waiting the tide to go into dock. The fact that the pilot who brings her to an anchor leaves her there, and she is taken on by another pilot in consequence of an arrangement among the Humber pilots, does not affect the compulsion. (Ct. of App.) *The Rigborgs Minde* 123

7. *Costs—Both ships to blame—Defendant exempt by compulsory pilotage—No counter-claim.*—The rule that where both ships are found to blame for a collision each party bears his own costs is to be followed in a case where the defendants' ship, which does not counter-claim, is held to be exempt from liability on the ground of compulsory pilotage. (Ct. of App.) *The Rigborgs Minde* 123

8. *Costs—Claim and counter-claim—Cross reference.*—In cases of collision, where both vessels are held to blame, and the amount of damage is referred to the registrar, and less than one-fourth is struck off the respective claim and counter-claim of the plaintiffs and the defendants, the costs of substantiating the plaintiffs' claim at the reference will be borne by the defendants, and the costs of substantiating the defendant's counter-claim at the reference by the plaintiffs. (Adm.) *The Mary* 33
The Savernake .....34 n.

9. *Costs—Reference—Withdrawal of part of claim—Amount allowed.*—Where a plaintiff in a reference in a collision action withdraws a large item of his claim at the reference and not before, and he recovers less than two-thirds of the amount originally claimed, but more than two-thirds of the amount which remains after his withdrawal of the above item, the original amount of his claim before withdrawal is the claim upon which costs are to be given, and he is not entitled to his costs. (Adm.) *The Eilean Dubh* 154

10. *Costs—Both ships to blame—One exempt by reason of compulsory pilotage—Appeal—Decree below varied.*—Where the Court of Appeal varies the decision of the Admiralty Court, finding one vessel solely to blame for a collision, by finding both vessels to blame, each party bears his own costs, both in the court below and in the Court of Appeal, and the fact that the owners of one are exempt from liability on the ground of com-

pulsory pilotage makes no difference to this rule. (Ct. of App.) *The Hector* .....*page* 101

11. *Damages—Advance as against freight—Bill of lading and policy assigned as security—Right of holders to recover—Shipowners' cargo.*—Where cargo is shipped on the shipowners' account and money is advanced to them by persons who take as security an assignment of a policy of insurance on the freight, and a bill of lading signed by the master and indorsed by him with a receipt of a sum of money on account of freight named in the bill of lading, and the ship is run down and sunk by the negligence of another vessel, the persons advancing the money as holders of the bill of lading have sufficient interest in the goods and freight to entitle them to recover from the owners of the wrong-doing vessel the sum of money advanced on account of freight. (Adm.) *The Thyatira* 147

12. *Damages—Both ships to blame—One exempt by reason of compulsory pilotage—Amount recoverable.*—Where in an action of collision it is held that it was occasioned by the fault of both vessels, but one of such vessels is exempt from liability on the ground of compulsory pilotage, the latter vessel is entitled by the Admiralty Court rule to recover half the damages sustained by her in the collision, and is not limited to the difference between half her damage and half the damage of the other ship. (Ct. of App.) *The Hector* 101

13. *Damages—Consequential—Loss of charter-party.*—Where a vessel by reason of a collision brought about by the wrongful navigation of another vessel, is obliged to abandon a charter-party, the loss arising from the abandonment of such charter is a loss caused by the collision, and as such must be made good by the wrong-doing vessel. (Adm.) *The Consett*.....34 n.

14. *Damages—Division of—Breach of regulations by one ship—Both to blame.*—Where two vessels are damaged by collision, for which both are to blame, one for wrongful navigation and the other for a breach of the Regulations for Preventing Collision at Sea, it not being shown that such breach could not possibly have contributed to the collision the damages are to be divided between the parties, according to the Admiralty Court rule. (P. C.) *The Hochung; The Lapwing* 39

15. *Damages—Latent damage not caused by collision—Repair required by Board of Trade surveyor—Liability for.*—Where a ship is damaged by collision and on opening her up to effect the repairs rendered necessary by the collision, certain parts of her not injured by the collision are found to be rotten and have to be renewed by order of the Board of Trade official, the cost of such renewal cannot be charged to the collision damage, although such parts, but for such opening up would have lasted some years. (Adm. Div.) *The Princess* 451

16. *Damages—Loss of freight—Shipowners' cargo—Assignment of freight—Assignees right on loss of ship.*—Where shipowners ship their own goods in their own ship they may, by indorsement of a bill of lading naming the right of freight, assign under the name of freight the enhanced value of the goods at the port of destination so as to give the assignees a right of action against wrong-doers causing the loss of ship and cargo. Whether the amount assigned under the name of freight is within the enhanced value is a question for inquiry. (Adm.) *The Thyatira* 147

17. *Damages—Measure of—Cargo owned by shipowner—Freight—Value at destination.*—In a case of total loss at sea by collision, a shipowner who has cargo of his own on board is entitled to recover, in lieu of freight, what would have been the enhanced value of the cargo at its destination, less the expenses of earning that value, and that is the proper form of claim, and not a claim for expenses in making the ship fit for sea, &c. (Adm.) *The Thyatira* .....*page* 178

18. *Damages—Measure of—Delay—Loss of market.*—Where by reason of a collision between two steamships, occasioned by the negligence of one, goods carried by the other are delayed in transit. damages for loss of market are not recoverable from the owners of the wrong-doing steamer, such damages being too remote by reason of the uncertainty of the duration of a sea voyage. (Ct. of App.) *The Notting Hill* 241

19. *Damages—Measure of—Loss of fishing—Average profits—Registrar and merchants.*—Where the plaintiff in a damage action claimed for demurrage upon the basis of loss of fishing during repairs, and the registrar and merchants estimated that loss by taking the average catch of similar vessels during the period of repairs, the court, on objection to the registrar's report, confirmed the report with costs. (Adm.) *The Risoluto*..... 93

20. *Damages—Measure of—Salvage consequent on collision—Commission on bail.*—In a damage action the plaintiffs are not entitled to recover as part of their damages a sum paid by them as commission on bail given in an action brought against their ship by salvors whose services were necessitated by the collision. (Adm. Div.) *The British Commerce* 335

21. *Dangerous machine—Steam steering gear—Duty to maintain efficient—Absence of negligence.*—The rule that a man is bound to maintain his property in such a condition that it is not dangerous to the public, applies to fixed and immovable property only, and not to movable chattels, and hence does not apply to a ship and the parts thereof, so as to make the shipowner, in the absence of negligence, liable for a collision caused by a defect in the construction in the ship's steam steering gear. (Adm. Div.) *The European* 417

22. *Dangerous machine—Steam steering gear—Latent defect—Absence of negligence—Public Highway.*—The user of a ship steered by steam steering gear in a crowded river is not the user of a dangerous machine in such a way as to render the shipowner, in the absence of negligence, liable for damages resulting from a collision occasioned by a failure of the steering apparatus. (Adm. Div.) *The European*..... 417

23. *Dangerous machine—Steam steering gear—Latent defect—Previous failure—Evidence of negligence.*—Where a ship comes into collision in a crowded river with another vessel by reason of her patent steam steering going wrong and getting out of control, and it is shown that such steering gear has on a previous occasion gone wrong in a similar way, and that after being carefully examined by a competent engineer, who has not been able to discover any defect, it has been replaced in the ship without alteration, such user in a crowded river, the hand gear on the ship being available, is evidence of negligence, rendering the shipowner liable for the damage occasioned by the collision. (Adm. Div.) *The European*..... 417

24. *Danube Regulations, Titre 2, cap. 2, art. 34—Duty of vessels as to side of river—Fog.*—Under art. 34, cap. 2, titre 2, of the Danube Regulations, directing that, where two steamships meet going in opposite directions, "ils sont tenus de se diriger de telle sorte qu'ils viennent tous deux sur tribord. A cet effet le bâtiment qui remonte le fleuve doit appuyer vers la rive gauche, et celui

qui descend vers la rive droite," vessels going down the river are bound to keep to the right bank, and if a vessel in a mist after sunset keep to the left bank and come into collision with another vessel, the breach of the rule is negligence. (Priv. Co.) *The Yourri*; *The Spearman*. 458

25. *Humber Navigation Rules—Regulations for Preventing Collisions at Sea—Merchant Shipping Act* 1873, *s.* 117.—The rules for the navigation of the river Humber are regulations contained in or made under the Merchant Shipping Acts 1854 to 1873, within the meaning of sect. 17 of the Merchant Shipping Act 1873; and hence their infringement will be visited with the result prescribed by that Act. (Adm. Div.) *The Ripon* .. 365

26. *Humber Navigation Rules, arts.* 2, 11—*Anchor light astern—Stern light—Special circumstances.*—Where a two-masted vessel in pursuance of art. 2 of the Rules for the Navigation of the River Humber, carries a second riding light astern in the position therein prescribed, and continues to carry such light after she gets under way and is crossing the river for the purpose of warning vessels going up or coming down of her position, the carrying of such a light at such a height above the deck is a breach of the regulations, and cannot be deemed to be the showing of a stern light within the meaning of art. 11, or warranted by the "special circumstances of the case," within art. 24. (Adm. Div.) *The Ripon* 365

27. *Launch—Necessary precautions—Crowded river.*—The duty of persons in charge of a launch, to take reasonable precautions to warn other vessels navigating the river before the vessel is launched, is to be construed as meaning that they are bound to take the utmost possible precautions. (Adm.) *The George Roper* 134

28. *Launch—Necessary precautions—Tugs in attendance—River Mersey.*—Tugs in attendance on a launch in the river Mersey should be dressed with flags, and should give warning to approaching vessels that the launch is about to take place. (Adm.) *The George Roper* 134

29. *Lien—Priority—Seamen's wages—Foreign ship.*—The plaintiffs in a damage action in which a foreign ship proceeded against has been sold by order of the court, and the proceeds brought into court to satisfy the claims against her, having no effective remedy except against the ship, are entitled to payment of their claim out of the proceeds in precedence to the seamen's claim against such proceeds for wages earned on the ship subsequently to the collision. (Ct. of App.) *The Elin* 120

30. *Loss of life—Action for—Inquiry or refusal thereof by Board of Trade—Foreign ship.*—Sect. 512 of the Merchant Shipping Act 1854, disentitling a party to bring an action to recover damages for loss of life or personal injury caused by a collision, unless the Board of Trade has completed or refused to institute an inquiry into the disaster, does not apply to foreign ships. (Adm. Div.) *The Vera Cruz* 254

31. *Loss of life—Action in personam—Admiralty jurisdiction—Judicature Acts—Both ships to blame—Contributory negligence.*—The Admiralty Court had no jurisdiction prior to the Judicature Act 1873 to entertain claims for loss of life, and there was consequently no rule in the Admiralty Court as to the division of damages in cases of loss of life, and as sect. 25, sub-sect. 9, of the Judicature Act 1873 has made no alteration in the principles of law as to the division of damages, passengers killed in a collision between two ships can recover nothing where both ships are to blame. (Adm. Div.) *The Bernina* 577

32. *Loss of life—Action in rem—Both ships to blame—Admiralty rule as to division of damages—Death of master—Right of recovery.*—The ships *A.* and *V. C.* came into collision, for which both were found to blame, the *A.* for breach of the statutory regulations for preventing collisions referred to in sect. 17 of the Merchant Shipping Act 1873, the *V. C.* for improper navigation. The master of the *A.* was drowned. His personal representative brought an action *in rem* under Lord Campbell's Act against the owner of the *V. C.* to recover damages for his loss, Held, that though the deceased was deemed to have been guilty of contributory negligence by reason of the breach of the regulations, the Admiralty Court rule as to the division of damages was applicable, and the plaintiff was entitled to recover half the damages sustained by the loss of the deceased. (Adm. Div.) *The Vera Cruz* .....*page* 254

33. *Loss of life—Both ships to blame—Identification with carrying ship—Contributory negligence—Action in personam—Lord Campbell's Act* 1846 (9 & 10 *Vict. c.* 93).—Where passengers are killed in a collision between two ships for which both are to blame, the deceased are so identified with their carrying ship as to be deemed to be guilty of contributory negligence, and hence their personal representatives suing the owners of the non-carrying ship under Lord Campbell's Act can recover nothing. (Adm. Div.) *The Bernina* ... 577

34. *Merchant Shipping Act* 1873, *s.* 16—*Duty to render assistance—Vessel injured—Showing lights.*—The duty to render assistance under sect. 16 of the Merchant Shipping Act 1873 is not confined to rendering actual assistance; but if a vessel whose duty it is to render assistance is so injured that the only assistance she can render is to burn rockets or hoist a globe light so as to indicate her position, she is bound to do so, and in default of so doing, she is, in the absence of proof to the contrary, to blame for the collision. (Adm.) *The Emmy Haase* 216

35. *Practice—Bail—Counter-claim—Discontinuance of principal action—Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 34.—The power of the Admiralty Division under sect. 34 of the Admiralty Court Act 1861 to order an action to be stayed until bail has been given to answer a cross-action or counter-claim, does not extend to making an absolute order to give bail, and in a damage action in which the plaintiffs had discontinued after the defendants had counter-claimed, the court refused to enforce an order, made by the registrar, to give bail to answer such counter-claim. (Adm.) *The Alexander* ... 89

36. *Practice—British and foreign ships—Depositions before Receiver of Wreck—Inspection of documents—Privilege.*—In a damage action, arising out of a collision between a British and foreign ship, copies of depositions made before the Receiver of Wreck by the crew of the British ship, and obtained from the Board of Trade by the owners of the British ship for the purposes of the action, are privileged, and inspection of them cannot be obtained by the owners of the foreign ship, even although the Board of Trade on the ground that no such depositions have been made by any member of the foreign crew, has refused to allow the foreign owners to see them. (Adm.) *The Palermo* 165

37. *Practice—City of London Court—Warrant of Arrest—Execution—Bailiff—Contempt of court—County Courts Admiralty Jurisdiction Act* 1868 (31 & 32 *Vict. c.* 71), *ss.* 23, 35.—A warrant of arrest issued in an action *in rem*, instituted for collision in the City of London Court, and directed to the high bailiff of the said court and others the

bailiffs thereof, is not duly executed if executed by a clerk in the bailiff's office, who is not a bailiff, and hence the master of the vessel so arrested is not guilty of contempt of court in removing her; but *semble*, if the warrant had been addressed to the clerk as an officer of the court it might, under the provisions of the County Court Admiralty Jurisdiction Act 1868, s. 23, have been duly served by him. (Adm. Div.) *The Palomares* ..... *page* 343

38. *Practice—County Court action—Transfer to High Court—Consolidation—Conduct of action.*—Where a County Court action, instituted to recover damages arising out of a collision with the defendants' vessel, is, at the instance of the plaintiffs, transferred to the High Court, and there consolidated with an action instituted in the Admiralty Division of the High Court by the defendants in the former action against the plaintiffs in that action subsequently to the institution of the County Court action, the plaintiffs in the County Court action, being the first to institute proceedings, will have the conduct of the consolidated actions. (Adm.) *The Stork*; *The Never Despair* 211

39. *Practice—Default action in rem—Motion for judgment—R. S. C., Order XXVII., r.* 11*—Affidavit.*—Where in an action *in rem* for collision the defendant makes default, the plaintiff should, on moving for judgment, support his claim by affidavit. (Adm.) *The Spero Expecto* 197

40. *Practice—Evidence—Course—Mode of navigation—Trinity Masters.*—Where the Admiralty Court is assisted by Trinity Masters, evidence as to a particular course and mode of navigation at a particular place in a dense fog and in a given state of the tide is not admissible. (Adm.) *The Kirby Hall* 90

41. *Practice — Evidence — Engineer's log.* — In a damage action the log kept by the engineer is admissible as evidence against his owners. (Adm. Div.) *The Earl of Dumfries* 342

42. *Practice—Evidence—Vessel sunk in navigable river—Lighting of wreck—Message to harbour authorities.*—Evidence showing that an officer of a sunken vessel sent a message to the harbour master informing him of the position of the wreck, and that the harbour master undertook to light the wreck, and that the messenger informed the officer of the harbour master's undertaking is admissible, as relating to an act done, and tending to disprove negligence on the part of the owners. (Ct. of App., reversing Adm.) *The Douglas* 15

43. *Practice—Inspection by Trinity Masters—Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 18.—In a collision action the court will not order the vessels to be examined by the Trinity Masters prior to the hearing of action except under very unusual circumstances, and especially not where the party applying has had the opportunity by his witnesses of inspecting the vessel himself. (Adm. Div.) *The Victor Covacevich* 417

44. *Practice—Pleading—Proof secundum allegata et probata.*—The rule that parties are only entitled to recover *secundum allegata et probata* is complied with in a cause of collision if one material allegation of negligence be proved, even if all others fail. (P. C.) *The Hochung*; *The Lapwing* 39

45. *Practice—Preliminary Act—Action under Lord Campbell's Act—R. S. C., Order XIX., r.* 28.—Order XIX., r. 28, directing that preliminary acts shall be filed "in actions in any division for damage by collision between vessels" applies to an action instituted in the Queen's Bench Division under Lord Campbell's Act, to recover damage occasioned by the death of the deceased in a collision at sea. (Butt, J.) *Webster* v. *Manchester, Sheffield and Lincolnshire Railway Company page* 256n.

46. *Practice—Preliminary act—Distance and bearing—Amendment.*—"The L. when first seen was at anchor" is an improper answer to art. 9 of a Preliminary Act inquiring the "distance and bearing of the other vessel when seen," and the court at the hearing ordered the party so answering to amend. (Adm. Div.) *The Godiva* 524

47. *Practice—Preliminary Act—Incorrect answers.*—Where in a collision action the questions in the Preliminary Act are improperly answered the court will always be disposed to view with suspicion the case of the party so answering, even though it appears to have been accidental, and if it proves to have been intentional the court will then scrutinise the case most closely and approach it with the gravest suspicion. (Adm. Div.) *The Godiva* 524

48. *Practice—Security for counter claim—Foreign Government—Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 34.—The Court of Admiralty has power under sect. 34 of the Admiralty Court Act 1861, to stay proceedings instituted by a foreign Government in rem for collision until the Government has given security for the amount of the defendants' counter-claim. (Ct. of App.) *The Newbattle* 356

49. *Practice—Ship and freight under arrest with cargo on board—Marshal—Discharge and sale of cargo.*—Where in an action *in rem* for collision against ship and freight, in which the defendants' ship was held solely to blame, and, being still under arrest with the cargo on board was ordered to be sold, the Court on motion directed the marshal to discharge the cargo, to retain the same in his custody as security for payment of the landing and other charges and freight, if any, due from the owners or consignees of the cargo in respect of the same, and that in default of any application for the delivery of the cargo within fourteen days, the marshal should be authorised to sell such part of the cargo as might be necessary to pay the said charges and freight, if any, due. (Adm. Div.) *The Gettysburg* 347

50. *Practice—Tug as third party—Application for direction—R. S. C., Order XVI., rr.* 18 *&* 21.—Where in an action for damage by collision the defendants had by notice brought in the owner of a tug towing the defendants' ship, and sought to make the tug liable for improper navigation and disobedience to orders, and the defendants applied for directions as to the mode of having the questions in the action determined, the Court declined to give directions, and dismissed the third party from the action upon the ground that questions between the defendants and the third party, totally different from those between the plaintiffs and the defendants, might arise in the case, and would be embarrassing to the plaintiffs. (Adm.) *The Bianca* 60

51. *Regulations for Preventing Collisions at Sea—Duty to obey—When it arises.*—Per Brett, M.R.: The duty to execute the manœuvres prescribed by the Regulations for Preventing Collisions at Sea does not arise from the mere fact of risk of collision, but only if such fact ought under the circumstances to be within the knowledge of those in command of the ship. (Ct. of App.) *The Beryl* 321

52. *Regulations for Preventing Collisions at Sea—Lights—Improperly carried—Look-out.*—Where it is the duty of a vessel to carry or show lights, and those lights are not carried where they are visible, or are not shown, the court will not be extremely nice in finding another vessel to blame because those on board her fail to see the first-mentioned vessel within a few yards of the dis-

tance when such vessel ought first to have been seen. (Adm. Div.) *The Pacific* ..... *page* 263

53. *Regulations for Preventing Collisions at Sea—Merchant Shipping Act* 1873 (36 & 37 *Vict. c.* 85), *s.* 17—*Infringement of Regulations—Death of master—Action under Lord Campbell's Act—Contributory negligence.*—Sect. 17 of the Merchant Shipping Act 1873, providing that in cases of collision a ship which has infringed any of the regulations for preventing collisions, contained in or made under the Merchant Shipping Acts 1854 to 1873, shall be deemed to be in fault unless the circumstances of the case made departure from the regulations necessary, so far affects a master whose ship has infringed such regulations, that in an action under Lord Campbell's Act to recover damages resulting from the death of the master, he will be deemed to be in fault for a breach of the regulations, and therefore guilty of contributory negligence, so as to affect the right of recovery. (Adm. Div.) *The Vera Cruz* 254

54. *Regulations for Preventing Collisions at Sea—Object of—Risk of collision.*—The object of the Regulations for Preventing Collisions at Sea is not merely to prevent actual collision, but also risk of collision, and therefore the regulations should be applied, not only when there is actual risk of collision, but also where the circumstances are such that it is probable that risk of collision may be involved. (Ct. of App.) *The Beryl* 321

55. *Regulations for Preventing Collisions at Sea—Sailing ships—Lights—Port and starboard tack ships—Merchant Shipping Act* 1873, *s.* 17.—The barque *A.*, while sailing at night on the port tack, sighted the barque *B.* on the port bow, showing no lights. Those on the *A.*, thinking that the *B.* was heading the same way as the *A.*, kept on, when suddenly it was seen that the *B.* was heading for the *A.*, and, although the helm of the *A.* was put hard-a-port, the vessels came into collision, the stem of the *A.* striking the starboard side of the *B.* In an action for collision, the Court held that the *B.* was carrying no lights, and that this being a breach of the regulations which might possibly have contributed to the collision, the *B.* was to blame; and further, that, having regard to the difficulty occasioned by the absence of the *B.*'s lights, there was no negligence on the part of the *A.* in not sooner taking steps to keep out of the way of the *B.* (Priv. Co.) *The Arklow* 219

56. *Regulations for Preventing Collisions at Sea, arts.* 2, 11—*Lights—Flare up—Right to burn.*—The burning of a flare by vessels other than overtaken and fishing vessels is not forbidden by art. 2 of the Regulations for Preventing Collisions at Sea, though blame may be attributed to a vessel exhibiting a flare if such an exhibition is misleading and contributes to collision. (Adm. Div.) *The Merchant Prince*..... 520

57. *Regulations for Preventing Collisions at Sea* 1863, *art.* 9—*Steam trawler—Lights—Look-out.*—A steam trawler, whilst fishing, was only carrying a white light when she ought to have been carrying the lights for a steamship under way. A steamship having a bad look-out, but with an officer on deck and in charge, was approaching the trawler, but did not see her until within a distance of from a quarter to half a mile, and then did not alter her course until too late to avoid a collision. Held, that, as the officer in charge might have acted sooner if he had seen a side light, and that, as it was not proved that the absence of the side lights could not by any possibility have contributed to the collision, the steam trawler was to blame for a breach of the regulations. (Ct. of App.) *The Dunelm* 304

58. *Regulations for Preventing Collisions at Sea* 1863, *art.* 9—*Steam trawler—Speed—Lights.*—A steam trawler with her nets down and attached thereto is "stationary" within the meaning of art. 9 of the Regulations for Preventing Collisions at Sea 1863, although she has way on her through the water, provided such way is not more than is necessary to keep her under command, and in such circumstances she is bound only to carry the white light required by that article; but, if she exceeds that speed, she is bound by art. 3 of the Regulations for Preventing Collisions at Sea 1880 to carry the lights of a steamship under way. (Ct. of App.) *The Dunelm page* 304

59. *Regulations for Preventing Collisions at Sea* 1863, *art.* 9—*Ditto* 1880, *art.* 11—*Fishing smack—Lights—Stern light—Overtaking ship.*—The bright white light carried by a trawling fishing smack when attached to her nets in pursuance of the provisions of art. 9 of the Regulations for Preventing Collisions 1863, although visible astern, is not a white light shown from the stern to an overtaking ship within the meaning of art. 11 of the Regulations for Preventing Collisions 1880. (Adm. Div.) *The Pacific* 263

60. *Regulations for Preventing Collisions at Sea, art.* 10 (*a*)—*Trawler's lights—Attached to nets but under way.*—Art 10 (*a*). of the Regulations for Preventing Collisions at Sea 1884, requiring all fishing vessels of twenty tons net and upwards, "when under way," to carry the ordinary lights of a vessel under way, unless required by other regulations to carry the lights therein prescribed, is applicable to trawlers whilst engaged in trawling and in motion. (Adm. Div.) *The Chuson* ... 476

61. *Regulations for Preventing Collisions at Sea, art.* 10 (*a*)—*Trawler's lights—Bad look-out—Contribution to collision.* — Where a steamship having come into collision with a trawler, which, in violation of the Regulations for Preventing Collisions at Sea, was carrying a white masthead light in addition to side lights, and it appeared that those on board the steamship had not seen the white light, the court refused to hold the trawler to blame for the breach of the regulations, on the ground that it could not possibly have contributed to the collision. (Adm. Div.) *The Chuson*..... 476

62. *Regulations for Preventing Collisions at Sea, art.* 13—*Fog—Moderate speed.*—Moderate speed, within the meaning of art. 13 of the regulations, varies according to the density of the fog; the thicker the fog, the slower ought to be the speed. (Ct. of App.) *The Beta*; *The Peter Graham* 276

63. *Regulations for Preventing Collisions at Sea, arts.* 13 — *Fog — Moderate speed—Approaching ships.*—Art. 13 of the Regulations for Preventing Collisions at Sea, which provides that every ship shall go at a "moderate speed" in a fog, requires the speed to become more moderate as the two vessels get closer together. (Ct. of App.) *The Dordogne* 328

64. *Regulations for Preventing Collisions at Sea, arts.* 13, 18—*Fog—Sailing ships—Approaching signals—Shortening sail.*—Where a sailing ship in a fog hears repeated whistles of an approaching steamship, indicating possible risk of collision, she is bound to take precautions, such as stationing men at the braces ready to put the sails aback, so as to stop her way in the event of a collision becoming imminent. (Adm. Div.) *The Zadok* 252

65. *Regulations for Preventing Collisions at Sea, art.* 13—*Fog—Sailing ship—Moderate speed—Bristol Channel.*—Moderate speed for a sailing ship within the meaning of Art. XIII. of the

Regulations for Preventing Collisions 1880 in a dense fog in the Bristol Channel, is the slowest speed that she can go so as to be under command, and, if she carries more sail than is necessary for this purpose, she will be guilty of a breach of the article. (Ct. of App.) *The Beta*; *The Peter Graham* ..... *page* 276

66. *Regulations for Preventing Collisions at Sea, arts.* 13, 18—*Fog—Steamship—Speed—Stopping and reversing—Signals.*—Where those on a steamship in a dense fog hear the whistle or fog horn of another vessel more than once on either bow and in the vicinity from such a direction as to indicate that the other vessel is nearing them, it is their duty, under art. 18 of the Regulations for Preventing Collisions at Sea, to at once stop and reverse her engines, so as to bring their vessel to a standstill in the water. (Ct. of App.) *The John McIntyre* 278

67. *Regulations for Preventing Collisions at Sea, arts.* 13, 18 — *Fog — Steamship — Approaching signals—Stopping and reversing—Speed.*—Where those in charge of a steamship in a dense fog hear a whistle and then others following it and getting nearer, even though the whistles get broader on their ship's bow, it is their duty on hearing the first whistle to reduce their speed, and as the vessels get nearer to bring their ship to as complete a standstill as is possible without putting her out of command, and when the other vessel has come close to, even though not in sight, to stop and reverse their engines. (Ct. of App.) *The Dordogne* 328
The Earl of Dumfries. (Adm.) ..... 329 n.

68. *Regulations for Preventing Collisions at Sea, arts.* 13— *Fog — Steamship — Moderate speed.*—Where those in charge of a steamship in a dense fog hear a whistle ahead, it becomes their duty to act sooner with their engines than if the whistle is heard on either bow: and in such a case they ought to act on the probability that the whistle belongs to a vessel approaching them, and that therefore risk of collision may be involved. (Ct. of App.) *The Ebor* 560

69. *Regulations for Preventing Collisions at Sea, arts.* 13, 18—*Fog—Steamship—Speed.*—Where those in charge of a steamship, going at a moderate speed in a dense fog, hear the steam whistle of another steamship in close proximity, but are unable to ascertain the course and position of the other vessel, it is their duty to stop and reverse the engines so as to take all way off her and bring her to a standstill, and if they neglect to do so, and a collision ensues, they will be held to blame for the collision. (Adm.) *The Kirby Hall* 90

70. *Regulations for Preventing Collisions at Sea, art.* 13—*Fog—Speed—Crossing track of vessels.*—It is the duty of a steamship or sailing vessel, in accordance with art. 13 of the Regulations for Preventing Collisions, when she is in a fog, passing across a course where it is to be expected that numerous vessels may be navigating, to reduce her speed to as low a rate as is consistent with her keeping good steering way. (Adm. Div.) *The Zadok* 252

71. *Regulations for Preventing Collisions at Sea, art.* 13—*Fog horn, effect of not hearing.*—The fact of a fog horn, alleged to have been blown on board a sailing ship, not being heard by those on an approaching ship, is not of itself proof that such fog horn was not blown, nor is it necessarily proof that there was negligence on board the approaching ship in not hearing it, as the direction in which the sound would be transmitted is uncertain. (Adm. Div.) *The Zadok* 252

72. *Regulations for Preventing Collisions at Sea, art.* 13—*Sailing ship—Fog—Speed—Reducing sail.*—*Semble*, that it is the duty of those in charge of a sailing ship, when in a dense fog they hear a succession of whistles approaching closer and closer, to reduce her speed by taking off sail so as to bring her to as near a standstill as possible while retaining command over her. (Ct. of App.) *The Dordogne* ..... *page* 328

73. *Regulations for Preventing Collisions at Sea, arts.* 16, 20—*Crossing and overtaking ship—Duty of.*—Where one of two ships is at the same time crossing and overtaking the other, art. 20 of the Regulations for Preventing Collisions at Sea 1880 applies, so as to render it the duty of the former to keep out of the way of the latter, notwithstanding the rule as to crossing ships, which in such cases does not apply. (Adm.) *The Seaton* 191

74. *Regulations for Preventing Collisions at Sea* 1884, arts. 16, 23—*Steamships crossing—Going into dock — Special circumstances.*—Where a steamship, in charge of a pilot, bound for Penarth Dock, and carrying the usual docking signal of two bright lights aft, saw, when crossing Cardiff East Flat, the red and masthead lights of a steamship coming down Cardiff Drain, bearing on her starboard bow and distant from three to four cables length; but the pilot in charge took no steps to get out of the way of the other vessel until a collision was inevitable, because he was of opinion that, as he was bound for dock, he was entitled to hold on, the Court held that his vessel was to blame for breach of art. 16 of the Regulations for Preventing Collisions, there being no "special circumstances" warranting a departure from the regulations. (Adm. Div.) *The Saint Andries* 552

75. *Regulations for Preventing Collisions at Sea, arts.* 16, 17, 18—*Steamships crossing—Mode of keeping out of way.*—Where one steamship is in such a position with regard to another vessel that it is her duty, under art. 16 (or, *semble* under art. 17), to keep out of the way of the latter, it is not obligatory on her to ease or stop and reverse her engines under art. 18, so long as there is no reason to suppose that she will not keep out of the way under the ordinary action of the helm. (P. C.) *The Rhondda* 114

76. *Regulations for Preventing Collisions at Sea, art.* 18—*Duty to stop and reverse—When it arises—Risk involved*—Art. 18 of the Regulations for Preventing Collisions at Sea, directing that, when two steamships are approaching so as to involve risk of collision, they shall slacken their speed or stop and reverse if necessary, is applicable not only where the officer in command sees or ought to see that there is actual risk of collision, but also where he sees the other vessel doing something which may involve risk of collision. (Ct. of App.) *The Stanmore* 441

77. *Regulations for Preventing Collisions at Sea, art.* 18—*Duty to stop and reverse—When it arises—Risk involved.*—Where a steamship is approaching another vessel so as to involve risk of collision, her master is not bound on making out the risk to instantly stop and reverse the engines in compliance with art. 18 of the Regulations for Preventing Collisions at Sea, but he is to be allowed a reasonably short time to judge what the best manœuvre is under the circumstances, though if he exceeds that time he will be held to blame for the collision. (Adm.) *The Emmy Haase* 216

78. *Regulations for Preventing Collisions at Sea, art.* 18—*Risk of collision—Duty to stop—Reversing "if necessary."*—Under art. 18 of the Regu-

lations for Preventing Collisions at Sea, a steamship approaching another vessel so as to involve risk of collision, is always bound to slacken her speed, but her duty to stop and reverse her engines is governed by the words "if necessary." (Ct. of App.) *The Beryl* .....*page* 321

79. *Regulations for Preventing Collisions at Sea, art.* 21—*Narrow channel—Falmouth harbour.*—Art. 21 of the Regulations for Preventing Collisions providing that "in narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship," applies to a steamship entering and passing up Falmouth harbour, and if a steamer going into that harbour keeps to the side of the channel which lies on her port hand, she violates the regulations. (Adm. Div.) *The Clydach*..... 336

80. *Regulations for Preventing Collisions at Sea, art.* 21—*Narrow channel—Straits of Messina.*—The Straits of Messina between Ganzirri and Faro Point on the Sicilian shore and Pezzo Point and Alta Fiumara on the Calabrian shore are a little less than two miles in width, and are a narrow channel within the meaning of art. 21 of the Regulations for Preventing Collisions at Sea. (Priv. Co.) *The Rhondda*..... 114

81. *Regulations for Preventing Collisions at Sea, art.* 22—*Keeping course—Slackening speed.*—The duty of a vessel to "keep her course" under art. 22 of the Regulations for Preventing Collisions at Sea is complied with if she keeps her heading, whilst checking her speed, because art. 22 covers direction only, and not speed. (Ct. of App.) *The Beryl* 321

82. *Regulations for Preventing Collisions at Sea, arts.* 18, 23—*Departure from—Not stopping and reversing—Only chance.*—A steamship approaching another vessel so as to involve risk of collision is justified in keeping her engines going full speed ahead where she is placed in a position of unexpected danger by the neglect of the other vessel to exhibit one of her lights whilst showing the other in an improper place, and where such going ahead is, in fact, the only chance of avoiding a collision. (Ct. of App.) *The Benares*..... 171

83. *Regulations for Preventing Collisions at Sea, art.* 23—*Departure from—Special circumstances—Only chance.*—Departure from the Regulations for Preventing Collisions at Sea is justifiable under art. 23, where the departure is the only chance of avoiding the collision, and is, in fact, the best manœuvre under the circumstances. (Ct. of App.) *The Benares*..... 171

84. *Tees Navigation Rules, art.* 22—*Speed over the ground—Not through water.*—In art. 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 over the ground and not through the water. (Ct. of App.) *The R. L. Alston* 43

85. *Thames Conservancy Rules—Effect of breach—Merchant Shipping Act*, 1873, *sect.* 17.—The Rules for the Navigation of the River Thames are not rules within sect. 17 of the Merchant Shipping Act 1873, and therefore a vessel is not to be "deemed to be in fault" for an infringement of these rules, unless it be shown that the infringement did, in fact, cause or contribute to the collision. (H. of L.) *The Margaret*; *Cayzer and others* v. *The Carron Company*..... 371
The Harton (Adm.)..... 213

86. *Thames Conservancy Rules, art.* 23—*Rounding points—Blackwall Point.*—Rules 23 of the Thames Conservancy Rules providing that steam vessels navigating against the tide shall before rounding certain points in the river ease their engines and wait till other vessels rounding the point have passed clear is not confined to the seaward side of a line drawn from Blackwall Point to Bow Creek, but applies to both sides of the point. (H. of L.) *The Margaret*; *Cayzer and others* v. *The Carron Company*.....*page* 371

87. *Thames Conservancy Rules, art.* 23—*Rounding points.*—The words "rounding a point," as used in art. 23 of the Thames Conservancy Rules, begin to apply when a vessel having to round is obliged to use her steering gear for the purpose of continuing her course round it, and cease to apply when that necessity terminates. (Ct. of App.) *The Margaret*..... 204

88. *Thames Conservancy Rules, art.* 23—*Rounding points.*—Art. 23 of the Thames Conservancy Rules applies during the whole time a steamship is rounding against the tide any of the points therein enumerated, and is not confined to the case of a vessel in the reach adjoining the point, and before she has begun to round it, sighting another vessel in the reach on either side of the point. (C. of App.) *The Margaret*..... 204

89. *Thames Conservancy Rules, art.* 23—*Rounding points—Easing.*—Where a steamship in the river Thames having come out of dock, and being bound down the river finds herself with the tide against her on the bend of any of the points enumerated in art. 23 of the Thames Conservancy Rules, where the river has begun to curve round, and those on board of her see another steamship in the reach below preparing to round the point with the tide, the first steamship is bound by the 23rd article to ease her engines and wait until the other vessel has passed clear. (Ct. of App.) *The Margaret*..... 204

90. *Thames Conservancy Rules, art.* 22, 23—*Rounding points—Easing—Use of helm.*—Where a vessel, proceeding down the river against a flood tide and about to round a point under her port helm, is bound to act under rule 23 of the Thames Conservancy Rules, she does not act inconsistently with rule 23 if she ports her helm in compliance with rule 22. (Adm.) *The Margaret*... 137

91. *Tug and tow—Joint tort feasors—Agreement as to payment of damages between tug and tow.*—The schooner *J. M. S.* having come into collision with a tug and her tow, a damage action *in rem* was instituted by the owners of the schooner against the tug to recover all the damages occasioned by the collision. Subsequently to the collision the plaintiffs received from the owners of the tow a sum of money, described in an agreement entered into between these parties "as an advance on account of the damages to be recovered from the owners of the tug." By the agreement it was agreed that the owners of the tow should give the plaintiffs all information and assistance necessary to bring the action to a successful issue; that if the schooner and the tug should both be held to blame, the plaintiffs should repay any sum by which the money already paid exceeded the moiety of damages recoverable against the tug; and that, as a basis of the arrangement, it was understood that the schooner should be found blameless for the collision. The Court, having found the tug alone to blame, held that the above payment was not such a payment by the tow in satisfaction of the damages occasioned by the collision as amounted to a settlement in discharge of the action, and was consequently no bar to the action, and that, notwithstanding the advance paid by the tow, the

plaintiffs were entitled to recover from the defendants all the damages occasioned by the collision. (Adm. Div.) *The Stormcock*.....*page* 470

92. *Tyne Navigation Rules, art.* 20—*Vessel entering river—Side of mid-channel.*—Where a vessel entering the Tyne from the southward, in order to get upon a course to take her up the river on the north side, crosses from south to north of mid-channel at from two to three cables lengths outside the south pier she thereby infringes bye-law 20 for the Regulation of the River Tyne, directing that vessels shall be brought into the port to the north of mid-channel; and she ought, on the proper construction of the bye-law, to have crossed from south to north at some considerable distance outside the pierheads. (Adm. Div. Since affirmed on appeal. See next volume.) *The Harvest*..... 546

93. *Vessel sunk in navigable river—Abandonment—Duty to light—Owners—Harbour master—Wrecks Removal Act* 1877 (40 & 41 *Vict. c.* 67).—Where a vessel is sunk in a navigable river by collision, for which she is held solely to blame, a duty of lighting the wreck is not imposed upon her owners, though they claim the ownership, if the vessel has been abandoned, and the harbour master under the provisions of the Removal of Wrecks Act 1877 has undertaken to have the wreck lighted, and her owners are not liable for damage resulting from the absence of such lighting (Ct. of App., reversing Adm.) *The Douglas* 15

See *Carriage of Goods*, Nos. 19, 20, 23, 29—*Carriage of Passengers*, No. 1—*Practice*, Nos. 1, 8, 9, 12, 15, 17, 22, 23, 36—*Salvage*, Nos. 15, 16—*Wrecks Removal*.

COMMISSION ON BAIL.

See *Collision*, No. 20—*Practice*, No. 10.

COMMUNICATION.

See *Charter-party*, No. 1.

COMPULSORY PILOTAGE.

See *Collision*, Nos. 1 to 7, 10, 12.

CONCEALMENT.

See *Marine Insurance*, Nos. 2, 3, 4.

CONSEQUENTIAL DAMAGE.

See *Collision*, Nos. 13, 15.

CONSIGNOR AND CONSIGNEE.

See *Carriage of Goods*, Nos. 9, 11, 26—*Principal and Agent—Sale of Goods*.

[CONSOLIDATED ACTIONS.

See *Collision*, No. 38.

CONSPIRACY.

See *Shipowners*, Nos. 2, 3.

CONSTRUCTIVE TOTAL LOSS.

See *Marine Insurance*, Nos. 7, 14, 15, 18.

CONSUL.

See *Wages*, No. 2.

CONTRIBUTION.

See *General Average—Marine Insurance Association*.

CO-OWNERS.

See *Jurisdiction*, No. 1—*Practice*, No. 26—*Restraint—Shipowners*, No. 4 to 8, 11.

COSTS.

See *Collision*, Nos. 7 to 10—*Limitation of Liability*, No. 1—*Practice*, Nos. 4, 10 to 17, 21, 26, 35, 36—*Salvage*, Nos. 1, 10, 17, 18, 34—*Shipowners*, No. 6—*Wrecks and Casualties*, Nos. 1, 4.

COUNSEL.

See *Practice*, Nos. 12, 15, 17.

COUNTER-CLAIM.

See *Collision*, Nos. 7, 8, 35, 48—*Practice*, Nos. 2, 3, 18—*Salvage*, Nos. 12, 31.

COUNTY COURTS ADMIRALTY JURISDICTION.

Carriage of Goods—Passengers' Luggage—County Courts Admiralty Jurisdiction Acts 1868 and 1869.—The County Courts Admiralty Jurisdiction Amendment Act 1869, s. 2, empowering County Courts with Admiralty jurisdiction to try claims "arising out of any agreement made in relation to the carriage of goods in any ship," does not cover a passenger's personal luggage. (Q. B. Div.) *Reg.* v. *Judge of the City of London Court* .....*page* 283

See *Collision*, Nos. 37, 38—*Practice* No. 6.

CREW SPACE.

See *Limitation of Liability*, No. 4.

CROSS ACTION.

See *Practice*, No. 18.

CROSSING SHIPS.

See *Collision*, Nos. 74, 75.

CUSTOM.

See *Carriage of Goods*, Nos. 11, 14, 15.

CUSTOMS AUTHORITIES.

See *Practice*, No. 7.

DAMAGE.

1 *Falmouth Harbour—Harbour master—Authority of—Beaching—Negligence—Liability of commissioners.*—It being within the scope of the authority of the harbour master of Falmouth Harbour, upon the proper construction of the Acts relating thereto, to regulate the place and manner of beaching a vessel therein for repairs, an order given by him to those in charge of a vessel to let go their anchor in such a way that the vessel sits upon it in beaching and is thereby injured, is negligence, for which the Harbour Commissioners, as his employers, are liable. (Ct. of App., affirming Adm.) *The Rhosina* 350, 460

2 *Harbour master—Authority—Limits of harbour—Beaching ship—Negligence—Liability of commissioners.*—Where a vessel is, in obedience to bye-laws, being beached in a harbour under the directions of the harbour master, and in order to reach the place of beaching selected by the harbour master she is properly passing through waters outside the limits of the authority of the Harbour Commissioners (whose servant the harbour master is), and while outside such limits damage is occasioned to her by the negligence of the harbour master in giving an improper order, the Harbour Commissioners are liable for the damage thereby occasioned. (Ct. of App., affirming Adm.) *The Rhosina* 350 460

DAMAGE TO CARGO.

Evidence—Master's letter to owners.—In an action for damage to cargo caused by the vessel running aground, a letter written by the master to his owners, stating the circumstances under which the vessel went ashore, is admissible as evidence against the defendants. (Adm.) *Burt and others* v. *Livingstone*; *The Solway* 482

See *Carriage of Goods*, Nos. 3, 4, 6, 21, 22, 24, 31, 32.

DAMAGES.

See *Carriage of Goods*, Nos. 5, 23, 29, 30—*Collision*, Nos. 11 to 20, 32, 33—*Master's Wages and Disbursements*, No. 13—*Practice*, No. 10.

DANUBE COMMISSION RULES.

See *Collision*, No. 24.

DECK LOAD.

See *General Average*, No. 1.

DEFAULT ACTION.

See *Bottomry*, No. 3—*Collision*, No. 39—*Practice*, Nos. 20, 28, 29—*Salvage*, No. 37.

DELIVERY.

See *Carriage of Goods*, Nos. 2, 7 to 11, 15, 18, 26—*Wages*, No. 1.

DEMURRAGE.

See *Carriage of Goods*, Nos. 12 to 18, 27—*Collision*, No. 19—*Salvage*, No. 19.

DEPOSITIONS.

See *Collision*, No. 36.

DERELICT.

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

DISBURSEMENTS.

See *Master's Wages and Disbursements*.

DISCOVERY OF DOCUMENTS.

See *Practice*, No. 21.

DISTRESS.

See *Sale of Ship*, Nos. 2, 3.

DOCK.

See *Carriage of Goods*, Nos. 7, 11, 12—*Collision* No. 74.

DOCK COMPANY.

Authority—Bye-laws—Power to exclude "lumpers"—Harbours, Docks, and Piers Clauses Act 1847—27 *Vict. c. cxxxi., ss.* 9, 10, 101, 102 *and* 115.—A dock company under a special Act incorporating the Harbours, Docks, and Piers Clauses Act 1847, which provides that the undertakers may make bye-laws (*inter alia*) for regulating the shipping and unshipping of all goods within the limits of the dock, and for regulating the duties and conduct of all persons, as well servants of the undertakers as others, who should be employed in the dock, cannot make a bye-law excluding from their premises or any vessel therein certain labourers called "lumpers," unless specially authorised by them, such bye-law being *ultra vires* and invalid. (Cave, J.) *Dick and Page* v. *Badart Frères* 49

DOUBLE LITIGATION.

See *Practice*, Nos. 22, 23, 24, 25.

DOUBLE PAY.

See *Master's Wages and Disbursements*, Nos. 1, 2.

ELECTION.

See *Practice*, Nos. 22, 24, 25.

ERROR OF JUDGMENT.

See *Wrecks and Casualties*, No. 6.

ESTOPPEL.

See *Carriage of Goods*, No. 2—*Marine Insurance Association*—*Sale of Ship*, No. 1.

EVIDENCE.

See *Charter-party*, No. 7—*Collision*, Nos. 23, 40, 41, 42—*Damage to Cargo*—*Master's Wages and Disbursements*, No. 5—*Practice*, No. 15—*Salvage*, Nos. 19, 21, 23, 33, 35—*Wrecks and Casualties*, Nos. 1, 2.

EXCEPTED PERILS.

See *Carriage of Goods*, Nos. 19 to 24—*Charter-party*, No. 5.

FALMOUTH HARBOUR.

See *Damage*, No. 1.

FINAL SAILING.

See *Carriage of Goods*, No. 25.

FISHING, LOSS OF.

See *Collision*, No. 19.

FISHING VESSELS.

See *Collision*, Nos. 57 to 61.

FLARE-UP LIGHT.

See *Collision*, No. 56.

FOG.

See *Collision*, Nos. 1, 24, 40, 62 to 72.

FOG-HORN.

See *Collision*, No. 71.

FOREIGN PORT.

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

FOREIGN SHIP.

See *Chain Cables and Anchors Act* 1874—*Collision*, Nos. 29, 30, 36—*Limitation of Liability*, No. 4—*Necessaries*, Nos. 4, 6—*Practice*, No. 20—*Wages*, No 2.

FREIGHT.

See *Bills of Lading Act*—*Carriage of Goods*, Nos. 1, 5, 25 *to* 28, 30—*Collision*, Nos. 11, 16, 17, 49—*Marine Insurance*, *Nos.* 1, 8 to 11—*Stoppage in Transitu*, No. 1—*Wages*, No. 1.

FROST.

See *Carriage of Goods*, No. 12.

GENERAL AVERAGE.

1. *Deck cargo*—"*At merchant's risk*"—*Jettison.*—Words in a charter-party providing that a deck load of timber is to be carried at full freight, but "at merchant's risk," do not preclude the owner of the deck load from recovering general average contribution if the cargo is carried on

deck by the custom of trade and is jettisoned. (Ct. of App., reversing Q. B. Div.) *Burton and Co.* v. *English and Co.*.....*page* 84, 187

2. *Port of refuge expense—Perils of the sea—Reloading and subsequent expenses.*—Where a vessel laden with cargo is compelled to put into port to repair an injury which is the subject of particular average, the expense of reloading the cargo, necessarily unloaded for the purpose of repairing the injury and expenses incurred for port charges, pilotage, and other charges subsequent to reloading, are not chargeable to general average. (H. of L., affirming Ct. of App.) *Svensden* v. *Wallace* 87, 232, 453

3. *Salvage—Towage contract—Liability of cargo owners.*—Where a master enters into a towage contract, rendering the shipowners liable to pay a sum of money named in the contract whether the services prove beneficial or not, and the ship and cargo are thereby saved, the remuneration agreed upon may be the subject of a general average contribution. (H. of L.) *Anderson, Tritton, and Co.* v. *Ocean Steamship Company*... 401

4. *Salvage expenses—Reasonableness—What chargeable to general average—Question for jury.*—The fact that a shipowner has become liable to pay, and has paid, a sum of money for services rendered to the ship and cargo, and that such payment was reasonable, does not show conclusively that the whole of such sum is chargeable to general average. Before the owners of cargo can become liable for a general average contribution it must be left to the jury to find what sum should properly be charged to general average under the circumstances. (H. of L., reversing Ct. of App.) *Anderson, Tritton, and Co.* v. *Ocean Steamship Company* 202, 401

5. *Security—Liverpool bond—Deposit—Unreasonable form.*—When there has been a general average loss incurred, and the contributions have not been ascertained, the shipowner is not entitled to make delivery of the cargo conditional upon the consignees signing an average bond in the form known as the Liverpool average bond, and making a deposit of 10 per cent. on the estimated value of their goods in the joint names, as provided by the bond, of the shipowners and their average adjuster, or in the names of the shipowners alone, or in the name of the average adjuster alone. A bond in such a form is unreasonable. (Ct. of App., affirming Q. B. Div.) *Huth and Co.* v. *Lamport and another*; *Gibbs and Son* v. *Lamport and another* 543, 593

6. *Security for—Reasonableness of bond—Lien.*—A shipowner has a lien on the cargo for general average, but if he requires security from the cargo owner for his contribution before delivering the goods, the required security must be reasonable. (Ct. of App.) *Huth and Co.* v. *Lamport and another*; *Gibbs and Son* v. *Lamport and another*..... 593

GENERAL SHIP.

See *Carriage of Goods*, Nos. 3, 4.

GULF OF ST. LAWRENCE.

See *Marine Insurance*, No. 20.

HARBOUR AUTHORITY.

See *Damage—Collision*, No. 42—*Poor Rate*, No. 1—*Wrecks Removal.*

HARBOUR COMMISSIONERS.

See *Damage—Practice*, No. 33.

HARBOUR DUES.

See *Poor Rate*, No. 1.

HARBOUR MASTER.

See *Collision*, No. 93—*Damage.*

HARBOUR DOCKS AND PIERS CLAUSES ACT 1847.

See Dock Company—St. Katherine's Dock Act 1864.

HULL PILOT ACT.

See *Collision*, No. 6.

HUMBER NAVIGATION RULES.

See *Collision*, Nos. 25, 26.

ICE.

See *Carriage of Goods*, No. 12.

"IMPROPER NAVIGATION."

See *Limitation of Liability*, Nos. 5, 6.

INDORSEES.

See *Bills of Lading Act.*

INSPECTION OF DOCUMENTS.

See *Collision*, No. 36.

INSURABLE INTEREST.

See *Marine Insurance*, Nos. 12, 13.

INTERROGATORIES.

See *Carriage of Goods*, Nos. 31, 32—*Practice*, No. 26.

ITALIAN CODE.

See *Practice*, Nos. 42, 43.

JETTISON.

See *General Average*, No. 1.

JOINDER OF PARTIES.

See *Practice*, Nos. 1, 27.

JOINT TORT FEASORS.

See *Collision*, No. 91.

JUDGMENT.

See *Bottomry*, No. 3—*Collision*, No. 39—*Practice*, Nos. 2, 3, 28, 29—*Sale of Ship*, No. 1.

JUDICATURE ACTS.

See *Collision*, No. 31.

JURISDICTION.

1. *Co-Ownership action—Port of Registry Guernsey—Admiralty Court Act* 1861, *s.* 8.—The Admiralty Division has no jurisdiction over an action *in rem*, instituted under sect. 8 of the Admiralty Court Act 1861, claiming an account of the earnings and sale of a ship when the ship is registered at the port of Guernsey, and not at any port in England or Wales. (Adm. Div.) *The Robinsons and The Satellite* .....*page* 338

2. *Loss of life—Collision—Action in rem—Admiralty Court Act* 1861, *s.* 7—*Lord Campbell's Act.* The Admiralty Division has no jurisdiction to entertain proceedings *in rem* for damages occasioned by loss of life, the words "damage done by any ship" in sect. 7 of the Admiralty Court Act 1861 not covering an injury resulting in loss of life, and not extending the provisions of Lord

Campbell's Act so as to include an action *in rem*. (H. of L., affirming Ct. of App.) *The Vera Cruz* ..... *page* 270, 386

3. *Loss of Life—Collision—Limitation of liability—Claims under Lord Campbell's Act.*—*Semble* per Brett, M.R.: If in an action for limitation of liability, some of the claimants are claiming under Lord Campbell's Act in respect of damages occasioned by loss of life, the Admiralty Division may entertain such claims. (Ct. of App.) *The Vera Cruz* 270

See *County Courts Admiralty Jurisdiction—Collision*, No. 31—*Wages*, Nos. 2, 3.

JURY.

See *Charter-party*, No. 9—*General Average*, No. 4—*Practice*, Nos. 30, 31.

LACHES.

See *Limitation of Liability*, No. 8—*Master's Wages and Disbursements*, Nos. 7, 11.

LANDLORD AND TENANT.

See *Sale of Ship*, No. 3.

LATENT DEFECT.

See *Carriage of Goods*, No. 33.—*Collision*, Nos. 21, 22, 23—*Salvage*, No. 12.

LAUNCH.

See *Collision*, Nos. 27, 28.

LAY DAYS.

See *Carriage of Goods*, Nos. 14, 15.

LIEN.

See *Carriage of Goods*, Nos. 5, 26, 28—*Collision*, No. 29—*General Average*, No. 6—*Master's Wages and Disbursements*, Nos. 4 to 12—*Necessaries*, Nos. 3, 4, 6, 7—*Practice*, Nos. 42, 43, 44—*Stoppages in Transitu*, No. 1—*Wages*, No. 6.

LIFE CLAIMS.

See *Carriage of Passengers*, No. 1—*Collision*, Nos. 30 to 33 — *Jurisdiction*, Nos. 2, 3 — *Limitation of Liability*, Nos. 9, 10.

LIFE SALVAGE.

See *Salvage*, Nos. 4, 5, 25, 26, 27.

LIGHTHOUSE.

See *Poor Rate*, Nos. 2, 3.

LIGHTERMAN.

See *Carriage of Goods*, No. 10—*Marine Insurance*, No. 4.

LIGHTERS.

See *Carriage of Goods*, No. 11.

LIGHTS.

See *Collision*, Nos. 4, 26, 34, 42, 52, 53, 57 to 61, 93.

LIMITATION OF LIABILITY.

1. *Costs—Issues raised by defendant.*—In an action for limitation of liability, where the defendants raised an issue which was decided against them, the Court ordered the plaintiffs to pay all the costs of the action, except the costs incidental to the raising of such issue, as to which each party was to pay his own costs. (Adm.) *The Warkworth* 194

2. *Crown—Admiralty stores—Admiralty suits Act* 1868 (31 & 32 *Vict. c.* 78), *s.* 3.—Assuming that the Crown is not bound by the Merchant Shipping Acts, it may nevertheless, under the provisions of the Admiralty Suits Act 1868, claim against the fund in a limitation of liability action in respect of the loss of Admiralty stores by collision. (Adm. Div.) *The Zoe* ..... *page* 58

3. *Crown—Rights of—Amount of Shipowner's liability—Merchant Shipping Acts—Quære*: Can the Crown, where a shipowner limits his liability, enforce any claim beyond the amount limited by the Merchant Shipping Acts? (Adm. Div.) *The Zoe* 58

4. *Foreign ship—Crew Space—Merchant Shipping Act* 1854 (17 & 18 *Vict. c.* 104), *s.* 21, *sub-sect.* 4 —*Merchant Shipping Act* 1867 (30 & 31 *Vict. c.* 124), *s.* 9.—The owners of a foreign ship, in limiting their liability, are entitled to the deductions in respect of crew space allowed by the Merchant Shipping Act 1854, s. 21, sub-sect. 4, if the provisions of that Act have been complied with, although there has been no compliance with the requirements of the Merchant Shipping Act 1867, s. 9. (Adm. Div.) *The Palermo* 369

5. "*Improper navigation*"—*Caused by owner's servant or agent—Merchant Shipping Act Amendment Act* 1862, *s.* 54.—All damage wrongfully done by one ship to another whilst the ship that does the damage is being navigated, and where the wrongful act of the ship which does the damage is due to the negligence of any person for whose negligence the owner is liable, is comprised within sect 54 of the Merchant Shipping Act Amendment Act 1862, unless such negligence occurs with the privity of the owner. (per Brett, M.R., Ct. of App.) *The Warkworth* 326

6. "*Improper navigation*"—*Defect in machinery —Merchant Shipping Act Amendment Act* 1862, *s.* 54.—Where a ship is held liable for a collision caused by a defect in her machinery, and such defect is due not to the master or crew, but to the negligence or default of other persons who are employed by the shipowner to repair the machinery on shore before the commencement of the voyage, and for the purposes of the voyage, the collision is nevertheless occasioned by "improper navigation" within the meaning of sect. 54, sub-sect. 4, of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63), so as to entitle the owner to limit his liability under the provisions of that Act. (Ct. of App., affirming Adm.) *The Warkworth* 194, 326

7. *Master also part owner—Right of other owners—Reservation of master's liability.*—In an action by shipowners to limit their liability in respect of a collision with their vessel, where it appeared that the master, who was on board at the time of the collision, was a part owner, and the collision occurred without the negligence or privity of the remainder of the owners, they have a right to have their liability limited, with a reservation of any right of action there may be against the master personally in respect of his negligence. (Adm.) *The Cricket*; *The Endeavour* 53

8. *Practice — Bringing in claims—Extension of time—Laches.*—In a limitation of liability action a claim may be brought in upon terms after the time fixed by the decree for bringing in claims has expired, provided the claimant has not been guilty of laches disentitling him to the indulgence. (Adm. Div.) *The Zoe* 583

9. *Practice—Loss of life—Damage to ship, goods, and merchandise—Payment into court—Affidavit.*—In an action of limitation of liability, where the plaintiffs have paid into court, or are willing

to pay in, 8*l.* per ton in respect of damage to ship, goods, and merchandise, but seek in respect of the life claims to pay into court, or give bail for an amount less than their total liability under the Merchant Shipping Act, the court, before fixing such amount, will require the plaintiffs to state on affidavit the names of the persons killed and injured their condition in life, the number of those who are legally entitled to claim, the number of claims that have been settled, and the amounts paid in settlement. (Adm. Div.) *The Dione* ..... *page* 347

10. *Practice—Loss of life—Damage to ship, goods, and merchandise—Stay of actions.*—In an action for limitation of liability, where it appeared that all the claims in respect of loss of life had been settled, the Court ordered that upon payment in of 8*l.* per ton, all persons having any claim, either in respect of loss of life or damage to ship, goods, or merchandise, should be restrained from bringing any action in respect of the collision. (Adm. Div.) *The Foscolino* 420

11. *Tonnage—Ship's register—Merchant Shipping Act Amendment Act* 1862, *s.* 54.—The tonnage in respect of which shipowners are entitled to limit their liability under sect. 54 of the Merchant Shipping Act Amendment Act 1862 is the tonnage appearing on the ship's register which was in force at the time of collision. (Adm. Div.) *The Dione* 347

12. *Two Collisions—Amount of liability—Separate acts of negligence — Merchant Shipping Act Amendment Act* 1862 (25 & 26 *Vict. c.* 63), *s.* 54.—Where a ship comes into collision with two vessels one after the other, there being a short interval between the two collisions, the shipowner will be entitled to limit his liability to 8*l.* per ton (there being no loss of life) if the first collision is the substantial and efficacious cause of the second, and there is no separate act of negligence on the part of those in charge of the plaintiffs' ship in respect of the second collision. (Adm. Div.) *The Creadon* 585

See *Carriage of Goods*, No. 22—*Jurisdiction*, No. 3—*Practice*, Nos. 8, 9.

LIS ALIBI PENDENS.

See *Practice*, Nos. 22, 23, 24, 25.

LIVERPOOL AVERAGE BOND.

See *General Average*, No. 5.

LOADING.

See *Carriage of Goods*, No. 13.

LORD CAMPBELL'S ACT 1846.

See *Collision*, Nos. 33, 45, 53—*Jurisdiction*, Nos. 2, 3—*Practice*, No. 1.

LOSS OF CARGO.

See *Carriage of Goods*, No. 23

LOSS OF LIFE.

See *Carriage of Passengers*, No. 1—*Collision*, Nos. 30 to 33—*Jurisdiction*, Nos. 2, 3—*Limitation of Liability*, Nos. 9, 10—*Wrecks and Casualties*, No. 6.

LOSS OF MARKET.

See *Collision*, No. 18.

LOSS OF PROFITS.

See *Salvage*, Nos. 3, 19, 21, 22, 23, 24.

LUMPERS.

See *Dock Company*.

MANAGING OWNER.

See *Master's Wages and Disbursements*, Nos. 3, 5, 12—*Necessaries*,—Nos. 1, 2—*Practice*, No. 11—*Shipowners*, Nos. 6, 7, 10.

MARINE INSURANCE.

1. *Abandonment—Subrogation of rights—Chartered freight not earned—Separate underwriters on ship and freight.*—Freight which has not been earned is not an incident of the ownership of a ship, and does not pass to the underwriters on the ship upon abandonment, and hence where shipowners effect a policy upon a ship with one set of underwriters, and upon freight with another, and whilst the ship is proceeding to her port of loading under charter-party, and before she has earned any freight, she is sunk by another ship, and her owners recover damages in respect of loss of ship and of loss of freight, the underwriters on ship have no right upon abandonment to the freight. (Ct. of App.) *The Sea Insurance Company* v. *Hadden and another* ..... *page* 230

2. *Concealment—Material fact.*—In marine insurance all facts which a prudent and experienced underwriter would take into consideration in estimating the premium are material and ought to be disclosed. (Ct. of App.) *Tate and Sons* v. *Hyslop* 487

3. *Concealment — Material fact — Knowledge of agent—Ignorance of principal—Insurance through third party.*—Where an agent, who is employed to effect an insurance for his principal, deliberately omits to communicate to that principal material facts which in the course of his employment have come to his knowledge, and which it is his duty to disclose to his principal, there is a concealment which will have the effect of vitiating an insurance subsequently effected by such innocent principal through another agent who is unaware of any such concealment of material information. (Ct. of App.) *Blackburn, Low, and Co.* v. *Vigors* 597

4. *Concealment — Material fact — Lighterman — Common carrier—Contract limiting liability.*—In effecting a policy of marine insurance on goods to be carried in London lighters, the disclosure of the fact that the lighterman is carrying them not as a common carrier but upon the terms that he will not be liable for loss unless caused by negligence is material, and ought to be disclosed to the underwriters, and its concealment vitiates the policy. ((Ct. of App., affirming Q. B. Div.) *Tate and Son* v. *Hyslop* 487

5. "*Free from average under* 3 *per cent., &c.*"—*Losses on separate voyage—On same voyage—Adding together.*—Upon the true construction of the warranty in a time policy upon ship and freight "free from average under 3 per cent. unless general, or the ship be stranded, sunk, or burnt," the losses occurring upon different voyages cannot be added together, although separate and distinct average losses occurring during the same voyage can be added together to ascertain whether the aggregate loss exceeds the limit of 3 per cent. (Ct. of App.) *Stewart and Co.* v. *The Merchants' Marine Insurance Company Limited* 506

6. "*Free from capture and seizure*"—*Application of—Belligerent—Barratry.*—In a policy of marine insurance a warranty "free from capture and seizure" applies not only to capture or seizure by

belligerents, but to any seizure, even if it be the result of a barratrous act of the master. (H. of L.) *Cory* v. *Burr* .....*page* 109

7. "*Free from capture and seizure*"—*Seizure by African natives—Plunder—Constructive total loss.*—The word "seizure" in a policy of marine insurance, in which the ship is "warranted free from capture and seizure and the consequences of any attempt thereat," includes a temporary seizure of the ship by African natives for the purpose of plundering the cargo, whereby the ship becomes a constructive total loss. (Cave, J.) *Johnston and Co.* v. *Hogg and others* 51

8. *Freight—Charter—Option to cancel exercised—Perils insured against—Loss.*—Where chartered freight is insured by a policy covering all risks incident to steam navigation, and the ship is chartered for a specific voyage, the charter-party containing a clause entitling the charterers, on the ship failing to arrive at the port of loading by a certain date, to cancel the charter-party, and owing to the failure of her machinery the ship does not arrive within the specified time, and the charterers thereon cancel, and no freight is earned, the loss of freight is not caused by the perils insured against, but by the exercise of the option to cancel. (Coleridge, C.J.) *Mercantile Steamship Company Limited* v. *Tyser* ..... 6 n.

9. *Freight—Charter—Time policy—Peril within time—Loss after time—Liability.*—A time policy on chartered freight for six months provided for payment of "loss of hire which may arise in clause 6 of charter-party for accidents occurring between the 15th April and the 15th Oct." The charter, after fixing the vessel for six months certain with option to the charterers to continue the charter for a further period, provided by clause 6 that, "in the event of loss of time by deficiency of men, collision, breakdown of engines, and the vessel becomes incapable of steaming or proceeding for more than forty-eight working hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage . . . . the acts of God, &c., excepted." During the currency both of the charter and of the policy the vessel sustained injury, but was able to complete her voyage. Owing, however, to the injury the charterers, who had exercised their option of extending the charter beyond the six months, refused to pay hire during the extended time until the vessel was fit to resume employment. In an action by the shipowner under the policy to recover the loss of freight for the extended time: Held, that though the accident occasioning the repairs had happened within the six months prescribed by the policy, the loss of freight had occurred subsequently to that time, and such loss was not covered by the policy. (Ct. of App., affirming Q. B. Div.) *Hough and Co.* v. *Head* 447, 505

10. *Freight—Loss of—Admiralty Charter—Putting out of pay—Discharge—Perils of the sea—Causa proxima.*—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 is rendered temporarily inefficient by reasons of the perils of the sea, and is thereupon by the commissioners put out of pay and discharged from the service, and the chartered freight outstanding is insured for three months under an ordinary time policy, the underwriters knowing of the existence of the charter-party, but not knowing its terms, the loss of freight not being proximately caused by perils of the sea, the shipowners are not entitled to recover it under the policy, (H. of L.) *Inman Steamship Company* v. *Bischoff* .....*page* 6

11. *Freight—Time policy—Contract of affreightment—Knowledge of underwriters.*—In the case of an ordinary time policy upon freight outstanding, the underwriters must be taken to have notice of the existence of a contract of affreightment, though not so as to extend the contract by implication to anything not covered by the terms of the policy. (H. of L., affirming Ct. of App.) *Inman Steamship Company* v. *Bischoff*..... 6

12. *Insurable interest—Cargo—Sale of goods—Appropriation — Shipment F.O.B. — Floating policy—Declaration.*—Where goods are shipped f.o.b., even though mixed with other goods of the same sort and not specifically appropriated to the buyer, if it appear that it was the intention of the parties, in the ordinary course of business, that the goods should be at the risk of the buyer, the buyer has an insurable interest in them, and if he has a floating policy on the goods he may declare in respect of the goods so shipped. (H. of L. affirming Ct. of App.) *Stock* v, *Inglis* 294, 422

13. *Insurable interests—Ship—Mortgagees — Liability for value of ship—Mortgage paid off—Policy ceded to mortgagees.*—When mortgagees of a ship by agreement with their mortgagors effect an insurance on the ship at the mortgagors' expense and hold the policy as part of their security, they have an insurable interest entitling them to sue on the policy, even if their mortgage has been paid off, where they have been compelled to pay to the mortgagors the value of the ship by reason of some default on their part, and the mortgagors have ceded to them their rights under the policy upon receipt of such payment. (Q. B. Div.) *Levy and Co.* v. *The Merchants' Marine Insurance Company* 407

14. *Reinsurance—Ship—Constructive total loss—Notice of abandonment.*—Notice of abandonment need not be given to the underwriters of a policy of reinsurance upon a constructive total loss of the ship insured. (Ct. of App.) *Uzielli and Co.* v. *The Boston Marine Insurance Company*..... 405

15. *Reinsurance—Ship—Constructive total loss—Notice of abandonment—Sue and Labour clause—Agency thereunder—Amount of Liability.*—Underwriters under an ordinary Lloyd's policy on a ship containing a suing and labouring clause in favour of the assured, their "factors, servants, and assigns," reinsured with the plaintiffs, who further reinsured with the defendants, for 1000*l.* subject to the same terms as those contained in the original policy, but to cover total loss only. The ship having gone ashore, her owners gave notice of abandonment to the original underwriters alone, who, having refused to accept the notice, floated the ship at considerable cost, and ultimately settled with her owners at 88 per cent. The plaintiffs having paid the original underwriters this 88 per cent., *plus* the expense of floating the vessel, making in all a loss of 112 per cent., sought to recover the same from the defendants. Held, that notwithstanding the settlement come to between the shipowners and the original underwriters, there had been a constructive total loss, that notice of abandonment to the defendants was unnecessary, that the defendants having insured only to the extent of 1000*l.* they were liable for no more, and that they incurred no liability under the suing and labouring clause, because the original underwriters who had floated the vessel were not the "factors,

servants, or assigns" of the defendants. (Ct. of App.) *Uzielli and Co.* v. *Boston Marine Insurance Company* ..... *page* 405

16. *Ship—Loss of—Barratry—Causa proxima.—Semble* (per Lords Blackburn and Bramwell), that there is no rule of insurance law that where barratry is the remote cause of a loss it is to be looked to rather than the immediate cause. (H. of L.,) *Cory* v. *Burr* 109

17. *Ship—Loss of—Capture—Barratry—Free from capture and seizure—Smuggling—Seizure—Causa proxima.*—Where a ship is insured under a time policy of marine insurance covering the ordinary perils including "barratry of the master," there being also a warranty "free from capture and seizure and the consequences of any attempt thereat," and the ship is seized by foreign customs authorities in consequence of the barratrous act of the master in smuggling, and proceedings are taken to procure condemnation and confiscation of the ship, the underwriters are not liable for expenses incurred in resisting the proceedings of the foreign customs authorities, the *causa proxima* of the loss being seizure and not barratry. (H. of L.) *Cory* v. *Burr* 109

18. *Total loss—Absolute—Policy against—Rights under—Perils of the sea—Constructive loss becoming absolute.*—A policy against absolute total loss only covers any such loss of the thing insured as is sufficiently complete to entitle the owners to recover without notice of abandonment. Where, however, a ship is driven ashore, and by the continuous action of the perils of the seas becomes a total loss, the assured are entitled to recover, even though the ship were at the time of being driven ashore a constructive total loss only. (Q. B. Div.) *Levy and Co.* v. *The Merchants' Marine Insurance Company* 407

19. *Warranty—Place of navigation—Admiralty chart—Effect given thereto—Judicial notice*—In construing a warranty in a policy of marine insurance not to navigate in a particular part of the sea, the court should take judicial notice of the geographical positions of, and general names applied to a district as shown on the Admiralty chart. (H. of L.) *Birrell* v. *Dryer* 267

20. *Warranty — Place of navigation — "No St. Lawrence"—Effect of.*—The words "No St. Lawrence between Oct. 1 and April 1" in a warranty in a policy of marine insurance preclude the ship insured from navigating, not only the river, but also the Gulf of St. Lawrence. (H. of L.) *Birrell* v. *Dryer* 267

See *Principal and Agent.*

MARINE INSURANCE ASSOCIATION.

Policies not issued—Calls—Liability of member—Estoppel.—Where a mutual ship insurance company—the practice of which was, that after the expiration of the first time policy no new policy was issued, but instead thereof stamped receipts were given for calls—passed resolutions with its members' assent transferring its business and effects to a new company, on the terms of the new company paying all the debts and liabilities of the old, and a member of the old company continued to keep his vessels on the books of the new company, but in accordance with the practice of the old company received no policy of insurance, such member is liable to the new company for calls, he being estopped from saying that the contracts, towards the losses on which he is asked to contribute, were invalid by reason of their not being in writing or not being stamped in accordance with 30 & 31 Vict. c. 23. (Ct. of App., affirming Q. B. Div.) *Barrow-in-Furness Mutual Ship Insurance Company Limited* v. *Ashburner* *page* 443, 527

MARITIME LIEN.

See *Collision*, No. 29—*Master's Wages and Disbursements*, Nos. 4 to 12—*Necessaries*, Nos. 3, 4, 6, 7—*Wages*, Nos. 5, 6.

MARSHAL'S FEES.

See *Practice*, No. 14.

MASTER.

See *Bottomry*, No. 2—*Carriage of Goods*, Nos. 2, 3, 4—*Charter-party*, Nos. 1, 2, 3, 4—*Collision*, Nos. 1, 4, 32, 53—*Damage to cargo—Limitation of Liability*, No. 7—*Master's Wages and Disbursements—Salvage*, No. 25—*Stoppage in Transitu*, No. 2—*Towage*, No. 1.

MASTER AND SERVANT.

See *Master's Wages and Disbursements*, Nos. 9, 10.

MASTERS WAGES AND DISBURSEMENTS.

1. *Double pay—Nonpayment of Wages—Merchant Shipping Act* 1854, *s.* 187—"*Without sufficient cause.*"—Where, in an action for master's wages, it appears that, at the institution of the suit, accounts are outstanding between the owners and the plaintiff, and that the same have not been taken or settled, and that within two days of the institution of the suit the wages are paid, the owners have not refused to pay "without sufficient cause" within the meaning of sect. 187 of the Merchant Shipping Act 1854, and therefore the plaintiff is not entitled to recover ten days' double pay. (Adm. Div.) *The Turgot* 548

2. *Double pay—Wages to date of final settlement—Merchant Shipping Act*, 1854, *s.* 187—*Merchant Seamen (Payment of Wages and Rating) Act* 1880, *s.* 4—*Question as to liability.*—Under the provisions of sect. 187 of the Merchant Shipping Act 1854, and sect. 4 of the Merchant Seamen Act 1880, as to the nonpayment of wages, the right to recover ten day's double pay and wages to the time of final settlement is not enforceable where there is a *bonâ fide* question as to liability. (Adm. Div.) *The Rainbow* 479

3. *Disbursements—Victualling contracts—Payment by master for provisions—Misappropriation by managing owner—Liability.*—A master on his appointment agreed with the managing owner that he, the master, should find the provisions for the officers and crew at a certain rate per day. The master subsequently agreed with the managing owner, who was also a ship's store dealer, that the managing owner should supply the provisions and should charge them against moneys of the master which he held in his hands. The managing owner, however, debited his co-owners with the costs of the provisions, and fraudulently applied the master's money to his own purposes. Held, in an action *in rem* against the owners by the master to recover wages and disbursements, that the master was entitled to credit for such amount in the settlement of his accounts with the owners, the fraudulent application of his money by the managing owner being a wrong done to the co-owners for which he was not responsible. (Adm. Div.) *The Dora Tully* 550

4. *Lien—Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 10.—*Quære*, has a master under sect. 10 of the Admiralty Court Act 1861 a maritime lien for his wages and disbursements? (Ct. of App.) *The Beeswing* 484

5. *Lien—Agreement to forego—Onus of proof.*—Where shipowners, in answer to a claim for wages, plead an agreement between the managing owners and the plaintiff that the plaintiff shall, instead of receiving his wages, allow it to remain in the hands of the managing owners, and has thereby foregone his right against the ship, the onus is upon the defendants to clearly prove that there was an express arrangement to that effect, before the court will deprive the plaintiff of his right. (Adm. Div.) *The Rainbow* .....*page* 479

6. *Lien—Bills of Exchange—Master liable thereon.*—Where a master has incurred liability by drawing bills of exchange for goods supplied to the ship, although such liability is not discharged, he has a maritime lien on the ship to the extent of that liability. (Adm.) *The Fairport* 62

7. *Lien—Bills of exchange—Payment not pressed—Laches.*—The act of a master in not compelling payment against his ship for a liability that he has incurred by drawing bills of exchange, because he believes that they will be met by his owners, until he is actually sued upon them himself, does not amount to such laches as will forfeit his lien against a purchaser. (Adm.) *The Fairport* ... 62

8. *Lien—Charter-party—Disbursements for ship and charterers—Rights in respect thereof.*—Where a ship is chartered under a charter providing that the master shall be appointed by the charterers, that the owners are to provide and pay for all provisions and wages of captain and crew, and for the necessary equipment and efficient working of the ship, that the captain is to be dismissed by the owners if he fails to give satisfaction and that the charterers shall provide and pay for all coals, pilotages, port charges, &c., the master is the servant of the shipowners, and hence he has a right *in rem* for his wages and such disbursements as are necessary for the navigation of the ship, and which the charterers had not by the provisions of the charter-party undertaken to pay; and *semble*, per Brett, M.R., if the charterers had refused to make these disbursements, and without them the ship could not be navigated, the master would be entitled to charge them against the shipowners. (Ct. of App.) *The Beeswing*..... 484

9. *Lien—Charter-party—Disbursements for ship and charterers—Rights in respect thereof—Drafts on owners.*—Where a ship was chartered under a charter providing that the captain should be appointed and dismissed by the charterers, that the shipowners were to provide and pay for all provisions and wages of the captain and crew, and for the necessary equipment for the efficient working of the ship, and that the charterers should pay for all the coals, port charges, and other expenses, except those above stated, and the captain instituted an action *in rem* against the owners of the ship claiming in respect of disbursements, consisting of provisions and coals, in respect of which latter item he had given a draft on the shipowners, which draft had been dishonoured, the Court held that the master, having notice of the charter-party, was agent for both the owners and the charterers in respect of the liabilities of each, as determined by the charter, and that therefore the owners were liable in respect of the provisions, but not in respect of the coals. (Adm. Div.) *The Turgot* 548

10. *Lien—Charter-party—Master servant of charterers.*—*Semble*, where a master is the servant of the charterers and not of the shipowners, he has no right against the ship or owners in respect of wages and disbursements. (Ct. of App.) *The Beeswing* 484

11. *Lien — Disbursements — Continuance — Purchasers for value—Laches.*—A master of a ship has a maritime lien for his disbursements made in the service of the ship, and such lien attaches to the ship in the hands of *bonâ fide* purchasers without notice of the lien at the time of the purchase, unless it be lost by the laches of the master, (Adm.) *The Fairport* .....*page* 62

12. *Lien—Loss of—Permitting owners to retain wages.*—A master who, after receiving a portion of his wages from the managing owners, elects to allow the balance to remain in their hands at interest, by so doing loses his lien, and cannot recover the balance *in rem*, but if he has had no opportunity of receiving his wages, or has been refused payment of them on demand, the mere fact of his allowing them to remain in the managing owners' hands after they become due will not deprive him of his remedy. (Adm. Div.) *The Rainbow* 479

13. *Misconduct—Dismissal—Forfeiture of right to damages—Mortgagee—Taking ship to sea.*—The taking away by a master of a ship to sea, after she has been taken possession of by the mortgagees, against their wishes, is such misconduct, even when done by the orders of the mortgagor, his original employer, as will disentitle him to recover in an action *in rem* as against the mortgagees any compensation for dismissal by the mortgagees, upon their recovering possession of the vessel, before the term of his engagement has expired. (Adm. Div.) *The Fairport* 348

See *Practice*, No. 31.

MATERIAL MEN.

See *Necessaries—Practice*, No. 35.

MEASURE OF DAMAGES.

See *Carriage of Goods*, Nos. 5, 23, 29, 30—*Collision*, Nos. 11 to 20.

MERCANTILE LAW AMENDMENT (SCOTLAND) ACT 1856.

See *Sale of Ship*, No. 2

MERCHANT SHIPPING ACTS.

See *Carriage of Goods*, Nos. 8, 9, 10—*Collision*, Nos. 3, 25, 34, 53, 55, 85—*General Average*, Nos. 3, 4—*Master's Wages and Disbursements*, Nos. 1, 2—*Poor Rate*. No. 2—*Salvage*—No. 15—*Seaman's Discharge—Wages*, Nos. 3, 7.

"MERCHANT'S RISK."

See *General Average*, No. 1.

MERSEY.

See *Collision*, No. 28.

MISCONDUCT OF SALVORS.

See *Salvage*, Nos. 30, 31.

MISDIRECTION.

See *Charter-party*, No. 9.

MORTGAGOR AND MORTGAGEE.

See *Marine Insurance*, No. 13—*Master's Wages and Disbursements*, No. 13—*Practice*, Nos, 14, 35.

NARROW CHANNEL.

See *Collision*, Nos. 79, 80.

NAVIGABLE RIVER.

See *Collision*, No. 93.

NECESSARIES.

1. *Advance to managing owner—Right against ship.*—The plaintiffs, shipbrokers, had made advances to the managing owner of a foreign ship for purposes other than the ship. The managing owner applied for a further advance, but the freight of the ship being in the hands of other persons, the plaintiffs refused, but agreed to supply money for necessaries for the ship, provided they could get security for the sums advanced. The plaintiffs handed a cheque for 350*l.* to the managing owner as though for the purchase of necessaries, and this cheque the managing owner handed back to the plaintiffs in part payment of the old advance. At the same time the plaintiffs made a further advance of 200*l.* for necessaries to the managing owner, and it was agreed that, in consideration of the amount of the two advances for necessaries supplied, the managing owner should return the amount with interest and charges, and that the plaintiffs should be at liberty to cover the amount by insurance on the ship. Held that, under the circumstances, the plaintiffs were entitled to recover so much of 350*l.* as had been actually expended in necessaries (*semble*, because the transaction enabled the managing owner to expend that sum, or part thereof, in necessaries.) (Adm.) *The Heinrich Bjorn* ..... *page* 145

2. *Advance to managing owner—Rights of Lender—Material men.*—A contract entered into with the managing owner of a ship for a loan of money to be laid out in necessaries places the lender in the same position as a material man supplying the goods. (Ct. of App.) *The Heinrich Bjorn*... 391

3. *Lien—Material men—British ship—Purchase for value—Vice-Admiralty Court Act* 1863, *s.* 10, *sub-sect.* 10.—Material men supplying necessaries to a British ship in a possession in which a Vice-Admiralty court is established, do not, under the Vice-Admiralty Courts Act 1863, s. 10, sub-sect. 10, acquire a maritime lien, and the ship when in the hands of subsequent purchasers for value without notice of the debt cannot be made chargeable with the necessaries. (Priv. Co.) *The Rio Tinto*..... 224

4. *Lien—Material men—Foreign ship—Purchase for value*—3 & 4 *Vict. c.* 55, *s.* 6.—3 & 4 Vict. c. 65, s. 6, does not create a maritime lien in respect of necessaries supplied to a foreign ship, and hence material men cannot enforce their claim by proceedings *in rem* against the ship when in the hands of subsequent purchasers for value. (Ct. of App.) *The Heinrich Bjorn* 391

5. *Premiums of insurance—Security for advances.*—Premiums paid by a shipbroker at the owner's request, to procure insurance on the ship, for the purpose of covering advances for necessaries made by the shipbroker, are not themselves necessaries. (Adm.) *The Heinrich Bjorn* 145

6. *Priority of liens—Possessory lien—Material men.*—Material men who have a possessory lien on a foreign ship are entitled to be paid out of the proceeds of the sale of such ship in priority to other material men having no such lien, notwithstanding that the latter have recovered judgment against the ship before the material men having the lien have recovered judgment against the ship. (Adm.) *The Immacolata Concezione* 208

7. *Priority of liens—Possessory lien—Material men—Seamen's wages.*—As against material men having a possessory lien a mariner's claim for wages earned before that lien commenced, viaticum, subsistence money for the time between leaving the ship and returning home, and the costs of the action to recover such wages, &c., rank before the claim of the material men, but *aliter* as to the claim for wages earned after the possessory lien commenced. (Adm.) *The Immacolata Concezione* ..... *page* 208

See *Bottomry*, Nos. 1, 2, 4—*Practice*, No. 14.

NOTICE.

See *Carriage of Goods*, Nos. 8, 9, 10—*Stoppage in Transitu.*

OBSTRUCTION TO NAVIGATION.

See *Collision*, No. 93—*Wrecks Removal.*

OVERTAKING SHIP.

See *Collision*, No. 59.

PART OWNERS.

See *Shipowners.*

PARTICULAR AVERAGE.

See *General Average*, No. 2.

PASSENGER.

See *Carriage of Passengers—County Courts Admiralty Jurisdiction—Collision*, Nos. 31, 33.

PASSING OF PROPERTY.

See *Bills of Lading Act.*

PAYMENT INTO COURT.

See *Limitation of Liability*, Nos. 9, 10—*Salvage*, Nos. 18, 32.

PERILS OF THE SEAS.

See *Carriage of Goods*, Nos. 19, 20, 23, 24—*General Average*, No. 2—*Marine Insurance*, No. 18.

PILOT.

See *Collision*, Nos. 1 to 6.

PILOTAGE DISTRICT.

See *Collision*, No. 3.

PLEADINGS.

See *Collision*, No. 44—*Practice*, Nos. 3, 34—*Salvage*, Nos. 32, 33.

PLEDGE.

See *Bills of Lading Act.*

POLICY.

See *Collision*, No. 11—*Marine Insurance.*

POOR RATE.

1. *Harbour—Berwick—Rateable value—Tonnage dues—Harbour dues—Wet dock.*—Under the local Acts applicable to Berwick Harbour the commissioners are entitled to levy harbour and tonnage dues on vessels entering and leaving the harbour, and in addition thereto to levy 2*d.* for every ton on any ship entering a wet dock made under the above Acts. The assessment committee, in assessing the commissioners to the poor rate as occupiers of the wet dock, included the harbour and tonnage dues. Held, that as the wet dock was not the sole meritorious cause of the commissioners' rights to the dues, the harbour and tonnage dues ought not to have been taken into account, but only the additional 2*d.* per ton on vessels actually using the dock. (Q. B. Div.)

Berwick Harbour Commissioners (apps) v. *Churchwardens and Overseers of the Parish of Tweedmouth* (resps.) .....*page* 532

2. *Lighthouse — Exemption from rateability — General authority—Local authority—Merchant Shipping Act* 1854 (17 & 18 *Vict. c.* 104), *s.* 430. —The 430th section of the Merchant Shipping Act 1854 exempting lighthouse authorities from payment of rates and taxes in respect of lighthouses is only applicable to lighthouses under the control of general lighthouse authorities, and is not applicable to a lighthouse under the control of a local authority. (Q. B. Div.) *The Mersey Docks and Harbour Board* v. *The Overseers of Llaneilian* 248

3. *Lighthouse—Telegraph station—Dwelling-house —Rateable value — Beneficial occupation.* — A lighthouse, consisting of a tower and dwelling-house adjoining and owned by a body of public trustees, who have the right to levy such dues as are necessary to defray expenses and no more, is not rateable to the poor rate in respect of the tower, which consisted of a light room and telegraph room, it being incapable of profitable occupation, but the adjoining dwelling-house is to be assessed at a valuation which takes into consideration the existence of a tower and its use as a lighthouse and not at its value, supposing it to be disconnected from and independent of the tower. (Ct. of App., varying Q.B. Div.) *Mersey Docks and Harbour Board* v. *Overseers of Llaneilian* 248, 358

PORT.

See *Carriage of Goods*, Nos. 14, 15, 16, 25.

PORT OF REFUGE.

See *General Average*, No. 2.

POSSESSORY LIEN.

See *Necessaries*, Nos. 6, 7—*Practice*, No. 35.

PRACTICE.

1. *Action in rem—Power to add parties—Collision —Clause under Lord Campbell's Act—R. S. C., Order XVI., r.* 11.—Plaintiffs commenced an action *in rem* under Lord Campbell's Act on the 4th Jan. 1884 in respect of loss of life by collision at sea on the 10th Jan. 1883. After the 10th Jan. 1884, it having been decided in the interim by the Court of Appeal that the Admiralty Court had no jurisdiction in such actions, the plaintiffs applied to add as defendants the owners of the wrongdoing ship personally. Application refused upon the ground that, under the provision of Order XVI., r. 11, proceedings against the parties proposed to be added would only be deemed to have commenced from the date of the service upon them of the writ of summons, and hence the action would not have been commenced against them within the time provided by Lord Campbell's Act, and the court being of opinion that it had no power to add parties as defendants *in personam* in an action *in rem*, thought it ought not to make the order merely because the objection as to time was an objection which ought strictly to be taken at a later stage. (Adm. Div.) *The Bowesfield* 265

2. *Admission of claim—Counter-claim for larger amount—Judgment upon claim—R. S. C., Order XL., r.* 11.—Where the plaintiff's claim for freight is admitted, but the defendants set up a counter-claim for damages for breach of a contract of carriage for a larger amount, the plaintiff is not entitled to judgment upon the claim, under Order XL., r. 11, as upon an admission in the pleadings. (Q. B. Div.) *Mersey Steamship Company Limited* v. *Shuttleworth and Co.* .....*page* 48

3. *Admission of claim—Frivolous counter-claim— Judgment on admission.—Semble*, where a plaintiff's claim for freight is admitted, but the defendants set up a counter-claim which is clearly frivolous for damages for breach of contract of carriage for a larger amount, the plaintiff would be entitled to judgment on his claim, and to have the sum claimed brought into court to await the result of the action. (Q. B. Div.) *Mersey Steamship Company Limited* v. *Shuttleworth and Co.*... 48

4. *Appeal—Costs—Judgment affirmed for different reasons.*—In a damage action where the judgment of the court below was affirmed, but for reasons other than those given by the judge below, the Court of Appeal ordered each party to pay his own costs. (Ct. of App.) *The Dunelm*..... 304

5. *Appeal—Withdrawal of notice—Effect on cross-appeal—R. S. C., Order LVIII., r.* 6.—Where an appellant withdraws his appeal after the respondent has given notice of motion by way of cross-appeal under Order LVIII., r. 6, should the respondent, determine to continue with his cross-appeal, his cross-notice will be treated as a substantive notice of appeal, in which case the original appellant may give a cross-notice of appeal that he intends to bring forward the subject-matter of his original appeal. (Ct. of App.) *The Beeswing* 335

6. *Appeal from County Court—Time for—County Courts Admiralty Jurisdiction Act* 1868, *s.* 27—*County Courts Act* 1875—The power conferred by sect. 27 of the County Courts Admiralty Jurisdiction Act 1868 to extend the time within which an instrument of appeal may be lodged, provided sufficient cause be shown, is not altered or curtailed by sect. 6 of the County Courts Act 1875, this latter section merely providing an alternative mode of appeal. (Adm.) *The Humber*..... 181

7. *Arrest by telegram—Issue of warrant—Removal from custody of Custom House officer—Contempt of court—R. S. C., Order IX., r.* 12.—It having been the practice of the Admiralty Court and of the Admiralty Division to give directions by telegraph to the officers of customs to arrest a ship immediately on the issue of the warrant and before the warrant itself can have reached the officer, such arrest is valid, and if the owner or master remove her out of the jurisdiction after the officer of customs has taken possession of her, he is guilty of contempt of court, notwithstanding the provisions of Order IX., r. 12, as to the mode in which service of the warrant is to be effected. (Adm. Div.) *The Seraglio* 421

8. *Collision—Damage to ship and cargo—Action by ship discontinued by consent—Ships held both to blame in cargo action—Limitation proceedings— Right of ship to claim.*—Owners of ship and owners of cargo laden on board of her respectively instituted actions *in rem* against another ship for damage by collision. In the ship action the following agreement was signed by the parties: "We hereby consent to this action being discontinued without costs on the ground of inevitable accident," and the registrar made an order thereon discontinuing the action. In the cargo action both ships were held to blame, and the defendants therein obtained a decree limiting their liability. The plaintiffs in the ship action then obtained an order from the judge rescinding the order of discontinuance, and claimed against the fund in the limitation action. Held, that the agreement and consent order amounted to a mere discontinuance of the action, and not to a release

of all rights possessed by the parties thereto against each other, and that, therefore, the plaintiffs in the ship action were entitled to claim against the fund. (Ct. of App., affirming the Adm. Div.) *Ardandhu* ..... *page* 573, 594

9. *Collision—Loss of ship and cargo—Action by ship dismissed by consent—Ships held both to blame in cargo action—Limitation proceedings—Right of ship to claim.*—Where owners of ship and owners of the cargo laden on board of her respectively institute actions against another ship for damage by collision, and in the ship action judgment is, by the consent of the parties, given, dismissing the action, but in the cargo action both ships are held to blame, and subsequently the defendants instituted an action for limitation of liability, the judgment in the ship action cannot be set aside by an order of the registrar in the absence of the plaintiffs in the cargo action, so as to enable the plaintiffs in the ship action to claim in the limitation action. *Semble*, the judgment in the ship action could only be set aside by the court itself upon the whole of the facts and the parties affected being brought before it; and *quære* whether any such order ought to be made. (Ct. of App.) *The Bellcairn* 503

10. *Commission on bail—Costs—Damages—Discontinuance.*—A successful defendant in an action *in rem*, where the action is decided in his favour or discontinued, cannot recover as costs the commission paid by him for bail to release his ship from arrest, though he may in some instances, where the arrest is made *malâ fide* or with gross negligence, recover it as damages. (Adm.) *The Numida*; *The Collingrove* 483

11. *Costs—Action without authority—Knowledge of proceedings—Setting aside.*—Where a shipowner applied to the court to set aside an order condemning him in the costs of unsuccessful legal proceedings taken in his behalf by the managing owner, on the ground that the proceedings had been instituted without his knowledge, consent, or ratification, and that the first intimation he had of the proceedings was a notice received by him about a month previous to the present application condemning him in the costs of such proceedings. the Court refused to grant the application, as it did not appear that the applicant, though he had no knowledge of the institution of, was not aware of the pendency of the proceedings, and because he had not at once applied to the court on becoming aware of the proceedings, instead of delaying to take any steps for over a month. (Adm. Div.) *The Bellcairn* 582

12. *Costs — Counsel's fees— Collision — Registrar's discretion.*—In any action for damage by collision where, the damage to one vessel amounting to 20,000*l.*, and to the other vessel to 2000*l.*, three counsel were instructed on behalf of the plaintiffs, and the fees marked on their briefs were respectively seventy-five guineas, fifty guineas, and thirty guineas, and the registrar, on taxation, reduced these fees to sixty guineas, forty guineas, and twenty-seven guineas; the Court, on appeal from the taxation, allowed the original fees, holding that they were proper fees in a case of that magnitude. (Adm. Div.) *The City of Lucknow* 340

13. *Costs—Detention of witnesses.—Semble*, the cost of detaining witnesses on shore may be allowed, although such witnesses are not called at the trial. This is a matter in the discretion of the registrar. (Adm. Div.) *The City of Lucknow* 340

14. *Costs—Marshal's fees—Sale of ship—Mortgagees intervening — Necessaries action.*—Where mortgagees intervened in a necessaries action which was discontinued by the plaintiff before coming to trial, the Court directed that the marshal's fees occasioned by the sale of the ship, which was ordered on the application of the mortgagees, should be borne by the mortgagees, who had received the proceeds of the sale, and for whose benefit it had been made. (Adm. Div.) *The Colonsay* ..... *page* 545

15. *Costs—Printed evidence for use in court—Collision—R. S. C., Order LXVI., r. 7, and Appendix N.*—In consequence of the negligent navigation of the *M.* the steamship *P. M.* came into collision with the *M.* and with the *D.* In a damage action instituted by the owners of the *P. M.* against the *M.*, the plaintiffs were successful. In a damage action, instituted by the owners of the *D.* against the *M.* to recover damages arising out of the collision between the *D.* and the *P. M.*, the plaintiffs were successful. In this latter action, by agreement between the parties, the evidence in the first action, which had been printed in the form of a record for the purposes of appeal, was admitted, and was supplied to the plaintiffs by the owners of the *P. M.*, the defendants refusing to provide them with it. The registrar, on taxation, allowed the plaintiffs, the owners of the *D.*, the amount paid by them to the owners of the *P. M.* for the printed evidence, and 3*d.* per folio for this printed evidence provided for the use of counsel in court in accordance with the terms of Appendix N. of the Rules of the Supreme Court 1883. On objection to the registrar's taxation the Court refused to disallow the 3*d.* per folio. (Adm. Div.) *The Mammoth* 289

16. *Costs—Several claims—Ship sold in one action—Right to costs of sale.*—Where, owing to the proceedings of one of several claimants against a ship, she is sold and the proceeds paid into court, so as to be available for all the claims, the party at whose instigation the ship is sold, though his claim is postponed after the others, is entitled to his costs up to and inclusive of the sale. (Adm.) *The Immacolata Concezione* 208

17. *Costs—Three Counsel—Collision action—Registrar's discretion.*—In a collision action where the trial promised to be protracted, and the damage done exceeded 2000*l.*, the Court refused to interfere with the registrar's discretion in allowing the costs of three counsel. (Adm. Div.) *The Mammoth* 289

18. *Counter-claim—Cross action—Admiralty Court Act* 1861, *s.* 34.—The words "cross-action" in sect. 34 of the Admiralty Court Act 1861 cover a counter-claim, and the court will stay a collision action till security is given for a counter-claim when covered by that section. (Ct. of App.) *The Newbattle* 356

19. *Court of Appeal—Equal division—Decision not binding.*—Although, in consequence of the Court of Appeal being equally divided in opinion, the decision of the court below stands, yet the Court of Appeal is not bound thereby on a subsequent occasion, though *semble* (per Brett, M.R.) it is otherwise in the case of the House of Lords. (Ct. of App.) *The Vera Cruz* 270

20. *Default proceedings—Action in rem—Sale of foreign ship—Necessary affidavit.*—The court will not order the sale of a foreign ship in a default action *in rem* merely on the affidavit to lead the warrant and the report of the marshal alleging that it is desirable the ship should be sold, but it further requires an affidavit verifying the cause of action and stating that no appearance has been entered on behalf of the ship. (Adm. Div.) *The Hercules* 545

21. *Discovery—Security for costs—R. S. C., Order XXXI., rr.* 25, 26.—The court or a judge is not

bound under Order XXXI., r. 25, to made an order dispensing with security for costs of discovery because both parties consent to dispense with such security. (Ct. of App.) *Aste, Son, and Kercheval* v. *Stunmore, Weston, and Co.*.....*page* 175

22. *Double litigation—Lis alibi pendens—Collision —Actions in rem—Bail—Stay of proceedings.*—Where a collision action was instituted in Holland in which the defendants' vessel was released upon a letter of guarantee given between the parties, and the plaintiffs subsequently instituted a second action in this country, and re-arrested the vessel, the Court of Admiralty stayed the second action and released the vessel: The Court of Appeal (Baggallay and Fry, L.JJ., Brett, M.R. *dissentiente*) affirmed the order, being of opinion that the letter of guarantee being in principle equivalent to bail, the second proceedings in this country were vexatious, and that having the power to stay them they ought, under the circumstances, to exercise that power. (Ct. of App.) *The Christiansborg* 491

23. *Double litigation—Les alibi pendens—Collision —High Court—Vice-Admiralty Court—Election —Stay of proceedings.*—Where, in a damage action *in personam* for collision, it appeared that the defendants had, prior to the institution of the action in the High Court, instituted proceedings *in rem* against the plaintiffs to recover damages in respect of the same collision in a Vice-Admiralty Court near to the place where the collision occurred, the Court upon summons stayed all further proceedings in the High Court until after the Vice-Admiralty action had been heard. (Adm.) *The Peshawur* 88

24. *Double litigation—Les alibi pendens—English and foreign courts — Judgment — Execution — Election—Stay of proceedings.*—Although a plaintiff may be put to his election between two actions, where one is in an English court and the other abroad, on the ground of vexation, the court will not consider the double litigation vexatious, where there are substantial reasons to induce the plaintiff to sue in both countries, as where he can get a judgment in each action, but execution is more easily obtained in one country than in the other. (Ct. of App.) *Peruvian Guano Company Limited* v. *Bockwoldt* 29

25. *Double litigation—Les alibi pendens—English and foreign courts—Subject-matter not identical —Election—Stay of proceedings.*—Where an action was brought in England against D. and Co. claiming delivery of seven cargoes, damages, and an injunction against disposing of the cargoes, which were claimed by the plaintiffs, and were then in ships in British waters, and another action was commenced in a French court by the same plaintiffs against the same defendants for six of the same cargoes, the ships and cargoes having been removed to France after the institution of the English action, and the cargoes sold by D. and Co., it was held (affirming Bacon, V.C.) that the double proceedings were not vexatious, and therefore the plaintiffs ought not to be put to their election whether they would proceed in the French or English action. (Ct. of App.) *Peruvian Guano Company Limited* v. *Bockwoldt* 29

26. *Interrogatories—Several defendants—Co-ownership action—Separate deposit—Security for costs —R. S. C., Order XXXI., r.* 26.—Where in a co-ownership action, brought by a managing owner against his co-owners for an account to recover a balance, the plaintiff sought to interrogate the defendants, who were numerous, and to be dispensed from making the usual deposit, the defendants contending that a deposit ought to be made in respect of each defendant interrogated, the Court ordered a deposit of 5*l.*, and 10*s.* for each additional folio over five and no more. (Adm. Div.) *The Whickham*.....*page* 479

27. *Joinder of parties—Defendants—Discretion of judge—Carriage of goods—R. S. C., Order XVI., r.* 11.—Upon an application in an action against shipowners for damage to cargo, under Order XVI., r. 11, by the defendant or defendants on the record, that other defendants be added, the court or judge may exercise a discretion, and the order will not be made unless it is shown that the non-joinder complained of will prejudice the parties to the action, or that "the presence before the court of additional parties is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter." (Q. B. Div.) *Leduc and Co.* v. *Ward and others* 571

28. *Judgment by default—Action in rem—Motion for judgment—R. C. S., Order XXVII., r.* 11.—As under Order XIII., r. 12, default actions *in rem* are to proceed as if the defendant had appeared, Order XXVII., r. 11, as to setting down an action on motion for judgment where the defendant makes default in pleading, applies to such actions, and judgment therein is to be obtained under the provisions of that rule. (Adm.) *The Spero Expecto* 197

29. *Judgment by default—Action in rem—Time— Rules of Supreme Court, Order XIII., r.* 12.—In default actions *in rem*, before the plaintiff can obtain judgment under Order XIII., r. 12, the ten days within which the defendants might have pleaded must have elapsed, and notice of trial must have been filed in the registry. (Adm.) *The Avenir* 218

30. *Mode of trial—Action in rem—Jury—Discretion —R. S. C., Order XXXVI., rr.* 4, 6, 7.—Actions *in rem* are excluded from the operation of Order XXXVI., r. 6, giving the parties an absolute right to trial with a jury by virtue of the provisions of Order XXXVI., r. 4, and hence applications for a trial with a jury in such cases are to be made under Order XXXVI., r. 7 (a), which gives the judge a discretion as to the mode of trial. (Ct. of App.) *The Temple Bar*..... 509

31. *Mode of trial—Action in rem—Master's wages— —Jury—Discretion.*—In an action *in rem* for master's wages and disbursements set down for trial at the assizes, where the judge of the Admiralty Division had in his discretion refused to allow a trial by jury, the Court of Appeal declined to interfere with such discretion. (Ct. of App.) *The Temple Bar* 509

32. *Notice of action—Form—Letter.*—Where a notice of action is required, the notice given should not be construed strictly, but a letter, which merely states that damage has been sustained for which the defendants will be held responsible, is not a notice of action. (Priv. Co.) *Union Steamship Company of New Zealand* v. *Melbourne Harbour Commissioners*..... 222

33. *Notice of action—Harbour commissioners— Officers.*—Where harbour commissioners were constituted by Act of Parliament, and a section of the Act required notice of action to be given to "any person for anything done by him under this Act:" Held (affirming the decision of the court below), that the fact that this section occurred in a part of the Act headed "Officers" could not be held to limit it to acts done by officers of the commissioners, but that the commissioners as a body, were entitled to notice of action. (Priv. Co.) *Union Steamship Company of New Zealand* v. *Melbourne Harbour Commissioners* 222

34.—*Pleadings—Form—R. S. C., Order XIX.*, r. 5.—The forms of pleading under Order XIX., r. 5, are not under all circumstances to be rigidly complied with, but are rather to be taken as the class of pleading it is desired to introduce. (Adm.) *The Isis* .....*page* 155

35. *Priority of claims—Costs—Sale of ship—Mortgage—Material men.*—Where after the commencement of a mortgage action against a British ship whose owners were domiciled in this country, material men with a possessory lien on the ship intervened, and the ship was sold by order of the court, but the proceeds proved only sufficient to satisfy the claim of the material men, the Court ordered that the taxed costs of the plaintiff in the mortgage action up to the date of the sale of the ship should be paid out of such proceeds. (Adm.) *The Sherbro'* 88

36. *Reference—Costs—Collision—More than one-third of claim disallowed—Discretion.*—The rule of the Admiralty Court, in damage actions, that where more than a third of the plaintiff's claim at the reference is disallowed he is condemned in the costs of the [reference, is not a hard and fast rule fettering the judge's discretion, and the judge is entitled, and ought to exercise his discretion as to costs according to the circumstances of each particular case. (Ct. of App.) *The Friedeberg* 426

37. *Registrar's report—Confirmation—No objection thereto—Right to payment.*—A report of the registrar and merchants does not necessarily stand confirmed by reason of the defendants failing to take objection thereto within the time provided for in rule 117 of the Admiralty Court Rules 1859, so as to absolutely entitle the plaintiffs to payment to them by the defendants of a sum of money which the court is of opinion ought not to have been allowed them in the report. (Adm.) *The Thyatira* 178

38. *Registrar's report—Objection to—Time for—Extension.*—The court has power to extend the time within which objection to the report of the registrar and merchants may be taken. (Adm.) *The Thyatira* 178

39. *Sale of ship by marshal—Private contract—Appraisement—Several claims—Assent of and notice to claimants.*—In an action for master's wages and disbursements, where the ship proceeded against was subject to other claims by mortgagees and material men, the Court upon motion, no opposition being offered, ordered an official appraisement of the ship to be made, and the ship to be sold by the marshal by private contract for a sum of money not less than the appraisement, upon proof that the mortgagees assented to such sale, and that notice of the motion had been served upon all the claimants. (Adm.) *The Planet* 144

40. *Service of writ—Action in rem—Solicitors—Marshal.*—In an action *in rem*, service of the writ of summons by a solicitor or his clerk, and not by the marshal, is a valid service. (Adm. Div.) *The Solis*..... 368

41. *Service of writ out of jurisdiction—Action against underwriters—Co-defendants served within jurisdiction—R. S. C., Order XI., r. 1 (g).*—The provisions of Order XI., r. 1 (*g*.) allowing service out of the jurisdiction where any person out of the jurisdiction is a necessary party to an action properly brought against some other person within the jurisdiction are applicable to the case of an action on a policy of marine insurance against several underwriters some of whom are within the jurisdiction and others resident in Scotland. (Q.B.Div.) *The Steamship Thanemore Limited* v. *Thompson and others*.....*page* 398

42. *Solicitors costs—Lien—Italian ship—Expenses of sending of crew home—Payment by Italian Government—Charge by Italian Code—23 & 24 Vict. c.* 127, *s.* 28.—Solicitors for defendants in a salvage action against a foreign ship, who are entitled to a charge upon the ship, or the proceeds thereof, for their costs and expenses incurred in the preservation of the property, do not take priority of the claim of the foreign Government, who, on the abandonment of the ship by her owners, are entitled, by the provisions of their Code, to a lien upon the ship, or the proceeds, for the expenses of sending back the ship's crew to their own country. (Adm.) *The Livietta* 151

43. *Solicitor's costs—Italian ship—Expenses of sending crew home—Payment by Italian Government—Charge by Italian Code—23 & 24 Vict. c.* 127, *s.* 28.—An Italian ship was brought into a British port by salvors. A salvage action having been instituted, the ship was sold by order of the court, and a sum was awarded out of the proceeds to the salvors. After payment of that sum, and the costs of the plaintiffs, a balance of 60*l.* 10*s.* 3*d.* remained in court. The defendants' solicitors had incurred expenses in pumping the ship, paying the marshal's possession fees, &c., and claimed a charging order upon the balance in court for such expenses, and sought payment out of such balance to them. The Italian Government, through their consul in this country, had sent home the crew of the ship, and had incurred expenses by so doing. By Italian law such last-mentioned expenses are a lien upon the ship. The Italian consul opposed payment out to the defendants' solicitors, and claimed priority for the lien of the Italian Government. Held, that the Italian Government was entitled to such priority. (Adm.) *The Livietta* 151

44. *Solicitors' costs—Settlement by parties—Order on defendants—Collusion.*—In a wages action, where the defendants effect a settlement behind the back of the plaintiffs' solicitor, and the plaintiffs fail to pay their solicitor's costs, the solicitor cannot obtain an order that the defendants should pay his costs, unless he show clearly that in making the compromise there has been collusion between the parties with the intention of depriving him of his lien. (Ct. of App.) *The Hope*..... 126

45. *Third party—Indemnity—Express or implied—Damage to cargo—Order XVI., r.* 48—Where a defendant claims to be entitled to indemnity over against a person not a party to the action leave will not be given under Order XVI., r. 48, to serve on him a third-party notice, unless the claim is on a contract of indemnity express or implied. (Ct. of App.) *Spiller* v. *The Bristol Steam Navigation Company* 228

46. *Trinity Masters — Functions — Questions of nautical skill—Judge.*—Per Brett, M.R.: The functions of the nautical assessors being to assist the judge by their advice, and not to control his decision, where the judge differs from his assessors on questions of nautical skill he is not bound by their opinion. (Ct. of App.) *The Beryl*..... 321

See *Bottomry*, No. 3—*Carriage of Goods*, Nos. 29, 31, 32—*Charter-party*, Nos. 7, 8, 9—*Collision*, Nos. 7 to 10. 35 to 50—*Limitation of Liability*, Nos. 8, 9, 10—*Salvage*, Nos. 32 to 36.

PRELIMINARY ACT.

See *Collision*, Nos. 45, 46, 47.

PREMIUMS.

See *Bottomry*, No. 4—*Carriage of Goods*, No. 30—*Necessaries*, No. 5.

PREROGATIVE OF CROWN.

See *Limitation of Liability*, Nos. 2, 3.

PRINCIPAL AND AGENT.

Marine insurance—Undisclosed principal—Foreign consignor—Right to insurance money.—Where goods are consigned to persons who, knowing that the consignor is acting for an undisclosed principal, insure the goods whilst on their voyage in their own names for the benefit of all parties interested, and on the ship carrying the goods being totally lost receive the money due on the policy, the undisclosed principal is entitled to recover this money (less expenses in respect of the insurance) against the consignees, who cannot set it off against the balance of their general account with the consignor. (H. of L.) *Mildred, Goyeneche, and Co.* v. *Maspons y Hermano* page 182

See *Carriage of Goods*, Nos. 2, 32—*Charter-party*, Nos. 3, 4—*Marine Insurance*, No. 3.

PRIORITY OF LIENS.

See *Collision*, No. 29—*Necessaries*, Nos. 6, 7—*Practice*, No. 35.

PRIVY COUNCIL.

See *Salvage*, No. 9.

RATIFICATION.

See *Charter-party*, No. 4.

RATS.

See *Carriage of Goods*, No. 24.

RECEIVER OF WRECK.

See *Collision*, No. 36.

REGISTRAR AND MERCHANTS.

See *Bottomry*, No. 4—*Collision*, Nos. 8, 9—*Practice*, Nos. 12, 17, 36, 37, 38—*Shipowners*, No. 11.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

See *Collision*, Nos. 4, 14, 25, 26, 51 to 83, 85.

RE-INSURANCE.

See *Marine Insurance*, Nos. 14, 15.

RELOADING.

See *Carriage of Goods*, Nos. 5, 28—*General Average*, No. 2.

REMOVAL OF WRECKS ACT 1877.

See *Collision*, No. 42—*Wrecks Removal*.

RES JUDICATA.

See *Sale of Ship*, No. 1.

RESHIPMENT.

See *Carriage of Goods*, Nos. 5, 28—*General Average*, No. 2.

RESTRAINT.

1. *Bond for safe return — Conditions — Value—Practice.*—In an action of restraint the proper form of bond is a bond for safe return, and not a bond to answer judgment in the action. The bond will be conditioned to the appraised or agreed value of the plaintiffs' shares, and not to double the value of such shares. (Adm. Div.) *The Robert Dickinson* page 341

2. *Bond for safe return to particular port—Duration of—Second action—Right to bring.*—Where minority owners have instituted an action of restraint claiming security for the safe return of the ship to a named port within the jurisdiction, and a bond is given by the defendants for that purpose, such bond remains in force until the ship returns to that port, and the plaintiffs are not entitled to institute another action for further security upon the ship's return to another port within the jurisdiction, and if such second action is instituted it will be dismissed with costs. (Adm. Div.) *The Regalia* 338

RIGHT OF ACTION.

See *Seamen's Discharge*.

"RISK OF COLLISION."

See *Collision*, Nos. 54, 76 to 78.

RULES OF SUPREME COURT.

See *Bottomry*, No. 3—*Collision*, No. 39, 45, 50—*Practice*, Nos. 1, 2, 3, 5, 7, 15, 21, 26 to 30, 34, 40, 41, 45—*Salvage*—Nos. 33 to 36—*Shipowner*, No. 5.

RUNNING DAYS.

See *Carriage of Goods*, Nos. 14, 15, 16, 17.

SAILING SHIP.

See *Collision*, Nos. 55, 64, 65, 72.

ST. KATHARINE'S DOCK ACT 1864.

"*Vessel*" — *Barge — Harbours, Docks, and Piers Clauses Act* 1847, *ss.* 3, 4.—A barge simply propelled by oars is not a "vessel" within the meaning of sect. 101 of the London and St. Katharine's Dock Act 1864, notwithstanding that the Harbours, Docks, and Piers Clauses Act 1847 incorporated therewith provides that the word "vessel" shall include ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise, and hence a barge owner is not liable under that section to a penalty for leaving his barge in the docks without any person on board. (Q. B. Div.) *Hedges and Son* (apps.) v. *The London and St. Katharine's Docks Company* (resps.) 539

SALE OF GOODS.

1. *Bill of lading—Duty to forward—Duty to accept—Delay.*—Per Brett, M.R.: In a contract for the sale of goods to be carried by ship to their destination it is implied that the shipper will forward the bill of lading with reasonable diligence, and if he do so, the purchaser cannot refuse to accept the goods because he gets the bill of lading after the arrival of the ship, and after charges in the nature of demurrage have been incurred. (Ct. of App.) *Sanders Brothers* v. *Maclean* 160

2. *Payment against bill of lading—One only tendered—Duty of vendee*—Where goods are bought abroad payment to be made in London in exchange for bills of lading, and one of a set of bills of lading made in parts is tendered to the vendee while the goods are still on the voyage, he is not entitled to refuse to accept the bill of lading merely on the ground that by taking one he runs the risk of the shipper or other person dealing fraudu-

lently with the other parts, but he is bound to accept the goods and pay for them in accordance with the terms of his contract. (Ct. of App.) *Sanders Brothers* v. *Maclean*.....*page* 160

3, *Payment by bills of exchange—Appropriation of shipments to payment—Failure of acceptors.*—Where a firm abroad orders goods from a firm in this country, and the goods are supplied by an agent who draws bills of exchange upon the home firm while he sends the goods to the foreign firm with the bill of lading, stating that he draws against the shipments, there is no such appropriation of the shipments, or the proceeds of sale thereof, to meet the bills of exchange, as will enable the holders of the bills to sue the foreign firm on the failure of the home firm after the latter have accepted the bills. (Ct. of App., affirming Ch. Div.) *Phelps, Stokes, and Co.* v. *Comber* 245, 428

4. *Payment by bills of exchange—Direction to charge against shipment—Specific appropriation.*—The purchasers of bills of exchange, on the face of which there is a direction to the drawees to charge the amounts thereof against particular shipments of goods, who do not receive therewith the bills of lading, do not obtain thereby any lien or charge on the shipments. The statement in the bills only amounts to a representation that the bills are regular, and actually drawn against shipments, and not accommodation bills. And even when, in addition to such a direction in the bills of exchange, the letter of advice by the consignors to the consignees incloses the bill of lading, and states that against the consignments the consignors value on them for a particular sum in favour of the bill holder (naming him), there is no specific appropriation of the shipments or the proceeds of sale to meet the bills. (Ct. of App.) *Brown, Shipley, and Co.*, v. *Kough* 433

5. *Payment by bill of exchange—Direction to charge against shipment—Specific appropriation.*—If the court in *Frith* v. *Forbes* (7 L. T. Rep. N. S. 261; 4 De G. F. & J. 409) did not rely on the special circumstances of that case as showing in fact that a specific appropriation of the shipments to meet the bills of exchange had been agreed on, but intended to lay down as a principle of law that a letter of advice, inclosing the bill of lading, and stating that against the consignments bills of exchange had been drawn in favour of the bill-holder constituted a specific appropriation in favour of the bill-holder, the decision in *Frith* v. *Forbes* is now overruled. (Ct. of App.) *Brown, Shipley, and Co.* v. *Kough* 433

6. *Shipping documents—Bill of exchange—Acceptance made on condition—Right to goods—Consignee.*—Where goods are consigned to a person in this country, and the consignor transmits the shipping documents and a bill of exchange to a creditor other than the consignee, and such creditor hands the shipping documents to the consignee with an intimation that they are at his disposal on his returning the bill of exchange duly accepted, the consignee must either accept the bill of exchange or return the documents, and if he refuses to accept the bill of exchange, but nevertheless takes possession of the goods, professing to retain the bill of lading as security for freight and other charges, the consignor's creditor is entitled to recover from the consignee as damages the value of the cargo less freight and interest on such value. (Ch. Div.) *Rew* v. *Payne, Douthwaite, and Co.*..... 515

See *Collision*, No. 49—*Marine Insurance*, No. 12.

SALE OF SHIP.

1. *Judgment—Res judicata—Estoppel—Shipbuilding agreement—Rectification.*—After money has been paid under a judgment deciding on the construction of an agreement for the sale of a ship that the plaintiffs were not entitled to priority over the defendants, such judgment constitutes no bar to a subsequent action by the plaintiffs claiming rectification of the agreement, on the ground that such construction was contrary to the intention of the parties. (Kay, J.; since reversed by Ct. of App. See next vol.) *Caird* v. *Moss*.....*page* 565

2. *Passing of property—Appropriation—Scotch law—Bankruptcy of vendor—Engine-building contract—Parts constructed and materials to pass—Mercantile Law Amendment (Scotland) Act* 1856 (19 & 20 *Vict. c.* 60), *s.* 1.—By the law of Scotland the effect of the appropriation and acceptance of a specific chattel by the contracting parties is to perfect the contract of sale, and to give the purchaser a right to demand delivery, but the property in the chattel does not pass to him until he has obtained delivery under the contract; and sect. 1 of the Mercantile Law Amendment (Scotland) Act 1856 (19 & 20 Vict. c. 60) imposes no limitation upon the right of the vendor's creditors to attach goods in his custody until the contract of sale has been so perfected, and hence where engineers contract with shipbuilders to supply engines for their ships, and an agreement is subsequently entered into between the parties by which it is stipulated that on payment being made on account of any engines the portions thereof so far as constructed, and all materials laid down in the engineers' yard for the purpose of constructing the same, shall become and be held as the absolute property of the shipbuilders subject only to the lien of the engineers for the payment of the price or any balance thereof that may remain due, the shipbuilders are not entitled on the bankruptcy of the engineers, as against the trustee in bankruptcy, although they have paid large sums on account, to take possession of the materials which were in the engineers' yard at the time of their bankruptcy. (H. of L.) *Seath and Co.* v. *Moore* 586

3. *Passing of property—Contract for building—Distress for rent—Landlord and tenant.*—A ship which is being built under a contract providing that the purchaser shall pay by instalments at various stages of its construction, and that at the payment of each instalment the property in the ship as completed up to that time is to vest in the purchaser, is liable to distress in respect of the shipbuilders' rent, the circumstances of the case not coming within any of the exceptions which exempt goods on the premises of a tenant from liability to distress for rent due to the landlord. (Pollock, B.) *Clarke* v. *The Millwall Dock Company*..... 462

See *Practice*, Nos. 14, 16, 20, 35, 39—*Salvage*, No. 37—*Shipowners*, No. 8.

SALVAGE.

1. *Agreement—Master—Crew—Costs.*—Where seamen instituted a salvage action in the High Court, and sought to dispute an agreement made by their master for 200*l.*, which the court upheld, apportioning 40*l.* to the crew, the plaintiffs were condemned in the costs of the action. (Adm. Div.) *The Nasmyth* 364

2. *Agreement—Master—Crew—Privity of contract.*—Where the master of a salving ship agreed to render salvage services for a reasonable named sum the Court refused, in a salvage action insti-

tuted by some of the crew, to depart from the terms of the agreement upon the ground that the crew were not actual parties to it, holding that such a course would be prejudicial to the interests of commerce. (Adm. Div.) *The Nasmyth* page 364

3. *Amount—Appeal—Damage sustained by salving ship—Loss of profit—Reduction of award.*—In a service of considerable merit lasting for sixty-two hours, where the court below on a value of 67,200*l.* had awarded 5000*l.* for the service, and 3535*l.* 1*s.* 6*d.* for damages and expenses arising out of the service, the Court reduced the award to a lump sum of 6000*l.* (Priv. Co.) *The De Bay* 156

4. *Amount—Derelict—Life salvage—Salvage of property,*—In a case of salvage of a derelict the Court, having out of the proceeds of ship and cargo, amounting to 608*l.*, awarded one-half to the salvors of property, awarded 150*l.* to life salvors taking off the crew, together with costs to both plaintiffs. (Adm.) *The Anna Helena* ... 142

5. *Amount—Derelict—Life and property—Salvage.*—It is not the general rule in cases of salvage of derelicts to give one half the value of the property saved, although in some cases where values are small and the services meritorious, it may be proper to do so. (Adm.) *The Anna Helena*..... 142

6. *Amount—Derelict—Salvage by sailing ship and steamship—Apportionment.*—A brig on a voyage from Norway to Cardiff, with a crew of nine hands, fell in with a derelict brig, in risk of imminent loss, between Heligoland and the Dogger Bank, and put a mate and two hands aboard her, who shortly after endeavoured to regain their own vessel, but their boat was swamped and one of the men drifted astern and was rescued by a fishing smack. After great difficulty and much hardship the two men navigated the derelict in safety to within a few miles of Dungeness, when she was taken in tow by a steamship and placed in Dover Basin. In consolidated actions of salvage brought respectively by the owners, master, and crew of the brig, and by the owners, master, and crew of the steamship, the Court awarded one-half the value of the property salved, out of which three-fifths were apportioned to the salving brig. (Adm.) *The Livietta*..... 132

7. *Amount—Services mainly towage—Apportionment between owners, master, and crew.*—Where, in a salvage action, the court awarded a total sum of 4000*l.*, and there was no special danger to the master or crew, and the service was mainly towage, the Court apportioned 3000*l.* to the owners of the salving ship. (Adm.) *The Kenmure Castle* 27

8. *Amount of award—Appeal.*—Where the Admiralty Court on a value of 62,000*l.* awarded 6000*l.* to a steamship, which, at great risk to herself, got another steamship off a coral reef in the Red Sea, ninety-five miles from Suez, and so saved her from probable total loss, and then at her request towed her within a few miles of Suez, the Court of Appeal refused to reduce the amount of the award. (Ct. of App.) *The Lancaster*..... 174

9. *Appeal—Practice—Amount—Privy Council*—In salvage appeals, the Court of Appeal, following the rule of the Privy Council, will not interfere with the amount of the award, unless the amount has been estimated on wrong principles or upon a misapprehension of the facts, or unless, assuming the principles and facts to be correct, the amount of salvage is, in the opinion of the Court of Appeal, exorbitant in the sense of being beyond all reason. (Ct. of App.) *The Lancaster* 174

10. *Bail.—Expenses of arrest on excessive amount—Practice.*—In a salvage action in which the plaintiffs arrested the salved ship in the sum of 3000*l.* and the court on a value of 14,000*l.* awarded 450*l.*, the salvors were ordered to pay all the costs and expenses of finding bail for 3000*l.*, such sum being in the opinion of the court unreasonably excessive. (Adm.) *The George Gordon* .....page 216

11. *Cargo—Liability of shipowner—Average bond—Duty to take delivery of cargo.*—Where salvage services are rendered to ship, freight, and cargo, there is no duty on the owners of the salved ship before delivering the cargo to take a bond from the consignees thereof securing payment by the consignees to the salvors of salvage due in respect of the cargo. (Adm. Div.) *The Raisby*..... 473

12. *Cargo—Liability of owners—Owners of salved and salving ships identical—Warranty of seaworthiness—Latent defect—Right of recovery—Counter-claim for amount paid to crew.*—Where a screw-steamship carrying cargo under a bill of lading containing the exception "accidents of the seas and of navigation," becomes disabled through her main shaft breaking in consequence of a latent defect in existence prior to the sailing of the vessel, and another vessel belonging to the same owners renders salvage services, such owners are precluded from recovering salvage against the cargo by reason of the services becoming necessary through the breach of their warranty of seaworthiness. In these circumstances the right of the crew of the salving ship to recover for the services is not affected by such unseaworthiness; but the owners of the cargo, having to pay such salvage, are entitled to recover by way of counter-claim, from such of the plaintiffs as are owners of the salved ship, the full amount which they, the owners of cargo, have to pay to the crew for salvage; and the same rule applies to the case of an owner of a salving ship who is not also the owner of the salved ship. (Adm. Div.) *The Glenfruin* 413

13. *Cargo—Services to—Liability of shipowners.*—Where salvage services are rendered to ship, freight, and cargo, the shipowners are not personally liable for the services to the cargo. (Adm. Div.) *The Raisby* 473

14. *Cargo—Services to—Liability of shipowners—Agreement for towage.*—Salvage services were rendered by the steamship *G.* to the steamship *R.* and her cargo under the following written agreement signed by both the masters: "At my request, the captain of the steamship *G.* will tow my ship, the steamship *R.*, to St. Nazaire, that being the nearest port for repairs. The matter of compensation to be left to arbitrators at home, to be appointed by the respective owners." The *R.* was towed to St. Nazaire, and thence proceeded to Dunkirk, where her cargo was delivered to French consignees. A salvage action *in rem* was commenced in England against ship, freight, and cargo, but the plaintiffs not being able to procure the appearance of the cargo owners, salvage was awarded in respect of ship and freight only. In a salvage action *in personam* against the owners of the *R.* to recover salvage for the services rendered to the cargo: Held, that the defendants were not liable under the agreement, and that there was no liability on shipowners to pay salvage for services to cargo. (Adm. Div.) *The Raisby* 473

15. *Collision—One ship assisting the other—Right to reward—Merchant Shipping Act* 1873, *s.* 16.—Where two ships having been in collision, one of them renders assistance to the other by towing her, being bound by sect. 16 of the Merchant Shipping Act 1873 to stand by and render

assistance, *quære*, whether she is entitled to salvage remuneration, even though she is not to blame for the collision. (Adm. Div.) *The Beta; The Peter Graham* ..... *page* 276

16. *Collision—Two ships in danger—Services to one—Benefit to other—Right to reward from both.*—Where two vessels are in collision, and a salvor renders service to one, without a request from or engagement by the other, and the latter is thereby rescued from a position of immediate danger, such service being a direct benefit to both vessels, entitles the salvor to salvage reward from both. (Ct. of App.) *The Vandyck* 17

17. *Costs—Action brought in improper amount—Small award—Both ships owned by same owner.*—Where a steamship, disabled by the breaking of her crank-shaft, was towed a distance of about thirty miles without danger or risk by another steamship belonging to the same owners as the disabled vessel, and fifteen of the crew of the towing vessel instituted a salvage action in the sum of 5000*l.* against the vessel towed, and arrested the vessel, cargo, and freight therein, the Court held such services to be salvage services, but of so slight a character that on a value of 105,500*l.* it awarded 15*l.*, and ordered the salvors to pay all the costs of the action, expressing disapprobation both at the institution of the action in the High Court, and at the arrest of the vessel for such an amount. (Adm.) *The Agamemnon* 92

18. *Costs—Tender—Payment into court—Practice.* Where in a salvage action defendants with their statement of defence tender and pay into court a sum of money in satisfaction of the plaintiffs' claim, and plead such payment into court, and the sum paid in is held to be sufficient, the court will order the defendants to pay the plaintiffs' costs up to the date of the delivery of the statement of defence, unless the circumstances of the case render it just and expedient to order otherwise. (Adm. Div.) *The William Symington* 293

19. *Damage to salving ship—Cost of repairs—Demurrage—Evidence—Amount recoverable.*—In a salvage action evidence of the specific injuries sustained by the salving ship and the cost of repairs thereof, and of demurrage during repairs, was tendered in the Court of Admiralty, and rejected. Held, in the Court of Appeal (Baggallay and Lindley, L.JJ.), that the judge is bound to receive such evidence, and to include the loss shown in his award, except in cases where such evidence is immaterial by reason of the property saved being too small in value to satisfy such loss, or by reason of the services being so trifling as to render it unjust that the loss sustained by the salvors should be borne by the owners of the salved property, or where from other circumstances it is obvious that the court cannot give an amount sufficient to cover the loss; but, per Brett, M.R., that the admission of such evidence is entirely in the discretion of the judge, subject to his award being reviewed by the Court of Appeal in the event of its being shown that the rejection of the evidence improperly affected the amount of the award. (Ct. of App.) *The City of Chester*..... 311

20. *Damage to salvor—Interest—Right to recover.*—Interest on the amount of loss and damage sustained by rendering salvage services is not recoverable by salvors. (Priv. Co.) *The De Bay* 156

21. *Damage to salving ship—Loss of profit—Evidence—Admissibility—Right to recover.*—Where in rendering salvage services a ship has sustained actual damage and loss of profit which is capable of being accurately ascertained, evidence of the amount thereof is admissible on behalf of the salvors, and the court should, where there is a fund sufficient for the purpose without depriving the owner of the benefit of the salvage, award to the salvors the amount of such loss and damage in addition to the salvage reward. (Priv. Co.) *The De Bay*..... *page* 156

22. *Damage to salvors—Loss of profits—Right to recover.*—Where the steamship *S.* having broken down twelve miles east of Scarborough, was, in twenty-four hours, towed into the Tyne at different intervals, by the steam trawlers *M.* and *F. A.* and the smack *S.*, and the master of the smack *S.* having entered into an agreement with the master of the steamship *S.*, whereby he was, for the sum of 20*l.*, to procure assistance, had informed the trawler *M.* of the whereabouts of the steamship *S.* only on condition of sharing in the salvage earned by the *M.*, the Court, on a value of 10,552*l.* 9*s.* 2*d.*, awarded to the *M.* 200*l.* in respect of the salvage, and 100*l.* for loss of profits and for repairs, to the *S.* 10*l.* and to the *F. A.* 70*l.* (Adm.) *The Sunniside* 140

23. *Damage to salvor—Loss of profits—Right to recover—Evidence.*—In a salvage action evidence of the loss of profits and damage sustained by the salving vessel is admissible as an element to be considered in awarding remuneration; but evidence of loss of profits is not to be taken in ordinary cases as a fixed figure always to be allowed as in the nature of damages. This rule does not apply with the same force to actual damage sustained. (Adm.) *The Sunniside* 140

24 *Damage to salvor—Depreciation in value—Loss of charter—Right to recover.*—Salvors are entitled to recover for general depreciation in the value of a sailing ship in consequence of the damage sustained, and for loss of charter-party if proved. (Priv. Co.) *The De Bay* 156

25. *Life salvage—Agreement—Authority of master.—Semble*, a master has no authority to bind his owners by an agreement to save the lives of himself and crew, as his owners have no beneficial interest in the subject-matter of such a contract. (Ct. of App.) *The Renpor* 98

26. *Life salvage—Agreement—No property saved—Right to reward.*—Where the steamship *R.* being in imminent peril of total loss, her master on behalf of himself and his owners entered into the following agreement with the master of the steamship *M. L.*: "It is hereby agreed between Thomas Gibb, the master of the above steamer, and Robert Osborn, master of the steamship *R.*, that the above steamer *M. L.* agrees to stay by me until I am in a safe position to get to port, for the sum of 1200*l.*, my vessel being badly holed in starboard bow near collision bulkhead;" and in pursuance of the agreement the *M. L.*, at great risk, stood by the *R.* until she sank, when the *M. R.* took off her master and crew; it was held (affirming Sir R. Phillimore), that no life salvage was recoverable, as no property had been saved, and that neither master nor owners were liable under the contract, as the condition "until I am in a safe position to get to port" had not been fulfilled. (Ct. of App.) *The Renpor*..... 98

27. *Life salvage—No property saved—Right to reward.*—Life salvage is only recoverable where ship, cargo, or freight is saved so that a fund out of which the award can be paid is realised; hence ineffectual attempts to save the property, though rendered at express request, give no claim to life salvage. (Ct. of App.) *The Renpor* 98

28. *Incomplete service without benefit—Ship ultimately saved — No right to reward.*—Where salvors in answer to a request for assistance render services which through no fault of theirs

are ineffectual, and leave the vessel in distress in a worse position than the one in which they found her, they are entitled to no reward, even though the vessel be ultimately saved by other salvors. (Adm. Div.) *The Cheerful* .....*page* 525

29. *Incomplete but beneficial service—Vessel ultimately saved—Right to reward.*—Where a vessel engaged in rendering salvage services is compelled in consequence of the nature of her cargo to abandon the service before it is completed, she is not deprived of her right to reward if by the services already rendered she has brought the vessel she is assisting from a position of danger into a position of comparative safety, and the vessel is ultimately saved. (Adm.) *The Camellia* 197

30. *Misconduct of salvors—Forfeiture—Diminution.*—Misconduct on the part of salvors, other than criminal misconduct, works a diminution, but not a total forfeiture of reward. (Adm. Ct. of Cinque Ports.) *The Marie*..... 27

31. *Misconduct of salvors—Loss of ship—Forfeiture of award—Counter-claim for damage to ship.*—Where salvors, having taken possession of a derelict vessel, whose crew had taken refuge on board the salvors' vessel, improperly refused to put back the crew or take the proffered assistance of a tug, although they themselves had no local knowledge, and then brought the derelict to anchor in an improper place, in consequence of which she was lost, the Court, although the ship and cargo were subsequently raised, and realised 3075*l.*, refused to give any salvage remuneration, and condemned the plaintiffs in costs, but dismissed the counter-claim for damages. (Adm.) *The Yan Yean*..... 135

32. *Practice — Pleading — Tender — Payment into court.*—In the defence in a salvage action the mere offer by the defendants to pay a sum named in an agreement made prior to the rendering of the services without payment into court is a bad plea. (Adm.) *The Nasmyth* 364

33. *Practice — Pleadings — Admission of facts—R. S. C., Order XIX., rr.* 4, 5.—In salvage actions the plaintiffs in their statement of claim should state fully the material facts of the service, and if such facts are admitted by the defendants, the court will not allow the plaintiffs at the hearing to amplify them by evidence, except on special grounds. (Adm.) *The Hardwick* 199

34. *Practice—Costs—Higher scale—Value of property salved—R. S. C., Order LXV., r.* 9.—In a salvage action, where the value of the salving ship, together with cargo and freight, was 80,000*l.*, of the property salved 42,000*l.*, and the award 2400*l.*, the Court refused to allow costs on the higher scale, the rule being that in the absence of special circumstances of difficulty or urgency costs on the higher scale will not be allowed. (Adm.) *The Horace* 218

35. *Practice — Pleadings — Form — Evidence—R. S. C., Order XIX., rr.* 4, 5, 7.—In salvage actions it may be proper in some cases, owing to the practice of the court that where the defendants admit the facts alleged in the statement of claim, the plaintiffs are not allowed to give any evidence at the hearing, to use a fuller form of statement of claim than that given in the example in the appendix to the Rules of the Supreme Court 1883, and approaching more nearly to the old form. (Adm.) *The Isis*..... 155

36. *Practice—Pleadings—Form—R. S. C., Order XIX., r.* 7.—In a salvage action where the plaintiffs had delivered a statement of claim in the form No. 6, sect. 3 of Appendix C to the Rules of the Supreme Court 1883, the Court, on motion by the defendants, ordered the plaintiffs under Order XIX., r. 7, to deliver a further and better statement of the nature of their claim, and ordered the costs of the motion to be costs in the cause. (Adm.) *The Isis* .....*page* 155

37. *Sale of ship and cargo before judgment—Deterioration in value—Order for sale—Default action.*—Where in a salvage action in which no appearance had been entered it was alleged upon affidavit that the ship and cargo were daily deteriorating in value, and that large expenses were being incurred in respect of the charge of the property, and that the plaintiffs had been in communication with the owners as to a sale, the Court, on motion by the plaintiffs prior to decree, ordered an appraisement and sale of the property. (Adm.) *The Anna Helena* 61

38. *Tender—Costs—Practice.*—In a salvage action it is not necessary that a tender should be accompanied with an offer to pay the plaintiffs' costs up to the date of tender. (Adm. Div.) *The William Symington* 293

See *Carriage of Goods*, No. 6—*Collision*, No. 20—*General Average*, Nos. 3, 4—*Practice*, Nos. 42, 43—*Wages*, No. 1.

SEAMAN'S DISCHARGE.

Refusal of certificate—Penalty—Action—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 172, 524.—Sects. 172 and 524 of the Merchant Shipping Act 1854 inflicting a penalty of 10*l.* upon any master who shall fail to give a seaman a certificate upon his discharge, and directing the whole or part of the penalty to be applied in compensating the seaman, exclude the seaman from instituting an action for damages against the master for withholding the certificate, his only remedy being the penalty inflicted by the Act. (Q. B. Div.) *Vallance* v. *Falle*..... 280

SEA WATER.

See *Carriage of Goods*, No. 24.

SEAMAN.

See *Collision*, No. 29—*Seaman's Discharge*—*Wages.*

SEAWORTHINESS.

See *Carriage of Goods*, Nos. 21, 22, 23—*Salvage*, No. 12.

SERVICE.

See *Bottomry*, Nos. 3—*Practice*, Nos. 40, 41.

SET-OFF.

See *Principal and Agent.*

SHIPOWNERS.

1. *British ship—British owners—Foreign registry—Liability—Merchant Shipping Acts.*—*Semble*, where a ship is owned by an English limited company, which for the purpose of carrying on business in a foreign country is registered in that country as a foreign company, and the ship is also registered there, the ship is nevertheless a British ship, and, although not having a British registry, is subject to all the liabilities of a British ship. (Ct. of App.) *The Chartered Mercantile Bank of India, &c.*, v. *The Netherlands India Steam Navigation Company Limited* 65

2. *Conspiracy of shipowners to exclude others—Restraint of trade—Cause of action—Injunction—Damages.*—The Court will not grant an *interim* injunction to restrain the existence of a combination of shipowners offering advantageous terms to shippers confining their shipments to the combination's ships, which combination is alleged by other shipowners to be a conspiracy for the pur-

pose of ruining them by driving away the trade from their ships, where the parties complaining do not show that they will suffer irreparable injury by the continuance of the combination, and where it appears that if the plaintiffs establish their case they will recover ample compensation by way of damages. (Q. B. Div.) *Mogul Steamship Company Limited* v. *McGregor, Gow, and Co.* *page* 467

3. *Conspiracy of shipowners to exclude others—Restraint of trade—Indictable offence—Right of action.*—A combination by shipowners offering advantageous terms to shippers confining their shipments to the combination's ships, and alleged by other shipowners to be a conspiracy entered into for the object of ruining them by driving away the trade from their ships may be an indictable offence, and therefore actionable. (Q. B. Div.) *Mogul Steamship Company Limited* v. *McGregor, Gow, and Co.* 467

4. *Co-owners—Order for an account—District registrar — Report — No appeal.*—Where a district registrar has made an order in an action in the Admiralty Division for an account between the part owners of a ship that the accounts be filed, and that they be proceeded with, it is too late to take objection to his making such order after he has reported, there having been no appeal against such order (Adm. Div.) *Gowan* v. *Sprott* 288

5. *Co-owners—Order for an account—District registrar—Report—Objection to—R. S. C., Order VI., r.* 1.—Where an action is instituted in an Admiralty District Registry by part owners of a ship against the managing owner thereof for an account and the writ claims an account under Order III., r. 8, and an order for the filing of the accounts is made under Order XV., r. 1, and the account is proceeded with pursuant to order, and the district registrar reports thereon, such report is to be treated as the usual report in an Admiralty Court Action, and if the defendant seeks to take objection thereto, he must do so according to the provisions of Order LVI., r. 11, otherwise the plaintiff will be entitled to judgment thereon. (Adm. Div.) *Gowan* v *Sprott* 288

6. *Co-ownership action—Claim by managing owners—Amounts left unpaid—Co-owners proceeded against—Stay of execution—Costs—Delay.*—A managing owner, who had not delivered accounts for nine years, instituted a co-ownership action for settlement of accounts, and for payment of the balance found due to him, and claimed certain items in respect of materials supplied to the ship for which he had not paid, and for which the defendants were being sued in the Queen's Bench Division. The registrar in his report allowed the plaintiff these items. Upon application to confirm the report, and for judgment, the Court decreed payment of the amount found due by the registrar, but stayed execution until the defendants were protected against the claims in the Queen's Bench Division, and refused the plaintiff the costs of the action upon the ground of delay in rendering his accounts. (Adm. Div.) *The Charles Jackson* 399

7. *Co-ownership action—Managing owner—Unpaid claims.—Quære:* Is a managing owner entitled to recover against his co-owners in respect of sums of money due to third parties on account of the ship, but which he has not paid? (Adm. Div.) *The Charles Jackson* 399

8. *Co-ownership action—Sale of ship—Minority and majority owners.*—The High Court of Justice (Admiralty Division) will not, in a co-ownership action, order the sale of a ship on the application of either minority or majority owners, unless the applicants prove strong necessity for so doing. (Adm. Div.) *The Marion* ..... *page* 339

9. *Expenses of voyage—Liability for—Time charter—Voyage charter.*—Where a ship, having been chartered out and home under a time charter, is being brought home under a voyage charter in consequence of the time charter having been broken, the purchaser of shares purchasing during such homeward voyage is not liable for losses incidental to the voyage out under the time charter. (Adm. Div.) *The Meredith* 400

10. *Managing owner — Right to remuneration — Commission profits.—Semble,* that a managing owner may be entitled to some reasonable sum as a commission on profits, although he owns shares in the ship and no express agreement as to his remuneration has been entered into. (Adm. Div.) *The Meredith* 400

11. *Practice — Co-ownership action — Registrar's report — Time for objection — Extension.* — The Court will not extend the time for objecting to the registrar's report in a co-ownership action without special grounds being shown by the party seeking to object. (Adm. Div.) *Gowan* v. *Sprott* 288

See *Carriage of Goods*, Nos. 5, 6, 8, 9, 10, 23, 28, 31, 32, 33—*Collision*, Nos. 11, 16, 17—*Wrecks and Casualties*, Nos. 3, 4.

SHIPPER.

See *Bills of Lading Act*, No. 1—*Carriage of Goods*, Nos. 3, 31—*Charter-party*, No. 3.

SHIPPING CASUALTIES INVESTIGATIONS ACT 1879.

See *Wrecks and Casualties.*

SMUGGLING.

See *Marine Insurance*, Nos. 17.

SOLICITOR.

See *Practice*, Nos. 40. 42, 43, 44.

SPEED.

See *Collision*, Nos. 58, 60, 62 to 70, 72, 81, 84.

STAMP ACT 1870.

See *Charter-party*, Nos. 7, 8—*Marine Insurance Association.*

STAY OF PROCEEDINGS.

See *Collision*, No. 35—*Limitation of Liability*, No. 10—*Practice*, Nos. 22 to 25.

STEAM STEERING GEAR.

See *Collision*, Nos. 21, 22, 23.

STOPPAGE IN TRANSITU.

1. *Duration of transit—Lien for freight—Notice to shipowner—Unpaid vendor—Sub-sale—Delivery order.*—Where the master of a ship retains a lien for freight upon the cargo, the bill of lading of which cargo has been indorsed by the purchaser as security for an advance, the fact of a sub-sale 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 due notice, the right to stop the purchase money payable by the sub-purchaser, after discharging the advance on the bill of lading. (H. of L.) *Kemp* v. *Falk* ... 1

2. *Notice to shipowner—Notice to master—Duty to forward.*—Per Lord Blackburn: Notice of stoppage *in transitu* given to a shipowner is not

effectual till it is communicated to the master, but it imposes on the owner an obligation to send it on with reasonable diligence. (H. of L.) *Kemp* v. *Falk* .....*page* 1

STRAITS OF MESSINA.
See *Collision*, No. 80.

STRANDING.
See *Carriage of Goods*, Nos. 3, 4.

SUB-SALE.
See *Stoppage in Transitu*, No. 1.

SUING AND LABOUR CLAUSE.
See *Marine Insurance*, No. 15.

TEES NAVIGATION RULES.
See *Collision*, No. 84.

TENDER.
See *Salvage*, Nos. 18, 32, 38.

TERMINATION OF TRANSIT.
See *Stoppage in Transitu*.

THAMES CONSERVANCY RULES.
See *Collision*, Nos. 85 to 90.

THIRD PARTY.
See *Practice*, No. 45.

TICKET.
See *Carriage of Passenger*.

TIME POLICY.
See *Marine Insurance*, Nos. 9, 10, 11.

TOWAGE.

1. *Agreement to pay for work done and to be done —Master's authority—Ship lost—Liability of owners.*—The steamship *W.* having found the steamship *A.*, on the 12th Feb. off Cape Finisterre in a disabled condition, towed her in heavy weather until the 14th Feb., when, in consequence of the condition of the *A.*, the master of the *W.* proposed to abandon her. However, at the desire of the master of the *A.*, it was agreed in writing that the *W.* should "stand by the *A.* as long as possible, and that the *W.* and the owners were to be paid for the time and towing already done and to be done from the 12th Feb. 1883." The *W.* thereupon again took the *A.* in tow, but on the 16th Feb., owing to stress of weather it was found necessary to abandon her, after which she was totally lost. In an action for towage against the owners of the *A.*, the Court held that the agreement entered into by the master of the *A.* was a reasonable one, and one which, in his position of agent *ex necessitate* for his owners, he had an authority to enter into, and awarded the plaintiffs the sum of 400*l.* in respect of the services rendered prior to and after the agreement. (Adm.) *The Alfred* 214

2. *Contract—Breach—Damage—Notice restricting liability for negligence.*—A term in towage contract, by which tug owners exe pt themselves from liability for damage or loss occasioned by the negligence or default of their servants, covers damage occasioned in con equence of the act of the master taking in tow t oo many vessels at a time in contravention of a statutory bye-law of the port in which the towage takes place, although the number of vessels causes the tug to be of insufficient power for the service. (Ct. of App., affirming Adm.) *The United Service* ...55, 170

3. *Contract—Breach—insufficiency of coal—Completion of towage—No damage—Right to recover.* —Where in the course of towage the tug, owing to her having started with an insufficient supply of coal, is obliged to cast off to go to the nearest port to ship more coal, and then returns and completes the towage, the tug-owners are entitled to be paid the price agreed upon in the towage contract if the owners of the tow do not prove any damage to have been occasioned to them by the temporary discontinuance of the towage. (Adm. Div.) *The Undaunted* .. ..*page* 580

4. *Contract—Warranty—Breach—Insufficiency of coal—Notice restricting liability.*—In a towage contract there is an implied undertaking on the part of the tug-owners to supply an efficient tug with sufficient equipments, including a proper supply of coal; and hence, a term in the contract by which the tug-owners are exempted from liability for loss or damage occasioned by the negligence of their servants is no defence to an action for damages occasioned to the owners of the tow in consequence of the towage being discontinued owing to the tug having started with an insufficient supply of coals. (Adm. Div.) *The Undaunted* 580

5. *Tug and tow—Duty to control navigation.*—It is not the duty of those in charge of a tow which is being towed with a long scope of hawser by night at sea to direct the movements of the tug—the circumstances being different to towing by day in a river. (Adm Div.) *The Stormcock* 470

See *Collision*, Nos. 28, 50, 91—*General Average*, Nos. 3, 4—*Salvage*, Nos. 7, 14.

TRINITY MASTERS.
See *Collision*, Nos. 40, 43—*Practice*, No. 46.

TYNE NAVIGATION RULES.
See *Collision*. No. 92.

UNDERWRITERS.
See *Marine Insurance—Practice*, No. 41.

VENDOR AND PURCHASER.
See *Sale of Goods—Sale of Ship—Stoppage in Transitu*, No. 1.

VICE-ADMIRALTY COURT.
See *Necessaries*, No. 3—*Practice*, No. 23—*Wages*, No. 3.

VICE-ADMIRALTY COURTS ACT 1863.
See *Necessaries*, No. 3.

WAGES.

1. *Freight—Abandonment—Ship brought in by salvors—Cargo delivered on demand.*—Where a salving ship takes a crew off a vessel in distress and puts men board of her, refusing to allow her own crew to return, and the two vessels are in company navigated into port, there is no such abandonment of the ship as to put an end to the contract of carriage, and subsequently there will be freight due upon the consignees requiring delivery of the cargo, such freight being *pro ratâ*, assuming the port not to be the port to which the cargo ought to have been taken under the contract of carriage. (Adm. Div.) *The Leptir*..... 411

2. *Jurisdiction—Foreign ship—Foreign law—Protest of consul.*—In an action for wages and damages for wrongful dismissal brought by persons domiciled in England against a foreign ship, in which they had served under articles signed in a port of the country to which the ship belonged, in which action imprisonment, hardship, and ill-treatment were alleged, the Court refused to interfere with the discretion of the judge below in declining to exercise jurisdiction

against the protest of the consul, which alleged that, by the law of the country to which the ship belonged, all disputes relating to the ship, or claims against the owner or master, were to be referred to and decided by the tribunals or consuls of that country. (Ct. of App. from Adm.) *The Leon XIII.* .....*page* 25, 73

3. *Jurisdiction — Vice-Admiralty Court — Joint action by six seamen—Order in Council—2 Will. 4, c. 51, s. 15—Merchant Shipping Act* 1854, *s.* 189.—A vice-admiralty court has jurisdiction to entertain an action for wages and compensation for wrongful dismissal brought by any number of mariners not exceeding six, under Order in Council pursuant to 2 Will. 4, c. 51, provided that the total amount found due to all the plaintiffs conjointly exceeds 50*l.*, although the amount found due to each is less than that sum. (Priv. Co.) *The Ferret* 94

4. *Seamen Date to which wages recoverable—Merchant Seamen Act* 1880.—The time up to which a seaman is entitled to an action to recover his wages under the Merchant Seamen Act 1880 is to the date of certificate of chief clerk in Chancery, or report of registrar in Admiralty. (Ch. Div.) *Re The Great Eastern Steamship Company; Claim of Williams and others* 511

5. *Seamen — Engagement by master — Agent for owners—Charter-party—Rights as to wages.*—A master who, though appointed by the owners of the vessel, yet under the terms of the charter-party thereby becomes the charterers' captain, is as between the owners and the seamen the agent of the owners, and hence seamen engaged for a voyage are not bound to look into the title of the master who appoints them to ascertain whether he is the captain of the owners or the charterers. (Ch. Div.) *Re The Great Eastern Steamship Company; Claim of Williams and others* 511

6. *Seamen—Foreign-going Ship—Lien—Voyage not proceeded upon.*—Seamen engaged by the owners or their agent for a voyage upon a foreign-going ship are entitled to a lien for their wages upon the ship, and the proceeds of sale thereof, although the engagement of the seamen has not been in writing, and although the ship does not proceed upon the voyage. (Ch. Div.) *Re The Great Eastern Steamship Company; Claim of Williams and others* 511

7. *Seamen—Termination of engagement—Merchant Seamen Act* 1880 (43 *&* 44 *Vict. c.* 16), *s.* 4.—The words "at the end of his engagement" in the Merchant Seamen Act 1880 (43 & 44 Vict. c. 16), s. 4, sub-sect 1, mean the time at which a seamen's actual service terminates, and include the natural effluxion of the agreement as well as the discharge of the seaman in breach of the contract. And therefore, to entitle a seaman to wages to the date of final settlement, it is not necessary that the whole term of his engagement should have expired, but it is sufficient that his actual service on board ship should have ended. (Ch. Div.) *Re The Great Eastern Steamship Company; Claim of Williams and others*..... 511

See *Collision*, No. 29—*Necessaries*, No. 7.

WARRANT OF ARREST.

See *Collision*, No. 37—*Practice*, No. 7.

WARRANTY.

See *Carriage of Goods*, No. 33—*Chain Cables and Anchors Act* 1874—*Marine Insurance*, Nos. 19, 20—*Salvage*, No. 12—*Towage*, No. 4.

WRECKS AND CASUALTIES.

1. *Appeal—Costs—Confirmatory evidence on appeal.*—Costs of an appeal will be given against the Board of Trade if the decision of the appellate court is against the Board of Trade, and also costs of further evidence produced by the party proceeded against, if such evidence is produced merely to confirm the evidence given at the hearing below. (Adm.) *The Famenoth*.....*page* 35

2. *Appeal—Further evidence—Application before hearing.*—An application for leave to adduce further evidence on appeal from the Wreck Commissioner should be made prior to the hearing of the appeal. (Adm.) *The Famenoth* 35

3. *Appeal—Shipowner—Shipping Casualty Investigations Act* 1879.—By the provisions of the Shipping Casualty Investigations Act 1879, no right of appeal from the decision of the Wreck Commissioner is given to a shipowner, though he appear as a party at the investigation and be condemned in costs. (Adm.) *The Golden Sea*... 23

4. *Costs—Shipowner—Improper ballast—Default of master.—Semble*, where the loss of a ship is due to improper ballast bought by the master without the knowledge or presence of the shipowner, and the shipowner has placed no restriction on the master as to price, no such blame attaches to the shipowner as will justify the Wreck Commissioner in condemning him in the costs of the Board of Trade inquiry. (Adm.) *The Golden Sea* 23

5. *Improper ballast—Purchase by master—Loss of ship—Suspension of certificate.*—The loss of a vessel which is due to improper ballast, purchased by the master, he knowing it to be largely composed of dirt, and no restriction being placed upon him by his owners as to price, is sufficient reason for the Wreck Commissioner suspending the master's certificate. (Adm.) *The Golden Sea* 23

6. *Master—Error of judgment—Loss of life—Suspension of certificate—Merchant Shipping Act* 1854, *s.* 242.—An error of judgment committed by a master of a ship, under circumstances of great difficulty and danger, is not such a wrongful act or default, within the meaning of the Merchant Shipping Act 1854, s. 242, as will justify the suspension of his certificate, even where there has been loss of life. (Adm.) *The Famenoth* 35

WRECKS REMOVAL.

Harbour authority—Sunken wreck—Obstruction to navigation—Collision—Removal of Wrecks Act 1877 (40 *&* 41 *Vict. c.* 16), *s.* 4.—Where a vessel is sunk by striking upon a sunken wreck lying in a channel without sufficient warning of the position, which wreck the harbour authority, under the provisions of the Wrecks Removal Act 1877, s. 4, had previously taken possession of and partially removed at the time of the accident, *semble*, the language of the Wrecks Removal Act, s. 4, being permissive, the harbour authority is not liable under that Act for the damage done, but under a local Act by which the authority is empowered to receive a portion of the light dues from ships entering the channel, and is directed to apply them in maintaining, improving, regulating, and buoying the channel, such authority is liable, as this latter Act casts upon the authority an obligation to remove the obstruction, and take the necessary means for warning vessels of its presence. (Kay, J.) *Dormont* v. *Furness Railway Company* 127

See *Collision*, Nos. 42, 93.

WRIT.

See *Bottomry*, No. 3—*Practice*, Nos. 40, 41.

REPORTS

OF

All the Cases Argued and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

HOUSE OF LORDS.

Nov. 3, 1881, *and July* 10, 1882.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN, WATSON, and FITZGERALD).

KEMP *v.* FALK. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Stoppage in transitu—Termination of transit—Sub-sale—Rights of original vendor against purchase money of sub-purchaser.

The consignees of a cargo of goods sold the cargo "to arrive," before the arrival of the ship, to sub-purchasers. The original purchaser having become bankrupt, the unpaid vendor gave a notice of stoppage in transitu to the master, after the sub-sales, and after a small part had been delivered. The bill of lading had been indorsed to a bank as security for an advance to the original purchaser, and the consignees remitted the proceeds of the sub-sales to the bank.

Held (affirming the judgment of the court below), that the case was governed by Re Westzinthus 5 *B. & Ad.* 817), *and* Spalding *v.* Ruding (6 *Beav.* 376), *and that the vendor was entitled, as against the trustee in the bankruptcy, to the balance of the purchase money after satisfying the claim of the bank.*

Ex parte Golding, Davis, and Co. (42 *L. T. Rep. N. S.* 270; 13 *Ch. Div.* 628 *distinguished.*

Per Lord Blackburn: Notice of stoppage in transitu given to a shipowner is not effectual till it is communicated to the master, but it imposes on the owner an obligation to send it on with reasonable diligence.

THIS was an appeal from a judgment of the Court of Appeal (James, Baggally, and Bramwell, L.JJ.), reported in 4 Asp. Mar. Law Cas. 280; 14 Ch. Div. 446, and 42 L. T. Rep. N. S. 780, under the name of *Ex parte Falk, Re Kiell*, reversing a decision of Mr. Registrar Hazlitt, sitting as Chief Judge in Bankruptcy.

On the 25th March 1878 the respondent Falk, a salt merchant at Liverpool, sold to one Kiell, then a merchant in London, a cargo of salt, to be shipped at Liverpool on board the *Carpathian*, for Calcutta. Kiell paid 415*l.* 12*s.* 2*d.*, part of the invoice price, in cash; and gave his acceptance at four months for the balance, amounting to 847*l.* 8*s.* 6*d.*

On the 20th July Kiell became bankrupt, and the appellant, Kemp, was appointed trustee under his liquidation. On the 29th July the *Carpathian* arrived at Calcutta, and before the bankruptcy Kiell's agents had sold the cargo to sub-purchasers "to arrive."

On the 27th July Falk served a notice of stoppage *in transitu* on the owners of the *Carpathian*, which they communicated to their agents in Calcutta on July 31st; and it was communicated to the master on Aug. 5th, at which time a small part only of the cargo had been delivered, and the freight had not been paid.

The bill of lading had been indorsed for value to the Bank of Scotland, and the balance of the proceeds of the sub-sales, after satisfying the claim of the bank, was paid to the appellant as trustee in Kiell's liquidation.

The unpaid vendor, Falk, applied to the Court of Bankruptcy that the trustee might be ordered to pay the money over to him, but the learned Registrar refused his application. This decision was reversed by the Court of Appeal, as above mentioned, on the authority of the case of *Ex parte Golding, Davis and Co.* (42 L. T. Rep. N. S. 270; 13 Ch. Div. 628), and from their judgment the present appeal was brought.

The facts appear more fully in the report in the court below, and in the judgments of their Lordships.

Nov. 3, 1881.—The appeal came on for hearing before Lords Penzance, Blackburn, and Watson.

Benjamin, Q.C. and *G. W. Lawrance* appeared for the appellant.

Cohen, Q.C. and *F. Thompson* for the respondent.

Their Lordships expressed a wish for further information as to the sub-sales and the deliveries under them, and the appeal was accordingly adjourned.

July 10, 1882.—*Bompas*, Q.C. and *G. W. Lawrance* (*Benjamin*, Q.C. with them) appeared for the appellants, and argued that the right of stoppage *in transitu* was at an end when the cargo had been re-sold "to arrive." The cases of *Re Westzinthus* (5 B. & Ad. 817) and *Spalding* v. *Ruding* (6 Beav. 376) are distinguishable, and *Ex parte Golding, Davis and Co.*, on which the court below based their judgment, went further than any previous authority, and cannot be maintained. At all events the right was gone when cash receipts

(*a*) Reported by C. E. MALDEN, Esq. Barrister-at-Law.

were given to the sub-purchasers, or at latest on Aug. 2nd, when there was a part delivery. The facts show that the consignees were indorsees for value, and if that were so the right of stoppage was gone. The cash receipts given to the sub-purchasers were "documents of title" within sect. 5 of the Factors Act 1877 (40 & 41 Vict. c. 39), and the delivery of them took away the right of stoppage. They also referred to

Slubey v. *Heyward*, 2 H. Bl. 504;
Hammond v. *Anderson*, 1 B. & P. N. R. 69;
Crawshay v. *Eades*, 1 B. & C. 81;
Tanner v. *Scovell*, 14 M. & W. 28.

Cohen, Q.C. and *F. Thompson*, 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 seems to me a case of very great simplicity. It is admitted that but for the indorsement of the bill of lading of the cargo in the *Carpathian*, the right of stoppage *in transitu* would have been well exercised as against everybody on Aug. 5th, after which the greater part of the cargo was delivered. Then the question is, what is the effect of the indorsement of the bill of lading? It was an indorsement to the Bank of Scotland, who had advanced money upon it; and the cases of *Re Westzinthus* (*ubi sup.*), and *Spalding* v. *Ruding* (*ubi sup.*), clearly establish that the right of stoppage *in transitu* is not discharged absolutely by an indorsement of a bill of lading by way of security or pledge, but that it remains, in equality at all events, as it was before, subject to a charge in favour of the indorsee of the bill of lading, which must be paid off; and being paid off, the person entitled to and exercising the right of stoppage *in transitu* stands in exactly the same position as to everybody else as if there had been no security, and no pledge, and no indorsement of the bill of lading. And against what is that right of stoppage *in transitu*? Not against some imaginary interest of the purchaser, but against the goods themselves. It is a right to stop the goods; and I have no notion of any right of stoppage *in transitu* which is not a right to stop the goods when they are still *in transitu* in contemplation of law. It is a qualified right in the circumstances which I have mentioned, because it cannot be asserted as against the holder of the bill of lading without paying him off; but the instant his claim is discharged it is exactly the same right as if there had been no security as against the original purchaser, and as against, in my opinion, every one claiming under him. It was contended that when after an indorsement by way of security, such as was here made to the Bank of Scotland, there has been a sale of the goods "to arrive" by the original purchaser, without any document of title, a sale which passes to the sub-purchaser such equitable interest as his immediate vendor could convey, that displaces the right of stoppage *in transitu* established by the cases I have referred to. From the beginning of the argument I was totally unable to understand how that could possibly be. The indorsement of the bill of lading to the Bank of Scotland can confer no title whatever upon the other persons to whom the original purchaser transfers such rights as he has. He can transfer no greater or better right than he has, and the right which he has is a right subject to a stoppage *in transitu* in all cases in which the right of stoppage *in transitu* remains in favour of the original seller of the goods. I put, therefore, aside the whole argument founded upon the existence of sub-purchasers. I assent entirely to the proposition that where the sub-purchasers get a good title as against the right of stoppage *in transitu* there can be no stoppage *in transitu* as against the purchase money payable by them to their vendor; at all events, until I hear authority for that proposition, I am bound to say that it is not consistent with my idea of the right of stoppage *in transitu* that it should apply to anything except to the goods which are *in transitu*. But when the right exists as against the goods, it is manifest that all other persons who have, subject to that right, any equitable interest in those goods by way of contract with the original purchaser or otherwise, may come in; and if they satisfy the claim of the seller who has stopped the goods *in transitu*, they can, of course, have effect given to their rights; and I apprehend that a court of justice in administering the rights which arise in actions of this description, would very often find that the rights of all parties were properly given effect to, if so much of the purchase money payable by the sub-purchasers as might be sufficient for his claim were paid to the original vendor; and, subject of course to that, the other contracts would take effect in their order and in their priorities. I observe an illustration of that in the letter of Aug. 5th 1878, written by the respondent's solicitors, in which they say that they have been told that Messrs. Wiseman, Mitchell, and Co., have contracted for the sale of the salt upon certain terms; that they do not want to put them to inconvenience, and that therefore they will be quite ready, upon being paid what is due to them, to let that contract receive proper effect. That is merely a way of working out the right of stoppage *in transitu*, which is a right against the goods, and, as I said before, could be in no way whatever affected or prejudiced by any dealings between the original insolvent purchaser and persons purchasing under him without any title founded upon an indorsement of the bill of lading for value received. I put that argument entirely aside; and I then come to the question which has been argued upon the special circumstances of this case.

I assume that there was no stoppage *in transitu* effectually made till Aug. 5th. I put, therefore, entirely out of the question whatever had been done *bonâ fide* before that time; and the question is whether there was not, as against the cargo then remaining undelivered, an effectual stoppage *in transitu*. The facts appear to me absolutely to exclude the notion of a constructive delivery of the whole cargo having taken place before Aug. 5th, because it appears that the sub-purchasers, to some of whom small portions of the cargo had been delivered before Aug 5th, were all dealing separately from each other. Each of them contracted to buy a certain quantity of salt, for which they paid Messrs. Wiseman, Mitchell, and Co.; they took receipts from them for their own portions. They "took those receipts to the vessel, and the quantities of salt for which they had respectively thus paid were then weighed out and delivered to them respectively in the presence and

under the supervision of the master or other officer of the ship, and the clerk of the consignees," without any arrangement as to the freight; from which it is apparent that nothing could be more separate and distinct than the delivery of each parcel in that case; and if there were no more than those facts, the delivery of one parcel could not possibly operate as a delivery of the whole. Then it was said that it ought to be considered, on account of the terms of the letter of Aug. 2nd 1878, that there was some constructive delivery of the whole cargo to the clerk of the consignees. That also appears to me to be a suggestion for which there is no warrant in the natural construction of the letter itself; a suggestion entirely unsupported by anything else, and really inconsistent with the fact that the delivery was not made by the clerk, but "in the presence of and under the supervision of the master or other officer of the ship, and the clerk." The clerk might be present, too, and might concur, but his concurrence could not mean that he had already become the possessor of the cargo, as if it had been taken out of the ship and delivered to him. The only other argument advanced was founded upon the fact that the consignees indorsed the bill of lading and delivered it to the captain. It was not indorsed to the captain for value, and there is nothing whatever to show that your Lordships ought to infer that it had been indorsed to somebody else for value. We know that it had been indorsed for value to the bank, and we know the extent of their claim under it; and the bank have been satisfied or must be satisfied. The suggestion that it was indorsed either to Messrs. Wiseman, Mitchell, and Co., as persons who are under contract or might be liable, or to any of the various sub-purchasers through them, is entirely without foundation; and in the agreed statement of facts no indorsement is mentioned at all, except the indorsement of the Bank of Scotland. It seems to me evident that the Bank of Scotland sent the bill indorsed to them in order that their own security might be realised, and it then came into the hands of Messrs. Wiseman, Mitchell and Co., for that purpose; and it is not said that the indorsement which preceded the delivery of the bill of lading to the captain by these gentlemen was for any special purpose whatever which could give any new title, legal or equitable, to anybody who had it not before. The result is that under those circumstances the case seems to me to be altogether within the ruling in the cases of *Re Westzinthus* (*ubi sup.*), and *Spalding* v. *Ruding* (*ubi sup.*), and therefore that the present appeal must be dismissed with costs.

Lord BLACKBURN.—My Lords: I perfectly agree in the result that this appeal must be dismissed with costs. Taking the agreed statement of facts it seems to me that the case is perfectly clear. We have no occasion to consider whether the case of *Ex parte Golding, Davis and Co.* (*ubi sup.*), was well or ill decided, because no point relating to it arises here, as was supposed in the court below. It appears that Mr Falk had sold to a Mr. Kiell a quantity of salt, which was shipped on board a vessel bound for Calcutta; that Kiell accepted a draft drawn against that cargo; that bills of lading were made out, which were signed, not by the master, as is usual, but by the shipowner himself; and that Kiell got those bills of lading. So far as that goes, nothing can be more firmly established than the law upon it. Falk, having delivered the goods and taken a bill of exchange, had no right whatever to meddle with those goods further, unless before the end of the transitus the purchaser became insolvent and stopped payment, and then if Falk had stopped the goods *in transitu* he would have been re-vested in his rights as an unpaid vendor as against Kiell. It is pretty well settled now that it would not have rescinded the contract. But before the end of the transitus come, his right to stop the goods *in transitu* might be defeated by an indorsement upon the bill of lading to a person who gave value. In the present case there was such an indorsement and transfer of the bill of lading, but it was only an indorsement and transfer for a particular and limited purpose. It appears that Kiell, in order to obtain an advance, got Messrs. T. Wiseman and Co., of Glasgow, the correspondents and agents of Messrs Wiseman, Mitchell, and Co. of Calcutta, to make an advance in his favour by drawing a bill of exchange upon him; and to secure the payment of that bill of exchange, the bill of lading was indorsed, and the Bank of Scotland, who discounted or took that bill, became holders of the bill of lading for the purpose of protecting themselves. It was clearly a transfer for value to the Bank of Scotland, and as such, so far as that went, it defeated the right of the stoppage *in transitu* at law. But the unpaid vendor's right, except so far as the interest had passed by the pledging of the bill of lading to the pledgee, or the mortgagee, whichever it was, enabled the unpaid vendor in equity to stop *in transitu* everything which was not covered by that pledge. That has been settled and considered law, or rather equity, ever since the case of *Re Westzinthus* (*ubi sup.*), and has been affirmed in *Spalding* v. *Ruding* (*ubi sup.*); and I have no doubt it is very good law upon that point. Here, therefore, the stoppage by Falk as unpaid vendor would re-vest in him his lien, except so far as concerned the Bank of Scotland, unless something else had happened. Now what has happened? The agreement was this: first of all it appears that Messrs. Wiseman, Mitchell, and Co., who were the persons to whom the goods were consigned, sent over to their correspondents, T. Wiseman, and Co., of Glasgow, a sale note, and then they forwarded it to Kiell and Co., in this letter: "Dear Sirs, we inclose sale note of your cargo of salt, *ex Carpathian*, to arrive," and so on. So that at that time it appears that Messrs. Wiseman, Mitchell, and Co. had entered into a contract at Calcutta for a sale of the goods "to arrive." The date of that letter was July 17th, a fortnight or so before the ship actually did arrive at Calcutta.

That, it was argued, put an end to the vendor's right to stop the goods *in transitu*, and *pro tanto* to the equitable right to stop them *in transitu* which remained in Mr. Falk. No sale, even if the sale had actually been made with payment, would put an end to the right of stoppage *in transitu* unless there were an indorsement of the bill of lading. Why an agreement to sell, unless it was made in such a way as to pass the right of property in the goods sold, should be supposed to put an end to the equitable right to stop them *in transitu*, I cannot understand. I am quite clear that it does not. It was next attempted to argue this: the Bank of Scotland, the holders of the bill of lading at Glasgow, forwarded the bill of lading in

due course to their agents at Calcutta; and it is surmised that those agents must have been some persons different from Messrs, Wiseman, Mitchell and Co. I infer that Messrs. Wiseman, Mitchell, and Co. were the persons who acted as their agents in this transaction, but I do not think it matters whether they were or not. Those agents received that bill of lading well knowing (or at all events they ought to have known) that the Bank of Scotland had, by virtue of its bill of lading, a hold over the goods. They were entitled to see that the goods were not sold or disposed of in any way prejudicial to their lien; and if they were sold, that the money, or enough of it to repay the Bank of Scotland and secure them, should pass through their hands or the hands of their agents; and I see nothing that happened afterwards which shows that they acted otherwise than in strict conformity with the duty thus cast upon them. It was argued that, inasmuch as Messrs. Wiseman, Mitchell, and Co. had acted for Kiell and Co. in selling the goods, taking a *del credere* commission to secure that the people to whom they sold should pay the price, therefore they were persons who were entitled to have the bill of lading indorsed to them as a security. I am utterly unable to understand that argument; it is clear to me that they were not so entitled. The next thing which was said was this, that Messrs. Wiseman, Mitchell, and Co., who, I cannot but think, were the persons employed by the Bank of Scotland as their agents, did at some time, I do not exactly know when, indorse the bill of lading and show it to the captain. I do not think that that comes to more than this, that they gave the captain complete notice when he arrived at Calcutta: "We are the persons who have the legal right to the delivery of these goods, for we have the bill of lading, holding it under the Bank of Scotland, and consequently we are the persons entitled to the goods. You can deliver only to us without being responsible to us; if you deliver to us or with our sanction you will not be responsible to us." I can put no other meaning upon it. Then it was argued that this amounts to a delivery of the whole cargo by the shipowner to Messrs. Wiseman, Mitchell, and Co., who from that time forward would be holders of the goods, the ship owner, in whose physical possession the goods were, being changed from holding the goods as shipowner not having delivered the goods into a warehouseman holding those goods in his ship as a warehouse. I think that is an arrangement which might be made, although it is not a very convenient one. The freight was not paid, but I think it is possible to make an arrangement by which, though the freight is not paid, the shipowner changes himself completely into a warehouseman instead of being a carrier; he alters his responsibilities altogether, and by arrangement or agreement retains a lien over the goods until the freight is paid. I think that such a contract might be made; but when one is asked to say that such a contract was made, the non-payment of the freight is a very important element, leading one to say that no such contract was made at all. In this case I cannot help thinking that no such contract was made, and there is no reason why we should hold that it was. The shipowner acted in the same way as if it had not been made.

Then comes an argument which I really think is not tenable, and I should hardly mention it if it were not for the great importance of everything relating to the Factors Act, and of every question touching it in the commercial world. It was argued that the recent statute (40 & 41 Vict. c. 39, s. 5), which says that the transfer of a delivery order or any other document of title shall put an end to an unpaid vendor's right to countermand that delivery order and to keep the goods, operates just to the same extent and under the same circumstances as in the case of a bill of lading for goods at sea. In order to make out that proposition reliance was placed upon this fact, that Messrs. Wiseman, Mitchell, and Co., who were holders of the bill of lading, as I have already said, for the Bank of Scotland, wrote to the captain of the ship, saying, "In order to save trouble we will not sign delivery orders for salt, but have written our *sircar* on board the above vessel to deliver salt to those men who produce cash receipts from our cashiers;" and by some strange process of reasoning it was said that the man who brought and showed to the *sircar* of Messrs. Wiseman, Mitchell, and Co. a receipt for a sum of money paid to their cashier for the salt, was the holder of a document of title for the salt in such a way that the indorsement of it would put an end to the right of stoppage *in transitu* by Mr. Falk. Now in the first place the statute in question was never meant to have that effect. In the next place, it is an abuse of language to call such a receipt as this a document of title in any shape. Then the last attempt was to say that the stoppage *in transitu* was not until the 5th Aug. I see that Bramwell, L.J. takes a different view of the law from what I had always understood it to be. I had always myself understood that the law was that, when you became aware that a man to whom you had sold goods which had been shipped had become insolvent, your best way, or at least a very good way, of stopping them *in transitu* was to give notice to the shipowner in order that he might send it on. He knew where his master was likely to be, and he might send it on; and I have always been under the belief that although such a notice, if sent, cast upon the shipowner who received it an obligation to send it on with reasonable diligence, yet if, though he used reasonable diligence, somehow or other the goods were delivered before it reached he would not be responsible. I have always thought that a stoppage, if effected thus, was a sufficient stoppage *in transitu*; I have always thought that when the shipowner, having received such a notice, used reasonable diligence and sent it on, and it arrived before the goods were delivered, there was a perfect stoppage *in transitu*. Consequently I think that when notice was given to the shipowners (and although they had signed the bill of lading instead of the master, I do not think that that makes any difference), they were under an obligation to forward it with reasonable diligence, if they could, to the master. What the shipowners did was this: on the 31st July they sent this telegram: "Charterers *Carpathian* failed, unless bill of lading held for value don't deliver." That was, as it strikes me, a sending forward of the notice to stop the goods *in transitu*, and consequently I should say that the stoppage *in transitu* was complete on the 31st July. But it is not necessary to decide that point, for it is clear enough that the goods were not then delivered, and nothing was

done which would be called a delivery of the whole or any part of them till the 3rd Aug., when a person brought one of these receipts for some small quantity of salt, and got it delivered. Then it was said that the delivery of a part is a delivery of the whole. It may be. In agreeing for the delivery of goods with a person you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery, and it may be very well that the delivery of a part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intend it as a delivery of the whole then it is a delivery of the whole, but if either of them dissents, then it is not so. I had always understood the law upon that point to have been agreed since the judgment of Parke, J. in *Dixon* v. *Yates* (5 B. & Ad. 313), and I rather think that the onus is upon these who say that it was intended as a delivery of the whole. Therefore the delivery of this particular parcel of salt was not a delivery of anything else. What we are now dealing with is the delivery of the salt which was delivered after the 5th Aug., which was quite sufficient to dispose of the whole sum now in dispute. We need not inquire what were the rights in any particular parcel of salt delivered on the 3rd Aug. The present question is with regard to the stoppage *in transitu* of the residue, after an undoubted notice was served on the 5th Aug. Is that subject to the rule that although the whole of the cargo could not be stopped because the bill of lading had been transferred to the Bank of Scotland, the interest which still remained in Kiell or his assigns, or in anybody else except those who had become transferees of the bill of lading, might be stopped, and might become vested in Falk the original vendor? I think there is no reason why it should not; and that being so, the judgment of the court below is right and ought to be affirmed.

Lord WATSON.—My Lords: It is not necessary for me to say much in regard to this case. I agree with your Lordships as to the result to which you come in point of fact, and, arriving at that result, it is quite impossible for me to hold, notwithstanding the very ingenious argument that has been addressed to us, that the case is not directly ruled by the cases of *Re Westzinthus* (*ubi sup.*) and *Spalding* v. *Ruding* (*ubi sup.*), There is no occasion for your Lordships to consider the effect or the propriety of the judgment of the Court of Appeal in the case of *Ex parte Golding, Davis and Co.* (*ubi sup.*). The law laid down by the other cases I have mentioned is very well established and very clear law, and, in my opinion, it directly applies to the facts of this case.

Lord FITZGERALD.—My Lords: I concur in the decision which has been announced by the Lord Chancellor. One of the questions before your Lordships' House is whether the transit of the goods had ended before the 5th Aug. 1878, when the vendor's notice to stop was delivered to the master of the *Carpathian* at Calcutta. "Transit" embraces not only the carriage of the goods to the place where the delivery is to be made, but also delivery of the goods there according to the terms of the contract of conveyance. Thus in this case "transit" means the conveyance of the goods to Calcutta, and their delivery "at the port of Calcutta" by the carrier, according to the terms of the charter-party and bill of lading, into the actual or constructive possession of the consignee. This seems to me to raise a question of fact which is not now open for controversy. It appears that the freight which was to be paid "on the right delivery of the cargo agreeable to bill of lading at a tonnage rate on the quantity delivered, in full of all port charges" was paid in two payments—on the 22nd Aug. and the 3rd Sept. 1878. It does not appear that the shipowners had on or before the 5th given up their lien for freight. No delivery orders had been given to the consignees or sub-purchasers. The course pursued by Wiseman, Mitchell, and Co., who stood in the position of consignees, was to indorse the bill of lading, and deliver it to the captain, with the letter of the 2nd Aug., and then as each sub-purchaser paid for the quantity he had purchased he got a receipt, took it to their clerk on board the ship, and his quantity was weighed out and delivered to him over the ship's side under the supervision of the master. The deliveries commenced on the 2nd Aug., when a small quantity was unshipped and delivered. No delivery took place on the 4th, and on the 5th a small quantity was delivered. But assuming that the delivery on the 5th took place before the notice to stop, there remained then in the ship in charge of the carrier far the greater portion of the cargo. It seems to me that at the time of the delivery of the notice to stop, that portion was still in transit, and liable to be stopped, and that there had been no actual delivery of the whole, and that the partial deliveries of the 2nd and 5th Aug. to different sub-purchasers of lots do not indicate any constructive delivery of part as representing the whole cargo, or give rise to any question of that character. This statement of facts seems to me to determine the whole controversy, for if there was nothing more there could be no doubt of the unpaid vendors' equity to stop the surplus after payment of the demands of the bank.

Another question was however raised, viz., whether the sub-sales of the whole cargo before the arrival of the *Carpathian* at Calcutta put an end to the right of the unpaid vendor to stop the goods, or defeated his equitable title to be paid out of the surplus of the unpaid purchase money. The facts again seem to prevent any such question arising. The argument in the court below was that the sub-sales amounted to a complete transfer of the property both legal and equitable in the goods, and that there was by the attornment of the master a complete delivery to the sub-purchasers before notice to stop was given, and that in such a state of facts it had never been held that the vendor had any right against the sub-purchaser's money. But we now learn that no delivery orders were signed by the master or by the agents, nor were any given by Wiseman, Mitchell, and Co. representing the consignees. The shipment in Liverpool was in bulk, "the ship not accountable for natural wastage," and each purchaser seems to have purchased not any specific lot, but so much, to be weighed out to him ex ship. I infer also that the money to be paid by the sub-purchasers for the quantity which remained in the ship after the deliveries of the 5th Aug. had not been paid to Wiseman, Mitchell, and Co. before the notice to stop. The foundation, therefore, on which the appellant here rested his argument in the court below is entirely removed.

Your Lordships ought to give full effect to the equitable principles on which the right of stoppage *in transitu* rests. It is a right founded on reason, and never works injustice. In affirming the decision of the court below your Lordships merely decide that the claims of the unpaid vendor against the surplus produce of his own goods, after providing for all prior rights, is superior to that of the creditors of Kiell, who had not paid for the goods. Confining myself to the facts of the case, I refrain from expressing any opinion how far a *bonâ fide* absolute sub-sale for cash made while the goods were at sea, and without notice of the claim of the unpaid vendor, may or may not affect the right of stoppage *in transitu*, though the subsale be unaccompanied by an indorsement and delivery of the bill of lading to the sub-vendee.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Ashurst, Morris, Crisp* and *Co.*

Solicitors for the respondent, *Field, Roscoe*, and *Co.*, for *Bateson, Bright*, and *Warr*, Liverpool.

July 11, 14, 15, *and Aug.* 1, 1882.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN, WATSON, and FITZGERALD.)

INMAN STEAMSHIP COMPANY *v.* BISCHOFF. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance—Time policy—Loss of freight—Perils insured against—Causa proxima.

In the case of an ordinary time policy upon freight outstanding, the underwriters must be taken to have notice of the existence of a contract of affreightment, though not so as to extend the contract by implication to anything not covered by the terms of the policy.

A Government time-charter contained a clause enabling the charterers, in case the ship should become inefficient for the service contracted for, "to make such abatement by way of mulct out of the hire or freight of the said ship as they should adjudge fit and reasonable." The ship was rendered temporarily inefficient by reason of the perils of the sea, and the charterers exercised their power of mulct.

Held (affirming the judgment of the court below), that the perils of the seas were not the proximate cause of the loss of freight, so as to render the underwriters of an ordinary time policy "on freight outstanding" liable as for a loss by the perils insured against.

THIS was an appeal from the judgment of the Court of Appeal (Lord Coleridge, C.J., Baggallay, and Bramwell, L.JJ.) reported 6 Q. B. Div. 648, 4 App. Mar. Law Cas. 419, and 44 L. T. Rep. N. S. 763, reversing a judgment of Brett, L.J. in favour of the plaintiffs (the present appellants) at the trial.

The action was brought by the appellants, the owners of a steamship called the *City of Paris*, against the respondents, who were underwriters of a policy on freight outstanding under a charter-party.

The facts of the case, and the terms of the policy, and of the charter-party, appear from the judgments of their Lordships, and from the reports in the courts below.

Benjamin, Q.C. and *French* appeared for the appellants, and contended that the freight was lost by the perils of the sea within the meaning of the policy. The policy was effected with reference to the charter-party, and it was found as a fact at the trial that the charterers were justified in throwing up the charter, as the adventure was wholly frustrated by the inefficiency of the ship in consequence of running upon a rock:

Havelock v. *Geddes*, 10 East. 555.

[Lord BLACKBURN referred to *Beatson* v. *Shanck*, 3 East, 233.] The underwriters had notice of the charter, which was a Government charter specially framed to avoid all questions of reasonableness in continuing the adventure. In the case of *Jackson* v. *Union Marine Insurance Company* (L. Rep. 10 C. P. 125; 2 Asp. Mar. Law Cas. 435; 31 L. T. Rep. N. S. 789), where the law gave an option to rescind the charter, the underwriters were held liable; here the power to rescind is given by the charter itself. That case laid down the principle that perils of the seas are not to be looked upon as a *causa remota* in such a case. Efficiency was a condition precedent in this charter.

Cohen, Q.C. and *Barnes* (*C. Russel*, Q.C. with them), for the respondents, maintained that the liability of the underwriters could not vary according to whether the charterers did or did not exercise an option given them by the charter but not referred to in the policy. The insurance was not on "chartered freight," but simply on "freight." The effect of the contention of the appellants would be to turn the policy into an insurance, not against the perils of the seas, but against the exercise of their power of mulct by the charterers. The *causa proxima* of the loss was the act of the Government. They referred to

Halhead v. *Young*, 6 E. & B. 312;
Rankin v. *Potter*, L. Rep. 6 E. & I. App. 83; 2 Asp. Mar. Law Cas. 65; 29 L. T. Rep. N. S. 142;
Geipel v. *Smith*, L. Rep. 7 Q.B. 404; 1 Asp. Mar. Law Cas. 268; 26 L. T. Rep. N. S. 361;
Hadley v. *Clarke*, 9 T. Rep. 259;
Mercantile Steamship Company v. *Tyser*, L. Rep. 7 Q. B. Div. Div. 73; (*a*)

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law

(*a*) *May* 21, 1881.

(Before Lord COLERIDGE, C.J.)

THE MERCANTILE STEAMSHIP COMPANY LIMITED *v.* TYSER.

THIS was an action on a policy upon chartered freight, instituted by shipowners against one of the underwriters of the policy.

The action came on for trial in Dec. 1880, but was reserved for further consideration until Jan. 15, 1881.

Webster, Q.C. (with him *R. T. Reid*) for the plaintiffs.

C. P. Butt, Q.C. (with him *Barnes*) for the defendant.

The material facts are sufficiently stated in the judgment of the court.

May 21.—Lord COLERIDGE, C.J.—This was an action on a policy upon chartered freight lost under the following circumstances:—The charter-party, was made at New York on the 29th of July 1875, and the voyage was described as "a voyage from the port of New York to Odessa." The freight was agreed "during the voyage aforesaid," at "5500*l.* British sterling in cash at Hull, England, on the good and proper discharge of the cargo in the aforesaid port of Odessa;" and then, after some stipulations not material to be noticed, was the following: "If the vessel has not arrived at the port of New York on or before the 1st of September 1875, the charterers

De Vaux v. *Salvador*, 4 A. & E. 420;
Greer v. *Poole*, (5 Q. B. Div. 272; 4 Asp. Mar. Law Cas. 300; 42 L. T. Rep. N. S. 687;
Ionides v. *Universal Marine Insurance Company*, 1 Mar. Law Cas. O. S. 353; 8 L. T. Rep. N. S. 705; 14 C. B. Rep. N. S. 259.

Benjamin, Q.C. was heard in reply.

Cur. adv. vult.

Aug. 1.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Selborne).—My Lords: The question in this appeal is whether a loss of freight by the exercise of a power of mulct or abatement reserved by charter-party to the charterers, which power in this case arose and was exercised by reason of the ship being temporarily rendered inefficient for the service in which she was engaged by perils insured against, is a loss for which the insurers are liable under an ordinary time policy, "on freight out-

have option of cancelling this charter-party." The policy, which was effected in London on Aug. 1, 1875, was "at and from London to New York, while there, and thence to Odessa, *via* Constantinople," and was a valued policy "at on chartered freight," and one of the conditions was "including all risks incident to steam navigation." The other risks taken were the ordinary ones, including perils of the seas. The clause in the charter containing what has been called the cancelling option was not mentioned to the defendant, and was not known to him at the time when the policy was effected. The ship (the *Ganges*) started on her voyage from this country on Aug. 7, and if all had gone well she had four or five days to spare for the performance of it, and might probably have arrived in New York in plenty of time to prevent the possible exercise of the cancelling option. But all did not go well; she broke down from some failure of her machinery in the British Channel; she had to put back for repairs, and the repairs took so long that it was impossible for her to reach New York till long after Sept. 8. Thereupon the charterers exercised their option, the charter was cancelled, and the freight lost. Under these circumstances, are the plaintiffs entitled to recover? It was argued for the defendants that the interest in the chartered freight had not commenced at the time when the charter was cancelled, that the freight was not lost by any of the perils insured against, and that the witholding from the underwriter the information as to the clause in the charter-party containing the cancelling option vitiated the policy. The first point, I think, must be decided for the plaintiffs. It appears to me that the reasoning of the judges in *Barber* v. *Fleming* (L. Rep. 5 Q. B. 59) is conclusive of this case, and especially the judgment of Sir James Hannen. By the very words of the policy here, the voyage in the course of which the freight was to be earned had commenced, although not that particular part of it for which freight was to be paid. This, according to *Barber* v. *Fleming* (*ubi sup.*) is sufficient; and if the second point were decided for the plaintiffs they would, in my opinion, be entitled to succeed. That point is whether the freight here was lost by any of the perils insured against, that is, by perils of the seas, or by any of the risks incident to steam navigation. I think it was not. I think the freight was lost by the exercise of the cancelling option which the charterers had the right to exercise. The breakdown of the ship gave the charterers the opportunity which it was at their pleasure to avail themselves of, or decline. *Causa proxima* and *causa remota* give rise, no doubt to subtle distinctions, to endless questions and decisions. Here it seems to me that it was not the perils of the seas which caused the freight to be lost, though it may be that these perils gave the charterers the right to cancel the charter. Nor, if I am right in what caused the loss of freight, will the cause as to the risks of steam navigation help the plaintiffs? These risks, I think, must mean physical risks, so to speak, incident to vessels propelled by steam machinery. The breakdown of an engine, the disabling of a screw, and things of that kind, if they caused the loss of freight, though they happened in calm water and fine weather, would be within the risks against which the underwriters contracted to insure. But if, as I think, they only gave occasion to that which was in itself the proximate cause of loss, they will not avail the plaintiffs. Still less, of course, will they avail if the proximate cause of loss was by no means the necessary result of the matters I have mentioned; and here it might or it might not, almost with equal probability, have been the interest of the charterers to cancel the charter. I believe this particular provision to be now for the first time the subject of litigation; and the question is therefore somewhat bare of authority. But the principles on which the cases of *Hadkinson* v. *Robinson* (3 B. & P. 388) and *Philpott* v. *Swann* (1 Mar. Law Cas. O. S. 151; 5 L. T. Rep. N. S. 183; 11 C. B. N. S. 270) were decided, appear to me to govern the case before me. In the first case, Lord Alvanley held that in an action on a policy on cargo which covered restraint of princes, the loss of cargo, by its being sold for almost nothing at a port short of the port of destination, that port being reported to the master during the voyage as shut against English ships, was not a loss covered by the policy. In giving the judgment of the court in banco, Lord Alvanley says: "Where underwriters have insured against capture and the restraint of princes, and the captain learning that if he enter the port of destination the vessel will be lost by confiscation, avoids that port, whereby the object of the voyage is defeated, such circumstances do not amount to a peril operating to the total destruction of the thing insured. If they could, the same principle would have applied in case information had been received at Falmouth that the ship could not safely proceed to Naples." The application of these remarks is obvious. If the boiler had burst before the vessel started, but after the risk attached, whereby she had failed to reach New York, and the charter had been cancelled, the underwriter would equally have been liable. *Philpott* v. *Swann* (*ubi sup.*) is also much to the purpose. In that case the ship had been prevented from loading a certain portion of cargo by being blown out to sea from the east coast of Africa, and went to St. Helena to repair some damage. From St. Helena she came home without returning to load the deficient portion of her cargo. After argument, Willes, J., delivering the judgment of the court, held that a policy on cargo did not cover this loss which was caused by not returning to Africa, though that non-return had been caused by perils of the seas, which were insured against. These cases appear to me to warrant the conclusion at which I have arrived. Nor does *Adamson* v. *Newcastle Steamship Freight Insurance Association* (4 Asp. Mar. Law Cas. 150; 41 L. T. Rep. N. S. 160; 4 Q. B. Div. 462; 48 L. J. 670, Q. B.) in any way conflict with it. In that case Sir Alexander Cockburn and my brother Manisty held (Lush, J. dissenting) that certain words, not the same as the words here, cancelled the charter-party, irrespective of the option or wishes of the parties to it. The arguments of my brother Lush are certainly weighty; but the case itself, whether rightly decided or not, was a case upon the construction of other words than those before me, and has really no bearing on the present case. On this point, therefore, I think the defendant entitled to succeed. I think he is entitled to succeed also on the point as to non-disclosure. The evidence showed that this provision as to the cancelling option was of comparatively recent introduction into charter-parties, that it had come in with the greater prevalence of steamships in the mercantile marine, that it was sometimes inserted and sometimes not in the charters of steamships, and that there was no usage as to its disclosure or non-disclosure. It is plain that it may enormously increase the risk to be run. In this case there were four or five days to spare; but the argument as to its non-disclosure would have been the same as if there had been but an hour. I think, therefore, that the fact of this option existing in this charter was a fact which the assured was bound himself to disclose to the underwriter. The case of *Bates* v. *Hewitt* (2 Mar. Law Cas. O. S. 432; 15 L. T. Rep. N.S. 366; L. Rep. 2 Q. B. 595) appears to me to be directly in point. On the whole I give judgment for the defendant.

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

Solicitors for the defendants, *Waltons*, *Bubb*, and *Walton*.

standing." It has been held by the Court of Appeal that they are not so liable, on the ground that the perils insured against were not the proximate cause of the loss. Although the charter-party is not mentioned in the policy, nor is the freight therein described as chartered freight, an insurance on freight must necessarily have reference to some contract of affreightment, under which, during the time covered by that policy, freight might be earned: and to ascertain what the freight insured was, in case of loss, the actual contract of affreightment must necessarily be regarded. In this case the insurers had express notice, by the letter of the 19th Feb. 1879, in which the order for the insurance was given, that the *City of Paris*, the ship mentioned in the policy, was an Inman steamer, then about to proceed on a voyage to Natal on Government charter. There were, at that time, hostilities in progress between this country and the Chief of Zululand, and the Government charter was for the use of the ship as a transport to convey troops and stores. That charter had reference to the general regulations for Her Majesty's transport service, and the special terms contained in it were in substance similar to those which had been long in use in Government charters for similar purposes, as appears from the case of *Beatson* v. *Shanck* (*ubi sup.*). Under these circumstances it appears to me that the question arising upon the policy ought to be determined in the same way as if the charter-party had been seen by the insurers, and referred to in the policy, though not, of course, so as to extend the contract of the underwriters by any unnecessary implication to anything not properly covered by the express terms of the policy.

The charter-party, dated the 20th Feb. 1879, was for the service and employment of the ship as a transport, on monthly hire, for the term of three calendar months certain, and thenceforward until the Board of Admiralty should give notice of discharge, such notice to be given when the ship was in port within the United Kingdom. The shipowners contracted to keep the ship in every respect seaworthy and fit for the service in which she was engaged; and the Board of Admiralty agreed to pay for the hire and freight of the ship, at the rate of 25*s.* per ton per calendar month, during such time as the ship should be continued in Her Majesty's employ, and should duly and efficiently perform that service, upon certificates, and by monthly instalments, with certain reserves, in the manner therein mentioned one month's freight being paid in advance. This agreement of the Board of Admiralty was, however, subject to a proviso, thus expressed:—"That if, at any time or times hereafter, it should be made to appear to the commissioners that any delay had been caused or had accrued by breach of orders or neglect of duty, or that the said ship has become incapable from any defect, deficiency, or breach of orders, or from any cause whatsoever, to perform efficiently the service contracted for, then and in every such case it should and might be lawful to and for the said commissioners to retain in arrear the pay of the ship for two months as aforesaid, 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 should adjudge fair and reasonable." There is nothing else which I think material in the charter-party. Upon the construction of this charter-party, I am of opinion that it is not a condition precedent of the contract of the Board of Admiralty to pay the monthly hire and freight of the ship, that she should "duly and efficiently perform the service" for which she was engaged: (*Boone* v. *Eyre*, 1 H. Bl. 273, n.; *Havelock* v. *Geddes*, *ubi sup.*) I am also of opinion that the ship could not be discharged from that service, without the consent of the shipowner, elsewhere than within some port of the United Kingdom; and that the power reserved to the commissioners to "put the ship out of pay," for any of the causes mentioned, had reference only to a retention of the monthly payments, which ought otherwise to have been made, so that no exercise of that power could result in a loss of freight. The power, therefore, upon the exercise of which the present question depends is that of making "such abatement by way of mulct out of the hire or freight of the said ship" as the commissioners should adjudge fit and reasonable, being the same power which in the case of *Beatson* v. *Shanck*, already referred to, was adjudged by the Court of King's Bench to be valid in law. This, according to the terms of the charter-party, was a power depending upon a judgment to be exercised, not by any officer or officers in charge of troops or stores on board the ship, but by the commissioners for executing the office of Lord High Admiral.

The facts which are material are these. The ship proceeded with troops and stores to Simon's Bay, and there, on the 21st March 1879, she struck upon a rock, receiving such serious injury that she was rendered unseaworthy and incapable of efficiently performing the service for which she was engaged until she had received extensive repairs, which were not completed, so as to make her again seaworthy and fit to sail or to perform the service contracted for, until the 23rd May following, which was after the expiration of the time covered by the insurance. The freight down to the 21st March 1879, when she struck on the rock, was duly paid. On the 12th April 1879, Capt. Adean, the senior naval officer in Simon's Bay, instead of granting the usual certificate on which monthly payments were to be made according to contract, noted, on the form provided for that purpose, that the ship had been "inefficient since the 21st March 1879, having touched the Roman rock and sustained much damage;" also that the "*City of Paris* was discharged from Her Majesty's service on the 17th April 1879, having been retained so long on account of removal of Government stores, &c." The troops and stores on board had, in fact, remained in the ship until they could conveniently be transferred to other vessels, an operation which was not completed by the local agents of the Government until the 17th April 1879. The agents of the Government having declined to continue the employment of the ship, she returned to England in July 1879, and a correspondence between her owners and the Board of Admiralty, or their solicitors, which had been commenced when she was on her voyage homeward, was continued till the 2nd Aug. 1879. The owners did not profess to be able to insist upon any legal claim, but they asked for equitable consideration from Her Majesty's Government; and the Board of Admiralty ultimately decided to make them some allowance in respect of the expenses of the voyage homeward, but declined to

pay freight for the period subsequent to the 21st March 1879. Having regard to the construction and legal effect of the charter-party, it appears to me that the acts of Captain Adeane at Simon's Bay, and the form of certificate signed by him on the 17th April, may be laid out of the case, inasmuch as the charter-party did not authorise the Board of Admiralty, and still less authorised their local agents, to discharge the ship from the service in which she was engaged, until she had returned to the United Kingdom; and the power of making an abatement by way of mulct out of freight was reserved only to the Board themselves, and cannot be regarded as having been finally exercised by them until after the ship's return to the United Kingdom. If the shipowners had voluntarily consented to a variation of the terms of the charter-party, involving a relinquishment of their claim to freight (which does not appear to have been the case), this could not have thrown upon the insurers any liability to which they would not otherwise have been subject: (*Everth* v. *Smith*, 2 M. & S. 278; *Philpott* v. *Swann*, 1 Mar. Law Cas. O. S. 151; 5 L. T. Rep. N. S. 183; 11 C.B. N. S. 270.) The result is that, in my opinion, a right to the freight in question must be deemed to have accrued under the terms of the charter-party, but to have been subsequently, in July 1879, defeated under the power of abatement by way of mulct reserved by the contract to the Board of Admiralty.

It has not been without doubt, or, I must add, without reluctance, that I have come to the conclusion that this is not a loss so directly, proximately, and immediately resulting from the perils of the seas insured against, so as to make it payable under the terms of the policy by the insurers. The general principle of *causa proxima, non remota, spectatur* is intelligible enough, and easy of application in many cases; but that there are cases in which a too literal application of it would work injustice, and would not really be justified by the principle itself, is apparent from the observations of Pollock, C.B. in *Montoya* v. *London Assurance Company* (6 Ex. 458), of Erle C.J. in *Ionides* v. *Universal Marine Insurance Company* (1 Mar. Law Cas. O. S. 353; 8 L. T. Rep. N.S. 705; 14 C. B. N. S. 259), and from *Bondrett* v. *Hentigg* (Holt N. P. Rep. 149). Nor do I think that the question can entirely depend upon the difference between a condition precedent (without which the right to freight would never accrue) and a condition subsequent, by which it might be defeated. The observations of Bramwell, B., at the conclusion of the judgment in *Jackson* v. *Union Marine Insurance Company* (*ubi sup.*), and from what took place during the argument of that case, as stated by Cleasby, B., appear to me to be adverse to so narrow a view. If, in the present case, the other terms of the charter-party being the same, a power had been reserved to the charterers or their agents to determine the contract and their liability to further freight, on the occurrence of any such damage to the ship by perils of the sea as might render her inefficient for the service which she had undertaken, and if such power had been exercised before any further freight was earned, I should have been of opinion that this was a loss of freight by perils of the sea for which the insurers were liable. Nor would it, in my opinion, have made any difference, although provision might have been made by the contract for the continuance of the troops and stores in the ship, after the exercise of the power to determine the contract, until such time as they could be conveniently landed or transferred to other vessels. But between such a case and that of a subsequent mulct under a special power, such as that contained in this charter-party, after freight had been earned which (unless the power of mulct were exercised) would be payable under the contract, there seems to me to be an important difference. The principle of such cases as *Hadkinson* v. *Robinson* (3 B. & P. 388), *Taylor* v. *Dunbar* (L. Rep. 4 C. P. 206), and *M'Swiney* v. *Royal Exchange Assurance Corporation* (14 Q. B. 634), seems to be here applicable, and obliges me to conclude that the risk of loss by the exercise, in such circumstances, of such a special power is different from the risk of loss by perils of the seas and ought to have been insured against in some more special manner, if it was the intention of the parties that it should be covered by the policy. I do not dissemble that there appears to me to be something of refinement in the distinction, which the rule laid down by the authorities, as applied to the particular facts of this case, obliges me to make; but, though refined, it seems to be a real distinction, and to justify the judgment of the court below. Upon the whole, therefore, I am unable to differ from the opinion which is entertained by others of your Lordships who heard this appeal, and I must move your Lordships to affirm the judgment appealed from, and to dismiss the appeal, with costs.

Lord BLACKBURN.—My Lords: This is an action on a time policy in the ordinary form, entered into in the name of the brokers for the plaintiffs, "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, on the *City of Paris* steamship." The subject-matter of insurance is specified as "on freight outstanding," the perils are the usual perils, including those of the sea. The defendants are underwriters who subscribed this policy. The question is whether, under the circumstances, there has been any loss of freight against which the underwriters are bound by their contract to indemnify the plaintiffs. The adventure in respect of which the plaintiffs intended to make this assurance was under a charter-party under seal, made on the 20th Feb. 1879, between the Commissioners of the Admiralty, on behalf of Her Majesty, of the one part, and C. F. Ellis, on behalf of the now plaintiffs, owners of the *City of Paris*, of the other part, by which the owners let, and the Commissioners hired and took on 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" shall cause notice to be given to the plaintiffs or the master in charge of the ship "that she is discharged from Her Majesty's service, such notice to be given when the said ship is in port in the United Kingdom." The first month's pay was paid in advance. Before the underwriters agreed to the insurance they were informed that the *City of Paris* was the Inman steamer about to proceed on a voyage to Natal on Government charter, and they might if they pleased have seen the charter, so that there would be no ground for setting up any defence on the

ground of non-disclosure or concealment, and no such defence was set up. But though the underwriters knew that this was the adventure upon which the ship was bound, and that there was such a charter-party, under which what was meant to be insured would accrue, it is not in any sense accurate to say that the policy must be read as if the charter-party were set out in it so as to affect its construction. The construction of the policy remains, that the underwriters are to make good any loss occasioned to the subject-matter of the insurance in this policy, described as "freight outstanding." "Freight," says Lord Tenterden, in *Flint* v. *Flemyng* (1 B. & Ad. 48), "as used in the policy of insurance, imports the benefit derived from the employment of the ship;" so that description covers the monthly hire of the ship for time. But as soon as it is ascertained that the policy attached on the hire under a particular charter-party, the charter-party must be read, in order to see how the subject-matter was affected by the misfortune which happened. Under one charter-party a temporary disablement of the ship might occasion a loss for which the underwriters on ship would be responsible, but which would not have any effect at all on the insured's right to recover the hire of the vessel while she was disabled. Under another, such a temporary disablement might deprive the shipowner of all claim for hire during the time she was disabled. In the first of these cases there could be no claim against the underwriters on freight, for there was no loss of freight. In the second, I do not see how it could properly be denied that there was such a loss. But the construction of the charter-party may be such, and this is the case now at bar, that it is a nice question whether the pecuniary loss which the assured have sustained in consequence of a peril of the sea is one which does or does not occasion a loss of the hire. If it does not occasion such a loss, though the consequence may be one which might have been insured against by an apt description, the underwriters on freight have not insured against it. Whether the individuals who subscribed this policy would have refused to insure at all on such a risk as being too speculative for them, or would have been willing to insure on an increased premium, I cannot tell. If what has happened is not a loss of freight within the meaning of the policy, they have a right to refuse to indemnify against it. The construction, therefore, of this charter-party is all important. I may observe that I do not think that it makes any difference in its construction that the charterers here are acting on behalf of Her Majesty, and that the regulations of Her Majesty's transport service are incorporated in and form part of the charter-party; and that two cases, *Beatson* v. *Shanck* (*ubi sup.*) and *Havelock* v. *Geddes* (*ubi sup.*), are very material authorities as to the principles upon which it should be construed. [His Lordship went through the clauses of the charter-party, and the facts of the case, and continued:] The owners say, and, it seems clear, say truly, that had it not been for the accident, which was a peril of the sea, they would have received pay from the 21st March 1879 till the 20th May 1879, when the policy expired by effluxion of time, and that they did not receive it at all: and they claim against the underwriters on freight to be indemnified against this. Brett, L.J. was of this opinion, and the plaintiffs before him had judgment against the underwriters. The Court of Appeal reversed this judgment.

It is clear that the pecuniary damage to the assured was precisely the same whether the hire for these two months was, in consequence of the perils of the sea never earned, or whether the commissioners had, in consequence of the perils of the sea, a right to make abatement by way of mulct to such amount as in their judgment was fit and reasonable, and to deduct that from the pay, and thought it fit and reasonable to deduct the whole. But the difference to the underwriters is considerable. In the first case the hire is clearly lost by the peril insured against. In the other I think it cannot properly be said that the hire has been lost at all, though the assured have had an equivalent mulct levied out of it. The courts below have not entered into the question of what was the construction of the charter party in any detail, Bramwell, L.J. in the Court of Appeal rather putting the judgment on the maxim *causa proxima, non causa remota, spectatur*, which is no doubt perfectly good law, and saying something about *causa causans*, and *causa sine quâ non*. I must own that I have always sympathised with what Lord Colonsay said in the case of *Rankin* v. *Potter* (*ubi sup.*): "Something is said about proximate and remote causes, and these are matters which are very apt to lead us into philosophical mazes;" which I think he did not use as a term of eulogy. I think, as he did, that when we get a clear view of the facts it is best to keep out of such philosophical mazes; and, as I think, the question here is not what was the proximate cause of a loss of freight, but whether there was any loss of freight. It seems to me clear that neither Captain Adean at the Cape nor the commissioners at home, nor anyone else, had power to discharge the *City of Paris* before the three months certain for which she was hired. Had she totally perished, so that she never could have been employed again at all, the hire would have ceased from the time of her destruction; but here use was made of her as a storeship till the 17th April, and after she was repaired she was capable of performing the work of a transport efficiently. In *Havelock* v. *Geddes* (*ubi sup.*), where by the terms of the charter-party the defendants had bound themselves to pay a monthly hire, and the shipowners had as here, covenanted, without any exception of the perils of the sea, to keep the vessel efficient, Lord Ellenborough, C.J. says: "The question then is whether, because the plaintiff has undertaken to keep the vessel tight, &c., the defendants have a right to deduct anything out of the freight they are to pay in respect of the time which may be taken up in making good such defects as may occur during the period for which the vessel is hired; and we are of opinion that they are not. From the accidents to which ships are liable, it was in the ordinary course of things to expect that this ship might want repairs in the course of her voyage, and when the defendants were making their bargain they should have stipulated to deduct for the time which might be exhausted in making these repairs, if they meant to make that deduction. Without such a stipulation, we think the true construction of the charter-party is, that while these repairs are going on the ship is to be considered in the defendants' service, and the defendants liable to continue their payments." No

question as to insurance arose in that case, but it seems to me clear that, if the plaintiff had insured his freight he could not have recovered anything in respect of the peril of the sea causing the necessity for those repairs, for no part of the freight was thereby lost; any damage to the ship would be borne by the underwriters on ship; any extra expenses to which he was put in consequence of his covenant would have to be insured by a special description. It is, however, argued that in this charter-party the words in the covenant to pay the freight "during such time as the ship shall be continued in Her Majesty's employ, and shall duly and efficiently perform the service for which she is hereby engaged," amount to such a stipulation as Lord Ellenborough refers to.

In Maude and Pollock on Shipping (3rd edit. p. 235) it is said, I think quite accurately, "It is often difficult in construing charter-parties to ascertain whether particular stipulations amount to conditions precedent. This is to be determined by seeking for the intention of the parties as apparent on the instrument, and from the surrounding circumstances, and by applying the ordinary rules of construction to each particular case. It does not depend on any formal arrangement of the words, but on the reason and sense of the thing as it is collected from the whole contract. Generally speaking, any stipulation which goes only to a portion of the consideration, or, in other words, the breach of which would deprive the party who has a right to insist upon it of a portion only of the benefit of his contract, will be construed not to be a condition precedent. It must, however, be recollected that this rule, although a very useful one, is only a rule of construction, or means of discovering the intention of the parties, to be applied where the words will bear either sense. For it is clear that the courts will not make contracts for the parties, and that if they use language which distinctly shows that they intend such a stipulation to be a condition precedent, it will be so construed. Constructions, however, tending to absurd and unreasonable results, will be avoided, if this can be done without violence to the terms used, because, where the intention is not clearly expressed, the parties are not to be presumed to have meant to make an absurd or unreasonable contract." In this case the Government did receive some benefit from the employment of the ship between the 21st March and the 17th April, though she was disabled from duly and efficiently performing the service for which she was engaged; and cases may easily be supposed in which they might have received more. I am, therefore, strongly inclined to think that the words relied on, even if they stood alone, would not amount to a condition precedent. But it is not necessary to decide the point, for the words are materially qualified and their effect altered by what follows, which shows that the charterers were relying upon the stipulation mentioned in *Beatson* v. *Shanck* (*ubi sup.*). There, in a transport charter, the provision, as stated in the report, was that "upon the loss of time, breach of orders, or neglect of duty by the said master, or from the ship's inability to execute or proceed on the service in which she might be employed, being made to appear, the said commissioners should have free liberty and be permitted to mulct or make such abatement out of the freight and pay of the ship as should be by them adjudged fit and reasonable." The words in the charter-party now before us are slightly different, and there is introduced a power to the commissioners to "retain in arrear the pay of the ship for two months as aforesaid, and to put the ship out of pay," which, as I think, must be construed as enabling them not to discharge the ship, but to withhold the giving of the monthly bills previously stipulated for two months, during which time the commissioners would have time to consider how they should use the power to make abatement by way of mulct out of the pay. I think that *Beatson* v. *Shanck* (*ubi sup.*) puts the proper construction upon this clause. If any of the specified cases, including inability from any cause whatever to perform efficiently the service contracted for, arises, the parties have agreed that the commissioners may make such abatement by way of mulct as they shall adjudge fit and reasonable. All that a court of law can inquire into is, whether there was such a case as to give the commissioners jurisdiction; if there was, even if they make an abatement which in the opinion of the court was neither fit nor reasonable, the court cannot interfere, and I think that the commissioners may properly take into consideration many things besides the mere inability, so that it is not at all clear that the resolution to pay nothing for the period from the 21st March to the 17th April, though the ship was then retained in the service, and actually used, might not be reasonable and fit, though it certainly seemed to me at first to be an inequitable resolution. But can it be said that the making such an abatement by way of mulct or fine, not necessarily because of the peril of the sea, is a loss of the freight, though power is given to retain and levy it out of the freight? I think not, any more than the power conferred on the Admiralty Court to give damages against the ship for a collision occasioning damage to another ship, and to enforce the payment by a proceeding *in rem* against the ship, is a loss of the ship. That was the case of *De Vaux* v. *Salvador* (*ubi sup.*). The prejudice which the owner of the ship sustains in the last case is a consequence of the peril of the sea, the collision, and it may be, and every day is, insured against by a collision or running down clause now in common use, but it is not a loss of the ship. It may be doubted whether the prejudice which the shipowners in this case sustained from the abatement by way of mulct is so direct and immediate a consequence, for it may have been imposed, or at least its amount increased, for many other reasons, and it might be difficult, though I think it possible, to frame a clause to cover it. But I think that it should be insured against, if at all, under a clause framed for the purpose, as it is not a loss of freight. I therefore think that the judgment of the Court of Appeal is right, and should be affirmed.

Lord WATSON.—My Lords: The terms of the policy of the 22nd Feb. 1879 appear to me to be sufficient to include freight to be earned under a time charter; and seeing that the respondents when they accepted the insurance had notice that the *City of Paris* was under a contract of charter-party, I am of opinion that the policy attached to the freight therein stipulated for, whether they did or did not choose to inform themselves of the particulars of the contract, and consequently that the respondents became liable for such part of

that freight as might be lost by any of the risks insured against during the period covered by the policy. There are two facts in the present case which have not been disputed. The first of these is, that the injury sustained by the vessel in Simon's Bay, and her consequent detention there while undergoing necessary repairs, were due to perils of the seas within the meaning of the policy. The second is, that the Commissioners of the Admiralty, who were the charterers, have not paid, and refuse to pay, freight subsequent to the 21st March 1879. Accordingly the only question which arises for decision is, whether the freight, which the vessel, in the absence of any casualty, would have earned between the 21st March and the 19th May 1879, is lost freight for which the insurers are liable. In order to appreciate the merits of that question, it is necessary to consider very carefully the terms of the charter-party. The engagement of the vessel was for an indefinite period, three calendar months being the minimum. Notice of discharge was only to be given when the vessel was in a port in the United Kingdom, and the owners were bound to keep her "staunch and substantial both above water and beneath, and in every respect seaworthy," at all times during the continuance of her charter. These stipulations seem to indicate that it was within the contemplation of both parties that the owners should from time to time, during the currency of the charter-party make such repairs upon the ship as were necessary to her efficiency as a transport. The clauses of the charter-party which bear upon the payment of freight, are somewhat peculiar, and the decision of the present case appears to me to depend upon the effect to be given to them. Freight is made payable at a monthly tonnage rate, during the time that the ship is in her Majesty's employ, and "shall duly and efficiently perform the service for which she is hereby engaged." The first month's freight is to be paid in advance. At the end of the second month the owner, on producing a certificate in due form, is entitled to a bill for a moiety of a month's freight; and at the end of the third month, upon production of a similar certificate, he becomes entitled to a bill for another moiety. At the end of the fourth and each succeeding month a bill for one month's freight is receivable upon a certificate being produced. The result of this arrangement is that, after the expiration of the first three months, the charterers have always from one to two months' freight already earned in their hands; and it is provided that the owner "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." Then follows the provision that if it shall be made to appear at any time to the commissioners that any delay has been caused by breach of orders, or that the ship became incapable from any cause whatsoever to perform efficiently the service contracted for, it shall be lawful for them "to retain in arrear the pay of the ship for two months as aforesaid, 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."

If the facts of the present case were such as to bring it within the principle of *Jackson* v. *Union Marine Insurance Company* (*ubi sup.*) that would afford an easy solution of the only question in issue. In that event the Commissioners of the Admiralty would have been, at common law, entitled to rescind the contract of charter-party, in respect that the sea risk encountered by the *City of Paris* in Simon's Bay had made the object which the contracting parties had in view commercially impossible of attainment. But there is really no analogy between the case of a charter for a single voyage with a particular cargo, and that of a charter indefinite as to time, place, and cargo; and, moreover, it appears to me that, on a fair interpretation of this charter-party, it was mutually contemplated that the ship might be injured by perils of the seas, and that, whenever that occurred, she was to be repaired. In my opinion, neither the Commissioners of the Admiralty, nor their officials at Simon's Bay, had a legal right to terminate the contract and to discharge the *City of Paris* from Her Majesty's service on the 17th April 1879. It is, however, unnecessary to consider whether any liability would have attached to the insurers if the commissioners had insisted upon their right to discharge the vessel upon the 17th April, and had declined to pay freight upon that footing alone. The commissioners ultimately disallowed all claims for freight after the 21st March, but allowed the cost of coals consumed on the homeward voyage, and the case was presented to your Lordships as if the commissioners had not discharged the vessel at Simon's Bay, but had disallowed freight from and after the 21st March in consequence of her inefficiency to perform the service for which she had been engaged. In this aspect of the case it could hardly be maintained that the commissioners were not empowered by the terms of the charter-party to refuse payment of freight subsequent to the 21st March 1879; but, when that is conceded, the question still remains whether the payments so withheld constitute lost freight within the meaning of the policy.

The appellants in the first place maintain that, by the terms of the charter-party, the due and efficient performance of the service for which the vessel was engaged formed a condition precedent to the earning of freight. I am unable so to read the contract. The language of the leading clause with respect to freight does not appear to me to be fairly susceptible of that construction, and any such construction is quite inconsistent with the clause which follows, giving power to the commissioners to make an abatement by way of mulct out of the hire or freight of the ship. Reading the two clauses together, I think it is clear that freight was to run during the whole period of the vessel's engagement, but that the commissioners, in the event of delay occurring, or of the vessel becoming inefficient, were to have the power of declining to issue monthly pay bills (which I take to be what is meant by putting the ship out of pay), and of retaining the freight, deducting from its amount on final settlement any sum which they in their discretion might fix as a reasonable mulct in respect of such delay or inefficiency. If I am right in my construction of the charter-party the case turns upon a very narrow point. The inefficiency of the vessel was admittedly due to perils of the sea, which were within the risk insured by the policy, and, if it had been expressly stipulated in the charter-party that freight should cease to be payable so long as the ship was inca-

pable from that cause of efficiently performing her contract, I do not doubt that the insurers would have been liable. That would have been a plain case of cesser or loss of freight by the perils insured against, but that is not the present case. The abatement of freight is not, in my opinion, necessarily dependent upon the fact that the vessel has been disabled by sea risks, but it is entirely dependent upon the discretion of the Commissioners of the Admiralty, who are not limited in the exercise of that discretion to considerations arising out of the casualty which has occasioned delay. They may quite legitimately take into account, in determining whether they will or will not inflict a mulct, the conduct of her owners under a totally different contract of charter-party, and many other considerations equally foreign to the ship or freight insured. In these circumstances, while I am conscious that the question is one of great nicety, I am unable to regard a disallowance of freight, which may be legitimately made on such considerations, as lost freight in the proper sense of the term. It appears to me that the deduction from freight, which the commissioners are empowered to make, is in truth and substance a penalty imposed upon the shipowner, which they are entitled to levy out of the freight retained in their hands. I am accordingly of opinion that the judgment of the Court of Appeal ought to be affirmed.

Lord FITZGERALD.—My Lords: The judgments of my noble and learned friends have my entire concurrence. As the charter was not limited in time, and might continue for a considerable period, it seems plain that its duration was not to be determined by any necessity arising for repairs, unless at least the repairs proved to be of so extensive a character, and likely to occupy so much time, as practically to put an end to the objects of the charter, and thus entitle the charterers to abandon the undertaking. The proviso so much commented on, which is the foundation of your Lordships' judgment, seems to me to have conferred on the commissioners large powers of a judicial character, to be exercised according to judicial discretion. They do not seem, either by themselves or their officers, to have directly and formally exercised those powers. It is not pretended that they determined to retain in arrear the pay of the ship for two months, and to put the ship out of pay; nor did they formally and directly adjudge and declare that it would be fit and reasonable to make any abatement by way of mulct out of the hire or freight of the ship. I have not been able to discover that Captain Adean had authority to discharge the ship from the service. Under such circumstances I should have had some difficulty in coming to the conclusion that the commissioners had legally exercised the powers conferred on them by the contract of affreightment, and had adjudged it to be fit and reasonable that there should be a mulct out of the freight. It seems, however, to be assumed on both sides that the commissioners did, in some form or other, exercise their powers, and did eventually adjudge it to be fit and reasonable to make, and did make an abatement by way of mulct out of the hire or freight equivalent to the two months' freight which had otherwise been earned.

It is on this that the plaintiffs seek to maintain the present action. I concur in the opinion that there has been no loss of freight within the terms of the policy. The freight was earned, but the plaintiffs have been deprived of it by the commissioners, in the exercise of the discretionary powers which the contract of affreightment vested in them. That was a risk against which the insurers did not insure. If, however, there was a loss of freight, it would remain to be considered whether "peril of the sea" was the immediate cause of the loss. The maxim, *In jure non remota causa, sed proxima, spectatur*, applies specially to marine insurances, so that in order to entitle the plaintiff to recover here the loss must be a direct, and not a remote consequence of the peril of the sea. The touching on the Roman rock was a peril of the sea, and probably but for that the ship would have completed her undertaking and earned her two months' freight, but it does not follow that the touching on the rock and consequent injury were the *causa causans*. The freight was not necessarily and directly lost by that calamity, and the consequent necessity for repairs. The plaintiffs were deprived of their right to the freight, if they were so deprived, by the action of the commissioners, or their officers, under the special provisions of the charter-party. The loss was not by the perils of the sea, but was occasioned by the contract. I concur in the opinion of Bramwell, L.J., in this case, that the loss was not the necessary and proximate effect of the perils of the sea, and that the plaintiffs have failed to establish the immediate relation of the one to the other.

Order appealed from affirmed and appeal dismissed with costs.

Solicitors for the appellants, *Gregory, Rowcliffes, and Co.*, for *Hill, Dickinson*, and *Lightbound*, Liverpool.

Solicitors for the respondents, *Waltons, Bubb, and Walton.*

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT LINCOLN'S INN.

Thursday, July 6, 1882.

(Before JESSEL, M.R., Sir JAMES HANNEN, and LINDLEY, L.J.)

PRICE *v.* LIVINGSTONE. (*a*)

Charter-party—Final sailing—Last port.

A charter-party provided that the owners of a vessel should receive an advance of one-third of the freight within eight days "from final sailing of the vessel from her last port in United Kingdom."

The vessel was loaded at Penarth Dock, and was towed by a steam-tug seven or eight miles, bringing her out about three miles into the Bristol Channel. The weather being threatening, she was there anchored, until the violence of the wind caused her cables to part, and she ran ashore. Part of the cargo was thrown overboard, and the remainder was damaged by the sea water.

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

The vessel had never left the port of Cardiff, as defined in the Gazette for fiscal purposes, although, taking the port in its ordinary commercial sense, she had done so and had been out at sea.

The owners claimed the amount of one-third of the freight, but the defendants contended that there had been no final sailing of the vessel from her last port, and that, therefore, they were not liable.

Held (affirming the decision of Lopes, J.), that the word "port" must be understood in its ordinary commercial sense; that the vessel had finally sailed as soon as she had left the port for the purpose of proceeding on her voyage without any intention of coming back; and that the owners were entitled to the freight claimed.

The defendants, on the 12th Oct. 1880, chartered of the plaintiffs a ship called the *Buckhurst* by a charter-party, which was partly in print and partly in writing. The material portions of the charter-party were as follows, the parts which were in writing being distinguished by italics:

It is this day mutually agreed between *Messrs. W. B. Price and Co.*, owners of the good ship or vessel called the *Buckhurst*, and classed 100 *A* 1, of the measurement of 1850 tons or thereabouts, now *building* in the port of *Dumbarton*, and *Messrs. Livingstone, Briggs, and Co.*, merchants, that the said ship being warranted tight, staunch, and strong, and classed as above during the voyage, shall with all possible despatch proceed to *Penarth Dock, Cardiff*, and after being in a loading berth . . . . shall there load a full and complete cargo of steam coals as ordered by the charterers, which they bind themselves to ship, &c., &c., and being so loaded shall proceed to *Bombay*, or so near thereunto as she may safely get, and deliver the same, &c., &c., the act of God, the Queen's enemies, fire, and all and every other the dangers and accidents of the seas, rivers, and navigation during the said voyage always mutually excepted. The freight to be paid on the quantity delivered at and after the rate of *twenty-one shillings and sixpence* per ton of 20cwt., or at the option of the agent of the P. and O. Steam Navigation Company at the port of discharge on the quantity shipped . . . . such freight to be paid as follows:—An advance of *one-third* by charterers acceptance at *three* months date and *one-third at six months date* from final sailing of the vessel from her last port in United Kingdom, clean bills of lading on charterers form for the cargo having been previously signed by the master and handed to the charterers, or at their option in cash within eight days from sailing under discount at bank rate, but not under 5*l.* per cent. per annum.

The vessel loaded a full and complete cargo at Penarth Dock on the 14th Jan. 1881, and was ready for sea the next day.

A steam-tug towed her out on the 16th Jan. for seven or eight miles to a point out in the Bristol Channel, about three miles from Lavernock Point, when, the weather being threatening, the captain anchored her.

The vessel continued anchored until the 18th Jan., but the violence of the wind caused the cables to part, and ultimately she was driven back and went ashore on Penarth Beach.

The captain ordered a portion of the cargo of coal to be heaved overboard, and the remainder was damaged by the sea-water.

The vessel had never left the port of Cardiff as defined in the *Gazette* for fiscal purposes, although, taking the port in its ordinary commercial sense, she had left it and had been out at sea.

The plaintiffs claimed 1056*l.*, the amount of one-third of the freight.

The defendants contended that there had been no "final sailing of the vessel from her last port in the United Kingdom," and that, therefore, they were not liable.

At the trial of the action, before Lopes, J. without a jury, judgment was given in favour of the plaintiffs.

The defendants appealed.

Hollams for the appellants.—The question turns upon the construction of the charter-party. The charter-party was designed to meet the case of a ship being driven back to port, and then the owners, having secured their freight, not being in a hurry to get off again. The vessel was never outside the port of Cardiff as defined in the *Gazette* for fiscal purposes. She had not finally sailed, and was driven back so as to be within the limits of the port in its ordinary commercial sense. If the vessel were driven by stress of weather into any port in the United Kingdom, such port would be covered by the words "last port." [Sir James Hannen referred to *Roelandts* v. *Harrison* (9 Ex. 444), as to the limits of the port of Cardiff, and to *Hudson* v. *Bilton* (6 E. & B. 565), as to final sailing.]

A. L. Smith, for the plaintiffs, was not called upon.

Jessel, M.R.—This case raises a simple point on a charter-party, which is partly in print and partly in writing. [His Lordship here read the material parts of the charter-party, distinguishing the parts in print and in writing.] Stress has been laid on the words "last port," but I am not much struck by them. If only one port is mentioned, it might be correct to strike out "last" from the printed form, but if there is only one port it must be but first and last, so I do not think that any stress is to be laid upon the expression. The question then is, what is meant by sailing from the last port? The word "port" must be understood in its ordinary commercial sense. There are ports which, like the port of Cardiff, extend miles for fiscal purposes, but they are not, for commercial purposes, to be treated as having that extent. This vessel was towed out to sea in the Bristol Channel, and had got seven or eight miles out of the port in its ordinary commercial sense. It was urged that she was driven back to Cardiff, and so had not finally sailed. That she was driven back is, to my mind, immaterial for the present purpose. She had finally sailed as soon as she had left the port for the purpose of proceeding on her voyage without any intention of coming back. It can hardly be seriously suggested that she had not "sailed" within the meaning of the charter-party, because she was in tow and her sails were not set. What is meant by "sailing" is departure from the port for the purpose of proceeding on her voyage.

Sir James Hannen.—The case of *Hudson* v. *Bilton* (*ubi sup.*) suggests the meaning of "final sailing;" the vessel must have got out of port ready for her voyage and for the purpose of proceeding on her voyage. It was held in that case that the vessel had not finally sailed, because her papers were not on board. In the present case everything was ready, and the fact that the vessel was driven back by stress of weather does not entitle us to say that she had not finally sailed. It is said that she had not finally sailed

from her last port, but as only one port is mentioned, "last port" must mean the port of Cardiff. It has been contended that, as she was driven back, the port into which she was driven was her last port, and that she never sailed from it. But this cannot have been the meaning of the charter-party, for it would leave it undetermined when the bills were to commence running, until it was ascertained that she had not been driven back into any port in the United Kingdom. The port from which a vessel starts, intending to go on a voyage, is her last port.

Lindley, L.J.—The question is, whether this vessel had finally sailed from her last port in the United Kingdom. Final sailing, I apprehend, means getting clear of the port for the purpose of proceeding on a voyage. Here the vessel left the port of Cardiff with no intention of going back. If a vessel goes seven or eight miles from the Penarth Dock she is out of port, for she is fairly at sea. I think that no great weight is to be attached to the word "last" as it occurs in a printed form.

Appeal dismissed.

Solicitors for the plaintiffs, *Parker* and *Co.*

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

SITTINGS AT WESTMINSTER.

Wednesday, June 21, 1882.

(Before Lord Coleridge, C.J., Brett, and Cotton, L.JJ.)

The Douglas. (*a*)

ON APPEAL FROM SIR R. PHILLIMORE.

Damage—Collision—Vessel sunk in navigable river—Liability of owner—Abandonment—Removal of Wrecks Act 1877 (40 *&* 41 *Vict.* c. 16), *s.* 4—*Duty to give warning—Hearsay evidence—Wrongful rejection of evidence.*

Where a vessel is sunk in a navigable river by collision, for which she is held solely to blame, a duty of lighting the wreck is not imposed upon her owners, though they claim the ownership, if the vessel has been abandoned, and the harbour-master under the provisions of the Removals of Wrecks Act 1877 *has undertaken to have the wreck lighted, and her owners are not liable for damage resulting from the absence of such lighting.*

Evidence showing that an officer of the sunken vessel sent a message to the harbour-master informing him of the position of the wreck, and that the harbour-master undertook to light the wreck, and that the messenger informed the officer of the harbour-master's undertaking, is admissible, as relating to an act done, and tending to disprove negligence on the part of the owners.

The D., by reason of a collision for which she was alone to blame, sank in the Thames. In answer to a message from her mate, sent shortly after she sank, the harbour-master at G. promised to light the wreck. Some hours afterwards the M. N. ran into the D., which had not yet been lighted.

Held, that no negligence or liability attached to the owners of the D. (*b*)

This was an appeal from a decision of Sir R. Phillimore, in which on the 25th April 1882, he held that the steamship *Douglas* was to blame for a collision between the s.s. *Mary Nixon* and the *Douglas*, while the latter vessel was lying sunken in Gravesend Reach, in the river Thames, about midnight on the 26th and 27th Oct. 1881, in consequence of a collision with another vessel.

The facts appear in the report of the case below before Sir R. Phillimore (46 L. T. Rep. N. S. 488; 4 Asp. Mar. Law Cas. 510; L. Rep. 7 P. D. 151), with the exception of the following, viz., that at the hearing of the action the defendants tendered the evidence of the master of the tug *Endeavour*, with the object of proving that he, at the request of the mate of the *Douglas*, shortly after the first collision, had informed the harbour master of the position of the *Douglas*, that the harbour master had informed him that immediate steps would be taken to have lights put on the *Douglas*, and that the master of the tug had told the mate of the *Douglas* of the undertaking of the harbour master. This evidence was not admitted on the ground that it was hearsay, and irrelevant, because it was not within the power of the defendants to shift the responsibility of guarding the *Douglas* from themselves to the harbour master. In answers to interrogatories, it further appeared that the defendants stated they had never given up their interest in the *Douglas*, and still claimed the ownership of the vessel.

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

(*b*) As several cases have recently arisen on the subject of obstruction in navigable channels, it may be well to here mention that the modern enactments relating to the removal of obstructions to navigation are contained in the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), the Dockyard Ports Regulation Act 1865 (28 & 29 Vict. c. 125), and the Removal of Wrecks Act 1877 (40 & 41 Vict. c. 16). In addition to the above there are special provisions relating to the Thames and Mersey: (cf. 20 & 21 Vict. c. 147, s. 86; and 21 and 22 Vict. c. 92.) The above Acts give powers to harbour-masters, conservancy and lighthouse authorities to remove wrecks and other obstructions to navigation at the expense of the owner of the obstruction, and should the owner refuse to pay the cost of such removal, the obstruction may be sold and the cost paid out of the proceeds. The liability of a person who occasions damage by causing an obstruction in a navigable channel or harbour, and failing to properly mark the position of such obstruction, has been considered from the very earliest days of shipping. In the Black Book of the Admiralty, among the judgments of the sea (Laws of Oleron), we find that it was incumbent upon the master of a vessel which was lying in haven which dries at low water, to buoy and mark his anchors, and that where damage was done to other vessels by his failing to do so he was liable for such damage. The rule as to the use of a navigable river seems to me that it must be used in a reasonable manner and for reasonable purposes; to go beyond this and cause an obstruction is to render oneself liable for damage resulting from the obstruction (*The Original Hartlepool Collieries Company Limited* v. *Gibb*, 3 Asp. Mar. Law Cas. 411; 36 L. T. Rep. N. S. 433); and where the obstruction is under statutory authority, the persons causing such obstruction are bound, if the obstruction is of a character to injure the property of the public, to take all precautions to avoid such injury: (*Jolliffe* v. *The Wallasey Local Board*, 2 Asp. Mar. Law Cas. 146; 29 L. T. Rep. N. S. 582.) Without statutory authority no one has a right to cause an obstruction in a navigable river, though at the time it may not be a nuisance, lest it become in the future an impediment to navigation: (*Attorney-General* v. *Terry*, 2 Asp. Mar. Law Cas. 174; 29 L. T. Rep. N. S. 716.) This even applies to the case of a private river where there are two riparian owners, each entitled to the soil *ad medium filum aquæ*, and one of the owners erects an obstruction on his own half of the soil: (*Bickett* v. *Morris*, 14 L. T. Rep. N. S. 835.

Bucknill, for the defendants, the owners of the *Douglas*.—The evidence as to the conversation between the master of the *Endeavour* and the mate of the *Douglas* was improperly rejected. It was most material for the purpose of proving absence of negligence on the part of the defendants. There was no negligence on their part.

Butt, Q.C. and *Gainsford Bruce* for the plaintiff.—The conversation referred to must not be admitted, inasmuch as it is heresay evidence, and further, it is immaterial under the circumstances of the case, seeing that the defendants were unable to delegate their duty to take due and proper care of the wreck to the harbour master. The defendants did not abandon the wreck. The defendants were legally bound to indicate the position of the wreck; through their fault an obstruction was caused in a navigable river, and yet no lights were placed upon the wreck. As a matter of fact those on board the *Mary Nixon* had no means of knowing of the presence of the wreck. By the Thames Conservancy Act 1857 (20 & 21 Vict. c. 147), ss. 86, 87, power is given to the conservators to remove vessels which are an obstruction to navigation, and by the Removals of Wrecks Act 1877 (40 & 41 Vict. c. 16), s. 4, it is provided that where any vessel is sunk, stranded, or abandoned, a conservancy authority "may" light or buoy such vessel until her raising, removal or destruction; the word "may" is used, and therefore the authority is not compelled to exercise the powers given by the Act. Even though the authority should exercise such powers, some considerable time would elapse before they were put in force. [Brett, L.J.—As the last act referred to has to do with the performance of a public duty, would not "may" in sect. 4 be read "must."] *Brown* v. *Mallet* (5 C. B. 599) and *White* v. *Crisp* (10 Ex. 312) are both authorities to the effect that the defendants were wrong in leaving the *Douglas* sunk at the bottom of the Thames, without taking proper and efficient steps to indicate her position to other vessels. It was quite possible for the crew of the *Douglas* to have themselves placed a light on the vessel, and they were wrong in merely presuming that the harbour master would necessarily do so:

Forbes v. *Lee Conservancy Board*, 4 Ex. Div. 116.
The Ettrick, sub nom. Prehn v. *Bailey and others*, 4 Asp. Mar. Law Cas. 428, 465; 45 L. T. Rep. N. S. 399; 6 P. Div. 127.

Bucknill was not called upon in reply.

Lord Coleridge, C.J.—It seems plain to me that the judgment of the Admiralty Division cannot be supported. Two courses are open to us: we can either send the case back for a new trial, or pronounce judgment upon the material before us. As the evidence was not given, and it is not certain what it would turn out to be, we could only grant a new hearing if the rejection of the evidence tendered were the only matter which we had to determine; but upon the facts before us we can reverse the judgment of the Admiralty Division and enter judgment for the defendants. The only question upon the evidence before us is whether the defendants were guilty of negligence; of course I am not speaking of the original negligence conducing to the original collision. It appears from all the facts that was no negligence of which the plaintiff can take advantage. There was a collision between the *Douglas* the *Duke of Buckingham* and the *Orion*, and afterwards between the *Douglas* and the *Mary Nixon*. After the *Douglas* had been sunk, a light was fixed in her rigging. The master of the *Douglas* having been thrown into the water, was taken in a boat to near Gravesend. Then the tug called the *Endeavour* went to Gravesend; there the mate instructed the captain to go to the harbour master and to request him to take care of the wreck. The defendants caused the captain of the *Endeavour* to be called as a witness. The counsel for the plaintiff objected that the conversation between the harbour master and the captain of the *Endeavour* took place behind the back of the plaintiff, and therefore could not be received in evidence. The judge of the Admiralty Division excluded it. The objection has not been seriously supported to-day; for the evidence was tendered as relating to an act done and tending to disprove negligence, a competent person having been sent to inform the harbour master. It was urged that the evidence was immaterial, because the master and mate had no right to delegate their duty to take due and proper care of the wreck to the harbour master; for it appears clear that the defendants still claimed to be owners of it. The evidence was not immaterial. I think that it was wrongly rejected. But it was stated to the mate of the *Douglas* that the harbour master had undertaken to light the wreck; there was therefore evidence that the mate, who represented the defendants, thought that the harbour master had undertaken to light the wreck. The harbour master *may* exercise the powers of the Removal of Wrecks Act 1877, and it is unnecessary to give any opinion as to the construction of the Act, and to determine whether he *must*; for having the power he appears to have undertaken to do the duty. It is to go too far to say that the captain and the mate of the *Douglas* were guilty of negligence; for even upon the present facts it must be inferred that the mate asked the official to do that which he had the power by statute to perform.

It has been argued that an action is maintainable, because it does not appear that the harbour master performed the duty; but it must be inferred upon these facts that he undertook to do the duty, and at least the mate of the *Douglas* had fair ground for supposing that he would perform it. The master and the mate of the *Douglas* had no power to retain the *Endeavour* to light the wreck. No act has been pointed out which they might be fairly expected to do. The evidence was improperly rejected, but sufficient evidence is before us to show that all things reasonable were done; there is no ground for finding that the master and the mate of the *Douglas* were guilty of actionable negligence. I think it unnecessary to discuss the two cases which have been mentioned, *Brown* v. *Mallett* (*ubi sup.*) and *White* v. *Crisp* (*ubi sup.*) I entertain a great respect for the learned judges who decided them; but I do not think that they trench upon our decisions, for they assume that the possession and the control over the sunken ship must remain in the owners in order to render them liable; these cases may be good law, for in *Brown* v. *Mallett* (*ubi sup.*) it was held that the owner of the barge was exempt from liability, on the ground that the declaration did not show him to be in possession at the time of the damage to

the plaintiff's steamship, and in *White* v. *Crisp* (*ubi sup.*) the action was founded on the circumstance that the defendants had the possession and the control of the wreck. Upon the grounds that I have stated, I am of opinion that the materials before us show that the judgment of the Admiralty Division must be reversed.

BRETT, L.J.—This is an action to recover damages for the injury occasioned to the plaintiff's steamship the *Mary Nixon*, by the negligence of those in charge of the defendant's steamship, the *Douglas*. The facts may be shortly stated as follows: the *Douglas* whilst going up the Thames came into collision with another vessel, the *Duke of Buckingham*, and sank; the collision was due to the negligence of those on board the *Douglas*; a light was fixed in her rigging, but it was extinguished upon her sinking. The mate of the *Douglas* went up to Gravesend and requested the captain of the tug called the *Endeavour* to ask the harbour master to fix some lights on the wreck; the harbour master said that he would do this, and his answer was reported to the mate of the *Douglas*. Before any lights were fixed to the wreck, the plaintiff's steamship in passing up the river struck against the sunken wreck of the *Douglas*, and sustained the injury, in respect of which this action is brought.

The liability of the defendants was alleged to exist upon three grounds. First, it was said by the plaintiff's counsel that a duty was imposed upon the defendants to light the wreck, that the duty was of the same nature as if the defendants had contracted with the plaintiff to light it, and that they are absolutely liable for the breach of it; this really seems to me to be almost the same as to argue that there was a contract; the contention is quite unsustainable, no duty, at least of that description can exist. Secondly, it was assumed in the argument that the defendants had committed an indictable offence in the channel of a navigable river; that was the effect of the argument addressed to us, although this contention was not put forward in direct terms. To wilfully scuttle a ship in a tide-way so as to cause an obstruction may possibly be an indictable offence; but what the defendants did was no indictable offence. Their own ship sank. It seems to me that no greater liability can exist against the defendants, than if their steamship had sunk without negligence. What is the liability of the owners of a sunken ship which is lying in a tide-way? If they keep possession of her, they must give notice where she has gone down. This is all their liability. Thirdly, it was said that the defendants did not take care to give notice where the wreck of the *Douglas* was lying. I incline to agree that if the owners of a wreck abandon it their liability ceases. But here the defendants claim the ownership of the wreck. It may be that the defendants did not hear of the accident for some time; as to those employed by them, the captain is *primâ facie* to act; it is for the plaintiff to prove that there was negligence. The captain appears to have gone ashore after the *Douglas* sank; what was he to do? He was not guilty of negligence. As to the mate, he gave instructions to the captain of the tug *Endeavour* to inform the harbour master. The latter evidently took it as a piece of information upon which he was to act, for he in effect promised to send lights within an hour. The mate of the *Douglas* had a right to assume that the harbour master would do what he promised. Upon the evidence before us there was no negligence and no liability upon the defendants. The judgment of the Admiralty Division cannot be supported. I say nothing as to *Brown* v. *Mallett* (*ubi sup.*) and *White* v. *Crisp* (*ubi sup.*), except that they were decided on demurrer.

COTTON, L.J.—I think that the evidence was improperly rejected. Under the removal of Wrecks Act 1877, s. 4, the harbour master had power to put up lights; and I think it became his duty to remove a dangerous obstruction. In my opinion the evidence, if it had been received, would have shown that the defendants had for the time abandoned the control of the wreck. There was therefore a wrongful rejection of evidence; but I agree that there ought not to be a new trial, for it is proved by the deposition of the mate of the *Douglas* that the collision was reported to the harbour master, and that the mate did receive a communication from the harbour master. This circumstance exonerates the defendants from the charge of negligence, for it gave the harbour master notice to perform the duty. The plaintiff cannot say that the injury to his steamship, the *Mary Nixon*, was occasioned by the defendant's wrongful act; his loss did not happen through their negligence.

Judgment reversed.

Solicitors for plaintiff, *Gellatly, Son* and *Warton*.

Solicitors for defendants, *William A. Crump* and *Son*.

Nov. 23, 1881, *and March* 8, 1882.

(Before Lord COLERIDGE, C.J., BRETT, and HOLKER, L.JJ.)

THE VANDYCK. (*a*)

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

Salvage—Collision—Service without engagement—Right to reward.

Where two vessels are in collision, and a salvor renders service to one, without a request from or engagement by the other, and the latter is thereby rescued from a position of immediate danger, such service being a direct benefit to both vessels, entitles the salvor to salvage reward from both.

THIS was an appeal from a judgment of Sir R. J. Phillimore, judge of the Probate, Divorce, and Admiralty Division, by which he, in a salvage action had awarded 300*l.* to the steam-tug *Stormcock* for salvage services rendered by her to the steamship *Vandyck*. The action was tried on Nov. 23, 1881.

The statement of claim delivered by the plaintiffs, as far as is material, was as follows:

1. The *Stormcock* is a twin screw steam-tug belonging to the port of Liverpool, of the burthen of about 465 tons, and propelled by two distinct sets of direct acting compound engines of 250 nominal, working up to 1228 indicated horse power, and is of the value of 16,000*l.* or thereabouts, and has a crew of 14 hands, all told.

2. The *Vandyck* is a screw steamship of the burthen of about 1098 tons registered tonnage, and was built in the year 1867.

(a) Reported by J. P. ASPINALL, and F. W. RAIKES Esqrs., Barristers-at-Law.

3. On the 14th Oct. 1881, at about 4.15 p.m., the *Stormcock* was at the Liverpool landing-stage, in the river Mersey, having just returned from rendering assistance to another vessel called the *Duchess of Argyle*. There was a tremendous hurricane blowing at the time, with a very heavy sea running.

4. At 4.15 p.m., as aforesaid, those on board the *Stormcock* saw the *Vandyck* on the Cheshire side of the Mersey, opposite the Alfred Dock, in collision with a large ship which proved to be the *Queen of Scots*, and the *Stormcock* at once went to the assistance of both the said vessels.

5. The *Stormcock*, on reaching the said vessels, found that the *Vandyck* had drifted right across the bows of the *Queen of Scots*, striking her with her starboard quarter, and carrying away the jibboom and other head gear of the *Queen of Scots*. The two vessels were grinding against each other heavily, and a large hole had been knocked in the afterpart of the starboard side of the *Vandyck*, and her rudder-post had been carried away. The *Queen of Scots* had both her anchors down, and the propeller of the *Vandyck* had got between the anchors of the *Queen of Scots*, thus rendering it impossible for the *Vandyck* to use her propeller to get away from the *Queen of Scots*. The above-mentioned vessel, the *Duchess of Argyle*, was lying about two cables' length astern of the *Vandyck*.

6. The *Vandyck* and those on board her were then in a position of great danger from the said collision, and in order to free the said vessels from one another, it was necessary that the *Queen of Scots* should be towed ahead, and that her anchor chains should be slipped.

7. It was also necessary that the *Queen of Scots* should be towed away before her chains were slipped, in order that the *Vandyck*, when set free, might be better enabled to clear the *Duchess of Argyle*.

8. The *Stormcock* then gave the *Queen of Scots* a hawser, which was made fast, and the *Stormcock* went on ahead until the *Queen of Scots* was enabled to slip her anchor chains, and the two vessels were thus set free from one another.

9. But for the services rendered by the *Stormcock* as aforesaid, the *Vandyck* would in all probability have sustained considerable further damage, and have sunk together with her cargo.

10. In the performance of the said services, the *Stormcock* was in considerable danger, and ran great risk.

The statement of defence delivered by the owners of the *Vandyck*, and the owners of her cargo, so far as is material, was as follows:

2. A little after 4 p.m. on the 14th Oct. 1881, whilst the wind was blowing a gale from the N.W., and the tide was first quarter ebb, the steamship *Vandyck*, and the ship *Queen of Scots*, both of which were at anchor in the river Mersey, fouled one another; the port bow of the *Queen of Scots* coming in contact with the starboard bow of the *Vandyck*. The *Vandyck* was riding to her starboard anchor, and had her steam up; the *Queen of Scots* had her port and starboard anchor down. The *Queen of Scots* struck the starboard quarter of the *Vandyck* with her port bow, and the *Vandyck* fell away to the westward across the bows of the *Queen of Scots*, and the propeller of the *Vandyck* was fouled by the starboard anchor chain of the *Queen of Scots*, and in consequence thereof the *Vandyck* was unable to use her propeller, and the vessels fell alongside each other, the bows of the *Queen of Scots* to the stern of the *Vandyck*. The *Vandyck* had two tugs, the *Merry Andrew* and the *Victory*, in attendance upon her, and they made fast to a line carried from the port quarter of the *Vandyck*, and held the *Vandyck*; and the *Queen of Scots* then slipped her starboard chain, and the *Vandyck* at once came clear. The *Vandyck* then cast off the tow-rope, and her head fell round to the tide. The chain of the *Vandyck* parted with the strain upon it, and the *Vandyck* then steamed ahead across the river; but, as her rudder-head had been injured in the collision, a hawser was passed to the tug *Victory* in order that the *Victory* might assist the *Vandyck* to get her head to the southward; but the towing-hook of the *Victory* parted, and the *Vandyck* then proceeded without assistance to the south of the Woodside landing-stage, and brought up with her port anchor.

3. The defendants say that the rudder-head of the *Vandyck* was twisted, but they deny that the rudder-post to the *Vandyck* had been carried away as mentioned in the 5th paragraph of the statement of claim, and although they admit that the *Queen of Scots* cut into the after part of the starboard side of the main deck of the *Vandyck*, they say that the *Vandyck* was not damaged below the water-line, and that she made no water, and that, as soon as the propeller was clear of the starboard chain of the *Queen of Scots*, there was nothing to prevent the engines of the *Vandyck* being used.

4. The defendants deny that the *Stormcock* went to the assistance of the *Vandyck*, or rendered assistance to her. The defendants deny that the *Vandyck* was in a position of great danger, as alleged: the two tugs before mentioned were sufficient to render, as they did render to the *Vandyck*, all necessary assistance.

5. The defendants deny the 7th paragraph of the statement of claim, and they deny that the *Stormcock* had begun to tow the *Queen of Scots* before her starboard chain was slipped.

6. The defendants admit that the *Stormcock* gave the *Queen of Scots* a hawser, which was made fast as alleged in the 8th paragraph of the statement of claim, but they do not admit the residue of the said paragraph, and they say that any services rendered by the *Stormcock* were rendered to the *Queen of Scots*, and not to the *Vandyck*.

7. As to the 9th and 10th paragraphs of the statement of claim, the defendants deny that but for the services rendered by the *Stormcock* the *Vandyck* would have sustained further damages; and they do not admit that in the performance of the alleged services the *Stormcock* was in danger, or ran great risk.

The action was heard on Nov. 23, 1881, before the judge, upon *viva voce* evidence; and, by agreement between the parties, upon the evidence given in a prior salvage action instituted by the owners of the *Stormcock* and by the owners of two other tugs against the *Queen of Scots* in respect of the services rendered to the *Queen of Scots* after her collision with the *Vandyck*.

On behalf of the plaintiffs, the master of the *Stormcock* and the pilot on board the *Queen of Scots* gave evidence that the two vessels had been in collision about ten minutes when the *Stormcock* came up: that had the *Queen of Scots* slipped her cable without any tug to hold her, she must have fouled the *Duchess of Argyle*, which was directly astern of her; that each time the *Queen of Scots* fell against the *Vandyck* with the heaving of the sea, she cut into the *Vandyck* nearer the water-line, and that had it not been for the assistance rendered by the *Stormcock* to the *Queen of Scots*, the *Vandyck* would have gone down. The masters of the tugs *Merry Andrew* and *Victory*, called on behalf of the defendants, stated that before the *Stormcock* was fast to the *Queen of Scots* the *Merry Andrew* had made fast to the *Vandyck*; that the *Victory* was fast ahead of the *Merry Andrew*, and that independently of the assistance of the *Stormcock*, the two tugs, *Merry Andrew* and *Victory*, could have pulled the *Vandyck* clear. The *Vandyck*, and the cargo laden on board of her, were valued at 83,500*l*.

Myburgh (with him *J. Walton*) for the plaintiffs.—The *Stormcock* rendered a valuable salvage service to the *Vandyck* in holding up the *Queen of Scots*. No reasonable and prudent man would have refused the services rendered to the *Vandyck*, and although such assistance was rendered after an express request for assistance from the *Queen of Scots*, yet it was directly instrumental in saving the *Vandyck*. The services were directly and approximately beneficial to the *Vandyck*, and consequently should be remunerated by her:

The Annapolis and The Golden Light, 1 Mar. Law Cas. O. S. 127; 5 L. T. Rep. N. S. 37; Lush. 355; *The Woburn Abbey*, 3 Mar. Law Cas. O. S. 310; 21 L. T. Rep. N. S. 707.

Butt, Q.C. (with him *G. Bruce*) for the defendants

—There was no salvage service in its legal sense rendered by the *Stormcock* to the *Queen of Scots*. The services were rendered to the *Queen of Scots*, and directly for her benefit. Those on board the *Vandyck* never requested the *Stormcock* to act on their behalf, and moreover the *Vandyck* required no more assistance than was in the power of the two tugs, *Merry Andrew* and *Victory*, to give her. If the *Queen of Scots* abstained from slipping her chains from fear of fouling the *Duchess of Argyle*, that was a matter which could not be said to affect the *Vandyck*.

Sir R. J. Phillimore.—This is another branch of the great case which has occupied us so long. In this case the steam-tug *Stormcock* brings her action of salvage against the steamship *Vandyck* which at the time the services were rendered was in collision with the ship *Queen of Scots*. Now the first question the court has to decide is, was there any salvage service, in its legal sense, rendered by the plaintiffs to the *Vandyck*, inasmuch as there was no request made to the *Stormcock* to act on behalf of the *Vandyck*; and several cases were cited to the court to show that the owners of the *Vandyck* were under no liability to pay salvage remuneration. But I am of opinion that in the circumstances of this case the evidence shows that the services of the *Stormcock* were accepted by the *Vandyck*. The next question is, what was the value of the services so rendered to the *Vandyck*; and looking to the evidence, and after conferring with the Elder Brethren of the Trinity House, I am of opinion that a valuable salvage service was rendered to the *Vandyck*, though it was one of very short duration, lasting only twenty minutes, and though it is possible the *Vandyck* might have received great assistance from other tugs that were there. But looking to the evidence, especially to that of the pilot of the *Queen of Scots*, who described the injury which the *Vandyck* had sustained from the *Queen of Scots*, and to all the circumstances of the case, I am of opinion that a very valuable salvage service was rendered to the *Vandyck*, and I shall award 300*l*.

From this decision the defendants in the court below appealed, on the grounds that the *Stormcock* had rendered no salvage services to the *Vandyck*, and that the award given by the learned judge of the Admiralty Court was excessive.

On the 8th March 1882 the appeal came on for hearing.

Butt, Q.C. and *G. Bruce* for the appellants.—The services in question were forced upon the *Vandyck*; she neither requested nor required them. She had two tugs in attendance upon her, and could, with their aid, have extricated herself from collision with the *Queen of Scots*. Even if offered, the services of the *Stormcock* would not have been accepted. The *Vandyck* never was in danger; but it was most material for the *Queen of Scots*, a small sailing vessel, in collision with a big steamer, to extricate herself as speedily as possible. This being so, a prudent master on board the *Vandyck* would have considered it unnecessary to employ or accept the services of the *Stormcock*. In a very similar case, *The Annapolis and The Golden Light* (1 Mar. Law Cas. O. S. 127; 5 L. T. Rep. N.S. 37; Lush. 355), where a vessel received benefit only indirectly, and there had been no acceptance on her part, it was held that she was not liable for salvage. There is no such thing as a salvage service, not founded on contract, either express or implied, and in the present case neither of these conditions exist.

Myburgh and *Walton*, for the respondents, were not called upon.

Lord Coleridge, C.J.—I am of opinion that the judgment of the court below must be affirmed. The law on the subject is to be found in *The Annapolis* (*ubi sup.*), and comes in effect to this, that, as far as services of this kind go, the right to be paid accrues if they are rendered when a vessel is so circumstanced that a prudent man would accept them. That this is the state of the law is affirmed by the Privy Council in express terms, We want no higher authority than this for ascertaining what is the law. Dr. Lushington in *The Annapolis* (Lush. 360) says as follows: "If persons are in a state of great and immediate danger, and means are offered to rescue them from that danger, and place them in a state of safety, is it not to be presumed they will accept that offer? And is it not fairly to be presumed that the *H. M. Hayes* would not have repudiated these services? Therefore I shall have no hesitation in saying that this was a salvage service, if you should hold that the *H. M. Hayes* was in immediate danger." Again at page 375, Lord Kingsdown, in the Privy Council, says: "They (their Lordships) agree with what they understand to be the opinion of the learned judge below, that it is sufficient if the circumstances of the case are such that, if an offer of service had been made, any prudent man would have accepted it. But in the present case the *H. M. Hayes* received only indirectly a benefit from the service rendered to the *Golden Light*. There was not only no acceptance of the service by her, but there was nothing done by the *Storm King* with a view to her benefit. She received benefit indirectly, as H.M.S. *Majestic*, or any other ship lying higher up the river than the *H. M. Hayes* may have received benefit." From this judgment it is obvious that to become entitled to salvage award no acceptance in point of form is required. In accordance with this judgment I am of opinion that the danger, to entitle salvors to recover remuneration, must be direct and immediate. It must not be indirect, because it would be obvious that, were it not otherwise, every ship within a certain distance which might or might not have suffered, might be considered liable to pay salvors, for averting the danger. The gentlemen who assist us are of opinion that the two ships were in great danger, and that the *Vandyck* could not have been got free by the two tugs which were assisting her. By the *Stormcock* bringing the *Queen of Scots* up to her anchors, the *Vandyck* was enabled to get clear of the *Queen of Scots*. There was, therefore, a great benefit conferred on the *Vandyck* by the *Stormcock*, and therefore, according to the law laid down in *The Annapolis* (*ubi sup.*) by Dr. Lushington, the *Stormcock* is entitled to savalge reward, and we think that the judgment of the learned judge below should be affirmed.

Brett, L.J.—I entirely agree with my Lord. Here, as we are advised that both ships were in very great danger, it cannot be doubted that what was done by the tug *Stormcock* did do a very great benefit to the *Vandyck*. It is said that the two tugs could not have cleared the *Vandyck* from the *Queen of Scots*, unless the other tug had

dragged the *Queen of Scots* up to her anchors. Mr Bruce argued that it would not have mattered to the *Vandyck* if the *Queen of Scots* had slipped her anchors. Well, but the answer is, she would not, under the circumstances, have done so. In that case we have heard that the *Vandyck* would have been ground to pieces. So far the case is like *The Annapolis* (*ubi sup.*), if the *H. M. Hayes* was in danger. What does Dr. Lushington say: "If, looking at all the circumstances in which the *H. M. Hayes* was placed with regard to the facility or non-facility of dropping her second anchor, and the probability of her anchor holding, you should be of opinion that, at the time when the *Storm King* took the *Golden Light* in tow, there was then serious and probably immediate danger of the *H. M. Hayes* being injured, either by the collision with the *Golden Light*, or by driving upon other vessels, then I shall come to the conclusion that she is bound to pay salvage." Every word, therefore, he says there applies to this case. We do not know what advice was given to Dr Lushington in that case, but the Privy Council say that they agree with him as to the law. They disagree with him on the facts, and they come to the conclusion that there was only the slight danger admitted in the pleadings. It seems to me that the law applies to this case, and that the *Vandyck* must pay because she was in serious and immediate danger, and because she received benefit from the services of the *Stormcock*. Mr. Bruce says that as soon as the *Stormcock* had taken hold of the *Queen of Scots*, and was holding her up to her anchors for her own benefit, to prevent her breaking loose and probably drifting on to the *Duchess of Argyle*, and almost certainly receiving great damage, the *Vandyck* ceased to be in danger, and became able to get clear of the *Queen of Scots* and with the aid of her two tugs take care of herself. But you must take the moment before the *Stormcock* took hold of the *Queen of Scots*. If at that moment the master of the *Vandyck* had been asked if the tug should take hold of the *Queen of Scots*, he would at once have said "Yes," if he had been a prudent man. I am of opinion, therefore, that the *Stormcock* rendered salvage services in this case to the *Vandyck*, and as no serious argument has been directed to the question of amount, with a view of showing that the award is excessive, I think that the judgment of the learned judge below should be affirmed.

Holker, L.J.—On the night in question the weather was bad, and there was a strong sea, and the *Vandyck* had drifted down upon the *Queen of Scots* and got her propeller entangled in the chain of that vessel; and a hole had been made in her, and was being every moment enlarged. The gentlemen who assist us give an opinion that the two tugs could not, by themselves, have got her out of collision. Under these circumstances, without any command or any request from the *Vandyck* the *Stormcock* drags the *Queen of Scots* up to her anchors. Now comes the question, is the law correct? I, for one, think it a most sensible law. Lord Kingsdown, when delivering judgment in the Privy Council, says that their Lordships "agree with what they understand to be the opinion of the learned judge below, that it is sufficient if the circumstances of the case are such that, if an offer of service had been made, any prudent man would have accepted it." As I am of opinion that in the present case a prudent captain of the *Vandyck* would have accepted the services of the *Stormcock*, had they been offered him, I think the judgment of the learned judge in the court below must be upheld, and the appeal dismissed with costs.

Appeal dismissed with costs.

Solicitor for the plaintiffs, *H. Thompson.*

Solicitors for the defendants, *Thorneley* and *Dismore.*

Thursday, Nov. 16, 1882.

(Before Baggallay, Brett, and Lindley, L.JJ.

Bolckow, Vaughan, and Co. *v.* Fisher and others. (*a*)

Damage to cargo—Negligence of master and crew—Practice—Interrogatories—Sufficiency of answer—Matters within knowledge of servant or agent.

In an action by the owners of cargo against the owners of ship for negligence in the navigation of the ship interrogatories were administered to the defendants, some of which inquired respecting the details of the navigation of the vessel at the time the loss occurred. The defendants refused to answer these interrogatories on the ground that they had no personal knowledge of the facts inquired about, though it was admitted that their officers and sailors, some of whom were still in their employment, possessed the necessary information.

Held, that the defendants must answer, inasmuch as a party interrogated is not excused from answering on the ground that he has no personal knowledge of the facts inquired about, if his servants or agents possess the necessary information, and it has come to their knowledge in the ordinary course of business.

The judgment of Field and Cave, JJ. reversed.

This was an action by the owners of cargo against shipowners for loss of cargo by the negligence of the servants of the defendants. The plaintiffs shipped, under a charter-party and a bill of lading, a cargo of iron on board the *Claremont*, a ship belonging to the defendants. The *Claremont* was wrecked, and the cargo and the vessel's log were lost. The plaintiffs sued the defendants, who pleaded that the loss was caused by perils excepted in the bill of lading. The plaintiffs administered (*inter alia*) the following interrogatories to the defendants:

5. At what time of the day on the 27th Jan. 1881 was Portland or Portland Bill sighted by those on board the steamship *Claremont*, and how did Portland or Portland Bill then bear, having regard to the position of the ship; What was the course on which the steamship *Claremont* was being steered when Portland or Portland Bill was first sighted on or about the 27th Jan. 1881? How far from the land was the said ship at that time? Were the Portland lighthouses, or either of them, seen or distinguished by any and what person on board the said ship, and when, on the said 27th Jan? Was not the land covered with snow? What means, if any, were taken to verify the distance of the *Claremont* from the land, or her position when Portland or Portland Bill was first sighted. What was the state of the weather at the time? State whether the weather was foggy or hazy.

14. Was the lead cast, or were any and what soundings taken, and when and where, by those on board the steamship *Claremont* after Portland or Portland Bill was sighted on the said 27th Jan., and prior to the time when the steamship *Claremont* stranded or struck? Was

(*a*) Reported by A. A. Hopkins, Esq., Barrister-at-Law.

there anything, and what, to prevent such soundings being taken? If yes, give the result of such soundings.

18. Was any, and what calculation made on the 27th Jan. 1881, and by whom, and when, after Portland or Portland Bill was sighted, of the distance run by the steamship *Claremont* from any and what point?"

The defendants made the following answer to the above interrogatories:

Neither of us, nor either of the above-named defendants, were on board the ship at any of the times referred to in the said interrogatories, and we have no personal knowledge of the matters inquired into. We do not possess the information necessary to enable us to answer the said interrogatories correctly. The matters inquired into by the said interrogatories, with the exception of such matters as can be ascertained by reference to tide tables and weather reports, can only be answered by taking, in great detail, the statements of the officers and crew who were from time to time on watch on board the said steamship during the several times of the happening of the matters inquired into, and comparing their statements and drawing inferences therefrom. We have not yet obtained full and accurate statements from the said several persons, many of whom are no longer in our employment, and some of whom we hope to obtain as witnesses at the trial; and we submit that we are not bound to answer as to our belief as to the various matters referred to in the said interrogatories, for to do so would be to disclose the details of the evidence of the witnesses for the defence, and our belief as to the same. We believe that very serious prejudice may be caused to us if we are compelled to answer these interrogatories in detail before the trial, and especially before all the proofs to be used at the trial have been prepared. We submit that the said interrogatories have been exhibited unreasonably and vexatiously, and that under the circumstances aforesaid we ought not to be called upon to give any further answers to them.

This answer was held insufficient, and a further answer being ordered, the following answers were delivered:

To the fifth interrogatory we say that we believe that Portland Bill was sighted, the ship being on a course about east by south, about 11 a.m. on the 27th Jan. 1881, bearing from the ship about north-east, and more than twelve miles distant. The exact distance is matter of judgment, and we cannot form any belief as to the distance further than as above stated from the materials now before us. The weather was hazy. As to the other matters inquired into by this interrogatory, we say that they relate to matters of detail, concerning which we have no personal knowledge, and that we cannot answer them without disclosing in detail the evidence of witnesses we intend to call at the trial.

In answer to the 14th, 15th, 16th, 17th, 18th, 19th, and 20th interrogatories, we say that we have no personal knowledge of these matters, and that it is impossible for us to answer these interrogatories without examining the officers and crew of the ship and disclosing the details of the evidence we intend to call at the trial.

These answers were also held insufficient, and a further answer to the three interrogatories above set out was ordered. The following answer was then delivered by the defendants:

By way of further answer to the said interrogatories, we say that we believe Portland Bill was sighted, the ship being on a course about east by south, about 11 a.m. on the 27th Jan. 1881, bearing from the ship about north-north-east, and more than twelve miles distant; that the weather was then hazy. Save as aforesaid we have no knowledge or information respecting the matters inquired into by the said interrogatories, save as appears by the protest dated the 1st Feb. 1881, a copy of which the plaintiffs have had produced for their inspection, and also all the documents referred to in the defendants' affidavit of discovery, filed on the 21st March 1882. We have not obtained statements of the officers or of the crew, who were from time to time in charge of the said vessel, or on watch on board during the several times of the matters inquired into, beyond what appears from the said protest and documents scheduled to the defendants' affidavit of discovery. We further say that we are not mariners, and we have no knowledge of the management or navigation of a ship at sea which would enable us to give an opinion upon any of the matters inquired into by the said interrogatories.

The plaintiffs objected that this answer was still insufficient, and applied for a further and better answer, and it was ordered by Williams, J. at chambers that a further answer should be delivered; but that order was set aside by Field and Cave, JJ., sitting as a divisional court, their Lordships being of opinion that the answer last set out was sufficient.

The plaintiffs appealed.

Edge for the appellants.—The plaintiffs can only discover by means of interrogatories what went on on board the ship before the accident, as the vessel's log was lost; they have no other means of finding out whether the defendants' servants were negligent. The defendants can easily learn what their own servants did, and are not entitled to answer that they will not ask them.

[He was stopped by the court.]

Gainsford Bruce for the defendants.—The answer is sufficient. Questions of this sort never were allowed under the Common Law Procedure Act. Before the Judicature Act a party was only required to answer to the extent of his own information, and there is nothing in the Judicature Acts or Rules to alter this principle. He cited

Phillips v. *Routh*, L. Rep. 7 C.P. 287; 26 L.T. Rep. N.S. 845;
Bechervaise v. *The Great Western Railway*, L. Rep. 6 C.P. 36; 23 L. T. Rep. N.S. 808;
Dalrymple v. *Leslie*, 8 Q.B. Div. 5; 45 L. T. Rep. N.S. 478;
Parker v. *Wells*, 18 Ch. Div. 477; 45 L. T. Rep. N.S. 517;
Benbow v. *Low*, 16 Ch. Div. 93; 44 L. T. Rep. N. S. 875;
The Minnehaha, L. Rep. 3 A. & E. 148; 3 Mar. Law. Cas. O.S. 518; 23 L. T. Rep. N.S. 747.

Baggallay, L.J.—This is an action brought by the owners of the cargo against the owners of the vessel for negligence, and in the course of the proceedings interrogatories were exhibited for the examination of the defendants; some of these interrogatories asked questions regarding the navigation of the ship at the time of the accident, as for instance at what time a particular headland was sighted, whether soundings were taken and so forth. To these interrogatories answers were given which were held not to be sufficient, further answers were given which were again held not sufficient, and the third time it was agreed by a wise arrangement between counsel that a limited number of test questions should be taken on which the question in dispute should be raised. One of the interrogatories is as follows: [His Lordship here read the question and the answer to it.] It is contended by Mr Gainsford Bruce that if this action had been brought prior to the passing of the Judicature Acts no such discovery as this could have been asked for, and that there is nothing in those Acts to alter the old practice on this point. There is no doubt that before the Judicature Acts there was a difference between the practice at Common Law and in Chancery as regards discovery from parties. The old rule in Chancery was that if a party did not plead or demur he must answer fully; but there is no doubt that the rule often operated prejudicially and in a hard way upon parties, and it has been considerably modified by the new rules made under

the Judicature Acts. So far as I am acquainted with the rules as to discovery in the Common Law Courts before the Judicature Acts, the Judicature Rules have increased the power which existed of enforcing discovery. The first rule of Order XXXI. is very general in its terms, and its generality is first modified by rule 5, which provides for the setting aside of interrogatories which have been unreasonably or vexatiously exhibited. Rule 19 also is a very important rule, and allows the court or a judge, if a party from whom discovery is sought objects to the same, and it appears that the right to the discovery sought depends upon any issue or question in dispute in the action, to reserve the question of the discovery until after the determination of such issue or question. This particularly applies to such cases as *Benbow* v. *Low* (*ubi sup.*). Now it is evident that as a general rule a shipowner has no knowledge of the nautical matters which precede the loss of his vessel, and under the old Chancery rule it is beyond all doubt that interrogatories such as those before us could be administered to the agents of the defendants, who had knowledge of the circumstances. Where an agent did an act in the course of his ordinary duty as agent, information as to the acts of that agent was often required and always allowed. The *Attorney-General* v. *Rees* (12 Beav. 50) was a case very like the present, and there the interrogatories were allowed. Of course in the case where the agent is a solicitor another question may arise and the interrogatories may be objectionable on other grounds; but in the case before us I see nothing objectionable in the interrogatories, and I am of opinion that the defendants have not sufficiently answered them. The appeal, therefore, must be allowed, and the order of Williams, J. must be restored.

Brett, L.J.—I am not prepared to retract the observations which I made at the beginning of my judgment in *Parker* v. *Wells* (18 Ch. Div. 477; 45 L. T. Rep. N. S. 517). I am still of opinion that such questions as the one at present before us are governed not exclusively by what has been the practice in Chancery, nor exclusively by what has been the practice at common law, but by the rules of the Judicature Acts. The question in this case is whether the answers to certain interrogatories administered to the defendants in the course of the case, which interrogatories are not themselves objected to, are sufficient; and the objection is that the defendants are not bound to answer, because in order to do so they must make certain inquiries of their servants or agents. It is argued that the defendants are not bound to make any such inquiries, but that it is sufficient for them to say in their answer, that they themselves were not personally present at the time the facts occurred which are being inquired about, but that their servants or agents were. Now, I think that of itself is not sufficient to excuse them from answering: it seems to me that a party interrogated is not excused from answering with regard to facts by saying that he himself was not present when the facts happened, but that his servants or agents were, if those facts were such as would be known in the ordinary course of business to his servants or agents. I think he would not be bound to answer if the facts were known only accidentally to his servants or agents, but only if they would come to their knowledge in the ordinary course of their business. I think also he would answer sufficiently if he said that although the facts were known to his servants or agents, yet they were not personally known to himself and that the agent who possessed the information was his agent no longer, and was no longer under his control; but that is not the position that is taken here; here the agent who possesses the information is the defendants' agent still, and there is no difficulty in obtaining from him that information.

Under these circumstances, the contention that the defendant is not bound to answer cannot be supported, and as this is the test on which the case has been made, by consent, to hang, therefore I think there must be further answers, subject to the rule I have indicated. Now, it is further argued that these interrogatories, if answered, would oblige the defendants to disclose their briefs; that is a figurative expression, but I take it to mean that as a rule a party can ask his opponents as to facts, but not as to his evidence of those facts; the plaintiffs here do not go beyond their rights in this respect. I agree that there is some limit to the enforcement of inquiry by means of interrogatories, if the defendants can show that in order to answer the interrogatories they will have to make inquiries which it is wholly unreasonable to ask them to make, that it will put them to unreasonable expense, or that the questions go into unreasonable detail, then I think that would be a ground for saying that they had answered sufficiently, but here the real ground of objection is that the defendants are not bound to make any inquiries, and will not make them. It is quite consistent with anything here that the defendants know who were the officers of the watch at the times inquired about, that those officers are still in their service, and may actually have been in their offices at the time when the defendants refused to answer these interrogatories, and yet the defendants maintain their right not to ask them; that contention seems to me to be wholly beyond their rights, and I am of opinion that the order of Williams, J. was right, and the Divisional Court was wrong in discharging it, and that therefore this appeal must be allowed. I wish to add that I have the gravest doubts whether these answers would not have been insisted on both in Chancery and at common law before the passing of the Judicature Acts.

Lindley, L.J.—The plaintiffs in this case are the owners of the cargo which was carried in a ship belonging to the defendants, which ship was lost. The plaintiffs brought an action for negligence against the defendants, and in the course of that action administered to them some interrogatories which the defendants declined to answer, and we have to say whether the defendants were right in their refusal. Now the way in which the case strikes me is this—it seems to me to resolve itself into the short question—can a person who is asked what he did by his servants or agents say "I do not myself know and I will not ask them?" I think it would be contrary to all principle to hold that this is so. Where a person does any acts by means of his servants and agents, and those acts aftewards become relevant in subsequent litigation, it seems to me that he does not sufficiently answer interrogatories about them by saying that he himself is ignorant,

but that his agents possess all the information; he is bound to go further and ask his servants or agents for their information on the subject. The information acquired by his servants or agents in the ordinary course of their business is to all intents and purposes his knowledge, and I think we must treat it as such. I think therefore that the order of Williams, J. at chambers was right, and that this appeal from the Divisional Court must be allowed.

Appeal allowed.

Solicitors for the appellants, *Pritchard* and *Sons*, for *Turnbull* and *Tilly*, West Hartlepool.

Solicitors for the respondents, *Parker*, *Garrett*, and *Parker*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, May 15, 1882.

(Before Sir James HANNEN, Sir R. PHILLIMORE, and Nautical Assessors.)

THE GOLDEN SEA. (*a*)

ON APPEAL FROM THE WRECK COMMISSIONER.

Appeal—Shipowner—Shipping Casualty Investigations Act 1879.

By the provisions of the Shipping Casualty Investigations Act 1879, *no right of appeal from the decision of the Wreck Commissioner is given to a shipowner, though he appear as a party at the investigation and be condemned in costs.*

The loss of a vessel which is due to improper ballast, purchased by the master, he knowing it to be largely composed of dirt, and no restriction being placed upon him by his owners as to price, is sufficient reason for the Wreck Commissioner suspending the master's certificate.

Semble, where the loss of a ship is due to improper ballast bought by the master without the knowledge or presence of the shipowner, and the shipowner has placed no restriction on the master as to price, no such blame attaches to the shipowner as will justify the Wreck Commissioner in condemning him in the costs of the Board of Trade inquiry.

THESE were two appeals on behalf of the master and managing owner respectively of the *Golden Sea*, a sailing ship of 1418 tons register, from a decision of the Wreck Commissioner, suspending the certificate of the master for three months, and condemning the managing owner in the sum of 100*l. nomine expensarum.*

The investigation was held under the provisions of the Merchant Shipping Acts at Bristol, on the 13th, 14th, and 15th Dec. 1881, before the Wreck Commissioner, assisted by nautical assessors. In answer to notices of investigation served on the master and managing owner, under Rule 5 of the Shipping Casualties Rules 1878, the master and managing owner appeared as parties to the investigation.

The material facts on which the learned commissioner founded his decision were the following: At Bristol the master of the *Golden Sea* bought ballast which was largely composed of dirt, soluble in water. The master bought the ballast on his own responsibility, none of the owners being present or interfering. The *Golden Sea* took the ballast on board, and on Oct. 4, 1881, proceeded to sea in ballast, with a crew of 23 hands, bound on a voyage to St. John's, New Brunswick. About Oct. 14 the ship met with bad weather, when she made water, which converted the ballast into mud, and thereby caused the pumps to be choked and ineffectual; and on the 20th she was abandoned by her master and crew, and foundered four hours after.

After the investigation before the commissioner, the following report of the court was sent to the Board of Trade:

The court, having carefully inquired into the circumstances of the above-mentioned shipping casualty, finds, for the reasons annexed, that the loss of the said vessel *Golden Sea* was due to the improper ballast which she took on board at Bristol; and which, having become converted into mud by the water she made, caused the pumps to be choked and the vessel to founder; but that the abandonment of the vessel when it took place was justifiable. For these wrongful acts and defaults the court suspends the certificate of Frederick Bowles, the master of the *Golden Sea*, for three months from this date, and condemns Richard George Guy, the managing owner of the said vessel, in the sum of one hundred pounds (100*l.*) *nomine expensarum.*

Dated this 15th day of Dec. 1881.

(Signed) H. C. ROTHERY, Wreck Commissioner.

We concur in the above report.

(Signed) { ROBERT HARLAND, K. METHVEN, } Assessors.

The Wreck Commissioner, in the annex appended to the report, after fully dealing with the facts in the case, which are set out in the judgment of the Court of Appeal, found the master to blame for purchasing ballast of an inferior quality. With regard to the owner, the Wreck Commissioner said as follows: "It was said by Mr Parr (counsel for the owner and master of the *Golden Sea*) that the owner having left the whole matter to the master, he was relieved of all responsibility, but that we cannot for any one moment admit. The owner cannot thus relieve himself of the responsibility which the law imposes upon him, of seeing that his vessel is sent to sea in a seaworthy condition. He knew that the vessel had cost them under 3*l.* a ton when they first sent her to sea about a year before, and that she could not, therefore, be a very high classed ship. He knew that on each of the two voyages on which he had sent her she had made a great deal of water, and had shown herself to be a very leaky vessel. He knew that after her last voyage, when it had been found necessary to throw overboard the whole of the deck cargo owing to the quantity of water which she made, she had undergone very slight repairs at Bristol. He knew, or ought to have known, the nature of this vessel's construction, and that any water getting into the vessel must pass over the ceilings to get to the pump well; that the pump sucked at fourteen inches, and that when there were sixteen inches in the well, the water would be over the ceilings; and yet he takes no steps to see that the master takes in proper ballast although he might and ought to have known that very improper ballast for a voyage across the Atlantic was frequently supplied to ships at Bristol. We think that the managing owner has been guilty of a serious dereliction of duty in this case, which has led to the loss of this vessel, and has exposed to the greatest risk the

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

lives of all on board. Under these circumstances, and seeing that this is not the first inquiry of the kind which has taken place at Bristol, in which the character of the ballast supplied to ships at this port has been fully exposed; seeing, too, that after the inquiry in the case of the *Acme* an official notice was issued by the Board of Trade, warning all shipowners and shipmasters against the ballast supplied here, we think that it is right that an example should be made, in order that both shipowners and shipmasters should know that they have no right to risk the lives of seamen by putting a quantity of 'dirty ballast' on board their vessels. We shall suspend the master's certificate for three months from this day, and shall condemn the managing owner in the sum of one hundred pounds *nomine expensarum*."

April 3 *and May* 8, 1882.—From this decision the master and managing owner appealed, and their respective appeals now came on before the President and Sir R. Phillimore.

Dr. *W. G. F. Phillimore*, for the managing owner of the *Golden Sea*.—Counsel for the Board of Trade will argue that the Shipping Casualties Investigations Act 1879, sect. 2, gives no appeal to the managing owner. The owner appeared at the inquiry and took part in the proceedings. The words in the 2nd section referred to include the right of appeal on behalf of the owner. He has been condemned in costs, and in effect been pronounced guilty of sending the ship to sea in an unseaworthy condition. The reflection on his character arising from an adverse finding against him is so serious that, it is only just, he should possess the right of appeal.

Cottingham for the master of the *Golden Sea*.—The loss of the *Golden Sea* was not due to the wrongful act or default of the master within the words of sect, 242 of the Merchant Shipping Act 1854. The loss of the vessel is to be attributed to the severe weather which the vessel met. Had it not been for the weather the master and crew would have had the time to keep the pumps clear.

Norris, Q.C. and *Dankwerts*, for the respondents, the Board of Trade, objected that the managing owner had no right of appeal, but were not called upon to argue the point. They contended that the decision of the Wreck Commissioner with respect to the master should be upheld.

Cur. adv. vult.

May 15, 1882.—The PRESIDENT (Sir James Hannen).—This is an appeal from a decision of the Wreck Commissioner, suspending the certificate of Frederick Bowles, the master of the *Golden Sea*, for three months, and condemning R. G. Guy, the managing owner of that vessel, in the sum of 100*l*. *nomine expensarum*. The learned Wreck Commissioner found that the loss of the *Golden Sea* was due to the improper ballast which she took on board at Bristol, and which, having been converted into mud by the water she made, caused the pumps to be choked and the vessel to founder. We entirely concur in this finding. The ballast was largely composed of dirt, which was liable to be washed away by the water which came into contact with it. The man who supplied it stated that it was not proper ballast for a ship without limbers, and that the common sense of the master would teach him that it was soluble in water. It was contended that this vessel had limbers, and therefore that there was no reason to suppose that water in ordinary circumstances would come in contact with the ballast; but whether there were what might technically be called limbers or not, we are of opinion that there was not sufficient security against the action of the water upon the ballast in the event of such ordinary incidents of the voyage arising, as the master was bound to contemplate and guard against. He himself says in his evidence that the pump sucked at fourteen inches, and that on the previous voyage he noticed that when there were sixteen inches of water in the well he would find water over the skin of the vessel. This would at once bring it in contact with the dirt ballast which was laid upon the skin, and the mud that then formed would be carried by the water into the pump well and would gradually choke the pumps. The Wreck Commissioner, with the concurrence of the assessors who assisted him, found that this was what in fact took place, and that the consequence was that with such ballast, with the water that there was in the vessel between the 14th and 20th Oct., when she was abandoned, it was impossible to keep the pumps clear. In this opinion we, together with our assessors, concur. The only point on which our assessors have felt any doubt is whether the gales which the vessel encountered between the 14th and 19th did not prevent the master and crew from doing more than was done to keep the pumps clear, and whether, therefore, the loss of the vessel must not be attributed to these gales. We, however, are of opinion that as the improper ballast contributed to the helpless condition in which the ship was on the 19th Oct., the master must be held responsible for that condition. It is possible that if the weather had been less severe, and the vessel had not sprung a leak, the pump well might have been kept clear; but, on the other hand, it is impossible to say that if the crew had only had to contend with ordinary water instead of water laden with dirt, they would not have been able to keep the vessel afloat. A master is not justified in proceeding on a voyage across the Atlantic with ballast on board of such a kind and so stowed as to clog the pumps in the event of bad weather, making the safety of the vessel depend on their proper action. We think that the event clearly establishes this. The master knew the character of the ballast. He bought it on his own responsibility, and no restriction was placed upon him by the owner as to the price he should pay. We have no doubt that he acted in what he thought was the interest of the owner in obtaining this cheap dirt rather than the better material which could have been obtained at a higher price, but this cannot relieve him of the responsibility for the consequences of his improper selection. We are therefore of opinion that the decision of the Wreck Commissioner as to the master was correct, and we dismiss his appeal.

With regard to the owner the case is very different. It has been our duty in the interest of the master carefully to investigate all the facts, and we feel bound to say that, so far as the case has been presented to us, we do not see any reason to impute blame to the owner. But an objection has been taken on behalf of the Board of Trade that no appeal lies from the decision of the Wreck Commissioner condemning the owner.

We feel constrained, though with great regret, to give effect to this objection. The appeal to this division is given by the Shipping Casualty Investigations Act 1879. By the 2nd section of that Act it is enacted, first, that "where an investigation into the conduct of a master, mate, or engineer, or into a shipping casualty has been held . . . . the Board of Trade may in any case, and shall" in certain cases order the cause to be reheard; secondly, that "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 has not been made, or has been refused, an appeal shall lie from the decision." We are of opinion that the clear meaning of these words is, that the decision from which an appeal is allowed is a decision with respect to the cancelling or suspension of the certificate, and not any other decision. If the reason of the enactment is considered, it confirms the view we take of the construction of the section. The decision of the Wreck Commissioner may deprive the master of the means of earning his livelihood. It was thought fit, therefore, to give the master a right of appeal. If it had been intended to give the owner a right of appeal, we cannot conceive any reason why it should be made to depend on whether the master's certificate had been dealt with, for the injury inflicted on the owner is the same, whether the master is found to blame or not. It is possible that no appeal was given to the owner because the Wreck Commissioner has only the power to express an opinion on his conduct, and has not directly the power of punishing him. But it is evident that the reflection on the character of the owner arising from an adverse finding against him is of a very serious nature. He has in fact, though not in form, been found guilty of a misdemeanour in sending a ship to sea in such an unseaworthy state that lives were likely to be thereby endangered. In addition to this, he has in effect been subject to a fine, *nomine expensarum*, of 100*l*. We think that an amendment of the law is called for, and that the right of appeal should be extended to the owner. Entertaining the opinion we have expressed, we are compelled to reject the owner's appeal, but we do so without costs.

Solicitor for the appellants, *Fielder* and *Sumner*.
Solicitor for the Board of Trade, *Murton*.

Tuesday, Nov. 7, 1882.

(Before Sir R. PHILLIMORE.)

THE LEON XIII. (*a*)

Jurisdiction—Wages — Foreign ship — Protest of consul.

In an action for wages and wrongful dismissal, brought by persons domiciled in England against a foreign ship in which they had served under articles signed in a port of the country to which the ship belonged, in which action imprisonment, hardship, and ill-treatment were alleged, the Court refused to exercise jurisdiction against the protest of the consul alleging that, by the law of the country to which the ship belonged, all disputes relating to the ship or claims against the owner or master were to be referred to and decided by the tribunals or consuls of that country.

The Nina ((3 *Mar. Law Cas. O. S.* 10, 47; 17 *L. T. Rep. N. S.* 391, 585; *L. Rep.* 2 *P. C.* 33) *followed.*

THIS was a motion on behalf of the owners of the Spanish steamer *Leon XIII.* to stay or dismiss an action brought against the *Leon XIII.* to recover wages and damages for wrongful dismissal.

It appeared that in Nov. 1881 the plaintiffs, John Wardrop, John Hodgson, and Thomas Baker, British subjects domiciled in England, were engaged by the defendants as first, second, and third engineers respectively on the *Leon XIII.*, then at the port of Liverpool, for a voyage from Liverpool to Manilla and back, and the plaintiffs accordingly joined the ship. On arriving at Barcelona the plaintiffs, having hitherto signed no articles, here signed articles of agreement in the Spanish language before the Spanish officials. On the 21st Dec. the plaintiffs were imprisoned on board the ship by the master of the *Leon XIII.* for alleged misconduct and insubordination, and were kept in confinement until the 27th March 1882, when they were discharged at Manilla, after an alleged trial by a Spanish tribunal.

On the return of the plaintiffs to England they instituted on the 24th July 1882 an action against the *Leon XIII.*, to recover their wages, and for damages for wrongful dismissal, and delivered their statements of claim.

On the 9th Oct., before any defence had been put in, the Spanish consul at Liverpool made a protest against the jurisdiction, which was filed by the defendants, and was as follows:

1. I, the undersigned, am the consul of Spain in Liverpool.

2. The above-named vessel, *Leon XIII.*, proceeded against in this action, is a Spanish ship belonging to the port of Barcelona, of which the Marquis de Campo, a Spanish subject resident in Madrid, is the sole and duly registered owner. The said vessel carries the Royal Spanish mails between Spain and Manilla and Philippine Islands, which form a portion of the Kingdom of Spain.

3. The plaintiffs in this action served on board the said vessel during the voyage in respect of which they claim in this action, under articles of agreement which are in the Spanish language, and were made and signed by them before the duly-authorised Spanish officials at Barcelona, and which constitute the form of agreement prescribed and recognised by the Spanish law. I have perused the said agreement with the signatures thereto, and the same comprise, as I am informed and verily believe, the signatures of the plaintiffs in this action.

4. The voyage mentioned in the said articles is a voyage from Barcelona to Manilla and other ports, and back to Spain and Liverpool.

5. The plaintiffs in this action have, by the terms of their agreement and by the law of Spain, submitted themselves to the provisions of the same law, by which the plaintiffs are restricted from taking proceedings against the said vessel or her owners in countries other than Spain or her colonies, or Spanish consuls, and are required to submit any dispute or claim such as that raised in this action respecting the voyage in the said articles mentioned, or against the owner of or master of the said vessel, to the Spanish authorities in Spain, or in foreign countries to the Spanish consuls.

6. English vessels enjoy these privileges in Spanish ports. The settlement of accounts and of wages, &c., amongst the members of their crews, even though there may be Spanish subjects among them, are in Spain settled by the British consuls, or by the British tribunals and courts in England or in her colonies.

7. Spain concedes even still more privileges to British vessels. All acts of neglect, misdemeanour, or crime committed on board an English vessel in Spanish waters or ports, if they do not affect the public peace, are judged by

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

the British consuls or the tribunals in England or her colonies, even though there are Spanish subjects amongst the crew compromised in the affair.

8. The engineers, John Wardrop, John Hodgson, and Thomas Baker, of the screw steamer *Leon XIII.*, were guilty of insubordination, breaking through the discipline of the ship, and wanting in the respect due to the captain and officers. For this they were tried by the competent Spanish tribunal of Manilla, the sentences passed upon them being communicated to the British consul in Manilla and to the parties interested.

9. Under the circumstances above stated, I therefore most respectfully subject that it is not within the jurisdiction of this honourable court to entertain the plaintiffs' claim; and, as consul of Spain, I consider it my duty respectfully and formally to protest against the exercise of the jurisdiction of this honourable court in or about the plaintiffs' claim in this action, because this case has been already tried by a Spanish tribunal, and as, if under similar circumstances, such a case had occurred on board of an English vessel in Spain, the Spanish courts would leave the affair entirely under the jurisdiction of the British authorities.

Signed and sealed with the official seal of this Spanish consulate in Liverpool, the 4th day of October 1882.

T. ORTUNO, Spanish Consul.

This protest was supported by affidavit, accompanied by a copy of the said articles. The articles contained no words by which the plaintiffs submitted themselves to the Spanish law.

In answer to the said protest and the affidavits of the defendants, the plaintiffs filed affidavits alleging that they had been wrongfully imprisoned and dismissed by the master of the *Leon XIII.*; that they had been guilty of no misconduct or insubordination, and were improperly deprived of their wages; that they had not by signing articles intended to submit themselves to Spanish law or any other than English law; that they were shipped in an English port; that all that happened at Manilla was that the master of the *Leon XIII.* made a statement to the Spanish authorities in Spanish, of which language the plaintiffs were ignorant: that they (the plaintiffs) had no opportunity to reply or call witnesses; and that they were then released with an intimation to the effect that they had been sufficiently punished, but without being informed for what they had been so punished. The defendants now moved the court to stay or dismiss the action with costs.

Butt, Q.C. (with him Dr. *W. Phillimore*), for the defendants in support of the motion.—The jurisdiction of the court is not disputed. The case of *The Nina* (17 L. T. Rep. N. S. 391, 585; 3 Mar. Law Cas. O. S. 10, 47; L. Rep. 2 P. C. 38) is a direct authority that it has this jurisdiction which the court will only exercise when it is of opinion that, having regard to the reasons advanced by the consul, and the answers to them offered on the part of the plaintiffs, it is fit and proper that the suit should proceed." The circumstances of the present case are not sufficiently strong to induce the court to exercise its jurisdiction. The plaintiffs, by signing articles of agreement as they did, subjected themselves to the law of Spain. Dr. Lushington, in *The Golubchick* (1 W. Rob. 143), where the plaintiffs were Spanish mariners suing a Russian ship, lays it down as a "settled doctrine of law that, when a subject of one country enters into the service of a ship belonging to the subjects of another country, he must be considered *pro hac vice* to be a subject of that country to which the vessel belongs." The plaintiffs are therefore to be considered as Spanish subjects, and their action is only to be tried in accordance with Spanish law.

J. P. Aspinall for the plaintiffs, against the motion.—In *The Nina* Lord Romilly lays down that there are circumstances which, if sufficiently strong, will induce the court to exercise its jurisdiction. The facts of the present case are very strong. The plaintiffs are domiciled in England, they shipped at an English port, they were wrongfully imprisoned and allowed no opportunity of defence when brought before the alleged tribunal at Manilla, and improperly dismissed from their positions as engineers. They can get no efficient redress elsewhere; and if forced to prosecute their claim in Spain, the expense would be great and probably prohibitory. A consul is not in a position to decide whether the plaintiffs' conduct justified their dismissal, and, should the plaintiffs succeed before the consul, the ship might never return to England, as has happened before in the case of Spanish ships. In an American case, *The St. Oloff* (2 Pet. Adm. 428), the circumstances closely resembling the present, the court exercised its jurisdiction. *The Nina* is distinguishable on the ground that there the plaintiff signed articles, containing an express provision that he would submit himself to the provisions of the commercial code of Portugal. In the present case there is no such specific submission to the laws of Spain. Before deciding whether the court should or should not entertain the suit, it is only right, seeing the allegations of the plaintiffs, that some further investigations should be made as to their truth, and that the evidence of the plaintiffs should be taken.

Butt, Q.C. in reply.—It is ridiculous to say that the case is to be tried to see if it be a fit case to be tried. It is entirely a matter for the Spanish authorities to decide whether there has been a contravention of the Spanish law.

Sir R. PHILLIMORE.—I have had some doubts in the course of the arguments that have been addressed to me, but upon the whole I do not see any substantial difference that can be taken between this case and *The Nina* and the case of *The Golubchick*. There is no doubt the ship belonged to the Spanish nation. The words of Dr. Lushington in the latter case are material: "It is, I conceive, a settled doctrine of law that, when a subject of one country enters into the service of a ship belonging to the subject of another country, he must be considered *pro hac vice* to be a subject of the country to which the vessel belongs." These plaintiffs must be taken *pro hac vice*, for the purpose of this suit, to be Spanish subjects on board a Spanish vessel under the Spanish flag. There is no doubt at all as to the propositions discussed during the argument, or that the court has power to use a discretion in the exercise of its jurisdiction. Upon the whole, without entering into the cases that have been fully considered, and the principle of law laid down in the case of *The Nina*, I am of opinion that there is no distinction between the case of *The Nina* and the present case, and I must dismiss the action.

Solicitors for the plaintiffs, *Pritchard* and *Sons*, agents for *Yates, Son* and *Stananought*, Liverpool.

Solicitors for the defendants, *Hill, Dickinson, Lightbound*, and *Dickinson*.

Friday, Feb. 17, 1882.

(Before Sir R. PHILLIMORE and Trinity Masters.)

THE KENMURE CASTLE. (*a*)

Salvage—Award—Owners — Master and crew — Apportionment.

Where, in a salvage action, the court awarded a total sum of 4000*l.*, *and there was no special danger to the master or crew, and the service was mainly towage, the Court apportioned* 3000*l. to the owners of the salving ship.*

THIS was a salvage action brought by the owners, master, and crew of the steamship *John David*, of 1807 tons gross register, belonging to the port of Antwerp, against the steamship *Kenmure Castle*, her cargo and freight.

The *Kenmure Castle*, a screw steamship of 1268 tons register, with engines of 180 horse power nominal, was, on the 14th Nov. 1881, proceeding up the Red Sea, bound on a voyage from China to London, laden with a cargo of tea, and manned with a crew of twenty-seven hands. On the same day, when about twenty miles N.W. of the island of Jebel Zuker, it was found that her crank shaft was broken, and on the morning of the 15th Nov. the Belgian steamship *John David*, which was proceeding from Bombay to London with a full cargo of cotton and wheat, came up with the *Kenmure Castle*, and, after an interview between the two masters, they both signed a memorandum to the effect that the assistance of the *John David* to tow the *Kenmure Castle* to Suez had been requested by the master of the *Kenmure Castle*, that the question as to the amount of salvage remuneration should be referred to arbitration in London, and that should the *John David* be in want of coals they were to be supplied from aboard the *Kenmure Castle* at the rate then current at Suez. The *Kenmure Castle* was then lashed alongside the *John David*, in order to facilitate the transfer of coal from the *Kenmure Castle* to the *John David*, and towage commenced and lasted for several hours, when the lashings were cast off and the *John David* began to tow ahead of the *Kenmure Castle*. On the morning of the 19th Nov. the two vessels were again lashed together, and about fifty tons of coal transferred to the *John David* after which towing ahead of the *Kenmure Castle* was resumed, and on the 23rd Nov. the two vessels came to anchor in Suez Roads. By reason of the two vessels being lashed together, the *John David* sustained damage through bumping against the *Kenmure Castle*. Throughout the towage, which lasted ten days, the weather was fine and the crew of the *John David* was exposed to no danger or risk.

The value of the *Kenmure Castle*, her cargo and freight, were taken at 75,140*l.* the value of the *John David* at 75,000*l.*

Butt, Q.C. and Dr. *W. G. F. Phillimore*, for the owners and masters of the *John David*, contended that the steam power assistance given by the *John David* entitled her ownres to large remuneration.

Nelson, for one portion of the crew of the *John David*; *Beaumont Morice*, for the other portion of the crew of the *John David*.

Myburgh, Q.C. and *Baden Powell*, for the owners of the *Kenmure Castle* and the owners of her cargo.

Sir ROBERT PHILLIMORE.—This is a salvage service, rendered by one large screw steamer to another in the Red Sea, beginning on the 15th Nov. and lasting till the 25th of that month. The vessel to which the services were rendered was the *Kenmure Castle*, a screw steamer of 1268 tons register, and 180 horse power nominal, and she was on a voyage from China to London with a cargo of tea, and was manned with a crew of twenty-seven hands. On the 14th Nov., as she was prosecuting her voyage up the Red Sea, when twenty miles N. W. of Jebel Zuker, it was found that her crank shaft was broken. She was from that moment a log upon the water, perfectly unable to do anything for herself, and requiring steam power assistance. The vessel that rendered the salvage services in this case was the *John David* belonging to the port of Antwerp. She was a screw steamship of 1807 tons gross register, and was prosecuting a voyage from Bombay to London with a full cargo of cotton and wheat. It is a curious incident that the *John David* and the *Kenmure Castle* with her cargo were of nearly equal value. Now, the towage in this case was an easy one in one sense. The weather was fine, and the vessel met with no accident in the whole course of the towage, but at the same time the court takes into consideration what would have happened if bad weather had set in. The salved vessel was in a state in which salvage assistance was necessary. If the weather had become rough, she might have drifted on the coral reefs, of which there are so many in the Red Sea. It must be remembered that the salving vessel was bound in the same direction as the vessel salved, and that there was no danger to the salvors personally. Bearing all these matters in mind, I have come to the conclusion, after consulting with the Elder Brethren, that the salvage remuneration awarded in this case should be 4000*l.*, and I apportion it as follows: 3000*l.* to the owners of the *John David*, 400*l.* to her master, and 600*l.* to her crew. With regard to the services of the owners of the *John David*, I may say that the efficiency of the steam power of their vessel was a main ingredient in the salvage service. I award one set of costs only.

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

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

(*a*) Reported by J. P. ASPINALL, and F. W. RAIKES, Esqs., Barristers-at-Law.

ADMIRALTY COURT OF THE CINQUE PORTS.

April 19 *and* 20, 1882.

(Before the JUDGE, A. Cohen, Esq., Q.C.)

THE MARIE. (*a*)

Salvage — Misconduct of salvors — Forfeiture — Diminution—Award.

Misconduct on the part of salvors, other than criminal misconduct, works a diminution, but not a total forfeiture of reward.

THIS was an action *in rem* instituted on behalf of the owners, master, and crew of the lugger *Lady Compton* of Deal, and the owners, master, and crew of the steam-tug *Lord Palmerston* of Dover,

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqs., Barristers-at-Law.

against the French brig *Marie*, her cargo and freight, to recover salvage reward for services rendered on the 26th March 1882.

On the 26th March 1882 the *Marie* was in the Downs, having lost her anchors and chains, and the wind was blowing a very heavy gale. As the *Marie* was in the neighbourhood of other vessels, those on board exhibited a signal of distress, in answer to which the *Lady Compton* went to the brig, and ten men from the *Lady Compton* boarded her. The brig was then got before the wind and, after rounding the South Foreland, the tug *Lord Palmerston* was engaged by the salvors to tow, and the brig was towed into Dover Harbour. The defence was that all the assistance requisite was the services of someone to pilot the *Marie* to Dover Roads; that it was against the wish of her master that the ten men of the *Lady Compton* assisted in the navigation of the *Marie*, but that they by superior force took possession of the *Marie*, and whilst on board her, prevented her crew from navigating the ship, which they were well able to do, and treated them with rudeness and violence.

Though the action was entered in the sum of 800*l.*, an appearance having been entered on behalf of the owners of the *Marie*, on application by the defendants, the *Marie* was released on bail in the sum of 400*l.*, and for the purpose of saving expense, and with the consent of the parties, the judge directed the action to be heard without pleadings. The *Marie*, her cargo and freight, were valued at 550*l.*

April 19.—The cause now came on for hearing before the judge.

Glyn, on behalf of the plaintiffs.—The services were meritorious salvage services, requiring much labour and risk. The weather was very bad and the *Marie* in great danger. *The Dosseitei* (10 Jur. 865), *Hartford* v. *Jones* (1 Ld. Raym. 393), and *Nicholson* v. *Chapman* (2 H. Bl. 254) are all cases in favour of the salvors.

Dr. *W. G. Phillimore* on behalf of the defendants.—The *Marie* was never in danger, and all that she required was pilotage assistance. The conduct of the salvors was violent and overbearing, and in opposition to the wishes of the master. Such misconduct deprives them of all salvage remuneration on the rulings in *The Lady Worsley* (2 Spks. 253), *The Martha* (Sw. 489), *The Dantzic Packet* (3 Hagg. 383), *The Black Boy* (3 Hagg. 386 n.), and *The Champion* (Br. & L. 69).

April 20.—The Judge (A. Cohen, Esq., Q.C.).—This is an action of salvage brought by the plaintiffs, the owners, master, and crew of the lugger *Lady Compton*, and the owners, master, and crew of the tug *Palmerston*, against the owners of the French brig *Marie*, of 108 tons register laden with a cargo of stone, and with her cargo and freight of the value of 550*l.* There are many facts in the case which are not at all in dispute. On the 26th of March last there was blowing an extremely heavy gale, and the *Marie* was in the neighbourhood of other vessels in the Downs. One anchor was slipped to avoid a collision, and then a second anchor was let go when she began to drive, and then that was also slipped. Under these circumstances, I think that the vessel was in distress and was in danger. A signal was hoisted on board the *Marie*; those on board the *Lady Compton* perceived the signal and went up to the brig, and ten men boarded the brig. The brig was got before the wind, and when they got round the South Foreland, a tug, which proved to be the *Lord Palmerston*, was hailed by the master of the lugger. An arrangement was made that the tug was to tow the brig and hold her in the roads; and it was agreed that the *Lord Palmerston* was to receive a proportion of the salvage remuneration. The tug took hold of the brig at about 10.30 and towed her until about 11.45, and then held her till the tide suited and ultimately took her into Dover Harbour. As to the facts which I have just mentioned, the evidence leaves no doubt. I am of opinion that these services rendered by the master of the lugger and the tug were salvage services, because the brig was in distress and in danger. But I am also of opinion that the services did not require much skill and labour and involved no risk at all; the services lasted but a very short time. I think that the services of ten men as salvors were by no means required; and I am of opinion that the master of the *Marie*, when he signalled, did not mean to signify more than that he wanted no other service than the services of a man who could pilot his vessel. If he had had a pilot on board all that he desired could have been done. There was no skill involved, and there was no necessity for those ten men to board this small brig, and I therefore do not think it right to award any larger amount of salvage remuneration, than it would have been the duty of the court to award, if only three men had boarded the brig. I come now to the services of the tug. The weather was not bad for the tug. She towed the vessel a short distance and held her for about two hours. The brig was not in danger.

But then it is said that all salvage remuneration in this case has been forfeited by misconduct, and that the conduct of the salvors was throughout violent, overbearing, and threatening. I believe that the evidence of the master of the brig is substantially true: that what he wanted was the service of some person who could pilot the vessel to Dover Roads, and he did not require the services of ten men to assist in the navigation of his vessel. I am, however, willing to assume that until Mr. Hodges, the agent, came on board, there was a misunderstanding between the salvors and the master of the brig. It is not quite certain what the master of the *Marie* intended to do, but I am willing to assume that he intended to go to Dover Roads, and remain there until he could get an anchor and chain, and that what was done up to the time when Mr. Hodges came on board, was not done contrary to the intentions of the master of the brig; but I am also of opinion, that after Mr. Hodges came on board the master and crew of the lugger did act in a violent and overbearing manner towards the master of the brig, and insisted on having their own way. It appears to me that a court of justice ought to express some kind of censure on ten men who boarded a small French brig, and who undoubtedly intended to have their own way, whatever the captain of that small vessel might do. On the other hand, I am also of opinion, that that misconduct is not such criminal misconduct as should lead to an entire forfeiture of salvage reward. In the case of *The Atlas* (1 Mar. Law Cas. O. S. 168, 235; 6 L. T. Rep. N. S. 737; Lush. 518) it was held in substance that wilful or criminal misconduct of salvors may work a forfeiture of salvage,

but that mere misconduct other than criminal, even though it occasions loss, will only work a diminution of reward. I cannot say that there was in this case wilful or criminal misconduct within the meaning of the judgment of *The Atlas* (*ubi sup.*). I entertain considerable doubt whether the master of the brig has sustained any pecuniary loss at all by what was done by the salvors, and see no reason to believe that the salvors did that which occasioned any extra expenditure. On the whole, taking into consideration the opinion of Dr. Lushington in the case of *The Atlas*, it is impossible to hold that what was done by the salvors worked a forfeiture of the whole of their remuneration; but I think that the plaintiffs' improper conduct during part of the time when they were rendering salvage services should lead the court to diminish the amount to which otherwise they would have been entitled, and I therefore award to the plaintiffs 70*l.* and costs. I observe with regret, no tender has been made in this case, but I do hope that in future, tenders will be made in cases where the services are similar to those in the present case. I also think it would be very desirable that in cases where tenders have been made, plaintiffs should consider the advisability of naming a sum, which, having regard to the amount of the tender, they would be prepared to receive in discharge of their claim. In this way many of these cases might be settled out of court, and thereby great expense saved to all parties, especially as the court would give costs with reference to the amounts so put forward by the respective parties as a proper salvage remuneration.

Solicitors for the plaintiffs, *Mowll* and *Mowll*.
Solicitors for the defendants, *Lowless* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 14 *and* 16, 1883.

(Before Jessel, M.R., Lindley and Bowen, L.JJ.)

Peruvian Guano Company Limited *v.* Bockwoldt. (*a*)

Double litigation—Concurrent actions in English and foreign courts—Vexatious litigation—Election—Difference in subject-matter.

Although a plaintiff may be put to his election between two actions, where one is in an English court and the other abroad, on the ground of vexation, the court will not consider the double litigation vexatious, where there are substantial reasons to induce the plaintiff to sue in both countries, as where he can get a judgment in each action, but execution is more easily obtained in one country than in the other.

The court will not put a plaintiff, who is suing a defendant in two courts, to his election—not between the two actions, but—between so much of the subject-matter of one action as is embraced in the other.

An action was brought in England against D. and Co. for delivery of seven cargoes, for damages, and for an injunction against disposing of the cargoes, which were claimed by the plaintiffs, and were then in ships in British waters. Afterwards the ships and cargoes were removed to French ports and the cargoes were sold by D. and Co. An action having been commenced in a French court by the same plaintiffs against D. and Co. for six of the cargoes:

Held (affirming the decision of Bacon, V.C.), that the double proceedings were not vexatious, and therefore the plaintiffs ought not be put to their election whether they would proceed in the French or the English action.

On the 6th May 1880 the plaintiffs, an English company commenced the present action against Bockwoldt and others, who were captains of certain ships called the *Charles Dickens*, the *Woodfield*, the *True Briton*, the *British Princess*, the *Chancellor*, the *North Star*, and the *Struan*, for an injunction to restrain them from parting with certain cargoes of guano.

On the 8th June 1880 Messrs. Dreyfus Brothers and Co., merchants, of London and Paris, were made defendants in the place of the captains, who were dismissed from the action; and in the statement of claim it was alleged that the bills of lading had been improperly indorsed and delivered to Dreyfus Brothers and Co. (who had notice at the time that the cargoes belonged to the plaintiffs), and that they had intercepted the ships and induced the captains to deliver the cargoes abroad, instead of in London, the port at which the plaintiffs had ordered the captains to discharge. The plaintiffs claimed delivery to them of the cargoes, damages, and, if necessary, an injunction against the disposal of the cargoes, and a receiver.

On the 2nd Dec. 1882 Dreyfus Brothers and Co. were served with a citation to appear before the Tribunal of Commerce of the Department of the Seine, sitting at Paris, in an action by the plaintiffs for restoration of the cargoes of all the above ships, except the *Struan*, or payment of their value, and for damages.

At the commencement of the English action the ships were in British waters, but they had since been removed to ports in France, and it was admitted that all the cargoes had since been sold and the proceeds received by Dreyfus Brothers and Co.

On the 8th Dec. 1882 Dreyfus Brothers and Co. moved in the English action, on notice, before Bacon, V.C., that the plaintiffs might be ordered, within seven days after the order to be made on the motion, to elect whether they would proceed with the action so far as the same related to the ships *Charles Dickens*, *Woodfield*, *True Briton*, *British Princess*, *Chancellor*, and *North Star*, or the French action brought by them in respect of the cargoes of the said ships.

Ingle Joyce for the defendants.—Where a plaintiff had commenced two actions, one in England and one abroad, and had written to say that he elected to go on with the foreign action, the court stayed the English action:

Pieters v. *Thompson*, G. Coop. 294.

Millar, Q.C. and *H. B. Buckley* for the plaintiffs.—There is no such letter here as in *Pieters* v. *Thompson*; and there is no precedent for the order asked:

Cox v. *Mitchell*, 1 L. T. Rep. N. S. 8; 7 C. B. N. S. 58;

McHenry v. *Lewis*, 46 L. T. Rep. N. S. 567; 21 Ch. Div

(*a*) Reported by Frank Evans, Esq., Barrister-at-Law.

This action is not now for goods, but only for damages.

Joyce in reply.—There must have been a previous order to elect in *Pieters* v. *Thompson*. (*a*) He also cited

The Mali Ivo, 3 Mar. Law Cas. O. S. 244; 20 L. T. Rep. N. S. 681; L. Rep. 2 Adm. and Ecc. 356;
The Catterina Chiazzare, 3 Asp. Mar. Law Cas. 170; 34 L. T. Rep. N. S. 588; 1 P. Div. 368.

(*a*) It appears, on searching at the Record Office, that on the 6th May 1815 (and therefore before the date of the decision reported G. Coop. 294) the following order was made by Lord Eldon, L.C. in *Pieters* v. *Thompson*: "Forasmuch as this court was this present day informed by Mr Heys, of counsel for the defendants, that the plaintiffs have exhibited their bill in this court against the defendants, the defendants have put in their answer thereto, and yet the plaintiffs prosecute (*sic*) the defendants both at law and in certain courts for one and the same matters, whereby the defendants are doubly vexed. It is ordered that the plaintiffs, their clerk in court and attorney-at-law having notice hereof, do, within eight days after such notice, make their election in which court they will proceed, and, if the plaintiffs shall elect to proceed in this court, then the plaintiffs are hereby stayed by injunction from proceeding in the courts abroad; but if the plaintiffs shall elect to proceed in the courts abroad, or in default of such election by the time aforesaid, then the plaintiffs' bill is from henceforth to stand dismissed out of this court as against the defendants, with costs to be taxed by Mr. Harvey, one of the masters of this court." The answer sworn on the 6th June 1815, in the same suit, was, so far as material, as follows: "And these defendants further say that since the complainants have filed their said bill against these defendants, and since these defendants have been served with process to appear and answer thereto, these defendants have received two several letters addressed to these defendants from two different persons, who are the agents of these defendants, at Amsterdam, in Holland, one of which letters purports to bear date at Amsterdam the 28th Feb. 1815, and to be signed by a person resident there called Rine Berenbrook, and is of the tenor or to the purport and effect following. ("Dear Sirs,—I am sorry to inform you that on the 25th inst., Messrs. Siedes Pieters and Sons of Learwarden [the plaintiffs] put in an arrest on all things as well on goods as money belonging to you, and at that period in my hands, as also those of Mr N. Bouvy. This arrest was authorised by the court on their having produced an abstract of your account with them showing a balance in their favour of 2138*l.* 3*s.* 8*d.* I have been extremely astonished by seeing this situation, and I hope you will find means to settle things in one way or the other, for as long as this arrest continues I have the hands entirely bound, and we cannot do anything together without compromising your safety); and the other of which letters purports also to bear date at Amsterdam, March 3, 1815, and to be signed by a person resident there called Nicholas Bouvy, and part of which, relating to the matter aforesaid, is of the tenor or to the purport and effect following videlicit: (This is to inform you that Siedes Pieters and Sons, at Learwarden, seized under my hands and directions much money and all what is belonging to you in order to find therein the payment of 2138*l.* 3*s.* 8*d.* sterling, which they say you are in debt. As the seizure must be prosecuted within eight days, I shall be obliged to make preparations for my defence. All the expenses will be at your charge); as in and by the said two letters, relation being thereunto had when produced, will appear. These defendants believe that the information contained in such two letters aforesaid is true, and that the complainants have, by process of the courts in Holland aforesaid, attached or seized goods and effects in that country which belong to and are the property of these defendants, having since been served with notice of such proceedings, and informed by their said agents at Amsterdam that the said complainants, the said Siedes Pieters and Gorben Pieters, were continuing the prosecution thereof, and these defendants have heard, and believe it to be true, that the complainants threaten and intend to attach other goods and effects which belong to and are the property of these defendants, and these defendants say that, by the means aforesaid, these defendants are and will be doubly vexed and harrassed by the complainants, who have filed their said bill in this honourable court against these defendants, and are proceeding in the court of justice in Holland aforesaid, against the goods and effects of these defendants, for the same matter, and these defendants deny all and all manner of unlawful combination and confederacy wherewith they are charged," &c.

Bacon, V.C.—It seems to be agreed that there is no authority on which the court can rely, one way or the other, for this application. The suit in this country alleges that the defendants Messrs. Dreyfus Brothers and Co. are in possession of cargoes to which the plaintiffs lay claim, and the claim asks that the defendants may be ordered to deliver those cargoes, or in the alternative to pay damages; but in the alternative only. Then it turns out that, although the defendants may be in possession of these goods, the goods are not in this country, so there can be no application *in rem* in this country relating to the cargoes, and no appointment of a receiver, or any other proceeding by which the court can take into its possession the thing in dispute. Then the plaintiffs, after instituting the suit in this country, find that they can have the relief which by the first prayer of the claim they desire to have, namely, the actual possession by delivery of the things in question, by proceedings in France. I cannot say that the suits are directly alike, or that there is no distinction in the relief asked. Suppose that in France the present plaintiffs should fail altogether, they may have a case in this country, and may obtain a decree in their favour. Suppose the plaintiffs should succeed in France, the effect of that upon the suit will be, that, whenever it comes on for hearing, the defendants will say, "You have had that which you sought to have." Therefore, it seems to me that natural justice does not interfere, and does not furnish me with any ground upon which I can proceed.

Certainly *Pieters* v. *Thompson* does not govern this case, because, although Mr. Ingle Joyce says it must be assumed that there was an order to elect, I can find no trace of it in the judgment as reported in Sir George Cooper's Reports. On the contrary, the application was to compel the plaintiffs to do that which they had promised to do. Proceedings were going on in the Dutch court, and the defendants said, "Do not let us be harassed here when we are called upon to defend the same case in the Dutch court." All that the court then required was, that the defendants should prove that the plaintiffs had elected, and that proof being furnished they stopped the proceedings. I do not think that case has any application to the case now presented. Nor has *Cox* v. *Mitchell* any application, for the courts of common law—I think I may say notoriously—had no jurisdiction on the subject of election; certainly in that case the court was not asked to exercise any such jurisdiction. There the party applying had been held to bail under the statute 1 & 2 Vict. c. 110. The proceeding, therefore, was most directly *in personam*. He asked to be released from bail because there was a suit pending in another country. One of the answers given in the judgment was, that it might suit the defendant's purpose very well to escape from the country in which the first suit was pending, and come here, thinking he was safe, and set the

plaintiff at defiance. The Court of Common Pleas, therefore, acted on the only authority it possessed, the statutory authority. The man had been held to bail under circumstances which justified that proceeding, and the court declined to interfere with it. The judges referred very pointedly to the circumstance that nobody in the courts of common law ever heard of an application to stay such proceedings as had been there taken; but there is not a trace of any judgment on the subject of election. The cases before Sir Robert Phillimore, which are entitled to be treated no doubt with great respect, apply much more pointedly to this application; but they are cases of collision between ships, and the jurisdiction was over the ships themselves. I cannot say, in the present state of the authorities, which are imperfect, or on the natural justice of the case, that the plaintiffs, who claim the actual possession of these goods (which they cannot get in this country), are debarred from making the same claim in another country where it may be that they can obtain that possession, simply because they have asked here for possession, and in case they fail to obtain it, for damages. I can make no such order as Mr. Ingle Joyce asks for. The costs of the motion will be—costs in the action.

The defendants appealed.

Davey, Q.C. and *Ingle Joyce* for the appellants.—The defendants are doubly vexed by the proceedings in this country and in France, and the onus lies on those who doubly vex to show that the double vexation should not be stayed. [Jessel, M.R. referred to *McHenry* v. *Lewis*, 47 L. T. Rep. N. S. 549.] That was not a case of election; it was a motion to stay proceedings. In *Pieters* v. *Thompson* (G. Coop. 294) the plaintiffs, when suing both in England and in a Dutch court, were put to their election. That does not appear in the report, and Bacon, V.C. could not be persuaded that any order had been made in that case, but a search has since been made and the record of the order has been found. In *Dawkins* v. *Simonetti* (44 L. T. Rep. N. S. 266) Jessel, M.R. said: "Under the old practice, when a man was sued in equity as well as at law, the plaintiff was put to his election; and it was just the same when one suit was in an English court and the other suit in a foreign court. The practice was to move to stay the proceedings either in the foreign court or in the English court. In dealing with such a question the court prevented double vexation, but it always exercised a discretion." There being jurisdiction, this is clearly a case in which it ought to be exercised; there is the same subject-matter except that there is no action in France as to one of the cargoes. [Jessel, M.R.—Why were the French proceedings commenced? *Millar*, Q.C. for the plaintiffs.—The plaintiffs had a double remedy; they could sue both in England and France, and they thought that by suing in France they would get relief sooner, execution being more easily obtained. In *McHenry* v. *Lewis* it was held that whenever there was a different remedy in a foreign country the double proceedings were not vexatious. The property in this case is in France. Jessel, M.R.—How can we do the defendants any good by staying the action as to all the cargoes but one? I never saw a case of election between proceedings as to some part of the common subject-matter.] The defendants ought not to be put to the expense of calling witnesses in both proceedings as to the cargoes which are common to both actions. It is no objection that the subject-matter of the two actions is not exactly the same. In some cases under the old practice the plaintiff might be allowed to make a special election. As to proceeding for part in equity, and for another part at law, though this was not allowed as of course (Seton on Decrees, 3rd edit. 949), in one case leave was given to proceed at law to get judgment, and in the Court of Chancery for discovery of assets:

Barker v. *Dumaresque*, 2 Atk. 119; Barn. C. 277.

The plaintiffs ought not to be allowed to vex us by availing themselves of a technicality; they have omitted to make the French proceedings apply to all the cargoes in order to escape the general rule as to the subject-matter of both proceedings being the same. The court can, however, retain the foreign action if it thinks the continuance of the proceedings abroad will vex the defendants:

Wedderburn v. *Wedderburn*, 4 M. & C. 596.

[Jessel, M.R.—Is there any case in which, the subject-matter not being all the same in both actions, the court has ordered election as to part which is the same?] There is a form of order in Seton on Decrees (3rd edit. 948), "that the plaintiff be at liberty to make his election to proceed at law for &c. and in this court for &c.; and let the plaintiff's bill as to &c. (so far as he proceeds at law) stand dismissed." [Jessel, M.R.—The blanks probably refer to procedure, not subject-matter.] They also referred to

Anon., 1 Vern. 104;
Order in Chancery of 9th May 1839, 1 Beav. ix.;
United States of America v. *Prioleau*. (*a*)

Millar, Q.C., on behalf of the plaintiffs, offered to let the French proceedings stand over till judgment in the English action had been obtained, on the defendants undertaking to enter judgment in France according to the result of the English action; but the defendants' counsel stated that they had no authority to consent.

(*a*) In this case, which is not reported, Wood, V.C., on the 24th July 1867, made an order (on motion by some of the defendants), which appears in the Entry Book of Decrees and Orders, 1867, B. fo. 1966, as follows:

Upon motion this day made unto this court by counsel for the defendants, Charles Kuhn Prioleau, Theodore Dehon Wagner, James Thomas Welsman, and William Lee Trenholm, who alleged that the plaintiffs, having exhibited their bill against the defendants, the defendants (above named) put in their answers thereto, and yet the plaintiffs prosecute the said defendants in the Equity Circuit Court of the United States of America for the district of South Carolina, for one and the same matters, whereby the said defendants are doubly vexed, it is ordered that the plaintiffs, their solicitors and agents having notice hereof, do within eight days after such notice make their election in which court they will proceed, whereupon such further order shall be made as shall be just.

An *ex parte* order to elect had been moved for, but refused. A similar order to that above was made by Wood, V.C. on the 9th Nov. 1867 in *United States of America* v. *Wagner*. The plaintiff did not elect, and on the 3rd Dec. an *ex parte* motion was made for an order calling on the plaintiffs to comply with the order to elect, or that in default the bill might be dismissed. Wood, V.C., however, declined to make the order except on notice to the plaintiffs. On the 4th Dec. the plaintiffs served notices of motion to discharge both the orders; but the motions stood over, both actions were compromised, and no argument or decision took place.

Millar, Q.C. and *H. B. Buckley*, for the plaintiffs, were not called upon.

Jessel, M. R.—It is very important in these cases that the court should, in stopping an action, clearly see that it does not do injustice. Of course a man brings an action at the peril of having to pay the costs if the action does not succeed; and, as a general rule, that is sufficient to protect defendants from ill-founded actions. There is another protection, which is, that where the action is vexatious it may be stayed. Now, it may be vexatious on many grounds. It may be so utterly absurd that the court can see it cannot possibly succeed, but is brought only for annoyance; and then there is jurisdiction to stay the action. That is pure vexation. Or it may be vexatious in this way: the plaintiff, not intending to annoy or harass the defendant, but thinking he will get some fanciful advantage, sues him at the same time in two courts within the same jurisdiction—in two of the Queen's courts. That is vexatious, because, whatever the intention of the plaintiff may be, he cannot get any benefit in that way, and the defendant is harassed by two suits. Now, similar, although not perhaps the same, considerations apply in a case where the actions are brought, one in a foreign country and one in this country. I have recently had to consider the general rule in *McHenry* v. *Lewis*, and I went so fully into it there that I do not think it is necessary for me to discuss it further. It may be put shortly, as regards this case, in this way: It is not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. He has the right to bring an action, and if there are substantial reasons to induce him to bring the two actions, why should we deprive him of that right? Seeking to obtain a substantial advantage is not vexatious. It is very unpleasant no doubt to be sued twice, and it is unpleasant to many people to be sued once; but still that does not make it vexatious, in a legal sense, where the plaintiff seeks to get a real substantial advantage. You cannot accuse him of vexation because he endeavours to obtain an advantage. As I put it in *McHenry* v. *Lewis*, and as I put it now, suppose in the one action a plaintiff could get execution against defendants residing and having large property in France, but not resident or having any property in England, that might be a good reason for suing them in France, and that might seem a reason for doing so when the action here was so advanced that the plaintiffs saw their way to a verdict here. The plaintiff says, "I shall get a verdict and judgment, but that will not avail me unless I can get execution. I can use the verdict and judgment in my French action; now I am here I will go on with my English action, and I will use the verdict in the French action with the view of getting judgment and execution." All that seems to be not unreasonable, and certainly not vexatious. That, I think, is one ground for declining to interfere.

But there is another ground. The plaintiffs say: "Our action in France does not relate to the same number of ships as the action in England does." Mr. Joyce said that this was a device to enable the plaintiffs to escape the rule; but, if it does enable them to escape it, it is a very good device. Take this case: The plaintiff has a right to six cargoes under the same title. The defendant has a place of business in England, and a place of business in France. The plaintiff brings an action for three cargoes in England, and three in France. Why may he not do so? He may think he may get sufficient to satisfy a judgment in England for three cargoes, but not for six. You could not stop the action in either country on the ground that the six cargoes were sued for under the same title. He, in fact, brings two actions for two different subject-matters. Does it make any difference that the action is for six in one country and one in the other? It appears to me that it cannot be so. He has a right to sue in each country for a different subject-matter. That brings me to the substance of the case. Supposing the plaintiffs specially elected, that is, elected to go on with the French action for six cargoes, and in England for one, which is what is suggested on the part of the defendant they might do, what good would that be to anybody? The two actions would still go on, and the only consequence suggested is, that a witness or two less would possibly—not necessarily—be required, in carrying on the litigation. That is not a ground for putting a man to his election. I asked whether any precedent could be found for putting a man to his election, simply because he might have to call a witness or two less in one of the two actions; and I need not say that such precedent could be produced. All the election rules proceed on the doctrine that you can put a final stop to at least one action, and this appears to be quite a novel attempt—and an attempt which is not founded in reason, or in sufficient reason—to stop one action on the ground that you can have a little less evidence in the other action, or try it in a less expensive mode. It seems to me that this, also, is a reason for our not interfering; and again the fact that there is no precedent for such an interference, is also a reason for this court not interfering. I think that if a precedent could have been found for an election, not between two actions, but between so much of the subject-matter of one action as is embraced in another, it would have been discovered a long time ago. The absence of precedent is not immaterial; and, considering the danger of depriving men of the opportunity of asserting rights which they are asserting *bonâ fide*, unless it is clear that the assertion of them is vexatious, I think we ought to be slow to extend the doctrine beyond the case to which our attention has been called. For these reasons I think the appeal should be dismissed with costs.

Lindley, L.J.—I am of the same opinion. The principles by which the court ought to be guided on applications of this nature were fully examined and discussed in the case of *McHenry* v. *Lewis*, which came before the Court of Appeal just before Christmas. I have had an opportunity of reading the judgments in that case as reported in the Law Times—The case is not yet in the Law Reports—and it appears to me to be a most valuable decision. As I understand it, it comes to this—that where the plaintiff is suing in this country and abroad in respect of the same matter, and a motion is made to compel the plaintiff to elect, it is not sufficient for the person so moving to point out that two proceedings are being taken with reference to the same matter; but he must go a step further and show that there is vexation in point of fact; that is to say, that there

is no necessity for harassing the defendant by double litigation. And I think the court ought to be very cautious before it interferes in cases of that kind, and for this reason: the court here is not, and cannot be, alive to all the advantages which a person may have in suing in the foreign court. It does not know with accuracy, unless the matter is called to its attention, what reasons there may be for preferring one court to another. If in any case it is established that there is nothing except vexatious litigation, there is ample jurisdiction in this court to make the order asked; but we ought to take care what we are about, and I am bound to say that in this case I do not see my way at all to make such an order as is asked. In other words, I do not see that there is such vexation in this case as to justify our interference. Apart from the fact that the action in France is for six cargoes, whereas the action here is for seven (a circumstance to which I will allude presently), I can see, after Mr. Millar's explanation, that there are certainly reasons—not vexatious reasons, not trumpery reasons, not harassing reasons—for bringing that action in France. The fact that the action in France is for six cargoes, and that the action here is for seven, satisfies me that it would be wrong to stop that action, because both actions must go on together, unless we see our way to stop one action altogether. I do not see how we are to do that. If we were to interfere in the way it is suggested that we ought to interfere, we should not accomplish what ought to be the result of interference, that is to say, stopping one action out of two; both actions would still go on. I think the appeal ought to be dismissed with costs.

Bowen, L.J.—I am of the same opinion; I think the law is clear enough. The difficulties which arise are the difficulties of administering or applying that law. When a plaintiff comes into an English court he asks for justice, and the court is bound not to refuse him justice; the court is bound, therefore, not to refuse to hear his case, and not to put him under difficulties in the way of having the action brought to a conclusion. Of course, that rule does not mean that a plaintiff, under the pretence of asking for justice, is to do that which is oppressive and vexatious; and the courts have always at law—with which I am more familar—and no doubt in equity also, interfered to prevent a plaintiff, under the colour of asking for justice, doing injustice for the sake of harassing others. Therefore, when what the plaintiff has been asking for has been frivolous, or sometimes when he has asked for it in a way which necessarily involves injustice, the courts have interfered. It seems to me that the principle upon which a plaintiff is put to his election, when it is suggested that a double action is being pursued, is a branch of the general law. The reason for putting him to his election and compelling him to decide whether he will go on with one action or the other is, that the prosecution of either one or the other appears to the court to be necessarily attended with injustice—that although one of the actions is right, two of them necessarily must be wroug. It is really a branch of the general law.

How are we to apply that doctrine to foreign courts? It seems to me we have no sort of right, moral or legal, to take away from a plaintiff any real chance he may have of an advantage. If there is a fair possibility that he may have an advantage, and a just advantage, by prosecuting a suit in two countries, why should this court interfere and deprive him of it? I think this case has illustrated, during its progress, the necessity of being very careful in exercising, on behalf of the court, this sort of prerogative power of interfering with actions. It turned out in the course of the argument that the French suit had this advantage, that the plaintiffs could, or thought they could, get execution more easily—and, as far as I know, they can get execution more successfully, and with more completeness—against the defendants than if they rested only on the English action. The defendants are so conscious, although they are applying to us to stay this action and to put the plaintiffs to their election, that there is something in that, that they cannot undertake (without referring to their clients abroad) to cure the blot, and put the procedure here on exactly the same footing with regard to the remedy as the procedure in France. That seems to me to illustrate exactly what was said by the court in the case of *McHenry* v. *Lewis*, and what I think ought always to be in the minds of the court in interfering with these actions. Persons who sue in different countries very often have reasons for doing so, which are not easily explained. There may be many reasons why a French action at the same time as an English action may not be vexatious or unreasonable. One obvious reason has been pointed out to us, and that is the facility of execution in the French action. I am myself very much impressed by the fact that, although we have had two cases within the last two months on this point, neither in the one case nor in the other have we had anything like a precedent shown us, or anything which approaches a light or easy interference on the part of the court in this country, to prevent double litigation, where the double litigation has no other element of oppression than this, that an action is going on simultaneously abroad.

Appeal dismissed with costs.

Solicitor for the appellants, *Clements*.

Solicitors for the plaintiffs, *C.* and *S. Harrison* and *Co.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, May 23, 1882.

(Before Sir R. Phillimore.)

The Mary. (a)

Collision—Practice—Counter-claim—Reference — Costs.

In cases of collision, where both vessels are held to blame, and the amount of damage is referred to the registrar, and less than one-fourth is struck off the respective claim and counter-claim of the plaintiffs and the defendants, the costs of substantiating the plaintiff's claim at the reference will be borne by the defendants, and the costs of substantiating the defendants' counter-claim at the reference by the plaintiffs.

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

THIS was a motion by the defendants, in an action *in rem* for damage by collision, for an order that the plaintiffs should pay the defendants' costs of the reference to the registrar in respect of the counter-claim, together with the costs of the motion.

The action was brought by the owners of the steamship *Violet* against the steamship *Mary* to recover damages in respect of a collision between the two vessels. The defendants counter-claimed in respect of the damage occasioned in the collision to their steamship, the *Mary*.

On the 3rd May 1881 the action was tried, and both ships were held to blame, the defendants being condemned in half of the plaintiffs' claim and the plaintiff in half of the defendants' counter-claim. A reference was ordered to the registrar and merchants to assess the amount of the damages. The plaintiffs' claim amounted to 944*l.* 15*s.* 9*d.*, the defendants' claim amounted to 5711*l.* 14*s.*, and on the 14th April 1882 the registrar assessed the cost of the damage occasioned to the *Violet* by the collision at 775*l.*13*s.*3*d.* and the cost of the damage occasioned to the *Mary* by the collision at 4672*l.* 8*s.* 5*d.*, but made no recommendation as to the costs of the reference.

The defendants in the action now moved the judge to order the defendants' costs of the reference in respect of the counter-claim together with the costs of the motion to be paid by the plaintiffs.

Bucknill, on behalf of the defendants, in support of the motion.—In accordance with the rulings in *The Consett* (4 Asp. Mar. Law Cas. 230; 42 L. T. Rep. N. S. 33; 5 P. Div. 77) and in *The Savernake* (5 P. Div. 166), (*a*) this motion should be granted. *The Consett* decided that the costs of the reference as to damages in damage actions do not follow the costs of the action, but are in the discretion of the judge as the costs of a fresh litigation. It has been the practice of this court, where less than one-fourth of the claim or counter-claim has been struck off, that the parties bringing in the claim and counter-claim respectively should have their costs incidental to the reference. As the defendants are ready to pay the costs of the plaintiffs in respect of the reference, the plaintiffs should be ordered to pay the defendants' costs.

W. G. F. Phillimore, on behalf of the plaintiffs, against the motion.—*The Consett* is distinguishable from the present case because there the registrar (see 5 P. Div. 229) (*b*) disallowed

---

(*a*) *Tuesday, April* 13, 1880.

THE SAVERNAKE.

THIS was a damage action, instituted by the owners of the steamship *Vesuvius* against the steamship *Savernake*. The defendants counter-claimed in respect of damage sustained by the *Savernake* in the same collision.

The action was tried on the 24th July 1876, and both vessels being held to blame, the owners of both vessels were ordered to pay half the costs of the damages sustained by the other, and a reference was ordered to the registrar to assess the amount of the damage.

In May 1877 all proceedings in the action in the Admiralty Division were stayed until the decision in a limitation of liability action commenced in Nov. 1876, in the Chancery Division by the owners of the *Savernake*.

June 25.—Judgment was given in this latter action in favour of the owners of the *Savernake*, and by an order of the 19th July 1877 it was declared that the owners of the *Vesuvius* were entitled to prove for half their loss and damage minus half the loss and damage sustained by the owners of the *Savernake*. The same order directed that inquiries as to the distribution of the fund paid in court, viz., 5212*l.* 3*s.* 5*d.*, being 8*l.* per ton of the *Savernake* plus interest, should stand over until the registrar of the Admiralty Division had assessed the amount of the damages sustained by the owners of the *Vesuvius*.

On the 22nd March 1879, the Court of Appeal reversed that portion of the above order which related to what the owners of the *Vesuvius* were entitled to prove for, and held that the owners of the *Vesuvius* were entitled to prove against the fund in court for one-half of the loss or damage sustained by the *Vesuvius*, directing that such amount should be found by the Admiralty registrar.

July 22, 1879.—The owners of the *Savernake* brought in their counter-claim for 957*l.* 6*s.*, and on the 10th Nov. 1879, no tender having been made by the owners of the *Vesuvius*, the registrar issued his report, finding the sum of 848*l.* 13*s.* with interest due to the owners of the *Savernake*, but made no recommendation as to how the costs of the reference should be borne.

April 13, 1880.—The owners of the *Savernake* moved to condemn the owners of the *Vesuvius* in the costs of the reference.

Myburgh in support of the motion.—The costs of the reference are within the discretion of the court. No tender has been made by the owners of the *Vesuvius*, and the amount of the counter-claim has been but slightly reduced by the registrar: (*The Consett*, 4 Asp. Mar. Law Cas. 230; 42 L. T. Rep. N. S. 33; L. Rep. 5 P. D. 77.)

E. C. Clarkson, contra.

Sir R. PHILLIMORE.—In this case I must follow the decision of the Court of Appeal in the case of *The Consett* (*ubi sup.*). The application will therefore be granted, and with costs.

Solicitors for owners of the *Vesuvius*, *Pritchard* and *Sons*.

Solicitors for owners of the *Savernake*, *T. Cooper* and *Co.*—ED.

(*b*) *June* 7 *and* 17, 1880.

THE CONSETT.

THIS was an appeal by the plaintiffs in a damage action from a portion of the registrar's report as to the loss sustained by the defendants by reason of a collision between the steamship *Consett* and the ship *Jessore*.

Jan. 25, 1878.—The action was heard, and the court found both vessels to blame and ordered a reference to the registrar and merchants to assess the amount of damages respectively sustained by both vessels. The registrar assessed the moiety of the loss sustained by the defendants at 1493*l.* 4*s.* The two last items numbered 22 and 23 in the defendants' claim, were in respect of consequential loss sustained by the *Consett* by the cancellation of a charter-party, which was necessitated by the above-mentioned collision, and these items the report had allowed. Upon this portion of the report, the plaintiffs now appealed. (The first twenty-one items of damage named and allowed in the report were in respect of the actual damage sustained by reason of the collision.)

June 7.—The petition on objection was heard.

Butt, Q.C. and *Myburgh* for the plaintiffs.

Cohen Q.C. and *Phillimore* for the defendants.

Sir ROBERT PHILLIMORE.—This is an appeal from the registrar assisted by merchants. The whole history of the case is very clearly set forth in the report. The appeal is not made upon the report generally, but only on one portion of it; and the question before me is, whether the loss of a beneficial charter is to be considered in estimating the damages which the counter-claimants sustained in the case. The collision took place on Oct. 10, 1877, and the *Jessore* sank. The *Consett*, at the time of the collision was under charter-party, whereby she was to proceed in ballast to Montreal to load a cargo of grain, and the freight was to be at the rate of 8*s.* 9*d.* per quarter, if the ship had to call for orders on the homeward voyage at either Queenstown, Falmouth, or Plymouth; and at a rate of 8*s.* 3*d.* per quarter if ordered direct from her port of loading to her port of discharge. The vessel left Antwerp on Oct. 8, between three and four o'clock in the morning, and came

nearly half the defendants' claim. And it is further submitted that in *The Consett* the court expressly refrained from laying down any general rule as to the costs of references to the registrar. The question how the costs of the reference are to be borne, where the plaintiffs and defendants have had more than three-fourths of their respective claims allowed, is not controlled by any reported decision. The plaintiffs ought not to be condemned in the costs of this motion.

Sir ROBERT PHILLIMORE.—In this case I must follow the decision of the Court of Appeal in the case of *The Consett*, and applying the principle laid down in that decision, I think that the portion of the motion which asks for payment of the costs of the reference, so far as regards the counter-claim, is a proper application, and that it ought to be granted. With respect to the remainder of the motion, I think in the circumstances that the plaintiffs and defendants should each bear their own costs on this application before me to-day. There will, therefore, be no order as to the costs of the motion.

W. G. F. Phillimore.—It is presumed that the costs of the reference, so far as regards the claim of the plaintiffs, will be borne by the defendants. They admit that they are willing to pay such costs.

Sir ROBERT PHILLIMORE.—Yes; the plaintiffs ought to have the costs of substantiating their claim.

Solicitors for the plaintiffs, *Pritchard* and *Sons*. Solicitor for the defendants, *W. Batham*.

Thursday, May 18, 1882.

(Before the Right Hon. the PRESIDENT, and Sir R. J. PHILLIMORE, assisted by Nautical Assessors.)

THE FAMENOTH. (*a*)

APPEAL UNDER THE SHIPPING CASUALTIES ACT 1879.

Board of Trade inquiry—Certificate of master—Merchant Shipping Act 1854, *s.* 242—*Appeal—Evidence—Costs.*

An error of judgment committed by a master of a ship, under circumstances of great difficulty and danger, is not such a wrongful act or default, within the meaning of the Merchant Shipping Act 1854, *s.* 242, *as will justify the suspension of his certificate, even where there has been loss of life.*

An application for leave to adduce further evidence on appeal from the Wreck Commissioner should be made prior to the hearing of the appeal.

Costs of an appeal will be given against the Board of Trade if the decision of the appellate court is against the Board of Trade, and also costs of further evidence produced by the party proceeded against, if such evidence is produced merely to confirm the evidence given at the hearing below.

THIS was an appeal from a decision of the Wreck Commissioner by which he had, on the 28th April 1882, found William Cowan Auld, the master of the *Famenoth*, in default for loss of life occasioned by his not sending assistance to his boat's crew, under the circumstances hereinafter stated, and suspended his certificate for three months.

An inquiry was held at Westminster, on the

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

---

into collision with the *Jessore*; on the 11th she came to Queenstown, where she remained. Great hopes were entertained that she would be able to proceed on her voyage in the middle of October, but, as the repairs were going on, it was found that she could not be got ready until the end of a fortnight, and that she would not be able to proceed before Nov. 1. It was calculated that she would not be able to arrive at Montreal and be able to take a fresh cargo before Nov. 25. And it appears from the evidence before the registrar, which it is not necessary to go into at length, as it has been fully discussed by counsel on both sides, that owing to the ice in the St. Lawrence, the usual time in the autumn up to which ships can leave Montreal is Nov. 25, but that there is a risk that ships leaving even on that date will be stopped by the ice. The owners of the *Consett* found themselves, they contend, in this position, that they were obliged to give up and abandon the charter. It was admitted that it was a profitable charter to them. It is not disputed by the appellants in this case, that demurrage or damages for detention might be awarded for the whole time the repairs were being done; but it has been said that the loss of a beneficial charter in this case is not a claim that can be dealt with under the head of damages; and it has been very fairly admitted that if the damage claimed under this head, or a legitimate portion of such damages, can be recovered, then the figures mentioned in the report are correct. The questions then arise, was it reasonably possible for the *Consett* to have performed her outward voyage under the charter? and if it was reasonably possible for her to have performed such voyage, had she any right to abandon her charter and oblige the appellants to pay the loss sustained? It is not contended that, if it was reasonably possible for her to have performed her charter, the damage for the loss of the charter could rightly be claimed. Now, the registrar and merchants have come to the conclusion that the risk of the *Consett* being unable to reach Montreal so as to sail on her homeward voyage before the St. Lawrence had been rendered unnavigable by ice, was such as it was not prudent to incur, and that the profit of a beneficial charter-party being lost was damage for which the appellants were liable. It is really a question of evidence whether it has been on the whole established that it was reasonably possible for the *Consett* to have performed the charter. I am of opinion that the evidence has established that it was not reasonably possible for her to do so; and if this proposition is established, the consequence must follow that the loss which the defendants have sustained by reason of the loss of a beneficial charter in this case must be included in the category of damages. I must therefore confirm the report and dismiss the appeal with costs.

June 17.—The defendants now moved the court to condemn the owners of the *Jessore* in the costs of and incident to substantiating the defendants' counter-claim before the registrar. The defendants claimed 2523*l.* 8*s.* 9*d.*; the registrar allowed 1493*l.* 4*s.*

W. G. F. Phillimore, for the defendants, in support of the motion.—The ordinary rule, condemning claimants in costs who have had a third of their claim struck off, does not apply to this case. The point of law raised before the registrar and on appeal was in both cases decided in favour of the defendants.

Myburgh for the plaintiffs.—The fact that a legal question has been decided against the plaintiffs at the reference does not oust the ordinary rule as to costs, where the registrar has disallowed nearly one-half of the defendants' claim: (*The Empress Eugene*, Lush. 138.)

Sir R. PHILLIMORE.—I am of opinion that the proper order to make in this case is, that the defendants, the owners of the *Consett*, shall have the cost of proving those items of their claim which are marked 1 to 21 (in the respect of the actual damage) in the schedule appended to the report of the registrar, and that each party shall pay a moiety of the reference fees. As to the residue of the costs of the reference and the costs in the action, each party must bear the share of such costs incurred by him. I make this decision in the peculiar circumstances of the cases.

Solicitors: for the plaintiffs, *Gregory, Rowcliffes*, and *Rawles*; for the defendants, *T. Cooper* and *Co.*—ED.

27th and 28th April 1882, before H. C. Rothery, Esq., Wreck Commissioner, assisted by nautical assessors, into the circumstances attending the stranding of the sailing ship *Famenoth*, of Aberdeen, on the Pan Sand, off Whitstable, on the 27th March 1882, when five lives were lost. The facts of the case were, that the *Famenoth* left London on the 26th March, with passengers on board, bound for Otago, in tow of the steam-tug *Benachie*, and in charge of a duly licensed Trinity House pilot. On the 27th March, the wind blowing with great violence from the N.N.W., the *Famenoth* was driven on to the Pan Sand, off Whitstable, and remained there hard and fast aground. The master of the *Famenoth*, considering his position one of great peril, proceeded to transfer the passengers on board to the tug *Benachie*. The gig of the *Famenoth*, having transferred one boat's load to the *Benachie*, then went adrift, and notwithstanding the efforts of her crew, she was carried away by the force of the wind and sea, and the five hands in her were lost. At this time there were two tugs in attendance on the *Famenoth*, and a third was fast coming up; but no assistance was rendered to the gig, though an attempt to do so was made by the *Benachie*.

The report furnished by the Wreck Commissioner to the Board of Trade was as follows:

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 her having been kept on a S.S.E. course for too long a time, instead of being laid on an E.S.E. course immediately after passing the West Girdler Buoy, heading for the Prince's Channel, and that the blame for the vessel having gone ashore rests with Edward John Taylor, the pilot who was in charge of her at the time, but was subsequently drowned.

The court is further of opinion that William Cowan Auld, the master of the *Famenoth*, is to blame for having kept the three steam-tugs, the *Benachie*, *Daring*, and *Victoria* in attendance on the vessel, instead of sending one of them off to the assistance of the five men who had gone adrift in the *Famenoth's* boat, the vessel herself being in no immediate danger, whereas the five men were in imminent risk of losing their lives.

For this wrongful act and default the court suspends the certificate of the said William Cowan Auld for three months.

The court is not asked to make any order as to costs.

Dated this 28th day of April 1882.

(Signed) H. C. ROTHERY, Wreck Commissioner.

We concur in the above report.

(Signed) BENJN. S. PICKARD, GEO. WM. WARD, R. WILSON, } Assessors.

With reference to the fourteenth question asked by the Board of Trade, viz.: "Whether, after the gig left the *Benachie*, the master of the *Famenoth* did or omitted any act the doing or omission of which conduced to the loss of the gig and those in her?" the Wreck Commissioner, in the annex appended to the report, after fully discussing the circumstances attending the loss of the gig, spoke as follows:

The whole responsibility, in our opinion, for the loss of the lives of these five men rests with the master of the *Famenoth*. He had two steamers, the *Benachie* and the *Daring*, alongside of him, and the *Victoria* was fast coming up; all the female passengers and children had been transferred to the *Benachie* and the *Daring*; his vessel was in no immediate danger; whereas he must have known, if he had thought of it, that the occupants of the boat would be in very great danger. As soon, therefore, as the *Benachie* had got back to him, he ought to have sent her to pick up the boat before it could reach the sands, over which it was no doubt driven, and where these unfortunate men in all probability perished; and for not having done so we think he is very greatly to blame.

I think that I have now answered all the questions which we have been asked, though not exactly in the order in which they have been put to us; and the last point which we have to decide is whether we are to accede to the application of the learned counsel for the Board of Trade that we should deal with this master's certificate. The master stated that it had never occurred to him to send the steam-tug after them, but in the opinion of the assessors it ought to have occurred to him. This is not a mere error of judgment; it is an act of negligence which has resulted in the loss of five valuable lives; and under these circumstances the assessors think that they would not be doing their duty unless they marked their sense of the master's conduct by suspending his certificate, and notwithstanding the very high character which we are told his owners are prepared to give him, and the time during which he is said to have been in their service, we think that we cannot do less than suspend his certificate for three months from this day. The court was not asked to make any order as to costs.

From this decision the master of the *Famenoth* appealed on the ground that the judgment of the Wreck Commissioner was wrong in finding that he had been guilty of negligence in not ordering the *Benachie* to follow the gig of the *Famenoth* and in suspending his certificate, because the evidence before the court did not justify the finding of any wrongful act or default on his part.

May 8.—Dr. *Phillimore*, on behalf of the master, moved the court (composed of Sir J. Hannen and Sir Robert J. Phillimore) for leave to produce further evidence on the hearing of the appeal.—As it was not until the actual hearing of the case that the appellant first became aware that the Board of Trade made charges against him in respect of his conduct, after the *Famenoth* had taken the ground, the appellant had failed to bring certain evidence on that point. He now desires to adduce the evidence of two passengers on board the *Famenoth* to justify his conduct in relation to the loss of the gig.

Israel Davis, on behalf of the Board of Trade, *contra*.

THE PRESIDENT (Sir J. Hannen).—We have decided to give the appellant leave to produce, on the hearing of the appeal, the further evidence which he has asked to be allowed to bring before us, but it must be understood that it will be a question for consideration hereafter how the costs should be borne. We think that it is right that the application for leave to give further evidence should have been made now rather than at the hearing of the appeal.

May 15.—The appeal now came on for hearing before the court (the President and Sir Robert Phillimore, assisted by Trinity Masters).

The *Admiralty Advocate* (Dr. Deane, Q.C.) and Dr. *W. G. F. Phillimore* appeared for the appellant.

Israel Davis appeared for the Board of Trade.

In accordance with the permission of the court as to the production of fresh evidence on behalf of the master, two passengers on board the *Famenoth*, who had been standing by the master when the boat drifted away, gave evidence confirming the truth of the statement of the master as to a conversation between him and the master of one of the tugs. The judgment contains, so far as is

material, the fresh evidence and the result of the evidence given below.

The PRESIDENT (Sir James Hannen). — This is an appeal from a decision of the Wreck Commissioner, by which he found W. Cowan Auld, the master of the *Famenoth*, to blame for keeping three steam-tugs in attendance on his vessel, instead of sending one of them to the assistance of five men who had gone adrift in the *Famenoth's* boat, "the vessel herself being in no immediate danger, whereas the five men were in imminent risk of losing their lives." The master's certificate was suspended for three months. The *Famenoth*, of the port of Aberdeen, was on the 27th March last being towed down the river from the Nore by a tug called the *Benachie*. She had a crew of twenty-four hands, all told, and more than twenty passengers on board. She was in charge of a duly licensed Trinity pilot named Taylor. A violent gale from the north-west having come on, the *Famenoth* was driven broadside on the Pan Sand. The blame for this has been found to rest with the pilot, who was afterwards drowned. What occurred after the vessel struck is clearly stated in the Wreck Commissioner's report in the following passage: "As soon as it was seen that the vessel was hard and fast, the captain of the *Famenoth* began to take measures to provide for the safety of his passengers, and with this view orders were given to get out the starboard lifeboat, but before this could be done a sea struck her and stove her in, upon which orders were given to get out the gig, which was done, and the second and third mates, one able and one ordinary seaman, having got in, some six or seven of the female passengers and children were put into her. Taylor, the pilot, also got into her, but apparently without any orders from the captain. The boat then pushed off, and having got alongside the *Benachie*, which was lying off at a short distance to leeward, a rope was thrown to her, and all the passengers were then transferred to the *Benachie*. The master of the *Benachie* then hailed the men in the boat to take a turn round one of the thwarts of the boat, saying that he would tow them back to the ship; and shortly afterwards, thinking that the boat was fast, the master of the *Benachie* gave orders to go ahead. Unfortunately, however, the rope in some way or other slipped, and the boat went adrift, and she began to drift towards the sand; on seeing which the master of the *Benachie* at once backed astern until he was in ten feet of water, when, fearing to get his vessel aground, he put her ahead again; but the boat herself, notwithstanding the efforts of her crew to pull her to windward so as to regain the ship, was carried by the force of the wind and sea over the sand, and when last seen they were on the other side of the sand, but were still pulling to windward. The *Benachie* then returned to the *Famenoth*, but in the meantime another steam-tug, called the *Daring*, had come up, and the remainder of the female passengers having been put into the damaged lifeboat, they were sent off and taken on board the *Daring*. When, however, the *Benachie* came alongside, the captain of the *Famenoth* told the master of the *Benachie* to pass his tow rope on board, and a third tug, the *Victoria*, having come up, all three passed their tow ropes to the *Famenoth*, and began to tow. Up to this time the vessel was making no water, but they had hardly been towing for more than five minutes, when it was reported that she was filling fast, upon which the captain ordered them to cease, and the tow rope was slipped. The *Benachie* was then ordered to come alongside to take off the remainder of the passengers and crew. This she succeeded in doing, but not without considerable difficulty, at the same time smashing her sponson; and between one and two o'clock all hands had left the *Famenoth* and gone on board the *Benachie*."

On these facts eighteen questions were put by the Board of Trade. The only one which it is necessary to consider is the fourteenth: "Whether, after the gig left the *Benachie*, the master of the *Famenoth* did or omitted any act, the doing or omission of which conduced to the loss of the gig or those in her?" On this point the Wreck Commissioner's judgment is as follows: "But then the question arises, ought not some effort to have been made to follow the boat and pick her up? When the *Benachie* ceased following the boat over the sand she returned to the *Famenoth*; but in the meantime the *Daring* had come up, and the master of the *Famenoth* then desired them to pass their tow ropes on board, which they did, as did also the steam-tug *Victoria*, which came up shortly afterwards, and all these steam-tugs then began to tow the vessel, but had to leave off a few minutes afterwards owing to the *Famenoth* filling with water. During all this time the boat was, no doubt, being driven before the gale, notwithstanding all the efforts of her crew to keep her to windward. Now it certainly does appear to us that either the *Benachie* or one of the other steamers should have been sent round the sand to look after the boat and pick her up; for at this time all the female passengers and children had been safely transferred, part of them to the *Benachie*, part to the *Daring*; the *Famenoth* had two steam-tugs in attendance upon her, and a third was fast coming up, and the vessel herself was in no immediate danger. With the wind and tide as they then were, one of these steam-tugs could have run round to the south of the Pan Sand in a few minutes, and without any risk to herself or to those on board her; and had she been sent off at once, she would, in all probability, have picked up the boat long before it had reached the sands, and have rescued the men in her; and to us it is inconceivable why this was not done." The decision of the Wreck Commissioner rests upon these two propositions, that the master of the *Famenoth* kept the tugs in attendance instead of sending one of them after the boat, and that his vessel was in no immediate danger.

It appears from the evidence that when the boat was seen to be adrift, the master of the *Famenoth* signalled to the master of the *Benachie* to go after her, which he did; but before he could reach the boat the tug herself touched the ground. The boat continued to drive through the breakers over the sand into the open water beyond. The *Benachie*, finding that she could not follow the gig, returned towards the *Famenoth* to pick up another boat load of passengers, who were being embarked in the damaged lifeboat of the *Famenoth*; but as another tug, the *Daring*, had just arrived, it became unnecessary for the *Benachie* to take any passengers on board. The captain of the *Famenoth*, who had been engaged in getting the rest of the women and children into the lifeboat, while the *Benachie* was going

after the gig, upon the tug returning, asked the captain why he had not gone to the gig? and he stated that he had gone as far as the draught of water would allow him, and this was the fact. This evidence of the captain, given before the questions affecting him were put by the Board of Trade, is confirmed by two witnesses who have been called before us. They say that the master of the *Famenoth* said, "Can't you do anything more for that boat?" The answer was that he could not go any farther after her. It has been observed of these witnesses that they fix the time of this incident later by the clock than the return of the *Benachie* from following the gig, but one of them expressly says that it was at that time, and we have no doubt that this is correct. In any case it confirms the inference we draw from the evidence of the captain of the *Benachie* that he was not prevented from going round the sand by the orders of the master of the *Famenoth*, but that it did not occur to him that it might be of use. Up to this point, therefore, no blame attaches either to the captain of the *Benachie* or of the *Famenoth*. But it is said that the captain of the *Famenoth* ought, at once, to have sent the *Benachie* round the sand, and that instead of doing so, he detained the tug to attend on him, and the Wreck Commissioner finds that no blame attaches to the captain of the tug, because he was bound to obey the orders from the *Famenoth*. But the captain of the tug does not excuse himself on this ground. He was asked, "Finding that the boat had driven across the sands, ought you not to have run down the channel by the North Tongue or round the sand a little farther to meet this boat driving down the channel and picked her up? A. Yes, it might have been done.—Q. If you had gone round you would have caught the gig before she would have been driven on to the Margate Sands, would you not? A. I do not say that.—Q. Did it not occur to you that it was a proper thing to do? A. No, or I should certainly have done it." The mode of getting round the sand by the channel by the North Tongue, suggested in this question, would have been useless, if adopted, for it would have taken the tug a course of many miles to get round. But it has, with more reason, been argued that the tug might have gone round by the western end of the Pan Sand. This, we are informed by our assessors, would have taken the tug a course of about three miles to bring her to the tail of the sand on the track of the gig. But whatever course it would have been possible to take, the answer of the tug master is distinct, that, if it had occurred to him that it was the proper thing to go round the sand, he would certainly have done so. This clearly shows that he did not feel restrained by any orders of the *Famenoth* from going after the gig. But, in fact, it did not occur to him to suggest to the master of the *Famenoth* that he could, by going round the sand, have a chance of overtaking the gig.

The question then arises whether there was culpable negligence on the part of the master of the *Famenoth* in not ordering the *Benachie* to go round the sand. It was clear that when his immediate anxiety as to the gig was relieved by seeing her on the other side of the sand, he turned his attention to saving the rest of the women and children. It does not appear, and there is no reason to suppose, that he had any special knowledge of the sands and the channels around them. He had lost the pilot, who was in the gig; and the deep sea pilot, who was on board did not suggest that the tug could go round the sand, and, as we have seen, the master of the *Benachie* did not suggest it. It is true, that by looking at the chart, we can now see a course that might have been taken round the sand, but we think that it cannot be imputed to the captain as culpable negligence that he did not see at the time that such a course might have been followed with a chance of success. We are of opinion that the master of the *Famenoth* did not recklessly detain the tug, knowing that it could have usefully followed the gig, but that not knowing that she could do so, he employed her with the two other tugs, in an endeavour to get his vessel off the sand. It is not disputed that this was a proper course for him to take, apart from the question of the propriety of his conduct with reference to the gig. It is unnecessary to refer more in detail to the non-employment of the *Daring* and the *Victoria* to look for the gig. If any one of the three tugs ought to have been sent, it would have been best to send the *Benachie*, as the masters of the other tugs did not know that the gig had gone adrift. But further, we are of opinion that the *Famenoth* was, and all on board her were, in immediate danger. That the captain of the *Famenoth* thought so is shown by his transferring the passengers into the tugs; but it is proved that it was blowing a hurricane at the time, and the vessel was being fast embedded in the sand. We are advised, and without such advice we should have thought it manifest, that the *Famenoth* and all on board her were in great and imminent peril, and, in fact, within a few minutes after the tugs began to tow the *Famenoth* was found to be filling fast. In such circumstances no one could predict what would happen to her. The fact that the *Famenoth* was afterwards got off, can make no difference in our consideration of the position in which her captain was at the time. He could have no assurance that the vessel and all on board her would not be lost, if he had not availed himself of the help of the tugs which he had at hand. We ought to add that our assessors are of the opinion, in which we concur, that in the circumstances the utmost that can be said against the behaviour of the captain of the *Famenoth* is that it manifested an error of judgment at a moment of great difficulty and danger, but that it did not amount to any act of culpable negligence. We, therefore, think that the judgment was erroneous and must be reversed.

Dr. *Deane*, Q.C.—As the costs of the appeal are in the discretion of the court and the appellant has been found guilty of no misconduct, it is submitted that the Board of Trade should bear such costs. The right of the appellant to costs is in accordance with the usual rule. In *The Arizona* (4 Asp. Mar. Law Cas. 269; 42 L. T. Rep. N. S. 405; L. Rep. 5 Prob. Div. 123; 49 L. J. 54, Prob.), where the court reversed the decision of the Wreck Commissioner suspending a master's certificate, the Board of Trade were ordered to pay the costs of the appeal.

Israel Davis.—The court has hitherto stated that which party should bear the costs incidental to the admission of fresh evidence on the hearing of the appeal, would be a question for considera-

tion. This evidence was adduced by the appellant and the Board of Trade ought not to bear these costs.

The PRESIDENT.—Undoubtedly the court intimated at the time that, while admitting additional evidence, it would depend upon the effect of that evidence whether or not the costs would be given to either of the parties. That is to say, if the ultimate decision of the case had turned upon the additional evidence, then undoubtedly, it would have been a reason for not allowing the costs, although the appeal was successful; but in this case the additional evidence was only relied upon for the purpose of confirming the inference which we draw from the original evidence. The learned counsel for the Board of Trade has spoken of a direction, that the Board of Trade should pay the costs of the appeal, as being unfair to the court below, which had not the additional evidence before it. It must be remembered that it is a course which the law allows when, instead of a simple appeal, it permits a re-hearing, which is the case here; therefore, in no proper sense of the word, can it be said to be unfair. The object of all tribunals is to arrive at the truth and justice of the case before them, and that must be, in some cases attained by receiving additional evidence. We see no reason for saying that this evidence was kept back. The charge against the captain was only developed when all the evidence had been given. The two witnesses who have been called before us, are not shown to have been present at the hearing before the Wreck Commissioner; I do not think there was any suggestion that they were present. They were not seafaring people, but it turns out that they happened to be standing by the captain at the time when the boat drifted away, and they were able to confirm, by their evidence, the truth of the statement which the captain himself had made. We, therefore, think that there is no reason why the usual rule should be departed from in this case. It has been mentioned that we have not only in the case which immediately preceded this, *The Golden Sea* (47 L. T. Rep. N. S. 579; 5 Asp. Mar. Law Cas. 23; 7 P. Div. 194), but in other cases, given the Board of Trade the costs when it has succeeded; we must apply the same rule in favour of the appellant when the Board of Trade is unsuccessful.

Solicitors for the appellant, *Lowless* and *Co.*
Solicitor for Board of Trade, *Murton.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

May 9 and 10, 1882.

(Present: The Right Hons. Sir ROBERT J. PHILLIMORE, Sir BARNES PEACOCK, Sir ROBERT P. COLLIER, and Sir ARTHUR HOBHOUSE.)

THE HOCHUNG—THE LAPWING.

CHINA MERCHANTS' STEAM NAVIGATION COMPANY *v.* W. L. BIGNOLD, AND CROSS APPEAL. (*a*)

ON APPEAL FROM THE SUPREME COURT OF CHINA AND JAPAN.

Collision—Effect of infringement of regulations for preventing collision—Lights—Apportionment of damage—Merchant Shipping Act 1873 (36 & 37 *Vict. c.* 85), *s.* 17—*Pleading—Variance—Secundum allegata et probata.*

Where two vessels are damaged by collision, for which both are to blame, one for wrongful navigation, and the other for a breach of the regulations for preventing collision at sea, it not being shown that such breach could not possibly have contributed to the collision, the damages are to be divided between the parties, according to the Admiralty rule.

The rule that parties are only entitled to recover secundum allegata et probata is complied with in a cause of collision if one material allegation of negligence be proved, even if all others fail.

THESE were cross appeals from two decisions of the Supreme Court of China and Japan at Shanghai, sitting as a Vice-Admiralty Court (*a*)

(*a*) Reported by J. P. ASPINALL, and F. W. RAIKES, Esqrs., Barristers-at-Law.

(*a*) The Vice-Admiralty jurisdiction of the Supreme Court for China and Japan was conferred upon it by the China and Japan Order in Council, dated March 9, 1865. This order was made under the provisions of the Act for the better government of Her Majesty's subjects resorting to China 1843 (6 & 7 Vict. c. 80) and of the Foreign Jurisdiction Act 1843 (6 & 7 Vict. c. 94). The above court exercises the jurisdiction of a Vice-Admiralty Court within China and Japan, and for vessels and persons coming to and within China and Japan. By a subsequent Order in Council, the China and Japan Order in Council, Aug. 14, 1878, which established in Japan a court styled Her Britannic Majesty's Court for Japan, the Vice-Admiralty jurisdiction possessed by the Supreme Court for China and Japan was extended to the Court for Japan. This last-mentioned Order in Council directs that any proceedings taken in China or Japan against one of Her Majesty's vessels, or the officer commanding the same as such, shall be taken only in the Supreme Court or in the Court for Japan, under their respective Vice-Admiralty jurisdiction.

On the subject of the jurisdiction, practice, and rules of Vice-Admiralty Courts, see vol. 1, pp. 477, 481, notes, where the Vice-Admiralty Courts then existing are set out.

A commission was issued on March 27, 1867, to the Lords Commissioners of the Admiralty, empowering them to appoint a vice-admiral, judge, and other officers for a Court of Vice-Admiralty in the Straits Settlements, and accordingly a vice-admiral and a judge were appointed in the same year. Prior to this date Admiralty jurisdiction had been conferred by Letters Patent dated Feb. 25, 1837 (cf. 6 & 7 Will. 4, c. 53) upon the Court of Judicature at Prince of Wales Island, Singapore, and Malacca, now included in the Straits Settlements (cf. 29 & 30 Vict. c. 115), and on Nov. 19, 1823, a commission was issued under the Great Seal, authorising a Vice-Admiralty Court to be established at Prince of Wales Island, but apparently no appointment was ever made. Sect. 17 of the Vice-Admiralty Courts Act Amendment Act 1867 enacts that, "The Vice-Admiralty Court Act 1863 shall, together with this Act, apply to any Vice-Admiralty Court now established, or hereafter to be established in the Straits Settlements."

By an Order in Council, dated Jan. 9, 1863, Vice-Admiralty jurisdiction, excepting jurisdiction relating to prize or booty, was conferred upon the Supreme Consular Court for Constantinople; and by the same order the Provincial Consular Courts within the Ottoman Dominions were granted like jurisdiction within their respective districts. Dec. 4, 1875, a commission, empowering the Lords of the Admiralty to create a vice-admiral and a Vice-Admiralty Court for the Colony of Fiji was substituted for a prior commission of July 1, 1875, empowering the Lords of the Admiralty to appoint a vice-admiral and Vice-Admiralty Court for the "Fiji Islands." Under the latter commission a judge was appointed in 1876. Dec. 28, 1877, a commission was issued empowering the Lords of the Admiralty to appoint a Vice-Admiralty Court in the colony of the Leeward Islands in lieu of the several Vice-Admiralty Courts then existing in the islands of Antigua, Dominica, Montserrat, Nevis, Saint Christopher, and Tortola; and on Feb. 1, 1878, a commission was issued by the Admiralty

dated the 28th July 1881, dismissing two cross petitions, filed respectively by the China Merchants' Steam Navigation Company and by Commander William Scott, in cross causes of damage. On the 21st July 1881 Commander Scott died, and on the following day an order was made substituting the first lieutenant of the *Lapwing*, Walter Bignold, in the commander's place, Bignold being duly authorised to be so substituted, and consenting. (*a*)

The cross causes of damage were brought in respect of a collision which took place between the Chinese Merchant Steamship *Hochung* and H.M. gun vessel *Lapwing* on the 17th April 1881 off Ocksen Island, in the Formosa Channel. The petition of the China Merchant Steam Navigation Company alleged (so far as is material) as follows:

4. About a quarter past 10 o'clock, p.m., of the 17th April 1881, the *Hochung* was about eleven or twelve miles E. by N. of Ocksen Island, steering N.E. ¼ E., magnetic, and with no sail set, was proceeding under steam at the rate of about nine knots an hour. The *Hochung* had all her regulation lights properly fixed and burning brightly, and a good look-out was kept on board of her.

5. In those circumstances a dark object was seen ahead on the starboard bow of the *Hochung*, and distant between one and two miles.

6. The said dark object was carefully examined and watched by the captain of the *Hochung*, who was in charge of the watch, and no light of any kind was visible.

7. In order to give a wider berth to the said dark object, the helm of the *Hochung* was put slightly to starboard.

8. A short time afterwards, the said dark object being then nearer, the masts and yards of a ship came into view, and smoke was also seen; but no lights being then visible, it was believed to be a steamer northward bound, and almost immediately afterwards, the masts appearing to open out very rapidly, a red light suddenly came into view, whereupon the helm of the *Hochung* was put hard-a-starboard, and the whistle was blown twice: but the steamer, which afterwards proved to be Her Brittanic Majesty's gun vessel *Lapwing*, came rapidly on towards the *Hochung*, and her stem having passed the *Hochung's* foremast, and a collision being imminent, the helm of the *Hochung* was put hard-a-port, as a last chance of avoiding the collision or easing the blow: but the *Lapwing* ran stem on into the *Hochung*, a little abaft the engine-room, striking her with great force, and the *Hochung* sank shortly afterwards.

The petition of Commander William George Scott was (so far as material) as follows:

2. The wind at this time (9.40 p.m. on the 17th April 1881), was northerly and light, the weather was overcast and gloomy, with occasional lightning and showers, and the *Lapwing* was steering S.W. by W. ½ W., and proceeding at a rate of about five to five and a half knots per hour, with her bow and stem lights properly exhibited, and a good look-out.

3. While on the aforesaid course, and about 10.15 to 10.20 p.m., the bright light of a steamship not under sail, which proved to be the screw steamship *Hochung*, belonging to the above-named defendants, was seen at a distance of three or four miles from the *Lapwing*, between one and two points on the latter's port bow.

4. Shortly afterwards the red light of the *Hochung* came into view under her bright light, and the course of the *Lapwing* was continued without alteration, until the two vessels had approached each other to a distance of between half to one mile, the *Hochung* then bearing about one point on the *Lapwing's* port bow.

5. At this time the helm of the *Lapwing* was ported gradually until she headed W.N.W., and then steadied, the red and white lights of the *Hochung* at the time of such steadying, bearing about five points on the port bow of the *Lapwing*.

6. Very shortly after this, the *Hochung*, which was proceeding at a rapid rate, altered her course; first, all three of her lights came into sight, then the red light was shut out, and only her green and white lights remained in view, and she continued her course right across the bows of the *Lapwing* at great speed. As soon as the alteration in the helm of the *Hochung* was perceived by the officer of the watch on board the *Lapwing*, the helm of the latter was put hard-a-port, the starboard engine was reversed full speed astern, and the port engine driven full speed ahead.

7. Finding that the *Hochung* continued to stand across the *Lapwing's* bows, the port engine of the *Lapwing* was also reversed full speed astern, but no change was made in her helm. When the *Hochung* was distant from the *Lapwing*, from about fifty to seventy yards, she apparently steadied her helm, and the two vessels came into collision, the *Hochung* passing in front of the *Lapwing* very rapidly, first carrying away the jib boom bowsprit and head gear of the *Lapwing*, and then the starboard quarter of the *Hochung* came into violent collision with the port side of the stem of the *Lapwing*, doing considerable damage to the latter vessel.

The cross causes were heard on several days during the month of July 1881, before the Chief Justice of the Supreme Court of China and Japan upon *viva voce* evidence, and on the 28th July the learned judge dismissed both petitions, leaving each party to pay his own costs.

In the judgment of the learned judge, he came to the conclusion that, on the balance of testimony, the *Hochung* had failed to prove her case as to the relative position of the two ships, and that the masthead light of the *Lapwing* was not properly exhibited at the time of collision. With respect to the case of the *Hochung*, the learned judge said: "It was contended on behalf of the *Lapwing* that, if the court should come to the conclusion that the *Lapwing* was not on the starboard bow of the *Hochung*, as the latter had alleged, there would be an end of her case on the first petition, in conformity with the 'rigid but wholesome rule' that has been laid down in *The Anne* (Lush. 55), *The East Lothian* (4 L. T. Rep. N. S. 487; 1 Mar. Law Cas. O. S. 76; Lush. 241), and *The Haswell* (Br. & Lush. 247), viz., that a plaintiff in Admiralty is only entitled to recover

---

appointing a vice-admiral and judge. Apparently no appointment has been made under a commission dated Sept. 6, 1880, empowering the Lords of the Admiralty to appoint a vice-admiral and judge for the Gold Coast Colony (settlements on the Gold Coast and Lagos united) instead of the separate Vice-Admiralty Courts then existing.—ED.

(*a*) Crown ships cannot be arrested, but the usual course is for the Admiralty to direct their proctor to appear and defend the action (*The Athol*, 1 W. Rob. 374; *The Volcano*, 3 Notes of Cas.) In such cases the practice is to proceed against the officer in command of the ship at the time of the collision, and should the Crown vessel be held to blame, the Government indemnifies the officer as their agent (*Rogers* v. *Dutt*, 3 L. T. Rep. N. S. 160). In consequence of this immunity from arrest, questions have arisen under what circumstances a vessel may claim to be a Crown vessel (*Fletcher* v. *Braddick*, 2 N. R. 182; *Hodgkinson* v. *Fernie*, 26 L. J. 27, C. P.; *The Parlement Belge*, 4 Asp. Mar. Law Cas. 83, 234). The regulations to avoid collision, made under the provisions of the Merchant Shipping Act 1854, and of the Merchant Shipping Act Amendment Act 1862, do not apply to Her Majesty's ships (*The Topaze*, 2 Mar. Law Cas. O. S. 38; 10 L. T. Rep. N. S. 659), but the Admiralty direct instructions similar to the above regulations to be issued to the officers in charge of Her Majesty's ships, and the breach of such regulations is always admitted by the Admiralty to be negligence (*H.M.S. Supply*, 2 Mar. Law Cas. O. S. 262; 12 L. T. Rep. N. S. 799).

This is, perhaps, the first instance where, in consequence of the death of an officer proceeded against, the officer next in command has been substituted in the deceased's place. It is, however, a useful practice where the Admiralty really intends to defend the action.—ED.

secundum allegata et probata. I understand the counsel for the *Hochung* to assent to this proposition—at any rate, he stated he had no authorities to cite in opposition to these—and, in my opinion, the proposition is well founded. I refer to the more recent case of *The Alice and The Rosita* (19 L. T. Rep. N. S. 753; 3 Mar. Law. Cas. O. S. 193; L. Rep. 2 P. C. 214) as an authority for these two positions—first, that, when two vessels are in motion, their bearings with regard to each other are a most material fact to be alleged and proved; and, secondly, that, where a material allegation of the plaintiff's is disproved by the evidence, the case must altogether fail." Then, after discussing the evidence, he proceeded: "I, therefore, on the balance of testimony, decide not only that the *Hochung* has not proved what she alleged, but that her allegation has been disproved, and, therefore, on the rule I have mentioned, her petition must be dismissed." With respect to the *Lapwing*, he said: "I think she must be taken, in her cross-petition and in her preliminary act, to allege that her regulation bow and steam (masthead) lights were properly exhibited *at the time of the collision*, especially when these documents are read in connection with the fifth and seventh paragraphs of her answer to the *Hochung's* petition. Now, it has been clearly shown that her steam (masthead) light at least was not properly exhibited at that time, for it had been hauled down after the *Hochung* had been reported, and from three to four minutes—it may have been longer—before the collision, and was not re-hoisted till after the collision. I consider the allegation as to lights being properly exhibited a most material one, and as it has been clearly disproved, I shall apply to the petition of the *Lapwing* the rule I applied to that of the *Hochung*, and dismiss it also. As in the result both petitions stand dismissed, there will be no order as to costs beyond ordering each party to pay one-half of the assessors' fees."

From this decision both parties now appealed. The case of the China Merchants' Steam Navigation Company on appeal submitted that the order or decree of the Supreme Court of China and Japan of the 28th July 1881, dismissing their original petition, was erroneous, and, further, that the petition against them was rightly dismissed in the court below, but that it should have been dismissed with costs for the following, among other reasons:

1. Because the lights of the *Lapwing* were not properly exhibited before the collision.
2. Because a proper look-out was not kept by those on board the *Lapwing*.
3. Because the helm of the *Lapwing* was improperly ported before the collision.
4. Because the engines of the *Lapwing* were not duly stopped and reversed.
5. Because the *Lapwing* was solely to blame for the said collision.
6. Because, even on the facts as found by the judgment, the court should have held both vessels to blame, and should have directed the damage to be divided.

In the case of Walter Lloyd Bignold on appeal it was submitted that the judgment dismissing the petition on behalf of the owners of the *Hochung* was right and ought to be affirmed, but that the judgment dismissing the petition on behalf of the *Lapwing* was wrong, for the following among other reasons:

1. Because the lights of the *Lapwing* were properly exhibited while the two vessels were approaching and in sight of one another, and ought to have been seen by those on board the *Hochung*.
2. Because the fact that the masthead light of the *Lapwing* was hauled down before the collision could not in the circumstances have contributed to the collision.
3. Because there was no look-out kept on board the *Hochung*.
4. Because the *Hochung* was to blame for the collision in not having kept a proper look-out, in having improperly starboarded her helm, and in not easing and not duly stopping and reversing her engines before the said collision.

Butt, Q.C., *Cohen*, Q.C., and *Masterman*, for the China Merchants' Steam Navigation Company. — The story on behalf of the *Hochung*, as to the relative bearings of the ships, when they became visible to and approached each other, is the true version. The *Lapwing* at the time of collision had no masthead light, and on the ruling of *The Hibernia* (31 L. T. Rep. N. S. 805; 2 Asp. Mar. Law Cas. 454), even though the absence of the light did not contribute to the collision, which is denied by those on board the *Hochung*, the *Lapwing* should be held to blame. The non-compliance by the *Lapwing* with the regulations in respect to lights materially contributed to the collision. On the facts found below both vessels should be held to blame, and the damage divided.

Dr. *Dean* Q.C., *A. Staveley Hill*, Q.C., and *Stokes* for W. L. Bignold.—The judge in the court below has found on the balance of testimony, that the version of the *Lapwing* as to the relative, positions of the vessels was correct. Presuming that the masthead light of the *Lapwing* was wanting at the time of collision, yet, in accordance with the decision in *The Fanny M. Carvill* (302 L. T. Rep. N. S. 646; 2 Asp. Mar. Law Cas. 565), the *Lapwing* would not be to blame, seeing that the absence of the masthead light could have had no possible connection with the collision. The decisions in *The Anne* (Lush. 55), *The East Lothian* (4 L. T. Rep N. S. 487; 1 Mar. Law Cas. O. S. 76; Lush. 241), *The Haswell* (Br. & Lush. 247), and *The Alice and the Rosita* (19 L. T. Rep. N. S. 753; 3 Mar. Law Cas. O. S. 193; L. Rep. 2 P. C. 214), are authorities for the suit of the *Hochung* being dismissed, on the ground that the proof was not *secundum allegata et probata.*

The judgment of their Lordships was delivered by

Sir ROBERT P. COLLIER.—This is a case of collision between the *Hochung*, a steamer belonging to the China Merchants' Steam Navigation Company, and Her Majesty's gunboat *Lapwing*, which happened on the 17th of April 1881, about 10.30 p.m. twelve miles off Ocksen Island, on the coast of China. The weather seems to have been calm; there was very little wind. Cross-suits have been instituted by the Steam Navigation Company and by the lieutenant of the *Lapwing*, who has been substituted for the commander who is, unfortunately, dead. The cases of the two vessels may be very shortly stated. They were steering in almost opposite courses, so as to be nearly meeting vessels, there being but a point or a point and a half's difference between their courses. The *Lapwing* represents herself to have been steering S.W. by W.½ W; the *Hochung* N.E. by E.½ E. The case of the *Hochung* is in substance this: That she first saw, at a distance of two or three miles, the *Lapwing* as a dark object in the water, having no lights of any description on her starboard bow,

and that the *Lapwing* continued on her starboard bow, and that being so the *Hochung*, supposing that the *Lapwing* was going to pass to starboard, starboarded her helm, and by that means turned to the northward; and that the collision occurred in consequence of the *Lapwing* porting her helm and thus meeting the *Hochung*. The case of the *Lapwing* is, that the two vessels were nearly meeting each other, their courses being only divergent by a point or a point and a half, and that they were port bow to port bow; that the commander of the *Lapwing* kept his course for a considerable time, when he ported his helm in order to give the *Hochung* a wider berth; that the *Hochung*, instead of continuing her course or porting in either of which cases there would have been no collision, starboarded her helm, and thereby came right across his bows, and this caused the collision. These are in substance the cases of the two vessels. There is also an allegation on the part of the *Hochung* that the *Lapwing* had no proper lights according to the regulations, and there is a denial of this on the part of the *Lapwing*. The learned judge found both vessels to blame. He adopted the version of the *Lapwing* as to the relative positions of the vessels, and as to the duty of each to steer her course under the circumstances, and he found the *Hochung* was to blame in that respect. He also found the allegation that proper lights had not been exhibited by the *Lapwing* proved. He therefore found both vessels to be in fault. Their Lordships are sensible of the advantage which the court below has of hearing and seeing the witnesses, and are not disposed to reverse decisions come to upon oral evidence, unless there is a very strong reason to suppose that the court below has come to a wrong conclusion. Their Lordships see no reason to suppose that the court has come to a wrong conclusion on either of the points which have been indicated. With respect to the positions and courses of the vessels, their Lordships observe that not only is there a conflict between the witnesses called on behalf of their respective vessels, but that some of the witnesses who are called by the *Hochung* who were on board the *Lapwing*, and who are disposed to give evidence in favour of the *Hochung*, corroborate the statements of the crew and officers of the *Lapwing* with respect to the courses of the two vessels. It is impossible for their Lordships, acting upon their general rules, to reverse a decision supported by such evidence. With respect to the question of lights it was admitted by the officer of the *Lapwing* that the principal light, the masthead light of the *Lapwing* had been hauled down some three or four minutes (it might have been more) before the collision; and this is confirmatory of the statement of the captain and crew of the *Hochung* that no light was visible on board the *Lapwing*. There is also some evidence (whether the learned judge attaches great importance to it or not does not distinctly appear) that her port side light was burning somewhat dimly, so that probably it could not be seen at so great a distance as it ought to have been, although unquestionably it was some time before the collision. Their Lordships therefore think that the finding of the learned judge upon the second point, namely, that the *Lapwing* failed to comply with the regulations with respect to exhibiting lights was proved.

The question then arises whether, this being so, the learned judge was right in dismissing both suits, and it becomes necessary to refer to the law bearing upon this subject. The 17 & 18 Vict. c. 104, s. 298, commonly called the Merchant Shipping Act, enacts as follows: "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 for the exhibition of lights or the use of fog signals, issued in pursuance of the powers hereinbefore contained, or of the foregoing rule as to the passing of steam and sailing ship or of the foregoing rule as to a steamship keeping to that side of a narrow channel which lies on the starboard side, 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." This enactment for a certain time altered the rule of the Court of Admiralty that, where it appears that both parties in cross suits are to blame, the damage shall be apportioned between them. But the rule was restored by the 25 & 26 Vict. c. 63, which repealed the section last quoted and enacted (sect. 29) that, "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 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 is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary." In the absence, therefore, of any enactment to the effect that the plaintiff shall not be entitled to recover any recompense, the ordinary rule of the Admiralty became again applicable to cases of collision, where both parties were to blame. A more recent statute, the 36 & 37 Vict. c. 85, s. 17, further enacts that, "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." This last enactment renders it unnecessary for the plaintiff to prove that the collision was occasioned by the non-observance of the regulations; he proves default on the part of the defendant by merely showing that the regulations have been infringed. This latter section has received interpretation from this board in several cases. It may be enough to refer to the case of *The Hibernia* (2 Asp. Mar. Law Cas. 454; 31 L. T. Rep. N. S. 805.) In this case, decided on the terms of the last statute, it was held that a ship not exhibiting proper lights was in fault, even if the want of lights did not contribute to the collision. This case may be considered as having been qualified to a certain extent by a subsequent case, *The Fanny M. Carvill* (2 Asp. Mar. Law Cas. 565; 32 L. T. Rep. N. S. 129, 646), in which this board, affirming a decision of Sir Robert Phillimore, expressed itself in these terms: "There remain, however, two other possible constructions. The fact is that, on proof of an infringement of any

of the regulations for preventing collisions, there arises, subject only to the qualification contained in the final clause of the section, an absolute presumption of culpability against the vessel guilty of such infringement, to which the court is bound to give effect, whatever the nature of the infringement may be. The other is, that the infringement must be one having some possible connection with the collision, or in other words, that the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision." And the same doctrine has been laid down by Sir Robert Phillimore in very much the same terms in a subsequent case of *The Englishman* (37 L. T. Rep. N. S. 412; 3 Asp. Mar. Law Cas. 506; 3 P. Div. 18; 47 L. J. 9 Prob.).

Applying the law as thus laid down, it appears to their Lordships in this case that, at all events, it has not been shown that the non-compliance by the *Lapwing* with the regulations in respect to lights could not have contributed to the collision. (*a*) On the contrary, they are inclined to think that, in all probability, it did materially contribute to the collision. That being so, the ordinary rule of the Admiralty Court applies as to the division of damage. It has been suggested by one of the learned counsel for the respondents that the learned judge was right in dismissing both suits, or at all events in dismissing the suit of the *Hochung*, on the ground that the proof was not *secundum allegata et probata*; but it appears to their Lordships that there is a sufficient allegation on the part of the *Hochung* that the *Lapwing* infringed the regulations with respect to lights; and, putting aside all the rest of their allegations, that would entitle the owners of that vessel to recover upon the proof of the infringement of the regulation with respect to lights. The allegations of the *Lapwing* of improper navigation by the *Hochung* are also sufficient and established. That being so, the ordinary rule of the Court of Admiralty applies; and therefore it will be necessary that the judgment should be varied by directing that, instead of the two petitions being dismissed, the damage should be divided between the parties according to the Admiralty rule, which is, that each party shall obtain from the other half of the damage which he has suffered. Their Lordships will therefore advise Her Majesty to vary the judgment in the manner which has been above intimated. There will be no costs on either side.

Solicitors for the company, *Harwood* and *Stephenson*.

Solicitor for W. L. Bignold, *F. Stokes*.

(*a*) This decision applies the provisions of the Merchant Shipping Act 1873, sect. 17, in an action which is really against a Queen's ship, although there is nothing in the Statute saying that it shall apply to Queen's ships. If the court considered that the Act dealt merely with procedure, or that they could look behind the actual party, no exception could be taken to their decision, but the point does not seem to have been raised in argument. —ED.

Supreme Court of Judicature.

COURT OF APPEAL.

SITTINGS AT WESTMINSTER.

Nov. 25 *and* 27, 1882.

(Before BAGGALLAY, BRETT, and LINDLEY, L.JJ.)

THE R. L. ALSTON. (*a*)

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

Collision—Speed—Rules for the Navigation of the River Tees, Art. 22.

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 over the ground and not through the water.*

Judgment of Sir Robert Phillimore reversed (46 *L. T. Rep. N. S.* 208; 4 *Asp. Mar. Law Cas.* 509 7 *P. Div.* 49).

THIS was an appeal by the plaintiffs from a decision of Sir Robert Phillimore assisted by Elder Brethren of the Trinity House, by which, on the 8th Feb. 1882, he had found the steamships *Lady Mostyn* and the *R. L. Alston* both to blame for a collision in the River Tees on Nov. 6, 1881, by reason of the construction which he placed upon rule 22 of the Rules for the Navigation of the River Tees.

The case is fully reported in the court below, where the facts are set out (4 Asp. Mar. Law Cas. 509; 46 L. T. Rep. N. S. 208). From this decision the plaintiffs, the owners of the *Lady Mostyn*, now appealed on the ground that the word "speed" in the above-mentioned 22nd rule, which is "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" meant speed over the ground, and not through the water as held by the learned judge below.

Butt, Q.C, and *Cohen*, Q.C. for the appellants.—If the construction be through the water, a steamship with a three-knot tide could approach a vessel at anchor at the rate of nine miles an hour, and yet be within the rule, whilst a steamship going against the tide could only approach at the rate of three miles an hour. Nine knots an hour is an improper rate of speed in a crowded river, seeing that considerable damage may be caused by the wash to vessels at anchor and to the banks, quite apart from danger of collision. The succeeding rule which provides for a maximum rate of speed of three miles per hour in a fog, on the construction of the learned judge below, would make it perfectly legitimate with a three-knot tide for one vessel to go at six knots an hour in a fog, but the other, were the tide running at any rate over three knots an hour, could not go at all. On the construction of through the water, a vessel going against the tide has all the force of the tide to stop her progress if necessary; whereas in the case of a vessel going with the tide at about nine knots this force is wanting—in fact the tide helps to keep up her excessive rate of speed. In the regulations for the navigation of the Thames,

(*a*) Reported by J. P. ASPINALL, and F. W. RAIKES, Esqrs., Barristers-at-Law.

speed is to be taken as rate over the ground, which shows that our construction of speed is workable, and commends itself to the Thames authorities. (*a*) It is obvious that rate over the ground can easily be ascertained by noticing the landmarks on the bank.

R. E. Webster, Q.C. and *W. G. F. Phillimore* for the respondents.—Speed can only be ascertained with certainty by noting the number of the revolutions of the engines. As the tide is ever varying in force, if speed means rate over the ground, it would be incumbent upon those navigating the Tees to be always watching the tide and varying the revolutions of their engines accordingly. There would be the further difficulty in the case of unknown eddies, tides at points, &c., which would make it constantly necessary to alter the speed of the steamship, supposing the existence and force of these eddies and tides were known. Besides it is only for a short time that the tide runs with such force as to give a vessel an undue rate of speed. The fact that in the Thames rules the words "over the ground" are inserted, shows that without them "speed" is to have its ordinary nautical meaning of rate through the water. Although by day it may be possible to approximate the rate over the ground by noticing landmarks, this is not so at night when landmarks are not visible. A vessel going with the tide requires considerable speed, to enable her to steer with ease and rapidity.

Butt, Q.C. in reply.—The difficulty as to varying tides and unknown eddies is easily met by going at a rate slightly within the maximum authorised rate.

Baggallay, L.J.—About two o'clock on the morning of the 6th Nov. last year, a collision took place in the river Tees between two steam-vessels, the *Lady Mostyn* and the *R. L. Alston*. There is a bye-law or rule regulating the navigation of steam-vessels in the river Tees, and that bye-law fixes the maximum of speed at which steam-vessels navigating the Tees may proceed. The rule is in these terms: "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." Shortly before the collision, the *Lady Mostyn* was proceeding down the river with a speed of five knots over the ground, having at the time the tide against her, the rate of the tide being assumed for the purpose of the argument as three knots an hour. Consequently the *Lady Mostyn*, in order to proceed five knots over the ground, must have been proceeding at the rate of eight knots through the water. If the rate of speed referred to in rule 22 means the rate of going through the water, she was exceeding the maximum which the rule allowed her to adopt; if, on the other hand, the true meaning of the rate of speed in the rule was the rate of going over the ground, she was within the limit. The learned judge in the Admiralty Court has come to the conclusion that the true construction to be put on the rule is, that the rate of speed is to be regulated by the going through the water, and not by the going over the ground, and from that decision the present appeal is brought, and it is the only question which we have to consider on the present appeal. We must, first of all, have regard to what must be supposed to have been the object of the framers of this bye-law, which is made under Act of Parliament. I think there can be no question, that it was made for the purpose of protecting and guarding, as far as might be possible, against a collision in the river. It may perhaps be suggested that it was formed also with a view of protecting the banks of the river, which might be injured by a high rate of speed, but I think the more important object would be that of preventing collisions. Collisions may be of several kinds. There may be a collision between two steam-vessels proceeding in different directions; there may be a collision arising from a steam-vessel proceeding at a certain speed, and coming in contact with some fixed object, as for instance a vessel at anchor; or there may be a collision between a steam-vessel going at a certain rate of speed and some other vessel, not a steam-vessel perhaps, crossing the course, or otherwise moving about at a greater or less rate of speed in the current of the stream; and we must consider that this rule is intended to be applicable to each and every of the several kinds of collision which may occur. It appears to me that directly we attempt to test the meaning of the words "rate of speed" by considering how they would operate and bear on the case of a collision between a steam-vessel in motion and an object at rest, or slightly moving, the construction contended for by the appellants has every element of being the right construction. If the rule is to be the rate of going through the water, and not the rate of going over the ground, a vessel having the tide in her favour and approaching an object at rest, or only slightly moving, would be at liberty to go at the full extent of the six miles over the ground, together with whatever the rate of the tide might be at the time, bringing the speed up in the case assumed to nine knots an hour. Therefore one hardly requires to have the position more than stated, to say that one can hardly suppose that it was the intention of the framers of that regulation that, if there was a three-knot tide running, the vessel which was coming in with the tide in her favour might go at the rate of nine knots an hour, whereas the one which was coming with the tide adverse to her should only go at the rate of three knots an hour. That seems to me an unreasonable construction. Whereas the construction contended for by the appellants, which is the rate over the ground, would allow each one to approach at the rate of six miles an hour; and the risk of collision is proportionate to the rate at which the vessels are, if both are in motion, approaching each other, or if one is at rest and the other in motion, the rate at which the one is approaching the fixed object.

I confess it appears to me that that is sufficient to suggest what would be the proper interpretation to put upon the rule. If the other interpretation were put upon it, it seems to me that it would lead to an irrational conclusion. But it has been suggested, and the argument was put prominently forward by the counsel for the respondents, that the very object of this rule was, that there should be something

(*a*) The rule referred to is Rule 15 of the bye-laws for the regulation of the navigation of the river Thames approved by Order in Council, dated March 18, 1880, and is as follows: "Steam vessels navigating the river between Barking Creek and London Bridge, other than river passenger steamers certified to carry passengers in smooth water only, shall never exceed a speed of seven statute miles per hour over the ground whether with or against the tide."—Ed.

in it by which the party navigating the vessel should know for certain what he ought to do. I ventured to suggest in the course of the argument that whoever had charge of the navigation must know at what rate his vessel was moving through the water substantially. If he is in any doubt so far as regards the actual rate of the tide, a small diminution from the maximum rate of speed allowed would be sufficient to enable him to proceed with reasonable certainty. At the same time, I cannot help thinking that the greater number of those navigating the river Tees must know at what rate of speed the tide is moving at a particular time when they are going up or coming down the stream; and although there may be some exceptional circumstances causing at a particular time some little variation, that is a matter that could be guarded against. The argument of the counsel for the respondents was that, although a man can approximately tell at what rate the vessel is going through the water, he cannot always tell at what rate she is going over the ground. If he cannot so accurately ascertain it, it seems to me that by a little care and a little keeping within the maximum amount he might always be on the safe side; but what the counsel for the appellants have said is a strong illustration that it is not so difficult to ascertain at what rate the ship is going over the ground, because, in the Rules for the Navigation of the River Thames, the rate of speed is there to be regulated in accordance with the rate of speed of going over the ground. It is therefore not so difficult to ascertain with any reasonable degree of certainty what is the rate of speed over the ground. I quite agree with the observation that the rules of one particular river can hardly be construed by the rules which are applicable to some other river; but it certainly appears to me to afford an answer to an argument such as that put by the counsel for the respondents, as to the rate being uncertain at which the vessel is going over the ground. I think that, although the object of the framers might have been to some extent for the protection of the banks of the river, what has been said with regard to the risk of collision appears to me a strong reason for the rule to be construed to mean the rate of speed over the ground rather than the rate of speed through the water, although the rate of speed might affect the banks of the river by reason of the wash. For these reasons I think that the construction which the learned judge has put upon the rule is not that which the words properly bear, and that this appeal should be allowed.

Brett, L.J.—In this case the vessel *Lady Mostyn* is found to be partly to blame, not on the ground of the speed at which she was approaching another vessel with regard to the two vessels themselves, but simply on the ground that she has committed a breach of one of the bye-laws of the Tees Conservancy regulations, and the question is raised, whether the construction which has been put upon one of these rules by the learned judge of the Admiralty Court is that which ought to be adopted, That is the only question which is before us. I think it must be obvious to anybody who reads this rule that it is capable of two constructions. It is unfortunately expressed in such language that it leaves it quite as much open with regard to its form of expression to the one interpretation as to the other. What, then, is to be done? We must try and get at the meaning of what was intended by considering the consequences of either construction. The rules are made for the navigation of a river which would be crowded with vessels, and of a river with banks in sight, and we must consider which is the more reasonable construction. Now it is undoubted, as my learned brother has pointed out, that there are three kinds of collision. With regard to a steam-boat she may be in danger of coming into collision with an approaching steamer; she may be in danger of coming into collision with a vessel at anchor; she may be in danger of coming into collision with a sailing vessel which is tacking across, and which therefore, in a narrow river and for the purposes of this rule would be in much the same position as a stationary object. With regard to the danger of collision there are always two matters to be considered as to the conduct of the vessels, one is as to her course and the other is as to her speed. There are rules for avoiding danger of collision in regard to both these considerations. There are always rules with regard to the course; that is to say, when a vessel is approaching another vessel she has to steer in a particular way. That is for the purpose of avoiding danger of collision with respect to her course. There are always other rules as regards the rate of speed, that is her facility for stopping in time to avoid a collision. This rule has nothing to do with steering; there are other rules, no doubt, with regard to steering. Rule 22 and the next one to it are concerned only with that part of the navigation of the steamship which relates to her power to stop herself when there is danger of collision.

I think we have exhausted almost every possible mode of viewing this case. The one which governs my decision certainly is this, that the rule is laid down with regard to the navigation of steamers in a crowded river with visible banks. I know that during the night the banks may not be seen; but these rules are made for the day as well as for the night, and probably are made for the day rather than for the night, because there is, I suppose, much more navigation in the day-time than in the night-time. On the construction of the rule—and this is what has most governed me—it must be obvious that a vessel going against a strong tide has a much greater facility than one which is going with the tide, because, however fast a vessel may be going through the water when she is going against the tide, the moment she tries to stop herself she has to assist her in stopping the force of the tide which is coming down upon her; whereas in the case of the vessel which is going with the tide the moment she tries to stop herself she has the force of the tide still carrying her on, and in order to stop herself really she must not only take off from herself the speed of which she herself is the cause, but she must so stop herself as to act against the force of the tide which is still carrying her on. It is said that, if the two vessels are approaching each other end on, the one against the tide and the other with it, that is not a matter to take into consideration. I very much doubt that; but it is most undoubted that it is very material when a vessel is approaching another vessel at anchor, or a vessel coming across the tide, which is very much the same as if she was

stationary. It is impossible to understand that anybody drawing these rules with regard to the navigation of steamers in a crowded and somewhat narrow river, should be supposed to admit for a moment that a steamer should be approaching any fixed object, or even a moving object, at the rate of ten miles an hour. That seems to me to be monstrous, and could not have been intended. That seems to me to be the real consideration which governs this matter. No doubt we have had difficulties about this interpretation. The great difficulty put to us was, the difficulty of judging of the rate of speed, and it was said that, if a vessel is in motion, her rate of speed can only be judged by the rate at which she is going through the water. But when a vessel is in the ocean, it is very much as if those on board were in a carriage driving across Salisbury Plain without a mark on it, when no doubt it would be very difficult to tell at what rate the carriage is going; but when a carriage is going along a road marked with milestones, it is easy to tell at what rate the carriage is going by marking one milestone and seeing how long it is before reaching another. The points in a river with banks are very much more like a road marked with milestones than like Salisbury Plain, because there are marks and steeples and other things which everybody navigating the river knows perfectly well, and by which he can judge of the rate of speed at which the vessel is going over the ground. He can judge by seeing how long the vessel is in going from one known mark to another known mark on the bank. An expression used before us, which is one of the nautical expressions to which we are accustomed, is, that this is to be the rate at which the vessel is going "over the ground;" but there is another equally well-known expression, which in a river seems to me to be the more apt, that is, the rate at which she is going "by the land," that is, by any fixed object on the land. Therefore the difficulty of judging of the rate of speed seems to me to vanish. Then comes the question, whether the two rules (rules 22 and 23) must be construed both alike. That would lead to a difficulty, which is supposed to suggest itself under the second rule. There are, as Mr. Butt and Dr. Phillimore pointed out, questions of contrary difficulties. There are difficulties both ways, and I cannot say that I think it is a well-drawn rule, but I agree with Mr. Butt, that the difficulty which he puts against Dr. Phillimore is greater than the difficulty which Dr. Phillimore puts against Mr. Butt. That which governs me is, I think, the real impossibility of supposing that anybody would allow a steamer to go in a crowded river with the tide past the land at the rate of ten or eleven miles in the hour. I therefore venture to differ from the learned judge of the Admiralty Court as to the construction of this rule.

Lindley, L.J.—I also am of opinion that the construction put upon the 22nd rule by the learned judge in the court below cannot be supported. The duty of the court is to construe these rules. Rule No. 22 is one of a series headed, "Bye-laws for regulating the navigation of steam and other ships." Now the language of rule 22, which is the one we have to deal with, is this: "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 an hour." The question is, what does that mean? Some light is thrown upon that by rule 29, which runs thus: "No ship shall be allowed to drift in any part of the river or harbour." Every ship must be properly navigated or moored. Therefore navigation, as I understand it, means "moving otherwise than by drifting;" that is, it seems to me, the motion imparted to the ship by steam, her engines, and so on. That is navigation, as I understand it. Now, we have to ascertain the rate of speed. Here again light is thrown upon this clause by other clauses, which refer to "dead slow," "full speed," "half speed," "quarter speed," and so on. I confess it seems to me, speaking rather as a landsman than as a nautical man, that what was meant by that was, the rate over the land, the rate at which the ship travels from one fixed point to another, the object being to avoid collision, either with fixed objects or with moving objects. If the objects are moving, they may be moving in the same direction, or in contrary directions; or they may be at anchor. That would be the construction that I should put upon it simply from a study of the rules and from considering the object which I conceive the rules have.

But I must say, I do feel considerably puzzled by the expression in the judgment below that the construction put upon the rule by the court below is the natural construction. I did not understand in what sense it could be supposed to be the natural view; but I think I understand what it is now, although I did not understand it at first. If the ship is out at sea without any visible object in sight and with no method of ascertaining the rate of speed over the ground, the only way of ascertaining the speed is, by the log or by the engines, that is, by the rate of the ship going through the water. That is intelligible enough, and one sees it is so. It is not possible in a moment, I suppose, to tell at what rate a ship is going, whether a steamship or a sailing vessel, over the ground, in a place where observations cannot be taken. It may be found out after a time at what rate she has been going, by taking certain observations at certain distances between certain points, and so it may be ascertained what distance she has traversed; but there is no way that I know of except by means of the log or some other such method of ascertaining at what rate a ship is going through the water. Therefore in that sense the rate of the ship might be said to be naturally the rate of the ship through the water. But totally different constructions apply to a vessel going along a river, and the same reasoning cannot be used. At all events in England our rivers are not so wide that we cannot tell at what pace we are going along the land, and that is really an answer to the observations of the respondents' counsel. His observation is quite true that it is difficult to tell at what rate the vessel is going, unless those on board have landmarks to guide them. They can tell if they have church towers or other things, or landmarks of any sort or kind which are known to navigators. Therefore the difficulty which he has suggested about the want of certainty, appears to me to be met by considering the place that the rules are dealing with. The other points that have been urged upon the court strengthen the same view, and I confess it appears to me the true construction of this rule is, that the

rate of speed in 22 means rate of speed over the ground, and not rate of speed through the water. The judgment must therefore be reversed. The appeal will be allowed with costs, and the action remitted to the court below to be decided there in accordance with the construction placed by this court on the rule under consideration. (*a*)

Appeal allowed.

Solicitors for the plaintiffs, *Gregory, Rowcliffes,* and *Co.*, agents for *Hill, Dickinson,* and *Lightbound,* Liverpool.

Solicitors for the defendants, *Pritchard,* and *Son,* agents for *Turnbull* and *Tilly,* West Hartlepool.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Wednesday, March 7, 1883.

(Before CAVE and DAY, J.J.)

HAIGH AND OTHERS *v.* ROYAL MAIL STEAM PACKET COMPANY. (*b*)

Carriage of passengers—Death by negligence—Contract—Exemption from liability—Collision.

The ticket of a passenger by a steamer of defendants contained a notice that the defendants would not be responsible for any loss, damage or detention of luggage under any circumstances; and that they would not be responsible for the maintenance or loss of time of a passenger during any detention of their vessels, nor for any delay arising out of accidents, nor for any loss or damage arising from perils of the seas, or from machinery, boilers, or steam, or from any act, neglect or default whatsoever of the pilot, master, or mariners.

Held, upon demurrer, that this provision exempted the defendants from liability in an action for the loss of life of a passenger by negligence of the defendants' servants in a collision with another ship.

THIS was a demurrer to a statement of defence.

The plaintiffs, who are the executors of the will of Charles Schwind, deceased, sued for the benefit and on behalf of his wife and children, for damages, caused (as alleged) by the negligence of the defendants' servants on board the defendants' steamship *Douro,* whereby the said steamship having come into collision with another ship was sunk, and the said Charles Schwind lost his life.

The defendants, amongst other defences, alleged that the contract of carriage between themselves and the said Charles Schwind exonerated them from liability for the alleged negligence.

By consent of counsel on both sides the statement of defence was taken as amended by the substitution for the words therein used of the words printed on the passenger's ticket, which was given to the said Charles Schwind as a receipt for his passage money, signed by an agent of the defendants.

The following "notice" was the material part of the ticket:

Passengers not embarking after taking their passage will forfeit half the passage money.

Passengers are to pay for whatever wines, spirits, malt liquors, or mineral waters they may order.

Each adult saloon passenger is allowed to carry twenty cubic feet of luggage; above that quantity will be charged for. All specie, bullion, jewellery, or other treasures carried by passengers must be shipped as treasure, and paid for at the established rates of freight. Merchandise is not allowed to be carried under the designation of luggage.

Children paying half or quarter fares, or those conveyed free, are not to be allowed seats at the saloon table.

The company will not be responsible for any loss, damage, or detention of luggage under any circumstances.

All luggage will have to pass through the Customs House abroad, whether British or foreign, and must be distinctly labelled with the passenger's name and destination.

The company will not be responsible for the maintenance of passengers, or for their loss of time, or any consequence resulting therefrom, during any detention consequent upon the occurrence of any cause to prevent the vessels from meeting at the appointed places, nor for any delay arising out of accidents, nor for any loss or damage arising from perils of the sea, or from machinery, boilers, or steam, or from any act, neglect, or default whatsoever of the pilot, master, or mariner, nor for any consequences arising from sanitary regulations or precautions which the company's officers or Local Government authorities may deem necessary, or should such sanitary regulations or precautions prevent embarkation or disembarkation.

No person can be received on board the company's ships when suffering from any infectious disorder, and if in the course of the voyage any passenger should be found to be suffering from a disorder of that character, he will be required, at his own expense, to find accomodation at any port in which the vessel may happen to be at the time, or at the first port she may reach after discovery of the existence of the disorder, it being understood that, when sufficiently recovered, such passenger will be conveyed to his destination in one of the company's vessels.

Any passenger is liable to a penalty of 100*l.* who carries gunpowder or other goods of a dangerous nature (stat. 17 & 18 Vict. c. 104), for example, lucifer matches, chemicals, or any articles of an inflammable or damaging nature.

The steward's fee is charged in the passage money.

This ticket must be exhibited on board when required by the company's officers, and must be delivered up to the purser of the ship conveying passengers to their final destination.

Cohen, Q.C. (with him *Lawrence*) for the plaintiff.—The mere words "loss or damage," as here found in this notice, do not include loss of life, or damage to person; they refer rather to an injury caused to the pocket of a passenger by loss of luggage or other property, or damage by delay or inconvenience. The word "damage" has undergone conflicting judicial decisions; in the *Franconia case* (36 L. T. Rep. N. S. 640; 3 Asp. Mar. Law Cas. 435; 2 Prob. Div. 163) the 7th section of the Admiralty Court Act 1861 (24 Vict. c. 10) was discussed by the Court of Appeal, the words being, "The High Court of Admiralty shall have jurisdiction over any claim for damages done by any ship;" although it was held that these words included in the jurisdiction of the court a claim for loss of life caused by collision, the Court of Appeal was equally divided on the subject. Here the words must be limited to the sense in which the other provisions are expressly applied; and if it should be considered there is an ambiguity in the

(*a*) Feb. 14, 1883. The case came on for hearing on the merits before Sir R. Phillimore, assisted by Trinity Masters, and the court finding that the speed of the *Lady Mostyn* was a proper speed within the meaning of the rule as construed by the Court of Appeal, and that she was properly navigated, pronounced the *R. L. Alston* alone to blame for proceeding at an improper speed and not taking proper measures to keep out of the way of the *Lady Mostyn.*—ED.

(*b*) Reported by M. W. MCKELLAR Esq., Barrister-at-Law.

words, they must be construed against the party in whose favour the exemption is provided.

Russell, Q.C. (with him *Phillimore*), for the defendants, was not heard.

Cave, J.—I do not think we need trouble the counsel for the defendants. Looking at the ticket and the circumstances of the contract, I cannot entertain a doubt about the meaning of these words. I think "loss or damage" must include the death of a passenger, if caused by any of the matters provided against. There are express provisions as to luggage preceding this particular exemption, and rendering these words inapplicable to a passenger's property; they can therefore, as it seems to me, only have any meaning in this provision if they refer to injury to life or person of a passenger. We refuse to allow the demurrer.

Day, J.—I am of the same opinion.

Judgment for defendants.

Solicitors for plaintiff, *C. W. Dommett*, for *Slater* and *Turnbull*, Manchester.

Solicitors for defendants, *Wilson*, *Bristows*, and *Carpmael*.

Thursday, April 5, 1883.

(Before Watkin Williams and Mathew, JJ.)

Mersey Steamship Company Limited *v.* Shuttleworth and Co. (*a*)

Practice—Action for freight—Admissions on pleadings—Admission of claim—Counter-claim—Motion for judgment on claim—Order XL., r. 11.

Where the plaintiff's claim for freight is admitted, but the defendants set up a counter-claim for damages for breach of a contract of carriage for a larger amount, the plaintiff is not entitled to judgment upon the claim, under Order XL., r. 11, *as upon an admission in the pleadings.*

Semble, if the counter-claim were clearly frivolous, the plaintiff would be entitled to judgment on the claim, and to have the sum claimed brought into court to await the result of the action.

This was a motion by the plaintiff for judgment upon admissions of fact in the pleadings.

The claim, which appeared by the indorsement upon the writ of summons, was for two sums of 687*l.* 6*s.* and 120*l.* 6*s.* 4*d.* for freight in respect of the carriage of certain goods belonging to the defendants, in a ship belonging to the plaintiffs.

The defendants in their statement of defence admitted the plaintiffs' claim, but set up a set-off and counter-claim for 5000*l.* for breach of contract by the plaintiffs in respect of the carriage of certain other goods belonging to the defendants, and loaded on board a ship belonging to the plaintiffs.

The plaintiffs then gave notice of the present motion for judgment on the claim, and that the money might be brought into court to await the decision of the cause.

By 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 of claim, whether such set-off or counter-claim be 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. But the court or a judge may, on the application of the plaintiff before trial, if, in the opinion of the court or judge, such set-off or counter-claim cannot conveniently be disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.

By Order XL., r. 11:

Any party to an action may at any stage thereof apply to the court or a judge for such order as he may, upon any admissions of fact in the pleadings, be entitled to, without waiting for the determination of any other question between the parties . . . any such application may be made by motion so soon as the right of the party applying to the relief claimed has appeared from the pleadings. The court or a judge may, on any such application, give such relief, subject to such terms, if any, as such court or judge may think fit.

Gainsford Bruce for the plaintiff.—The claim is admitted, and a counter-claim is set up; therefore the plaintiff is entitled to judgment on his claim, under Order XL., r. 11, as it is admitted on the pleadings, and the money must be paid into court to await the decision of the cause. This very question has been decided quite lately in the case of *Showell* v. *Bowron* (L. T. March 24, 1883, p. 372; W. N. 1883, p. 50.) In that case also, as in this, the counter-claim was for damages, and was not in the nature of a set-off. For the purposes of the present motion, the plaintiff cannot say that the counter-claim is a frivolous one; it can only be said that it is in dispute. [Watkin Williams, J.—Order XIX., r. 3, gives a defendant a right to set up a counter-claim; your application, if successful, would practically deprive the defendants of this right, because the defendants might not be able to bring the money into court, and the plaintiff could issue execution. Moreover, Order XIX., r. 3, seems to show that in some cases a counter-claim is a defence to a claim. Mathew, J.—In the case in the Weekly Notes, the court may have thought the counter-claim fictitious.] If the court in each case has to inquire whether the counter-claim is *bonâ fide*, great expense will always have to be incurred. The plaintiffs ask in effect that security may be given for their claim. [*Hollams*.—This very question was discussed in chambers under Order XIV., r. 1, when the application was three times refused.] The power given to the judge by Order XIV., r. 1, is discretionary, and the application is made before any pleadings have been delivered. Here the application is one of right, for judgment on admissions in the pleadings. In strictness the plaintiffs are entitled to judgment and execution. They ask for this on the authority of *Showell* v. *Bowron* (*ubi sup.*).

F. W. Hollams, for the defendants, was not called upon.

Watkin Williams, J.—In this case I am clearly of opinion that Mr. Bruce is not entitled to the order which he asks for. The application is under Order XL., r. 11, to sign judgment upon admissions of fact in the pleadings. The plaintiffs brought an action to recover two sums of 687*l.* 6*s.* and 120*l.* 6*s.* 4*d.* for freight. The defendants by their defence admitted these sums to be due, but set up a counter-claim, in which they claimed 5000*l.* for breach of contract on the part of the plaintiffs in the carriage of certain goods in the plaintiffs' ship. Mr. Bruce contends that by Order XL., r. 11, he is entitled to judgment, because no defence is shown upon the statement of defence, and that he is entitled to judgment, with all its usual consequences. This is not, in

(*a*) Reported by W. P. Eversley, Esq., Barrister-at-Law.

my opinion, a correct rendering of Order XL., r. 11, and for this simple reason, that, if this were so, it would take away the right given to a defendant by Order XIX., r. 3, of defending an action by setting up a counter-claim. By this proposed construction of Order XL., r. 11, the defendants would be deprived of their rights under Order XIX., r. 3. I do not wish to say that in no case is a plaintiff entitled to judgment, either with or without execution. But no special circumstances have been brought before us by Mr. Bruce to induce us to allow the plaintiff to sign judgment. He puts his case upon the broad ground of principle, that, an admission having been made, he is entitled to judgment. This is not the true principle. I do not cast any doubt on the case of *Showell* v. *Bowron* (*ubi sup.*). The counter-claim in that case may have been a frivolous one, without any connection with the plaintiff's claim, and only set up for the purpose of putting off the evil day, and the court may have ordered the money to be paid into court in order to secure to the plaintiff the amount of his claim. This motion must be refused.

MATHEW, J.—I am of the same opinion. Mr. Bruce was constrained to admit that on his construction of Order XL., r. 11, he was entitled not only to judgment, but also to execution. Order XL., r. 11, applies only where final redress upon any admission can be given to a party, and which cannot be effected or altered in any way by any subsequent verdict or judgment. Mr. Bruce says, I am entitled as of right to final judgment. I cannot agree to that contention. Order XL., r. 11, refers to a different class of cases that chiefly occur in Chancery It in no way controls the earlier rule (rule 3 of Order XIX.), by which the defendant is entitled to set up and plead a counter-claim in answer to a claim. If Mr. Bruce's contention is right, it would equally apply to a set-off As to the case of *Showell* v. *Bowron* (*ubi sup.*), I can only assume that there the court exercised their discretion in a particular way, having regard to the nature of that counter-claim. In this case the application was practically gone into at chambers on an application under Order XIV., r. 1, when it was refused. This application cannot be granted.

Motion refused.

Solicitors for the plaintiffs, *Flux, Son,* and *Co.*

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

Saturday, March 3, 1883.

(Before CAVE, J.)

DICK AND PAGE *v.* BADART FRÈRES. (*a*)

Dock—Bye-law—Validity of—Ultra vires—Power to exclude "lumpers" not employed by dock company from company's premises—Harbours, Docks, and Piers Clauses Act 1847—10 *Vict. c.* 27, *ss.* 33, 81, 82, 83—27 *Vict. c. xxxi., ss.* 9, 90, 101, 102, *and* 115.

By the Harbours, Docks, and Piers Clauses Act 1847, *s.* 33, *it was provided that upon payment of the authorised rates, the harbour, dock, and pier should be open to all persons for shipping and unshipping goods. By sect.* 83 *of the same Act, it was provided that the undertakers might make bye-laws (inter alia) for regulating the shipping and unshipping of all goods within the limits of the undertakers' premises; for regulating the duties and conduct of all persons, as well servants of the undertakers as others, who should be employed on the undertakers' premises; for regulating the duties and conduct of the porters and carriers employed on the undertakers' premises, and fixing the rates to be paid to them. The S. dock company, whose special-Act* (27 *Vict. c. xxxi.) incorporated the Harbours, Docks, and Piers Clauses Act* 1847, *made a bye-law excluding from their premises or any vessel therein certain labourers, called "lumpers," unless specially authorised by them.*

Held, on further consideration, that such bye-law was ultra vires and invalid.

THIS action was tried at the London Michaelmas Sittings at Guildhall before Cave, J. and a common jury.

The jury found a verdict on the question of fact submitted to them, but the learned judge reserved the point of law for further consideration.

The plaintiffs were the owners of the steamship *Homer*, and she was chartered by Messrs. Grace and Co., of Alexandria, by a charter party dated the 7th Jan. 1882, whereby the ship was to go to Alexandria, and there load a cargo of cotton seed, and then proceed to a safe port in the United Kingdom, according to orders, freight to be paid in cash as therein provided, eleven working days (weather permitting) to be allowed the charterers for loading and discharging the ship, and ten days on demurrage, if required, at 6*d.* per gross register ton per day. The ship was accordingly loaded at Alexandria, and the cargo was shipped under a bill of lading, dated the 24th Feb. 1882, by which the cargo was to be delivered at the Surrey Commercial Docks to Messrs. John Peel and Co. or their assigns, and which stated that four working days (weather permitting) remained for the discharge of the cargo. The bill of lading was duly indorsed to the defendants.

The ship arrived on the 16th March, and notice was given to the defendants that this ship would be ready to discharge on the morning of Friday, the 17th March.

The plaintiffs gave the dock company notice that they would discharge the cargo by their own crew and by their own "lumpers" (*i.e.*, labourers). The plaintiffs were bound to provide men to deliver the cargo over the ship's side; the defendants were bound to provide weights, scales, and weighers. The defendants asked the dock company to provide weights, scales, and weighers, to weigh out the cargo.

The dock company refused to provide weights, scales, and weighers, unless the plaintiff discharged the cargo by the dock company's servants and "lumpers.

In consequence of this refusal on the part of the dock company a delay of two days beyond the lay days occurred, and the plaintiff, on Monday, the 20th March, allowed the cargo to be discharged by the dock company's own servants. The plaintiffs claimed 64*l.* 4*s.* as demurrage in respect of this delay. The defendants contended that the delay was occasioned solely by the acts and default of the plaintiffs, and that the unloading was prevented by the plaintiffs not complying with the dock company's bye-laws:

The defendants relied on the following bye-laws

E

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

made under sect. 83 of the Harbour, Docks, and Piers Clauses Act 1847, and sect 90 of the company's special Act, which were as follows:—

1. No lumpers are allowed to work on board any vessel in the docks, or on the wharves or premises of the company, but such as are authorised by the company, unless permission in writing be previously obtained from the superintendent. And for every breach of this bye-law the person offending is liable to a penalty of not exceeding 5*l*.

2. Only servants of the dock company are allowed to perform any work within the dock premises, whether on ship, lighter, or on shore, with the following exceptions; Crews discharging the cargoes of their own ships. Stevedores and their men (when sanctioned by the company). Lightermen and carmen delivering or receiving goods, and lightermen navigating their craft.

The jury found that the dock company's refusal to provide weights, scales, and weighers prevented the discharge of the cargo. The case was reserved for further consideration upon the question whether the bye-laws set out above were valid or not.

By 10 Vict. c. 27, s, 33:

Upon payment of the rates made payable by this and the special Act, and subject to the other provisions thereof, the harbour, dock, and pier shall be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers.

By sect. 81:

Where under the special Act the undertakers shall have the appointment of meters and weighers, the undertakers may appoint and licence a sufficient number of persons to be meters and weighers within the limits of the harbour, dock, and pier, and remove any such persons at their pleasure, and may make regulations for their government, and fix reasonable rates to be paid, or other remuneration to be made to them for weighing and measuring goods.

By sect. 82:

When a sufficient number of meters and weighers have been appointed by the undertakers, under the powers of this and the special Act, the master of any vessel, or the owner of any goods . . . . shall not employ any person other than a weigher or meter licensed by the undertakers, or appointed by the Commissioners of Her Majesty's Customs, to weigh or measure the same.

By sect. 83:

The undertakers may from time to time make such bye-laws as they shall think fit for all or any of the following purposes: (that is to say,)

For regulating the use of the harbour, dock, or pier;

For regulating the shipping and unshipping, landing, warehousing, stowing, depositing, and removing of all goods within the limits of the harbour, dock, or pier, and the premises of the undertakers:

For regulating the duties and conduct of all persons, as well the servants of the undertakers as others, not being officers of customs or excise, who shall be employed in the harbour, dock, or pier, and the premises of the undertakers:

For regulating the duties and conduct of the porters and carriers employed on the premises of the undertakers, and fixing the rates to be paid to them for carrying any goods, articles, or things, from or to the same:

. . . . provided always, that such bye-laws shall not be repugnant with the laws of that part of the United Kingdom where the same are to have effect, or the provisions of this or the special Act.

The Harbours, Docks, and Piers Clauses Act 1847, save so far as the clauses thereof are by this Act excepted or varied, is incorporated with this Act.

By sect. 90:

In addition to the power of making, altering, and repealing bye-laws contained in the Acts incorporated with this Act, the company may from time to time make, alter, and repeal such bye-laws, rules, and regulations as they think fit for the following purposes:

. . . . For regulating the conduct of all persons who shall enter, remain, or be employed in or about the works, or in or about any vessel therein.

By sect. 101:

The company from time to time may demand and take in respect of vessels entering or using the docks any sums not exceeding the rates specified in schedule (C.) to this Act.

By sect. 102:

The company from time to time may demand and take for all goods comprised in schedule (D.) to this Act, which shall be shipped or landed, received or delivered, at the docks, any sums not exceeding the rates mentioned in such schedule, and for all other goods any sums not exceeding the rates charged by other dock companies in the Port of London with respect to like goods.

By sect. 115:

The company may from time to time appoint and license so many persons as the company think sufficient to be meters and weighers within the limits of the docks.

Finlay, Q.C. and *A. Gray*, for the plaintiffs; *Mellor* Q.C. and *Hollams*, for the defendants.

The arguments appear sufficiently in the judgment of the learned judge.

CAVE, J.—This case is of very great importance to the dock company; but, after a very full and able discussion, I do not think that there is anything to be gained by taking time to consider my judgment, and so I shall at once proceed to state it. The real question I have to decide is, whether the bye-law now under discussion (because I consider that the second bye-law does not, for the purposes of this case, carry the matter further than the first bye-law) is a valid one or not. [The learned Judge read the bye-law.] The answer to this question depends upon whether the making of this bye-law is within the powers conferred upon the dock company by the Harbours, Docks, and Pier Clauses Act 1847, or by their special Act. The special Act incorporates the public Act. Sect. 83 of the public Act empowers the dock company to make bye-laws for the special purposes therein stated. Sect. 33 of the same Act is as follows: [The learned Judge read the section.] By this section the harbour, dock, and pier are to be open not only to the shipowner and the owner of goods, but also to their servants, whether engaged by the shipowner solely for duty in the dock, or engaged for other duties. *Primâ facie*, therefore, we ought to expect no bye-law which would exclude from the premises of the dock company any class of men. I now come to consider the words of sect. 83. Mr. Mellor relies on the words in the 4th clause of that section. This clause, say the defendants, gives the dock company power to make this bye-law. In my opinion it does not. It only provides that rules may be made to control the shipping or unshipping of goods, but does not affect the question as to who may be employed to ship or unship them. Then the 6th clause has been strongly relied on by the defendants. Now, it seems to me perfectly clear that when the section gives power to regulate the duties and conduct of all persons, whether servants of the dock company or others, the power so given cannot be used to exclude those very persons from the dock company's premises. A bye-law, made under this clause, which provided that only persons of good character were to be employed, or that contained provisions of a similar nature, could be good; but not so a bye-law excluding such persons. I come, then, to the conclusion that this bye-law is

not warranted by the 6th clause, and I am unable to find any other clause or section by which it can be supported. The special Act, by sect. 115, empowers the dock company to appoint and license meters and weighers, and the public Act, by sect. 81 enables the dock company to fix reasonable rates to be paid to them; and sect. 82 of the public act prohibits the master of any vessel or the owner of any goods from employing a meter or weigher other than those so licensed. This section shows very strongly that, but for this express prohibition, the shipowner or goods owner might employ meters and weighers of their own. There are no similar clauses or sections taking away the shipowner's right to employ "lumpers." Hence sect. 33 is expressly applicable, and there is nothing in the Act to qualify it in the sense that this bye-law strives to do, and hence "lumpers" not employed or authorised by the dock company can come upon the dock premises to discharge their duties. Lastly, the last clause (10) in sect. 83, for regulating the duties and conduct of porters and carriers, and fixing the rates to be paid to them, extends to "lumpers" not employed by the dock company. The special Act fixes certain rates as a maximum. Mr. Finlay has pointed out, and this confirms me in my opinion, that the special Act does not limit in any way the charges for loading and unloading goods; hence if the dock company have the power of preventing any persons, not being their own servants, from loading or unloading, the dock company have the power of charging what they please for this class of work. There must be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors: for the plaintiffs, *Stibbard Gibson, and Co.*; for the defendants, *Hollams, Son, and Coward.*

March 3 *and* 21, 1883.

(Before CAVE, J.)

JOHNSTON AND CO. *v.* HOGG AND OTHERS. (*a*)

Marine insurance—Policy—Vessel warranted free from capture and seizure—Temporary seizure for purposes of plunder—Constructive total loss.

The word "seizure" in a policy of marine insurance, in which the ship is "warranted free from capture and seizure and the consequences of any attempt thereat," includes a temporary seizure of the ship for the purpose of plundering the cargo, whereby the ship becomes a constructive total loss.

A ship owned by the plaintiffs during the continuance of the risk covered by a policy with the above warranty, which the defendants had underwritten, got ashore on the African coast, and was forcibly taken possession of by natives, who ripped up the deck and plundered the cargo, and then deserted the ship.

The plaintiffs brought an action on the policy of insurance. The defendants contended that the loss was a loss by seizure within the meaning of the warranty. It was admitted that the ship thereby became a constructive total loss, and that due notice of abandonment had been given.

The jury found that the natives took possession of the ship to plunder the cargo, and not for the purpose of keeping her.

Held, that this seizure, though only temporary, was a "seizure" within the meaning of the words in the warranty, and that the defendants were not liable.

THIS case was tried during the London Michaelmas Sittings at the Guildhall, before Cave, J. and a common jury, and was reserved for further consideration.

March 3.—*James Fox* (*Butt*, Q.C. with him) appeared for the plaintiffs.—In addition to the cases referred to in the judgment, the following cases were cited:

Kleinwort v. *Shepard*, 32 L. T. Rep. O. S. 313; 28 L. J. 147, Q. B.; 1 E. & E. 607;
Cory v. *Burr*, 45 L. T. Rep. N. S. 713; 4 Asp. Mar. Law Cas. 480, 559; 8 Q. B. Div. 313; 47 L. T. Rep. N.S. 181; 9 Q. B. Div. 463.

Gully, Q.C. and *Barnes* appeared for the defendants.—The following cases were cited by them:

Naylor v. *Palmer*, 21 L. T. Rep. O. S. 168; 8 Ex. 739; 22 L. J. 329, Ex.; s. c. in Exch. Ch., 10 Ex. 382;
Powell v. *Hyde*. 26 T. L. Rep. O. S. 74; 5 E. & B. 607; 25 L. J. 65 Q. B.

The facts and arguments appear sufficiently in the judgment.

Cur. adv. vult.

March 21,—CAVE, J.—The plaintiffs in this case were the owners of a vessel called the *Cypriot*; and they sued the defendants, underwriters at Lloyd's, on a policy of insurance effected on that vessel, alleging that she had been lost by perils insured against. The plaintiffs had in the policy warranted the vessel free from capture and seizure and the consequences of any attempt thereat, and the defence was that the loss was a loss by seizure within the meaning of that warranty. It was admitted by the parties that the *Cypriot* during the continuance of the risk became a constructive total loss by reason of the proceedings of and damage done by the natives as described in the examination of the master; that due notice of abandonment was given; and that the only issue to be tried was whether the loss was a loss by any of the perils from which the vessel was warranted free. From the examination of Edward Laidlow, it appeared that on the 7th Oct. 1879 the *Cypriot* got ashore while going down the Brass River. On the following day the natives took forcible possession of the ship, drove away the master and crew, and plundered the vessel in the manner there described. The consequence was, as stated in the admissions, that the ship became a constructive total loss. The jury found that the natives seized the vessel for the purpose of plundering the cargo, and not for the purpose of keeping her.

It was contended for the plaintiffs that to constitute a seizure of a vessel there must be a taking possession with intent to keep it as one's own, and not merely for purposes of plunder; and in support of this contention certain passages from well-known text writers were cited. In Phillips on Insurance, 3rd edit., vol. 1, sect. 1108, it is said speaking of loss by capture, that "by capture is meant the taking possession of property with the purpose of appropriating it to the captor's own use, by which it is distinguished from a mere detention with the design of ultimately liberating the property, as in the case of an embargo." For this position the case of *Black* v. *Marine Insurance Company* (11 Johnson's American Rep. 287) is

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

cited. The author also says: "A seizure is equivalent to a capture, as it is made with the intention of depriving the owner of his property in the subject." But a little further on, sect. 1110, the author remarks: "The word 'capture' is of itself broad enough to comprehend any forcible seizure, arrest, or detention, which may be lawfully insured against." Moreover, in *Black* v. *Marine Insurance Company*, the court said: "Seizure may, in general, be applicable to a taking or *detention* for the violation of some municipal regulation." In Marshall on Insurance, 4th edit., p. 394, it is said: "Capture is when a ship is subdued and taken by an enemy in open war, or by way of reprisals, or by a pirate, and with intent to deprive the owner of it. Capture may be with intent to possess both ship and cargo, or only to seize the goods of the enemy, or contraband goods, which are on board a neutral ship. The former is a capture of the ship in the proper sense of the word; the latter is only an arrest and detention, without any design to deprive the owner of it." In Parsons on Insurance, vol. 1, p. 584, it is stated that "'Capture,' or its equivalent 'seizure,' means a taking with intent to keep: 'arrest' or 'detention,' a taking with intent to return the thing taken, as where a ship is arrested by an embargo, or stopped for search, or detained in a port by an actual blockade thereof, or perhaps by being lawfully restrained from entering her port of destination." At another page, p. 576, the author says: "If a seizure which (becomes a capture, if it be intended to take from the owner the property seized), &c.," which is hardly consistent with the previous definition of seizure.

Several cases were cited which had but a very remote bearing on the point in dispute. The only one it is necessary to mention is that of *Rodocanachi* v. *Elliott* (28 L. T. Rep. N. S. 840; 2 Asp. Mar. Law Cas. 21; L. Rep. 8 C. P. 649), in which case Brett, L.J.—then Brett, J.—in the course of his judgment says (at p. 848 of L. T. Rep. and at p. 670 of L. Rep.): "Capture means the hostile seizure of goods with intent to deprive the owner of them;" upon which it is to be observed that, in the opinion of that learned judge, seizure *plus* the intent to deprive the owner of goods is equivalent to capture; from which it follows that the intent to deprive the owner of the goods is not implied in the word "seizure." The ordinary and natural meaning of "seizure" is a forcible taking possession. This was admitted by Mr Butt; but he contended that the word "seizure" had acquired a peculiar connotation in insurance law, and was in fact a technical term involving an intent by the person seizing to keep possession of the vessel as his own. In support of this proposition he relied on the passages above cited, and submitted that in this case what the natives had done was an arrest and not a seizure. In my opinion the word "seizure" must be taken in its ordinary and natural meaning, and is not a term of art. The passages I have cited from Phillips certainly do not prove that the word has any technical meaning; and the case of *Black* v. *Marine Insurance Company* (*ubi sup.*), which that author cites in support of his view as to the meaning of capture, shows, if anything, that seizure is a general term capable of a very wide meaning. Marshall seems to recognise two meanings of the word "capture," but certainly does not assert that the more restricted meaning is that in which alone the word is understood in insurance law. The passages from Parsons are not more definite: and that from the judgment of Brett, L.J. is rather in favour of the defendants. The seeming confusion in some of these passages arises from the desire of the authors in question to give a distinct and different meaning to such words as "capture," "seizure," "arrest," "detention," "restraint;" and the impossibility of accomplishing the task is shown by their attempts to distinguish between "arrest," "restraint," and "detention." I have no doubt that the word "seizure," like many other words, is sometimes used with a more general, and sometimes with a more restricted meaning; and whether it is used in a particular case with the one meaning or the other depends not on any general rule, but on the context and the circumstances of the case.

This brings me to the consideration of the policy sued on, and after reading it carefully I cannot find any indication that the word "seizure" is used in any but its ordinary and general signification. Indeed the words "free from capture and seizure, and the consequence of any attempt thereat, point to the more general meaning of the word "seizure," since, in the case of an unsuccessful attempt at seizure, it must obviously be difficult to say what the intention was of those who made the attempt. In this particular case, if the natives had been beaten off by the master and crew, it would have been far from easy to determine what their intention was with regard to the vessel, although it might have been easy to determine what their intention was with regard to the cargo. As to the contention that there was an arrest, the action of the natives cannot, to my mind, be correctly so described; although, if their act amounted to a seizure, it is immaterial whether it was or was not an arrest, unless these terms are mutually exclusive, which I do not think they are. In truth the natives neither intended to keep possession of the vessel as their own, nor to return it to the owners. Their object was plunder, and to facilitate that object they seized the vessel, not caring what became of it after their main object—that of plunder—was effected. Being clearly of opinion that the acts of the natives amounted to a seizure within the meaning of the warranty, I must direct the verdict and judgment to be entered for the defendants with costs.

Judgment for the defendants.

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

Solicitors for the defendants, *Waltons, Bubb,* and *Walton.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, July 11, 1882.

(Before Sir R. PHILLIMORE).

THE CRICKET; THE ENDEAVOUR. (*a*).

Limited liability — Collision — Liability of part owners.

In an action by shipowners to limit their liability in respect of a collision with their vessel, and where it appeared that the master, who was on board at the time of the collision, was a part owner, and the collision occurred without the negligence or privity of the remainder of the owners, they have a right to have their liability limited, with a reservation of any right of action there may be against the master personally in respect of his negligence.

THIS was an action brought by the owners of the *Cricket*, a barque of 320 58 tons register, against the owners, master, and crew of the steam-tug *Endeavour*, for limitation of liability in respect of a collision between these vessels.

The *Cricket*, while on a voyage from Middlesboro' to Parnahiba, in the Brazils, came into collision on the 1st Dec. 1881 with the steam-tug *Endeavour*, then lying at anchor off Kingstown. Shortly afterwards the *Endeavour* sank, and was lost, with her coal, provisions, and sundry effects of her master and crew, but no loss of life or personal injury was thereby sustained.

On the 3rd Dec. 1881 an action *in rem* was commenced by the owners of the *Endeavour* against the present plaintiffs. The present plaintiffs entered an appearance in that action, and admitted their liability for the damages caused by the collision subject to a reference to the registrar and merchants to assess the amount.

The registrar, by his report dated the 8th March 1882, found that there was due to the owners of the *Endeavour* 3112*l.* 3*s.* 6*d.* and interest.

The plaintiffs in the present action, in their statement of claim, pleaded that the collision was not caused by or with the actual fault or privity of any of the plaintiffs, and that the registered tonnage of the *Cricket* calculated according to the provisions of the Merchant Shipping Acts was 320.58 tons and no more. The plaintiffs offered to pay into court the sum of 2564*l.* 13*s.*, being 8*l.* per ton on the registered tonnage together with interest.

The defendants alleged that the collision was caused by the negligence of one of the plaintiffs who was on board the *Cricket* at the time, being the master and a part owner.

The plaintiffs produced the managing owner as a witness, who proved that he was the owner of twenty-four sixty-fourth shares, and that the other shares were held by other plaintiffs, but that none of the plaintiffs save the master, James Cranch, were on board at the time of the collision.

Hall, Q C. (with him *Nelson*), for the defendants, submitted that in order to exempt the plaintiffs from liability beyond 8*l.* per ton, they ought to show that the loss and damage occurred without the fault or privity of the owners or any of them. There was no evidence that James Cranch had not been guilty of negligence, although he was one of the owners and master at the time of the collision. After the owners have paid 8*l.* per ton the master is liable *in personam* for the difference.

Phillimore, for the plaintiffs, *contra*.—The fact of the master being owner does not affect the question of limited liability:

The Spirit of the Ocean, 12 L. T. Rep. N. S. 239; 2 Mar. Law Cas. O. S. 192.

Even where one of the owners is master and has occasioned the loss by his negligence, the other owners are not liable beyond the statutory limit:

Wilson v. *Dickson*, 2 Barn. & Ald. 2.

Hall in reply.—All that was decided in *Wilson* v. *Dickson* (*ubi sup.*) was, that where owners are sued collectively the fact that one of them is personally responsible for the collision will not deprive them, as a body, of their right to limit their liability. Under any circumstances the decree ought not to preclude the defendants from their right of recovery against J. Cranch, and I would suggest that, if the court should decide against my contention, words should be inserted in the decree reserving my right against that plaintiff.

Sir R. PHILLIMORE pronounced that the owners of the vessel *Cricket* were entitled to limited liability according to the provisions of the Merchant Shipping Act 1854 and the Merchant Shipping Act 1862, and that, in respect of loss or damage to ships, goods, merchandise, or other things, caused by reason of the improper navigation of the said vessel *Cricket* on the occasion of the collision between that vessel and the steamship the *Endeavour* on the 1st Dec. 1881 the owners of the said vessel *Cricket* were answerable in damages to an amount not exceeding 2564*l.* 13*s.*, and such sum being at the rate of 8*l.* for each ton of the registered tonnage of the said vessel *Cricket* without deduction on account of engine room, without prejudice to any right of action the defendants might have against the plaintiff James Cranch, the master of the said vessel. And he ordered that the defendant should have his costs.

Solicitors for the plaintiffs, *Pritchard* and *Sons*, agents for *Bateson*, *Bright* and *Warr*, Liverpool.

Solicitors for the defendants, *Lowless* and *Co.*

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Nov. 16 *to* 21, 1882.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE BENARES. (*a*)

Collision—Lights — Speed—Regulations for preventing collisions—Infringement—Arts. 3, 18.

A steamship, approaching another vessel so as to involve risk of collision, may be justified in keeping her engines going full speed ahead, where she is placed in a position of danger by the neglect of the other vessel to exhibit one of her lights whilst showing the other.

THIS was an action *in rem*, instituted by the owners of the steamship *Gerarda* against the barque *Benares* and her freight to recover the damages sustained by the *Gerarda* in a collision which took place between that vessel and the

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES Esqrs., Barristers-at-Law.

Benares on the 24th Oct. 1882 in the English Channel.

The case on behalf of the plaintiffs was, that the *Gerarda*, a steamship of 1082 tons register, bound at the time of the collision on a voyage from Shields to Genoa with a crew of twenty-three hands and a cargo of coals, was, shortly before 3 30 a.m. on the 24th Oct. 1882, in the English Channel, the St. Catherine's Light bearing about N.W. ½ W., the wind being a strong breeze from about the south. The *Gerarda* was at the time under steam, making about seven knots and heading about W. by N. Under these circumstances those on board the *Gerarda* observed a green light about three-quarters of a mile off, and bearing about a point on the port bow, and immediately after what appeared to be a white light was seen near the green light. The helm of the *Gerarda* was then starboarded and steadied, and the two vessels were thus brought green light to green light. Directly afterwards the vessel herself (which proved to be the *Benares*) was seen at no great distance, and it was also seen that, though no red light was visible, the port side of the *Benares* was open, and there was danger of collision. The helm of the *Gerarda* was at once put hard-a-starboard, and her engines kept going to assist the helm, and she paid off quickly; but the *Benares* coming on struck the *Gerarda* on the starboard side abaft the engine room, cutting her down below the water's edge, and some hours afterwards the *Gerarda* sank, a portion of her crew saving themselves by climbing on board the *Benares* before the vessels separated.

In the statement of defence it was alleged that, under the circumstances aforesaid, the *Benares*, a four-masted iron barque of 1646 tons register, was in the English Channel off the Isle of Wight bound on a voyage from Calcutta to London. She was proceeding under topsail and main top-gallant sail and fore-topmast staysail, steering on E. by S. course and making about six knots. A good look out was being kept on board, and her regulation lights were burning brightly and duly exhibited. Under these circumstances the mast-head light of the *Gerarda* was seen about a point on the port bow and from three to four miles distant. Shortly afterwards the red light was seen and then the green light, the red light being shut in. The *Benares* was kept on her course until a collision was inevitable, when her helm was put hard-a-starboard in order to ease the blow, but immediately afterwards the vessels came into collision as above described. The defendants alleged that the collision was caused by the *Gerarda*, which was a steamer, improperly neglecting to keep out of the way of the *Benares*, and they counter-claimed for the damage sustained by their vessel.

The action came on for trial on the 16th Nov., when witnesses were examined on both sides.

The main point in dispute was whether the *Benares* had her red light exhibited or not. The plaintiffs' witnesses stated that when they got on board the *Benares* after the collision they saw that the red light was not in its proper place, but was actually in the lamp house, and had just been trimmed or was being trimmed. This was denied by the defendants' witnesses, who stated that it was in its place, and burning brightly.

Butt, Q.C. (with him *W. G. F. Phillimore*) for the plaintiff.—The evidence is conclusive that the *Benares* had no red light, and, further, that her green light was not in its proper place. The regulations for preventing collisions have thus been infringed, and it was this infringement which caused the collision. The fact that the *Gerarda* kept her engines going is, under the circumstances, justifiable.

C. Hall, Q.C. (with him *Bucknill* and *Kennedy*) for the defendants.—It was the duty of the *Gerarda*, being a steamer, to keep out of the way of the *Benares*. This she failed to do, because a good look-out was not kept on board of her. She admits that she kept her engines going through-out. The *Benares* had her proper side lights duly exhibited.

Butt, Q.C. in reply.

Sir ROBERT PHILLIMORE.—This is a case of collision which took place about 3.30 a.m. on Tuesday the 24th Oct. in this year between a steamship and a sailing ship in the English Channel. The direction of the wind was about south. The vessels which came into collision were a screw steamship called the *Gerarda*, of 1082 tons register, bound from Shields to Genoa with a crew of twenty-three hands and a cargo of coals, and a four-masted iron barque of 1646 tons register called the *Benares*, on a voyage from Calcutta to London, laden with a general cargo and manned by a crew of thirty-two hands all told. The *Benares* ran into the starboard side of the *Gerarda* abaft the engine room and sank her. The action in this case was brought by the owners of the *Gerarda*, who contended that the collision was caused by the *Benares* not having a red light duly exhibited and burning. On the other hand the defendants contended that the collision was caused by the improper navigation of the *Gerarda* which, being a steamer, should have kept out of the way of the *Benares*. Now, undoubtedly it was the duty of the *Gerarda*, being a steamship, to get out of the way of the *Benares*, but it was also the corresponding duty of the *Benares* to exhibit a proper red light in order to apprise the *Gerarda* of her position. We are of opinion that the evidence establishes that a red light was not duly exhibited on board the *Benares*. It is to be borne in mind that the *Gerarda* was entitled to have a red light exhibited not only at the time of the collision, or a few minutes before, but also for a reasonable time before the happening of the collision, in order that the *Gerarda* might be enabled to properly conduct her navigation. This being so, we are of opinion that the *Benares* was to blame for the absence of this red light. Now as to the statement of defence and counter-claim of the *Benares*, it simply comes to this, that a good look-out was not kept on board the *Gerarda*. A careful consideration of the evidence leads us to a contrary conclusion. We think there was a proper look-out kept on board the *Gerarda*. It now remains to be considered whether the *Gerarda* was or was not to blame for continuing her speed of seven knots an hour after there was danger of collision. It was the duty of the steamer under the rule to slacken her speed, unless it is shown that the circumstances of the case made a departure from the regulation necessary. Now, in our opinion, the *Gerarda*, having seen the green light only, was right in starboarding and in keeping on

at full speed, this departure from the regulations on the part of the *Gerarda* being necessary to avoid collision. Had the *Gerarda* seen the red light of the *Benares*, this departure from the regulations for preventing collisions would not have been justified. The more the case is considered the more clearly it appears that the absence of the red light on board the *Benares* was the sole cause of the collision. Accordingly, I pronounce the *Benares* alone to blame for the collision.

Solicitors for plaintiffs, *T. Cooper* and *Co.*
Solicitors for defendants, *Pritchard* and *Sons.*

Monday, Jan. 15, 1883.

(Before Sir R. PHILLIMORE and TRINITY MASTERS.)

THE UNITED SERVICE. (*a*)

Towage—Contract—Implied term—Notice restricting liability—Statutory bye-law—Negligence—Damage—Stranding—The Harbours, Docks, and Piers Clauses Act 1847—*the Great Yarmouth Port and Haven Act* 1866.

A term in a towage contract by which owners of tugs exempt themselves from liability as to damage or loss occasioned by the negligence or default of their servants, covers damage occasioned in consequence of the act of the master taking in tow too many vessels at a time in contravention of a regularly constituted bye-law of the port in which the towage takes place, even where the number of vessels causes the tug to be of insufficient power for the service.

The steam-tug U. S. was engaged to tow the R. R. down the river at Y., and out to sea. As the U. S. proceeded she took other vessels in tow, eventually having seven in tow at the same time. By a regulation made by the harbour or pier master under the Harbours, Docks and Piers Clauses Act 1847 *and the Great Yarmouth Port and Haven Act* 1866, *a tug is forbidden to take more than six vessels in tow at the same time. The owner of the R. R. had previously to the towage received a notice from the owners of the U. S. exempting them from any liability in respect of any damage caused by the negligence or default of their servants, which was admitted to form part of the towage contract. On the way out to sea the pier master warned the master of the tug that he had too many vessels in tow. The tug nevertheless proceeded, and when at the entrance of the harbour the R. R. stranded, and became a total wreck.*

Held, that the owners of the U. S. were protected by their notice from liabilty for the damage to the R. R.

THIS was an action brought by the owners of the fishing smack *Red Rose* to recover damages for injuries sustained whilst being towed by the tug *United Service.*

The plaintiff's re-amended statement of claim was so far as is material as follows :

1. The plaintiff was on the 2nd Nov. 1881 the owner of the fishing smack *Red Rose* of the port and harbour of Great Yarmouth, which is a harbour within the meaning of the Harbours, Docks, and Piers Clauses Act 1847.

2. The defendants are the owners of steam-tugs in the same port, and, among others, of the steam-tug *United Service.*

3. On the afternoon of the 3rd Nov. 1881, the *United Service* was lying moored at the quay at Great Yarmouth, alongside the brigantine *Hannah*, when the plaintiff requested the master of the *United Service* to take in tow the *Red Rose* and tow her to sea. The *United Service* shortly afterwards came down the river and harbour at Yarmouth, towing the *Hannah* to sea, and when alongside the *Red Rose* a line was sent by the master of the *United Service* on board the *Red Rose*, to which the *Red Rose's* crew made the latter's tow rope fast. This tow rope was then hauled on board the *United Service* and made fast, and the *United Service* proceeded to tow the *Hannah* and *Red Rose* side by side.

4. This is the ordinary way in which contracts for towage to sea are made by the defendants' servants on their behalf. In the absence of mention of any special sum there is a usual towage price, which the owner of the towed vessel thereby binds himself to pay, and the servants of the defendants show that they undertake the towage by sending their line on board the vessel to be towed.

5. Shortly after the *Red Rose* had been thus taken in tow, two other vessels were taken in tow by the *United Service*, and were towed side by side astern of the *Hannah* and the *Red Rose.*

6. The wind was from about south by east half east, blowing strong into the entrance of the river, and the tide was flood. In these circumstances the *United Service* had not, though her engines and machinery were in good order, power enough to tow more than the vessels she had in tow. Notwithstanding this, the *United Service* proceeded to take in tow, besides the four vessels already mentioned, two other vessels, which were arranged side by side behind the two previous vessels and finally a seventh vessel.

7. This seventh vessel was taken in tow in breach of one of the directions or regulations duly given or made by the harbour master or pier master, under the Harbours, Docks, and Piers Clauses Act 1847, and the special Act, the Great Yarmouth Port and Haven Act 1866. Such direction or regulation is as follows : "No steam vessel used for the purpose of towing vessels shall, at any one and the same time, tow, or have in tow, or aid or assist in towing, more than six vessels, and that such vessels in tow shall not, at any time, exceed more than two vessels abreast." Public notice is given of these directions and regulations, which are well known to the plaintiff and to the defendants, and to ship owners at Great Yarmouth generally, and were binding upon the defendants and their servants.

8. As the vessels approached the mouth of the harbour the wind and tide and the sea meeting them proved too strong for the *United Service* with so many vessels in tow, and she was unable to make head against the wind, tide, and sea, by reason of the number of the vessels in tow, and her crew, though a sufficient crew, were not numerous enough to get and keep all the ropes of the vessels in tow, in their proper positions over the stern, and several of the vessels in tow, including the *Red Rose*, were carried out of their course on the north shore and took the ground, and the *Red Rose* in particular so took the ground that she could not be got off, and became a total wreck, and was lost.

9. The master of the *United Service*, in taking and keeping so many vessels in tow, disobeyed the directions of the harbour master and pier master, and did not regulate his vessel according to the directions of the harbour master and pier master, made in conformity with the Harbours, Docks, and Piers Clauses Act 1847, and the special Act, for as much as he did not obey the directions and regulations mentioned in paragraph 7, which had been duly served upon him, or of which he had notice; and further, forasmuch as he disobeyed or neglected to comply with the oral directions of the harbour master and pier master, directing him that he had too many vessels in tow, and requiring him to leave some of them at the pier and tow them out afterwards.

10. The plaintiff claims to recover the damage occasioned by such wreck and loss.

11. The defendants rely upon the following notice given by them :

"Notice to shipowners, fishing boat owners, shipmasters, and others. The Great Yarmouth Steam-tug Company, Limited, owners of steam-tugs, *Victoria*, *United Service*, *Express*, *Meteor*, *Sailor*, *Star*, *Pilot*, and *Andrew Woodhouse*, respectfully give notice that they

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

will tow vessels, boats, or other crafts by the above named steam-tugs on the following conditions only: That they are not to be answerable or accountable for any loss or damage whatever which may happen to or be occasioned by any vessel, boat, or any of the cargoes on board of the same while such vessel, boat, or craft is in tow of either of the steam-tugs in the river or at sea, and whether arising from or occasioned by any supposed negligence or default of them or their servants, or defect or imperfections in the said steam-tugs or either of them, or the machinery or any other part of the same, or any delay, stoppage, or slackness of the speed of the same however occasioned, or for what purpose wheresoever taking place, and that the owner or persons interested in the vessels, boats or crafts or of the cargoes on board the same so towing, undertake, bear, satisfy and indemnify the said tug owners against the same."

12. The plaintiff admits the receipt of this notice, and admits that it formed part of the contract between him and the defendants, but he says that the defendants are not protected against his claim by the terms of this notice.

13. The plaintiff says that there was an implied contract in law that the *United Service* would not undertake a work beyond her power to perform, and a further implied contract in law that she would not act unlawfully or in disobedience of the above mentioned printed or written and oral directions and regulations to the detriment of the plaintiff, and a further implied contract that her master would regulate his vessel in accordance with the directions of the pier master or harbour master.

14. The plaintiff further maintains that the breach of duty or misconduct of the master of the *United Service* in taking an excessive number of vessels in tow was not one of the matters excepted by the said notice.

The defendants in their statement of defence to the re-amended statement of claim, pleaded as follows:

1. With reference to the 6th paragraph of the amended statement of claim, the defendants deny that in the circumstances therein stated the *United Service* had not power enough to tow more than the vessels which she then had in tow. On the contrary the *United Service* had power enough to tow all the vessels which she took in tow.

2. With reference to the 7th paragraph of the amended statement of claim, the defendants deny that the said vessel was taken in tow in breach of the said bye-law or regulation. They deny that the said bye-laws or regulations were duly made by the authorities of the harbour, or that the same were made under the Harbours, Docks, and Piers Clauses Act 1847, and they deny that such bye-law or regulation was in the words or to the effect set forth in the 7th paragraph. The defendants further say that the said bye-law or regulation was *ultra vires* and invalid, and was not binding upon the defendants or their servants.

3. Even if the defendants were guilty of the alleged breach of the bye-law, and injury to the *Red Rose* resulted from the alleged breach, nevertheless no cause of action thereby accrued to the plaintiff, nor did he become entitled hereby to maintain this action against the defendants to recover damages for an injury resulting from such alleged breach of the said bye-law.

4. The alleged injury to the *Red Rose* was not the consequence of the alleged breach of the said bye-law, nor was the same caused by the *United Service* taking in tow more than six vessels.

5. With reference to the 8th paragraph of the amended statement of claim, the defendants say that the inability of the *United Service* to make head against the wind, tide, and sea was not caused by the number of the vessels in tow, or by her crew not being numerous enough to get and keep all the ropes of the vessel in tow in their proper position over the stern, or by any negligent act or omission on the part of the defendants or their servants.

6. The crew on board the *Red Rose* set too much canvas on her, and let her get too much to leeward, having regard to the direction and force of the wind and her relative position towards the *United Service* and the other vessels then in tow, and thereby materially contributed to the stranding of the *Red Rose*.

7. The injury to the *Red Rose* was also brought about by the negligence and improper conduct of the crews on board the *Dolphin*, *Flash*, and *Galatea*, then also in tow, setting too much canvas, and also in steering those vessels so as to let them go too much to leeward.

8. With reference to the 9th paragraph of the amended statement of claim, the defendants deny that the master of the *United Service* disobeyed any verbal directions of the harbour master or pier master, or that the master failed to regulate his vessel according to the directions mentioned in the said paragraph. The defendants deny that even if the harbour master or pier master did give any such directions the same were heard or understood by the master of the *United Service*, and they deny that even if the said directions had been obeyed, such obedience would have averted the stranding of the *Red Rose*; on the contrary, such obedience would have resulted in the stranding of all the smacks then in tow. Even if the master of the *United Service* did disobey the said verbal directions of the harbour master or pier master, nevertheless no cause of action accrued thereby to the plaintiff, nor did he become thereby entitled to maintain this action against the defendants to recover damages for an injury resulting from such alleged disobedience of such directions.

9. The defendants do not admit the damage alleged to have been sustained by the plaintiff by the alleged wreck or loss.

10. With reference to the 11th and 12th paragraphs of the amended statement of claim, the defendants rely on the said notice as forming part of the contract between the plaintiff and defendants, and repeat the same, and plead it as a defence to all the matters and causes of action set forth and alleged in the amended statement of claim, and say that the defendants are by the terms of such notice, protected against the claim of the plaintiff.

11. With reference to the 13th paragraph of the amended statement of claim, the defendants say that there was no implied contract in law that the *United Service* would not act in disobedience of the said directions and regulations to the detriment of the plaintiff and that there was no implied contract in law that the master would regulate his vessel in accordance with the directions of the pier master or harbour master.

12. With reference to the 14th paragraph of the amended statement of claim, the defendants say that the breach of duty or misconduct of the master of the *United Service* (if any such were committed) in taking more than six vessels in tow was one of the matters excepted by the said notice.

Butt, Q.C (with him *Phillimore*), in opening the case for the plaintiffs, stated briefly the facts of the case.—The tug *United Service* had been engaged to tow two vessels (of which the *Red Rose* was one) out to sea. The tide was then setting up, and the wind about S. by E. As the tug proceeded down the river she took other vessels in tow, and before she breasted the lifeboat house she had six vessels in tow. She then eased and took a seventh in tow astern of the others. As the tug proceeded out to sea the pier master hailed the master of the tug that he had too many vessels in tow, and that he should leave some of them at the pier and return for them when he had taken the remainder out to sea. The master of the tug however said that it was all right, and that he could manage them all. The seventh vessel had been taken in tow in breach of the regulations made by the harbour master or pier master as in the 7th paragraph of the re-amended statement of claim set forth. Besides this, the master of the tug had disobeyed the oral directions of the pier master. The pier master and the harbour master were in the same category in the Act of Parliament (the Harbours, Docks, and Pier Clauses Act 1847, 10 & 11 Vict. c. 27). The authority of the pier master extended up the river, and was collateral with the authority of the harbour master. He further maintained that there was (1) an implied

contract in law that the *United Service* would not undertake a work which was beyond her power to perform; (2) an implied contract in law that she would not act unlawfully or in disobedience of the printed or oral directions and regulations to the detriment of the plaintiff; and (3) an implied contract that her master would regulate his vessel in accordance with the directions of the pier master or harbour master; and further, that the breach of duty or misconduct of the master of the *United Service* in taking an excessive number of vessels in tow was not one of the matters excepted by the said notice.

Before any evidence was given on either side,

Webster, Q.C. (with him *Hall*, Q.C. and *Witt*), for the defendants, submitted that, taking the facts stated by the plaintiffs, and appearing in the statement of claim as admitted, the defendants were thereon entitled to judgment. The plaintiffs admit that the terms of the notice form part of the towage contract. That notice covers all damage, however occasioned. Assuming for sake of argument that the master of the tug by taking a seventh vessel in tow broke the bye-law made by the harbour master or pier master as alleged in the 7th paragraph of the re-amended statement of claim, nevertheless the notice covered the breach of that bye-law. These same regulations and also the notice given by the tug owners have already been discussed:

Symonds v. *Pain*, 30 L. J. 256, Ex.

The liability of the company was restricted by their notice, which was an express term in the towage contract. A contractor may always exempt himself from a common law liability for negligence by an express term or notice:

Peninsular, &c., Steam Company v. *Shand*, 12 L. T. Rep. N. S. 809; 2 Mar. Law Cases O. S. 244; 3 Moore P. C. N. S. 272.

Negligence resulting in the infringement of bye-laws or regulations made under the authority of an Act of Parliament or Order in Council can be put on no higher ground than ordinary negligence at common law, because the mere breach of a statute does not give a cause of action:

Stevens v. *Jeacocke*, 11 Q. B. 731.

The fact that a mere breach of a bye law made under a statute has caused damage does not vest a right of action in the party suffering the damage against the person guilty of the breach:

Atkinson v. *Newcastle, &c., Waterworks Company*, 36 L. T. Rep. N. S. 761; 2 Ex. Div. 441.

In the present case the tug owners are protected not only from the negligence of the master of the tug, but also from any wilful act and default:

Taubman v. *The Pacific Steam Navigation Company*, 26 L. T. Rep. N. S. 704; 1 Asp. Mar. Law Cases 336.

Even if the tug owners are not protected by the terms of their notice from liability for the breach of an implied condition precedent, in this case there is no breach of such a condition, for the alleged negligence of the master was committed after the towage contract had commenced:

Steel v. *State Line Steamship Company*, 37 L. T. Rep. N. S. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72.

Butt, Q.C. and *Dr. Phillimore, contra*, argued that the towage contract was made according to the law at the time existing. Whether determined by statute or otherwise, it was an implied term that the tug should not take more vessels in tow than she was capable of taking in safety. Whether the statute applied or not, the implied term exists: (1 Maude & Pollock, 357.) The owners of the tug could not protect themselves against the unseaworthines of the tug. On the authority of *Steele* v. *State Line Steamship Company* (37 L. T. Rep. N. S. 333; 3 App. Cas. 72; 3 Asp. Mar. Law Cases, 516) they argued that there was an implied warranty that the tug should be "tow-worthy."

Webster, Q.C. in reply.

Cur. adv. vult.

Jan. 23.—Sir R. PHILLIMORE.—The question which I have now to decide is an important one, though lying within narrow limits. It arises in an action for breach of contract brought by the owner of a smack against the owners of a steam-tug engaged to tow the smack. The facts which I have to deal with are set forth in the allegations in the plaintiff's statement of claim. They have not been proved, but are admitted as true by the defendants for the sake of argument in order that the legal question which arises may be decided. They are shortly as follows. On the 3rd Nov. 1881 the plaintiff, who was owner of the fishing smack *Red Rose*, of the port and harbour of Great Yarmouth, requested the master of the steam tug *United Service*, belonging to the defendants, to tow the *Red Rose* out to sea. The *United Service* was at that time lying moored at the quay at Great Yarmouth alongside of a brigantine called the *Hannah*, and the *Red Rose* was some little way lower down the river. In compliance with the plaintiff's request, the *United Service*, being under the command of her master, a servant of the defendants, came down the river and harbour having the *Hannah* in tow, and when alongside the *Red Rose* she made that vessel fast to herself, and proceeded seawards, having the *Hannah* and the *Red Rose* both in tow side by side. Shortly afterwards two other vessels were taken in tow by the *United Service*, and were towed side by side of each other, astern of the *Hannah* and the *Red Rose*. The wind at this time was blowing strongly into the entrance of the river, and the tide was flood. The engines and machinery of the tug were in good order, and she appeared able to manage the four vessels which she already had in tow, but could do no more. She proceeded, however, to take in tow two other vessels, besides the four already mentioned, and finally a seventh vessel. As the vessels approached the mouth of the harbour the wind and sea proved too strong for the tug with so many vessels in tow; the tow-ropes got out of order, and ultimately the *Red Rose* was carried out of her course, took the ground so that she could not be got off, and became a total wreck.

For this loss the plaintiff claims damages. The seventh vessel was taken in tow in breach of a regulation duly made by the harbour master or pier master under the Harbours, Docks, and Piers Clauses Act 1847, and the special act, the Great Yarmouth Port and Haven Act 1866, a regulation which forbids a tug to take more than six vessels in tow at once. The master of the tug moreover disobeyed certain oral directions given him by the pier master with regard to the vessels he was towing. Before entering into the towage contract mentioned above, the plaintiffs had received the following notice, issued by the defendants, which,

he admits, formed part of the contract: "Notice to shipowners, fishing boat owners, shipmasters, and others.—The Great Yarmouth Steam Tug Company Limited, owners of steam-tugs *Victoria, United Service, Express, Meteor, Sailor, Star, Pilot,* and *Andrew Woodhouse*, respectively give notice that they will tow vessels, boats, or other crafts by the above-named steam-tugs on the following conditions only, that they are not to be answerable or accountable for any loss or damage whatever which may happen to or be occasioned by any vessel, boat, or craft, or any of the cargoes on board of the same, while such vessel, boat, or craft is in tow of either of the steam-tugs in the river or at sea, and whether arising from or occasioned by any supposed negligence or default of them or their servants, or defects or imperfections of the said steam-tugs, or either of them, or the machinery, or any other part of the same, or any delay, stoppage, or slackness of the speed of the same, however occasioned or for what purpose wheresoever taking place; and that the owner or persons interested in the vessels, boats, or crafts, or of the cargoes on board the same so towing, undertake, bear, satisfy, and indemnify the said tug owners against the same." The defendants rely upon this notice as protecting them against the plaintiffs claim in respect of the alleged wrong-doing of their servant, the master of the *United Service*.

The contention of the plaintiff is that the defendants are liable notwithstanding the notice—that it was an implied term of the contract that the master of the tug (1) should obey the regulations framed under the statutory authority, and (2) should under the general law, apart from any statutory rule, take no more vessels in tow than the tug was competent to manage—that this implied condition is in the nature of a warranty, and that a breach of it constitutes something more than the negligence against which the defendants are protected by this notice. According to the argument of the plaintiff's counsel, the negligence referred to in the notice is merely the ordinary negligence of a tug master during the performance of a towage contract, not a breach of a warranty implied in the contract, and that if such warranty was intended to be negatived, the notice should have expressly provided for it. It appears to me that the only point to be decided is whether or not the words in the notice, "negligence or default of . . . their servants," cover the alleged wrong doing of the master of the tug in disobeying the statutory regulations, and the directions of the pier master, and taking in tow more vessels than his tug was competent to manage. It is important to observe that the tug is admitted to have been competent to tow four vessels, and that at the time when the performance of the contract began, and during the first part of such performance, the tug was altogether within her right, the alleged unlawfulness not occurring until the seventh, or at least the fifth and sixth vessels were taken in tow, when part of the contract had already been performed.

Of the authorities cited, I think the case of *Steel* v. *The State Line Steamship Company* (3 App. Cas. 72) was most in point. In that case a bill of lading contained a special clause which added negligence of the persons in the service of the ship to the usual excepted perils. Part of the cargo was damaged during the voyage by sea water coming through an insufficiently secured port-hole. It seems to have been considered that if the evidence had established the fact that the deficiency of the port-hole had arisen during the voyage through negligence of the crew and was not due to any defect existing before the departure of the ship from harbour then the ship owners would have been protected by the special clause in the bill of lading. The circumstances of the present case seem to me to be analogous. I am of opinion that the alleged wrong doing, as it arose entirely during the performance of the contract, was "negligence and default" within the meaning of the notice issued by the defendants, and nothing more. I cannot allow that the somewhat subtle distinction attempted to be drawn by the plaintiff's counsel between negligence and breach of a warranty implicitly contained in the contract is to be found in the circumstances before me, nor am I able to see any material difference between the negligence of the master in breaking a statutory rule, and his negligence in breaking the general law. On these grounds I pronounce on the question before me in favour of the defendants.

Solicitors for the plaintiff, *Ingledew* and *Ince*.

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

Tuesday, Feb. 20, 1883.

(Before Sir ROBERT PHILLIMORE and TRINITY MASTERS.)

THE LANCASTER. (*a*)

Salvage—Award—Amount.

Where a steamship at great risk to herself got another steamship off a point in the Red Sea, ninety-five miles from Suez, surrounded by coral reefs, and so saved her from probable total loss, and then at her request towed her within a few miles of Suez, the Court on a value of 62,000*l. awarded* 6000*l.*

THIS was a salvage action brought by the owners, master, and crew of the steamship *Ossian* against the steamship *Lancaster*, her cargo and freight.

The plaintiffs' statement of claim was so far as material as follows:—

1. The *Ossian* was a screw steamship of about 1210 tons register at the time the services hereinafter stated were rendered. She was owned by some of the plaintiffs, and was on a voyage from Suez to Tuticorin in the East Indies in ballast, where she was under a charter to load a cargo of sugar for Liverpool, the freight of which amounted to 6500*l.*

2. On Tuesday the 30th May 1882, at about 5 a.m., the *Ossian* was passing down the Red Sea about ninety-five miles from Suez, and the wind was from the N. and N.W. blowing a strong breeze with a heavy sea running and surf breaking, when those on board the *Ossian* observed the *Lancaster*, which is a screw steamer of about 1200 tons register (and which the captain of the *Ossian* had learnt at Suez was in distress) aground at a point of the shore which is surrounded by coral reefs and about five miles north of the point known as Ras Garib, and as the *Ossian* came near the *Lancaster* signalled "Can you tow me off?"

3. The *Ossian* at once made towards the *Lancaster*, and when within a short distance brought up by her starboard anchor. A boat from the *Lancaster* with her captain in it came alongside the *Ossian*, and it being too rough and boisterous for the *Lancaster's* captain to get on board the *Ossian*, the captain of the latter vessel

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

managed with great difficulty and at much peril to leap into the said boat, and it thereupon, in a heavy sea and surf and strong wind, proceeded towards the *Lancaster*, which was boarded by both captains with some difficulty.

4. The captain of the *Ossian* then ascertained, as the facts were, that the *Lancaster* with a cargo of wheat from Bombay for the United Kingdom had been ashore as above stated since the night of Saturday the 27th of May 1882, that whilst so ashore she had signalled to two steamers, both of which had, because of the danger attached thereto, refused compliance with her request; that she was bumping and sliding on the rocks, that her stern post and bottom were started; that she was holed and making water in the after hold; that her after ballast tank was full of water, and that she had jettisoned 300 tons of cargo.

5. Jettisoning the cargo as aforesaid did not at all assist in getting the *Lancaster* off the rocks on which she was aground, but, on the contrary, increased the peril of her position by enabling the sea and wind to have greater power in rolling and bumping her upon the rocks.

6. Both the captain of the *Lancaster* and the captain of the *Ossian* considered it very doubtful, owing to her dangerous position, and the state of the wind and sea, whether the *Ossian* could possibly succeed in getting the *Lancaster* afloat, and the master of the *Lancaster* being anxious that the *Ossian* should not leave her side, if unable to tow her off, made the following offer to the captain of the *Ossian*, which he accepted:

"Tuesday, 30th May 1882.

"I this day offer W. Tillar, Master *Ossian*, one hundred pounds per day for standing by and rendering any service I may need, and as long as I may need, but not over seven days. In case the ship is got off, this is to be void, and claims settled by arbitration."

7. The master of the *Ossian* then managed, with much risk and difficulty, to return to his vessel in the *Ossian's* life boat, and brought his vessel as near as he dared to the *Lancaster*, in order to endeavour to tow her off the rocks. By this manœuvre the *Ossian* was necessarily brought into such dangerous proximity to numerous coral reefs that, to prevent her also getting aground, which in the then condition of the wind and high sea running was imminently probable, she was compelled to put out two anchors to seaward. Those on board the *Ossian* then prepared to run a line on board the *Lancaster*. This, after considerable difficulty and risk, the sea still running very high, and the wind being strong, they succeeded in doing, and afterwards in connecting the two ships by means of the *Lancaster* hawser.

8. The *Ossian* being then under steam attempted to move the *Lancaster*, but was obliged to increase the pressure in her boilers to upwards of 70lbs., and after a considerable time succeeded in making the *Lancaster* move, and ultimately in getting her off the reef on which she had settled. The *Lancaster's* propeller slowly reversing she ultimately came off, and was towed into deep water by the *Ossian*. During the assistance so rendered the risk and danger to the *Ossian* was increased by her chains fouling both her anchors so laid out as aforesaid, and in addition the tow rope got foul of the propeller, rendering it necessary for the mate of the *Ossian* to dive repeatedly in order to cut and clear the same. These operations took six hours' incessant labour on the part of a large number of the *Ossian's* officers and crew, and were effected at great jeopardy to the lives and safety of some of them. During the whole of this time, from the wind and sea prevailing with the screw rendered useless, the *Ossian* was in great peril and risk.

9. The *Ossian* succeeded in towing off the *Lancaster* at about 4.30 on Tuesday, and then, at the request of the captain of the *Lancaster*, proceeded to take her in tow for the port of Suez, then ninety-five miles distant. After towing her to within a few miles of that port, there being a strong head wind and a heavy sea, and the *Lancaster* steering very badly throughout the towage, the hawser parted on being shortened at the request of the master of the *Lancaster*, and the *Ossian* prepared to send a fresh hawser aboard, when the captain of the *Lancaster* intimated that he thought his vessel could steam without towing if the *Ossian* kept by her.

10. Owing to the damage the *Lancaster* had received while ashore she was so disabled as to make it unsafe and imprudent for her to proceed alone to Suez, and it was on this account that the master of the *Lancaster* begged those on board the *Ossian* to stand by his ship, although she was then so near to Suez, till he reached that place, so as to be ready and at hand to render such assistance as might be necessary. This the *Ossian* did, and the *Lancaster* going ahead dead slow reached Suez safely in company with the *Ossian* on Wednesday the 31st May.

11. The place where the *Lancaster* went aground is one of very great peril. It is surrounded by dangerous coral reefs, and the *Lancaster*, owing to the position in which she was lying, was exposed to the full force of the wind and sea, and, had not those on board the *Ossian* come to her assistance, the *Lancaster*, her crew and cargo, would probably have been destroyed and lost. As it was, when the *Lancaster* arrived at Suez the remainder of her cargo had to be discharged, and the vessel had to undergo considerable repairs before she was able to proceed on her homeward voyage.

12. The said services were rendered with considerable skill and promptitude, and with great risk to the captain and several of the *Ossian's* crew, and the *Ossian* was exposed to very great risk and damage in rendering the said services.

14. The *Ossian* was of the value of 30,000*l*. In rendering the said services her owners incurred damage and expenses to the amount of about 400*l*., and she deviated from her voyage and was delayed a considerable time in the performance thereof.

The defendants, whilst substantially admitting the services of the *Ossian* as set forth in the statement of claim, pleaded that the state of the weather and the risk and peril to the *Lancaster* and to the *Ossian* were greatly exaggerated, that the jettison of the cargo did materially assist the *Lancaster* in getting afloat, that the steam power of the *Lancaster* materially assisted the *Ossian*, and that the *Lancaster* would in time have floated quite apart from any assistance rendered by those on board the *Ossian*.

Feb. 20.—The action came on for hearing before the judge, assisted by Trinity Masters, upon *vivâ voce* and printed evidence. The log of the *Ossian* and the protest of her master were put in by the plaintiffs. The value of the *Lancaster*, her cargo and freight, were taken at 62,000*l*.

Myburgh, Q.C. (with him *L. E Pike*) for the plaintiffs. The services to the *Lancaster* were rendered at great peril to the *Ossian* and those on board of her, seeing the dangerous coral reefs which were in the immediate vicinity. But for the services of the *Ossian* the *Lancaster* must have been lost.

Cohen, Q.C. (with him *M'Leod*, Q.C., and *J. P. Aspinall*) for the defendants.—The risk and peril to the salvors have been greatly exaggerated. Had the *Lancaster* continued to jettison her cargo she would have come off without any assistance.

Myburgh, Q.C. in reply.

Sir ROBERT PHILLIMORE.—This is a most meritorious case of salvage service. The service was rendered by one very large steamer, the *Ossian*, to another very large steamer, the *Lancaster*. Whilst passing along the Red Sea about ninety-five miles from Suez, the *Lancaster* struck upon a rock five miles north of the point known as Ras Garib. Coral reefs were all around her at the time, and the state of her peril may be taken from the captain's own protest, which gives the epitome of the service rendered in words which are true and cannot be gainsaid. The material portion of the protest commences as follows:—"Left Bombay on May 10th 1882, bound for Dunkirk. May 20th, passed Aden. May 27th, strong wind and heavy

sea, weather very hazy. At 8.30 p.m. Ras Garib abeam. At 9.15 p.m. the ship took the ground and struck repeatedly with great violence. Immediately reversed engines full speed astern, squared the yards, set topsail and foresail, and did all possible to try and back the ship off, but without avail. Seeing the vessel's critical position consulted the officers, and taking into consideration the great distance to the nearest port, from whence help could not possibly be had in less than six days, decided that the only means of saving the ship and cargo was to jettison a portion of the cargo." And then the captain proceeds to state as follows:—"In the interest of all concerned commenced throwing overboard the cargo from the hatchways in order to lighten the fore-end. 28th May, continued to jettison. Let go starboard anchor to keep ship's bow from driving in shore, owing to the heavy swell running. Ship thumping heavily. 2 p.m.: Tried to put out anchor from starboard quarter, but was prevented by the heavy sea. About 3 p.m. carpenters reported the No. 3 ballast tank to be filling. Set pumps working continually. Supposed hole in ship's bottom, as the tank completely filled. 3.30 p.m.; Signalled an Irish line steamer for assistance. He replied, 'Too much sea on.' Gave him ship's name and asked to be reported. 6.20 p.m.: Signalled for assistance to a steamship bound towards Suez, but got no reply. 29th May: Fresh gale and short sea, ship thumping heavily. 6 a.m.: Started discharging from the after hatches on account of ballast tank filling; stern of ship striking heavily. 8 a.m.: Got the boats ready for lowering, as the after peak was found to have filled. 5.30 p.m.: Succeeded in carrying out an anchor from the starboard quarter about 100 fathoms seaward, and kept a continual strain on it to keep the ship's stern from working in shore. 30th May: Gale and sea continues. Engineer reported ship straining under engine room; still jettisoning cargo."

Whilst the *Lancaster* was in this condition she received the services rendered by the *Ossian* in this case. It is not immaterial to remember that before the *Ossian* came up the *Lancaster* had made signals to two other vessels passing up the Red Sea, and that they had been either unable or unwilling to render assistance to her. The effect of the help rendered to her by the *Ossian* was to release her from a position of the greatest peril; and, according to the clear and decided opinion of the Elder Brethren, if she had remained many hours longer in the position in which she was when the *Ossian* came up, she would have been lost with all on board. It is not necessary to say more. Every element that could constitute a most valuable salvage service was present in this case; and one circumstance to be borne in mind is, that the services were not effected without jeopardy to all on board the *Ossian*, as, on the *Lancaster* coming off the reef, the chains of the *Ossian* fouled both the anchors of that vessel, and the tow rope got foul of the *Ossian's* propeller, so as to render it for the time useless.

The only question remaining to be considered is the amount of compensation that should be awarded by the court. The value of the ship, cargo, and freight is about 62,000*l.*, and, after due consideration and consultation with the Elder Brethren of the Trinity House, and taking into consideration all the facts, I award 6000*l.* Out of this award the mate and those men belonging to the crew of the *Ossian* who acted as divers at great peril to themselves should receive such shares of the award as will adequately reward their services.

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

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

Thursday, April 5, 1883.

(Before BUTT, J.)

THE BIANCA. (*a*)

Practice—Collision—Tug and tow—Third party—Directions—Order XVI., rr. 18 *and* 21.

Where in an action for damage by collision the defendants had by notice brought in the owner of a tug towing the defendants' ship, and sought to make the tug liable for improper navigation and disobedience to orders, and the defendants applied for directions as to the mode of having the questions in the action determined, the Court declined to give directions, and dismissed the third party from the action upon the ground that questions between the defendants and the third party, totally different from those between the plaintiffs and the defendants, might arise in the case, and would be embarrassing to the plaintiffs.

THIS was a summons in the Admiralty Division, referred by the Liverpool District Registrar to the judge, in an action of damage, to obtain directions under Order XVI., r. 21, as to the mode of having the questions in the action determined.

The collision, out of which the action for damage arose, took place about two p.m. on the 15th Jan. 1883, in the river Mersey, between the steam tug *Gamecock*, which was lying at anchor, and the ship *Bianca*, which was being towed out of dock and across the river by the steam-tug *Rescue*.

On the 5th Feb. the owners of the *Gamecock* instituted an action against the *Bianca*. The owners of the *Bianca* appeared, and on the 12th Feb. the plaintiffs delivered their statement of claim.

On the 6th March the defendants, the owners of the *Bianca*, obtained leave by the judge's order to serve a notice on the Liverpool Steam Tug Company Limited, the owners of the steam-tug *Rescue*, claiming indemnity from them in respect of the damage proceeded for, pursuant to Order XVI., r. 18. This notice was duly served, and on the 15th March an appearance was entered for the Liverpool Steam Tug Company Limited, in pursuance of the above notice.

On the 17th March the defendants took out a summons in the Liverpool District Registry, in the following terms:

Let the plaintiffs, defendants, and the owners of the steam-tug *Rescue*, their solicitors or agents, attend me, at 3, Brunswick-street, Liverpool, on Monday, the 19th inst., at eleven o'clock in the forenoon, to show cause why the district registrar should not give directions as to the mode of having the questions in this action determined pursuant to the rules of the S. C. Order XVI., r. 21.

On the 19th March the summons was heard, when the owners of the steam-tug *Rescue* refused

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

to undertake the burden of defending the action, and the summons was adjourned until the 29th March, to enable the defendants to put in their defence.

On the 28th March the defendants delivered their statement of defence, paragraph 10 of which was as follows:

10. In the alternative the defendants say that the said collision was due to the negligent and improper navigation of the *Rescue*, and to the disobedience of those on board of her to the orders of those on board of the *Bianca*.

The adjourned summons came on for hearing before the district registrar on the 29th March, and he, having read the statement of defence, adjourned the summons to the judge in chambers, where the parties were represented by counsel.

Roscoe, in support of the summons, for the defendants.—The questions between the defendants and the third parties are similar to those between the plaintiffs and defendants. Expense will be saved by the third parties being bound by the decision in this action:

The Cartsburn, 4 Asp. Mar. Law Cas. 202; 5 P. Div. 59; 41 L. T. Rep. N. S. 710;
Benecke v. *Frost*, 1 Q. B. Div. 419; 34 L. T. Rep. N. S. 728.

Kennedy, for the plaintiffs, against the summons.—10th paragraph in the statement of claim is embarassing to the plaintiffs. It is obvious from that paragraph that questions not at issue between the plaintiffs and defendants may arise between the defendants and the third parties:

Schneider v. *Batt*, 8 Q.B. Div. 701; 44 L. T. Rep. N. S. 142;
Horwell v. *London General Omnibus Company*, 2 Ex. Div. 365; 36 L. T. Rep. N. S. 637;
Treleven v. *Bray*, 1 Ch. Div. 176; 33 L. T. Rep. N. S. 827;
Bower v. *Hartley*, 1 Q. B. Div. 652.

W. G. F. Phillimore, for the third parties, opposed the summons and asked to be dismissed from the proceedings.

Upon the conclusion of the arguments the judge announced that he would take time to consider and would give judgment in court.

April 5.—BUTT, J.—I have looked through the authorities that were cited, and the conclusion to which I have come is, that there are valid reasons why, in the exercise of my discretion, I should decline to give any directions under Order XVI., r. 21, in this case. Assuming that I have power to give such directions, I see no sufficient reason in this case why, in the face of the plaintiffs' opposition, I should embarrass them and the defendants with any further questions as to the rights and liabilities of the defendants and the third parties *inter se*. It is probable—to say the least of it—that there will arise in the case (for I have read the pleadings) questions between the defendants and the third parties totally different and distinct from those between the plaintiffs and the defendants. Under these circumstances the third parties, the owners of the steam-tug *Rescue*, must be dismissed from these proceedings.

Upon the application of counsel for the third parties and the plaintiffs, the learned Judge ordered the defendants to pay the costs of all proceedings taken by them to bring in the third parties.

Solicitors for the plaintiffs, *Fielder* and *Sumner*.
Solicitors for the defendants, *W. W. Wynne* and *Son*.
Solicitors for the third parties, *Toller* and *Sons*.

Tuesday, May 1, 1883.

(Before BUTT, J.)

THE ANNA HELENA. (*a*)

Salvage—Derelict — Default action — Sale before judgment.

Where in a salvage action, in which no appearance had been entered, it was alleged upon affidavit that the ship and cargo were daily deteriorating in value, and that large expenses were being incurred in respect of the charge of the property, and that the plaintiffs had been in communication with the owners as to a sale, the Court, on motion by the plaintiffs prior to decree, ordered an appraisement and sale of the property.

THIS was an unopposed motion by the plaintiffs in a salvage action, in which no appearance had been entered by the defendants, to obtain, prior to decree, an order for the appraisement and sale of the property salved. The action was brought by the owner, master, and crew of the fishing smack *John Ellis*, against the owners of the Dutch schooner *Anna Helena*, her cargo and freight, to recover reward for salvage services rendered in Dec. 1882 to the *Anna Helena* and her cargo, by bringing her into Newcastle derelict, and in a waterlogged condition.

The *Anna Helena* was placed in the care of the receiver of wreck at Newcastle, in whose charge she had remained until her arrest in this action, when she passed into the custody of the marshal. It being found impossible to settle the amount of salvage out of court, this action was brought on the 17th April 1883 but no appearance had been entered either for ship or cargo.

The plaintiffs now applied for the sale of the property salved upon the affidavit of the owner of the *John Ellis*, supported by correspondence from the Dutch consul at Newcastle, who represented the owners and underwriters of the *Anna Helena*. The fifth paragraph of the said affidavit was as follows:

5. I am informed and believe the said vessel and her cargo are daily deteriorating in value, and that large expenses are and have been incurred in respect of the charge of the property, and it is therefore desirable that the same should be realised without delay.

May 1.—*J. P. Aspinall* moved the court to order a commission to issue for the appraisement and sale of the *Anna Helena* and her cargo.

BUTT, J.—I think that, although there is no appearance by the defendants, as it is sworn upon affidavit that the property is daily deteriorating, I will under the circumstances order it to be sold before decree.

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

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Thursday, Nov. 30, 1882.

(Before Sir R. PHILLIMORE.)

THE FAIRPORT. (*a*)

Disbursements of master—Maritime lien—Liability—Transfer of ship—Laches—Admiralty Court Act 1861, *s.* 10.

A master of a ship has a maritime lien for his disbursements made in the service of the ship, and such lien attaches to the ship in the hands of bonâ fide purchasers without notice of the lien at the time of the purchase, unless it be lost by the laches of the master.

Where a master has incurred liability by drawing bills of exchange for goods supplied to the ship, although such liability is not discharged, he has a maritime lien on the ship to the extent of that liability.

The act of a master in not compelling payment against his ship for a liability that he has incurred by drawing bills of exchange, because he believes that they will be met by his owners, until he is actually sued upon them himself does not amount to such laches as will forfeit his lien against a purchaser.

THIS was an action brought by Edward Stewart Dargie, of Arbroath, the master of the steamship *Fairport* belonging to the port of Arbroath, against that vessel and her owners intervening for disbursements made on behalf of the vessel whilst the plaintiff was master.

The plaintiff indorsed his writ for a claim for disbursements made during the time he was master of the vessel, and claimed 300*l.* (inclusive of costs). The plaintiff did not deliver any statement of claim, but gave notice in lieu thereof. The defendant's statement of defence was as follows:

1. The plaintiff was at some time prior to the 14th Oct. 1881, master of the steamship *Fairport*. The owners of the *Fairport*, while the plaintiff was master, were George Pitcairn Roy, and Peter Smart Roy, and John Smart Roy.

2. The defendants, on the 14th Oct. 1881, purchased for valuable consideration the sixty-four sixty-fourth shares of and in the said vessel the *Fairport* from the then owners, the said George Pitcairn Roy, and Peter Smart Roy, and John Smart Roy, and the said shares were transferred to them by bills of sale of that date according to the provisions of the Merchant Shipping Acts, and they were afterwards duly registered as the owners of the *Fairport*, and are now such owners.

3. The disbursements, if any, made by the plaintiff were made before, and the plaintiff ceased to be her master before the purchase of the *Fairport* by the defendants.

4. The defendants deny that the plaintiff at any time made such disbursements as claimed, and say, that if he did he was repaid and reimbursed all such disbursements.

The plaintiff had joined the vessel as her master in March 1879, and at that time she was owned by Messrs. Roy and Sons of Arbroath.

In September 1879 the vessel was sent to Sunderland to take in coal for London, in charge of the plaintiff, who was instructed to communicate with Messrs. Lunham and Co. of London, who were the time charterers of the vessel. The plaintiff brought the vessel to London, and was then instructed by the charterers to proceed on voyages to the Mediterranean and back. Before he started, he was directed by Messrs. Roy and Sons to pay for the coal, which he took on board at the different ports at which he called, by bills drawn on Messrs. Lunham and Co. On his outward voyage he called at Gibraltar, took in coal, and drew a bill on Messrs. Lunham and Co., which was by them paid. He took in a further supply at Malta, and on the return journey at Gibraltar, in January 1880, drew bills as before, which also were paid by the charterers.

In April 1880 the vessel was again sent out to the Mediterranean in charge of the plaintiff. She called at Gibraltar for coal, and the plaintiff drew a bill on Messrs. Lunham and Co. for 40*l.* 14*s.* This bill was indorsed originally to Murietta and Co. and afterwards to De Mattos and Co., who then became the holders; it was accepted by Messrs. Lunham and Co. but never paid.

On the 4th May 1880 the vessel was again at Gibraltar, and a further supply of coal was obtained from Messrs. Longlands, Howell, and Co., and the plaintiff drew a bill for 58*l.* 18*s.* 10*d.* on Messrs. Lunham and Co., payable to the order of Messrs. Longlands, Howell, and Co. This second bill was indorsed to Messrs. De Mattos and Co., but was not accepted by Messrs. Lunham and Co., who had become insolvent. Messrs. Roy and Sons were applied to, but they refused to pay these two bills, and on the 7th June 1880 (shortly after they had become due) Messrs. De Mattos and Co. commenced proceedings against the plaintiff. The writ was served on the plaintiff in August 1880, and he then went to sea.

On the 17th July 1881, whilst he was at sea, judgment was given against him for 113*l.* 8*s.* 2*d.* On his arrival in England he took proceedings against the vessel on the 23rd Nov. 1881 to recover the amount of his liability under the bills, and the vessel was arrested in this action.

On the 14th Oct. 1881 the vessel was sold by Messrs. Roy and Co. to a Mr. J. J. Wallace and others, who appeared in the action as defendants.

Nov. 30.—The action came on for hearing.

Barnes for the plaintiff.

W. G. F. Phillimore for the defendants.

The arguments sufficiently appear in the judgment.

Cur. adv. vult.

Dec. 12.—Sir R. PHILLIMORE delivered judgment as follows:—This is an action *in rem*, in which the plaintiff, who was formerly master of the steamship *Fairport*, seeks to recover a sum of money, for which he has become liable, on two bills of exchange drawn by him whilst he was master in order to provide necessaries for the vessel. The *Fairport* was owned by Messrs. Roy and Sons of Arbroath, in Scotland. In the spring of 1880 she was chartered by Messrs. Lunham and Co of London, and sent to the Mediterranean with the plaintiff as master. On the 12th April 1880 the plaintiff obtained coals at Gibraltar for the use of his vessel, and paid for them by drawing a bill for 40*l.* 14*s.* on Lunham and Co. He did this in accordance with his previous practice on similar occasions, and in obedience to instructions received from the charterers and confirmed by Messrs. Roy and Sons, the owners of the vessel. On his return voyage, on the 4th May 1880, he obtained a further supply of coals and other necessaries at Gibraltar, paying for them as before by a bill which he drew on Messrs. Lunham and Co. for 58*l.* 18*s.* These two

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

bills came into the hands of a Mr. De Mattos, who is still the holder of them. The first bill was accepted by Lunham and Co., the second was not, and Lunham and Co. having shortly afterwards become insolvent, neither of the bills was met at maturity, nor have they been subsequently met. Mr. De Mattos, as holder of the dishonoured bills served a writ on the plaintiff as drawer in Aug. 1880, and obtained judgment against him in July 1881 for 113*l.* 8*s.* 10*d.*, being the amount of the two bills and costs. This sum has not yet been paid. In Oct. 1881 Messrs. Wallace and Co., the defendants in this action, bought the *Fairport* from Roy and Sons, and in the following November the plaintiff began the present action *in rem* to recover the above-mentioned sum of 113*l.* 8*s.* 10*d.* with costs. A writ was issued in this court, and the vessel has been arrested.

The defence raised by Messrs. Wallace and Co., the present owners, is reducible to the three following propositions, two of law, one of mixed law and fact. The two propositions of law are: 1. That a master's disbursement does not constitute a maritime lien. 2. That even if it does, the subject of the present action is a liability, and not properly a disbursement, the plaintiff as yet having actually paid nothing, and that a mere liability cannot create a maritime lien. 3. The proposition of mixed law and fact is that if there were a maritime lien, the plaintiff is precluded by his own laches from enforcing it against a *bonâ fide* purchaser for value. The law as to the first proposition appears to me to be laid down correctly in the judgment of Dr. Lushington in *The Mary Anne* (L. Rep. 1 Adm. & Eccl. 8; 13 L. T. Rep. N. S. 384; 2 Mar. Law Cas. O. S. 294), which expressly decides that since the passing of the 10th section of the Admiralty Court Act 1861 a master has a maritime lien for his disbursements. I followed this decision in *The Feronia* (L. Rep. 2 Adm. & Eccl. 65; 17 L. T. Rep. N. S. 619; 3 Mar. Law Cas. O. S. 54), and I may observe also that it is treated as settled law in the last edition (4th edit.) of the Maude and Pollock's Law of Merchant Shipping (vol. 1, pp. 86. 125). The second proposition depends upon the true construction of the words in the before-mentioned 10th section, "disbursements made by him," and the cases of *The Chieftain* (B. & L. 104; 8 L. T. Rep. N. S. 120; 1 Mar. Law. Cas. O. S. 327) and *The Edwin* (B. & L. 281; 10 L. T. Rep. N. S. 658; 2 Mar. Law Cas. O. S. 36) were cited by the defendant's counsel in support of his contention that disbursements must mean money actually paid by the master, and cannot be applied to a mere liability created as in the present case by a bill of exchange drawn by him and afterwards dishonoured. Both these cases were carefully considered in the judgment in *The Feronia* (*ubi sup.*), in which case I held that the money earned by freight having been paid into court, the liabilities incurred by the master for the benefit of the ship were to be considered as disbursements, and to be discharged out of the fund in court. In the present instance there is no freight paid into court. But the court has its hand upon the *res*, and ought not to part with it, in my opinion, until justice is done to all parties. The judgment in *The Feronia* was followed in a subsequent judgment which I delivered in *The Marco Polo* (24 L. T. Rep. N. S. 804; 1 Asp. Mar. Law Cas. 54), and was mentioned without disapprobation in the case of *Re Rio Grande do Sul Steamship Company* (5 Ch. Div. 282; 36 L. T. Rep. N. S. 603; 3 Asp. Mar. Law Cas. 424). I must also refer to the report of the registrar in the case of the *Red Rose*, which is printed at the end of the case of *The Feronia* (*ubi sup.*), and which is stated in the judgment in that case to have been approved by Dr. Lushington. Upon the whole I think that any doubt that may have arisen from the decisions in *The Chieftain* and *The Edwin*, must be holden to be now set at rest, and that the law is correctly laid down in *The Feronia*. The conclusion at which I arrive is that the liability which the plaintiff has incurred for the use of the ship is a disbursement within the meaning of the 10th section of the Admiralty Court Act 1861, and that he is entitled to a maritime lien on the ship.

It remains to consider the question of laches. The law on this subject is established by the cases of *The Bold Buccleugh* (7 Moo. P. C. C. 267; 3 W. Rob. 229). and *The Europa* (8 L. T. Rep. N. S. 368; 1 Mar. Law Cas. O. S. 337; B. & L. 89; 2 Moo. P. C. C., N. S. 1). It results from these cases that a maritime lien is not indelible, and may be lost by negligence or delay where the rights of third parties may be compromised; but, where reasonable diligence is used and the proceedings are had in good faith, the lien travels with the thing into whatsoever possession it may come. What constitutes reasonable diligence must depend upon the particular circumstances of each case. In the present case I hold that it is proved that until judgment was actually obtained against the plaintiff (who by the way was continually at sea), he believed, and not unreasonably so, that his liability would not become absolute, and that Messrs. Roy and Sons, his previous employers, would protect him from having to meet the bills himself. I am of opinion that he cannot fairly be charged with such want of diligence as would forfeit his lien. If it were necessary to decide whether the defendant, Mr. Wallace, was, as a matter of fact, aware of the liability attaching to the ship when she was bought by his firm, I should be inclined to believe the positive evidence of Mr. Breslauer on the subject in preference to that of Mr. Wallace, who could only speak to his want of recollection of the alleged conversations. I pronounce for the plaintiff in this case.

Solicitors for the plaintiff, *Ingledew* and *Ince*.
Solicitor for the defendant, *W. Batham*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Feb. 14 *and March* 8, 1883.

(Present: The Right Hons. Lord BLACKBURN, Sir BARNES PEACOCK, Sir ROBERT COLLIER, Sir RICHARD COUCH, and Sir ARTHUR HOBHOUSE.)

ELLIOTT *v.* LORD. (*a*)

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, QUEBEC (APPEAL SIDE).

Charter party—Construction—"Prompt despatch"—Demurrage—Delay in loading owing to want of facilities at mines.

A ship was chartered to load a cargo of coals, and to "receive prompt despatch in loading" It was

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

proved that the facilities of the port were greater than the production of the mines, and that in consequence of want of facilities for getting the coals down from the mines the ship was delayed in loading.

Held (reversing the judgment of the court below), that the charterers were liable under the charter-party for the delay so caused.

THIS was an appeal from a judgment of the Court of Queen's Bench for Lower Canada, (appeal side), consisting of Ramsay, Monk, and Baby, J.J. (Cross J. dissenting) which had reversed a judgment of the Superior Court (Torrance, J.) in an action brought by the appellants as owners of the ship *Gresham*, against the respondents as charterers, to recover damages for demurrage under a charter-party.

The facts of the case appear fully from the judgment of their Lordships.

Butt, Q.C, and *J. G. Witt* appeared for the appellants.

Cohen, Q.C., and *W. W. Kerr* for the respondents.

The following cases were cited in the course of the arguments:

Kearon v. *Pearson*, 7 H. & N. 386; 31 L. J. 1, Ex.;
Kay v. *Field*, 8 Q. B. Div. 594; 46 L. T. Rep. N. S. 630; reversed on appeal, 10 Q. B. Div. 241; 47 L. T. Rep. N. S. 423; 4 Asp. Mar. Law Cas. 526, 588.
Ashcroft v. *Crow Orchard Colliery Company*, L. R. p. 9 Q. B. 540; 2 Asp. Mar. Law Cas. 397; 31 L. T. Rep. N. S. 266;
Robertson v. *Jackson* 2 C. B. 412;
Taylor v. *Clay*, 9 Q. B. 713;
Leideman v. *Schultz*, 14 C. B. 38;
Hudson v. *Ede*, L Rep. 3 Q. B. 412; 18 L. T. Rep. N. S. 764; 3 Mar. Law Cas. O. S. 114;
Postlethwaite v. *Freeland*, 5 App. Cas. 499; 42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302.

Their Lordships took time to consider their judgment.

March 8.—The judgment of the Court was delivered by Sir RICHARD COUCH. — This is an appeal from a judgment of the Court of Queen's Bench for Lower Canada, in the province of Quebec (appeal side), in an action by the appellants against the respondents to recover damage in the nature of demurrage for the detention of the appellant's ship, the *Gresham*, at Sydney, Nova Scotia, whether she had gone to load under a charter-party dated the 12th June, 1872. Torrance, J., as the judge of the Superior Court for Lower Canada, province of Quebec, district of Montreal, on the 21st May 1880, decided that the *Gresham* was unduly detained for seventeen days, and condemned the defendants in 850*l*., damages, with interest and costs. This decision was reversed on the 21st March 1882, by three of the judges of the Court of Queen's Bench (appeal side), one judge, Cross, J., dissenting. No objection was made in this appeal to the amount of the damages, and it was agreed before their Lordships by the respondents' counsel that, if the appellants are entitled to recover damages, they are to be calculated for seventeen days at the rate of 50*l* per day as was adjudged by Torrance, J.

The appellants were the owners of a steamship called the *Gresham*, and the defendants were merchants trading at Montreal, under the firm of Lord, Magor, and Munn. On the 12th June 1873 the plaintiffs, through Mr. John G. Sidey, their agent at Montreal, entered into a charter-party with the defendants for the hire of the *Gresham*, then at Liverpool. The material part of it is as follows: "It is this day mutually agreed between J. G. Sidey, of Montreal, agent of the good steamship or vessel called the *Gresham*, whereof

is master, of the measurement of $\frac{1801}{1162}$ tons, or thereabouts, now in Liverpool, of the one part, and Messrs. Lord, Magor, and Munn, of Montreal, that the said ship being tight, staunch, and strong, and every way fitted for the voyage, shall, with all convenient speed, sail and proceed to Sydney or other port, or so near thereunto as she may safely get, and there load from the factors of the said merchant a full and complete cargo of coals, taking her turn with other steamers, but taking precedence of sailing vessels, and receive prompt despatch in loading and discharging, and to load and discharge always afloat." The *Gresham*, under the command of E. G. Bulkeley, the master, proceeded from Liverpool to Sydney, and arrived there on the morning of Saturday, the 19th July 1873, when the master, about 9 a.m. on that morning, notified to Messrs. Archibald and Co. of Sydney, the agents of the charterers there, that she was ready to receive and load her cargo under the charter-party. On the 25th July a few bunker coals were shipped, but no cargo coals were shipped on board the *Gresham* until the 4th Aug., on which day she began to take in cargo coals, and finished loading on the 13th. She was then compelled to leave with less than her full cargo by 300 tons, but no question arises as to this. The appellants in their declaration alleged that the defendants did not according to the terms of the charter-party load the *Gresham* with a full and complete cargo of coals, taking her turn with other steamers, but taking precedence of sailing vessels, and afford and give the said steamship prompt despatch in loading her cargo of coals. And the defendants by their plea averred that they complied with the conditions of the charter-party, and that the *Gresham* had her turn with other steamers, taking precedence of sailing vessels, according to the custom and usage of the port of Sydney, and had prompt despatch in loading at Sydney. The material evidence upon this matter is that of Mr. Frederick N. Gisborne, the only witness called for the defendants, and the entries in a shipping book of which he produced a copy, and which he said contained a complete history of the business done during the period to which they relate. Mr. Gisborne stated that he was the engineer of two or three coal companies at Sydney; that all vessels loading from the mines he was attending to were of necessity reported to him, and no other person had any right to enter reports of vessels. Each vessel was put down in turn in the book at the time it was reported, and they were loaded in that order. None of the steamships that were berthed or reported after the *Gresham* were loaded before her, and the *Hibernia* being reported before the *Gresham* was loaded before her. They gave the *Gresham* coal as fast as they could deliver it—as fast as facilities of the mines would allow—the facilities of the pier were greater than the production of the mines, and the vessels could have been loaded in a shorter time or with more despatch if the facilities at the mines had been better. The following is a copy of the entries in

the shipping book: "Extracts from Shipping Book, 1873:—S.S. *Kangaroo.*—Telegraph Cable Fleet. Commenced loading, 19th July. Completed, 24th. Cargo, 761 tons. S.S. *Gresham.*—Reported, 22nd July. Commenced loading, 25th. Completed, 13th Aug. Cargo, 1830½ tons. Schr. *Heroine.*—Arrived, 22nd July. Loaded, 24th. Cargo, 120 tons. Schr. *Fear Not.*—Arrived, 24th July. Loaded, 25th Cargo, 52 tons. Schr. *Trial.* — Reported, 25th July. Loaded, 26th. Cargo, 41 tons. S.S. *Hibernia.*—Telegraph Fleet. Reported, 19th July. Commenced loading, 30th. Completed 5th Aug. Cargo, 1901 tons. Schr. *Rebecca Ann.*—Arrived, 31st July. Loaded, 1st and 2nd Aug. Cargo, 192 tons. S.S. *Alpha.*—Completed discharging, 1st Aug. Commenced loading, 7th Aug. Completed, 16th. Cargo, 1959 tons. S.S. *R. M. Hunton,* took 143 tons bunker coal, 6th and 7th Aug. S.S. *Crosby,* took 234 tons bunker coal, 11th and 15th Aug." It was explained by Mr. Gisborne that the three schooners, *Heroine, Fear Not,* and *Trial,* occupied inside berths where no large steamers could lie, and the loading of them did not interfere with the loading of the larger vessels. But the *Hibernia,* which was reported on the 19th July, did not commence loading until the 30th, and between the 24th and 30th only three small cargoes of 120, 52, and 41 tons respectively were loaded, viz, on the 24th, 25th, and 26th. No coals were loaded on the three following days, and the loading of the *Hibernia's* cargo of 1901 tons was completed between the 30th July and the 5th of August. The loading of the *Gresham's* cargo, 1830½ tons, was completed between the 4th and 13th of Aug., only a few bunker coals having been loaded on the 25th of July.

These dates show the time within which it was possible to load the cargo if the coals had been ready. The arrival of the *Gresham* having been notified to the defendants' agents on the 19th July, the plaintiffs were, by the terms of the charter-party, entitled to a full and complete cargo of coals on that day. The respondents' counsel did not dispute that when the ship is ready to load the charterers must have a cargo ready, but he contended that they were not bound to do anything till the ship was in her turn, and it was not shown that she did not begin to load before the 5th Aug. because the cargo was not ready. The facts, however, are that the defendants employed the same person, the agent of the coal companies, to load the *Gresham* as was employed to load the *Hibernia.* In consequence of the delay in getting the coals down from the mines, there was not a sufficient supply at the port, by which the loading of the *Hibernia* was delayed. This deficiency of coals, and not the waiting for her turn was the cause of the *Gresham* not sooner obtaining her cargo. The defendants undertook that the ship should receive prompt despatch in loading, and their Lordships are of opinion that they are responsible for this delay. It is not necessary to consider whether the *Gresham* was thus delayed for the whole of the seventeen days, it having been agreed that 850*l.* shall be taken as the amount of the damages.

Their Lordships therefore will humbly advise Her Majesty to reverse the decree of the Court of Queen's Bench (appeal side), and to affirm the judgment of the Superior Court of the 21st May 1830, with costs. And the respondents will pay the costs of this appeal.

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

Solicitors for the respondents, *Simpson, Hammond,* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 10, 11, 13, 14, 15, 1882, *and Jan.* 17, 1883.

(Before BAGGALLAY, BRETT, and LINDLEY, L.JJ.)

THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA, *v.* THE NETHERLANDS INDIA STEAM NAVIGATION COMPANY LIMITED. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bill of lading—Exceptions—Collision—Negligence or default of master or servants—Negligence of servants on board another ship—Liability of shipowner — Damages — Judicature Act 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *sub-sect.* 9.

Where a vessel carrying cargo under a bill of lading providing against loss and damage from collision and loss or damage from any act, neglect, or default whatsoever of the pilots, master, mariners, or other servants of the owners in navigating the ship, collides with another vessel belonging to the same owners by reason of the joint negligence of both vessels and the cargo is lost, there is no liability under the contract of carriage, as such loss is covered by the above exceptions, but the owners are liable in tort for the negligence of their servants on board the vessel not carrying the cargo.

Under such circumstances the Admiralty Court rule as to the division of damages applies, and the owners' liability is one half the damage, their liability in respect of the carrying ship being covered by the bill of lading.

Semble, where a collision between two ships is caused by the negligence of either or both, such collision is not an accident or peril of the sea within the meaning of a bill of lading. (*b*)

Semble, where a ship is owned by an English limited company, which for the purpose of carrying on business in a foreign country is registered in that country as a foreign company, and the ship is also registered there, the ship is nevertheless a British ship, and, although not having a British registry, is subject to all the liabilities of a British ship.

The plaintiffs shipped specie on board the defendants' ship, under a bill of lading which contained the following: "Accidents, loss, and damage from . . . . collision . . . . and all the perils, dangers, and accidents of the sea . . . . 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, mariners, or other servants of the company, in navigating the ship . . . . excepted."

The defendants were an English limited company,

(*a*) Reported by P. B. HUTCHINS, Esq., Barrister-at-law.

(*b*) See *Woodley and Co.* v. *Mitchell and Co.*, p. 71, where this point has later been expressly decided.—ED.

but their ships were registered in Holland in the name of a Dutch company composed of the same persons as the defendant company, and carried the Dutch flag. The contract was in English, and made at an English port.

On the voyage the carrying ship came into collision with another ship, also belonging to the defendants, and was sunk, and the plaintiffs' specie was lost.

In an action to recover the value of the specie, the jury found that the carrying ship was in some degree to blame, but the other ship was mainly in fault.

Held, that the question of the defendants' liability depended on English law, and they were liable independently of contract, for the negligence of their servants on board the ship which came into collision with the carrying ship.

Held, also, that the exceptions in the bill of lading exempted the defendants from liability for collision caused by the negligence of their servants on board the carrying ship, but that the acts of their servants on board the other ship was not a breach of the contract contained in the bill of lading.

Held, also, that as both ships were to blame, the Admiralty rule as to damages applies, by sect. 25, sub-sect. 9, of the Judicature Act 1873, and therefore the damage occasioned by the collision should be equally divided between the two ships, and, the defendants' liability as owners of one of the ships being excluded by the terms of the bill of lading, they were only liable for half the damage.

APPEAL by the defendants from the judgment of Pollock, B., Manisty and Stephen, JJ. (reported 46 L. T. Rep. N. S. 530; 4 Asp. Mar. Law Cas. 523; 9 Q. B. Div. 118).

The plaintiffs sued to recover the value of specie shipped under a bill of lading on board the defendants' steamship *Willem Kroon Prins der Nederlander*, to be carried from Singapore to Sourabaya, lost on the voyage owing to a collision with another steamship called the *Atjeh*, also belonging to the defendants.

The facts and the material terms of the bill of lading are shortly stated in the head-note, and more fully in the judgments of Pollock, B. in the court below, and of Lindley, L.J. in the Court of Appeal.

The Divisional Court held the defendants liable for the full amount of the damage occasioned by the collision.

Nov. 10, 11, 13, 14, *and* 15, 1882.—*Benjamin*, Q.C., and *Cohen*, Q.C. (*F. W. Raikes* with them), for the defendants, in support of the appeal.—The defendants cannot be liable in contract, for the terms of the bill of lading expressly exclude their liability. It is true that it has been held in several cases that the exceptions contained in bills of lading did not exempt the shipowners from liability for loss caused by the neglect or default of persons whom they themselves employed:

Phillips v. *Clark*, 2 C. B. N. S. 156; 26 L. J. N. S. 168, C. P.;
Lloyd v. *The General Iron Screw Collier Company Limited*, 10 L. T. Rep. N. S. 586; 3 H. & C. 284; 2 Mar Law Cas. O.S. 32;
Grill v. *The General Iron Screw Collier Company Limited*, 14 L. T. Rep. N. S. 711; 18 L. T. Rep. N. S. 485; L. Rep. 1 C. P. 600; L. Rep. 3 C. P. 476; 2 Mar. Law Cas. O. S. 362;
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 decisions, however, have no application to the present case, for the terms of the bill of lading are different, the form having been altered for the express purpose of excluding the kind of liability which in those cases was held not to be excluded. It is impossible to say that the defendants can be liable in contract as owners of the *Atjeh*, for carriers of goods by sea do not contract with reference to the acts of persons on board ships belonging to them, other than the ship in which the goods are carried, and such persons have nothing to do with the carriage. Again, the defendants cannot be held liable in tort for the negligence of those on board the *Atjeh*. An action does not lie in England for a tortious act done in a foreign country, unless it is shown that such act is illegal in the foreign country where it was done:

Phillips v. *Eyre*, 22 L. T. Rep. N. S. 869; L. Rep. 6 Q. B. 1.

The *Atjeh* was commanded by a Dutch captain, and sailed under the Dutch flag, and a Dutch corporation were the legal owners; therefore she was a Dutch, not an English ship, and a Dutch ship on the high seas is, for the purpose of liability for tortious acts committed on board, to be treated as foreign territory:

Lloyd v. *Guibert*, 13 L. T. Rep. N. S. 602; L. Rep. 1 Q. B. 115; 2 Mar. Law Cas. O. S. 283.

It follows, therefore, that the case is governed by Dutch law, and there is nothing to show any liability by that law. Assuming, however, that the defendants are liable for the acts of those on board the *Atjeh*, still they cannot be liable for the whole amount of the damages occasioned by the collision, for by sect. 25, sub-sect. 9, of the Judicature Act 1873, "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." According to the Admiralty doctrine the defendants, as owners of the *Atjeh*, would only be liable for half the loss:

The Milan, 5 L. T. Rep. N. S. 590; 1 Mar. Law Cas. O.S. 185; Lushington, 388; 31 L. J. 105, Adm.;

and their liability as owners of the *Kroon Prins* is excluded by the bill of lading.

Butt, Q.C. and *Myburgh*, Q.C. (*Barnes* with them) for the plaintiffs.—The plaintiffs have a double remedy, for the defendants are liable either in contract or in tort. The argument for the defendant is an attempt to set up the Dutch law as to one part of the case, and the English law as to the other. The words in the bill of lading are not sufficient to exempt the defendants from liability where they owned both the ships which came into collision. Both the ships are English, and the contract is English; therefore the case is governed by English law. But, assuming that the ships are Dutch, the English law would still prevail. It is not correct to speak of a foreign ship as part of the territory of a foreign power for the purpose of such a case as the present, for cases of collision between foreign ships on the

high seas are decided in English courts according to English law:

The Johann Friederich, 1 Wm. Rob. 35;
Reg. v. *Keyn*, 2 Ex. Div. 63.

Even assuming that the Dutch law applies, the defendants are still liable; in the absence of evidence to the contrary, the Dutch law would be assumed to be the same as the English, but the evidence goes to show that the defendants would be liable for a tort according to the Dutch code. The rule as to dividing the damages does not apply where the same person is the owner of both ships.

Cohen, Q.C. replied.—In addition to the authorities above cited the following were referred to and commented on in the course of the argument:

Thorogood v. *Bryan*, 8 C. B. 115;
Cattlin v. *Hills*, 8 C. B. 123;
Child v. *Hearn*, L. Rep. 9 Ex. 176;
Armstrong v. *The Lancashire and Yorkshire Railway Company*, 33 L. T. Rep. N.S. 228; L. Rep. 10 Ex. 47;
Horwell v. *The London General Omnibus Company*, 36 L. T. Rep. N. S. 637; 2 Ex. Div. 365;
Tuff v. *Warman*, 2 C. B. N. S. 740; 5 C. B. N. S. 573;
Waite v. *The North-Eastern Railway Company*, E. B. & E. 719;
Long v. *Duff*, 2 B. & P. 209;
The Sussex Peerage case, 11 Cl. & F. 85;
Lord Nelson v. *Lord Bridport*, 8 Beav. 527;
Duchess Di Sora v. *Phillipps*, 10 H. of L. Cas. 624;
The Mary Moxham, 34 L. T. Rep. N. S. 559; 1 P. Div. 107; 3 Asp. Mar. Law Cas. 191;
The Gaetano and Maria, 46 L. T. Rep. N. S. 835; 7 P. D. 137; 4 Asp. Mar. Law Cas. 535;
The Halley, 3 Mar. Law Cas. O. S. 131; 18 L.T. Rep. N. S. 879; L. Rep. 2 P. C. 193;
Chapman v. *The Royal Netherlands Steam Navigation Company*, 40 L. T. Rep. N. S. 433; 4 P. Div. 157; 4 Asp. Mar. Law Cas. 107;
The Khedive, 43 L. T. Rep. N. S. 610; 4 App. Cas. 876; 3 Asp. Mar Law Cas. 360;
The Helène, L. Rep. 1 P. C. 231; 2 Mar. Law Cas. O. S. 390; 14 L. T. Rep. N. S. 873;
Taylor v. *The Liverpool and Great Western Steam Navigation Company*, 30 L. T. Rep. N. S. 714; L. Rep. 9 Q. B. 546; 2 Asp. Mar. Law. Cas. 275;
Hayn v. *Culliford*, 40 L. T. Rep. N. S. 536; 4 C. P. Div. 182; 4 Asp. Mar. Law Cas. 128;
The Leon, 44 L. T. Rep. N. S. 613; 4 Asp. Mar. Law Cas. 404; 6 P. Div. 148.

Cur. adv. vult.

Jan. 17, 1883.—The following judgments were delivered:—

Brett. L.J.—The facts will be stated in the judgment of Lindley, L.J., but as the decision of the Divisional Court has made the case one of considerable general importance, I think it right to express my own individual opinion. So far as the action is founded on contract, it must be first observed that the whole of the contract is in writing. It was, no doubt, a contract for the carriage of goods, but by the consent of the parties it was reduced into the form of a bill of lading. But the whole contract is in the bill of lading, and you cannot look for any term of it outside the bill of lading. The questions are—By what rule or by what law is the effect of that contract to be determined? what is its true construction? and, to what matters does it apply? The defendants suggested that it was a Dutch bill of lading, and that it must be construed according to Dutch law. I doubt whether the construction would be different under Dutch law from the construction under English law; but it seems to me clear beyond all question that it is an English bill of lading, and must be construed according to English rules of construction. It is said that the bill was given by the captain of a ship which was registered in Holland and carried the Dutch flag. If it was really an English ship, of course the whole of that argument falls to the ground. But it seems to me that, even if the ship was a Dutch ship, the contract was still an English contract. It may be true *primâ facie* that if a ship carries the flag of a particular country a contract respecting the carriage of goods by her is to be taken to be made under the law of that country. But that fact is not conclusive; it is a question of the intention of the parties, and one must look at all the circumstances. In the present case, every one of the persons for whose benefit the ship was employed and was earning profit was an Englishman. The company was registered in Holland as a Dutch company, but it was also registered in England as a limited company. The contract was made in an English port by the servant and agent of the defendants in order to obtain a profit for them. It was entered into with an English merchant for the carriage of goods from an English port to a Dutch port. It was drawn up in the English language in the ordinary form of an English bill of lading, and the defendants were described in it as an English limited company. Taking all these circumstances into consideration, the inference seems irresistible that the contract was intended to be an English contract, even if the ship was a Dutch ship, which I think she was not. If so, the contract must be construed according to the rules of English law.

The goods were lost as the immediate result of a collision at sea. If there had been no exception in the contract, it would not have signified how the goods were lost. The bill of lading contained first an absolute contract for the delivery of the goods, and the defendants would, if there had been no exception, have been liable for the mere non-delivery of the goods. But the bill of lading contained exceptions, and the question is whether they relieve the defendants from liability for the loss in such a case as the present. There are three kinds of collision. A collision may arise from mere accident, without any fault on either side. Such a collision is within the description of accidents of the sea: and if there had been no exception of collisions the shipowner would be absolved from liability by reason of the exception of accidents. But a collision may also arise from the default of those who are on board the ship which is carrying the goods, without any default of those who are on board the other, or from the sole default of those on board the other ship, or the crews of both ships may be in default. If the collision were caused by the sole default of those on board the other ship, the shipowner would be liable, though there was no default on the part of his servants. To meet this liability the exception of collisions was inserted, and the court has no right to limit the meaning of the word. It covers every kind of collision; it certainly covers the case where there is no default on the part of the carrying ship.

But the loss may be the immediate result of a collision brought about by the negligence of those on board the carrying ship. If such a case is treated as a collision, it would be covered by the exception of collisions. But we are

entitled to look at the real cause of the loss, the *causa causans*, not the *causa proxima*. In every bill of lading there is an implied contract on the part of the shipowner that the master and the crew shall use ordinary care in the carriage of the goods, and the negligence of the master and the crew is a breach of the implied condition; and as the court is entitled to look at the *causa causans*, it may hold that the loss was really occasioned by the negligence of the master and crew, and treat the collision as only a circumstance in the case, and hold the loss occasioned by the breach of that implied contract not to be covered by the exception of collisions: (see *Lloyd* v. *The General Iron Screw Collier Company Limited*, 10 L. T. Rep. N. S. 586; 2 Mar. Law Cas. O. S. 32; 3 H. & C. 284; *Phillips* v. *Clark*, 2 C. B. N. S. 156.) In order to meet this the shipowners in the present case have insisted on the stipulation excepting loss resulting from the default of their servants, and this was assented to by the shippers. The liability of the shipowner on this implied contract is therefore eliminated, and he cannot be held liable for a loss occasioned by the negligence of his servants, whether that loss was the immediate result of a collision or not. You cannot rely on the implied contract by the shipowner that the goods should be carried with reasonable care by his servants. Of course, if any personal negligence of the shipowner could be relied on as the cause of the loss, that would not be within the exception. If, for instance, he were to employ as master a person known to be of drunken habits, and the loss was the natural consequence of the drunkenness of the master, the owner would be liable. And so, also, if the owner chose to appoint as master a person known to be incompetent, or chose to direct the master not to employ a pilot in entering a particular port. A loss caused by the negligence of the servants of the owner is alone excepted. It is said that the owners in the present case are liable because the loss was occasioned by the negligence of their servants on board another ship. This depends on whether any contract can be implied by the shipowner as to the care which should be used by their servants on board another ship. How is it possible to imply such a contract? You can only imply a contract when you are bound to come to the conclusion that at the time of entering into the contract the parties must have intended such an implication. It seems impossible to hold that, in making a contract in relation to the carriage of goods by a particular ship, the parties can have had in their contemplation the conduct of persons on board another ship. The exception does not apply to them, not because those persons are not within its words, but because they are not within the contract at all, and the owners cannot be held liable by contract for the conduct of their servants on board another ship. Therefore, so far as the plaintiff's case is based on contract, they cannot recover for the negligence of the shipowners' servants on board the other ship, because they must rely on the contract contained in the bill of lading, and they cannot recover for the negligence of the owners' servants on board the carrying ship, because that is covered by the exception.

It remains to consider whether the defendants are not liable in tort, or in an action on the case. The jury found that the collision was occasioned in part by the negligence of the defendants' servants on board both the ships. It was suggested that the ships were Dutch ships, and that by the Dutch law the defendants were not liable, and that this court must administer Dutch law. This raises the questions whether the ships, or rather whether the *Atjeh* was a Dutch ship, and whether, if it was, the defendants are not liable. I am of opinion that the ships were both English ships, not Dutch. It was said that they were both Dutch ships because they were registered in Holland and carried the Dutch flag. The defendants were an English joint-stock company limited, composed of English shareholders alone—there was not a foreign shareholder; and for the purpose of carrying on a particular trade from Holland it was necessary that they should be registered in Holland, and for that purpose they were registered in Holland, and had their ships registered in Holland. But the Dutch company had no power to deal with the ships, and they did not do so. Every appointment was made by the English company. The captain of the *Atjeh* though he was a Dutchman, was the servant of the English company and owed obedience to them. Does the mere fact that the ship was registered in Holland and carried the Dutch flag make it a Dutch ship? It is absurd to suppose that the mere carrying of a flag by a ship can make her the ship of the country whose flag she carries. Pirates always carried the flags of every nation, and yet they were hanged by every nation. The nationality of a ship, unless she is employed by a Government under letters of marque, turns on her ownership; and in the present case it is clear that the owners were an English company, and the mere fact of the registration of the ship in Holland for the purpose of a particular trade could not make her a Dutch ship. It was said that she could not be a British ship, because she was not registered in England, as required by the Merchant Shipping Acts. But those Acts apply only to British ships; and before a ship can be registered under them she must be a British ship. If a ship which is a British ship is not registered under the Acts she cannot obtain the advantages given by registration, but her owners cannot avoid liability by omitting to register. The nationalty of a ship depends upon her ownership, and for the purpose of liability it is immaterial whether she is registered or not. But, assuming that both ships were Dutch, nevertheless it seems to me that, if this action had been tried in Holland, the defendants would have been liable. The loss did not occur in Holland, or in any place under the exclusive jurisdiction of the Dutch courts. It is not like the case of a tort committed in a foreign country within its exclusive jurisdiction. Then no action for the tort can be maintained in this country, unless it could be maintained in the foreign country. But here the loss occurred on the high seas, which are within the common jurisdiction of all countries. From time immemorial actions for such a tort have been maintained, even against foreigners who could be served in this country, and they are tried according to maritime law as administered in this country, and by that law the owner of a ship is liable for the negligence of the master and crew: (see *The Milan*, 5 L. T. Rep. N. S. 590; 1 Mar. Law Cas. 185; Lushington, 388; 31 L. J. 105, Adm.; *The Leon*, 44 L. T. Rep. N. S.

613; 4 Asp. Mar. Law Cas. O.S. 404; 6 P. Div. 148.) It seems to me that the defendants are liable for the negligence of the master and crew of the *Atjeh*, even if she were a Dutch ship.

The jury have found that the collision was the result of the combined negligence of the defendants' servants on board both the ships. If in such a case the two ships belonged to different owners, each of the owners would have to pay half the loss. The defendants are relieved by the conditions of the bill of lading from that half of the loss which would otherwise have fallen on them as owners of the *Kroon Prins*, but they are not relieved from the other half, for which they are liable in consequence of the negligence of their servants on board the *Atjeh*. I may add that if shipowners were to venture to draw up bills of lading in such a form as to absolve themselves from liability for loss occasioned by their personal negligence, and it were found that shippers of goods could not resist this, the shipowners would assuredly be met by an Act of Parliament, just as railway companies have been.

Lindley, L.J. read the judgment of himself and Baggallay, L.J. as follows:—This is an appeal by the defendants from a judgment of Pollock, B., Manisty and Stephen, JJ. The facts are not in dispute. They are thus stated in the report in the court below (9 Q. B. Div. 118; 4 Asp. Mar. Law Cas. 523). The action was brought by the plaintiffs as owners of goods shipped at Singapore under the bill of lading in the defendants' vessel the *Willem Kroon Prins der Nederlander*, to be carried to Sourabaya, and lost through a collision between that vessel and the *Atjeh*, another vessel of the defendants. The collision took place on the high seas. The bill of lading, which was in the English language, and in which the defendants were described by their above corporate name, excepted, among other things (1) collision (2) 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. The jury found at the trial that the *Atjeh* was mainly in fault in causing the collision, but that the *Kroon Prins* was also in some degree to blame. The Divisional Court held that the defendants were liable by virtue of their contract for the whole of the loss. In addition, however, to the facts there mentioned, it was stated to us that the two ships were registered in Holland in the name of a Dutch company, composed of the same persons as the English company who are the defendants. The Dutch company was, in fact, a bare trustee of the ships for the defendants, and the object of forming the Dutch company, and of having the ships registered in Holland in the name of that company, was to enable the defendants to trade with those ships to Java, which is a Dutch possession. The counsel for the defendants, while denying all liability on the part of the Dutch company, waived any advantage which might be taken of the fact that the Dutch company was not in form a party to this action, and admitted that for all the purposes of this action the defendants represented the Dutch company. The court below decided in the plaintiffs' favour on the ground that the contract contained in the bill of lading was governed by English law, and not by Dutch or Dutch-Indian law; and upon the further ground that, according to English law, the defendants were liable for a breach of the contract to carry contained in the bill of lading. In this view of the case it became unnecessary to consider the liability of the defendants, irrespectively of the contract. Nor did the court below express any opinion upon that point.

Upon the first point the decision of the court below appears to me correct. The parties to the contract were English, although the master who signed the bill of lading was a Dutchman. The contract was in the English language, and was made at Singapore, which is an English port, where English law prevails. The ship sailed under the Dutch flag, was bound to a Dutch port, and was commanded by a Dutch captain. As regards the privileges of trade, which the ship might enjoy as a Dutch ship in Dutch ports, the parties, no doubt, relied on the Dutch law, but as regards the construction and effect of the contract itself as between the plaintiffs and the defendants, there can, I think, be no doubt that the parties were contracting with reference to English law, and not with reference to the law of the country under whose flag the ship sailed in order to obtain the privilege of trading with Java. This conclusion is not at all at variance with *Lloyd* v. *Guibert* (L. Rep. 1 Q. B. 115; 2 Mar. Law Cas. O. S. 283), but rather in accordance with it. It is true that in that case the law of the flag prevailed, but the intention of the parties was admitted to be the crucial test, and the law of the ship's flag was considered as the law intended by the parties to govern their contract, as there really was no other law which they could reasonably be supposed to have contemplated. The plaintiff there was English, the defendant French, the *lex loci contractus* was Danish, the ship was French, her master was French, and the contract was in the French language. The voyage was from Hayti to Liverpool. The facts here are entirely different, and so is the inference to be deduced from them. The *lex loci contractus* was here English and ought to prevail unless there is some good ground to the contrary. So far from their being such ground, the inference is very strong that the parties really intended to contract with reference to English law. In order to determine the effect of the contract according to English law, it is necessary to ascertain its true meaning, and in particular the extent of the express exception of collision from the liability undertaken by the defendants. If the word "collision" means every collision, however caused, then the defendants, having expressly stipulated against liability for collision, are not liable for a breach of their contract to carry. Again, if the word "collision" means every collision except a collision caused by the negligence of those engaged in carrying the goods, then, again, the defendants having expressly stipulated against liability for collision, even though so occasioned, are not liable for any breach of their contract to carry. But if the word "collision" means collision not occasioned by the negligence of the defendants or their servants, then the defendants will not have excluded their liability for damage by all collisions, but only for such as may not have been occasioned by the negligence of themselves or their servants in the navigation of the carrying ship; they will not have excluded their liability for damage by collision occasioned by the negligence of themselves

or their servants otherwise than in the navigation of the carrying ship. If the word "collision" means what is now supposed, it will follow that in the events which actually happened the defendants will be liable for a breach of their contract to carry. For their contract is to carry safely except in the excepted cases, and upon the present supposition the case which has arisen will not be one of them. The contract in this case is contained in a bill of lading. The contract has reference to a particular ship—viz., to the ship on board of which the goods are to be put; the goods are to be delivered on the safe arrival of that ship, and the conditions and exceptions contained in the bill of lading all have reference to the voyage of that ship and to her captain and crew. The first set of exceptions includes collision, and perils, dangers, and accidents of the sea. The second exception extends to loss or damage from any act, neglect, or default of the master, mariners, or other servants of the company in navigating the ship. The carriage of the goods on board the ship referred to in the bill of lading is the subject to which the contract refers, and in construing it this must be borne in mind. As a mere matter of construction, I should come to the conclusion that the word "collision" in the bill of lading meant every collision between the carrying ship and any other, but that, inasmuch as the word "collision" alone would not or might not extend to collisions occasioned by the negligence of those in charge of the carrying ship, additional words were inserted to cover even this case. Certain authorities, however, were referred to for the purpose of showing that the word "collision" does not extend to collisions occasioned by the negligence of the carrier or his servants, but the authorities referred to do not go this length; they are all confined to negligence on the part of those who are in charge of the goods to be carried. The word "collision" as construed in those cases was restricted, but only so far as the true construction of the whole contract required. We are now asked to restrict it further, and, as it appears to me, to an extent not warranted by the rest of the contract or by the authorities. On the one hand, care must be taken not to confine a general principle to cases which merely illustrate its application; but, on the other hand, care must be taken not to apply decided cases so as to defeat the real object and meaning of persons when expressed in sufficiently plain language. The introduction of the word "collision" in addition to risks and dangers of the sea, shows that something was intended to be excepted which those words would not or might not themselves include. But such expressions as "perils of the sea, accident, or damage of seas" and the like in charter-parties and bills of lading have been long held to extend to collisions not occasioned by the negligence of the master or crew of the carrying ship: (*Buller* v. *Fisher*, Abbott on Shipping, 12th edit. p. 592.) And, on the other hand, such expressions have been held not to apply to collisions occasioned by such negligence: (*Lloyd* v. *General Iron Screw Collier Company*, 2 Mar. Law Cas. O.S. 32; 3 H. & C. 284; *Grill* v. *General Iron Screw Collier Company*, L. Rep. 1 C. P. 600; 2 Mar. Law Cas. O. S. 362; and 3 C. P. 476.) So an exception of leakage and breakage has been held not to include leakage or breakage caused by the carelessness of the shipowner or his servants in stowing: (*Phillips* v. *Clark*, 2 C. B. N. S. 156; *Czech* v. *General Steam Navigation Company*, L. Rep. 3 C. P. 14; 3 Mar. Law Cas. O. S. 5; see also *The Chasca*, L. Rep. 4 Ad. & Ec. 446.) Having regard to these decisions, the introduction of the word "collision" into the bill of lading in this case would not exonerate the defendants from liability in respect of a collision caused by the negligence of their servants who had charge of the ship in which the plaintiffs' goods were being carried but this liability is expressly excluded by additional words. These additional words were probably inserted to meet, not only the decisions referred to, but also the more general observations of several eminent judges to the effect that the shipowner cannot protect himself from liability for the misconduct of his servants by the use of general words only: (see per Kelly C.B. in L. Rep. 3 C. P. 481; per Willes, J. *Ib.* p. 19; per Lush, J. in L. Rep. 9 Q.B. 549.) In truth it is the application of this principle which gives rise to the difficulty which the court has to solve. The plaintiffs themselves invoke this very principle and rely upon it, and contend that the general word "collision" is not sufficient to protect the defendants from liability for the negligence of their servants, whether in the management of the carrying ship or any other. This, moreover, is the view taken by the court below. The answer to it is that the meaning of the parties must be gathered from the whole contract, and that all the exceptions taken together show that what the parties really intended was to exclude all collisions, even though attributable to the negligence of those who were entrusted with the carriage of the plaintiffs goods. This intention might no doubt have been expressed more plainly, but the closer the course of decision on this subject is studied the more plain does it, I think, become that the real meaning of the parties was as above stated. I am aware that in questions arising on bills of lading and charter-parties the rule is to regard the *causa causans* rather than the *causa proxima*, and that there is a difference in this respect between such documents and policies of insurance. But this rule is, after all, subordinate to the true construction of the contract, and ought not to be applied so as to defeat the intention of the parties as therein expressed. For example, if the *Atjeh* had been owned by strangers, and the collision had been caused wholly by the negligence of her captain, the loss of the plaintiff's goods would, as between them and the defendants, be regarded as a loss by collision within the true meaning of the bill of lading, and not as a loss by an unexpected peril—viz., the negligence of the captain of the *Atjeh*. This illustration shows that the liability of the carrier turns on the true construction of the contract, and that the distinction between *causa proxima* and *causa causans* is not the test of liability. The word "collision" may cover both or only the first, according to the meaning of the parties as expressed in the contract. For the above reasons I am unable to concur in the view taken by the court below, that the defendants are liable on the contract—*i.e.*, for a breach of their contract to carry safely.

It becomes, therefore, necessary to consider whether the defendants are liable to the plaintiffs for the loss of their goods apart from the contract into which the parties entered by the bill of lading

It is contended that because both ships were registered in Holland in the name of a Dutch company, and were both lawfully sailing under the Dutch flag, and came into collision on the high seas, the plaintiffs' rights apart from the contract must be decided by the Dutch law. But although both ships may have been Dutch, and entitled by the law of Holland to trade with Dutch ports in Java, yet it is not to be forgotten that both ships, were, in fact, owned beneficially by the defendants, and were both navigated by persons who were in fact the servants of the defendants. What, then, is the law applicable, as between the plaintiffs and the defendants, to a loss of the plaintiffs' goods occasioned by a collision between these two ships? What reason is there for saying that Dutch law, as distinguished from English law or the general maritime law, is to govern such a case? The reason alleged is that, each ship being Dutch, the law of the flag—that is the Dutch law—regulates the persons on board each ship, and determines the rights and liabilities of her owners both towards the captains and crews, and towards the owners of the cargoes on board. This reason is based on a very common and fruitful source of error—viz., the error of identifying ships with portions of the territory of the states to which they belong. The analogy is imperfect, and is more often misleading than the reverse, as I have endeavoured to point out before: *Reg.* v. *Keyn*, 2 Ex. Div. 93, 94.) In this particular case the analogy appears to me more misleading than usual. I am not aware of any decision in this country to the effect that, where two ships come into collision on the high seas, the rights and liabilities of their respective owners have been held to depend on the laws of the respective flags of the ships. The law applicable in this country to cases of collision on the high seas is the maritime law as administered in England, and not the laws of the flags: (see *The Johann Friederich*, 1 W. Rob. 35; *The Leon*, 6 P. Div. 148; and Foote on Private International Law, pp. 398 and 403.) According to the maritime law, the defendants, as principals of the captain of the *Atjeh*, are clearly liable for the consequences of his negligence. If it be objected that the Dutch company, and not the defendants, are the owners of the *Atjeh*, and responsible for the acts of her captain, the objection is answered by the admission made by the defendants' counsel in this court, that the defendants represent the Dutch company for all the purposes of this action. Probably, even without this admission, the result would be the same, considering that the Dutch company were bare trustees for the defendants. But the admission gets rid of all difficulty with respect to ownership, such as had to be encountered in *The General Steam Navigation Company* v. *Guillou* (11 M. & W. 877).

Assuming, then, that the defendants are liable to the plaintiffs for the loss occasioned by the negligence of the master of the *Atjeh*, it is necessary to determine the amount of damages to which the plaintiffs are entitled. The action, viewed as an action of tort, appears to come distinctly within sect. 25, clause 9, of the Judicature Act 1873, and the rules of the Admiralty Court have to be ascertained and applied. It becomes unnecessary, therefore, to discuss the doctrine laid down in *Thorogood* v. *Bryan* (8 C. B. 115) and other cases of that class, for the Admiralty Court has never adopted that doctrine: (see *The Milan*, 31 L. J. 105, Adm. and 1 Lush. 388, 403; 1 Mar. Law Cas. O. S. 185; 5 L. T. Rep. N. S. 590.) According to the rules of the Admiralty Court, if the two ships had belonged to different owners, then, as both ships were to blame, the plaintiffs would have been entitled to recover one-half of the amount of their loss from the owners of the *Atjeh*, and one half from the owners of the *Kroon Prins*. As both ships belong to the same owners, the above rule would render the defendants liable for both halves, *i.e.*, for the whole of the loss, and this would be the proper result, were it not for the special stipulation contained in the bill of lading, which exonerates the defendants from the share of the loss attributable to the negligence of those in charge of the *Kroon Prins*. The contract in this case exonerates the defendants from half of the loss and leaves them liable for the other half, and the plaintiffs are entitled to judgment on this footing. Unless the parties can agree upon the sum for which judgment is to be entered, the amount must be ascertained by a reference to a master or a referee. The plaintiffs will be entitled to the costs of the action, but, the appeal having been to a great extent successful, each party should pay his own costs of the appeal.

Judgment reversed in part.

Solicitors for plaintiffs, *Waltons, Bubb*, and *Walton*.

Solicitors for defendants, *Lovell, Son*, and *Pitfield*.

Thursday, March 1, 1883.

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

WOODLEY AND Co. *v.* MICHELL AND Co. (*a*)

Bill of lading—Perils of the sea—Collision—Negligence.

A collision between two ships caused by the negligence of either is not a peril of the seas within the meaning of those words in a bill of lading.

The plaintiffs were the owners of a cargo of barley shipped at Caen on board the defendants' schooner Kate *for delivery in London. The bill of lading was in the usual form, the only exception contained in it being the exception of "perils of the sea." The* Kate, *while sailing up the Thames, collided with a steamer, and was sunk, and the cargo lost. In an action to recover the value of the cargo the jury found that the collision was caused by the* Kate *starboarding her helm, but that there was no negligence on her part. There was no finding as to the steamer.*

Held, that the loss was not occasioned by a peril of the sea.

THIS was an appeal by the plaintiffs from the judgment of Hawkins, J. at the trial of the action.

The action was brought by the plaintiffs, who were indorsees for value of a bill of lading against the defendants, who were the owners of the schooner *Kate*, to recover the value of a cargo of barley shipped on board that vessel. The cargo was shipped at Caen in Normandy, on board the *Kate*, to be carried to London, under a bill of lading, which contained only one exception, that of "perils of the sea." While the *Kate* was sailing

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

up the Thames she came into collision with the steamer *Fyneoor*, and was sunk and the cargo lost. The plaintiffs sued the defendants to recover the value of the cargo, alleging negligence on board the *Kate*. The defendants denied the negligence, and pleaded that the loss was occasioned by a "peril of the sea." At the trial before Hawkins, J. the jury found that the collision was in fact caused by the *Kate* starboarding her helm, but that there was no negligence on the part of those in charge of her. There was no finding as to the *Fyneoor*. Upon these findings Hawkins, J. entered judgment for the defendants.

The plaintiffs appealed.

Butt, Q.C. and *Tyser* for the appellants.—On these findings the plaintiffs are entitled to judgment. A collision is not a "peril of the sea" within the meaning of those words in a bill of lading, except in the case of a collision absolutely accidental and not in any way caused by the act of man:

> *The Chartered Mercantile Bank of India* v. *The Netherlands India Steam Navigation Company*, 52 L. J. 220, Q. B.; 5 Asp. Mar. Law Cas. 65.

"Peril of the sea" in a bill of lading has a different meaning to those words in a policy of insurance. The rule in the case of a policy of insurance is that the *causa proxima* of the loss is to be regarded; but the rule in the case of a bill of lading is that the *causa causans* is to be looked to. They cited

> *Buller* v. *Fisher*, 3 Esp. 67;
> *Trent and Mersey Navigation* v. *Wood*, 3 Esp. 127;
> *Smith* v. *Scott*, 4 Taunt. 126;
> *Dudgeon* v. *Pembroke*, L. Rep. 2 App. Cas. 284; 36 L. T. Rep. 382; 3 Asp. Mar. Law Cas. 393;
> *Dixon* v. *Sadler*, 8 M. & W. 895.

Webster, Q.C. and *Sutton* for the respondents.—A peril of the sea is such an accident as may be expected to happen on the sea. [The Court referred to *Lloyd* v. *The General Iron Screw Colliery Company*, 3 Hurl. & C. 284; 2 Mar. Law Cas. O. S. 32.] The passage from Parson's Maritime Law there quoted is altered in later editions (see ed. 1869, vol. 1, bk. 1, chap. 7, p. 259.) If the passage as altered is good law this case is clearly within it. [Brett, L.J.—I doubt whether the passage quoted from the later edition of Parson's Maritime Law is correct.]

Brett, L.J.—I am of opinion that this appeal must be allowed. The jury have found that this collision between a sailing vessel and a steamer was caused by the sailing vessel starboarding her helm, but they have also found that, under the circumstances, this starboarding of the helm was not an act of negligence; and there has been no finding at all as to the steamer. The question is whether, on these findings, judgment ought to be entered for the plaintiffs, who are the owners of the cargo on board the sailing vessel, or for the defendants, who are the owners of the sailing vessel. It seems to me that, in such a case as this, it was only necessary for the plaintiffs to prove non-delivery of the cargo—the defendants could only answer that in one way, by showing that such non-delivery was caused by something excepted by the bill of lading. Now the bill of lading only excepts "perils of the sea," the defendants, therefore, had to bring this case within that exception. I am not prepared to retract anything I said in *The Chartered Mercantile Bank of India* v. *The Netherlands Steam Navigation Company* (*ubi sup.*), but I am bound to say that I do not think that all I there said was so necessary for the decision of that case as to make it binding on us here. We need not now consider whether all that was said there was right or wrong. This much, however, I must say here—that although a collision which happens without any negligence on the part of either vessel is, or may be, a peril of the sea, yet a collision which happens in consequence of the negligence of those on board either of the vessels, so that without some negligence somewhere it would not have happened, is not a "peril of the sea" within the meaning of those words in an English bill of lading. On the findings of the jury in this case, I therefore think the defendants must fail, as the jury have only found that the collision happened without negligence on board one of the two vessels. But if we look at the findings by the light of the facts of the case, then I think it appears at once inevitable that the defendants must fail, because the moment it appears that the collision was between a sailing vessel and a steamer the court is bound to take notice of the rule that it is the duty of the sailing vessel to keep her course, and the duty of the steamer to keep out of the way. The defendants then, as it seems to me, are in this inevitable difficulty. The only way in which the finding of the jury can be dealt with is to assume that the *Kate* was put into a position of such extreme peril by the negligence of the steamer, that those in charge of her may be excused from obedience to the rule. Even if there was no negligence on board the *Kate*, there must have been some on board the steamer, and it is clear law that a collision which happens in consequence of negligence on either vessel cannot be said to be a "peril of the sea" within the meaning of those words in a bill of lading.

Cotton, L.J.—I am of the same opinion. The plaintiffs sue for non-delivery of the cargo; the defendants are clearly liable unless there is something in the bill of lading to excuse them from their liability. The defendants say that they are excused under the exception of perils of the sea. There is no decision binding on this court which lays down that a collision caused by the negligence of either vessel is a peril of the sea; and it appears to me that, where there is in fact no peril arising either from the waves or the wind, and an accident happens in consequence of a negligent act of someone that accident cannot properly be said to arise from a peril of the sea. Here the defendants are in this dilemma—that, in order to prove that there was no negligence on their own ship, they are obliged to assume negligence on board the steamer. I agree with Brett, L.J. that the finding of the jury can only be right on the supposition that the steamer was guilty of negligence. Therefore, it seems to me that whichever way we look at it, the defendants are liable, and that this appeal must be allowed.

Bowen, L.J.—The plaintiffs are entitled to succeed unless the defendants can show that the loss was occasioned by a peril of the sea. The jury have found that the loss was caused by the starboarding of the helm of the carrying vessel, the *Kate*; and they have added that there was no negligence on board the *Kate*. It is clear to my mind that on this finding alone the owners of the

Kate are not entitled to judgment. But it does not stop there, because we have to consider whether, taking the findings of the jury in conjunction with the admitted facts of the case, we are of opinion that the loss was caused by a peril of the sea. Now, the facts are that the *Kate* was going up the Thames under no sort of peril of wind or tide, and in no danger whatever, and the steamer was coming down. All that can be urged is that the *Kate* was driven to starbord her helm by the action of the steamer. Under these circumstances I think there is, at any rate, no evidence that the loss was occasioned by a peril of the sea; and, though I do not in the least dissent from what has been said by Brett, L.J., I think it sufficient to say that in the present case the findings of the jury do not entitle the defendants to judgment.

Appeal allowed.—Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Waltons, Bubb,* and *Walton.*

Solicitors for the defendants, *Clarkson, Greenwell,* and *Co.*

Wednesday, April 25, 1883.

(Before Brett, M.R. and Bowen, L.J.)

The Leon XIII. (*a*)

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

Jurisdiction — Wages — Foreign ship — Protest of Consul.

In an action for wages and wrongful dismissal brought by persons domiciled in England against a foreign ship, in which they had served under articles signed in a port of the country to which the ship belonged, in which action imprisonment, hardship, and ill-treatment were alleged, the Court refused to interfere with the discretion of the judge below in declining to exercise jurisdiction against the protest of the consul, which alleged that, by the law of the country to which the ship belonged, all disputes relating to the ship, or claims against the owner or master, were to be referred to and decided by the tribunals or consuls of that country.

This was an appeal by the plaintiffs from a decision of Sir Robert Phillimore, given on the 7th Nov. 1882, by which he had declined to exercise jurisdiction in a wages action brought by seamen against a foreign ship.

The action was brought by three English engineers against the Spanish steamer *Leon XIII.* to recover wages and damages for wrongful dismissal. After the statement of claim had been delivered, the Spanish Consul at Liverpool made a protest against the jurisdiction of the English court, and on motion by the owners of the *Leon XIII.*, the court refused to exercise jurisdiction.

The facts of the case are fully reported in the court below: (47 L. T. Rep. N. S. 659; 5 Asp. Mar. Law Cas. 25; 8 P. Div. 121.)

J. P. Aspinall and *French* for the appellants.

R. T. Reid, Q. C. and *W. G. F. Phillimore, for* the respondents, were not called upon.

The argument was substantially the same as that used in the court below. The cases cited were

The Nina, 17 L. T. Rep. N. S. 391, 585; 3 Mar. Law Cas. O. S. 10, 47; L. Rep. 2 P. C. 38;
The Golubchick, 1 W. Rob. 143;
Limland v. *Stephens,* 3 Esp. 269;
Hulle v. *Heightman,* 4 Esp. 75;
Sigard v. *Roberts,* 3 Esp. 71;
The St. Oloff, 2 Pet. Adm. 428 (Amer.);
The Jerusalem, 2 Gallison, 198 (Amer.);
Bucker v. *Klorkgeber,* Abbott, 402 (Amer.);
Davis v. *Leslie,* Abbott, 134 (Amer.).

April 25.—Brett, M.R.—In this case an action has been brought against a Spanish ship in the Admiralty Court by certain engineers who had served on board the defendants' ship. The action was brought to recover wages due, compensation for wrongful dismissal, and perhaps to recover damages for alleged false imprisonment. I say "perhaps" because it must be noticed that in the statement of claim there is no prayer for damages for false imprisonment, unless it be considered as included in the prayer for general relief. The suit then having been instituted in the Admiralty Court, a protest was presented by the Spanish consul at Liverpool, in which it is asserted that the dispute ought to be tried, not in the Admiralty Court, but by the Spanish consul, and though there is some alleged difficulty as to what consul is meant in the protest, it seems to me clear that it means the Spanish consul at Liverpool, that is to say, at the place where the ship was seized and the dispute arose. The consul's protest was supported by his affidavit, and both protest and affidavit allege these grounds why the case should not be tried in the Admiralty Court: that although the plaintiffs are British sailors, yet they entered into a contract with the master of a Spanish ship, and that it was made in a Spanish port. I think this latter fact is immaterial. Although the plaintiffs are Englishmen, they have entered into a contract to serve on board a Spanish ship, and nowhere else. The consul also alleges facts which are evidence to show that the contract is a Spanish contract in the Spanish language, and in the form of Spanish articles, all being strong, indeed, I may say conclusive, evidence to show that the contract of service was a Spanish contract of service. The consul goes on to state that a Spanish seaman serving under such articles is liable in case of a dispute between him and the shipowner to have it settled by Spanish law, and by Spanish law the plaintiffs can only have the case settled before a Spanish court or a Spanish consul abroad, meaning thereby, as I have said, the consul at the place where the dispute arises. To this protest and affidavit no answer by affidavit has been made, that is, no sworn answer, that the Spanish consul's statement of the Spanish law is an erroneous exposition of that law.

Under these circumstances, and with that evidence before him, the learned judge of the Admiralty Court held, in obedience to the decisions of Dr. Lushington and the Privy Council, that he had, notwithstanding the protest, jurisdiction to try the action, but that he had a discretion to exercise in respect of it, namely to decide whether he should try it himself or leave the parties to go before the Spanish consul; in other words, to refer the matter to be tried by the consul. Then this is an appeal against that decision, on the ground that the learned judge erroneously exercised his discretion. The learned judge, in giving his

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs. Barristers-at-Law.

judgment states that he gives his decision first of all on the ground that a man "must be considered *pro hâc vice* to be subject of that country to which the vessel belongs." That is his first ground; and then he says "upon the whole, without entering into the cases which are fully considered, and the principles of law applicable to them in the case of *The Nina* (*ubi sup.*), I am of opinion that no difference is established between that case and the present, and I must dismiss this suit," meaning that he could see no difference between this case and the principles of law acted on in former cases. These principles are distinctly stated in *The Nina* (*ubi sup.*), and *The Golubchick* (*ubi sup.*), and it is clear that the court, even though there is express provision in the articles that the seamen bind themselves to go before the tribunals of the country to which the ship belongs, is not ousted of its jurisdiction. But it is equally clear that though the Admiralty Court has the jurisdiction, yet in each particular case it will exercise its discretion and consider if it will entertain the action or not. It seems to me that *The Nina* lays down this ground to guide the judicial discretion, that if all the foreign consul does is to protest without giving reasons, then the Court of Admiralty in its discretion will proceed with the action. But if he does give reasons, then the Court of Admiralty will inquire into the reasons, and allow them to be contradicted. Then when it has entered into the facts it will proceed to exercise its discretion in each particular case. In *The Nina* the circumstances were that certain English sailors entered into articles on a Portuguese ship, and I will assume that under those articles they undertook to abide by the decision of a Portuguese tribunal. But there it is to be noticed that there was no negative stipulation that they would not apply to an English court for redress. There was there an affidavit of the consul supporting the protest that by Portuguese law these sailors could only proceed before a Portuguese tribunal. Then the Court of Admiralty held that, though not bound to give up its jurisdiction, yet under the circumstances of such a protest it would decline to go further with the matter, and released the ship. The court held that the fact of the sailors being British seamen would not cause them to entertain the action, if, being British seamen, they had bound themselves by a foreign contract to serve on board a foreign ship. That entirely supports the proposition laid down by the learned judge here, that when seaman enter into the service of a Spanish ship, with Spanish papers and a Spanish flag, they are to be taken to be, *pro hâc vice*, Spanish subjects. Therefore the case is to be decided as if these men were Spanish sailors serving on board a Spanish ship, and under Spanish articles; and the consul says that being such they can only complain to a Spanish court or consul, and he therefore submits that the court should not exercise jurisdiction. In *The Nina* the court acted in accordance with the consul's wish; so here, when the learned judge says, "I abide by *The Nina*," he means to say, and does in effect say, although not literally, that, applying the principles in *The Nina*, these engineers are to be considered as Spanish sailors; and that in the face of the protest, which he thinks a fair and proper one, the court will not exercise its jurisdiction.

It is then said that the learned judge has exercised his discretion wrongly. What then is the rule as regards this point in the Court of Appeal? The appellant must show that the judge has exercised his discretion on wrong principles, or that he has acted so differently from what is the view of the Court of Appeal that they are justified in saying he has exercised it wrongly. I cannot see that any wrong principle has been acted on by the learned judge, or anything done in the exercise of his discretion so unjust or unfair as to entitle us to overrule his discretion. He acted expressly in accordance with *The Nina*, and I think the judgment is correct.

Then it is suggested that the materials before the learned judge were erroneous, and that the consul's statement of Spanish law was incorrect. Perhaps if this had been distinctly proved before us now, it may be that we might have altered the decision of the learned judge, but as the matter stands we have no materials before us to show that the consul's statement of the Spanish law is erroneous; and, although a long period of time has elapsed since the hearing of this case in the court below, nothing in the nature of evidence has been brought before us to support the assertion of the appellants' counsel, and we are not bound to take their statement as to the contents of the Spanish code. There is no suggestion that an affidavit can be obtained, and it is said there is no Spanish expert in London or any of the large English seaports. We cannot act on these suggestions; there is really no good ground advanced why we should have different materials before us. We are in fact powerless to overrule the learned judge, so that these men must go before the Spanish consul at Liverpool, and the appeal must be dismissed with costs.

BOWEN, L.J. concurred.

Judgment dismissed.

Solicitors for the appellants, *Pritchard* and *Sons*, agents for *Yates, Son*, and *Stannanought*, Liverpool.

Solicitors for the respondent, *Gregory* and *Co.*, agents for *Hill, Dickinson*, and *Lightbound*, Liverpool.

Tuesday, May 29, 1883.

(Before BRETT, M.R., LINDLEY and FRY, L.JJ.)

COVERDALE, TODD, AND Co, *v.* GRANT AND Co. (*a*)

Charter-party—Exception—Frost preventing 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 a cargo of iron. The charter-party contained 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 accident 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."

The ship arrived in the East Bute Dock, and loading was commenced, but was interrupted by

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

reason of a severe frost, which prevented the lighters containing the iron coming through the canal into the dock, the docks themselves being free from ice.

Held, in an action to recover demurrage, that the defendants were not protected by the exception in the charter-party as to detention by frost.

The decision of Pollock, B. reversed.

This was an appeal from a judgment of Pollock, B. The action was brought to recover demurrage and damages for the detention of the plaintiffs' steamship *Mennythorpe*.

The facts are fully stated in the report in the court below (46 L. T. Rep. N.S. 632; 4 Asp. Mar. Law Cas. 528.)

The *Solicitor-General* (*Brynmor Jones* with him), for the plaintiffs, referred to *Kay* v. *Field* (47 L. T. Rep. N. S. 423; 4 Asp. Mar. Law Cas. 588). That case and the present one were decided by Pollock B. on the same grounds at the same time. His judgment in *Kay* v. *Field* was reversed by this court. This case is not distinguishable. [He was stopped.]

Bowen Rowlands, Q.C. and *Moulton* for the defendants,

Brett, M.R.—I am of opinion that there is no distinction between this case and that of *Kay* v. *Field*, and therefore the judgment appealed from must be reversed.

Lindley, and Fry, L.JJ. concurred.

Appeal affirmed.

Solicitors for the plaintiffs, *Shum, Crossman*, and *Co.*, for *Turnbull* and *Tilley*, West Hartlepool.

Solicitors for the defendants, *Clarke, Rawlings*, and *Clarke*.

June 6, 13, 1882, *March* 2 *and* 3, 1883.

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

The Fanny; The Mathilda. (*a*)

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

Charter-party — Shipbroker — Master — Agent — Ratification—Foreign port.

G., a shipbroker at G. G. chartered the Finnish vessels F. and M. prior to their arrival at G. G., and without communication with the owners. G. had on several previous occasions chartered the F. and M. under similar circumstances, and all of these charter-parties had been carried into effect. After the arrival of the F. and M. at G.G. their masters were on several occasions at G.'s office, and were shown their charter-parties. A fortnight after the vessels' arrival at G.G., during which time freights had risen, the masters refused to take up the charter-parties.

Held, that the masters by their conduct had not ratified the charter-parties in such a way as to make them binding.

A master has no authority to bind his owners by writing forward to a broker in a foreign port, prior to the ship's arrival therein, authorising the broker to charter his ship.

The authority of a master to bind his owners by charter party arises when he is in a foreign port, and his owners are not there, and there is difficulty in communicating with them.

A master is not the agent for his owners to hold out a person as authorised to charter his ship, so as to bind the owners.

This was an appeal from the judgment of Sir Robert Phillimore, given on the 13th June 1882, by which he, reversing the decision of the judge of the Grimsby County Court, held that the owners of the Finnish ships, *Fanny* and *Mathilda*, were liable for non-performance of two charter-parties signed by a Grimsby shipbroker, named Grauberg, under the circumstances hereinafter stated.

Ebenhard Grauberg, a native of Finland, carrying on business at Grimsby as a shipbroker for a period of fifteen years, had during that time acted as agent for Finnish ships, he being the only person in Great Grimsby who could speak the Finnish language. Since 1876 he, without any communication with the owners of the ships *Fanny* and the *Mathilda*, had, by authority from the masters, made two charter-parties for outward cargoes for the *Fanny* and nine for the *Mathilda*, all of which had been accepted by the masters of the respective vessels and duly carried out. These charter-parties had been entered into by Grauberg prior to the arrival of the vessels in Grimsby, and were signed by him "as agent."

The following were undisputed facts in the case with respect to the two charter-parties now in question: The charter-party relating to the *Fanny* was made on Sept. 15, 1881 by Grauberg, and purported to be made between the Master of the *Fanny* and E. Bannister and Co. (the plaintiff firm), in respect of the carriage of coals to Cronstadt. On Sept. 16, 1881 a similar charter-party relating to the *Mathilda* was entered into by Grauberg, and Bannister and Co. Both these charter-parties were signed by Bannister, and by Grauberg "as agent." Sept. 24, 1881 the two vessels arrived in the port of Great Grimsby, when they were boarded by Frost, Grauberg's clerk, and there was some conversation between him and the respective masters as to the chartering of their vessels. Sept. 26, the masters were at Grauberg's office, and were subsequently there on other occasions. Oct. 4, Grauberg dined with the masters on board the *Mathilda*. Oct. 5, Grauberg received the following letter from the master of the *Fanny*:

> Grimsby, Oct. 5, 1881.—Herr Ed. Grauberg.—I do not accept your freight or your charter-party for 7*l.* 10*s.*, as I can obtain better freight. I have tried to see you several times, but could not find you. (Signed) A. Yrjola.

Oct. 6, Bannister wrote to the master of the *Fanny* to take cargo on board, in answer to which the master wrote saying that he had not fixed his ship with Bannister; and Oct. 8, the master of the *Mathilda* in answer to a similar letter from Bannister, dated Oct. 7, wrote to the same effect. The masters were both Finns, and the charter-parties were drawn up in English.

The evidence on behalf of the plaintiff was that Frost, on boarding the vessels, had informed the masters of the charter-parties, at which they had expressed satisfaction; that on Sept. 26, the masters at Grauberg's office had expressed themselves satisfied with the charter-parties; that on Sept. 29, the masters were shown the charter-parties, and after reading them the master of the *Fanny* took his away with him, and the master of the *Mathilda* returned his to Grauberg.

(*a*) Reported by J. P. Aspinall, and F. W. Raikes, Esqrs., Barristers-at-Law.

On behalf of the owners of the *Fanny* and the *Mathilda* the evidence was that Grauberg had never before chartered the vessels without express authority from the masters; that on the present occasion he had no such authority; that when Grauberg's clerk had alluded to the vessels being already fixed, the masters had denied Grauberg's authority to do so; that on Sept. 29, Grauberg informed the masters he could guarantee them freight at 7*l.* 10*s.*; that on Oct 4, the master of the *Fanny* was for the first time told by Grauberg of his charter-party, when it was given to him by Grauberg, and that on being informed of its contents, he returned it to Grauberg; and that the master of the *Mathilda* saw his charter-party for the first time on Oct. 7, when ordered by Bannister to take on board cargo.

Actions were commenced in the Great Grimsby County Court in Oct. 1881 by Edward Bannister under the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51) for damages for non-performance of the charter-parties, and the ship's were arrested in these actions. The subject-matter of both actions being the same, the actions were tried together on *viva voce* evidence, and judgment was entered for the shipowners. As the learned County Court entirely rested his decision on the ground that the masters could not delegate their authority to enter into charter-parties without leave from their owners, he found none of the facts in dispute.

From this decision the plaintiffs appealed; and the appeal came on for hearing before Sir R. Phillimore on the 6th June 1882.

J. P. Aspinall and *Phillimore* for the appellants.—Grauberg having on previous occasions chartered the ships *Fanny* and *Mathilda*, and all of these charters having been carried out, had what amounted to a general antecedent authority to bind the ships. He had, for a course of years, chartered all Finnish ships coming to Great Grimsby, and was recognised as authorised to bind Finnish ships which had taken up previous charters made by him. This is a case where the exigencies of business require that the masters should appoint a sub-agent for chartering their ships, and it is immaterial, when they have thus delegated their authority, if the charter-parties are entered into prior to the arrival of the ship in port. In *De Bussche* v. *Alt* (8 Ch. Div. 286; 3 Asp. Mar. Law Cas. 584; 38 L. T. Rep. N. S. 370) the Court of Appeal lays it down that there are circumstances, by reason of usage or of the nature of the particular business, under which an agent is entitled to delegate his authority to sub-agents, and so bind his principal. Story, J., in sect. 14 of his Law of Agency recognises this power of an agent, and specifically instances the case of a master employing a broker to charter his ship. Apart from the question whether the masters actually delegated their authority or not, their continuous employment of Grauberg, coupled with the fact that all Finnish ships so employed him, would amount to a holding out of Grauberg as authorised to charter their ships, within the decision of *Smith* v. *Maguire* (3 H. & N. 560), so as to bind their owners. A passage in cap. xvii., s. 443, of Story's Law of Agency is to the same effect. Even presuming that under the circumstances of the case there was no general antecedent authority in Grauberg to bind the owners by charter-party, yet, seeing the previous relations between Grauburg and the *Fanny* and *Mathilda*, it requires but a slight act on the part of the masters to justify the court in deciding that the charter-parties were ratified. Putting aside all previous relations, it is contended that the conduct of the masters amounted to a ratification.

Butt, Q.C. and *Witt* for the respondents.—Grauberg, notwithstanding the fact that certain charter-parties entered into by him for Finnish vessels were carried out, has no authority to bind shipowners by charter-parties entered into prior to the arrival of the vessels in port, the terms of which subsequently the masters could never see until arrival. His previous employment gives him no general antecedent authority to bind the owners, seeing that the charter-parties were made prior to the arrival of the vessels in port, and he had received no communication from the owners authorising him to fix their vessels. Grauberg should have confined himself to looking out for charters and submitting them to the masters on arrival. The onus is on the plaintiff to prove ratification of the charters, by the masters, and this he has failed to do. The charter-parties being in English, and the masters speaking only Finnish, even if the charters were shown to them they would be ignorant of their contents. On the masters understanding that the charters purported to be an agreement between Bannister and their vessels, fixing the vessels for Cronstadt at 7*l.* 10*s.* they at once repudiated the charters.

Cur. adv. vult.

Sir Robert Phillimore.—The court is indebted to counsel on both sides for a good argument and for a pertinent reference to authorities. These two cases, the circumstances of which are so nearly similar that it is unnecessary to deal with them separately, come before me on appeal from the judge of the County Court of Lincolnshire, holden at Great Grimsby. The appellant, who was the plaintiff in both actions in the court below, is a Mr. Bannister, a merchant of Great Grimsby, and the respondents (defendants in the court below) are the respective owners of the two vessels. The claim in both instances is for damages for non-performance of a charter-party, and is made under the County Courts Admiralty Jurisdiction Amendment Act of 1869 (32 & 33 Vict. c. 51), being a claim arising out of an agreement made in relation to the use or hire of the ships. The charter-parties in question were not signed by the owners or by the captains of the vessels, but by a Grimsby shipbroker named Grauberg. The appellant does not contend that Grauberg had any specific authority in respect of these particular charter-parties, but, as I understand, contends that Grauberg had what amounted to a general antecedent authority to bind the respondents by agreements such as those in dispute, and that, even if this were not so, the captains had subsequently adopted or ratified these particular charter-parties, which adoption or ratification would be binding on the owners. The respondents deny both previous authority and subsequent adoption or ratification. It appears from the evidence that Grauberg had been a shipbroker at Grimsby for fifteen years, and had constantly acted as agent for Finnish

vessels, he being the only person in that town who could speak the Finnish language. He had acted for the *Fanny* and for the *Mathilda*, which were both Finnish vessels, since 1876, and had made during that time two charter-parties for the former, and eight or nine for the latter. These charter-parties were signed by E. Grauberg "as agent," and were all carried into effect. On the 15th Sept. 1881 the charter-party of the *Fanny*, now in question, was entered into. It purported to be an agreement between the captain of the *Fanny* and E. Bannister and Co., the appellant's firm, and stipulated that the vessel should take on board a cargo of coals at Grimsby, and deliver them at Cronstadt at a freight of 7*l.* 10*s.* per keel of 21⅓ tons. It was signed by the appellant on behalf of his firm, and by Grauberg, who signed as agent, as on previous occasions. On the next day a charter-party, similar in all respects was made and signed by the same persons for the *Mathilda*. The two vessels were at that time absent from Grimsby, but on Sept. 24 they arrived at that port, and were boarded by a clerk of Grauberg's, named Frost. At this point there arises a discrepancy between the accounts given by Grauberg and Frost on the one side, and by the captains of the two vessels on the other, and an important issue of fact is raised. In dealing with this issue I am not assisted by the judgment of the learned judge of the County Court, who rested his decision on other grounds, and did not express any opinion as to which of the conflicting accounts ought to be believed. I regret that I have not had the advantage of having the witnesses personally before me, and am obliged to draw from a careful examination of the printed evidence, the best conclusion in my power. The result is that I am of opinion that the evidence of Grauberg and Frost is worthy of credit, and that the evidence of the captains of the two vessels is not. I therefore consider it proved that on Sept. 24 Frost informed both captains on board their respective vessels that these charter-parties had been made for them, and that the captains did not repudiate the charter-parties, and further, that during the succeeding days both captains were more than once at Grauberg's office, and had conversation with him, and that certainly as early as the 29th he showed them the charter-parties, and told them what he had done, and that he did not receive any intimation of dissent on their part until six days later, when it was time for them to take their cargoes on board and sail. It has been urged that the captains did not understand the language in which the charter-parties were written; but I have come to the conclusion, looking to all the circumstances, that they were made substantially cognisant of their contents, sufficiently at least to know the obligations which they were incurring. It is undisputed that on Oct. 5 the captain of the *Fanny* wrote to Grauberg, saying that he could obtain better freight, and throwing up his charter-party, and three or four days later the captain of the *Mathilda* wrote, throwing up his charter-party.

Mr. Bannister thereupon brought his action in the County Court against the owners, and the learned judge decided against him, principally on the grounds that the maxim *Delegatus non potest delegare* applied to this case; that the masters were only the agents of the owners, and, though in that capacity they could make contracts to carry goods or freight, they could not delegate that authority without special leave, which leave was not shown; that therefore the circumstances relied upon by the plaintiff to prove ratification by the captains were, even if accepted as true, most insufficient to bind the owners. He further decided that no proof had been given that the owners had in any way antecedently constituted Grauberg their agent, for the purpose of fixing their vessels with contracts.

From this decision Mr. Bannister is now appealing. Now I am of opinion—and indeed it is admitted by the counsel for the respondents—that the learned judge in the court below has over-strained the application of the legal maxim on which he relies. The maxim in question is unquestionably a rule, but it is one subject to various exceptions and qualifications. The law is plainly laid down in the judgment of the Court of Appeal, in *De Bussche* v. *Alt* (38 L. T. Rep. N. S. 370; 3 Asp. Mar. Law Cas. 584; 8 Ch. Div. 310), where the following passage occurs: "The first condition raises a question which, as it appears to us, does not present any difficulty. As a general rule, no doubt the maxim *Delegatus non potest delegare* applies, so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim, when analysed, merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case the reason of the thing requires that the rule should be relaxed, so as on the one hand to enable the agent to appoint what has been termed a "sub-agent" or "substitute" (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for the want of a better, and for the sake of brevity); and on the other hand to constitute in the interests and for the protection of the principal a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied, where from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where in the course of the employment unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute; and that where such authority exists, and it is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of his duties which his employment casts upon him as if he had been appointed agent by the principal himself." I will also refer to the opinion of Story, who says, in sect. 14 of his Law of Agency, "In general, therefore, when it is in-

tended that an agent shall have power to delegate his authority, it should be given him by express terms of substitution. But there are cases in which the authority may be implied; as where . . . . it is the ordinary custom of trade . . . . so where, by the custom of trade, a shipbroker or other agent is usually employed to procure freight or charter-party for ships seeking a freight, the master of such ship who is authorised to let the ship on freight will incidentally have the authority to employ a broker or agent for the owner, for this purpose." It appears to me that the present case is precisely one of those contemplated in the passages which I have just read, and that the captains were able to constitute Grauberg as sub-agent, and to constitute a privity between him and the respondents. In my judgment, therefore, there was a ratification of the charter-parties which was binding upon the respondents. I consider also that the evidence is sufficient to show such a continuous employment of Grauberg by the captains—an employment which was in conformity with the usages of the Finnish trade at Grimsby—as would constitute a holding ont to third persons that Grauberg was their authorised agent in the matters in question, as would, in fact, amount to an antecedent general authority. In so doing the captains were acting within their powers as agents for the owners, who would, according to the authorities which I have cited, be estopped from repudiating the acts of a sub-agent so constituted. This doctrine of holding out a person as agent is well explained in the judgment of Pollock, C.B. in *Smith* v. *Maguire* (3 H. & N. 560): "I think that questions of this kind," says the learned Chief Baron, "whether arising on a charter-party, a bill of exchange, or any other commercial instrument, or on a verbal contract, should be decided on this principle. Has the party who is charged with liability under the instrument or contract, authorised and permitted the person, who has professed to act as his agent, to act in such a manner and to such an extent that, from what has occurred publicly, the public in general would have a right to reasonably conclude and persons dealing with him would naturally draw the inference, that he was a general agent? If so, the principal is bound, although, as between him and the agent, he takes care on every occasion to give special instructions; and I think it makes no difference whatever, whether the agent acts as if he were the principal or professes to act as an agent, as by signing 'A. B., agent for C. D.'"

I will refer also to the following passage in Story's Law of Agency, cap. 17, s. 443; "But the responsibility of the principal to third persons is not confined to cases where the contract has been actually made under his express or implied authority. It extends further and binds the principal in all cases where the agent is acting within the scope of his usual employment, or is held out to the public or to the other party as having competent authority, although in fact he has, in the particular instance, exceeded or violated his instructions and acted without authority. For in all such cases, where one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract by holding out the agent as competent to act and as enjoying his confidence." The conclusion from the premises which I have stated is, that I must reverse the judgment of the County Court, on the grounds both of general antecedent authority and subsequent adoption or ratification. I pronounce for the appellants. The question of damages in both cases will be referred to the registrar here. An application has been made to me as to the costs of certain witnesses in the court below. The question as to these costs I shall also refer to the registrar here, and if he has any difficulty he will apply to the court.

From this decision the defendants appealed, and on the 2nd March 1883 the appeal came on for hearing.

Witt (with him *Butt*, Q.C.) for the appellants.

J. P. Aspinall (with him Dr. *Phillimore*) for the respondents.

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

March 3.—Brett, L.J.—This case, which comes from the Admiralty Court, is in a peculiar position. The case was heard by the County Court judge at Grimsby, who did not decide any questions of fact, resting his decision entirely on a point of law. It seems to me, however, that he dealt with the case in such a manner that I should have no difficulty in determining on which side he believed the witnesses to be most credible. The case then went on appeal to the Admiralty Court, where it was before the learned judge in the same position as it now comes before us, the whole of the evidence being on paper, so that we have precisely the same materials to form our judgment upon as the learned judge in the court below. It was heard in June 1882, in the Admiralty Court, and now comes here in March 1883, the County Court judge having decided the case in 1881; so that, even were we to send it back to him, it is now too late for him to give us any opinion as to the credibility of the witnesses on either side from their demeanour before him. It is impossible for the County Court judge, with all his duties, to carry his mind back to this case. It would only be possible for him to read the printed evidence, as we have done, and draw his own inferences of fact. Therefore we must decide the case, as it seems to us, on an examination of this printed evidence. Of course, under these circumstances, there is considerable difficulty.

On the question whether there was a general antecedent authority, there was no evidence of any direct communication between Grauberg and the shipowners, and the inference for us to draw as to ratification is an inference from the action of the captains. Now suppose that the captain before the ships had arrived at Great Grimsby had written to Mr. Grauberg asking him to make charter-parties for them before their arrival. To my mind no captain before arrival has any authority in law to bind his owners by such letters, and a charter-party so made would not be binding on the owners, unless subsequently ratified. It appears that on some occasions letters have been written to Grauberg, at Grimsby, by the captains, from Cronstadt, ordering the ship to be chartered in a particular way, which is a practice open to every possible objection. The captains might actually have been writing from Cronstadt, while the owners were in the same town with

them. The authority of the captain to bind his owners by charter-party only arises when he is in a foreign port and his owners are not there, and there is difficulty in communicating with them. The system of a master writing forward in the way I have described to have his ship chartered might counteract the very orders of the owners, who had themselves written to the very same place. If, therefore, it could be shown that the captains had ever authorised Grauberg to make the charter parties in question they would not, apart from ratification, be binding upon the owners. If a captain in 1880, when at Grimsby, thinking he will be there again in 1881, authorises Grauberg to make a charter-party for him in 1881 before his ship arrived, that is contrary to business and law. It was said that there was evidence of a holding out of Grauberg as agent. If so, it must be a holding out to Bannister. But that could only be a holding out by the captains, and, although a captain has a right to bind his owners by a charter, he has no right under the circumstances to bind his owners by a holding out. If the owners had held out the agent at Grimsby to a particular party as the person authorised to make charters, then they would be bound by it; but a captain is not the agent of the owners for that purpose. Therefore, if it were proved in this case that the captains had held out Grauberg as their agent to make charter-parties, this would not bind the owners. There was therefore no authority in Grauberg to make charterparties so as to bind the owners.

But suppose he made charter-parties, and the masters did ratify them, the general rule is, that no person can ratify unless he could have made the contract to be ratified: but supposing, for the purposes of the present case, that the captains could ratify the charters, how does the matter stand? The plaintiff was content to take a charter party not signed by the captain, and without even knowing whether the ship was in port or not. If he deals in that way he consequently runs the risk of Grauberg's authority. Therefore the onus of proving the ratification, when business is carried on in this loose and improper way, lies on the plaintiff. The point of the case is, whether Grauberg has shown this. I will not now dissect the evidence. I am only unprepared to say that the captains knowingly ratified these charter-parties in such a way as to make the act a complete ratification. On this point there is a direct conflict of evidence. Upon that conflict, which is before us on paper, I am not able to know the truth. I therefore think the respondent must fail because there is no evidence to satisfy any tribunal that the masters, knowing the contents of the charter-parties, ratified them.

COTTON, L.J.—I am of the same opinion.

BOWEN, L.J.—I am of the same opinion.

Appeal allowed.

Solicitors for the plaintiffs, *Clarkson, Greenwell,* and *Wyles,* agents for *Grange* and *Wintringham.*

Solicitors for the defendants, *Pritchard* and *Sons,* agents for *A. M. Jackson.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Dec. 2 1882, *and Feb.* 19, 1883.

(Before FIELD, J.)

BURDICK *v.* SEWELL. (*a*)

Bill of lading — Indorsement of, by way of security for money advanced—Liability of indorsee for freight—Passing of property in goods —Bills of Lading Act (18 *&* 19 *Vict. c.* 111), *s.* 1.

The mere indorsement and delivery of a bill of lading by a shipper of goods by way of security for money advanced does not "pass the property" in the goods within the meaning of sect. 1 *of the Bills of Lading Act* (18 *&* 19 *Vict. c.* 111) *so as to render the indorsee liable to the shipowner for freight.*

THIS action, tried before Field, J., was brought by the plaintiffs as owners of the steamship *Zoe* to recover the sum of 174*l.* 8*s.* 9*d.* in respect of freight for the carriage of goods from London to Poti, in Russia.

The defendants were bankers at Manchester, to whom the shipper had indorsed the bill of lading for the goods as security for advances made by them to enable the shipper to pay for the goods which he had caused to be manufactured in this country. The facts fully appear in the judgment of the learned judge.

Charles Hall, Q.C. and *Edwyn Jones* for the plaintiffs.

A. L. Smith and *Danckwerts* for the defendants.

The following authorities were cited:

Story on Bailments, sect. 287;
Donald v. *Suckling,* 14 L. T. Rep. N. S. 772; L. Rep. 1 Q. B. 585;
Pigot v. *Cubbley,* 15 C. B. N. S. 701;
The Freedom, 20 L. T. Rep. N. S. 229; 3 Mar. Law Cas. O. S. 359; 1 Asp. Mar. Law Cas. 28; L. Rep. 3 P. C. 594;
Barber v. *Meyerstein,* 22 L. T. Rep. N. S. 808; 3 Mar. Law Cas. O. S. 449; L. Rep. 4 E. & I. App. 317;
Glyn, Mills, and Co. v. *The East and West India Dock Company,* 43 L. T. Rep. N. S. 584; 47 L. T. Rep. N. S. 309; 6 Q. B. Div. 480: 7 App. Cas. 606; 4 Asp. Mar. Law Cas. 345, 580;
Halliday v. *Holgate,* 18 L. T. Rep. N. S. 656; L. Rep. 3 Ex. 299;
Dracachi v. *The Anglo-Egyptian Navigation Company,* 17 L. T. Rep. N. S. 472; 3 Mar. Law Cas. O. S. 27; L. Rep. 3 C. P. 190;
Lickbarrow v. *Mason,* 1 Sm. L. C. 7th edit. 756;
Reeves v. *Capper,* 1 Bing. N. C. 136; 5 N. C. 140.

Feb. 19.—FIELD, J.—This action was tried before me without a jury, and raises a difficult and important question as to the effect of the Bills of Lading Act (18 and 19 Vict. c. 111) in transferring liability for freight from the shippers to an indorsee of a bill of lading. It was brought by the plaintiffs, the owners of the ship *Zoe,* to recover 174*l.* 8*s.* 9*d.*, freight and charges in respect of sixty cases of machinery shipped by one Nercessiantz and carried to Poti in the Black Sea under a bill of lading dated the 21st Sept. 1880, whereby the goods were made deliverable to shippers or assigns, of which bill of lading the defendants became indorsees under the following circumstances: On the 26th Oct. 1880 Nercessiantz (who had been engaged in previous business

(*a*) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

transactions with the defendants, bankers at Manchester) applied to them for an advance of 300*l.* to enable him (as he said) to complete his payment in this country for the machinery represented by the bill of lading in question, which he had caused to be manufactured in this country, to supply an order in Georgia; and, as a security for the advance, he proposed to indorse the bill of lading to them. He had, however, already (as he said), sent out one of the parts, and the defendants, whilst declining to make the full advance without the deposit of the third part, consented to advance 50*l.* conditionally upon his undertaking to procure and deposit the third part against the advance of the balance by way of security for the whole. Accordingly, on the 30th Nov., Nercessiantz brought the third part and deposited it indorsed in blank (the other two having been already indorsed) and obtained the balance of the advance, saying that he was shortly going out to Poti to superintend the receipt and delivery of the machinery, and that the amount advanced would be repaid before he left England, and that he would call again and make definite arrangements for that purpose. This, however, he never did, and the defendants in consequence in the following month of February indorsed and sent out one part of the bill of lading to their agents at Tiflis, with instructions to make inquiries and protect their interests there. In the meantime, and as far back as Sept. 1880, the *Zoe* had arrived at Poti, and no one appearing to clear the goods they were, on the 14th Oct., landed and warehoused at the Russian Custom-house with (as I infer) the usual stop for freight. Things remained in this state until the month of September in the following year, Nercessiantz not only not appearing to clear the goods, but taking no notice of the communications addressed to him by the agents of the ship, and also by those of the defendants. By the Russian law goods landed and not cleared within twelve months are liable to be sold for duty and charges, the only mode of avoiding the sale being to reship the goods to some other than a Russian port; and in Aug. 1881 the defendants' agents at Tiflis advised them of this state of the law, and of the imminence of sale for these claims, and asked for instructions. The member of the defendants' firm who had made the advance to Nercessiantz, and was conversant with his affairs, was at this time on his way to Poti in reference to these and other matters of business there; and the defendants' firm in England wrote to the ship's agent at Poti, advising him that they held the bills of lading, and that Mr. Sewell would probably communicate personally with them. This he appears to have done, and the defendants on the 28th Sept. also wrote to the plaintiffs' agent in London to the same effect, and requested him to hold for them any proceeds of the sale beyond what was enough to answer their own freight and charges. The sale however (which soon afterwards took place) by the Russian Custom-house officials appears to have produced no more than sufficient for their own claim, and the plaintiffs thereupon required payment of the freight and charges from the defendants, and, on refusal, brought the present action.

Upon the argument before me it was contended on their behalf that the "property" in the bill of lading and goods had under these circumstances passed to the defendants within the meaning of the Bills of Lading Act, and that they, as indorsees, were liable; the defendants, on the other hand, contending that the transaction was one of mere "pawn or pledge" by which no property passed sufficient to render the defendants liable. In order to say which of these two contentions ought to prevail, the intention of the parties to the contract as gathered or to be implied from the circumstances of the transaction must be looked at. Now, advances against deposit of goods are probably some of the most ordinary transactions either of common or commercial life, and if there is delivery, and there are no terms expressed either verbally or in writing, giving any larger effect to the contract, it is known as a contract by way of "pawn or pledge," the legal effect of which is that only a special property passes from the borrower to the lender, although coupled with a power of selling the pledge and transferring the whole property in it on default in payment at the stipulated time, if there be any, or at a reasonable time after demand and nonpayment, if no time for repayment be agreed upon: (*Pothonier* v. *Dawson*, Holt's N. P. 383; and *Donald* v. *Suckling*, L. Rep. 1 Q. B. 585). Moreover, until such default, although the lender may assign the pledge to another to the limited extent of his own interest in it, *i.e.* as a security for the amount due, he cannot pass the whole and entire property in the goods to another, for by the contract the general property remains in the pawnor, who by virtue of that general property may determine the special property by tender of the secured amount, and may immediately recover the pledge on the refusal in a possessory action. Delivery is, however, an essential element of every contract by way of pledge. Such delivery may be actual, as is the every-day life transaction with the pawnbroker, or it may be constructive either by making the custody of the pledgor that of the pledgee (*Reeves* v. *Capper*, 5 Bing. N. C.), or (if the goods are still under the operation of a bill of lading) by indorsement of the bill; and the latter form of the transaction is one very commonly adopted in commerce. As, however, in the case of land by a conveyance by way of mortgage, so also in that of goods, a more effective security may be created by bill of sale, and by the usual terms of such an instrument the whole and entire property in the goods is assigned and passes to the lender, subject to the usual stipulations as to possession and sale, leaving, however, nothing in the way of legal property in the borrower, but only an equitable right to redeem. This latter form of security, although very usual in money-lending transactions of a mere individual character, is not, I believe, usually adopted in those purely commercial transactions where advances are obtained against goods represented either by warrants or bills of lading, these being two of the ordinary modes by which goods are made a security for an advance, within one of which the transaction now in question must be ranged. The question in the present case resolves itself into this, whether the security was intended to operate, or by implication of law arising upon the undisputed facts did operate, in the same way as an assignment by bill of sale or as a mere pledge. If the former, the whole and entire property would pass, and as a consequence the liability to freight would be transferred to the defendants, for although, as suggested by the defendants' counsel it is highly

probable that neither Nercessiantz nor the defendants had in their minds at the time the liability to freight, yet, if the latter took the security of a contract by which "the property passed" to them, they cannot take the good and reject the bad. On the other hand, if the contract, although carried out by the indorsement of the bill of lading, remained merely a pledge, I think it clear that the property, as expressed in the act, did not pass, for by those words I understand the whole and entire legal property and not merely the limited interest which is transferred by the contract of pledge.

Now the plaintiffs' counsel contended that the former was the true effect of the indorsement, and he relied upon the opinion to that effect expressed by Brett, L.J. in the recent case of *Glyn, Mills, and Co.* v. *The East and West India Dock Company* (43 L. T. Rep. N.S. 586; 6 Q.B. Div. 480; 4 Asp. Mar. Law Cas. 345.) There Brett, L.J., after adverting to the peculiar facts of that case, says: "The legal effect of the transaction, in my opinion, was, hat by the indorsement of the bill of lading the egal 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 rights of ownership over the sugar, but that Cottam, Morton, and Co. might exercise any such rights as 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* (L. Rep. 2 C. P. 38, at p. 51), 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 of the pledgee for the purpose of the validity of the pledge, 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 view 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* (1 Sm. L. C. 7th edit. 756), namely, that such an indorsement passes the legal property, It is suggested that an indorsement of a bill of lading, when accompanied by such a letter of charge, has not the same full effect in passing the property as if there was 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 is still an equity though recognised by the common law courts."

I apprehend, however, the language of the learned Lord Justice in that case must be read as applied to the facts of that particular case, and as I on the hearing of that case, which was tried before me without a jury, came to the conclusion that the intention of the parties and the implication of law from the dealings was that the whole and entire property did pass, I agree in the view of the Lord Justice thus limited and understood. I thought in that case of *Glyn* v. *The East and West India Dock Company* that the indorsement, coupled with the terms of the indorsement of the 15th May, and the transactions between the parties did amount in effect to a mortgage (see *Flory* v *Denny*, 7 Ex. 581), and that the right of property as well as that of possession had passed to the plaintiff; and although my judgment was reversed in the House of Lords upon another ground (which the learned counsel for the plaintiff declined to argue before me), my view as to the property passing was supported by Baggallay, L.J., and Brett, L.J., *dissentiente*, however, Bramwell, L.J., and *abstinente* the House of Lords on the final appeal. Lord Bramwell, however, considered the transaction in that case as not amounting to any more than a pledge, expressing his view of the transaction thus (43 L. T. Rep. N. S. at p. 590; 6 Q. B. Div. 490; 4 Asp. Mar. Law Cas. 345): "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, or any action by the dock company for warehouse rent, or charges, or otherwise, supposing such action would lie against some one; they did, however, by the handing over to them of the bill of lading indorsed under the agreement, acquire a special property and right of possession. And I cannot doubt that, as against an actual wrongdoer, and against any person who had actually converted the sugars to his own use, as by their consumption and sale, or dealt with them under a claim of title, they might have maintained a 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."

It is between these conflicting views of such high authority that I have to find my way to a result in the present case. In the view of the limited

effect of the observations of Brett, L.J. which I have expressed the learned counsel for the plaintiff did not concur. He contended that it was the intention of the Lord Justice to enunciate the general proposition that by the law merchant of England the necessary legal implication from or effect of an indorsement of a bill of lading for an advance was, that by it the whole and entire legal property passed; or at least said that was the true deduction from the case of *Lickbarrow* v. *Mason* (*ubi sup.*), referred to by the Lords Justices, as well as from the subsequent authorities; and I proceed, therefore, to the consideration of them. In the last-mentioned case the action was brought by an indorsee for value of a vendee against persons claiming under the vendor, and the question to be decided was, whether, under the circumstances, the vendor could stop *in transitu* the goods comprised in the bill of lading, the vendee having become insolvent. The question, therefore, to be decided was not limited, as in the present case and in that of *Glyn, Mills, and Co.* v. *The East and West India Dock Company*, to the claim of two rivals immediately claiming title under the indorsement of different parts of the bill of lading, but as to the effect of a general and unrestricted indorsement to a third party claiming *bonâ fide* and for value, and without notice of any contract or equities existing between the immediate parties to the indorsement. The Court of Queen's Bench held that, as between these parties, the property passed to the indorsee free from any restriction, just as if the goods had been actually delivered to him, and gave judgment for the plaintiff. The Court of Exchequer Chamber reversed this judgment, on the ground that the operation of the indorsement was no more than an indication to the master of the person to whom the goods were to be delivered, and that the indorsee had no better title to them than his indorser, and gave judgment for the defendant. The judgment of the Exchequer Chamber was, however, in its turn reversed by the House of Lords, presumably on the basis of the reasoning of Buller, J. in the opinion delivered by him in the House. But I do not understand that case as holding that, as between the immediate parties, the law merchant implies that of necessity the indorsement has that operation; and indeed, in the case of *Hibbert* v. *Carter* (1 T. Rep. 745), Buller, J., upon whose reasoning the House of Lords decided *Lickbarrow* v. *Mason*, seems to me to have laid down the contrary. *Hibbert* v. *Carter* was an action on a policy of insurance with a denial of interest. The plaintiff had effected the insurance on instructions and account (as expressed in the policy) of Kerr, of whom he was the general consignee, but Kerr had before the insurance was effected, unknown to the plaintiff, indorsed the bill of lading to a creditor, Delpratt, and Buller, J., at the trial, there being no evidence of the circumstances attending the indorsement, held that by this indorsement the whole property had passed to the latter, and would have nonsuited the plaintiff, but that the defendants had omitted to pay the premiums, for which therefore the plaintiff had a verdict. *In banco*, however, the Court modified the general proposition there apparently laid down, holding that, although generally where a bill of lading is taken by a creditor as a security for a debt the whole property passes; parties are always at liberty to vary this general rule by entering into any particular agreement between themselves; and, upon evidence being given by affidavit that the consignor had no intention of passing the whole property to Delpratt by indorsement, but merely intended to give him a charge upon the net proceeds in the plaintiff's hands, directed a new trial, upon which the plaintiff had a verdict. Buller, J., before whom the case was again heard, said that the *primâ facie* transfer of the whole property is subject to be controlled by the evident intention of the parties. This case was thus decided before the case of *Lickbarrow* v. *Mason*, and was referred to by Buller, J. in that case, and with approval. It could not therefore have been his intention in *Lickbarrow* v. *Mason* to have said anything in conflict with it, and if his language and that of the other judges who took part in that case is read, keeping this in mind, I do not think that Mr Hall's contention is supported by that decision.

In *Lickbarrow* v. *Mason*, in the court below, Ashurst, J. thus expresses himself: "When a man sells goods he sells them on the credit of the buyer; if he deliver the goods the property is altered and he cannot recover them back again, though the vendee immediately becomes a bankrupt. But where the delivery is to be at a distant place, as between the vendor and the vendee the contract is ambulatory till delivery; and therefore, in case of the insolvency of the vendee in the meantime, the vendor may stop the goods *in transitu*. But as between the vendor and the third person the delivery of a bill of lading is a delivery of the goods themselves; if not, it would enable the consignee to make the bill of lading an instrument of fraud." Then he says: "If the consignor had intended to restrain the negotiability of it he should have confined the delivery of the goods to the vendee only, but he has made it an indorsable instrument. So it is like a bill of exchange, in which case as between the drawer and the payee the consideration may be gone into, yet it cannot between the drawer and the indorsee." Then he goes into the reasons of that and says; "The rule is founded purely on principles of law, and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed, but the effect of that indorsement is a question of law, which is that, as between the original parties, the consideration may be inquired into, though when third persons are concerned it cannot. This is also the case with a bill of lading." Therefore it seems that Ashurst, J, did not intend to lay down a general proposition that a mere indorsement of necessity passed the property, but only as between third parties. Buller, J.'s judgment in that court does not deal with the particular question, and I will advert presently to his opinion delivered in the House of Lords. Grose, J, says very much the same thing. He says: "I conceive this to be a mere question of law whether as between the vendor and the assignee of the vendee the bill of lading transfers the property. I think that it does" (carefully guarding his proposition to that particular relation, and not giving it any greater effect.) In the Exchequer Chamber Lord Loughborough delivered a very celebrated judgment, which was reversed no doubt, but that does not take away the value of it as a clear statement of his view. He reasoned upon different principles altogether, he took it that the bill of lading was

a contract, as undoubtedly it is, between the shipper and the ship master, and is no contract with anybody else; that it contains merely the terms upon which the master says, "I receive the goods," and contains his undertaking to deliver them, so that it is no more than a receipt, or a direction to the master as to whom he was to deliver the goods. He says this: "By the delivery on board, the ship master acquires a special property to support that possession which he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the goods until he has disposed of it by some act sufficient in law to transfer property. The indorsement of the bill of lading is simply a direction of the delivery of the goods." Then he says, "Goods in pawn, goods bought before delivery, goods in a warehouse, or on shipboard, may all be assigned." And he winds up in the result by saying that it passes such right as, and no better than the person assigning had in it. No doubt Lord Loughborough's judgment has never been followed, and, on the contrary, the judgment of Buller, J. has. When it came before the House of Lords there was a considerable difference of opinion (in those days as now): five judges in the Exchequer Chamber differed with Buller, J., and there never has been a positive decision reported anywhere of the House of Lords; but the opinion of Buller, J. has always been taken as the law, and been adopted and followed as the law up to the present day. I refer to his language to show that he only decides the point as between third parties, and not between the immediate parties. He says, speaking of the case of *Godfrey* v. *Furzo* (3 P. Wms. 185), upon which he commented a good deal: "The next point there stated is, what is the law in the case of a pure factor without any demand of his own? Lord King says he would have no property. The expression is used as between consignor and consignee, and obviously means no more than that in the case put the consignor may reclaim the property from the consignee. The reason given by Lord King is, because in this case the factor is only a servant or agent for the merchant beyond sea. I agree, if he be merely a servant or agent, that part of the case is also good law, and the principal may retain the property" (Lord King held that no property passed by the indorsement of the bill of lading); and then he says: "But then it remains to be proved that a man who is in advance or under acceptances on account of the goods is simply and merely a servant or agent, for which no authority has been or, as I believe, can be produced." Then he says, after going into the facts: "As between the principal and a mere factor, who has neither advanced nor engaged in anything for his principal, the principal has a right at all times to take back his goods at will; whether they be actually in the factor's possession or only on their passage makes no difference, the principal may countermand his order, and though the property remain in the factor till such countermand, yet from that moment the property revests in the principal, and he may maintain trover." It is true in that case there was an informality, the result of which was that a *venire de novo* was directed, which came on for trial, and upon that occasion the jury found a special verdict; and Mr. Hall relied a good deal upon the terms of that special verdict. It is thus stated in *Lickbarrow* v. *Mason*: "*A venire facias de novo* having been accordingly awarded by the Queen's Bench, a special verdict was found upon the second trial containing in substance the same facts as before with this addition, that the jury found that by the custom of merchants bills of lading for the delivery of goods to the order of the shipper or his assigns are, after the shipment and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery, or transmitting of the same to any other person, and that by such indorsement and delivery or transmission the property in such goods is transferred to such other person," so that there is here no limitation either as to the parties or in reference to the operation of the bill of lading as a mere complement of delivery. But I apprehend that this also must be read as applied to the facts of that particular case, and Lord Tenterden considered unquestionably that the true effect of that case was in the limited way I have expressed it, as will be seen from the statement of it in Abbott on Shipping, 7th edit. p. 533, and 11th edit. p. 432, in which he says: "It is now the admitted doctrine of our courts that the consignee may, under such circumstances, confer an absolute right of property upon a third person indefeasible by any claim on the part of the consignor." Those words show, in my judgment, the limitation he put upon the proposition—that is to say, as between third parties—and *Lickbarrow* v. *Mason* is no authority for extending the proposition to the immediate parties to the contract.

But then the plaintiff relied upon observations made and language used by the learned Lords Hatherley and Westbury in giving judgment in the more recent case of *Meyerstein* v. *Barber*. In that case the question did arise, as in this case, as to the effect of such an indorsement as between the immediate parties, and I cannot distinguish the facts in *Meyerstein* v. *Barber* from those of the present case. There was in that case, as in this, simply an advance and deposit of an indorsed bill of lading by way of security, and no formal instrument of any kind executed. The question in that case arose thus: the plaintiff was indorsee of the bill of lading, first in point of time, but taking only one part, and the only possession or right of possession which he had at the time of the conversion by the defendant was that which was given him by the indorsement. The defendant Barber, on the other hand, was indorsee by subsequent indorsement and delivery to him of the second part of the bill of lading, and he had clothed his title with possession by obtaining warrants in his own name, and thus been guilty of a conversion. Upon the argument the plaintiff's case was, that the indorsement was by way of pledge, and that by it sufficient right of property had passed to him to entitle him to maintain trover against the defendant; and the defendant's argument, based upon the contention that both transactions were only by way of pledge, was that, inasmuch as the plaintiff had not and the defendant had obtained delivery, which is, as I have before observed, the essential complement of a pawn, the latter had a better title. In the Court of Common Pleas, and also in the Exchequer Chamber, the transaction was treated by everybody as one of pledge, the language of Erle, C.J., Williams, J., and Martin B., being expressly to

that effect, and concurring in holding that the mere indorsement of the bill of lading was such a delivery of the goods as amounted to a valid pledge entitling the plaintiff to hold the goods as against Abraham, his indorser, and all claiming title under him; and the judgment was affirmed by the House of Lords. It is no doubt true that Lord Hatherley and Lord Westbury, in giving their advice to the House, used expressions which appear to be to the effect that by the indorsement the whole and entire property passed to the plaintiff. However, reading those expressions as applicable to the particular facts of the case, I do not think that the learned Lords intended to say anything more than that, as between the first and second indorsees, sufficient property had passed to the plaintiff to entitle him to maintain the action, and that the indorsement *per se* amounted to a delivery. In expressing this view Lord Hatherley indeed speaks of the transaction as a pledge and it must be recollected that a mere pledge with its limited operation passes property quite sufficient to maintain a possessory action against a wrongdoer: (*Ayres* v. *South Australian Banking Company*, L. Rep. 3 P. C. 548.) The decision in that case really was that, under the circumstances, the bill of lading had not fulfilled its office, and was therefore capable of assignment. In expressing this view of *Meyerstein* v. *Barber* I am not unmindful of the expressions used by Brett, L.J. in *Glyn, Mills and Co.* v. *East and West India Dock Company* (6 Q. B. Div, 490; 4 Asp. Mar. Law Cas. 345) in regard to that case, and to which I have already referred. I am unable, with the greatest possible respect, to concur in that view of *Meyerstein* v. *Barber*; and it seems to me that the parties intended, both as matter of law and business, that the transaction in that particular case was a pledge.

Having considered these authorities, and a great many more which I do not cite, I have come to the conclusion that, far from supporting the plaintiff's proposition, they show that as between the immediate parties the intention must prevail; and in the present case I come to the conclusion, upon the facts, that the parties did not intend anything more than a pledge—*i.e.*, not to take the whole property in the goods out of Nercessiantz, but to leave the general property with him, contemplating that he would deliver the goods to the parties for whom he had bought them, and that the possession of the bill of lading would enable the defendants to stop their advance out of the proceeds by making them necessary parties to the delivery, or, at the lowest, to put it in their power to compel the borrower to redeem the pledge and thus obtain the only document by which the borrower could obtain delivery of the goods and perform the contract. If such is the true result of the facts, the Bills of Lading Act does not apply, and I therefore am of opinion that no sufficient property passed to render the defendants liable. The question in the present state of the authorities is, no doubt, not free from difficulty, and no one is more conscious than I am of the little practical value attaching to my judgment; but I have done the best I can to form a judgment, and it is for the defendants with costs.

Judgment for the defendants.

Solicitors for plaintiffs, *Lowless* and *Co.*

Solicitors for defendants, *Hare* and *Co.*

March 6, 7, *and* 19, 1883.

(Before CAVE and DAY, JJ.)

BURTON AND Co. *v.* ENGLISH AND Co. (*a*)

Charter-party—Deck load at merchant's risk—Jettison—General average.

The plaintiffs' deck cargo of timber on board the defendants steamship was jettisoned on a voyage from the Baltic to London. The charter-party contained a clause that the steamer should be provided with a deck load, if required, at full freight, but at merchant's risk.

Held, that these words prevented the plaintiffs from recovering a general average contribution from the defendants.

THIS was a special case, stated by an arbitrator as follows:

1. The plaintiffs are timber merchants, carrying on business in London. The defendants are the owners of the steamship *Harvest*.

2. In the month of June 1881 the plaintiffs chartered the *Harvest* to load a cargo of goods at Finnklippan in Sweden (in the Baltic) and proceed therewith to London, and there deliver the said cargo on being paid freight as in the said charter mentioned. [The charter-party was made part of the case, but the only material clauses were the following:

The vessel was to

load, always afloat, from the factors of the said merchants a full and complete cargo not exceeding 480 standards of mill-sawn deals, and (or) battens with sufficient ends, 8 feet and under, as required by captain for broken stowage only. The steamer to be provided with a deck load, if required, at full freight, but at merchant's risk, which they bind themselves to ship, not exceeding what she can reasonably stow and carry,

At certain freights,

in full of all port charges and pilotage (the act of God, the Queen's enemies, fire, restraint of rulers and princes, and all and every other dangers and accidents of the seas, rivers, and steam navigation, and to machinery or boilers, of whatever nature or kind, during the said voyage always mutually excepted).

In case of average, same to be settled in accordance with the law and custom at Lloyd's.

The captain is to telegraph from his last discharging port to the New Gellivara Company Limited of Finnklippan, naming the probable date of the steamer's arrival, and to apply to them for cargo.

In the margin,

The master has liberty to load firewood or lathwood for steamer's benefit, also 250 to 300 tons iron as ballast.]

3. The vessel duly proceeded to Finnklippan, and there loaded from the agents of the plaintiffs 37,518 pieces of redwood battens under deck, and at the request of the shipowner, made in pursuance of the stipulation in the said charter-party, the said agents also loaded 5892 pieces of redwood battens on the deck of the ship, and the master of the ship signed a bill of lading for the whole of the said goods, referring to conditions "as per charter-party."

4. Pursuant to the above stipulation in the margin of the said charter-party the defendants entered into a second charter-party with the New Gellivara Company, under which the said New Gellivara Company shipped, and the said master took on board the said ship under deck as ballast, 300 tons of iron, and the master signed bills of lading for the said iron, referring to conditions as per charter-party.

(*a*) Reported by M. W. MCKELLAR, Esq., Barrister-at-Law.

[The second charter-party contained the same exceptions of risks as the first, and the only material clause was a parenthesis, "steamer brings a cargo of deals, including deck load, for owners' benefit."]

5. It was proved by the plaintiffs that there is a custom or usage for ships carrying timber cargoes upon voyage from Finnklippan, and from other Baltic ports in the neighbourhood, to English ports and ports on the continent of Europe to carry a deck cargo of timber upon such voyages, and that such custom existed at the time of the effecting of the said charter-parties, and thence and until the arrival of the said ship in London upon the voyage in question in this action.

6. The vessels sailed on her voyage from Finnklippan to London with the said goods, and on the 12th July 1881 stranded, and was in danger of being lost, and with a view to lighten her, and to get her off the ground, a part of the deck load of timber was necessarily jettisoned, and was lost. The vessel being thus lightened came off the ground and completed her voyage, and delivered the remainder of her cargo safely.

7. It is admitted that the said cargo was necessarily and properly jettisoned, and that such jettison was necessary to save ship and the rest of the cargo.

8. From the commencement of the said voyage until its completion the cargo of timber was and remained the property of the plaintiffs, and the cargo of iron was and remained the property of the New Gellivara Company. The New Gellivara Company acted as agents for the plaintiffs in the shipment of the said cargo of timber. Before shipment of any of the cargo of wood and iron, the New Gellivara Company were aware of the terms of the first charter-party, and knew that the ship was to carry a deck load.

9. It was proved by the evidence of eminent average adjusters that it has been the practice of English average adjusters up to the present time, in cases where deck loads are carried under charter-parties or bills of lading, providing that such deck loads shall be carried at merchant's risk, to exclude all claims by owners of such deck loads to have losses by jettison of such deck loads made good by general average contribution, and that they act in such cases upon the construction which average adjusters put upon the above words "at merchant's risk" contained in charter-parties and bills of lading. The practice of average adjusters on this and all other points is based upon what the adjusters believe to be English law. There is an association of adjusters at which points of practice are discussed and regulated, and whenever a decision of a competent court of law is given upon any point affecting their practice the association holds a meeting and alters their practice so as to accord with the law as laid down by the decision. This evidence was adduced by the defendants to show the practice of average adjusters, and not (as expressly admitted) any custom at Lloyd's. The average adjusters called were unable to state, in the absence of papers or documents to refer to, whether they had been called upon to admit or exclude a claim for a jettisoned deck load, where such deck load had been shipped under a charter-party or bill of lading containing the exact words "the steamer to be provided with a deck load if required at full freight, but at merchant's risk," but stated that, in their view, it was immaterial whether the goods were shipped on deck at the request of the charterer or the shipowner. The evidence as to the practice of adjusters was produced by the defendants, and was objected to by the plaintiffs upon the ground that the legal right of the parties could not be affected by the practice of adjusters, that such practice could not amount to a custom, and if it did, it was not shown to be a custom at Lloyd's and was consequently not within the charter-party.

The evidence was admitted subject to the opinion of the court on its admissibility.

10. The plaintiffs contend that the value of so much of the deck load as was so jettisoned under the circumstances aforesaid must be made good in general average or contribution, and that they are entitled to recover from the defendants, as owners of the vessel, a general average contribution or a contribution in respect of the said loss proportioned to the value of the said vessel and her freight. The defendants contend that no general average contribution, or contribution of any sort, is payable by them in respect of the said jettison of the said portion of the said deck load.

The question for the opinion of the court is, whether the plaintiffs are, under the circumstances herein stated, entitled to recover a general average contribution or a contribution from the defendants.

If the court should be of opinion in the affirmative, then it is to be referred to an average stater or other arbitrator to be agreed upon between the parties or appointed by a judge in chambers if the parties differ, to assess the amount of such general average contribution, and judgment is to be entered for the plaintiffs for the amount so assessed with costs; if the court should be of opinion in the negative, judgment is to be entered for the defendants with costs.

Cohen, Q.C. (with him *Barnes*) for the plaintiffs.—It must first be observed that the practice mentioned in the case is a very different thing from a custom, The meaning of "merchant's risk," as the words are here used and under circumstances of this nature, has been substantially decided. In *Crooks* v. *Allen* (41 L. T. Rep. N. S. 800; 4 Asp. Mar. Law Cas. 216; 5 Q. B. Div. 38) Lush, J., following the previous decision of Blackburn, J. and himself in *Schmidt* v. *Royal Mail Steamship Company* (42 L. J. 646, Q. B. Div.; 4 Asp. Mar. Law Cas. 217, n.), limited the application of exemptions in a bill of lading to the contract of carriage, and held that "unless the contrary appears, the words used must be so construed" as to have no effect upon general average contribution. There are many other cases in which exemptions in bills of lading and charter-parties have been held inapplicable to everything but the liability of the shipowner as a carrier. For instance:

Steel and others v. *State Line Steamship Company*, 37 L. T. Rep. N. S. 333; L. Rep. 3 App. Cas. 72; 3 Asp. Mar. Law Cas. 516;

Taylor v. *Liverpool and Great Western Steam Company*, 2 Asp. Mar. Law Cas. 275; 30 L. T. Rep. N. S. 714; L. Rep. 9 Q. B. 546;

Macawley v. *Furness Railway Company*, 27 L. T. Rep. N. S. 485; L. Rep. 8 Q. B. 57;

Wright v. *Marwood*, 45 L. T. Rep. N. S. 297; 7 Q. B. Div. 62; 4 Asp. Mar. Law Cas. 451.

Myburgh Q.C. for the defendants.—The words "at merchant's risk" must be construed so as to have some meaning; and they would have none if the defendants are liable for general average contribution. They cannot apply to negligence of seamen without more express adaptation than that contained in this charter-party: (see Maude & Pollock, 4th edit. p. 357.) [CAVE, J.—Do you contend that these words exclude contribution from other cargo owners?] Yes, certainly; that is the only meaning they can have. The cases of *Wright* v. *Marwood* and *Macawley* v. *Furness Railway Company* have therefore no authority in the present contract. All other possible risks of the merchants are covered by the words of the charter-party:

D'Arc v. *London and North-Western Railway Company*, 30 L. T. Rep. N. S. 763; L. Rep. 9 C. P. 325;

Hall v. *Great Eastern Railway Company*, 33 L. T. Rep. N. S. 306; L. Rep. 10 Q. B. 437.

Cohen, in reply.—The exemption from negligence depends upon the words of each contract; and these words may be interpreted to have a meaning if they apply to that only:

Austin v. *Manchester, Sheffield, and Lincolnshire Railway Company*, 21 L. J. 179, C. P.

March 19.—CAVE, J. delivered the judgment of the Court (Cave and Day, JJ.):—This is an action by the shipper against the shipowner to recover a general average contribution, or a contribution in the nature of general average, for the jettison of a deck cargo of timber, and it is admitted that, by reason of a custom to carry deck cargoes of timber on similar voyages, the shipowner is liable, unless he is protected by the terms of the charter-party. That instrument provides that the ship shall load a full and complete cargo of deals at Finnklippan and deliver them at the Surrey Commercial Docks, the act of God, the Queen's enemies, fire, restraint of rulers and princes, and all and every other dangers and accidents of the seas, rivers, and steam navigation, and to machinery or boilers, of whatever nature or kind during the said voyage, always mutually excepted. The important stipulation is as follows: "The steamer to be provided with a deck load, if required, at full freight, but at merchant's risk." For the plaintiffs it was contended that the words "at merchant's risk" have reference solely to the liability of the shipowner as carrier, and do not apply to a claim for general average contribution, which is not a risk to which the shipowner is exposed as a carrier, but one to which he is exposed as owner of the ship in common with the owners of the cargo; and in support of this contention *Schmidt* v. *Royal Mail Steamship Company* (42 L. J. 646, Q.B. Div.; 4 Asp. Mar. Law Cas. 217, n.) and *Crooks* v. *Allen* (4 Asp. Mar. Law Cas. 216; 41 L. T. Rep. N. S. 800; 5 Q.B. Div. 38) were cited. In the former of these cases it was held that an exception in a bill of lading of "fire on board and the consequences thereof" did not relieve the shipowner from liability to a general average contribution in respect of damage done to the cargo by pumping in water to extinguish a fire. In the latter case it was held that a condition in a bill of lading, "the shipowner or railway company are not to be liable for any damage done to any goods which is capable of being covered by insurance," did not exempt the shipowner from liability to contribute to a general average loss caused by the ship being scuttled on the occasion of a fire breaking out in the hold. In the former of these cases the exception of fire on board was inserted among other exceptions relieving the shipowner from liability as carrier; and in the latter case the carriage on board the ship and the carriage by railway were linked together, which went to show that the exception was to apply to things for which a railway company would be liable in respect of carriage on land, which could not include general average contribution. Lush, J., however, who took part in the decision of both those cases, laid down the principle 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 for general average, and that unless the contrary appears the words must be construed with reference to the contract to carry.

It was contended for the plaintiffs that this principle must apply in the present case, and that, as the words "at merchant's risk" are capable of being construed to refer to the negligence of the master and crew, they must be taken to have that meaning. We do not think that Lush, J. meant to assert that the language of a bill of lading cannot be construed to apply to a general average contribution, if that is its more natural meaning. Undoubtedly the ordinary use of a bill of lading is to regulate the respective rights and liabilities of the shipowner and the shipper or his assigns; but there seems no reason why, if the shipowner desires to make any stipulation with regard to his liability, or that of the owners of cargo to average contribution, he should not introduce it into a bill of lading. Even where the ship is put up as a general ship, and there is a custom to carry deck loads, there is no reason why a shipowner should not, with a view to getting a higher rate of freight from the owners of cargo below deck, stipulate with the owner of a deck cargo that he should make no claim for a general average contribution in respect of the jettison of the deck load, and such a stipulation, if made, would not unnaturally find its place in the bill of lading.

What then is the natural meaning in this case of the words "at merchant's risk" in the charter-party? Mr. Cohen had some difficulty, looking at the exceptions which applied to the cargo below deck, in pointing out what were the additional matters intended to be covered by the words "at merchant's risk;" but ultimately he contended that it meant risk of loss by the negligence of the master and crew. This, however, would lead to the anomaly that the shipowner would be liable to general average contribution where, as here, the deck cargo was necessarily and properly jettisoned, but would be free from liability if it was unnecessarily and improperly jettisoned, which seems absurd. By our law, agreeing in this respect with the law of most foreign countries, deck cargo jettisoned is not entitled to general average contribution, and the reason usually assigned is, that it is a dangerous cargo certain to be jettisoned before any other, and liable to be unduly jettisoned before any other, and liable to be unduly jettisoned owing to the facility of doing it when cargo under the hatches would not be. We have, however, introduced an exception to this general rule where, as here, there is a custom in the trade to carry a deck cargo, although in the absence of such custom there is no such

exception solely by reason that the cargo has been shipped on deck by agreement with the shipper: (*Wright* v. *Marwood*, 4 Asp. Mar. Law Cas. 451; 45 L. T. Rep. N. S. 297; 7 Q. B. Div. 62.) If in interpreting the words "at merchant's risk" we are driven to choose, as Mr. Cohen seems to admit we are, between the risk of jettison and the risk of all kinds of negligence of the master and crew, we are of opinion that the former is the more natural meaning, and although the plaintiffs are not bound by the practice of average adjusters, yet, in a matter of some doubt like this, we are fortified in our opinion by finding it to be in accordance with that practice. If the plaintiffs are not entitled to recover a general average contribution, we think it follows from *Wright* v. *Marwood* that they are not entitled to recover contribution of any other kind. There will, therefore, be judgment for the defendants with costs.

Solicitors for plaintiffs, *Waltons, Bubb*, and *Walton*.

Solicitors for defendants, *H. C. Coote*, for *H. A. Adamson*, North Shields.

Friday, March 2, 1883.

(Before LOPES, J.)

SVENSDEN *v.* WALLACE BROTHERS. (*a*)

General average — Particular average — Putting into port to repair—Expenses of warehousing and reloading cargo—Charges for entering and leaving port.

A ship laden with cargo whilst on a voyage from Rangoon to London was compelled to put into port in consequence of an injury which was the subject of particular average. Certain expenses necessary for her repairs were there incurred in warehousing and reloading the cargo, and in respect of port dues on entering and leaving the port.

Held, that the putting into port was an act of voluntary sacrifice undertaken for the common benefit of the adventure, and that those expenses were consequent upon it, and were therefore chargeable to general average.

THIS was a case tried before Lopes, J. at Guildhall, and reserved for further consideration.

The statement of claim alleged that—

1. The plaintiffs were the owners of the ship *Olaf Trygvason*, and the defendants the owners of a cargo of rice shipped on board the said ship at Rangoon, and delivered at Liverpool in Oct. 1880.

2. During her voyage from Rangoon to Liverpool the ship met with heavy weather and sprang a dangerous leak, in consequence of which the master was compelled for the preservation of the ship and cargo to bear up for St. Louis, Mauritius, and take refuge in that port.

3. At St. Louis the ship was surveyed, and such repairs were done as were necessary in order to enable her to prosecute her voyage to Liverpool.

4. Certain expenses were incurred in respect of the said ship taking refuge in St. Louis which were the proper subject of general average, and the same were defrayed by the plaintiffs.

5. The said general average expenses consisted, among other things, of charges for pumping the ship, for landing, storing, and reshipping the cargo, and for port dues in respect of entering and leaving the said port.

6. The proportion of the said general average expenses payable by the defendants amounted to 770*l.* 2*s.* 4*d.*

By their statement of defence the defendants admitted their liability to repay to the plaintiffs the expenses in respect of the storage or warehouse rent of the cargo at St. Louis, but denied their liability in respect of the expenses of reshipping the cargo, and the port charges, pilotage, and other claims subsequent to the reloading of the said cargo. They accordingly paid to the plaintiffs the sum of 681*l.* 13*s.* 1*d.* in respect of those parts of the claim which they admitted.

They further pleaded as follows:

The said cargo of rice was laden on board the said ship or vessel *Olaf Trygvason*, 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 reshipping 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 are not liable to pay the said sum of 770*l.* 2*s.* 11*d.* or any part thereof, save and except the sum of 681*l.* 13*s.* 1*d.* so paid as aforesaid.

Issue thereon.

Charles Russell, Q.C., *Cohen*, Q.C., and *Warr* for the plaintiffs.

Butt, Q.C., *Webster*, Q.C., and *Myburgh*, Q.C. for the defendants.

The following authorities were cited during the arguments:

Attwood v. *Sellar*, 4 Asp. Mar. Law. Cas. 153, 283; 41 L. T. Rep. N. S. 83; 42 L. T. Rep. N. S. 644; 4 Q. B. Div. 342; 5 Q. B. Div. 286;
Job v. *Langton*, 6 E. & B. 779;
Walthew v. *Mavrojani* 3 Mar. Law. Cas. O. S. 382; 22 L. T. Rep. N. S. 310; L. Rep. 5 Ex. 116;
Schuster v. *Fletcher*, 3 Q. B. Div. 418; 3 Asp. Mar. Law. Cas. 577; 38 L. T. Rep. N.S. 605; 47 L. J. 530 Q. B.;
Hall v. *Anson*, 4 E. & B. 500;
Abbott on Shipping, 3rd edit. 335;
Phillips on Insurance, p. 1350;
Benecke on Principles of Indemnity in Marine Insurance.

LOPES, J.—The amount in dispute in this action is small, 88*l.* 19*s.* 10*d.*; but the principle involved is important. It is intended, as I under-

(*a*) Reported by DUNLOP HILL, Esq., Barrister-at-Law.

stand, not only to raise a point not decided in the case of *Attwood* v. *Sellar* (41 L. T. Rep. N. S. 83; 42 L. T. Rep. N. S. 644; 4 Asp. Mar. Law Cas. 153, 283 4 Q. B. Div. 342; 5 Q. B. Div. 286), but also to test the propriety of the case of *Attwood* v. *Sellar*, decided in the Appeal Court. The distinction between the present case and the case of *Attwood* v. *Sellar* is this: In *Attwood* v. *Sellar* the vessel went into a port of refuge in consequence of an injury which was the subject of general average; in the present case in consequence of an injury which was the subject of particular average. It was determined by the case of *Attwood* v. *Sellar* that when a vessel goes into a port of refuge in consequence of an injury to her which is the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing this injury, and expenses incurred for pilotage and other charges in leaving the port, are the subject of general average. I am bound by the case of *Attwood* v. *Sellar*, and if in this case the vessel had gone into a port of refuge in consequence of an injury which was the subject of general average, I mean an act of voluntary sacrifice, I should have been bound to have given the plaintiffs judgment for 88*l.* 19*s.* 10*d.*, for the only distinction between that case and the present is the injury which caused the respective vessels to seek a port of refuge. I have now to determine whether there is any practical difference, so far as the incidence of expenses is concerned, between the case of a ship necessarily seeking a port of refuge in consequence of an injury which is the subject of general average and a ship necessarily seeking a port of refuge in consequence of an injury which is the subject of particular average. I can see no practical distinction. The putting into a port of refuge, if necessary, is an act of voluntary sacrifice undertaken for the common benefit of the adventure, ship, cargo, and freight; and I think every expense consequent upon it incurred to enable the ship afterwards to proceed safely on her voyage with her cargo so as to earn her freight is incurred for the common benefit of the adventure, and is chargeable to general average. There are expressions in the judgment in *Attwood* v. *Sellar*, both in the court below and the Appeal Court, which would seem to cover this point. They are, however, *obiter dicta*, and were not necessary for the decision of that case.

It seems to me that the point relied on by the defendant, that the expenses of going out of port are not chargeable to general average because the cargo is in safety when the port is reached, is unsustainable. The cargo is in safety when the port is reached; still it must be admitted that the expenses of unloading are general average expenses. Such an argument would be equally cogent whether the cause of putting into port was a general or a particular average damage. In *Attwood* v. *Sellar*, however, it was held that the expenses of going out of port were general average expenses. I am of opinion the plaintiffs are entitled to judgment for 88*l.* 19*s.* 10*d.*, with interest in the usual way and costs. I have not thought it necessary to cite authorities. So far as the principle involved in *Attwood* v. *Sellar* is concerned, the authorities are most exhaustively dealt with by Thesiger, L J. in his most able judgment in that case in the Appeal Court. With regard to the other question raised in this case not decided in *Attwood* v. *Sellar*, there is little authority to be found.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Field, Roscoe,* and *Co.*

Solicitors for the defendants, *Waltons, Bubb,* and *Walton.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, Feb. 20, 1883.

(Before Sir R. Phillimore.)

The Sherbro. (*a*)

Mortgage action—Material men—Sale of ship—Costs—Priority—Practice.

Where after the commencement of a mortgage action against a British ship whose owners were domiciled in this country, material men with a possessory lien on the ship intervened, and the ship was sold by order of the court, but the proceeds proved only sufficient to satisfy the claim of the material men, the Court ordered that the taxed costs of the plaintiff in the mortgage action up to the date of the sale of the ship should be paid out of such proceeds.

This was an application to the judge in court by the plaintiff in a mortgage action against the British ship *Sherbro*, asking for an order that he should be paid his costs in such action, out of a fund in court, the proceeds of the sale of the vessel mortgaged.

After the action had been commenced, Messrs. Sage and Son, material men, having a possessory lien on the ship, intervened in the action, and also brought an action under sect. 4 of the Admiralty Court Act 1861 (24 Vict. c. 10) to enforce their claim. No appearance was entered by the mortgagor (the owner who was domiciled in this country), and with the consent of the plaintiff and Messrs. Sage and Son the vessel was sold in the action by order of the court, the proceeds amounting to 359*l.* The total claim of Sage and Co. exceeded the fund in court.

Sage and Co., as material men taking precedence of the mortgagee, applied for payment out, but, the mortgagee opposing, 300*l.* was paid out to them in part satisfaction of their claim, the balance remaining in court subject to questions of priority of other claims and costs.

Another action had been commenced by the master of the ship for wages.

The plaintiff now moved the court for payment of his costs out of the 59*l.* still remaining in court.

W. G. F. Phillimore for the mortgagee, in support of the application.—If it had not been that the mortgagee had prosecuted this action and arrested and sold the ship, Messrs. Sage and Son would not have been able to enforce their claim. The court should therefore reward the mortgagee's exertions on behalf of Sage and Son by giving him his costs up to the sale of the ship.

Nelson, contra, for Sage and Son.—Another action had been commenced by the master, in which we could have enforced our claim. Moreover, we had a common law remedy. We are the successful parties, and therefore should not be

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law

made to bear the mortgagee's costs, a large portion of which was recklessly incurred, after he had notice of our possessory lien.

Phillimore in reply.

Sir ROBERT PHILLIMORE.—I think that the plaintiff is entitled to receive his taxed costs up to the date of the sale of the ship, out of the balance of the fund in court, and I shall make the desired order, and at the same time order that whatever remains after the plaintiff's claim for costs has been satisfied, shall be paid out to the interveners.

Solicitors for the plaintiff, *Emmanuel*, and *Simmonds*.

Solicitors for the interveners, *Lowless* and *Co.*

Tuesday, Feb. 6, 1883.

(Before Sir R. PHILLIMORE.)

THE PESHAWUR. (*a*)

Practice—Collision—Lis alibi pendens—Stay of proceedings.

Where, in a damage action in personam for collision, it appeared that the defendants had, prior to the institution of the action in the High Court, instituted proceedings in rem against the plaintiffs to recover damages in respect of the same collision in a Vice-Admiralty Court near to the place where the collision occurred, the Court upon summons stayed all further proceedings in the High Court until after the Vice-Admiralty action had been heard.

THIS was a summons by the defendants in a damage action *in personam* in the High Court, to obtain a stay of proceedings on the ground that proceedings in an action *in rem*, arising out of the same collision, instituted by the present defendants against the present plaintiffs were pending in the Vice-Admiralty Court at Ceylon.

The collision out of which the actions arose took place on the 15th Oct. 1882 in the Indian Ocean near the island of Ceylon, between the plaintiffs' steamship *Glenroy* and the steamship *Peshawur* belonging to the Peninsular and Oriental Steam Navigation Company.

On the 6th Dec. the owners of the *Glenroy* instituted an action *in personam* against the Peninsular and Oriental Steam Navigation Company, in which action an appearance was entered by the defendants.

On the 30th Jan. the defendants took out a summons calling upon the plaintiffs to show cause why all further proceedings in the action should not be stayed pending the determination of an action *in rem* for the same cause of action, instituted by the Peninsular and Oriental Steam Navigation Company against the owners of the *Glenroy*, in the Vice-Admiralty Court of Ceylon.

The defendants supported the summons by affidavit, in which it was alleged as follows:—That on the 17th Oct. the defendants instructed their agents in Ceylon to institute an action *in rem* in the Vice-Admiralty Court against the *Glenroy*; that such action was instituted prior to the action in the High Court; and that expense and time would be saved by trying the action in Ceylon, because the *Glenroy* was confined exclusively to trading between Calcutta and other ports in the Indian Ocean, and because at the date of the affidavit the *Peshawur* was expected shortly to arrive at Ceylon.

The counter affidavit filed by the plaintiffs alleged that the plaintiffs could not counter-claim in the action alleged to be pending in the Vice-Admiralty Court of Ceylon; that neither expense nor time would be saved by trying the action in the Vice-Admiralty, seeing that the respective owners of both vessels were resident and domiciled in England; and that, should the plaintiffs obtain judgment in Ceylon, such judgment could not be there enforced, as there was no property of the defendants in Ceylon.

The summons having come on in chambers, was adjourned into court.

Roscoe, in support of the summons, for the defendants.—The court has a discretion, and should in the interest of all parties stay further proceedings in this action. Thereby much expense and time will be saved. It is to be noticed that the action in Ceylon was commenced prior to the proceedings in the High Court.

W. G. F. Phillimore, for the plaintiffs, against the summons.—This is an action of considerable importance, which should be tried in the High Court. The suitors are resident, and domiciled in this country. No extra expense will be incurred by trying the action in the High Court, and to have the action tried in Ceylon might prejudice the plaintiffs.

Sir ROBERT PHILLIMORE.—There are two questions raised in this case: first, whether I have the power, in my discretion, to direct a stay of proceedings in the action brought in this court by the owners of the *Glenroy* against the Peninsular and Oriental Steam Navigation Company; and, secondly, whether, if I have this power, I ought in the circumstances to exercise it in favour of the defendants in the action here. Now I think I have a discretion as to whether I should stay the proceedings here, or allow them to go on, and I shall exercise this discretion in favour of stopping all proceedings in the action in this court until after the suit at Colombo has been heard.

Solicitors for the plaintiffs, *Gregory, Rowcliffe* and *Co.*

Solicitors for the defendants, *Freshfields*, and *Williams.*

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Tuesday, June 5, 1883.

(Before BUTT, J.)

THE ALEXANDER. (*a*)

Collision — Practice — Bail — Counter-claim — Admiralty Court Act 1861 (24 *Vict. c.* 10), *s.* 34.

The power of the Admiralty Division under sect. 34 *of the Admiralty Court Act* 1861 *to order an action to be stayed until bail has been given to answer a cross-action or counter-claim does not extend to making an absolute order to give bail, and in a damage action in which the plaintiffs had discontinued after the defendants had counter-claimed, the Court refused to enforce an order, made by the registrar, to give bail to answer such counter-claim.*

(*a*) Reported by J. P ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

THIS was a motion by the defendants in a damage action of collision, asking that the plaintiffs should, within four days, give bail to answer defendants' counter-claim and costs.

On the 5th May the action was brought by the owners of the *Earl of Zetland*, against the owners of the *Alexander*, to recover damages in respect of a collision between the two vessels. The defendants counter-claimed.

The *Alexander* was arrested, whereupon bail was given in the sum of 700*l*.

On the 23rd May, the defendants, on application to the registrar, obtained the following order: "Upon hearing both solicitors, it is ordered that plaintiffs do give bail to answer defendants' counter-claim and costs, in the sum of 2000*l*."

On the 28th May the defendants' solicitors received from the plaintiffs' solicitors a written notice that they wholly discontinued the action. Up to the date of the present action there had been no compliance with the above order, and the defendants were now moving the court to have that order enforced within four days.

W. G. F. Phillimore in support of the motion.—Although the defendants have discontinued the action, the counter-claim still lives by virtue of the authority of *McGowan* v. *Middleton* (W. N. 1883, p. 75), which overruled *Vavasseur* v. *Krupp* (15 Ch. Div. 474), and a decision of Sir R. Phillimore's founded on *Vavasseur* v. *Krupp*, viz., *The Albatross* (not reported). That being so, the plaintiffs should give bail under sect. 34 of the Admiralty Court Act 1861. [BUTT, J.—The only authority for compelling bail is under the Act of Parliament. Under the rules there is power given the defendants to arrest the plaintiffs' vessel. [BUTT, J.—The power to arrest does not necessarily compel bail.]

T. Bucknill against the motion.—The registrar has no power to make the order. All the court can do is, in the words of the section, "suspend the proceedings in the principal cause until security has been given to answer judgment in the cross-cause."

BUTT, J.—The only way I can deal with the matter is this: It seems that *per incuriam* a wrong order has been made; and, as I cannot make a new order enforcing an order which I think wrong originally, I must refuse this application.

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

Solicitors for the defendants, *Stokes, Saunders*, and *Stokes*.

Feb. 10, 12, *and* 13, 1883.

(Before Sir R. PHILLIMORE and Trinity Masters.)

THE KIRBY HALL. (a)

Collision—Fog—Speed—Admissibility of evidence—Nautical assessors.

Where a steamship, going at a moderate speed in a dense fog, hears the steam-whistle of another steamship in close proximity, but is unable to ascertain the course and position of the other vessel, it is the duty of those in charge of her to stop and reverse the engines so as to take all way off her and bring her to a standstill, and if they neglect to do so, and a collision ensues, she will be held to blame for the collision.

Where the Admiralty Court is assisted by Trinity Masters, evidence as to a particular course and mode of navigation at a particular place in a dense fog and in a given state of the tide is not admissible.

THESE were consolidated actions *in rem*, instituted respectively by the owners of the steamship *City of Brussels* and owners, and by the owners of the cargo laden on board the *City of Brussels*, against the steamship *Kirby Hall* and her freight, to recover the damages sustained by reason of a collision between the two above-named steamships on the 7th Jan. in Liverpool Bay, near the north-west lightship. The *Kirby Hall* counter-claimed for the damages sustained by her in the said collision.

The plaintiffs alleged that, a little after 6 a.m. on the day of the collision, their vessel, the *City of Brussels*, a screw steamship of 2435 tons register, whilst on a voyage from New York to Liverpool with mails, a general cargo and passengers, and manned by a crew of one hundred hands all told, had arrived off the north-west lightship, near the entrance to the sea channels leading to the river Mersey. The wind was about S.E., there was a dense fog, and the tide was flood. Under these circumstances, by the order of the pilot, the *City of Brussels* having been turned round, her head was brought about W.N.W., and her engines having been stopped, she drifted slowly towards the bar stern foremost, drifting about a knot an hour or rather more, to E.S.E. with the tide. A good look-out was being kept on board her, and her regulation lights were duly exhibited and burning brightly. Shortly before 6.50 a.m., under these circumstances, those on board the *City of Brussels* heard the whistle of a steamer, which afterwards proved to be the *Kirby Hall*, on their starboard side before the beam. The whistle was answered each time it was heard, and after it had been so sounded and answered several times, the masthead light of the *Kirby Hall* was seen about a ship's length off, about two points forward of the starboard beam of the *City of Brussels*. The engines of the *City of Brussels* were at once reversed full speed, and the *Kirby Hall* was hailed to go astern; but the *Kirby Hall* coming on at great speed with her stem struck the starboard side of the *City of Brussels* abaft the foremast, doing her so much damage that she shortly afterwards sank with everything on board her, and ten lives were lost.

The statement of defence, so far as is material, was as follows:

1. The *Kirby Hall* is an iron screw steamship of 2700 tons gross, and 1759 tons registrar, belonging to the port of Liverpool, and was, at and before the time of the collision hereinafter mentioned, on a voyage from Glasgow to Liverpool with a crew of twenty-five hands and about 840 tons of cargo and 792 tons of coal on board.

2. In the course of the said voyage, the *Kirby Hall*, at about 0.55 a.m. on the morning of the 7th Jan., the Chicken Rock Light being then in sight and bearing N.E., was placed on a S.E. ½ S. course and so proceeded until about 5.10 a.m. on the said morning, when the weather became foggy and the steam-whistle was blown, and the *Kirby Hall* was slowed and then stopped. There was little or no wind. The regulation lights of the *Kirby Hall* were duly exhibited and were burning brightly, and a good look-out was being kept on board of her.

3. After being stopped for a few minutes, the *Kirby Hall* was put on a S.E. by S. ½ S. course and again

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

proceeded at slow speed, her steam-whistle sounding duly at short intervals.

4. Under these circumstances, at about 6.45 a.m. the flood tide then running, those on board the *Kirby Hall* heard the foghorn of the north-west lightship apparently nearly ahead of them, and after it had been heard a second time and a dense fog still continuing, the master of the *Kirby Hall* was about to bring to an anchor, when the whistle of a steamship, which afterwards proved to be the *City of Brussels*, was heard on the port bow of the *Kirby Hall*. The engines of the *Kirby Hall* were then working dead slow, and the whistle of the *City of Brussels* was then heard again, but closer on the port bow. The engines of the *Kirby Hall* were thereupon immediately stopped, and her helm was put hard aport, when a white light of the *City of Brussels* was seen by those on board the *Kirby Hall* nearly ahead and about from one to two ship's lengths distant, and the engines of the *Kirby Hall* were immediately reversed full speed astern, but shortly afterwards the stem of the *Kirby Hall* came into contact with the starboard side of the *City of Brussels* near the fore-rigging. The *Kirby Hall* received some damage from the said collision, and the *City of Brussels* sank in about forty minutes.

8. Those on board the *Kirby Hall* did all in their power to avoid and prevent the said collision. The said collision was, as regards the defendants and the *Kirby Hall* and those on board of her, an inevitable accident.

9. The said collision and the damages consequent thereon were caused by the improper conduct and neglect of those on board the *City of Brussels*, in not keeping a good and sufficient look-out, and in not keeping out of the way of the *Kirby Hall*, or taking timely and proper measures to do so, and in not reversing the engines in due time, and in placing, keeping, and navigating the *City of Brussels* improperly and in an improper manner under the circumstances in the track and fairway of vessels bound to and from the port of Liverpool.

In the reply delivered by the plaintiffs it was alleged that, at the time of the collision, the *City of Brussels* was in charge of a compulsory pilot, and that if the collision was occasioned by any negligence on board the *City of Brussels*, it was occasioned solely by the neglect or default of the pilot.

Feb. 10.—The action came on for trial. During the plaintiffs' case it was proposed to adduce evidence on behalf of the plaintiffs to prove that the *City of Brussels* was being navigated in the customary manner of the place at the time of the collision.

Butt, Q.C. in support of the evidence.—Evidence as to a particular mode of navigation in a particular place has been given in this court:

The Velocity, L. Rep. 3 P. C. 44; 21 L. T. Rep. N. S. 686; 3 Mar. Law Cas. O. S. 308;
The Andalusian, 2 P. Div. 231.

It is to be remembered that this is not a question of general seamanship, on which it is the province of the Trinity Masters to decide, but a custom observed at a particular place and under particular circumstances, viz., when the tide is flood and there is a dense fog.

Sir *F. Herschell* (S.G.) *contra*.—It is always the practice of this court, when there are assessors sitting to assist the court, to reject evidence as to seamanship and nautical skill. It would be a dangerous practice to break through the rule. In the case of *The Earl Spencer* (L. Rep. 4 A. & E. 431; 2 Asp. Mar. Law Cas. 523; 33 L. T. Rep. N. S. 235) your Lordship refused to allow evidence as to the customary mode of navigation in a particular place.

Sir ROBERT PHILLIMORE.—I think on the whole I ought not to admit the evidence in question. I think it is evidence on a point on which it is the province of the Trinity Masters to advise the court, and I do not think I ought to do anything which will go any way towards allowing the examination of expert witnesses on questions of nautical skill and seamanship in cases where the court is assisted by the Trinity Masters.

The evidence on behalf of the plaintiffs fully supported the allegations in the statement of claim, whilst the master of the *Kirby Hall* admitted that he did not stop and reverse his engines on hearing the first whistle from the *City of Brussels*, and that it was upon the whistle being heard a second time closer on the port bow of the *Kirby Hall* that the engines were stopped and the helm put hard-a-port.

Butt, Q.C. (with him *Webster*, Q.C. and *W. G. F. Phillimore*) for the plaintiffs.—[During the argument the Judge stated that, in his opinion, in which he was supported by the Trinity Masters, the *City of Brussels* was not to blame under the circumstances for not having anchored, and that she in no way contributed to the collision.] It has been laid down by the Privy Council, in *The Frankland* (1 Asp. Mar. Law Cas. 489; 27 L. T. Rep. N. S. 633; L. Rep. 4 P. C. 529), affirming the judgment below, that a steamship going in a fog and hearing a whistle sounded in the vicinity is bound to stop. This decision has been acted upon in subsequent cases. Yet the *Kirby Hall*, in total ignorance of the whereabouts of the vessel whose whistle she had heard, kept her engines going and ported her helm. It is a matter of common knowledge that it is almost impossible in a dense fog to ascertain the direction from whence sounds come. Under these circumstances, it was the duty of those on board the *Kirby Hall* to take all way off her as speedily as possible.

Sir *F. Herschell*, S.G. (with him *P. Myburgh*, Q.C. and *Bucknill*) for the defendants.—The court is not bound by the decision in *The Frankland* (*ubi sup.*), as the circumstances in the present case are different; and indeed it cannot with reason be maintained that in all cases a steamer in a dense fog is to stop immediately the whistle of another steamship is heard. Each case must be decided according to its particular circumstances, and in the present case everything that was reasonable and prudent was done by those on board the *Kirby Hall*. Her engines were stopped immediately the second whistle was heard, and it is to be noticed that the requirements of the Regulations for Preventing Collisions at Sea, article 13, is, that a vessel in a fog shall go at a moderate speed. The navigation of the *Kirby Hall* was in every way seamanlike and in accordance with the regulations, and if the collision was not caused by the negligence of those on board the *City of Brussels*, it was the result of an inevitable accident.

Butt, Q.C. was not called upon in reply.

Sir ROBERT PHILLIMORE.—This is a case of collision which happened between six and seven o'clock on the morning of the 7th Jan. 1883 in Liverpool Bay near the north-west lightship. The vessels which came into collision were, the screw steamship *City of Brussels* and the screw steamship *Kirby Hall*. The *City of Brussels* was a very large steamer of 3700 tons gross, and the *Kirby Hall* was of 2700 tons gross. The *City of Brussels* was proceeding from New York to Liverpool with seventy passengers and a crew of one hundred

hands, and the *Kirby Hall* was proceeding with a crew of twenty-five hands and 792 tons of coal on board from Glasgow to Liverpool. The stem of the *Kirby Hall* came into contact with the starboard side of the *City of Brussels*, which received such damage in the collision that she sank in about forty minutes. There was a dense fog at the time, as dense a fog as one can well imagine, according to the account given by both sides; and I think the doctrine laid down in the case of *The Frankland* (*ubi sup.*), to which the court has been referred, is one which covers the present case, and upon the principles of which the present case must be decided. A passage in my judgment in that case has been referred to in the argument, but I will read it again: "Both vessels were going, in truth, in the most absolute uncertainty," which was the case here, "as to the proceedings of the other, and in such a state of circumstances I have had to ask myself this question: Could anything have been done to avoid this collision which was not done? And the opinion of the court, fortified by that of its nautical assessors, is, that upon hearing the whistles of each other so near and approaching each other, each vessel ought not only to have stopped, but to have reversed until its way was stopped"—that is the part of the judgment of the Court of Admiralty to which attention should be more carefully drawn—"when it could have hailed and ascertained with certainty which way she was proceeding, and by that means the collision would or might have been avoided."

I have already arrived, and I mentioned the fact at an earlier stage of this case, at the conclusion that the *City of Brussels* is free from blame for the collision. We have therefore now only to deal with the questions, whether the *Kirby Hall* is to blame, or whether the collision was an inevitable accident. Taking into consideration the judgment to which I have just referred and others to which the attention of the court has been drawn, and having special reference to the facts of this case, we have arrived without hesitation at the conclusion that the *Kirby Hall* is solely to blame by reason of not stopping her way in the water when the whistle of the *City of Brussels* was heard the first time, and instead thereof going ahead without knowing where the *City of Brussels* was or what she was doing. And we wish to state, with as much emphasis as possible, that those in charge of a ship, in such a dense fog as was described in this case, should never conjecture anything when they hear a whistle in such close proximity as was the case here, whether the sound appears to them to come from a vessel approaching them or not. In the dense fog, which is proved to have prevailed in this case, those on board the *Kirby Hall* were bound not to speculate, but to bring their vessel to a standstill at once. It is upon these principles that I decide the present case and pronounce the *Kirby Hall* alone to blame for this collision.

Solicitors for the plaintiffs, *Hill, Dickinson, Lightbound,* and *Dickinson.*

Solicitors for the defendants, *Bateson, Bright,* and *Warr.*

Monday, April 23, 1883.

(Before BUTT, J.)

THE AGAMEMNON. (*a*)

Salvage — Towing disabled steamer — Crew — Excessive claim.

Where a steamship, disabled by the breaking of her crank-shaft, was towed a distance of about thirty miles without danger or risk by another steamship belonging to the same owners as the disabled vessel and fifteen of the crew of the towing vessel instituted a salvage action in the sum of 5000*l. against the vessel towed, and arrested the vessel, cargo, and freight therein, the Court held such services to be salvage services, but of so slight a character that on a value of* 105,500*l. it awarded* 15*l., and ordered the salvors to pay all the costs of the action, expressing disapprobation both at the institution of the action in the High Court, and at the arrest of the vessel for such an amount.*

THESE were consolidated salvage actions brought by part of the crew of the steamship *Telemachus*, belonging to the port of Liverpool, against the steamship *Agamemnon*, her cargo and freight. The *Agamemnon* was arrested in the sum of 5000*l.*

The *Agamenon*, a steamship of 2347 tons (gross tonnage), with engines of 300 horse-power was, on the 4th Oct. 1882, in the Mediterranean Sea, bound on a voyage from Shanghai to London, laden with a general cargo, carrying five passengers, and manned by a crew of forty-eight hands all told. On the same day, when off the Bay of Tunis, it was discovered that the crank of the crank-shaft of the *Agamemnon* was broken. Her engines were accordingly stopped, and she was put under sail until such time as the broken crank could be replaced by the spare one which was on board her. At about 8.30 p.m. on the same day the steamship *Telemachus*, which belonged to the same owners as the *Agamemnon*, bound on a homeward voyage from China in cargo, sighted the *Agamemnon*, which had three red lights up to signify that she was not under control. The *Telemachus* bore down upon the *Agamemnon*, when she was informed of the accident, and lay by her till the next morning. The *Telemachus* was then attached ahead of the *Agamemnon*, and at 7.30 a.m. began to tow, the two vessels being headed in for Tunis, which port they both reached, and were safely anchored in at about 3 p.m. on the same day. When the towage began Tunis was distant about thirty-one and a half miles, and bore about S.W. by W. Throughout the weather was fine, and the plaintiffs were exposed to no danger.

The value of the *Agamemnon*, her cargo, and freight was 105,500*l.*

April 23.—The action came on for hearing, when the counsel for the plaintiffs applied that the case might be postponed on the ground of the absence from England of several material witnesses. This application was opposed, and the Court ordered the case to proceed subject to the plaintiffs' case being prejudiced by the absence of the witnesses.

H. Lush-Wilson for the plaintiffs.—The services were clearly salvage services. The plaintiffs were put to extra labour and fatigue other than was

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqs., Barristers-at-Law.

contemplated when they entered into their articles. If the vessels had belonged to different owners, the towing vessel would have got salvage, in which her crew would have participated. The salved property was of great value, and the plaintiffs are entitled to a reasonable award:

The Jubilee, 4 Asp. Mar. Law Cas. 275; 42 L. T. Rep. N. S. 594.
The Sappho, L. Rep. 3 P. C. 694; 1 Asp. Mar. Law Cas. 65; 24 L. T. Rep. N. S. 795.

W. G. Phillimore, for the defendants.—This was merely a towage of one partially disabled vessel by another vessel belonging to the same owners. To constitute salvage where the services consist in towing, there must be probable danger to the towed vessel. Here there was none:

The Strathnaver, L. Rep. 1 App. Cas. 58; 34 L. T. Rep. N. S. 143; 3 Asp. Mar. Law Cas. 113;
The Princess Alice, 3 W. Rob. 138.

The plaintiffs should never have brought this action in the High Court, and ought to be condemned in costs for so doing.

Lush-Wilson in reply.

BUTT, J.—I have already expressed my opinion during the course of this case, that this action ought never to have been brought in the High Court. I do think that it is an abuse of the process of the court to arrest a ship for such a claim as this, and to insist on bail being given in the sum of 5000*l*. No respectable practitioner should lend himself to this kind of proceedings, for it looks very much like an attempt to extort money by putting the owners to inconvenience and expense.

As regards the merits of the action, I have had grave doubts whether I ought not to dismiss it. It is difficult from a common-sense point of view to say that these men should have any extra reward, as they received pay during the time the services were being performed, and in rendering them they had not to incur hardships; on the other hand the authorities go to the extent of saying that if a vessel renders services to another, the crew of the salving ship are entitled to participate in the reward. I am clearly bound, I think, by the case of *The Sappho* (*ubi sup.*), which decided that where the salving and salved vessel belong to the same owners, the crew are entitled to salved reward. I am constrained from holding that, if the *Telemachus* had belonged to other owners than those who were also owners of the *Agamemnon*, she would not be entitled to some reward; for though the *Agamemnon* was in no serious danger, yet she was broken down. She properly put up three red lights to signify that she was not under control, and she was in an unmanageable state near a coast, and it would have taken those in charge of her three or four days to have replaced the broken crank-shaft. If, then, these vessels had belonged to different owners, both the owners and crew of the *Telemachus* would have been entitled to salvage. Therefore I am bound to make some award. But I have this in my power to give the plaintiffs what I think fit. I shall give them the sum of 15*l*. which is exactly 1*l*. a head, but I shall condemn them in the whole costs of this action, as I think that this suit should have been brought in the County Court, and that the defendants' ship should not, especially as it belonged to such a well-known and solvent firm, have been arrested in so trivial an action.

Solicitors for the plaintiffs, *J. W. Carr* and *Tomkies*.

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

Tuesday, March 6, 1883.

(Before Sir R. PHILLIMORE.)

THE RISOLUTO. (*a*)

Collision—Reference—Loss of fishing—Measure of damages.

Where the plaintiff in a damage action claimed for demurrage upon the basis of loss of fishing during repairs, and the registrar and merchants estimated that loss by taking the average catch of similar vessels during the period of repairs, the court, on objection to the registrar's report, confirmed the report with costs.

AN appeal from the registrar's report by the defendants.

This was a damage action brought against the Italian barque *Risoluto* and her freight by the owner, master and crew of the French fishing brig *Emma* of 143 tons and manned by a crew of twenty hands, to recover damages arising out of a collision between the two vessels on the 6th July 1881, in the North Atlantic Ocean off Newfoundland.

The owners of the *Risoluto* defended the action, and it was heard on the 13th and 14th March 1882 when the court found the *Risoluto* to have been alone to blame for the collision, and referred the question of damages to the registrar and merchants.

At the time of the said collision the *Emma* was cod-fishing on the Great Bank of Newfoundland, and by reason of the collision she had to put into St. Pierre Miquelon, an island off the south coast of Newfoundland, for repairs, whence she did not get back to the fishing grounds until the 26th Aug. 1881.

On the 4th Aug. 1882 the reference came on before the registrar, assisted by Mr. Young and Mr. Sellar.

In addition to the costs of repairs, the plaintiffs claimed as demurrage 30,000 francs, grounding such claim "on the basis of the loss of fish which average catches of other vessels showed she (the *Emma*) would have taken from the 6th July 1881, the date of the collision, to the 26th Aug. 1881, or 30,000 cod, at an average of one franc per cod." In support of this claim the plaintiffs filed affidavits sworn to by the owners of French fishing vessels varying from 100 to 281 tons, which were cod-fishing off Newfoundland during the season in question, in which were given from the entries in their books the number of fish caught from the 6th July to the 26th Aug. by the respective vessels, such number varying from 25,000 to 51,000.

In a counter-affidavit filed on behalf of the defendants, and sworn to by their agent in England, it was alleged that the *Emma* during the whole of the season, from the end of April to November, ought, in order to pay expenses whilst absent from her home port, to take 60,000 fish, of the value of 60,000 francs; that, in order

(*a*) Reported by J. P. ASPINALL, and F. W. RAIKES Esqrs., Barristers-at-Law.

to arrive at this value, the share of the crew had been included, but interest on ship and equipment, together with depreciation by wear and tear were omitted; and that the profits made at the Newfoundland cod fisheries were not in excess of the ordinary profits made by similar sized vessels engaged in other trades.

The registrar reported that the loss sustained by the plaintiffs amounted to 1473*l.* 16*s.* 5*d.* together with interest, 22,000 francs of which was for loss of fishing during the period mentioned above. The registrar and merchants arrived at the sum of 22,000 francs on the basis of the probable catch of fish which the catches of other vessels showed the *Risoluto* would have taken.

A portion of the notes on the reference, drawn up for the use of the court, were as follows:

A sum of 22,000 francs was allowed for loss of fishing. The vessel had a crew of twenty hands and eight small boats, it being the practice for the boats, with two men in each and long-lines, to surround the vessel whilst fishing. An immense number of French as well as native and somewhat smaller vessels are engaged in the trade, some of them landing their fish from time to time, and others, including the *Emma*, taking everything they catch to Bordeaux, receiving a bounty for so doing from the French Government. The cod fishery opens late in April and ends in November. The *Emma* had left Dieppe as usual about the middle of March, with the necessary salt to preserve the fish to be caught by her, going straight to St. Pierre, to procure herrings as bait for the early fishing, and afterwards, having damaged her windlass, she had returned to St. Pierre, and, having got a supply of bait for the later fishing, had only just resumed fishing when the collision in question occurred. At the close of the season she proceeded to Bordeaux and landed and sold 36,474 cod, which realised 37,855 francs. It was proved that the average number of fish caught by other vessels in those seas greatly exceeded that quantity, and that unless that was the case, the proceeds would not cover the expenses. The registrar and merchants therefore came to the conclusion on the information furnished, especially by the defendants, that 22,000 francs should be allowed as the loss sustained by the interruption to the fishing occasioned by the collision, an allowance for demurrage in the usual way being inapplicable to this case.

From the report the defendants appealed to the court, and on the 9th Aug. 1882, a notice of objection was filed in the registry by the defendants, the chief ground as to the demurrage allowed being that the registrar had estimated the loss of fishing on wrong principles, and had received improper evidence.

March 6.—By arrangement between the parties, the objection was heard on motion.

Bucknill for the appellants.—The evidence as to the average takes of other vessels should not have been received. The evidence upon which the registrar ought to have estimated this claim for demurrage should have been the profits of the *Emma* herself during preceding years. Evidence showing the takes of other vessels, different from the *Emma* in tonnage and in number of crew, is too speculative to found this sum of 22,000 francs upon.

W. G. F. Phillimore in support of the report.—All objections as to evidence should have been taken before the registrar. The principle upon which the registrar acted is not new:

The Gleaner, 38 L. T. Rep. N. S. 650; 3 Asp. Mar. Cas. 582.

We have discharged the onus upon us of proving that we have sustained a direct loss arising from the non-employment of the *Emma* in consequence of the collision:

The Clarence, 3 W. Rob. 283.

Bucknill in reply.

Sir ROBERT PHILLIMORE.—Taking into consideration all the circumstances of this case, and the authorities on the question, and the fact that the registrar was assisted by Mr Young, who has had so large an experience in these cases, I am of opinion that I ought not to interfere with the report of the registrar. I therefore dismiss the motion with costs.

Solicitors for the plaintiffs, *Stokes, Saunders, and Stokes.*

Solicitors for the defendants, *T. Cooper* and *Co.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

March 6 *and* 7, 1883.

(Present: The Right Hons. Lord BLACKBURN, Sir BARNES PEACOCK, Sir ROBERT P. COLLIER, and Sir RICHARD COUCH.)

THE FERRET; JOSEPH PHILLIPS AND OTHERS *v.* THE HIGHLAND RAILWAY COMPANY. (*a*)

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF VICTORIA.

Jurisdiction—Wages—Joint action by six seamen—Order in Council—2 Will. 4, *c.* 51, *s.* 15—*Merchant Shipping Act* 1854 (17 *&* 18 *Vict. c.* 104), *s.* 189.

A vice-admiralty court has jurisdiction to entertain an action for wages and compensation for wrongful dismissal brought by any number of mariners not exceeding six, under Order in Council pursuant to 2 *Will.* 4, *c.* 51, *provided that the total amount found due to all the plaintiffs conjointly exceeds* 50*l.*, *although the amount found due to each is less than that sum.*

THIS was an appeal from a judgment of the Vice-Admiralty Court of the Colony of Victoria dismissing an action *in rem* brought by the appellants who were seamen for the recovery of their wages, compensation for wrongful dismissal, and *viaticum* to England.

The action was brought on the 24th Aug. 1881, according to the rules and regulations made by an Order in Council, dated the 27th June, 1832, pursuant to the Act 2 Will. 4, c. 51, by which it was provided (*inter alia*) that, in suits for mariner's wages, the mariner may proceed against the ship, freight and master, or the ship and freight, or the owner, or the master alone, and any number of mariners not exceeding six may proceed jointly in one action.

The facts of the case were as follows: Oct. 1880 the plaintiffs shipped under articles on the steamship *Ferret*, for a voyage, not to exceed three years, from Cardiff to Marseilles, thence to any ports between the 75 deg. of latitude north, and 65 deg. of latitude south, and return to a port of discharge in the United Kingdom, or on the continent of Europe. The *Ferret* proceeded on her voyage from Cardiff, but shortly after passing Gibraltar in darkness, the name and number of

(*a*) Reported by J. P. ASPINALL, and F. W. RAIKES, Esqrs., Barristers-at-Law.

the ship was altered by order of the master Thomas Watkins, and of James Stewart Henderson, the reputed owner of the ship, the name *Bantam* being substituted for her former name. Then, or shortly afterwards, James Stewart Henderson, who had been on board since the commencement of the voyage, told the crew that he was the legal owner of the vessel, that it was bound on an important secret expedition, and that he would shoot any of the crew who did not obey him. Acting under duress, the crew, including the plaintiffs, promised to obey. The ship then after touching at one of the Cape de Verde Islands, and at Santos, and having on the voyage her name changed to the *India*, reached the Cape of Good Hope about the end of Jan. 1881. There Thomas Watkins, who had been master of the ship since she started from Cardiff, left her, and a man named Wright, who until then had acted under the name of Carlyon as chief officer, thenceforth assumed to act as master. On the 14th Feb. 1881, the ship left the Cape of Good Hope, and reached Melbourne on the 19th April 1881. The ship was there seized by order of the Government, and the crew were turned out of her. Wright, Henderson, and the purser, were prosecuted for conspiracy, and convicted on the 14th July 1881. The seamen required as witnesses were paid by the Government, the others were placed in the Sailors' Home, and offered a certain allowance. Several accepted this allowance, and were engaged as seamen on board vessels in the port. The six plaintiffs refused the amount offered to them, and commenced proceedings, each of them claiming an amount exceeding 50*l*.

The action came on for hearing on Dec. 23, 1881, on *vivâ voce* and documentary evidence, and on Jan. 10, 1882, the learned judge gave judgment, dismissing the action without costs on the ground that he had no jurisdiction, because the sums found due to each of the plaintiffs were less than 50*l*.

The learned judge in his judgment, after shortly stating the facts, with respect to his reasons for dismissing the action, said: "At the conclusion of the evidence in support of the allegations it was contended for the respondents that the court possessed no power to entertain a question of damages or compensation for wrongful discharge, and that the amount on which the jurisdiction of the court depended was that found to be actually due to each seaman, and not to all the seamen collectively, but to each separately. To this contention the petitioners answered that the plea of tender had determined the question of jurisdiction, it was then too late to consider such an objection, and, even if entertained, the interpretation put by the respondents on the statute 17 & 18 Vict. c. 104, s. 189, was erroneous. The first objection has already been decided. In *The Great Eastern* (L. Rep. 1 Ad. & E. 384; 2 Mar. Law Cas. O. S. 553; 17 L. T. Rep. N. S. 228) a claim was entertained for compensation in the nature of damages for a wrongful discharge of seamen before the expiration of the term of agreement. So also in *The Blessing* (L. Rep. 3 P. D. 35; 3 Asp. Mar. Law Cas. 561; 38 L. T. Rep. N. S. 259) it was ruled by Sir Robert Phillimore, that the words in the statute 'claim for wages' included a claim for wrongful dismissal, apart from wages. With these decisions, especially in this jurisdiction, in which compensation may be regarded as in the light of wages earned, I have no hesitation in overruling this objection. The proper intepretation of the statute 17 & 18 Vict. c. 104, s. 189, involves a more difficult question. In *The Fairy Queen* (3 Ir. Jur. 283) it was held that the action was barred by the statute 7 & 8 Vict. c. 112, s. 16. No doubt there the words used are not the same as in the subsequent enactment. The one, the earlier enactment, prohibits the institution of a suit for wages; the later, the institution of a suit for the recovery of wages by or on behalf of any seaman or apprentice, &c., but the difference between the words in the earlier and the more recent enactment was caused apparently in order to avoid the difficulty pointed out by Parke, B. in *Hollingworth* v. *Palmer* (4 Ex. 284). The court is of course bound by the words used, not by the reason, if it were so, for which they were used. The subject-matter of several suits by separate persons could not be united in one action at law, although several seaman may for special reasons sue for their wages in Courts of Admiralty. If this be so the restriction ought to be the same in all the courts, for all are classed together, Admiralty, and Common Law, &c. Were this restriction in derogation of common law rights, the words ought to be construed strictly, but if the right of seamen to unite in one action the subject-matter of several is confined to Courts of Admiralty the clause need not be so rigidly interpreted. Its construction presents some difficulty, but I think it is a bar to a suit even in the Admiralty jurisdiction, unless some one at least of the suitors establishes a claim to 50*l*., when each one so establishing his right may recover. There remains the question of whether the plea of tender precluded the respondents (the defendants) from raising the question of jurisdiction. Some difficulty, I must be allowed to observe, is experienced in adjudicating in Admiralty suits at the present day in accordance with a procedure framed fifty years ago. Adhering, however, to those rules, as must be done so long as they are in force, I think the course taken is justifiable. The plea is not according to the observation of Willis, J. in *Rossi* v. *Grant* (5 C. B. N. S. 701) a plea to the jurisdiction, but a plea in bar. Dr. Lushington in *The Blakeney* (Swa. 428) no doubt decided that 'an absolute appearance once made cannot be recalled, all objections to the jurisdiction must be taken on the earliest occasion,' but the same very learned judge in *The Harriet* (5 L. T. Rep. N. S. 210; 1 Lush. 291; 1 Mar. Law Cas. O. S. 152) evidently after appearance, held expressly with regret, that the evidence showed the claim for wages was barred as it did not amount to the minimum of 50*l*. A similar construction is also put by text writers of some repute (Williams and Bruce, Admiralty Jurisdiction, p. 176, note c.) on the same statute. I think, therefore, the respondent was not precluded from raising the objection to the jurisdiction. For, until all the evidence has been given, the amount due on which the jurisdiction depends cannot be accurately ascertained. With a view of diminishing the costs in a suit in which so many were interested, and the amounts were so small, and with the consent of the parties, I determined the amount instead of remitting the matter to the registrar and merchants, and allowed the sums set forth in the case for wages and compensation. I granted no allowance for *viaticum*, as the evidence showed that all the suitors could

have obtained employment on ships bound direct to London at much higher wages than they were receiving on board the *Ferret*. As in no one case did the sums so allowed reach the minimum 50*l*. I dismissed the suit, but, following the course taken in the case of *The Harriet* (*ubi sup.*), without costs."

The sum found by the learned judge to be due to the plaintiffs amounted in all to 203*l*. 19*s*. 8*d*.

From the above decision the plaintiffs now appealed, and in their case submitted that the judgment of the court below was erroneous, and ought to be reversed, or the cause remitted with proper directions for the following, among other reasons:—

1. Because the court had jurisdiction to give judgment for the sums awarded by it to each of the appellants on one or other of the following grounds (1): That each of the appellants claimed a sum exceeding 50*l*.; (2) that the sum awarded to the appellants exceeded 50*l*.; (3) that it did not appear that the owners or any legal master of the ship resided within twenty miles of the place where the seamen were put on shore; (4) that the respondents waived objection to the jurisdiction; (5) that the ship was under arrest at the time of the suit being brought; (6) that all suits for seamen's wages can be entertained by the Vice-Admiralty Court of the colony of Victoria.

2. Because the learned judge of the court below ought not to have admitted evidence of the payment of the Government to the seamen, and ought to have awarded to each of the appellants a sum of money as viaticum.

In the case of the respondents, on appeal, it was submitted that the decree dismissing the action was right for the following, amongst other reasons:—

1. Because the amount due to each of the promovents was less than 50*l*.

2. Because the said action was a suit or proceeding for the recovery of wages under the sum of 50*l*., within the meaning of the statute 17 & 18 Vic. c. 104, s. 189.

3. Because it was not shown by or on behalf of the promovents that any of the excepted circumstances referred to in the statute 17 & 18 Vict. c. 104, s. 189, existed in the present case.

4. Because the respondents did not, by the plea of tender or in any other way, preclude themselves from objecting to the jurisdiction of the said court in respect of the said action.

5. Because the said court had no jurisdiction in respect of the said action.

March 6.—The appeal came on for hearing. *Jeune* (*Wyke* with him) for the appellants.—The cases of *The Harriet* (*ubi sup.*) and *Rossi* v. *Grant* (*ubi sup.*) do not touch the present case, because in those cases the sum found due to the plaintiffs did not amount to the sum required by the statute. Here the sums found due exceeds 50*l*., and it is immaterial that the particular items are less than 50*l*. 203*l*. 18*s*. 9*d*. has been found due in one and the same action, and therefore the requisite of the recovery of 50*l*. has been complied with. The six plaintiffs have brought their action under the Order in Council, pursuant to 2 Will. 4, c. 57, and in that action over 50*l*. has been recovered. The word "seaman" in sect. 189 of the Merchant Shipping Act 1854 should be read as including the plural. This is borne out by the Interpretation Act (13 & 14 Vict. c. 21). If so, the statute is clearly complied with. The plaintiffs also claimed more than 50*l*. apiece, and if the judge had given viaticum, as he should, the amounts recovered would have in all cases exceeded 50*l*. *The Fairy Queen* (*ubi sup.*) is not in point, because the words in sect. 16 of 7 & 8 Vict. c. 112, on which the case was decided differ materially from sect. 189 of 17 & 18 Vict. c. 104. With respect to the residence of the master within twenty miles, how can it be said that Wright was a legally substituted master when he wrongfully took possession of the ship, and of his own will took command of her? The owners would not be bound by the acts of such a substituted master, and should not now be allowed to set up that he was a master within the meaning of the section. How can it be said that Wright was a master against whom the seaman could have a remedy?

The Eliza Cornish, 17 Jur. 738;
The Alexander, 1 Dod. Adm. 278;
The Cynthia, 16 Jur. 748.

Hollams (with him *A. Cohen*, Q.C.) for the respondents.—The sums found due to each of the plaintiffs were less than 50*l*., and the plaintiffs cannot now say that Wright was not the master, seeing that they by their conduct have recognised him as such. Hence the plaintiffs have not shown that any of the excepted circumstances in sect. 189 exist in the present case. The plaintiffs' remedy was to proceed in a summary manner before justices, as is contemplated in sect. 188, and to uphold the plaintiffs' contention would be practically to make that section almost nugatory. It cannot be said that sect. 189 is complied with because the total amount of wages exceeds 50*l*., inasmuch as the decree is for the particular items found due to each, and such items are all under 50*l*. *The Fairy Queen* is directly in point, and in that case the learned judge rejected the petition of the seamen when the aggregate amount of the claims of a crew for wages exceeded 20*l*., but the claim of each individual was less than 20*l*.

Jeune was not called upon to reply.

Their Lordships' judgment was delivered by Sir BARNES PEACOCK.—This was a suit brought by six seamen, in the Vice-Admiralty Court of Melbourne, to recover wages and compensation for wrongful dismissal. The suit was brought by the six seamen jointly, the amount claimed for each being a larger sum than 50*l*.; but the judge reduced the amount due to each of the plaintiffs to a sum less than 50*l*., the total, however, amounting to 203*l*. 19*s*. 8*d*. The first question to be considered is whether the judge had jurisdiction. That depends upon the 189th section of the Merchant Shipping Act of 1854. Previously to the passing of that Act His Majesty King William IV., by an Order in Council made under the authority of an Act of Parliament, passed in the second year of his reign, ordained certain rules and regulations to be acted upon by the Vice-Admiralty Courts abroad. One of those rules was contained in the 15th section. It states than any number of seamen, not exceeding six, may join in one action in a Vice-Admiralty Court to recover their wages. It was therefore at the time of the passing of the Merchant Shipping Act 1854, lawful for six seamen, if they pleased, to join in one action in the Vice-Admiralty Court to recover their wages; and compensation also falls under that rule. The 188th section of that Act enacted that: "Any seaman or apprentice, or any person duly authorised on his behalf, may sue in a summary manner before two justices of the peace acting in or near the place at which the service has terminated, or at which the seamen or apprentice has been discharged, or at which any person upon

whom the claim is made is or resides, for any amount of wages due to such seaman or apprentice, not exceeding 50*l.* over and above the costs of any proceedings for the recovery thereof." The 189th section, which is the section relied upon, enacted that "No suit or proceeding for the recovery of wages under the sum of 50*l.* shall be instituted by or on behalf of any seaman or apprentice in any court of admiralty or vice-admiralty, or any court of session in Scotland, or in any superior court of record in Her Majesty's dominions unless the owner of the ship is adjudged bankrupt or declared insolvent, or unless the ship is under arrest or is sold by the authority of any such court as aforesaid; or unless any justices, acting under the authority of this Act, refer the case to be adjudged by such court, or unless neither the owner nor the master is or resides within twenty miles of the place where the seaman or apprentice is discharged."

The question, then, is, whether this enactment prevents several seamen from joining in one suit in a vice-admiralty court to recover wages when the total amount of the wages claimed exceeds 50*l.*, and the wages of each is less than 50*l.* Having reference to the Interpretation Act (13 & 14 Vict. c. 21), which was in force when the Merchant Shipping Act of 1854 was passed, and by which it is enacted that words in the singular number shall include the plural, their Lordships are of opinion that they may read sect. 189 as if it had said "No suit or proceeding for the recovery of wages under the sum of 50*l.* shall be instituted by or on behalf of any seaman or seamen." It was contended that the section could not be read in that way, inasmuch as it speaks of actions brought in any of Her Majesty's courts of record, in which six seamen cannot join; but it does not follow that because six seamen cannot join in a suit in one of Her Majesty's courts of record they are not to join in a suit in the Vice-Admiralty Court under the provisions of the rules to which allusion has already been made. Their Lordships think that the 189th section must be read *reddendo singula singulis*, and that if six seamen join in a suit in a vice-admiralty court, where six seamen may join, and the total amount of the wages due to the six exceeds 50*l.*, they may proceed in that suit, although the wages of each included in the amount sought to be recovered are less than 50*l.*

It was agreed that the judge instead of sending the matter to the registrar to assess the amount, should himself ascertain it; and he found with regard to each of the six that the wages and compensation due was a sum less than 50*l.*, but that the total amount due to the six was 203*l.* 19*s.* 8*d.* Their Lordships think that the judge had jurisdiction under the rule and section, to which allusion has already been made, to award that sum of 203*l.* 19*s.* 8d. partly for wages and partly for wrongful dismissal. In the first place, there was a contract entered into by Watkins, who was the duly authorised master of the owners at Cardiff. He entered into a contract with the seamen, and they were hired at certain fixed amounts for a period of three years for a certain voyage. It appears that the master left the ship at the Cape, and that a man named Wright, who was then the mate, took possession and ran away with it for the purpose of stealing it. When the ship arrived at Melbourne on the 22nd April 1881 the Government seized it on behalf of the owners upon the ground that it was in the possession of men who had stolen it, and they put the seamen ashore. Three days afterwards, on the 25th April, the ship was delivered up by the Government to the agent of the owners. The agent took possession, and the owners must be bound by his act. By taking possession of the ship they ratified what the Government had done in taking possession of it on their behalf, and putting the seamen ashore. The seamen contended that they were entitled not only to their wages up to the time of the seizure, but to compensation for being turned out of the ship after it arrived at Melbourne. If the seamen had been *participes criminis*, if they had joined Wright in endeavouring to steal the ship, of course they would not have been entitled either to wages or to compensation: but that defence was never made. The seamen, although they were at first arrested, were never tried for the offence of complicity. They were discharged, and no defence was set up in the suit in the Vice-Admiralty Court that the plaintiffs were not entitled to their wages upon the ground of complicity. A sum, not including compensation, was tendered to them for their wages up to the date of the seizure of the ship. Nothing was offered by way of compensation for the wrongful dismissal. The learned judge who tried the case said: "In consequence of information received by the Government, the steamer had been seized by the officers of Customs. The master and mate were arrested, and the seamen removed from the vessel, some of the crew being kept under the surveillance of the police as witnesses, awaiting the trial of the master and mate. The seamen required as witnesses were paid by the Government; the others were placed in the Sailors' Home, and offered a certain allowance. Several accepted this allowance, and were engaged as seamen on board vessels in the port. The promoters refused the amount offered them, and instituted the present proceedings." Their Lordships are of opinion that, under the circumstances (no defence having been set up that the plaintiffs were guilty of complicity), they were entitled to recover their wages, and a reasonable and proper amount for compensation. The judge fixed the amount which he would have awarded, if he had had jurisdiction, at 203*l.* 19*s.* 8*d.*, but he dismissed the suit upon the ground that he had no jurisdiction, inasmuch as the suit was for wages under the amount of 50*l.* Their Lordships ought to give the same judgment as the judge would have given if he had considered that he had jurisdiction and had referred it to the registrar to assess the amount, and the registrar had fixed it at 203*l.* 19*s.* 8*d.* and the judge confirmed the report of the registrar.

Several other points were made, and, amongst others, that Wright was the substituted master, notwithstanding he took the command after Watkins left, for the purpose of stealing the ship; and that although in gaol for stealing the ship, he was residing within twenty miles of the place where the seamen were discharged, within the meaning of the 189th section. Their Lordships consider that the point on which the judgment has already been pronounced is sufficient to decide the case, and that it is not necessary to express an opinion upon the other points. Under

these circumstances their Lordships will humbly advise Her Majesty that the judgment of the judge be reversed, and that, instead thereof, a decree be given in the suit for the plaintiffs for the sum of 203*l.* 19*s.* 8*d.*, to be distributed amongst the several plaintiffs in the manner in which the learned judge has divided the total amount amongst them, with costs in the lower court. The respondents must pay the costs of this appeal.

Solicitor for the appellant, *J. Sheldon Hepworth.*
Solicitors for the respondents, *Hollams, Son,* and *Coward.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, April 20, 1883.

(Before Brett, M.R., Cotton and Bowen, L.JJ.)

The Renpor. (*a*)

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

Life salvage—No property salved—Agreement—Right of recovery.

Life salvage is only recoverable where ship, cargo, or freight is saved, so that a fund out of which the award can be paid is realised; hence ineffectual attempts to save the property, though rendered at express request, give no claim to life salvage.

Semble, A master has no authority to bind his owners by an agreement to save the lives of himself and crew, as his owners have no beneficial interest in the subject-matter of such a contract.

Where the steamship R. being in imminent peril of total loss, her master on behalf of himself and his owners, entered into the following agreement with the master of the steamship M.L.: "It is hereby agreed between Thomas Gibb, the master of the above steamer, and Robert Osborn, master of the steamship R. that the above steamer M.L., agrees to stay by me until I am in a safe position to get to port, for the sum of 1200*l., my vessel being badly holed in starboard bow near collision bulkhead"; and in pursuance of the agreement the M.L., at great risk, stood by the R. until she sank, when the M.L. took off her master and crew; it was held (affirming Sir R. Phillimore), that no life salvage was recoverable as no property had been saved, and that neither master nor owners were liable under the contract, as the condition "until I am in a safe position to get to port" had not been fulfilled.*

This was a demurrer to a statement of claim in a salvage action, in which the owners, master, and crew of the steamship *Mary Louisa* claimed salvage reward in respect of services rendered to the steamship *Renpor* and to her master and crew.

The statement of claim, so far as is material, is as follows:

1. The plaintiffs are the owners, master, and crew of the screw steamship *Mary Louisa*, and the defendants are the owners and master of the screw steamship *Renpor*.

2. The *Mary Louisa* is a screw steamship of 1976 tons register, propelled by engines of 200 horse-power nominal, and was at the time of the occurrences hereinafter mentioned in the course of her voyage from Newcastle-upon-Tyne to New York, laden with a general cargo and manned by a crew of twenty-three hands. The value of the *Mary Louisa*, her cargo, and freight, was about 40,000*l.*

3. On or about the 10th April 1882, in the course of the said voyage, the *Mary Louisa* came into a vast field of ice, extending, as it was subsequently ascertained, for many hundred miles, and consisting of large floes and hummocks, with frequent icebergs of large size. By the exercise of great care and caution and skill in the navigation of the *Mary Louisa*, she was conducted through the ice-fields at considerable risk, but without sustaining damage. About noon on the 13th April, whilst still in the ice-field, and after having, during the early part of the day, passed about thirty large icebergs, those on board the *Mary Louisa* observed a large steamer about four miles to the southward and westward of them in the ice, making signals for assistance.

4. Thereupon, the course of the *Mary Louisa* was directed with difficulty through the pieces of ice towards the steamer, which proved to be the steamship *Renpor* of 1323 tons gross register on a voyage from West Hartlepool to Boston with a heavy cargo of pig iron and some potatoes, and on coming up with her, it was found that she had been in collision with the ice and had her starboard bow stove in below the water-line, and that she was making a great deal of water and the water was gaining on her in spite of the efforts of the crew to plug the holes and to keep the water down by pumping. The crew of the *Renpor* were worn out by constant exertion and exposure to cold. Although cargo had been jettisoned from the fore-part of the vessel, the *Renpor* was in imminent danger of sinking, and the lives of all on board of her were in peril. It was unsafe for the crew to trust to their boats owing to the quantities of ice around the ship; and the *Renpor* was about 1000 miles from land. The quantity of water coming into the forepart of the ship caused so much pressure on the forward bulkhead, that there was great danger that the bulkhead would suddenly give way and the *Renpor* would at once go to the bottom.

5. When the *Mary Louisa* approached the *Renpor* the master of the latter informed the master of the *Mary Louisa* of the condition of his vessel, and about 5 p.m. on the said 13th April, the weather at the time being thick and threatening, the master of the *Renpor* boarded the *Mary Louisa* and requested her master to remain by him so long as the *Renpor* and the lives of those on board the *Renpor* continued exposed to danger.

6. The master of the *Mary Louisa* informed the master of the *Renpor* that he was ordered, as the fact was, not to delay his voyage to render salvage services, except in order to save life, but having regard to the danger in which the lives of the master and crew were placed, he would accede to the request of the master of the *Renpor*, provided that he would enter into a written agreement. Accordingly, the following agreement was entered into by the master of the *Mary Louisa* on behalf of himself, and the owners, and the remainder of the crew of that vessel, and by the master of the *Renpor*, on behalf of himself and the owners of the *Renpor*, and signed by the said masters.

"Lat. 43° 30′ N. Long. 50° 00′ W.—*Mary Louisa*, April 13th, 1882.—It is hereby agreed between Thomas Gibb, master of the above steamer, and Robert Osborn master of the s.s. *Renpor*, that the above steamer *Mary Louisa* agrees to stay by me until I am in a safe position to get to port for the sum of 1200*l.*, my vessel being badly holed in starboard bow near collision bulkhead."

The master of the *Renpor* then returned to his ship.

7. In pursuance of the said agreement the *Mary Louisa* was kept in the neighbourhood of the *Renpor* during the night of the 13th April, the *Renpor*, owing to the fog, being at times lost sight of, and her position being only distinguished by the sound of her steam-whistle; and at 2 a.m. the next morning, rockets were sent up from the *Renpor* as signals of distress, and the *Mary Louisa* was thereupon taken with great skill and with the utmost expedition possible under the circumstances, towards the *Renpor*, and, when in a position in which the *Renpor* could approach her, she was stopped for the *Renpor* to come up. As the *Renpor* appproached, those on board of her were heard to be crying out that the *Renpor* was sinking and asking for immediate assistance.

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

The forward bulkhead had suddenly given way, and the *Renpor* was sinking.

8. The *Mary Louisa* remained as close to the *Renpor* as was safe until about 3 a.m., when the master and the whole of the crew of the *Renpor*, twenty in all, were, by their own boats, got on board the *Mary Louisa*. As soon as they were all on board, the *Mary Louisa* steamed clear of the *Renpor* and lay by her until she sank, about 9 a.m.

9. The *Mary Louisa* with the crew of the *Renpor* proceeded on her voyage to New York, where she arrived on the 19th April. The *Mary Louisa* had previously relieved another vessel in the course of her voyage, and was short of provisions.

10. The above-mentioned services were rendered with great care and skill, and in rendering the said services the *Mary Louisa* and her crew were exposed to risk of collision with the *Renpor*, and loss occured to the owners of the *Mary Louisa* by reason of the delay to their ship caused in rendering the said services, and they incurred risk in respect of the cargo on board the *Mary Louisa*. The *Mary Louisa* was in attendance on the *Renpor* for sixteen hours, and she was further delayed in proceeding out of her course in order to reach the *Renpor*.

11. By reason of the said services the lives on board the *Renpor* were saved.

12. The plaintiffs say that they were at all times ready and willing to perform the said agreement and that they have performed the same; and they have done all things necessary on their part to entitle them to recover from the defendants the said agreed sum of 1200*l*.

The plaintiffs claim:

1. That the court will pronounce for the said agreement.

2. Judgment for the sum of 1200*l*., or such other sum together with the costs as to the court may seem just.

3. Such further and other relief as the nature of the case may require.

The defendants demurred to the whole of the statement of claim, alleging that

The same is bad in substance and in law, on the grounds that the agreement therein pleaded is not alleged to have been performed, and that no cause of action arose till its performance, and on the ground that no property of any of the defendants is therein alleged to have been saved; and as to the defendant, the master of the steamship *Renpor*, on the further ground that he is not shown to be under any personal liability on the agreement therein pleaded; and, as to all the defendants, on other grounds sufficient in law to sustain this demurrer.

Aug. 2.—The demurrer came on for argument.

W. G. F. Phillimore for the defendants, in support of the demurrer.—The agreement was never carried out, and therefore, neither the owners nor the master of the *Renpor* are liable under it. The *Renpor* never was "in a safe position to get to port," and it makes no difference that the plaintiffs were ready and willing to carry out the agreement, or that in attempting to do so they imperilled themselves and their property. Apart from the agreement, the defendants are not liable for life salvage, because no property has been saved, and in no case has the Admiralty Court awarded life salvage where no property has been saved:

The Fusilier, Br. & L. 341; 10 L. T. Rep. N. S. 699; 12 L. T. Rep. N. S. 186; 2 Mar. Law Cas. O. S. 39 & 177;
The Zephyr, 2 Hagg. 43;
The Cargo ex Schiller, 36 L. T. Rep. N. S. 714; 3 Asp. Mar. Law Cas. 439; 2 P. Div. 145;
The Sarpedon, 37 L. T. Rep. N.S. 505; 3 P. Div. 28; 3 Asp. Mar. Law Cas. 509;
The Johannes, Lush. 182; 1 Mar. Law Cas. O. S. 24; 3 L. T. Rep. N. S. 757.

G. Bruce, contra, for the plaintiffs.—The defendants are liable for a *quantum meruit* under the agreement. The lives of the crew were saved and efforts were made to save the property. Irrespective of the agreement, the owners of the *Renpor* are liable for salvage, upon the authority of Dr. Lushington in *The Undaunted* (Lush, 90; 2 L. T. Rep. N. S. 520.) In that case Dr. Lushington said that salvors working under an express request are entitled to salvage award, although no property is saved. Here there was an express request, and the plaintiffs are, therefore, to be distinguished from mere volunteers, who are only entitled to salvage when property is saved. The authority is the same in *The E. U.* (1 Spinks 63). Life salvage has been awarded to salvors, who have themselves saved no property, where the property has been saved by other persons, and if so, can it with reason and justice be denied to the present plaintiffs, whose efforts are equally as meritorious as the life salvors in those cases:

The Cargo ex Schiller (*ubi sup.*);
The Fusilier (*ubi sup.*).

In *The Medina* (1 P. Div. 272) life salvage was given, though no property was saved. The decision in *The Johannes* (*ubi sup.*) does not affect the principles of salvage, and entirely turned upon the interpretation of an Act of Parliament.

W. G. F. Phillimore in reply,—In *The E. U.* (*ubi sup.*) and *The Undaunted*, as a matter of fact, the property had been saved, although not by the plaintiffs, and hence there was a fund out of which salvage could be paid. In *The Medina* (*ubi sup.*) the services consisted in saving more than life, because there the passengers were carried to their destination, whereby the owners of the *Medina* were enabled to carry out their contract of carriage and so earn freight.

Sir R. Phillimore.—I am of opinion that this demurrer is good, and that it must be sustained. In this case there is no vessel or property out of which a salvage reward can be given, and there is no personal liability on the part of the master or owner to pay any sum or salvage services rendered. The law was, I think, correctly laid down by me, in accordance with other cases, in the case of *The Sarpedon* (3 Asp. Mar. Law Cas. 509; 37 L. T. Rep. N. S. 505: 3 P. Div. 28) as follows: "I consider it to be now a fixed principle of salvage law that, in the absence of any special contract, some property in the ship or cargo must be saved in order to found the liability of the owners of the ship or cargo to payment of salvage remuneration." Now, it is contended in this case that there is a special contract which is binding upon the parties. The words of this contract are: "It is hereby agreed between Thomas Gibb, master of the above steamer, and Robert Osborn, master of the s.s. *Renpor*, that the above steamer *Mary Louisa* agrees to stay by me until I am in a safe position to get to port for the sum of 1200*l*., my vessel being badly holed in starboard bow near collision bulkhead." Well, now the vessel was lost a few hours afterwards, and, therefore, he never was put "in a safe position to get to port" by Thomas Gibbs, master of the steamer. He never was in that position. But it has been contended (with abundant ingenuity, I must say), that "in a safe position to get to port" does not mean "to get to port," but "stay by me as long as I thing necessary." That would be, I think, not introducing explanatory words into the agreement, but making a new agreement altogether. First of all, it is said that the agreement was fulfilled by the master being ready to render assistance at the time when the vessel

went down; and then it is contended, as I understand, if it was not carried into effect, that there should be a *quantum meruit*; and then, thirdly, it was contended that outside the agreement a fair sum could be claimed from the master. It may be my fault, but I am unable to follow the argument by which some of these strong propositions were said to be supported. It seems to me that the words of the agreement are perfectly plain and intelligible. If the *Renpor* had been taken by the *Mary Louisa* "into a safe position to get to port," the conditions of the agreement would have been fulfilled; but it is admitted she did not get to port, and, as I have already said, other words must be necessarily introduced into the agreement to make it intelligible.

Now, it is said independently of the agreement altogether, that the master of the *Mary Louisa* is entitled to some sum of money, some remuneration, because, at the request of the master of the *Renpor*, he stood by him, and that he did all things necessary to entitle him to recover. This proposition, as I understand it, is not to be found in the agreement itself, but it rests upon the general law. I can only say that I think no case has been made out against the master which would enable the *Mary Louisa to* sustain that position, and that really the more the matter is looked at, the more simple it appears to be. The only question I have to ask myself in this case is, whether the demurrer is sustainable which impugns this contract, inasmuch as the conditions of it were never fulfilled, and inasmuch as the vessel never was put in a "safe position to get to port." Upon the facts admitted in this case, it appears to me to be so, and, therefore, I pronounce in favour of the demurrer.

From this judgment the plaintiffs appealed, and the appeal came on for hearing on the 16th and 20th April 1883.

Arthur Charles, Q.C. and *Gainsford Bruce*, for the appellants, used substantially the same argument as that in the court below.

W. G. F. Phillimore, for the respondents, was not called upon.

Brett, M.R.—In this case, I am of opinion that the judgment of the court below is right and must be affirmed. The suit is brought under the following circumstances: The defendant's vessel, the *Renpor*, was in the greatest possible danger; she was surrounded by ice, she could not move out of it, and she was 1000 miles from land when the plaintiffs' vessel came up with her. The *Renpor* very shortly afterwards sank, but before that happened the plaintiffs' steamer got off and saved the lives of her master and crew. The plaintiffs' vessel while rendering this service was in considerable danger, and there were therefore present several of the elements of a salvage service, namely, danger to the lives and property, both of salvors and salved, and a service rendered.

Now, it is said that this action is maintainable, irrespective of the agreement which was entered into by the masters in writing, as a life salvage service. As I have already said, there are many elements present which entitle the plaintiffs to salvage, but there is one element wanting, which is invariably required by Admiralty law in order to found an action for salvage. There must be something saved, more than life, which will form a fund out of which salvage may be paid. In other words, the saving of life alone, without the saving of ship, cargo, or freight, is not enough to justify salvage being recovered in the Admiralty Court. Life salvage, it is true, may by statute be payable under some circumstances, but then it must be paid by the Board of Trade. It is said that, under some circumstances, if life is saved, after the services have been requested by the master of the ship which is in danger, the shipowner is bound to pay salvage, although there is no *res* saved, and *The Undaunted* (*ubi sup.*), has been cited in support of this proposition. The *E. U.* (*ubi sup.*) has also been relied on as an authority in favour of it, more especially a dictum of Dr. Lushington, which is to be found in that case. But *The Undaunted* is really no authority in favour of the plaintiffs' contention, because in that case the ship was saved, and therefore there was a fund from which payment could be made. The question in that case was, whether the plaintiffs could be paid out of that fund, and it was decided that they could, because they had exerted themselves to save the ship at the request of the master. It is now unnecessary to say whether we agree with that decision or not, but it in no way breaks the fundamental law of the Admiralty Court, that something must be saved in order to give valid grounds for a salvage action. *The E. U.* (*ubi sup.*) is a similar case; but there a supposititious case is mentioned by Dr Lushington, which is supposed to support the plaintiffs' contention in the present case. If Dr. Lushington did state this supposed case as containing his view of the law, it is contrary to what he has laid down before; but if it does mean that, with all respect for his great authority, I am unable to agree with him. But I doubt if it is an exact statement of the learned judge's opinion, and also whether, on consideration, he would have so decided. The cases of *The Fusilier* (2 Mar. Law Cas. O. S. 37, 177; Br. & L. 341), *The Zephyr* (2 Hagg. 43), and *The Cargo ex Schiller* (*ubi sup.*) are contrary to the plaintiffs' contention, and support the fundamental Admiralty Court rule that some property must be saved to give rise to a claim for salvage.

Then it has been argued that an action in the nature of a common law suit could be brought on this agreement, which is binding on the shipowner. But there are two circumstances necessary in order to make an agreement binding on an owner: Firstly, the contract must be made under a necessity, and secondly, it must be made for his benefit. I desire not to appear to say a cruel thing, but I must express a doubt whether if an agreement is made only for the purpose of saving a master and crew, without regard to any saving of the property of the shipowner, though it be in a case of necessity, yet as the subject-matter is without benefit to the shipowner, the master has authority to bind the owner to a money payment. But if this agreement was not merely one by which the lives of the master and crew were to be saved, what does it mean? The contract must be read, having regard to the circumstances and the parties to it, and it is idle to suppose that those on the *Renpor* had made up their minds that the ship would sink at once. What undoubtedly was contemplated was the possibility

of the vessel arriving safely in port. The words "me" and "I" in the contract, clearly mean the ship and master and crew—the ship, master, and crew are treated as one thing. The words are "to stay by me until I am in a safe position to get to port." Thus it is a contract which the master would have authority to make, and would bind the owner to pay the sum mentioned in it for staying by until the ship was safe. Therefore, in order now to make this money payable, you must put in the words "or sink," or else the condition is not fulfilled. Any question of a *quantum meruit* claim arising out of it is one which, though mentioned during the discussion of the case, cannot be seriously argued. I think, therefore, that the agreement is a proper salvage agreement which fixes the amount of salvage to be paid for services to both life and property, but leaves untouched all the other conditions necessary to support a salvage award, and, as on principle, and on the construction of the contract itself, there must be something saved, I am of opinion that neither owner nor master are liable in this action, because no *res* have been saved. Therefore, in my opinion, this appeal must be dismissed, and the judgment below affirmed.

COTTON and BOWEN, L.JJ. concurred.

Appeal dismissed.

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

Solicitors for the respondents, *Ingledew* and *Ince.*

March 8, 9, 10, *and May* 2, 1883.

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

THE HECTOR. (*a*)

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

Practice—Costs—Collision—Both vessels to blame—Appeal—Judgment below varied—Compulsory pilotage—Amount recoverable.

Where the Court of Appeal varies the decision of the Admiralty Court, finding one vessel solely to blame for a collision, by finding both vessels to blame, each party bears his own costs, both in the court below and in the Court of Appeal, and the fact that the owners of one are exempt from liability on the ground of compulsory pilotage makes no difference to this rule.

Where in an action of collision it is held that it was occasioned by the fault of both vessels, but one of such vessels is exempt from liability on the ground of compulsory pilotage, the latter vessel is entitled by the Admiralty Court rule to recover half the damages sustained by her in the collision, and is not limited to the difference between half her damage and half the damage of the other ship.

THIS was an appeal from a decision of Sir Robert Phillimore, by which he had found the steamship *Hector* solely to blame for a collision which took place in the English Channel on the 1st Sept. 1881 between that vessel and the steamship *Augustus.* The defendants had pleaded compulsory pilotage, but the learned judge held that, under the circumstances of the case, this plea could not be sustained.

(*a*) Reported by J. P. ASPINALL, and F. W. RAIKES, Esqrs., Barristers-at-Law.

March 9.—On appeal the Court varied the decision of the court below by finding both vessels to blame, but further held that the defendants had established their plea of compulsory pilotage, and were thereby exempt from liability in respect of the said collision.

The question then arose how the costs of the appeal were to be borne, and the court directed this question to be reserved for a further inquiry to ascertain what was the practice in a case like the present, where the decision below finding one vessel solely to blame was varied by both vessels being held to blame.

March 10.—*Myburgh*, Q.C. (with him *Butt*, Q.C.) for the appellants.—Although the old Admiralty Court rule was that where both vessels are held to blame there should be no order as to costs, yet James, L.J., in the case of *The Condor* (4 Asp. Mar. Law Cas. 115; 40 L. T. Rep. N. S. 442; 4 Prob. Div. 115), derogates from that rule, and lays it down that there should be one uniform practice as to costs, and that a successful appellant should get his costs. The owners of the *Hector* are successful appellants, and should therefore get the costs.

W. G. F. Phillimore for the respondents.—James, L.J., in a case subsequent to *The Condor* (*ubi sup.*), *The Milanese* (4 Asp. Mar. Law Cas. 318; 43 L. T. Rep. N. S. 107), upheld the old Admiralty Court rule. The owners of the *Hector* are not entirely successful appellants, seeing that they are partly to blame for the collision. They have only succeeded in getting both ships to blame.

BRETT, L.J.—We have not to deal in this case with a case which might arise—which is this, that the Admiralty Court should have found both vessels to blame, and that on appeal we should affirm that judgment. In that case the appeal would have been obviously and clearly wrongly brought. As to that case, therefore, we need say nothing. But in this case the Admiralty Court has found one of the two vessels to blame, whereupon the other vessel appealed, and we, differing from the Admiralty Court, have come to the conclusion that both vessels were to blame, and that therefore the judgment in the Admiralty Court ought, in our view—we say no more than that—to have been that both vessels were to blame. Well, then, it is true that the appellant was, as it were, forced to bring the appeal, because, if he had sat contented with the judgment, he was made solely liable to pay all the damage done to the other vessel, and to pay all the costs of the action. He could not sit still under such a judgment. He was obliged to appeal, and he does appeal. Well, two modes of appeal might arise. He might appeal, and state as the sole ground of appeal that the judgment ought to have been that both vessels were to blame. If he did that, he would succeed absolutely on the ground of his appeal, if we found that that was right. But even then I am not prepared to say that we should give costs, for a reason which I shall presently mention. Then the other mode is to appeal and to state that the judgment ought to have been entirely in his favour in the court below. Well, then, if you take the grounds of his appeal and the ground of his argument, here he fails to support the ground of his appeal entirely; he fails to

support his argument entirely, but he succeeds in part. But then there arises this difficulty, that by claiming more than he has got, he has done no harm to the other parties, because it is absurd to suppose that if he had claimed the judgment that both vessels were to blame they would have accepted that settlement. He has, therefore, done no harm by it. He is forced to appeal, and he succeeds in altering the judgment, and he has done no harm to the other party by claiming more. Therefore I hardly think that that can be the ground upon which the rule is supposed to have been established.

My own view of the matter is that the Admiralty Court, which always exercised a very wide jurisdiction with regard to the discipline of the seas, laid down this rule, as a matter of discipline to enforce discipline at sea, viz.: if both vessels are to blame, neither of them shall gain by any litigation in the matter; and I think that the Privy Council adopted that view of it, and carried it out, except where there were exceptional circumstances. I should say that an exceptional circumstance would be where the appeal is avowedly brought only for the purpose of getting the judgment that both vessels were to blame. That might have been an exception; but I am not sure of that. No; I would not say that that would be an exception. I think it is an exception where the judgment of the court below has been that both vessels are to blame, and that question and that judgment are affirmed. That would be the exception, and perhaps that is the only one. I think the Privy Council came to the conclusion that they, acting in Admiralty, would carry out the same rule that the Admiralty Court had fixed upon in order to preserve discipline at sea, namely that neither party, if both were to blame, should gain anything by the litigation.

Now, it was supposed for a moment that James, L.J. was derogating from that rule in this case (*The Condor, ubi sup.*) which has been cited to us. But I do not think he did. I think he must have been alluding to some other form or to some exception to that case, because after that, in *The Milanese* (*ubi sup.*), it is obvious that he and the Court of Appeal at all events referred to the old rule. I think the better way to solve the matter is to say that, in order to preserve care at sea, where it is so important that care should be observed, the Court of Appeal will adopt the rule of the Admiralty Court and the rule of the Privy Council to this extent, that (unless in some exceptional case), where both vessels are to blame, they will not allow either vessel to gain by the litigation. Therefore the costs of the appeal will not be given any more than the costs of the action.

Cotton, L.J.—I agree with the rule; but I do not know if it is to be settled on reason or sound principles whether I should have so laid it down. Whoever appeals, I think, ought to get the costs of a successful appeal, and to pay the costs of an unsuccessful one.

Bowen, L.J.—I am of the same opinion. What I add is not for the purpose of adding any weight or authority to the matter as to the practice which Brett, L.J. has so competently dealt with. The rule is based, I think, upon common sense. When two ships are equally in fault, it is, as he says, a matter of discipline that neither ship should benefit by the litigation. Now I should have said that a party appealing ought to pay the costs of an appeal in one contingency and one only, where both ships are held to blame. If the appeal is brought to set the court right where the court below is wrong, having held one ship alone to blame it seems to me that the costs of the appeal ought to follow the general rule that the litigation ought to be borne equally by both sides. The appeal is a step in the litigation, and a necessary and natural step. But if the appeal is brought to set the court wrong where the court below is really right, as where it has held both ships to blame, why of course the person who is unwise enough to try to set the court wrong ought to bear the costs. In this particular case they bring the appeal to set the court right, and although they sought to go further and make the court find the respondent's vessel alone to blame, this case does not fall under the class of cases to which I have alluded, where the sole object of the appeal is to set the court wrong. I should like to add, in order to make my meaning quite clear, that, in my opinion, if the only object of the appeal is to set the court wrong, then the person who brings the appeal ought to pay. That is what I meant to say. That should be the exception.

May 2.—The owners of the *Augustus* applied to the court to ascertain the effect of the judgment given in this case by the Court of Appeal on March 9.

The Court of Appeal, varying the decision of the court below, had found both vessels to blame, but held that the *Hector* had satisfactorily established the plea of compulsory pilotage, the judgment being "that the *Hector* recover half her damages, and the *Augustus* nothing at all." The present application was for an order that the judgment should be drawn up in accordance with the case of *The Stoomvaart Maatschappy Nederland* v. *The Peninsular and Oriental Steam Navigation Company* (L. Rep. 7 App. Cas. 795; 4 Asp. Mar. Law Cas. 567; 47 L. T. Rep. N. S. 198), and should read "that the *Hector* should recover a moiety of the excess of her damage over that of a moiety of the damage done to the *Augustus*."

The following Acts of Parliament were referred to:

The Merchant Shipping Act 1854, 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 Merchant Shipping Act Amendment Act 1862, 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 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 pound of the ship's tonnage.

R. Webster, Q.C. and *W. G. F. Phillimore* (with them *Stubbs*), for the owners of the *Augustus*, in support of the application.—17 & 18 Vict. c. 104, s. 388, says: "No owner or master of any ship

shall be answerable to any person whatever." 25 & 26 Vict. c. 63, s. 54, says: "The owners of any ship, whether British or foreign, shall not . . . be answerable in damages." These sections are, therefore, almost indentical in words and purpose, both limiting the amount of the shipowner's liability under specified circumstances. The House of Lords has decided in *The Stoomvaart Maatschappy Nederland* v. *The Peninsular and Oriental Steam Navigation Company* (*ubi sup.*) that sect. 54 of 25 & 26 Vict. c. 63 is to be applied to a case like the present after the liability of the shipowners irrespective of the statute is determined. It therefore follows that sect. 388 of the Merchant Shipping Act (17 & 18 Vict. c. 104) 1854 is to be applied at the same time, and, if so, the owners of the *Augustus* are liable only for a moiety of the damage suffered by the *Hector* less a moiety of the damage suffered by the *Augustus*.

Charles, Q.C. (with him *Myburgh*, Q.C.) for the owners of the *Hector*, *contra*.—The decision in the House of Lords is not applicable to the present case, as the sections in question are widely different. Sect. 54 assumes a liability and then limits it. Sect. 388 says there shall be no liability. It is therefore useless to argue that in the present case the liability is to be arrived at by striking a balance, seeing that the liability of the owners of the *Hector* is zero; in other words, sect. 54 is to be applied at the end of the action, and sect. 388 at the beginning. They referred to

The Demetrius, L. Rep. 3 Ad. & E. 523; 26 L. T. Rep. N. S. 324; 1 Mar. Law Cas. 250.

Webster, Q.C. in reply.

Brett, M.R.—It seems to me that this case is not governed by the case of *The Stoomvaart Maatschappy Nederland*, v. *The Peninsular and Oriental Steam Navigation Company*, and that the two sections, sect. 388 of the Merchant Shipping Act 1854, and sect. 54 of the Merchant Shipping Amendment Act 1862 are to be applied at different periods of the dispute between the parties. The effect of the decision in the House of Lords was, as I understand it, that the sect. 54, which was to limit the amount of the shipowner's liability, was not to be applied until the liability, irrespective of the statute, was ascertained according to the ordinary practice of the Admiralty Court. Where in the Court of Admiralty there were counter-charges against the two vessels for the same collision, either the two vessels were reciprocally seized by both parties in the Admiralty Court, or both the parties were reciprocally brought before the court. There were, therefore, two actions, and each party was plaintiff in an action. But by the practice of the Admiralty Court, as stated by Dr. Lushington and other judges of that court before him, the Admiralty Court exercised a power which the Common Law Courts could not. Where there were counter-claims in respect of the same collision, although the actions were brought by the opposing parties as separate actions—which they were at the commencement by reason of the seizure of the ships at different times, and irrespective of each other—the Admiralty Court exercised the power of consolidating the two actions for the purposes of the trial, and, if convenient, tried the cross suits at the same time; but, if inconvenient, the court had power to try them separately. Again, where there were cross actions in respect of the same transaction, the Admiralty Court exercised this further power, which the common law courts also exercised, viz., having determined the liability of the parties in the cross actions, the Admiralty Court would not issue what was equivalent to execution for each party, leaving them to settle what that should be, but issued a monition for the balance. There was, therefore, only one party who eventually was made to pay, viz., the party against whom the balance was. Therefore, in construing the statute, it is to be remembered that the 54th section was founded upon the assumption that the vessel is the thing out of which the damages are to be paid. And if the ship is under arrest the Admiralty Court can order the ship to be sold; but where the ship fetches more than the 8*l.* per ton, then, under certain circumstances, the owners can limit their liability to 8*l.* per ton. That is the assumption upon which the statute was passed, and in *The Khedive* it was held that the section was not to be applied until the amount of damages had been settled for which, but for the statute, the monition would have gone. That reasoning, however, will not apply to the present case, for the section limiting liability is applicable at the end, not at the beginning, of the trial, as sect. 388 of the Act of 1854 is. There never has been any doubt at common law, irrespective of the statute, that the moment the plea of compulsorily pilotage is satisfactorily made out, the shipowner is relieved from liability. All the Act did was to make the matter more certain, so that there might be no doubt. The shipowner cannot be held liable for the act of a person who is not his servant, and about whose services he has no choice, and he is not, therefore, liable in respect of a collision caused solely by the fault of a compulsory pilot.

The judgments in the Admiralty Court, I cannot help thinking, although we have no information as to that, have always been drawn up in the same form as the one before us. Certainly the judgment in the case of *The Demetrius* (*ubi sup.*) was so drawn up, and I cannot think that that is an isolated case. If the Admiralty Registry were examined, I believe it would be found that this case had arisen over and over again, and that the judgments had been drawn up in the same way. I must say it would be a surprise to me that this were only the second case. But what happens if the statute be taken as applicable to the liability of the owners of the *Hector*? There is a collision between these two ships; each ship, if the action was brought in the ordinary way, would seize the other in the Admiralty Court, so that there would be a cross action. With regard to the *Augustus*, she has been found to blame for the collision, so that she must pay, if nothing else happens, all the damage which the *Hector* has suffered. With regard to the *Hector*, it has been found not that her owners are to blame, but that her navigation is to blame through the fault of the pilot. The owners are not liable for his default, and therefore are not liable for anything to the owners of the *Augustus*. The result then is that the liability of the owners of the *Augustus* is declared, but that of the owners of the *Hector* is denied, and they are dismissed from the suit. There is, therefore, no balance to be calculated, and the owners of the *Hector* are not liable for a penny of the damage done to the *Augustus*, the owners of which ship must go against the pilot and get what they can. The *Hector* is, therefore,

entitled to succeed, but she is suing in the Court of Admiralty, which has had a constant practice from the time when there first were compulsory pilots, that where in these suits it was found that the navigation of the ship was wrong, although it was the wrongful act of the compulsory pilot, the shipowner can only recover half the damage. That is the way the judgment has here been drawn up, and it must be held to be right.

Cotton, L.J.—I am of the same opinion. It is argued that the words of sect. 388 of the Merchant Shipping Act 1854 and sect. 54 of 25 & 26 Vict. c. 63 are so nearly the same, that a similar construction is to be put upon both, and that therefore the section doing away with the liability of the owner for the act of the pilot is to be applied at the same stage as sect. 54 of 25 & 26 Vict. c. 63. Sect. 388 does not limit the amount of liability, but says that the owner is not to be liable when the loss is sustained by the default of the compulsory pilot. But sect. 54 is different. This latter section assumes a liability for damages; it does not relieve the owner from liability for the damage, it only says that the owner shall not be required to pay, under certain circumstances, more than a certain amount in respect of the damage. As the owners of the *Hector* are not responsible for the wrongful act of the pilot, and are, therefore, under no liability, there can be no balance between the two claims for the purpose of ascertaining the limit of the amount to be paid.

It was argued that the present case was governed by the decision in the House of Lords. But is it so? In that case the owners of both ships were liable to pay half the damage done by their respective ships. The reasoning in that decision applies only to the case where there is an interlocutory judgment for the purpose of ascertaining and fixing the amount for which the owners are answerable. And when one comes to look at that case, it is seen that Lord Blackburn there says the proper form of decree is that formed by the Admiralty Court, and also points out that the judgment of the House of Lords is only to apply to a case where the owners of both ships are liable in consequence of the collision having been occasioned by those for whose acts they are answerable, that is, the master and crew. When that is the case, of course a balance must be struck, which is arrived at by dividing the damages for which they are liable, and paying over the balance to the party to whom it is due. I therefore think this case is in no way governed by the case of *The Stoomvaart Maatschappy Nederland* v. *The Peninsular and Oriental Steam Navigation Company* (*ubi sup.*), seeing that the owners of the *Hector* are relieved from all liability by reason of the wrongful act being that of the compulsory pilot.

Bowen, L.J.—I am of the same opinion. I would only add that it seems to me there is a broad distinction between sect. 54 of the Merchant Shipping Act 1862 and sect. 388 of the Merchant Shipping Act 1854. The 54th section expressly assumes a case where liability exists, and then proceeds to limit the measure of damages, whereas sect. 388 has nothing at all to do with any measure of damages, and says there shall be no liability at all. Bearing this in mind, all that has been said by the Master of the Rolls and Cotton, L.J. follows by a necessary train of logic.

Solicitors for the plaintiffs, *Stokes, Saunders,* and *Stokes.*

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

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

May 29 *and June* 12, 1883.

(Before Cave, J.)

Allen and Others v. Coltart and Co. and others. (*a*)

Bill of lading—Terms and conditions of—Delivery of goods—Liability of holder of bill of lading—Ship ordered to discharge in a particular dock on arrival—"If sufficient water"—Demurrage.

Where bills of lading are indorsed for the purpose of enabling the indorsees to sell the goods named therein, and so recoup themselves for advances made by them to the indorsers, but with no intention of further passing the property, such indorsees do not incur any liability under the Bills of Lading Act (18 & 19 *Vict.* 111).

Burdick v. Sewell (5 *Asp. Mar. Law Cas.* 79; 48 *L. T. Rep. N. S.* 705; 10 *Q. B. Div.* 313) *followed.*

Where the holder of a bill of lading, under which he is entitled to the delivery of goods on certain terms as to freight, demurrage, and taking delivery, presents that bill of lading and demands delivery of the goods, he thereby prima facie offers to perform those terms of the bill of lading on which alone the goods are deliverable to him.

Where a bill of lading introduces a condition in the charter-party to the effect that "the ship shall proceed to a port to discharge in a dock as ordered on arriving, if sufficient water, or so near thereunto as she may safely get, always afloat," it is a clause introduced in the interest of the shipowner, and restricts the generality of the power to name a dock; and while the obligation of the shipowner is to proceed to the dock named, if there is sufficient water to enter the dock when the order is given; on the other hand, if there is not then sufficient water, the ship is not bound to discharge in the dock named.

The defendants, the holders of a bill of lading, ordered a ship, on arriving, to discharge at a particular dock; at the time of giving the order, and for nearly a month afterwards, it was impracticable, owing to the state of the tides, for the ship to enter the particular dock. The ship entered another dock, but the defendants refused to accept delivery at the latter dock.

Held, that the defendants were liable for demurrage for the time beyond the lay days.

The facts and arguments appear sufficiently in the judgment.

C. Russell, Q.C. and *French* appeared for the plaintiffs.

Crompton, Q.C. and *Bigham* appeared for the defendants.

Cur. adv. vult.

June 12.—Cave, J. delivered the following judgment.—In this case, which was tried before me at Liverpool, the plaintiffs, who are shipowners, sued the defendants for delay in taking delivery of goods shipped on board the plaintiff's ship *Bridge-*

(*a*) Reported by W. P. Eversley, Esq., Barrister-at-Law.

water under a bill of lading of which the defendants were holders. On the 6th Nov. 1880 the *Bridgewater* was chartered by the plaintiffs to Messrs. Knight and Co., of Quebec, under a charter which provided that the ship should load a cargo of timber at Quebec, "and, being so loaded, shall therewith proceed to Liverpool to discharge in a dock, as ordered on arriving, if sufficient water, or so near thereunto as she may safely get, always afloat, and there deliver the same as per bills of lading." The cargo was loaded and bills of lading were signed, which provided for the delivery of the cargo at the port of Liverpool "unto the order of the shipper or his assigns, he or they paying freight for the said goods, dead freight, and demurrage, if any may be shown due, as per charter-party, conforming to all the conditions thereof, with average accustomed." The ship arrived in the Mersey on the 16th June 1881, when the defendants, Messrs. Robert Coltart and Co., who were the holders of two out of five bills of lading, ordered her to the Canada dock: the other defendants, who were the holders of the remaining three bills of lading, took no part in this order. At the time when the order was given there was not sufficient water to enable the ship to enter the Canada Dock, nor was there sufficient water for that purpose until the 14th July; and the ship went into the Morpeth dock, at Birkenhead, that being a proper course to take under the circumstances, and there remained until the 14th July, when she was taken into the Canada dock.

When the ship first arrived in the Mersey, the plaintiffs set up a claim to detain the cargo until payment of a sum claimed for the detention of the ship at Quebec for 103 days. This claim the plaintiffs afterwards abandoned and the question disputed at the trial was, whether this claim of the plaintiffs was the sole cause of the delay in the delivery, or whether there was a further delay after that claim had been abandoned, owing to any refusal by the defendants, Messrs. Coltart and Co., to take delivery elsewhere than in the Canada dock. Upon this question the jury found a verdict for the plaintiffs for 100*l.* against Messrs. Coltart and Co., and by my direction a verdict for the defendants, Dempsey and Harrison. At the trial Mr. Crompton, on behalf of Messrs. Coltart and Co., took certain points of law, which it was agreed I should reserve for further consideration, and the jury were discharged on the terms that, if the discussion of these legal points involved the determination of any question of fact which had not been submitted to the jury, I should have power to determine it. The case was heard on further consideration on the 29th May. The first contention was, that Messrs. Coltart and Co. had no property in the goods, as they only held the bill of lading to recoup themselves for advances they had made on the timber, and consequently were not liable as assignees of the bill of lading under the 18 & 19 Vict. c. 111, s. 1, and in support of this contention *Burdick* v. *Sewell* (5 Asp. Mar. Law Cas. 79; 48 L. T. Rep. N. S. 705; 10 Q. B. Div. 313) was cited. I am of opinion that this contention is well founded. I think that, under the circumstances proved at the trial, I ought to hold that the intention of Messrs. Knight and Messrs. Coltart and Co. was, that the latter should hold the bill of lading and the timber merely as a security to cover the advances they had made, and that the intention of both parties in giving and receiving the indorsed bill of lading was not to pass the property to Messrs. Coltart and Co., but to enable them to obtain possession of the timber on its arrival in Liverpool, in order that they might have the security of the timber for their advances. It appears to me, however, that the plaintiffs are entitled to maintain this action, quite independently of 18 & 19 Vict. c. 111. As far back as 1811 it was held in *Cook* v. *Taylor* (13 East. 399), that where the master of the ship had contracted by bill of lading with the shippers to deliver goods to certain persons or their assigns, he or they paying freight for the same, the demanding and taking of such goods from the master by a purchaser and assignee of the bill of lading without the freight having been paid, was evidence of a new agreement by him as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight due for the carriage of such goods, the delivery of which was only stipulated to be made to the consignees named in the bill of lading or their assigns, he or they paying freight for the said goods. It is true that the decision only extends to the payment of freight, but that is because that was the only condition of delivery in the bill of lading there under consideration; the ground of the decision is, that where goods are deliverable to the holder of a bill of lading on certain conditions being complied with, the act of demanding delivery is evidence of an offer on his part to comply with those conditions, and the delivery, accordingly, by the master is evidence of his acceptance of that offer. Thus, when the bill of lading stipulated on the face of it for the payment of demurrage, it was held that the taking of the goods under it by the indorsee, was evidence of an agreement to pay the demurrage: (*Stindt* v. *Roberts*, 5 D. & L. 460.) This case is explained by Parke, B. in *Young* v. *Moeller* (5 El. & Bl. 762), as establishing the principle that the receipt of the cargo by an indorsee of the bill of lading is evidence of an agreement to be bound by its terms whatever they may be. Thus, in *Wegener* v. *Smith* (15 C. B. 285) it was held that the acceptance of a cargo by the indorsee of the bill of lading, whereby the goods were deliverable to order "against payment of the agreed freight and other conditions as per charter-party," was a circumstance from which the jury might imply a contract on his part to pay the demurrage stipulated by the charter-party, notwithstanding his refusal at the time of receiving the goods to pay the demurrage. This case was expressly approved of and followed in *Porteus* v. *Watney* (4 Asp. Mar. Law Cas. 34; 39 L. T. Rep. N. S. 195; 3 Q. B. Div. 534).

Is there, then, evidence in this case on which I ought to find that the defendants Coltart and Co. agreed to take delivery on the terms of the bill of lading? I am of opinion that there is. It seems to me that, if the holder of a bill of lading, under which he is entitled to the delivery of goods on certain terms, presents that bill of lading and demands delivery of the goods, he thereby *primâ facie* offers to perform those terms of the bill of lading on which alone the goods are deliverable to him. According to the evidence of Mr. Castle which I do not find to be contradicted, Mr. Coltart said he had a right to name the dock according to

the charter-party, and he had named the Canada dock and wanted delivery there. He named the Canada dock, not because he refused to perform the conditions of the bill of lading, but because he conceived that under those conditions, he was entitled to name the Canada dock. It is true that at first the plaintiff refused to accept Mr. Coltart's offer to fulfil the conditions of the bill of lading and take delivery; but the jury have found in effect that afterwards the plaintiff was ready and willing to deliver on the terms of the bill of lading, and that there was a delay caused by the refusal of Messrs. Coltart to accept delivery elsewhere than in the Canada dock. Having regard to this finding of the jury, I think I ought to come to the conclusion that there was an agreement between the plaintiff and the defendants Coltart and Co. that the former should give and the latter should take delivery under the terms of the bill of lading; and that there was a delay in such delivery by reason of the defendants Coltart and Co. refusing to take delivery elsewhere than in the Canada dock.

This brings me to the second question in the cause, which is, whether under the terms of the bill of lading the defendants Coltart and Co. were justified in refusing to take delivery elsewhere than in the Canada dock. If they were, they are entitled to judgment. If they were not, then the jury have found that they have broken their agreement to take delivery on the terms of the bill of lading and have assessed the damages at 100*l*. Now, as I have said, the bill of lading introduces all the conditions of the charter-party, one of which is that the ship shall "proceed to Liverpool to discharge in a dock as ordered on arriving, if sufficient water, or so near thereunto as she may safely get, always afloat." It is important to ascertain the meaning of the words actually used, and cases decided on the construction of charter-parties containing different language are not of much assistance. The controversy in this case turns on the meaning and application of the words "if sufficient water," and one method of arriving at their force is, to consider what the construction of the charter-party would be if they were absent. The cases of *Parker* v. *Winlow* (7 El. & Bl. 942), *Bastifel* v. *Lloyd* (1 H. & C. 388), and *Dahl* v. *Nelson* (4 Asp. Mar. Law Cas. 392; 44 L. T. Rep. N. S. 381; 6 App. Cas. 38) were cited as establishing that, where a shipowner undertakes to proceed to a wharf in a tidal harbour (which cannot be reached during the neap tides), or as near as he may safely get, and the ship arrives during the low tides, the master must wait for the higher tides, on the ground that his contract is to go to the wharf if, in the ordinary course of navigation, it can be reached, and that the shipowner takes on himself the risk of delay from the ordinary course of navigation. In the cases cited the ships could have got to the wharves to which they had contracted to go at ordinary spring tides, and the delay did not exceed ten days. In this case there were but two or three days in the month when the *Bridgewater* could have got to the Canada dock, and the time between the giving the order and the first day when the vessel could get into the dock was twenty-six days. Assuming, however, for the purposes of this case, that such a delay is one arising from the ordinary course of navigation, it is necessary to ascertain the effect of the words "if sufficient water," Mr. Crompton contended that they mean "if sufficient water in the ordinary course of navigation;" or, in other words, they mean nothing more than the words "always afloat" at the end of the clause. This construction, however, would give no meaning at all to the words "if sufficient water." I can see no other way of construing them than to put on them a meaning which shall restrict what would be the meaning of the clause if they were absent. It seems to me that they are introduced in the interest of the shipowner, and restrict the generality of the power to name a dock: that the obligation of the shipowner is to proceed to the dock named if there is sufficient water to enter the dock when the order is given, and if there is not then sufficient water the ship is not bound to discharge in the dock named. It is contended that, if this is the construction, the shipowner would be justified in refusing to go to the dock if there were not sufficient water at the time, although there might be in two or three days, The answer to that, I think, is, first, that if the construction I have put on the charter-party is the only one that gives any meaning to the words "if sufficient water," it is no answer to say that that construction might in certain cases be productive of hardship on the shipper; and secondly, that as the shipowner, if he cannot get to the dock named, must go as near thereunto as he can safely get always afloat, he would find it to his advantage to exercise his rights reasonably, and rather wait two or three days than to insist on delivery being taken at some place where possibly the discharge might occupy a longer time, while the charterer on the other hand would find it to his interest, if there was a convenient dock with sufficient water, to name that dock rather than one to which the ship would not get without a delay of two or three weeks. For these reasons I am of opinion that there must be judgment for the plaintiffs against the defendants Coltart and Co. for the sum of 100*l*. assessed by the jury, with costs.

Judgment was given for the other defendants at the trial.

Solicitors for the plaintiffs, *Gregory, Rowcliffes, and Co.*, for *Hill, Dickinson, and Lightbound*, Liverpool.

Solicitors for the defendants, *W. W. Wynne and Son*, for *T. T. Martin*, Liverpool, and *Forshaw and Hawkins*, Liverpool.

June 9 and 16, 1883.

(Before NORTH, J.)

HORSLEY *v.* PRICE AND CO. (*a*)

Charter-party—Construction—"At all times of the tide"—Shipowner's duties—Demurrage.

A charter-party provided that a steamship should load a cargo of timber, and being so loaded proceed to Sharpness, "or as near thereto as she may safely get at all times of the tide and always afloat."

On the 5th Sept. 1882 the ship arrived at King Road, a place sixteen miles from Sharpness, and not within the ambit of its port, but which in the state of the tides prevailing on that day was as near thereto as she could get with her full cargo

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

always afloat. The captain offered to deliver at King Road the whole cargo, or so much as would lighten the ship enough for her to proceed to Sharpness. The charterers refused.

On the 9th Sept. the state of the tides permitted the ship to proceed, and she did proceed to Sharpness, and delivered her cargo.

Held, that, on the true construction of the charter-party, the ship was not bound to reach a spot within the ambit of the port of Sharpness, and that the insertion of the words "at all times of the tide" relieved the shipowner from any liability to wait a reasonable time for the tide, and that he was entitled to demurrage, on the basis of the voyage having terminated on the ship's arrival at the nearest place to Sharpness that she could reach with a full cargo in the state of the tides prevailing at the time of her arrival.

THIS was the further consideration of an action tried before North J. without a jury upon circuit. The following statement of the facts is taken from the judgment :—

The plaintiff was the owner of a steamship named the *Halo*, of 924 tons, and on the 26th July 1882 he chartered her to the defendants through their agents. The charter-party provided that the ship, which was then at Rouen, should proceed to Ljusne (Soderhamn), a Swedish port in the Baltic, or so near thereunto as she may safely get, and, there load always afloat from the factors of the charterers a full cargo of deals and battens, and, being so loaded, should therewith proceed to Sharpness, "or so near thereto as she may safely get at all times of the tide and always afloat," and deliver the same on payment of freight, The only other material stipulations in the charter-party were that the cargo should be discharged with all despatch, as customary, and that demurrage was to be paid at the rate of 35*l.* a day, that the cargo was to be taken from alongside the vessel at the expense of the charterers, and that demurrage was to be payable if more than six days were occupied in discharging.

On the 5th Sept. the *Halo* arrived with her cargo at King Road, an open roadstead in the Severn, opposite the mouth of the Avon, where ships can lie at anchor, but there is no wharf; it is within the ambit of the port of Bristol. Sharpness is a place fifteen or sixteen miles higher up the Severn, and is not within the port of Bristol, but is within that of Gloucester. It was admitted that King Road was the nearest place to Sharpness; that the *Halo* could reach it with her full cargo on board in the then state of the tides in the Severn at any time up to the 9th. In that state of things various communications took place between the persons acting for the ship and the charterers respectively, and the result of the evidence on that subject was, in the opinion of the court, that the ship's agents alleged that the voyage was complete, and offered to deliver the cargo at King Road, or if the charterers would lighten the vessel by taking delivery of part, then to proceed to Sharpness with the remainder, and in either case to enter the ship at Bristol; but that the defendants' agents declined that offer and refused to take delivery of any part of the cargo at King Road, or to recognise the ship at all until she arrived at Sharpness. Under these circumstances the ship was not entered at Bristol, as such entry would have been useless.

She remained at King Road till the 9th, and on that day the tides just permitted her to go on to Sharpness, and she arrived that evening.

On Monday, the 11th, she began the discharge of her cargo, which was completed on the 14th.

H. Matthews, Q.C., and *Lawrence* for the plaintiff.—The state of the tides from the 5th Sept. to the 9th prevented the ship getting to Sharpness always afloat, the plaintiff was therefore entitled to adopt the alternative and deliver the cargo as near as she could safely go with full cargo:

Shield v. *Wilkins*. 15 L. T. Rep. O. S. 117; 5 Ex. 304.

The plaintiff was ready to deliver at King Road on the 5th Sept.; for the evidence shows that the preliminary objection taken by the defendants that he had not entered the ship at Bristol and could not deliver was waived. The lay days, therefore, began to run from the 5th Sept. They referred to

Jones v. *Barkley*, 2 Doug. 684;
Nelson v. *Dahl*, 4 Asp. Mar. Law Cas. 172; 24 L. T Rep. N. S. 365; 12 Ch. Div. 568; and in H. of L. 44 L. T. Rep. N. S. 382; 4 Asp. Mar. Law Cas. 392; L. Rep. 6 App. Cas 38;
Capper v. *Wallace*, 4 Asp. Mar Law Cas. 223; 42 L. T. Rep. N. S. 130; 5 Q. B. Div. 163;
Parker v. *Winlow*, 7 E. & B. 942;
Hotham v. *The East India Co.*, 1 T. R. 638, 645.

J. J. Powell, Q.C., *Anstie*, Q.C., and *H. D. Greene* for the defendants.—The words "at all times of the tide" are new and must be construed reasonably, and as they are ambiguous, most strongly against the shipowner who inserted them. The result of the plaintiffs construction would be, that if at any point of the voyage, even in leaving the port of departure, the ship arrived at a place she could not pass at dead low water, she could claim that the voyage ended there. The captain was bound to go on if he could get on without unreasonable delay; the state of the tide is one of the ordinary risks of navigation which fall on the shipowner:

Bastifell v. *Lloyd*, 1 H. & C. 388; 31 L. J. 413, Ex.
Schilizzi v. *Derry*, 25 L. T. Rep. O. S. 66; 4 E. & B. 873;
Metcalfe v. *Britannia Iron Works Co.*, 3 Asp. Mar. Cas. 313; 35 L. T. Rep. N. S. 796; 1 Q. B. Div. 613; and 36 L. T. Rep. N. S. 451; 3 Asp. Mar. Law Cas. 407; 2 Q. B. Div. 423.

The words "at all times of the tide" cannot refer to the verb "get" which proceeds them; they mus be taken with the words "always afloat" which follow. The important point is that a ship should be always afloat when lying in port. That is what the parties meant the words "at all times of the tide" to refer to. The legal result is the same as if those words were omitted:

Hillstrom v. *Gibson*, 3 Mar. Law Cas. O. S. 362; 22 L. T. Rep. N. S. 248; 8 Sess. Cas. 3rd ser. 463.

The charter-party is made out on the ordinary printed form for the port of London, but those words are struck out, and the port of Sharpness written in. Where part of a document is on a printed form, and the rest written in by the parties, the written part must prevail:

Robertson v. *French*, 4 East, 130;
Mercantile Marine Assurance Co. v. *Titherington*. 11 L. T. Rep. N. S. 340; 34 L. J. 11, Q.B.; 5 B. & S. 765.

Even if the plaintiff had a right to terminate the voyage at King Road, his proper claim is not for demurrage. He ought to have delivered and warehoused the cargo at Bristol, or sent part

by lighters up to Sharpness, and sued us for the expenses:

Hayton v. *Irwin*, 4 Asp. Mar. Law Cas. 212; 41 L. T. Rep. N. S. 666; 5 C. P. Div. 130.

Matthews, Q.C. in reply.

Cur. adv. vult.

June 16.—NORTH, J. (after stating the facts of the case as above):—This action is brought to recover 105*l.* for three days' demurrage, upon the basis that the ship's voyage terminated, upon the true construction of the charter-party, on her arrival at King Road on the 5th, that the six lay days expired on the 11th, and that demurrage is payable for the three subsequent days. This action is defended upon the footing that the voyage was not completed until the ship's arrival at Sharpness on the 9th, when the six lay days began to run, and that the cargo having been completely discharged within the six days, no demurrage is payable. A subordinate point is raised by the pleadings that the plaintiff never was ready and willing to deliver the cargo at King road, inasmuch as no delivery could take place without the ship being first entered at Bristol, which was never done: but, as I find that the parties did offer to make such entry, and the defendant refused to accept, this defence fails. To adopt the language of Lord Mansfield in *Jones* v. *Barkley* (*ubi sup.*), "the party to perform must show that he was ready; but if the other party stops him, on the ground of an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act."

The principal question in this case is when the voyage was terminated, and when the lay days began to run, and this depends upon the true construction of the charter-party, and principally on the words "at all times of the tide." It appears from *Parker* v. *Winlow* (*ubi sup*), *Bastifell* v. *Lloyd* (*ubi sup.*) and *Nelson* v. *Dahl* (*ubi sup.*), that when the charter-party provides that a ship shall go to a harbour named, or as near thereto as she can safely get, the primary object is to get to the place named, and the alternative condition does not arise unless the cause which prevents the immediate arrival of the ship at the place named is such that it cannot be got rid of by the shipowner by reasonable means, and within a reasonable time, having regard to the nature and the object of the voyage; and further, that if the cause of detention be the arrival of the vessel during the low tides, her having to wait for the tide to increase is one of the ordinary incidents of navigation, and the shipowner must submit to the delay so occasioned. No one could say that four days' waiting for such a purpose was not reasonable, and it was not disputed that if the words "at all times of the tide" had not been found in the charter-party, the plaintiff must have borne the risk of the delay at King Road, the lay days would not have commenced till the 9th, and the defendants would have been entitled to judgment. What, then, do the words mean? The defendants cannot say that they have practically any meaning at all. Their contention is that they are not to be read in connection with the previous words, "so near thereto as she may safely get," but with the succeeding words, "and always afloat," and that the whole sentence thus read means simply that the ship is, during the progress of the voyage, and while lying at the port of discharge, to be afloat at all times of the tide, that is to say, always. There are several reasons why I cannot adopt this construction. The words in common use to provide for this purpose are "always afloat," or "lie always afloat," and I have no recollection of having ever myself seen a charter-party or policy containing the words "at all times of the tide," though the words "so near thereto as she may safely get, and lie afloat at all times of the tide" are found in the Scotch case of *Hillstrom* v. *Gibson* (*ubi sup.*); but in that case the words "and always" are not found. In the present case the usual phrase "always afloat" is found, and I am asked in effect to treat the words "at all times of the tide" as surplusage, adding nothing to the meaning of the contract. This, in my opinion, I cannot do. They are not words of usual occurrence; they are, as pointed out by Baron Channell in *Bastifell* v. *Lloyd*, essentially words put in by the shipowner, and I must give them a meaning, if possible.

In the present case there is one reason which appears to me absolutely conclusive why I should not adopt the defendant's construction, which is this, the charter-party shows that the shipowner considered it quite as important that the vessel should be always afloat at the loading port as at the port of discharge. He provides for it in both places by the use of the words "always afloat," but in speaking of the port of discharge the words, "at all times of the tide" are added; and the only conclusion I can come to is, that they are intentionally introduced there for the purpose of making provision for something not otherwise provided for, and in contemplation of some event possibly arising at the ship's destination not anticipated at the loading port. I do not forget Mr. Green's argument that, as the word "Sharpness" is written in the charter-party, and the words "or as near thereto as she may safely get" are printed, I must strike out the latter words, and read the charter-party as providing for the port of arrival being Sharpness only. If his view was sustainable, I should have to do more, for I should have also to strike out the words "at all times of the tide and always afloat," and this certainly would simplify the construction of the document; but it is sufficient to say that I cannot strike out or reject any words, but must construe the document as it stands, and must give every portion of it some signification, if possible. In my opinion, the words "at all times of the tide" were put in on purpose to make the contract different from what it would have been if they had not been inserted, in other words, to relieve the shipowner from a burden which the law would have thrown upon him in the absence of those words, viz., the risk of delay upon arrival from the state of the tides in the river to which the charterer's convenience required the ship to go. It is obvious that every day's delay must be a considerable loss to the shipowner, and this charter-party seems to me expressly designed to relieve the owner at the charterer's expense from a chance of loss, to which he was possibly awakened by the decision in *Nelson* v. *Dahl* (*ubi sup.*). The point which arose for decision in *Hillstrom* v. *Gibson* and *Capper* v. *Wallace* (*ubi sup.*), viz., whether and how far it was incumbent on the shipowner to discharge part of the cargo at King Road, and so by lightening the vessel enable her to proceed to Sharpness with the residue, does not arise here for

on the evidence I find that the plaintiff offered to adopt this course, and the defendants declined to consent to it, pointing out that it would not be of any use. It was said that a construction of the charter-party which enables the shipowner to end the voyage at a point short of Sharpness, when by a short and reasonable delay he would have been able to carry his whole cargo to that destination, is a hard and unreasonable one. But if it appears to me, as it does, the only one which gives a proper signification to the words used by the parties, I cannot reform the contract upon any such ground as suggested; and further, any argument founded upon hardship is open to this rejoinder, that it is the interest of shipowners to act reasonably towards charterers; and in the present case the plaintiff actually did more than he was bound to do, and for their accommodation, and to save them expense, did wait at King Road, and ultimately proceeded to Sharpness, and in my opinion he is only acting reasonably in claiming payment as agreed for the time so lost to him. This seems to me a far more appropriate and reasonable course for the shipowner to adopt than that which Mr. Anstie says was his only and proper one, viz., to have himself discharged the cargo at King Road at the end of the lay days, and warehoused it at Bristol, leaving the charterers to get it as they could, and then to have sued the charterers for damages from their refusal to take delivery at King Road.

It was also argued by Mr Anstie that the decisions in *Schilizzi* v. *Derry*, and *Metcalfe* v. *The Britannia Iron Works* (*ubi sup.*) show that the words "as near thereunto as she can safely get" must be construed to mean a point within the ambit of the port named as near the port itself as she can safely get. It is not for me to say after those decisions that such a construction would be adding words to the charter-party not found there, but to make those cases analogous at all to this present I should certainly have to add words to those charter-parties which were not found there, viz., some such words as "in all states of the river" in the first case, "and at all seasons of the year" in the second. In the present case I cannot accede to the contention so urged. If I were to read the words "to Sharpness, or as near thereunto within the ambit of that port" (or the port of Gloucester, if you will), "as she could safely get at all times of the tide and always afloat," I should be reading the charter-party *ut magis pereat quam valeat*, for it is not suggested that any such place exists, or that the ship ought to have gone or could have gone to any port above King Road short of Sharpness itself; and, therefore, what I am asked to do is to exclude from this charter-party all the qualifying words following the word "Sharpness," and this I cannot do. I may add that, in the case of *The Alhambra* (44 L. T. Rep. N. S. 637; 6 P. Div. 68), the contention that the words "within the ambit of the port" were to be read into a charter-party providing that a ship should go to a port, or as near thereto as she could safely get, does not seem to have occurred to the judges of the Court of Appeal, or to the experienced counsel who argued that case.

I think I have noticed all the arguments addressed to me on behalf of the defendants except one founded on the case of *Hayton* v. *Irwin* (*ubi sup.*), and that I am obliged to pass over without comment, because, probably from my own fault, I was quite unable to follow it, or to see its application to this case. Under these circumstances there will be judgment for the plaintiff for 105*l.*, and the costs will follow the event.

Solicitors for the plaintiff, *Turnbull, Tilly*, and *Mousir*.

Solicitors for the defendant, *Harvey, Oliver*, and *Capron*, for *Smith* and *Franklin*, Gloucester.

HOUSE OF LORDS.

April 27 and 30, 1883.

(Before the Lord Chancellor (Selborne), Lords Blackburn, Bramwell, and Fitzgerald.)

Cory v. Burr. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance—Barratry — Warranty "free from capture and seizure"—Proximate cause of loss—Smuggling.

In a policy of marine insurance a warranty "free from capture and seizure" applies not only to capture or seizure by belligerents, but to any seizure, even if it be the result of a barratrous act of the master.

In a time policy the ordinary perils, including "barratry of the master," were enumerated, and the subject-matter of the insurance was "warranted free from capture and seizure, and the consequences of any attempt thereat." During the continuance of the policy the ship was seized and detained by the Spanish authorities in consequence of the barratrous act of the master in smuggling.

Held (affirming the judgment of the court below), that such seizure was covered by the warrantry, and that the underwriters were not liable.

Semble (per Lords Blackburn and Bramwell), that there is no rule of insurance law that where barratry is the remote cause of a loss it is to be looked to rather than the immediate cause.

This was an appeal from a judgment of the Court of Appeal (Lord Coleridge, C.J., Brett and Cotton, L.JJ.) reported in 4 Asp. Mar. Law Cas. 559, 9 Q. B. Div. 463, and 47 L. T. Rep. N. S. 181, affirming a judgment of the Queen's Bench Division (Field and Cave, JJ.), reported in 4 Asp. Mar. Law Cas. 480, 8 Q. B. Div. 313, and 45 L. T. Rep. N. S. 713, upon a special case.

The action was brought by the appellants, the owners of the steamship *Rosslyn*, against the respondent, who was one of the underwriters of a time policy of insurance, to recover the expenses they had incurred in obtaining the release of the ship, which had been seized by the Spanish revenue authorities under circumstances which appear in the head-note in the judgment of Lord Blackburn.

Webster, Q.C. and *Tyser* (*Myburgh*, Q.C. with them) appeared for the appellants, and contended that the warranty in the policy applied only to capture or seizure by belligerents. This seizure was not within the warranty, it was the result of an act of barratry, which is one of the perils insured against, and was in fact a continuing act up to the seizure. If barratry was not within the

(a) Reported by C. E. Malden, Esq., Barrister-at-Law.

warranty, then a seizure which is the consequence of a barratrous act cannot be either. They referred to

Powell v. *Hyde*, 5 E. & B. 607;
Kleinwort v. *Shepard*, 1 E. & E. 447; 28 L. J. 147, Q. B.;
Ionides v. *Universal Marine Insurance Company*, 1 Mar. Law Cas. O. S. 353; 8 L. T. Rep. N. S. 705; 14 C. B. Rep. N. S. 259;
Vallejo v. *Wheeler*, 1 Camp. 143;
Roscow v. *Corson*, 8 Taunt. 684;
Havelock v. *Hancill*, 3 T. R. 277;
Heyman v. *Parish*, 2 Camp. 149;
Arcangelo v. *Thompson*, 2 Camp. 620;
Hahn v. *Corbett*, 2 Bing. 205;
Livie v. *Janson*, 12 East. 648;

and the following American authorities:

Waters v. *Merchants Louisville Insurance Company*, 11 Peters, 213;
American Insurance Company v. *Durham*, 12 Wend. N. Y. Rep. 463; 15 Id. 9;
Suckley v. *Delafield*, 2 Caines, 222.

Cohen, Q.C. and *Barnes*, who appeared for the respondent, were not called upon to address the House.

At the conclusion of the arguments for the appellants their Lordships gave judgment as follows:

The LORD CHANCELLOR (Selborne).—My Lords: This is an appeal from a unanimous judgment of the Court of Appeal affirming a unanimous judgment of the Queen's Bench Division; and I believe that all your Lordships agree that it is not necessary to call upon the counsel for the respondent. I am by no means sure that it might not be sufficient for me to say simply that I agree with the judgments given by Field and Cave, JJ., and also in the reasons which they gave for those judgments, and in the reasons which were given in the Court of Appeal. I will, however, make one or two observations upon the principal points on which the case depends. Everything depends upon the construction of the words of the warranty in the policy, the warranty being "free from capture and seizure, and the consequences of any attempts thereat." The first question which has been considered in the argument has been, what is the meaning of the words "capture or seizure?" "Warranted free," clearly means that the insurers are not to be liable for the things to which the warranty applies. I own that I should have hesitated, even if there had been no authority, before I should have been brought to agree with the view which was thrown out in the course of the argument, and which Brett, L.J. seemed to think might have influenced him if there had not been authority against it — I mean the view that "capture and seizure" in such a warranty must be taken to mean *primâ facie* belligerent capture and seizure only. My reasons for saying so are that the word "seizure" is used as well as the word "capture." I am disposed to agree that if the word "capture" had stood alone it might have appeared to point to a belligerent capture, but the addition of the word "seizure" is only officious, as I read the warranty, by supposing that it is to exclude that narrow construction of the word "capture," and to let in other "seizures," such as Cotton, L.J. suggests, by means of the revenue laws of a foreign state. The facts of this case show what the nature and effect of such a seizure is. The ship was seized in every sense we can put upon the word "seized." It was taken forcible possession of, and that not for a temporary purpose, not as incident to a civil remedy and the enforcement of a civil right, not as security for the performance of some duty or obligation by the owners of the ship, but it was carried into effect in order to obtain a sentence of condemnation and confiscation of the ship; and the case states that that would have been the result of the seizure which took place in the present instance if money had not been paid to redeem the ship from that confiscation and total loss. To my mind those facts are properly described by the word "seizure" in its natural sense, and unless there is something else in the policy to show that the word was meant to bear a different sense, not inclusive of such a state of facts, I should have said in the absence of authority, that they were included. But then we find that there were two authorities, which show, at all events, that these words in such a warranty cannot be restrained to a belligerent capture. In the case of *Kleinwort* v. *Shepard* (1 E. & E. 447) there was a capture by a mutinous crew—an act which might be described as piracy on the part of that crew undoubtedly, and might therefore have come within the word "pirates," as mentioned in the policy, but it was not a belligerent capture beyond all doubt. In the other case, *Powell* v. *Hyde* (5 E. & B. 607), there was no belligerent capture, there was an accident. The ship was shot at and sunk by a friendly power mistaking her for an enemy. That would certainly not be a belligerent capture, but it was regarded as a "capture" in the sense which was to be obtained from the juxtaposition of the words "capture" and "seizure," and the comparison of them with the other words which occur in the body of the policy, and show that it was meant to cover and include all sorts of losses of that kind—losses by "men-of-war," by "enemies," by "pirates," by "rovers," by "takings at sea," by "arrests, restraints, and detainments of all kings, princes, and people."

Therefore, both on authority and on principle, I reject the idea that these words "capture and seizure" can be so narrowly construed as to exclude such a seizure as that which took place in the present case. But then it is contended that if the claim might have been made upon the footing of barratry, though there was a capture or seizure, and though the capture or seizure only caused the loss, and there would have been no loss without the capture or seizure, yet that if a claim might be made upon the footing of barratry, then the warranty does not apply. I confess I have never seen how such a construction could be put upon the policy and the warranty, taken together, without leading to consequences altogether destructive of the whole operation of the warranty. Because—let me suppose the case of a belligerent capture—that capture is as much attributable to "men-of-war" or "enemies," or "taking at sea," as any seizure by reason of barratry can be attributed to barratry; indeed, more directly and immediately. Men-of-war and enemies might or might not have taken the ship, but their coming into contact with the ship, their firing at her—we may suppose their placing her in a position of jeopardy—is the first step towards "capture or seizure," which is its consequence. Then the argument, if it is sound as to barratry, would seem to be sound as to

men-of-war and enemies also, that because there is an express insurance against those things, therefore a "capture or seizure," and consequently an attack by men-of-war or enemies, is to be taken out of the warranty. I might follow it further as to "pirates," and as to "restraints and detainments of kings, princes, and people." It is quite manifest that the object of this warranty is, and must be, to except such losses, otherwise covered by the policy, and coming within its express terms, as arise out of, and are as losses occasioned by, "capture or seizure." That appears to me to be equally the case whether remotely it was occasioned by barratry or not; in fact, the remoter it is the stronger the argument that it must be the case as to barratry. Therefore, I entirely agree both in the conclusions and in the reasons of the two courts below.

Lord BLACKBURN.—My Lords: I also agree entirely in the result to which the courts below have come, and with one exception, which perhaps is not very material, I agree with their reasoning; but I think it is necessary to say that I do not at present agree in one thing said. A passage was cited from Arnould on Insurance (vol. ii., p. 838), which lays down that, while it is very true that the general rule is that in insurance you look to the proximate cause and not the remote cause, there is an exception in the case of barratry, and that the remote cause may be looked to there. I can only say that I think there is no other authority for such a rule, and, though certainly Field, J. and Brett, L.J. seemed to suppose naturally, on the authority of that statement in the text-book, that this was a rule of insurance law, I, as at present advised, do not think that it is. The very instances which are given in the passage from Arnould are instances in which the courts thought rightly or wrongly—I think rightly—that the cause of loss was barratry, and that the consequence for which the parties were entitled to be indemnified was not a remote consequence. That is all I say upon that part of the subject. I am merely putting in a protest against what may be hereafter cited as being an established principle of insurance law. For my own part I do not think that it is.

Now, proceeding from that to the rest of the case, I thoroughly agree in the judgments which were pronounced below. The policy here is in the ordinary Lombard-street form, which has been in use for more than a century, and contains the ordinary enumeration of the perils against the loss from which the underwriters undertake to indemnify the assured. Many of these, as for instance, "men-of-war." "enemies," "pirates," "rovers," and, I may add, "barratry of the master or mariners," do not in themselves necessarily occasion any loss; but when by one of these the subject assured is taken out of the control of the owners, there is a total loss by that peril, subject to be reduced if by subsequent events the assured either do get, or but for their own fault might get, their property back: (*Dean* v. *Hornby*, 3 E. & B. 180.) There are other perils, such as "takings at sea," "arrests, restraints, and detainments of princes," which from their nature involve such a taking of the subject insured out of the control of the owners. That being the case, supposing there had been no warranty at all, was there a loss here which would be one for which the underwriters would be liable? Upon the facts stated, I cannot doubt it. The definitions of barratry in the case of *Earle* v. *Rowcliffe* (8 East. 126) has never been departed from. The effect of that case is that the act of a captain, for his own purposes and to serve his own ends, engaging in a smuggling transaction which might tend, and in this case did tend, to the injury of his owners, and to the ship being seized, is barratry. The captain in the present case had done that: he had employed the ship for the purpose of carrying tobacco. When he was off the coast of Spain he caused the engines to be stopped to look out for the ship into which he had intended to tranship the tobacco in order that it might be smuggled, and he proceeded "dead slow" while he was looking out for that vessel. That was a clear case of barratry. While he was doing this "two craft came alongside with Spanish revenue officers on board, who seized the ship, and took her into Cadiz." Now, first of all, was that act of the two Spanish revenue officers in taking and seizing this ship, in itself one of those matters which would be covered by the insurance against the enumerated perils? I cannot myself doubt that it was. I cannot doubt that it came quite within the terms, "restraints and detention by a prince or people," namely, the Government of Spain, and their seizing the vessel was, I think, a thing for which the owners might have recovered under that head. But, it was also, I think, not at all a remote, but a direct and immediate consequence of the barratrous act of the captain, and it might, therefore, have been recovered for in the old times, when we were particular about pleadings under a count in which it was laid as being barratry, and the loss as being a consequence of it. The case that was referred to of *Havelock* v. *Hancill* (3 T. R. 277) is a case where the party recovered on a count for barratry, which would not in itself occasion any damage—but it was held good on demurrer—and in those days they were particular upon demurrer—the count alleging almost identically the same thing as happened here, except that the seizure was by the English Government for smuggling against the English law, instead of being by the Spanish Government for smuggling against the Spanish law. That was a case in which the underwriters were held to be resposible, and I think myself that they might also have been held responsible if the count had alleged the loss to have been occasioned by restraint of princes.

Now comes the question, Does this warranty free the underwriters from that responsibility? That is the main question. First, let us see what the warranty is. There are warranties which in effect merely say, We will define the sort of adventure in which you shall be engaged when we are to indemnify you; for example, it shall be warranted that the ship shall not sail anywhere except in the Mediterranean, or something of that sort, defining the risk which they are to encounter; and if the ship goes out beyond that distance, then it is like a deviation, she has incurred a different kind of risk from that which the underwriters undertook to bear—it has become altogether a different adventure. That is one description of warranty. But there is another which has been for a long time used, expressed in the phrase "warranted free from" particular things. I need only point, as I did in the course

of the argument, to the ordinary warranty which is printed at the foot, and has been so for more than a century, known as the memorandum, "corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins are warranted free from average under 5*l.* per cent. and all other goods; also the ship and freight are warranted free from average under 3*l.* per cent., unless general, or the ship be stranded, sunk, or burnt." That kind of warranty, "warranted free" in that sense, means that, although the general terms of the policy would have covered this, yet, considering the special riskiness of the particular matter, the underwriters, unless they are paid a premium for consenting to take it in, do not choose to be liable where the particular thing happens which they have stipulated by this warranty that they shall be warranted free from. Now here they are "warranted free from capture or seizure, and the consequences from any attempts thereat." It was argued that here they have not been warranted free from barratry. That is true; but the barratry would itself occasion no loss at all to the parties insured if it had not been that the Spanish revenue officers doing their duty—they were quite right in that respect—had come and seized the ship. The barratry of the captain in coasting along there—hovering, as we should call it, along the coast—in order that the small smuggling vessel might come and take the tobacco, would have done the insured no harm at all. The underwriters do undertake to indemnify against barratry; they do undertake to indemnify against any loss which is directly sustained in consequence of the barratry; and in this case, I think, as I said before, the seizure was as direct a consequence of the barratry as could well be. But still, as Field, J. says, it was the seizure which brought the barratry into operation. I think that is the phrase which he uses. The seizure brought the loss into existence—it was a case of seizure. Then why should it not be protected by this warranty?

The American cases which have been referred to are quite different; they are founded upon the case of *Havelock* v. *Hancill* (*ubi sup.*). There the voyage was described as "any lawful adventure," or "any lawful voyage," and if it had been not a lawful voyage it would have been like a deviation. It would have been a different kind of adventure from that of which the underwriters took the risk. The fact of its being not a lawful voyage would have made it one for which they had not engaged to be responsible. The underwriter in that case might have said: "*Non hæc in fœdera veni.* I have engaged to indemnify you against the risks of a lawful voyage, you engaged in an unlawful voyage." But the answer was: "This was not an unlawful voyage, for what was done here was to engage in a lawful voyage, and the barratry of the captain did not make that voyage unlawful." The decision has stood now for a century, and has not been quarrelled with. I should have thought that that was as plain a decision as one could wish for. The American courts upon that—with some want of logic, I cannot help thinking—drew the inference that, where there was a warranty free from seizure and capture in consequence of illicit trading they were to hold that it was to be an illicit trading to which the insured was a party. I think that is what it comes to, or at least to which the owner of the ship was a party. I think that it is an illogical consequence, and I do not approve of the reasoning by which it was come to. But it is sufficient to say that it has nothing to do with the present case. There was no illicit trading here, there was nothing but the act of barratry. There are no such words used here as "warranted free from capture or seizure in consequence of illicit trading," if that would have made any difference. The question then is reduced, as it seems to me, to this: When the whole loss was occasioned by that which was certainly a "seizure," it is within the meaning of the warranty? I say certainly it is. If it were perfectly *res integra* there would be something to be said in favour of holding that "capture" and "seizure" ought to be limited, or might be supposed to be limited, to belligerent risks—risks in time of war—although I think that there would be a great deal to be said against it. But the point is not new. In *Kleinwort* v. *Shepard* (*ubi sup.*) the decision was this: the seizure was one which was in no wise connected with the acts of foreign princes or their subjects, it being the act of coolies, who were not pirates in the sense of being assailing thieves, for they were lawfully in the ship; they were passengers who rose in mutiny; they were not barratrous, for they were not the captain nor the crew, they were neither the one nor the other; but it had been held in the case of *Naylor* v. *Palmer* (10 Ex. 382), which I argued myself, that whether they were pirates or not, it was quite clear that they were *ejusdem generis*, and consequently they came within the words "and other perils." It was at least another peril which was clearly covered. Now in the case of *Kleinwort* v. *Shepard* (*ubi sup.*) it was decided that a seizure of that sort was a seizure within the perils which were warranted against. That is in fact a much stronger decision than the present. All that is necessary to say in the present case is that the warranty is against a seizure by a power. I do not say at all that *Kleinwort* v. *Shepard* (*ubi sup.*) is not perfectly right. I only say that it goes further than is required here, and I also say that I quite agree with what was thrown out in the American case, and again to-day, that, when a decision has been come to and acted upon, which has stood for thirty years, as to the construction of such words as these, it requires some very strong reasoning to justify one in saying that we should now hold that where people have used these identical words, knowing the meaning which has been previously put upon them by a judicial decision, they do not mean the same thing. Consequently, I think that strong reasoning will be required for reversing the case of *Kleinwort* v. *Shepard* (*ubi sup.*). But it is enough to say that this was a seizure, being the act of the power which made that seizure, and therefore that the court below are perfectly right in the conclusion at which they have arrived.

Lord BRAMWELL.—My Lords: I am of the same opinion. What was in contemplation by the parties in this case may be very doubtful; and I should have thought that it was very doubtful also what was the meaning of these words originally; but a meaning has been put upon them, and, that meaning having been acted upon, I think it is desirable that it should be abided by, because undoubtedly people who make contracts

make them in reference to the well-understood meaning of such words, and if that meaning is an inconvenient one they can alter the words. I think that the meaning of the words which are here to be construed is now plain. The warranty is a warranty "free from capture and seizure;" it is perfectly general in its terms. If the vessel has been captured or seized, and a loss has been thereby occasioned, it is within the warranty. Now it is said here that the loss was not from the seizure, but that in truth it was from the barratry, and it is ingeniously suggested that the seizure was "an intermediate step." But it was the ultimate and final step which occasioned the loss, and but for the payment of money the ship would have been confiscated, which would have been merely a following up of the seizure. One might put this case: Supposing the ship had been confiscated and sold, and then the Spanish Government, upon some representations made to them, had returned a portion of the proceeds, would there not have been a loss by seizure? There would. And is it not equally so now? To my mind that point is really not tenable. But then it is said that when barratry is the *causa remota* of the loss it nevertheless may be relied upon without reference to the *causa proxima*. Now I will say nothing as to any general rule, except to express a doubt as to whether what Brett, L.J. said about that matter is perfectly correct. I have a misgiving about it, but I do not consider it necessary to determine anything of that sort here. It is possible that in some cases where there has been barratry, and a consequent loss within the perils insured against, you might call that a loss by barratry. In my opinion you cannot do so in this case. Call it an ultimate loss if you like. That ultimate loss was by a seizure, and that was warranted against.

Lord FITZGERALD.—My Lords: I entirely agree. The question arises on the proper interpretation of the limitation of the liability of the insurers contained in the clause, "warranted free from capture and seizure, and of any attempt thereat." This warranty must be taken to apply to some of the risks previously enumerated, and to limit the otherwise unlimited liability of the insurers. On looking back to the enumeration of the perils which the policy was intended to cover, we find some the generality of which may be the subjects of the limitations expressed in the warranty. For example, "arrests, restraints, and detainments of all kings, princes, and peoples of what nation, condition, or quality soever; barratry of the master and mariners, and all other perils, losses, and misfortunes." The contention of the plaintiffs is that the warranty does not apply where, as in the case before us, the seizure has been the immediate consequence of the barratrous act of the master, and, on the other hand, the defendant insists on the literal construction of the warranty as embracing all cases in which the ship has been taken forcible possession of by superior power or authority. If the latter construction is to prevail, then the defendant contends that, the seizure having been the immediate proximate cause of the loss, he, the insurer, is exempt from liability. The question seems a simple one; but, if we depart from the literal construction, we may be led into complications and metaphysical refinements from which mercantile contracts ought, as far as possible, to be free. If the question had come before us unfettered by authority, and if the decision in the court below had been in favour of the plaintiffs, I should have been content. But I have an invincible objection to uncertainty in the interpretation of mercantile contracts. The literal interpretation of the exemption would embrace all cases of capture or seizure which would otherwise have been within the perils insured against, and so far as the authorities have gone they are in favour of the defendant's contention. I allude to *Powell* v. *Hyde* and *Kleinwort* v. *Shepard*, which have been already commented upon. In the construction of this warranty it is observable that capture and seizure do not mean the same thing. "Capture" would seem properly to include every act of seizing or taking by an enemy or belligerent. "Seizure" seems to be a larger term than "capture," and goes beyond it, and may reasonably be interpreted to embrace every act of taking forcible possession, either by a lawful authority, or by overpowering force. I am quite satisfied with, and adopt, the interpretation put upon those words in the judgments of the courts below, following the views put forward in the cases of *Powell* v. *Hyde* and *Kleinwort* v. *Shepard* (*ubi sup.*). It was urged upon us that it was unreasonable and unjust as applied to the present case. It appears to me, on the contrary, that the warranty, as now interpreted, was a reasonable stipulation for the insurers to make.

I find the following to be the definition of "barratry" given by Willes, J. in *Lockyer* v. *Offley* (1 T. R. 252): "Barratry is every species of fraud or knaverey of the master by which the freighters or owners are injured." Now it is obvious with so loose a definition as that, there may be instances of barratry which may be either harmless, or effect but a small loss; for instance a deviation, or wilful delay. But barratry may also consist in a very small matter, over which the owners or freighters have no control, the effects or consequences of which may be very serious, and I can well understand the prudence of insurers stipulating, "We will not be responsible for seizure caused by some barratrous act of the master or crew, rendering not only the ship, but also the cargo, liable to confiscation." If such be the interpretation which is to be put upon the contract, I ask the question, By what was the loss occasioned? I apprehend that there can be but one answer to this question, namely, that the loss arose from the seizure. There was no loss occasioned by the act of barratry. The barratry created a liability to forfeiture or confiscation, but might in itself be quite harmless. But the seizure which was the effective act toward confiscation, and the direct and immediate cause of the loss, was not because the act of the master was an act of barratry, but that it was a violation of the revenue laws of Spain. Now in the same clause of the warranty the words are "warranted free from capture and the seizure, and the consequences of any attempt thereat." If in place of the Spanish cruiser having seized their vessel she had failed to seize her, but in the attempt had sunk the vessel, I should have put the same question, "What caused the loss?" and the proper answer would have been: "Not the barratrous act of the captain, but the sinking of the vessel by the Spanish cruiser." On these grounds I agree

that the judgment of the court below should be affirmed.

Order appealed from affirmed; and appeal dismissed with costs.

Solicitor for the appellants, *H. C. Coote*, for *H. A. Adamson*, North Shields.

Solicitors for the respondent, *Waltons, Bubb*, and *Walton*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(Present: Sir ROBERT COLLIER, Sir BARNES PEACOCK, Sir JAMES HANNEN, Sir RICHARD COUCH, and Sir ARTHUR HOBHOUSE.)

May 31, *June* 1, 2, *and* 5, 1883.

SCICLUNA AND ANOTHER *v.* J. P. STEVENSON; THE RHONDDA. (*a*)

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF MALTA.

Damage—Collision—Narrow channel—Current—Special circumstances—Crossing steamships—Stopping and reversing—Regulations for Preventing Collisions at Sea, Arts. 16, 18, 21, 22, 23, *and* 24.

The Straits of Messina between Ganzirri and Faro Point on the Sicilian shore and Pezzo Point and Alta Fiumara on the Calabrian shore are a little less than two miles in width, and are a narrow channel within the meaning of art. 21 *of the Regulations for Preventing Collisions at Sea.*

Where one steamship is in such a position with regard to another vessel that it is her duty, under art. 16 (*or, semble, art.* 17), *to keep out of the way of the latter, it is not obligatory on her to ease or stop and reverse her engines under art.* 18, *so long as there is no reason to suppose that she will not keep out of the way under the ordinary action of the helm.*

The R., on rounding Faro Point on her starboard side, at a distance of half a mile, into the Straits of Messina, observed the A.-L. at a distance of about half a mile and about a point on the starboard bow of the R. The A.-L., being also on the Sicilian side of the Straits of Messina, and having that shore on her port side, the R. at once put her helm hard-a-port, but failed to answer her helm in consequence of a strong current. She then blew her whistle and stopped and reversed her engines full speed. The A.-L. did not ease or stop her engines, but put her helm hard-a-port, and was struck by the R. nearly amidships and sunk. In an action brought by the A.-L. against the R.:

Held, that the place in question was a narrow channel within the meaning of art. 21; *that the A.-L. was to blame for being on the wrong side of the channel; that the circumstances were not such as to justify the A.-L., under arts.* 23 *and* 24, *for a breach of the arts.* 18 *and* 22; *that the R. was not to blame for not having eased or stopped and reversed on first seeing the A.-L., she not being under art.* 18, *so long as there was no reason to suppose that she would not answer her helm and so clear the A.-L.* (*a*)

THIS was an appeal from the decision of Sir A. Dingli, K.C.M.G., judge of the Vice-Admiralty Court of Malta, by which, on the 23rd June 1882, he had found the French steamer *Alsace-Lorraine* alone to blame for a collision which took place in the Straits of Messina about two a.m. on the 30th Nov. 1881, between that vessel and the British steamer *Rhondda*, and in consequence of which the *Alsace-Lorraine*, together with her cargo, sank and became a total loss.

At the time of the collision the *Alsace-Lorraine*, a screw-steamer of 375 tons burthen and with engines of 75 horse-power, was on a voyage from Brindisi to Cette with a cargo of wine; and the *Rhondda*, a screw-steamer of 638 tons burthen and propelled by engines of 98 horse-power was on a voyage from Marseilles to Samos, in ballast.

The weather was fine but without any moon, and the wind was very light from the S.E.

The action was brought by the underwriters of the *Alsace-Lorraine* and her cargo, and they alleged that the *Alsace-Lorraine* was navigating the straits, keeping on the Calabrian shore, which was on her starboard side, going about six knots an hour, and that the *Rhondda*, whose masthead light had been observed over the point of the Faro (the extreme point of Sicily), was observed to round that point, and to be steering a course about S.W. ¼ S.; that the *Alsace-Lorraine*, whose course had on sighting the masthead light of the *Rhondda* over the land been altered a little to starboard, had got the *Rhondda* about one or one and a half points on her (the *Alsace-Lorraine's*) port bow, and that under these circumstances the *Rhondda* was observed to be "bearing almost directly upon the *Alsace-Lorraine*, and to avoid a collision the helm of the latter vessel was put hard-a-port, but notwithstanding this step, the *Rhondda*, which did nothing apparently to avoid a collision, ran into the *Alsace-Lorraine*, ... striking the *Alsace-Lorraine* almost amidships with such violence that she sank in deep water in about twelve or fifteen minutes after collision, with the cargo of wine on board of her."

No special allegation was made in the libel of

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs. Barristers-at-Law.

(*a*) The following are the Articles of the Regulations for Preventing Collisions at Sea (1880), which were discussed in the case:

Art. 16. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

Art. 18. Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse if necessary.

Art. 21. In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship.

Art. 22. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course.

Art. 23. In obeying and construing these rules due regard shall be had to all dangers of navigation, and to any special circumstance which may render a departure from the above rules necessary in order to avoid immediate danger.

Art. 24. 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 the neglect of any precautions which may be required by the ordinary practice of seamen or by the special circumstances of the case.

the plaintiffs as to any act of negligence on the part of the *Rhondda* except the foregoing; but the collision was alleged to have been "imputable solely to the master and crew of the *Rhondda*, and to the negligent and improper navigation of that vessel in the Straits of Messina," and to have been "in no way imputable to the *Alsace-Lorraine* or any person on board of her, who all did the utmost in their power to avoid or prevent the said collision."

The defendants, who made no counter-claim for the damage sustained by them in the collision, alleged that, on entering the Straits of Messina, about half a mile from the Faro Light, which was on the starboard side of the *Rhondda*, and when that light was bearing about N.W. ½ N., they suddenly saw the masthead and green lights of the *Alsace-Lorraine* about half a mile off, and about one point on the *Rhondda's* starboard bow, "that the helm of the *Rhondda* was at once put hard-a-port, but that she failed to answer her helm, owing to the strong current, and that the engines were at once stopped and reversed full speed, and the steam-whistle blown, but that about three minutes afterwards a collision ensued. . . the *Rhondda's* starboard bow coming in contact with the port-side of the *Alsace-Lorraine* about amidships, and considerable damage being done to the *Rhondda*." It was also alleged on the part of the *Rhondda* that "the *Alsace-Lorraine* did not keep to the side of the Straits of Messina which lay on her starboard side" (art. 21), and denied that the collision was due to any negligence or default of those on board the *Rhondda*, and alleged that it "was entirely caused by the improper navigation of the *Alsace-Lorraine*, and by the neglect and default of those on board the latter vessel, who failed to comply with the provisions contained in art. 21 of the Regulations for Preventing Collisions at Sea."

The case was heard on documentary proofs brought in by the parties, and on evidence given *viva voce*, the proctors of both parties agreeing in accordance with a precedent in the court, that professional witnesses, Staff Commander A. de G. Sutton, R.N., H.M.S. *Inflexible*, for the plaintiffs, and Staff Commander G. K. Moore, R.N., H.M.S. *Thunderer*, for the defendants, should be produced before the court for examination, and that the judge might freely confer with them also in chambers. Many witnesses locally acquainted with the Straits of Messina, and of whom several were fishing in the straits at the time of the collision, were called by both sides, to prove on which side of the straits the vessels were navigating previous to and at the time of the collision, and also as to the direction and force and existence of the current at the time and place; and on these three points there was a great conflict of testimony.

A great number of questions were asked both by the court and by the parties of the professional witnesses with respect to the existence and effect of a current on a ship, and also as to the manœuvres performed by both ships.

On the 23rd June the learned Judge delivered a judgment dealing at great length with the evidence, but finding that a channel of a width of 1 mile 1600 yards (the average width of the straits between Ganzirri and Faro on one—the Sicilian—side and Pezzo Point and Alta Fiumara on the other, the Calabrian) was unquestionably a narrow channel within the meaning of the rule. That the *Rhondda* met the *Alsace-Lorraine* on the side of the Straits which lay on the former vessel's starboard side. That at the moment when the *Rhondda* ported her helm to avoid meeting the *Alsace-Lorraine* there was a current running northwards, and that there was nothing to lead to a belief that there was not also a counter-current which produced the whirls shown on the chart by scrolls. That there was nothing to exclude the possibility, or even probability, that the *Rhondda* might have had her bow in one eddy and her stern in another at the time of porting her helm, and that her answering her helm in that case would be retarded. That there was no reason for not giving credit to the evidence that the helm of the *Rhondda* was ported, but the ship did not answer owing to a current which took her on her starboard bow. That when the captain of the *Rhondda* gave the order for porting he had no reason to suspect that the ship would not obey the helm, and . . . that if that manœuvre had been successful the collision would have been avoided. That if between the order for porting and the order for stopping and reversing the engines a minute elapsed . . . no procrastination could be imputed to Captain Stevenson, or to any person on board the *Rhondda*; and that, seeing the danger of a collision, he, Captain Stevenson, took all the precautions in his power to avoid it. That the *Alsace-Lorraine* was not justified in porting, as the vessels were not meeting end on within the meaning of rule 15, nor was the circumstance that the *Rhondda* did not come to starboard a special circumstance such as within articles 23 and 24 to excuse the *Alsace-Lorraine* for porting. That the *Alsace-Lorraine* was approaching the other ship in a manner to involve a risk of collision, and nevertheless she did not slacken her speed or reverse her engines. That the plaintiffs had not made out their case, and that they had failed in proof of the libel by them given: and he dismissed the defendants from the suit and condemned the plaintiffs in costs.

From this judgment the plaintiffs appealed, alleging in their case the following reasons for its reversal:

(1) Because it appears by the evidence that the *Alsace-Lorraine* was being navigated with all due and proper care in a proper and seamanlike manner, and in accordance with the rules of navigation.

(2) Because the judgment of the court below is wrong in ruling that the *Alsace-Lorraine* infringed art. 21 of the Regulations for Preventing Collisions at Sea.

(3) Because it appears by the evidence that the *Rhondda* was navigated in a careless manner, and without a proper look-out being kept on board her, and without taking proper measures with helm or engines for rounding into the straits.

(4) Because the *Rhondda* did not keep out of the way of the *Alsace-Lorraine*, as it was her duty to do.

(5) Because the *Rhondda* was not prevented from keeping out of the way of the *Alsace-Lorraine* by any current as alleged.

(6) Because the *Alsace-Lorraine* was right in porting when and as she did.

(7) Because it was not the duty of the *Alsace-Lorraine* to starboard.

The respondent, on the other hand, maintained in his case that the judgment of the court below was right, and that it should be affirmed and the appeal dismissed with costs for the following reasons:

(1) Because the manœuvres executed and attempted by

those on board the *Rhondda* were the right and proper manœuvres.

(2) Because the *Alsace-Lorraine* was seen as soon as it was possible to see her in the position in which she was, and after seeing her nothing was neglected on board the *Rhondda* to prevent the collision.

(3) Because the *Rhondda* was navigated in a proper manner, and on that side of the fairway or mid-channel of the Straits of Messina which lay on her starboard side, the said straits being a narrow channel within the meaning of art. 21 of the International Regulations for Preventing Collisions at Sea.

(4) Because so far as the *Rhondda* was concerned the collision was an inevitable accident.

(5) Because the *Alsace-Lorraine* was navigated in an improper manner, and was not kept on that side of the fairway or mid-channel of the Straits of Messina which lay on her starboard side, the said Straits of Messina being a narrow channel within the meaning of art. 21 of the International Regulations for Preventing Collisions at Sea, and it being at the time safe and practicable for the *Alsace-Lorraine* to keep to that side of the fairway or mid-channel which lay on her starboard side.

(6) Because there was no proper look-out kept on board the *Alsace-Lorraine*, in consequence of which the *Rhondda* was not seen in proper time, and the manœuvres executed and attempted on board the *Rhondda* were not observed as they should have been.

(7) Because those on board the *Alsace-Lorraine* improperly neglected to keep their course.

(8) Because the helm of the *Alsace-Lorraine* was improperly ported when the *Rhondda* was observed before the collision.

(9) Because the helm of the *Alsace-Lorraine* was improperly put hard-a-port and her course directed across the bow of the *Rhondda* before the collision.

(10) Because, when the *Alsace-Lorraine* was approaching the *Rhondda* in such a manner as to involve risk of collision, those on board of her failed to slacken her speed, or to stop and reverse their engines.

(11) Because the said collision and the damages consequent thereon were caused wholly by neglect or default of the *Alsace-Lorraine*, or some person or persons on board of her, and were not caused or contributed to by the *Rhondda*, or by any person or persons on board of her.

The appeal came on for hearing before the Judicial Committee of the Privy Council, assisted by nautical assessors, on the 31st May, and was heard on that day and on the 1st, 2nd, and 5th June.

Russell, Q.C. and Dr. *Phillimore* (with them Dr. *Stubbs*) for the appellants.—The judgment of the court below is wrong, and must be reversed. The learned judge found the *Alsace-Lorraine* to blame on three grounds: (1) Because the place where the collision happened is, he says, a narrow channel, and because the *Alsace-Lorraine* was on the Sicilian side of it. This consists first of a misapprehension of the scope of art. 21, and secondly of a view of the position of the *Alsace-Lorraine* which is not borne out by the evidence. Art. 21 was never meant to apply to a sea passage nearly two miles wide, and in which there is room for any probable number of ships to pass and cross one another. A provision similar in terms to this was contained in the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 297. That section was repealed by the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63); but whilst it was in force, in no instance is there a case reported where it was held to apply to a channel like this. It was, and this article is, meant to apply to the crowded navigation of narrow rivers:

The Panther, 1 Spinks, 31.

The rule is in fact meant to apply only to those channels which are so narrow as to render the performance of the ordinary manœuvres for vessels passing and crossing each other dangerous, which certainly is not the case in a place two miles broad. But even if this were to be held a narrow channel, the evidence does not support the view that the *Alsace-Lorraine* was nearer to the Sicilian than the Calabrian coast. It will be found, on carefully weighing the evidence and the answers of the experts, that she was, for practical purposes, near mid-channel. The second ground on which the learned judge finds the *Alsace-Lorraine* to blame is for porting her helm; but, if it was right for the *Rhondda* to port so as to pass port side to port side, we had a right to expect she would port, as indeed she had been doing, to come round the Faro Point, and if we were justified in that expectation, our porting could not do any harm, but would facilitate her manœuvre. The third ground of blame alleged is that we did not stop and reverse. The answer is, that we were not bound to stop and reverse at a time when by the exercise of ordinary care and skill the *Rhondda* could have avoided us. So long as this was the case we were not approaching so as to involve risk of collision, and when we find that by the neglect of the *Rhondda* so to manœuvre with her helm as to keep out of our way, as it was her duty to do, and see that vessel at a few ship's lengths off coming straight down on us without altering her course, we are put by her action in a position such as to render a departure from the rules not only justifiable, but necessary, under art. 23. Had we stopped our vessel right in the way of the approaching ship, it would at once have rendered a collision absolutely inevitable; the only way to attempt to avoid it then was to go on full speed, so as, if possible, to get clear before she reached us. The *Alsace-Lorraine* was not therefore to blame on any of the grounds alleged against her. The judge was also wrong in finding the *Rhondda* not to blame. If the current exists, a person in charge of a ship should make himself acquainted with its direction and force, and if he is not acquainted, especially in a place like this, where no doubt at certain times the currents are very violent, he should take a pilot who does know about them. It amounts to this, if the current existed the master of the *Rhondda* negligently omitted to make himself acquainted with it and to take measures to guard against its effects. If it did not exist, he has no excuse for not keeping out of our way. There can be no doubt that under art. 16 he was bound to keep out of the way. The real cause of this collision, however, was the bad look-out on board the *Rhondda*. There can be no excuse for her not having seen the *Alsace-Lorraine* until the *Rhondda* had actually come round Faro Point and straightened her course to S.W., at a distance of half a mile from the land—a distance which, the joint speed of the two vessels being fifteen miles an hour, would be traversed in two minutes, a space of time in which the use of the helm alone could not avoid a collision. She was also to blame because, when she did discover us at that short distance in a position in which it was her duty under art. 16 to keep out of the way, she did not at once stop and reverse. The non-observance by the *Alsace-Lorraine* of arts. 18 and 22 was justified under the circumstances by art. 23, and within the principle on which, in the case of *The William Frederick* v. *The Byfoged*

Christensen (4 App. Cas. P. C. 669; 4 Asp. Mar. Law Cas. 201; 41 L. T. Rep. N. S. 535), the Judicial Committee held that the *William Frederick* was justified in luffing, the *Byfoged Christensen* pertinaciously refusing to keep out of the way; and the conduct of the *Rhondda*, even assuming the current to have operated as alleged, is condemned by the case of *The Khedive* (5 App. Cas. H. L. 876; 4 Asp. Mar. Law Cas. 360; 43 L. T. Rep. N. S. 610), as in the relative positions of the vessels at half a mile distant she was bound to keep out of the way, by stopping and reversing, there being already danger of collision apparent to her, though not to the *Alsace-Lorraine*, on whom the onus of getting out of the way did not lie, and who had a right to expect the *Rhondda* to perform her duty.

At the close of the appellants' argument, and after consultation, the Committee informed the respondents' counsel that they were of opinion that the *Alsace-Lorraine* was to blame, and directed them to confine their arguments to the question whether the *Rhondda* was not also to blame for not seeing the *Alsace-Lorraine* sooner, and for her manœuvres after seeing that vessel, especially in not stopping and reversing at an earlier period.

Webster, Q.C. and Dr. *Raikes* for the respondent.—Those on board the *Rhondda* could not have seen the *Alsace-Lorraine* at an earlier period than they did. It is impossible to see the side lights over the land, and the *Alsace-Lorraine* being a small vessel, her masthead light would be at a very small elevation; and therefore, even if the masthead light of the *Rhondda*, which was a vessel nearly double her size, was ever visible to the *Alsace-Lorraine* over the point, it does not follow that the masthead light of the *Alsace-Lorraine* was ever visible to the *Rhondda*. As soon as the point was cleared the *Alsace-Lorraine* was seen in shore and coming out from the shore, her lights being mixed with the shore lights on the Sicilian coast. The *Rhondda* would have no reason to expect a steamer coming towards her on that coast in breach of the regulations, and therefore one white light amongst many, which would, as the *Rhondda* came round the point, be altering their relative position to each other as seen from that vessel, would not particularly draw attention; had the light been that of a sailing ship lawfully there, there would have been no difficulty in clearing her, as there being little or no wind, she would be making no way through the water, and the least movement of the helm of the *Rhondda* would have cleared her. As soon as the lights were made out at a distance, which must have been more than half a mile, although the *Alsace-Lorraine* was already in the wrong for being where she was, the *Rhondda* acted in the right way, having a red light one or one and a half points on her starboard bow. She had no reason to suppose that she would not alter one point under an hard-a-port helm in the distance of over half a mile which intervened between her and the *Alsace-Lorraine*; and therefore, whilst there was no reason to suppose that she would not answer her port helm, she was not approaching the *Alsace-Lorraine* so as to involve risk of collision within the meaning of art. 18. That article did not apply until it became apparent that the ship from some cause did not answer her helm. When that was apparent it became at once evident that there was danger of collision, and then it became the duty of the *Rhondda* to stop and reverse, which she did. *The Khedive* (4 Asp. Mar. Law Cas. 360; 5 App. Cas. 876; 43 L. T. Rep. N. S. 610) is really a direct authority in our favour. It is not held there, or in any other case, that the duty to stop and reverse arises whilst there is no reason to suppose that the ships will not clear by the ordinary manœuvres of the helm, because, so long as that is the case, there is no "danger of collision." It is only when from any cause the collision cannot in all human probability be avoided by the action of the helm, that the duty arises to stop and reverse, and as soon as that duty arose it was performed. Had the *Alsace-Lorraine* stopped and reversed when we did, and when our whistle gave her notice of something unusual, the collision could not have occurred, and therefore no blame can be attached to the *Rhondda*, the existence and direction of the current at that particular point being unknown. No inference adverse to the *Rhondda* can be drawn from the fact that she has not counter-claimed or brought a cross-action for her damage, for the *Alsace-Lorraine* having sunk, there was no *res* to arrest and sue, and therefore the defendants would have got no fruit from a judgment in their favour, the owners of the *Alsace-Lorraine* being French, and having no property in Malta or this kingdom.

Dr. *Phillimore* in reply.—In addition to the cases mentioned above, reference was made in the argument to the case of *The Jesmond and Earl of Elgin* (L. Rep. 4 P.C. 1; 1 Asp. Mar. Law Cas. 150; 25 L. T. Rep. N. S. 514).

June 4.—The judgment of the Committee was delivered by

Sir J. HANNEN.—The first question to be considered in this case is, whether or not the Strait of Messina is a narrow channel which makes it the duty of a vessel passing along it to keep to its own starboard side. Their Lordships do not propose to define what is a narrow channel, or to lay down what particular width or length will constitute it. It is sufficient to say that they are of opinion that this is a narrow channel within the meaning of art. 21 of the Regulations for Preventing Collisions at Sea allowed by Her Majesty in Council on the 14th Aug. 1879, and that they concur in the opinion which the learned judge in the court below has expressed upon that point. It has not been suggested that there were any circumstances which would excuse the departure from the rule if it be applicable. But the contention in the court below was that there had not been an infringement. The whole case evidently proceeded upon a consciousness on the part of those on board the *Alsace-Lorraine*, that to establish that they were not to blame, they had to prove that she was keeping along the Calabrian coast; but their Lordships concur with the learned judge of the court in Malta that this contention has not been established, and that the evidence is really overwhelming that the course of the *Alsace-Lorraine* was along the Sicilian shore, and therefore that she infringed the rule contained in art. 21, without which infringement on her part the accident could not have happened. It follows, therefore, that the onus is upon the *Alsace-Lorraine* to prove that those on board the *Rhondda* were wholly or partly to blame.

It was contended on behalf of the appellants that, if the *Rhondda* had kept a good look-out, she ought to have seen the *Alsace-Lorraine* sooner than she did, and that if she had done so the accident might have been avoided; and they complain that the learned judge in the court below did not deal with this point; but it does not appear that it was ever insisted upon in the court below. If the appellants had intended to raise that point, questions should have been put, and an opportunity given at the trial to the opposite party to remove any doubt, if any doubt existed upon the subject. Their Lordships are of opinion that the fact that the *Alsace-Lorraine* was not seen by the *Rhondda* across the neck of land to the west of Faro may be dismissed from consideration, as it is probable that when the *Alsace-Lorraine* had passed over from Pezzo Point to Sicily and was close under the shore it would be impossible that its lights should be seen by the *Rhondda*. It is, however, admitted that the *Rhondda* did not see the *Alsace-Lorraine* until she herself had rounded or was round—the phrases differ—the Faro Point; and the question is, whether there was negligence on her part in this respect. Questions have arisen as to the exact position of the two vessels at the time when they first saw one another. Both the captain and the man at the helm of the *Rhondda* speak of the white light of the *Alsace-Lorraine* being mixed with the lights of Messina; and if a line be drawn from some point of that considerable tract which may be included in the general name of Messina—there may be lights along a considerable extent of coast, and we do not know what particular lights they refer to—that would bring the *Rhondda* to a point somewhat to the north-west of the position in which she is roughly indicated to be by the drawing upon the chart. That, however, is so entirely out of any proportion that it affords but a very uncertain guide. There can be no doubt that the *Rhondda* was coming round under a port helm, otherwise she could not have got into the position in which the witnesses for the *Alsace-Lorraine* allege she was; and, assuming her to be on a line drawn from Messina past the coast and beyond Capo di Faro at half a mile outside the Faro light, as it is said she was, and putting the *Alsace-Lorraine* at the same distance, not exceeding half a mile, on the other side, it would make them a mile distant at the time when they first sighted one another. That distance would not be traversed in a straight line, and therefore it would give more than a mile to be travelled; but, extending it even to a mile and a half, it does not give a space which would take any very considerable time for these vessels to cover, having regard to the speed at which they were going, one of them at the rate of nine miles an hour and the other six. Now here is the positive statement of the captain of the *Rhondda*, supported by the evidence of the helmsman and of the chief mate, that, as soon as the *Alsace-Lorraine* was seen emerging from the Faro Point, the process of porting the helm of the *Rhondda* was ordered, and was carried out. The explanation given by Stevenson, the captain, is contained in these words: he says, "she appeared to be coming out from the land, as she was too close to the land of Sicily." Silly, the helmsman, is asked, "How was it you did not see the other steamers' lights before? (A.) Because, I suppose, she was steaming very close to the Sicily coast. We did not see her light before we rounded the Faro Point." That is the evidence given by them, which was accepted by the learned judge below. He found that as soon as the *Alsace-Lorraine* became visible to the *Rhondda* the order to port the helm was given, and that it was carried out; and their Lordships are not in a position to hold that he arrived at an incorrect conclusion. Now, if that was the order given, and if that order was so carried out, was it a wrong manœuvre? It was not suggested in the court below that it was a wrong manœuvre. The case presented and maintained by Lelièvre was, that the accident happened because the *Rhondda* did not continue to port her helm. That is the contention. He says that she was under a port helm, that she ought to have continued so, and that if she had been so, there would have been no accident. Now, in answer to the questions which were put to the experts, and which form part of the record, they say, in the state of things which existed, or appeared to exist, when the *Rhondda* saw the *Alsace-Lorraine* coming out from the Faro Point and showing her red light, it was the duty of the *Rhondda* to keep out of the way; and that of course is obvious under the rule. They further say that there was time to do it. So no doubt there would have been unless some obstacle had arisen. Further they say that she might have reversed in three minutes and in the distance of a mile. That will be dealt with presently. Then they say that at the time when she discovered, if it be true that she did discover, that she was not obeying her helm, it would have been impossible for the collision to be avoided by the *Rhondda* going round to her own port side; but that it was the duty of the *Rhondda*, when a risk of collision arose, to slacken or stop and reverse. The contention on the part of the *Rhondda* is that this is precisely what she did; and their Lordships are of opinion that this is established.

The next question is whether or not the *Rhondda* failed by her own fault to keep out of the way of the *Alsace-Lorraine* under the 16th article; and that, no doubt, was the substantial question as to the conduct of the *Rhondda* which was contested in the court below. Lelièvre says, "As soon as the *Rhondda* saw our manœuvre she ought to have starboarded, that is, gone to the starboard and passed astern. If the *Rhondda* had continued her way without deviation she would have avoided the *Alsace-Lorraine*, but she made a movement to port, and that caused the collision." He goes so far as to say, that not merely was there a cessation to keep the course round, but that she actually went the other way, which might be the effect of the current, if in fact it was strong enough to push her in that direction, The evidence of Stevenson, Silly, Bray, and Hookey shows that the order to hard-a-port was given, and that no other order was given, but that, in fact, it did not take effect. Now, if that evidence is to be relied upon—and the learned judge had the opportunity of seeing these witnesses and hearing the manner in which they gave their evidence, and their Lordships cannot say that he was not justified in believing their evidence—that disposes of the case; because, if once it is established that the order to port was given, and that if it had been carried out it would have taken the *Rhondda* clear of the *Alsace-Lorraine*, then, if the *Rhondda* was prevented from carrying out that manœuvre, it becomes

merely an interesting speculation what the actual cause was. Undoubtedly it was strongly in evidence that there was such a stream at this place whether it be called current or eddy, and that it was calculated to have an effect in the manner suggested on a vessel coming round into the neck of the channel. It is easy to conceive, when one looks at the confirmation of the coast, that this current would be deflected by the Faro Point, and would be felt upon the starboard bow of a vessel precisely at the point where the *Rhondda* had arrived. There is the statement that this did take place. If it be the fact that it took place—which must depend, of course, upon the veracity of these witnesses—it remains only for the experts to reconcile their theory with the fact, and the fact cannot be displaced by their theory. Their Lordships are of opinion that there was abundant evidence in support of the conclusion the court did arrive at, that there was a current or eddy which had the effect on the action of their vessel alleged by the witnesses on board the *Rhondda*. But it is further contended that precautions ought to have been taken by the *Rhondda* to avoid this current, or whatever it is to be called, because it is found noted in the charts, and must be taken to be a thing that persons navigating this channel ought to have in their contemplation. But there is nothing to show that, under ordinary circumstances, there would be any risk in a vessel coming round there. The current and the eddy are variable. Nobody can tell for certain that they will be felt at a particular place; and, above all, the *Rhondda* had no reason to anticipate that the operation of the current or eddy would have any bearing upon her duty with reference to the *Alsace-Lorraine*, because she had a right to expect that the coast would be clear from steamers coming out in the direction in which the *Alsace-Lorraine* was.

Then, further, it is said that, at any rate, she violated her duty in not reversing her engines sooner. The vessels were about a mile apart from one another when first sighted. As they were meeting, she would not have so much as a mile to go to come to the point of collision. Her engines were reversed, which it appears would take from two to three minutes. It appears that they had already been completely reversed, so that twelve revolutions had been taken at full speed astern, and therefore that shows that for a very considerable portion of the time we are now dealing with the order had been given to reverse her engines, and that this order had been complied with, since her engines were actually going astern at the time of the collision. Then, if this be so, all the time that has to be accounted for is the short period between seeing the *Alsace-Lorraine* and the order being given that the engines should be reversed. The reason given for its not having been done sooner is, that it was not until the captain found that the vessel was not obeying her helm that he became aware of the necessity of taking this step of reversing the engines. Their Lordships are of opinion that if that was the fact, as they, with the learned judge below, come to the conclusion that it was, then no blame can be imputed to the captain of the *Rhondda* for not having stopped and reversed sooner. Upon this point, the case of *The Khedive* has been referred to; but it will be found that it is not alppicable to the present case. By that decision the wholesome rule was laid down that where one of these regulations has prescribed something to be done, the captain of a vessel who departs from it will not be justified merely by its being thought that a man of ordinary skill and nerve would do as he did; if he sees there is danger of collision, then it is his duty to obey the rule. In that case it was thought to be clear that the captain did see there was danger of collision, and therefore that he could not be excused for not having obeyed the rule. But Lord Blackburn points to the state of facts which, as had been found by the learned judge below and their Lordships also found, existed in this case, for he says: "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": (5 App. Cas. 894; 4 Asp. Mar. Law Cas. 360; 43 L. T. Rep. N. S. 610.) Lord Watson says, to the same effect: "Had it been possible to hold upon the evidence that the period in question was so brief, and the *Voorwart's* sudden change of course so startling, that the captain could not be fairly expected to suppose, and did not believe 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 the 16th article could not reasonably be held to apply before the moment at which it was actually obeyed." That is the state of facts which their Lordships are of opinion existed here. The captain gave the order to hard-a-port. If the ship had obeyed her helm she would have been taken clear, and no collision would have taken place. It was only when the captain discovered that his vessel was not obeying her helm that the risk of collision appeared to him, and it was only then that it became his duty to stop and reverse; and that is precisely what he says he did, and what the fact of the engines being already working in the opposite direction when the collision took place proves he had done at a period of two or three minutes before the collision took place. With regard to the case of *The Earl of Elgin* (4 Privy Council Appeals, 1; 1 Asp. Mar. Law Cas. 150; 25 L. T. Rep. N. S. 514), the marginal note very plainly shows that it is in no way an authority against the view that has been presented in this case: "Art. 16 of the Admiralty Regulations for Preventing Collisions at Sea only applies when there is a continuous approaching of two steamships. When two ships under steam 'are meeting end on or nearly end on, so as to involve risk of collision' as provided for in Art. 13, and one of them at a proper distance ports her helm sufficiently to put her on a course which will carry her clear of the other, and enable her to pass on the port side, she thereby determines the risk, and is not approaching another ship so as to involve risk of collision within the meaning of art. 16, and is not bound to slacken speed or stop." Applying that ruling to this case, when the *Rhondda's* helm was put hard-a-port, that manœuvre, if it had been successful, would have put her on such a course as would have determined the risk, and therefore the duty of slacken-

ing speed did not arise. It only arose when it was discovered that this manœuvre could not be carried out.

Adopting this view of the case, it becomes immaterial to consider the other measures of the *Alsace-Lorraine* which were taken after her sighting of the *Rhondda*; because their Lordships are of opinion that it is established that the *Alsace-Lorraine*, by proceeding along the wrong side of the channel, and coming out suddenly from under the land at that side, occasioned the collision which afterwards happened, and that she has failed to establish that the *Rhondda*, by anything she did, contributed to it, or could in any way have avoided it, but that she was prevented from doing that which would have avoided the collision by the action of the current or eddy upon her in the manner which has been described by the several witnesses. Their Lordships are therefore of opinion that this appeal should be dismissed with costs, and they will humbly advise Her Majesty to that effect.

Solicitors for the appellants, *Stokes, Saunders*, and *Stokes*.

Solicitors for the respondent, *Waltons, Bubb*, and *Walton*.

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, May 4, 1883.

(Before Brett, M.R., Cotton and Bowen, L.JJ.)

The Elin. (*a*)

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

Collision — Wages — Maritime liens — Priority— Foreign ship—Proceeds of sale.

The plaintiffs in a damage action, in which a foreign ship proceeded against has been sold by order of the court, and the proceeds brought into court to satisfy the claims against her, having no effective remedy except against the ship, are entitled to payment of their claim out of the proceeds in precedence to the seamen's claim against such proceeds for wages earned on the ship subsequently to the collision.

Quære, would this decision apply to the case of a British ship?

This was an appeal from a decision of Sir Robert Phillimore in a damage action instituted Nov. 24, 1881, by the owners of the English barque *Paria* against the Russian barque *Elin*. The collision took place in the Downs on the 21st Nov. 1881.

After the collision salvage services were rendered to the *Elin*, in respect of which an action was commenced on the 11th Jan. 1882.

On the 19th Jan. 1882 a wages action was brought against the *Elin* by her master and crew.

On the 25th Dec. 1881 liability was admitted in the damage action, and on the 10th Feb. 1882 the *Elin* was sold, realising 726*l.* 18*s.* 9*d.*, which was paid into court.

On the 2nd May 1882 judgment was given for the plaintiffs in the salvage action, and 243*l.* 18*s.* 8*d.* was paid out of the proceeds in court to the salvors' solicitors.

On the 7th March 1882 judgment in the wages action was given for the plaintiffs in the sum of 123*l.* 12*s.* 1*d.*

The balance in court being 483*l.* 0*s.* 1*d.*, and the damage sustained by the *Paria* exceeding 1200*l.*, a summons was taken out by the owners of the *Paria* calling upon the defendants to show cause why the 483*l.* 0*s.* 1*d.* should not be paid out to them, and the plaintiffs in the wages action moved the judge in court to order that their claim should be satisfied out of the 483*l.* 0*s.* 1*d.* On the hearing of the summons and motion it was agreed to state a special case.

The special case was as follows:—

1. On the 21st Nov. 1881 the Russian barque *Elin*, when in the Downs, while on a voyage from Skelefica to Cette, with a cargo of wood, came into collision with the English barque *Paria*, in which collision both vessels sustained damages.

2. On the same date, after the collision, salvage services were rendered to the *Elin* by salvors, and with their assistance the *Elin* was safely brought by her own crew into the port of London, and to a discharging berth, where the discharge of her cargo, which was not completed until the 24th Dec. 1881, was performed by the said crew, and a large sum for wages, which would otherwise have been paid to labourers from the shore, was saved.

3. On the 24th Nov. 1881 the owners of the *Paria* commenced this action against the *Elin* and her freight to recover damages occasioned by the said collision, and the *Elin* was arrested.

4. On the 11th Jan. 1882 an action for salvage was commenced on behalf of Pilcher and others for some of the services rendered as hereinbefore stated to the *Elin* and her cargo. Another action for the other services was on behalf of Buchan and others commenced on the 28th Jan., and by an order of court, dated the 18th Feb., these two actions were consolidated. On the 2nd May 1882 judgment was given in these consolidated actions, by which judgment the sum of 500*l.* and costs were adjudged to the plaintiffs in the said consolidated actions.

5. On the 28th Dec. 1881 the owners of the *Elin* admitted liability for the damage occasioned by the said collision, and determined to abandon the voyage and not to repair the *Elin*, and the owners of cargo on board the *Elin* thereupon obtained their property in London from the owners of the *Elin* without paying any freight, except an advance paid to the master at the port of loading on giving bail to answer the claim in the consolidated salvage action. The cargo was discharged by the crew of the *Elin*, as previously stated.

6. On the 19th Jan. 1882 an action (1882, K. No. 61) was commenced in the Admiralty Division of the High Court of Justice, on behalf of the master and crew of the *Elin*, against the *Elin* and her freight for wages from the month of May 1881 to the 15th Jan. 1882, on which date all these plaintiffs, except the master, were dismissed from the ship, and up to which date all these plaintiffs, except the master, had remained in the service of the ship. These plaintiffs also claimed ten days' double pay and the expenses of their journey home.

7. On the 7th Feb. 1882 the owners of the *Paria* applied for and obtained an order for the sale of the

(*a*) Reported by J. P. Aspinall, and F. W. Raikes, Esqrs., Barristers-at-Law.

Elin, and the *Elin* was subsequently sold by the marshal after her cargo had been discharged as aforesaid, and the full proceeds were paid into court.

8. On the 7th March 1882 the plaintiffs in the wages action other than the master obtained judgment for the wages and ten days' double pay and their expenses home, and the plaintiff, the master, obtained judgment for the expenses of his return home, his wages having been by special agreement made payable only out of freight earned.

9. The salvors have received their salvage, so far as it was adjudged against the *Elin* out of the fund paid into court as stated in paragraph 7, and the balance is insufficient to satisfy the claims of the *Paria* and of the crew.

10. On the 27th June 1882 a summons on behalf of the plaintiffs in this action, asking for payment of their claim out of the fund in court, came on and was adjourned into court. On the same day a motion by the plaintiffs in the wages action for payment of their claim out of the fund in court also came on, and the plaintiffs in the wages action abandoning the claim of the master to be paid in priority to the plaintiffs in this action, and the claim of the seamen to be paid their wages earned before the date of the collision in like priority to the plaintiffs in this action, but insisting upon their claim to be paid all the subsequently earned wages, ten days' double pay, and expenses home of the crew, in priority to the plaintiffs in this action, an order was made on the adjourned summons and motion that a special case should be stated in this action as between the plaintiffs in this action and the plaintiffs the crew in the wages action for determining their respective priorities.

The questions for the decision of the court are:

1. Whether the owners of the *Paria* are entitled to have their claim satisfied out of the balance of the said fund in court in priority to the wages of the crew of the *Elin* earned subsequently to the date of the collision, their ten days' double pay and their expenses home, or in priority to any and which of these sums.

2. How the costs of and incidental to this special case are to be borne.

July 25.—The case now came on for argument before Sir R. Phillimore.

Stokes, for the owners of the *Paria*.—On the authority of Dr. Lushington in *The Linda Flor* (6 W. R. 197; 30 L. T. Rep. O.S. 234; Swa. 309) the claim of the owners of the *Paria* should take precedence over the claim for wages, even though they be earned subsequently to the collision in respect of which the owners of the damaged vessel claim. The crew, if the *res* be insufficient, have a remedy *in personam* against the owner. To allow the seamen to be paid out of the *res* in priority to the damage claimant would be to unfairly prejudice the rights of the damage claimant, and at the same time to unjustly indulge the owner of the wrong-doing ship by enabling him to pay claims out of the *res*, for which he could otherwise be made liable. That would be to diminish the liability of the wrong-doer; and, moreover, it is not unjust to say that the seamen's claim shall be postponed, seeing that the collision was brought about by their misconduct. In *The Linda Flor* (*ubi sup.*) Dr. Lushington confirms a like decision which he had arrived at in *The Chimœra* (not reported), where the circumstances were similar. These decisions were given in 1853 and 1857 respectively, and have ever since stood unchallenged. In *The Duna* (5 L. T. Rep. N. S. 217; 1 Mar. Law Cas. O. S. 159; 6 Irish Jur. N. S. 358), an Irish case, the decision follows Dr. Lushington in *The Linda Flor*. Again, the general rule that maritime liens rank in an inverse order will not apply, as the lien of the owners of the *Paria* is *ex delicto*, and as such takes precedence of the crew's lien *ex contractu*:

The Benares, 7 N. of C. Sup. p. 1;
The Duna, *ubi sup.*;
The Aline, 1 Wm. Rob. 111.

W. G. F. Phillimore and *L. P. Beaufort* for the crew of the *Elin*.—Maritime liens rank in inverse order, and therefore the wages lien, which has attached later than the damage lien, should take priority. Bottomry takes precedence of damage:

The Aline, (*ubi sup.*);
The Bold Buccleuch, 7 Moo. P. C. Cas. 267.

Salvage takes precedence of damage:

The Cargo ex Galam, 9 L. T. Rep. N. S. 950: Br. & L. 167; 1 Mar. Law Cas. O. S. 408;
Attorney-General v. *Norstedt*, 3 Price, 97.

But wages take precedence of bottomry and salvage:

The William F. Stafford, Lush. 69;
The Selina, 2 N. of C. 18;
The Union, Lush. 128.

Therefore, if seamen's wages are preferred to salvage and bottomry, and salvage and bottomry are preferred to damage, seamen's wages must necessarily take precedence of damage. Moreover, it has ever been the custom of the Admiralty Court to strenuously uphold the lien for seamen's wages: *The Union* (*ubi sup.*) *The Linda Flor* was decided without any consideration of the rules and principles governing maritime liens, and its supposed equitable grounds are erroneous, as the shipowner is not limited to proceeding *in rem*, but has the same remedy as the seamen by proceeding personally against the owners of the *res*. All that *The Benares* (*ubi sup.*) decided was, that the owner of the wrong-doing vessel could not recoup himself out of the *res* for wages paid by him to his crew in precedence to the damage claimant.

Stokes in reply.

Sir Robert Phillimore.—This is a special case stated in order to obtain a decision between two competing maritime liens on the proceeds of a vessel sold by the marshal of this court. The facts are shortly as follows: The Russian barque *Elin* came into collision with the English barque *Paria* in November last, and both vessels sustained injury. After the collision salvage services were rendered to the *Elin*, and she was safely brought into the port of London by her own crew with the assistance of the salvors. Shortly afterwards four several actions were brought against the *Elin*: the first by the owners of the *Paria* for damages sustained by the collision; the second and third, which was consolidated, by two sets of salvors respectively, and the fourth by her own master and crew for wages earned both before and after the collision, for ten days' double pay and the expenses of their journey home. In the first action the owners of the *Elin* admitted damages, and the vessel was on the application of the owners of the *Paria* sold by the marshal, and the proceeds paid into court. In the consolidated salvage actions judgment was given

against the *Elin*, and the amount has been paid out of the aforesaid proceeds of sale. In the fourth action the crew obtained judgment for their wages and ten days' double pay and their expenses home, and the master obtained judgment for his expenses home only. The proceeds of sale are insufficient to satisfy the amounts awarded by the court to the owners of the *Paria*, and to the master and crew of the *Elin*. It is admitted that the claim of the *Paria* takes precedence over the claim of the master, and also over that of the crew so far as regards wages earned before the collision; but a question has been raised as to whether the *Paria* can demand priority over the wages earned by the crew after the collision, the ten days' double pay, and the expenses of their journey home.

It is to decide this point that the special case has been stated in which it is agreed that the questions for the decision of the court are: (1) Whether the owners of the *Paria* are entitled to have their claim satisfied out of the balance of the said fund in court in priority to the wages of the crew of the *Elin* earned subsequently to the date of the collision, ten days' double pay, and their expenses home or in priority to any and which of these sums; (2) How the costs of and incidental to this special case are to be borne. Various decisions were cited to me as bearing upon the subject. Some of them relate to questions of civil contract, such as bottomry, and not to liabilities arising out of a delictum, such as damages occasioned by a collision; but there is one case which seems to me directly in point, and the authority of which is binding upon me. That is the case *The Linda Flor* (*ubi sup.*), decided by Dr. Lushington after careful consideration in 1857. In this case the facts were very similar to those of the present case, priority for wages earned, both before and after the collision, being claimed over damages occasioned by the collision. Dr. Lushington says: "This is a foreign vessel proceeded against in a cause of damage and condemned to pay that damage. The master and crew have commenced proceedings for their wages. The owners of the vessel and cargo receiving the damage object, because the proceeds are insufficient to satisfy all the claims, and therefore the consequence would be that those who have suffered from a wrong-doing would recover less than their loss. The same question was agitated in *The Chimœra*, and I was then of opinion that the mariner could not maintain the claim to the prejudice of the parties damnified by the collision. I adhere to that opinion, and I do so especially for the following reasons: That by the maritime law of all the principle maritime states, the mariner has a lien on the ship for his wages against the owner of that ship; that he has also a right of suing the owner for wages due to him; that some uncertainty may exist as to the maritime lien when in competition with other liens or claims, and amongst these I might instance the case of a ship in the yard of a shipwright (in such a case, I should have no difficulty in saying that, the lien of the shipwright would be superior to the lien of the mariner). That in the case of a foreign ship doing damage and proceeded against in a foreign court, the injured party has no means of obtaining redress save by proceeding against the ship herself, and that, I apprehend, is one of the most cogent reasons for all our proceedings *in rem*. That in a case where the proceeds of a ship are insufficient to compensate for damage done, to allow the mariner to take precedence of those who have suffered damage would be to exonerate so far the owner of the ship to whom the damage is imputed, at the expense of the injured party—the wrong-doer at the expense of him to whom wrong has been done. Then, as to the mariner, what is the hardship to which he is exposed? It is true he is debarred from proceeding against the ship, but his right to sue the owner remains unaffected. It is, however, not to be forgotten that in all these cases of damage, or nearly all, the cause of the damage is the misconduct of some of the persons composing the crew. This is not the case of a bankrupt owner; it will be time to consider such a case when it arises." The authority of this case has never been questioned, and has always been treated as undoubted law. In *The Duna* (5 L. T. Rep. N. S. 217; 1 Mar. Law Cas. O. S. 159), a case decided in the Irish Admiralty Court in 1861, *The Linda Flor* was followed, and an elaborate judgment was delivered in which the principles on which that decision rested were fully set forth, and the distinction was pointed out between an *obligatio ex contractu*, which is the basis of an action for wages, and an *obligatio ex delicto* upon which the liability for damage is founded. I observe that, in last edition of Mr Maude and Baron Pollock's Law of Merchant Shipping, the decision in *The Linda Flor* (*ubi sup.*) is quoted and treated as settled law. The question, therefore, is not *res integra*, and it is not my duty to consider whether, if it were so, the priority of the seamen's lien ought to be established. I consider myself bound by the decision in *The Linda Flor*, and I decide on all points raised in the special case in favour of the owners of the *Paria*. I shall leave each party to bear their costs of the special case.

From this decision the seamen appealed, and on May 4, 1883, the appeal came on for hearing.

W. G. F. Phillimore in support of the appeal for the seamen.

C. Hall, Q.C. and *Stokes*, for the respondents, were not called upon.

The arguments for the appellants were substantially the same as that used in the court below.

Brett, M.R.—The question, and the sole question, here is, whether we are prepared to overrule the decisions in *The Chimœra*, *The Linda Flor*, and *The Duna* (*ubi sup.*), and say that the principles as laid down in *The Benares* (*ubi sup.*) are all wrong. It has been argued that those decisions are wrong in that they break through the rule of the Admiralty Court as to the priority of maritime liens. It seems to me that the principles of these decisions are wholly independent of the rule as to the priority of maritime liens. The rules as to priority of maritime liens, whatever they may be—and we are not now called upon to say what they are—have been laid down by Dr. Lushington, and were perhaps known better to him than to anyone else. He never intended to break the rules as to maritime liens, and the decisions in *The Benares*, *The Chimœra*, and *The Linda Flor* are wholly independent of them. The rule which he acted on was this, that in the case of a foreign ship which had wrongfully injured another ship the liability of her owner to the owner of the injured

ship, subject to any limitation by Act of Parliament, was the whole value of the ship and freight; that is, in the English Admiralty Court into which the ship was generally seized, although not always, as bail might be given and she be bailed out. Now that being the measure of the liability of a foreign owner under those circumstances, the question arose whether he could relieve himself of that liability by the payment of wages to the crew out of the proceeds of ship and freight, for which wages he would be liable otherwise than out of ship and freight. If the Admiralty Court allowed seamen to recover wages out of this fund, it would in so doing give a relief to the owners of the wrong-doing ship. Dr. Lushington, in the exercise of the great equitable maritime jurisdiction of the Admiralty Court, and not being bound by any rule of the municipal law either common or equitable, treated the matter on broad principles of justice, and came to the conclusion that it would be unjust to the owner of the injured ship and an unjust indulgence to the owner of the wrong-doing ship, if he allowed the seamen's wages to be paid out of the proceeds of ship and freight, bearing in mind that these wages could be recovered *aliunde*. And he came to that conclusion wholly independently of any considerations as to priority of maritime liens, and upon a principle of justice so as not to do injustice to the owner of the injured vessel, and not to give an unjust indulgence to the owner of the wrong-doing vessel.

The whole question here is, whether there is any principle on which we can say that these decisions are wrong, after they have stood unquestioned for so many years. It is said that they break the rule as to the priority of maritime liens; but it seems to me that they do not, and that those rules are left standing untouched. Now is there anything unjust in those decisions? I am not prepared to say that in one sense it may perhaps be somewhat hard on the seamen not to allow them to obtain their wages from the *res* in court; but it must be borne in mind that they may recover them upon their contract with the owners of the vessel on which they have served. I think with Dr. Lushington that as between the shipowners a contrary decision would be more unjust, seeing the hardship it would inflict on the owner of the injured ship. I cannot therefore disagree with Dr. Lushington's large view of justice, and this appeal must be dismissed.

Cotton, L.J.—The case referred to, *The Linda Flor*, decided in 1857, seems to me to be in point, and there is also a previous decision, *The Chimœra* of earlier date. That, however, does not appear to be the earliest case, as the principle acted upon in *The Linda Flor* seems to have been laid down in *The Benares* by Dr. Lushington, and he ever after acted upon it. The question therefore is, whether we are to overrule this long series of cases, based as they are on the equity of the Admiralty Court. I doubt whether they would be applicable in the case of a bankrupt owner, or where for some other reason the crew would be unable to enforce their claim. But in this case it is not shown that the crew have no other remedy, and the principle that the owner of the ship which has caused the damage shall not be at liberty to withdraw any part of the fund, arising from the value of his ship and freight, to the prejudice of the claimant for damage, is I think a just one. For my part I can see no reason therefore why we should reverse after this long lapse of time the existing rule, which has been formulated by these several decisions.

Bowen, L.J. concurred.

Appeal dismissed.

Solicitors: for the plaintiff, *R. Greening*; for the defendants, *Stokes, Saunders*, and *Stokes*.

April 30 *and May* 1, 1883.

(Before Brett, M.R., Cotton and Bowen, L.JJ., assisted by Nautical Assessors)

The Rigborgs Minde. (*a*)

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

Collision—Compulsory pilotage — Anchor — Hull Pilot Act (2 *& 3 Will.* 4, *c.* 105, *Local and Personal*), *ss.* 22, 36, *and* 41.

Pilotage is compulsory on vessels coming into the port of Hull, and, where the vessel is going into dock, remains compulsory until she reaches her ultimate destination in the dock, and does not cease because the vessel anchors in the river waiting the tide to go into dock. The fact that the pilot who brings her to an anchor leaves her there, and she is taken on by another pilot in consequence of an arrangement among the Humber pilots, does not affect the compulsion.

The position of an anchor, which is required for letting go in a port, is within the discretion of the pilot in charge, and if damage is occasioned by reason of the anchor so being placed with the pilot's consent or directions, the owners are exempted from liability for such damage.

The rule that where both ships are found to blame for a collision each party bears his own costs is to be followed in a case where the defendants' ship, which does not counter-claim, is held to be exempt from liability on the ground of compulsory pilotage.

This was an appeal from a decision of Sir Robert Phillimore in a damage action, by which he on the 8th June 1882 had found the Danish schooner *Rigborgs Minde* alone to blame for a collision in the Humber Dock of Hull, with a flyboat belonging to the trustees of the Aire and Calder Navigation Company.

The facts alleged on behalf of the plaintiffs were as follows:—

About 6.30 p.m. on the 4th March, the flyboat No. 12, of about eighty tons, with two hands on board, laden with a cargo of wheat, was crossing the Humber Dock, from the Railway Dock, being pushed by boat-hooks, and making about a knot an hour. The weather was fine and clear, the wind about N.W. and the tide nearly high water. Under these circumstances the *Rigborgs Minde* was seen about fifty yards off, broad on the starboard bow of the flyboat, proceeding along the dock at about four knots an hour. A collision being imminent, the helm of the flyboat was ported, but the *Rigborgs Minde* came on, and with the fluke of her anchor, which was hanging at her bows in the water, struck the flyboat on her starboard side, penetrating her side about amid-ships and causing her to sink. The plaintiffs charged the *Rigborgs Minde* with excessive speed, with

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

neglect in not having a check rope to the dolphins, and having the stern rope slacked too much, and with breach of the rules and regulations of the Humber Dock by reason of the mode in which the anchor was carried.

The defendants alleged that under the circumstances above-mentioned the *Rigborgs Minde*, a schooner of 150 tons register, having cast off the tow rope from her tug, was in the Humber Dock in charge of a duly licensed pilot, proceeding to the Prince's Dock to unload. She had a stern rope made fast to the west side of the dockhead, the rope being paid out as required. On her port hand were three dolphins, and whilst the *Rigborgs Minde* was so proceeding the flyboat was seen broad on the port bow, about ten yards off, rounding the innermost dolphin. Although the flyboat was immediately hailed by those on board the *Rigborgs Minde* to hold on by the dolphin, she was propelled across the bows of the *Rigborgs Minde*, and sustained the damage complained of. The defendants also pleaded compulsory pilotage.

The owners of the *Rigborgs Minde* did not counter-claim.

The dock regulations above-mentioned are made under and by virtue of the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), s. 52, and direct

> That every vessel before entering into or passing out of either the locks or basins, or of the entrance thereof respectively, and before removing from one part of any dock to another, and during the time of such removal, and whilst lying in any dock, shall have her anchors in on deck, &c.

June 8, 1882.—The action came on for hearing upon *vivâ voce* evidence before Sir R. Phillimore, assisted by Trinity Masters. Evidence on behalf of the defendants showed that the *Rigborgs Minde*, an inward-bound vessel in charge of a duly licensed pilot, had come up to and anchored off the Island pier in the Humber Dock; that after a temporary anchorage she had then proceeded on in charge of a fresh pilot; that only one set of pilotage dues had been paid for both pilots; that the position of the anchor was in accordance with the directions of the pilot, and that when lowered it caught in the bobstay, which, as they contended, was due to an inevitable accident. It also appeared that it was customary, by arrangement between the Humber pilots, for the pilot who brought a vessel into the river to leave her where the vessel temporarily anchored in the river to wait till the tide served, and return to the out district, and for a fresh pilot to take the vessel on to her place of destination in the port.

Butt, Q.C. (with him *Bucknill*) for the plaintiffs.

W. G. F. Phillimore (with him *F. W. Raikes*) for the defendants.

Sir Robert Phillimore.—I am of opinion that, if the anchor of the *Rigborgs Minde* had been lowered sufficiently, there would have been no damage. I and the Trinity Masters believe that the anchor-stock caught on the bobstay as it was being lowered, and that it was held in such a position as to cause the pea of the anchor to go through the flyboat, and this occasioned her to sink. If the anchor had been low enough the bobstay would have fended off the flyboat, and if the stern rope had been held on taut when the flyboat was first seen, the schooner would not have come up ahead, and there would have been no collision. I pronounce the schooner alone to blame for this collision.

From this judgment the defendants appealed, and on the 30th April the appeal came on for hearing.

W. G. F. Phillimore and *F. W. Raikes* for the appellants, the owners of the *Rigborgs Minde*.—The flyboat was alone to blame. If any blame attaches to the navigation of the *Rigborgs Minde*, the responsibility is upon the pilot who was in charge of the vessel by compulsion of law:

The Maria, L. Rep. 1 A. & Ecc. 358; 2 Mar. Law Cas. O. S. 528; 16 L. T. Rep. N. S. 717;
The Hull Pilot Act (2 & 3 Will. 4, c. 105), ss. 22, 36, and 41 (Local and Personal).

The charges against the *Rigborgs Minde* are excessive speed, absence of check rope to the dolphins, failing to haul the stern rope taut, and carrying the anchor in an improper manner. Assuming these charges to be correct, they are all matters within the province of the pilot. With respect to the manner of catting the anchor, the selection of an anchorage place, and mode of anchoring and preparing to anchor, there are two decisions to the effect that these matters are within the pilot's province:

The Gipsy King, 2 W. R. 537;
The Christiana, 7 Moo. P. C. C. 172.

The remaining point is whether the crew of the *Rigborgs Minde* were guilty of any negligence in the mode of letting go the anchor, and the fact of its catching in the bobstay is submitted to be under the circumstances an inevitable accident.

Hall, Q.C. and *Bucknill* for the respondents.—It cannot be said that the *Rigborgs Minde* was in charge of a compulsory pilot. She had very properly come up as far as the Pier Island in charge of a compulsory pilot, who then left her. But then all compulsion ceased. She remained anchored there really in the port, for a couple of hours, and then for her own convenience chose to take the assistance of a pilot to navigate her from one place in the dock to another. All that the Act requires is that a vessel coming into and out of the port shall be under the charge of a duly licensed pilot. But this vessel had ceased to be a vessel coming into the port. She had already come in and been anchored for a substantial time. The same question arose in *The Maria* (*ubi sup.*), and was there decided in accordance with our contention.

Raikes in reply.

The sections referred to in the Hull Pilot Act (2 & 3 Will. 4, c. 105) are as follows:—

> Sect. 22. And whereas the guild or brotherhood of masters and pilots, seamen of the Trinity House in Kingston-upon-Hull commonly called "The Corporation of the Trinity House in Kingston-upon-Hull" have, as well by usage for a long period of years as by virtue of letters patent, or charters granted to them by the Crown, been empowered to appoint pilots to conduct ships or vessels sailing or navigating, into or out of the port of Kingston-upon-Hull and the limits and liberties thereof, and into and out of and upon the River Humber and from the said river out to sea, and between Flamborough Head northward and Winterton Ness southward, and into and out of the several ports, creeks, harbours and places situate between those two last-mentioned headlands or places, in pursuance of which powers the said corporation have from time to time appointed a sufficient number of pilots for the purpose before mentioned. Be it further enacted that it shall be lawful for the said guild or brotherhood of masters and pilots seamen of

the Trinity House in Kingston-upon-Hull, commonly called "The Corporation of the Trinity House in Kingston-upon-Hull," and they are hereby required to grant licences under their common seal to such persons as they shall after due examination approve of and think properly qualified to be pilots for conducting ships and vessels into and out of the port of Kingston-upon-Hull, and of the port of Great Grimsby in the county of Lincoln, and upon any part of the river Humber, below the said port of Kingston-upon-Hull, and so far out to sea as to bring the North Ness of Dimlington on the coast of Holderness to bear or be seen a sufficient distance clear or open of the land to the southward thereof, so as to pass clear of a certain sand or shoal, called the New Sand, and also so far along the coast to the northward thereof as the said North Ness of Dimlington, and to the southward thereof as a certain point or headland on the coast of Lincolnshire, commonly called or known by the name of Donna-Nook; and the persons so licensed shall for the purposes of this Act be called "Humber Pilots," and all ships and vessels sailing, navigating, and passing as aforesaid, except as hereinafter provided, shall be conducted and piloted within the limits aforesaid by pilots so licensed, and by no other pilots or persons.

Sect. 36. And be it further enacted that the master or other person having the command of any ship or vessel which, under the provisions of this Act, shall be liable to pilotage, shall, on arriving at or within the limits for which pilots are directed to be licensed under this Act, display and keep flying or hoisted the usual signal for a pilot to come on board, by hoisting a flag in the daytime and a light in the night time at the masthead in a conspicuous situation clear of the sails and rigging of the vessel, and so as to be distinctly visible; and if any Humber pilot shall be within hail or approaching, and within a reasonable distance of any such ship or vessel with the proper distinguishing flag flying in his vessel or boat, the master or other person having the command of such ship or vessel shall, by heaving to in proper time, or shortening sail, or by all practical means consistently with the safety of the ship or vessel, facilitate such pilot getting on board; and every master or other person having the command of any such ship or vessel who shall not display and keep flying or hoisted such signal for a pilot to come on board from the time such ship or vessel shall have arrived off any or either of the limits before specified, as the case shall be, or who shall not heave to, shorten sail, or otherwise consistently with the safety of the ship or vessel facilitate such pilot getting on board as aforesaid, shall forfeit and pay double the amount of the sum which would have been demanded for pilotage of such ship or vessel from the place or distance where such ship or vessel, under the provisions of this Act, ought to have displayed and kept flying or hoisted such signal for a pilot to come on board as aforesaid.

Sect. 41. And be it further enacted, that every such pilot as aforesaid who shall be employed to pilot or conduct any ship or vessel into the said port of Kingston-upon-Hull, shall and is hereby required to take the same to such place of delivery, whether in the haven or the old harbour or in any of the wet docks of the said port, as the master or commander of such ship or vessel shall require, or so near thereunto as he can safely get, and then moor such ship or vessel in some proper situation without being paid any other rate than is hereby directed to be paid for piloting such ship or vessel into the said port; and in case the attendance of any such pilots shall be required to take care of such ship or vessel from such first mooring, and to conduct her higher up the said haven or old harbour or into any of the said wet docks or other place of delivery, the pilot who shall have brought the said ship or vessel to such mooring, or some other of the said Humber pilots, to be by the said commodore of pilots appointed for that purpose, on the application of the master or commander of such ship or vessel shall attend and shall be paid for unmooring, transporting, and removing such ship or vessel to her place of delivery as aforesaid, if such ship or vessel shall draw thirteen feet of water or upwards, not less than nine shillings, nor more than eleven shillings; and if such ship or vessel shall draw ten feet of water and upwards, and not exceeding thirteen feet, not less than six shillings and sixpence, nor more than eight shillings and sixpence, and if such ship or vessel shall draw under ten feet of water, not less than four shillings nor more than six shillings, according to the discretion of the said commissioners.

Brett, M.R.—In this case the collision has taken place between two vessels in the Humber Dock at Hull, and the learned judge of the Admiralty Court has held that the schooner, the defendant's vessel, was solely to blame. Although he has not mentioned anything with regard to compulsory pilotage in his judgment, yet I cannot help thinking that he was of opinion that a compulsory pilot was on board the vessel and that the *Rigborgs Minde* was to blame in respect of something which was not covered by the fact of a compulsory pilot being on board; and if he was dealing with this case as one of compulsory pilotage I think he must have considered that the fault was in the manner and mode in which the anchor was let go at the time when the pilot finally ordered it to be let go. The question is whether we agree with the learned judge. The first point then is whether there was a compulsory pilot on board the *Rigborgs Minde*, and on the construction of the Hull Pilot Act it is clear to me that the pilot taken on board a vessel inward bound to the port of Hull is a compulsory pilot. In this opinion I am confirmed by Dr Lushington when he decided the case of *The Maria* (*ubi sup.*). There has, however, been an attempt made to show that by reason of the change of pilots, the compulsory pilotage had ceased. But it is a common custom for pilots to settle among themselves to divide their duties. One brings a ship up to the port, another takes her into dock, and the two performances of their duty by these pilots must be considered as a single pilotage service, so that here there was really only one act of pilotage although performed by two pilots, for which one set of pilotage dues was paid. It has also been argued that compulsory pilotage had ceased because the *Rigborgs Minde* had anchored off the Island Pier before she was taken into dock, and it was tried to bring the case within the authority of *The Maria*, and to say that the vessel was not under compulsion because she had already come into the port and at the time of the collision was merely moving from one part to another. But a temporary anchorage has not this effect, and I am of opinion that the compulsion is not at an end until the vessel is finally anchored at her destination, and until that time the *Rigborgs Minde* was always an inbound vessel. And it must be noticed that Island Pier, even if in the Humber Dock Basin, is practically in the river, and that this vessel was bound for the Prince's Dock, to which she had to pass through the Humber Dock Basin. Therefore, during her progress to her destination it is clear that pilotage is compulsory. [His Lordship then discussed the navigation of the fly-boat, and found that she was to blame.]

It is next said that the *Rigborgs Minde* came up the dock too fast, and was going at the rate of four knots. If she was going at that rate which I, on an examination of the evidence, think was not the case, yet there is nothing to show that she was not going at a pace which the pilot meant her to go, and if it was too fast, that was the fault of the pilot. As regards a check rope to the dolphins, it was the fault of the pilot not to have one, and if the stern rope was slacked too much it was slacked in accordance with the orders of the pilot. Lastly it is said that

her anchor was wrongly and improperly slung as the ship went up the dock, and that when the final order to let go was given it was done in an unseamanlike manner. But all of these matters, with the exception of the last, are concerned with the navigation of the ship, by way of steering her on her course, and attention to them is within the pilot's duty. Now let us see how the anchor was placed. According to the evidence it is clear that it was placed by the pilot's orders as he wished, for the purpose of being let go at any moment, and there is the authority of Dr Lushington in *The Gipsy King* (*ubi sup.*) to show that this is a matter under the control of the pilot, so that, if there was anything wrong in the placing of the anchor, that was the fault of the pilot. Assuming, then, that anything done wrongly up to the moment of letting go the anchor was the fault of the pilot alone, anything done wrong after that moment would no doubt be the fault of the crew, and anything done in letting it go was the action of the crew, and the question if they did or did not execute the order properly is one of seamanship, and for our assessors to decide. We therefore follow a practice, which I wish were more done in the Admiralty Court, of reading out the questions and answers put by us to them, so that the parties may know how much of the decision is due to them, and how much to us. The question we have put to them is that, taking for granted the anchor to be placed as described, was the fact of the anchor catching in the bobstay due to a want of reasonable skill and care on the part of those whose duty it was to lower it? They have answered that in their opinion there was no want of reasonable skill and care, and that the catching of the anchor in the bobstay was an accident.

On all of these grounds I am of opinion that there was no fault on the part of the master and crew of the *Rigborgs Minde*, and that the negligence on board the *Rigborgs Minde*, which caused the collision, was that of the pilot, and as we consider the flybcat to blame on the facts, both vessels must be held to blame for this collision, but the owners of the *Rigborgs Minde* are exempt from liability through the fault being that of the compulsory pilot.

Cotton, L.J.—Having looked carefully at the sections of the Act, I am of opinion that, on the construction of sects. 22, 36, and 41, pilotage was certainly compulsory on the *Rigborgs Minde*. I agree, also, that the change of pilots does not make the pilotage less compulsory.

Bowen, L.J. concurred.

May 1.—The defendants applied to the court to know how the costs were to be borne.

Phillimore, for the appellants.—Although it has been laid down by this court in the case of *The Hector* (*ante*, p. 101; 48 L.T. Rep. N.S. 890; 52 L.J. 51, P. D. & A.), that where both ships are held to blame there shall be no costs, yet this case materially differs from *The Hector*. We have here made no counter-claim, and have established the plea of compulsory pilotage. We are, therefore, entirely successful. In *The Hector* the owners of *The Hector* counter-claimed, and were therefore only partially successful in the Court of Appeal.

Hall, Q.C., for the plaintiffs (respondents).—The rule laid down in *The Hector* was absolutely general, and the present case is no exception.

Brett, M.R.—No costs will be given on either side, here or in the court below. Both vessels were to blame. It is a fixed rule of Admiralty procedure, both in the court of first instance and in the Court of Appeal, that in such cases there should be no costs on either side. That rule is not altered by the fact of the fault on one of the vessels being solely the fault of a compulsory pilot in charge.

Solicitor for the plaintiffs, *C. A. Clulow*.

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

Thursday, June 7, 1883.

(Before Brett, M.R., Lindley and Fry, L.JJ.)

The Hope. (*a*)

Solicitor's lien for costs—Settlement by parties—Collusion—Wages action—Practice.

In a wages action, where the defendants effect a settlement behind the back of the plaintiff's solicitor, and the plaintiffs fail to pay their solicitor's costs, the solicitor cannot obtain an order that the defendants should pay his costs, unless he show clearly that in making the compromise there has been collusion between the parties with the intention of depriving him of his lien.

This was an appeal from an order of Sir Robert Phillimore, made in chambers, in an action for seamen's wages and damages for wrongful dismissal, by which he ordered that the defendants should pay the taxed costs of the action to the plaintiffs' solicitors.

The action was commenced on the 17th Jan. 1883, in the Liverpool district registry, by the plaintiffs, two seamen, against the owners of the ship *Hope*, and on the 19th the defendants' solicitors gave an undertaking to appear. On the 22nd the plaintiffs accepted 5*l.* each from the defendants in settlement of their claim and costs, and thereupon left the country without paying their solicitors their costs. The plaintiffs' solicitors then made an application to the district registrar at Liverpool for an order that the defendants should pay their taxed costs, alleging that the settlement had been made "behind their backs."

The Liverpool Registrar referred this application to Sir Robert Phillimore, who ordered that the defendants should pay the taxed costs of the plaintiffs' solicitors.

From this order the defendants now appealed.

Bigham for the defendants (the appellants).—The plaintiffs' solicitors, in order to justify this order, must show that it was effected fraudulently, with a view of depriving them of their costs. Of this there is no evidence. It has nowhere been decided that parties, after they have employed solicitors, may not compromise, provided such compromise be *bonâ fide*. All the authorities upon the point support this contention:

Brunsdon v. *Allard*, 2 E. & E. 19;
Sullivan v. *Pearson*; *Ex parte Morrison*, L. Rep. 4 Q.B. 153; 19 L. T. Rep. N. S. 430;
Nelson v. *Wilson*, 6 Bing. 568;
Clark v. *Smith*, 6 Man. & G. 1051; 13 L.J. 97, C.P.

Nasmith for the solicitors.—The appellants must show that the learned judge took a wrong view of the evidence before him. The fact that the parties on one side to this settlement were sailors is suggestive that after the sailors got the money

(*a*) Reported by J. P. Aspinall and F. W. Raikes Esqrs., Barristers-at-Law.

they would be at very little trouble to pay their solicitors. Sailors belong to a migratory class. The ways of sailors were well known to the defendants, who were shipowners, and who should not therefore have put the sailors in a position to defraud their solicitors.

Brett, M.R.—We have some difficulty in dealing with this case, seeing that it was taken by Sir Robert Phillimore in chambers, where the learned judge had not the advantage of having the authorities on the point cited to him. I do not think we can differ from the judge merely on the ground that he took a wrong view of the evidence. We differ from him in that he decided this case on wrong legal principles in holding that, if a compromise is made between the parties to the cause without the knowledge and acquiescence of the plaintiffs' solicitors, the defendants should pay the plaintiffs' solicitors' taxed costs. There is strong evidence to show that the compromise was made without the knowledge or acquiescence of the plaintiff's solicitors, and that the defendant knew that the plaintiffs had employed solicitors. The cases which have been cited to us show that the mere fact that a compromise has been effected without the knowledge of the solicitor is not sufficient; but that it must be further shown clearly that there was the intention in the minds of both of the parties to deprive the plaintiffs' solicitors of their lien for costs. It seems to me that in this case there is absolutely no evidence of such collision, or that it was in the minds of the defendants to deprive the plaintiffs' solicitors of the fruits of what they had done. We are asked to say that that is the necessary inference to be drawn from a settlement of this kind having been made by sailors with shipowners. But there is no rule of law that sailors are to be presumed to be cheats, nor is there any evidence at all as to that. This case, therefore, has not been brought within the rule laid down in the cases which have been cited, and this appeal must therefore be allowed.

Lindley, L.J.—I also think that this order must be discharged. I do not think that there is any difference in the principles to be applied to cases in the Admiralty Division, and to those in any other divisions of the High Court. It seems to me that there is not any rule or practice which prevents parties effecting a compromise without the intervention of their solicitors. Therefore a litigant who employs a solicitor in the ordinary way can compromise the action; but this principle or rule has been engrafted upon that, namely, that the compromise must be honestly effected, and not for the purpose of cheating the solicitors. The general rule is correctly stated in Archbold's Practice (13th ed., pp. 142, 143), where, after referring to the solicitors Act 1860 (23 & 24 Vict. c. 127), s. 28, which enables the court to make a charging order upon property recovered or preserved through the instrumentality of the solicitor, it is stated that a "solicitor has also, it is said, a lien for his costs upon a judgment recovered by his client, or upon money or costs awarded or ordered to be paid to him in a cause in which the solicitor was employed; and this even though the client had previously become a bankrupt. This lien, however, is in truth merely a claim to the equitable interference of the court." Then it runs on thus, which I think is right, "the court will exercise this equitable interference when the solicitor has given the opposite party or his solicitor notice of his lien, and that he claims the amount payable to his client to be paid to him in the first instance; in which case the opposite party will at his peril pay the client, or release the claim, or compromise it without the assent of the solicitor. So the court will exercise it, though no such notice has been given in cases where it is clearly made out that there has been some collusion or fraudulent conspiracy between the parties to cheat the solicitor of his costs. But unless such notice be given, or there has been such collusion or fraudulent conspiracy, the client, although he sues *in formâ pauperis*, may compromise with the other party, and give him a release without the intervention of his solicitor." In support of every one of these propositions a number of authorities are therein cited. Here there is no evidence that it was the intention of the parties to defeat the plaintiffs' solicitors of their lien for costs, and we cannot presume that sailors are cheats.

Fry, L.J.—It appears to me that the law which governs this case was correctly laid down by Tindal, C.J., in *Nelson* v. *Wilson* (*ubi sup.*), when he says that "it is undoubtedly competent for the party to settle the case without the intervention of his attorney; and if the attorney proceeds in order to secure his costs, he is bound to make out a clear case of fraud between the plaintiff and defendant to deprive him of such costs." In my opinion the plaintiffs have failed to establish such a clear case of fraud in this case. I therefore think the order was wrong, and this appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs, *Speechly, Mumford,* and *Landon,* agents for *J. W. Carr* and *Tomkies,* Liverpool.

Solicitors for defendants, *W. W. Wynne* and *Sons,* agents for *H. Forshaw* and *Hawkins,* Liverpool.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

March 10 *and April* 5, 1883.

(Before Kay, J.)

Dormont *v.* Furness Railway Company. (*a*)

Harbour authority—Sunken wreck—Duty to remove obstacle to navigation—Removal of Wrecks Act 1877 (40 *&* 41 *Vict. c.* 16), *s.* 4—*Action against harbour authority for injury caused to plaintiff's ship by sunken wreck.*

The plaintiffs' ship was injured and sunk by striking against a sunken wreck in Piel Channel, a channel leading into Barrow harbour. The defendant company had, under local Acts, power to remove wrecks and obstructions from the channel in question. They were also, by virtue of those Acts, the harbour authority within the meaning of the Removal of Wrecks Act 1877. *The defendants had taken possession of the wreck a few days before the plaintiffs' vessel struck upon it, and had partially removed it when the accident happened. The plaintiffs sued the defendant company for the damages caused by the accident,*

(*a*) Reported by J. G. Alexander, Esq., Barrister-at-Law.

and it was admitted that, if responsible, they were guilty of negligence.

Semble, the defendants were not responsible for the damage occasioned under sect. 4 of the Removal of Wrecks Act, as the language of the section is permissive, and could not be read as imposing a duty upon harbour authorities; nor had they rendered themselves responsible by taking possession of the wreck.

By one of the local Acts the defendants were empowered to receive a certain proportion of the light dues from ships entering Piel Channel, and those dues were to be applied for maintaining, improving, regulating, and buoying the channel.

Held, that this cast upon the defendants an obligation to remove the obstruction, and to take the necessary means for warning vessels away from it, upon the principle of Mersey Board *v.* Gibbs (14 *L. T. Rep. N. S.* 677; *L. Rep.* 1 *H. L.* 93), *and that on this ground the plaintiffs were entitled to recover.*

Dicta in The Douglas (47 *L. T. Rep. N. S.* 502, 5 Asp. Mar. Law Cas. 15; 7 *P. Div.* 151), *as to the effect of section 4 of the Removal of Wrecks Act, doubted.*

THIS was the further consideration of an action tried before Kay, J. and a special jury at Liverpool. At the trial the amount of damages was agreed, and a verdict taken, subject to the question whether the defendant company was liable. The facts of the case, and the statutory enactments bearing upon them, are sufficiently set out in the judgment.

Gully, Q.C. and *Henn Collins* (*W. R. Kennedy* with them) for the plaintiffs.—The action is brought against the defendants as being the harbour authority for the port of Barrow, who are authorised by their local Act to take tolls from ships approaching within the prescribed limits of their harbour; under these circumstances they are subject to a common law obligation to keep the approaches to the harbour in a safe condition for those whom they invite to use it. Even if they are not otherwise liable under the local Acts, as we contend they are, they have at all events rendered themselves liable by taking possession of the wreck:

Winch v. *Conservators of the River Thames*, L. Rep. 9 C.P. 378;

Forbes v. *Lee Conservancy Board*, 4 Ex. Div. 116.

The rule applied in these cases is really that which the House of Lords acted upon in *Mersey Board* v. *Gibbs* (14 L. T. Rep. N. S, 677; 2 Mar. Law Cas. O. S. 353; L. Rep. 1 H. L. 93). The principle of that decision covers the present case, as the defendants receive the tolls and are bound to apply them in buoying the harbour. Another question is, whether the defendants are not liable under the Removal of Wrecks Act (40 & 41 Vict. c. 16), s. 4. We contend that that section throws upon the defendants, who are the harbour authority under the Act, the duty of initiating proceedings, for neglect in the performance of which they are liable, or at all events that they become liable under that section when they have initiated proceedings, as was the case here. The word "may" in that section is to be read as "must," it confers on the harbour authority the right as against the owners of the wreck to take possession of it although it has not been relinquished, and this accounts for the use of words which are *primâ facie* permissive only. The dicta of Brett and Cotton, L.J.J., in *The Douglas* (47 L. T. Rep. N.S. 502; 5 Asp. Mar. Law Cas. 15; 7 P. Div. 151), are in favour of this view.

C. Russell, Q.C. and *Aspland* for defendants.—The plaintiffs' vessel was not going into Barrow harbour, but into Piel, and the defendants therefore incurred no duty towards her, as they are expressly prohibited from levying dues beyond the limits of Barrow harbour, and this ship would not have paid them any dues at all. The only power given to the defendants in respect of Piel harbour is that vessels using that harbour pay 3*d.* per ton per annum in respect of light dues, and that sum is paid into a fund, of which any surplus which may remain after certain payments thereout come into the hands of the defendants. This brings the case directly within the decision of *Forbes* v. *Lee Conservancy Board* (*ubi sup.*). The Act does not impose any duty upon the defendants with regard to the navigation of the channel, and there must be a duty imposed before they can be made liable:

Collis v. *Selden*, L. Rep. 3 C. P. 495.

The word "may" is used throughout the statutes relating to the removal of wrecks in such a way as to show that it was intended only to confer on harbour authorities discretionary powers with regard to the subject, to be exercised or not, as they may think proper. The observations of Brett and Cotton, L.JJ. in *The Douglas* are merely *obiter dicta*, quite unnecessary for the decision in that case.

Gully, in reply, referred to *White* v. *Crisp* (10 Ex. 312), as showing the duty of the owner of a sunken wreck to do everything in his power to warn other vessels off, and that his responsibility ceases on abandonment.

Cur. adv. vult.

April 5.—KAY, J.—On the 8th Sept. 1882 the plaintiffs' sloop, the *Agnes*, was making her way by Piel Channel to Piel harbour, near Barrow, when she struck upon a sunken wreck, and was so much injured that she went down. The wreck was a ship called *The Brothers* which had sunk in that place on the 19th July 1882. The place where *The Brothers* sank is outside the harbour of Barrow, but is in the channel leading to that harbour, and leading also to Piel harbour. The defendants, the Furness Railway Company, have a certain authority over both the harbours and the channel leading to them, and it was admitted upon the trial of this action that, if it was their duty to remove the wreck of *The Brothers* or to protect ships coming up the channel from the danger of running upon it, the defendants had been guilty of negligence, and the amount of damage was agreed. It was also admitted that upon the 3rd Aug. 1882 the defendants took possession of the wreck of *The Brothers* and proceeded to remove it, and they had partially done so by the 8th of that month.

It is argued that under the Acts of Parliament which relate to the matter a duty to protect ships against this wreck was thrown upon the defendants; and secondly, that, even if that were not so, by taking possession and commencing to destroy it they have

assumed that duty, and are therefore liable. There is no evidence as to how *The Brothers* was sunk—whether by negligence of the master or not. I think I must infer that after being sunk she was abandoned by the owner. By a statute passed in 1863 the harbour of Barrow was vested in the defendants, the Furness Railway Company, and sect 14 defined the limits of the harbour and provided that the company should have jurisdiction over Piel harbour and Piel Channel beyond these limits, "for the purpose of maintaining, improving, regulating, and buoying the said harbour and channel" to a point there mentioned as Helpsford Scar, which is further seawards than the place where this accident occurred; but it was further provided that such powers should not confer on the company the right to levy dues or rates beyond the limits of the harbour of Barrow, and that the defendants should not in anywise impede the present access to Piel harbour, or diminish or affect in any way its present use, conveniences, privileges, or immunities as a harbour of refuge. By another Act passed in 1879, reciting that section, it was provided that the powers of the harbour master should comprise and include the harbour of Barrow and Piel harbour and Piel Channel beyond the place of this accident, but that nothing in the Act should confer upon the company the right to levy dues or rates beyond the limits of the harbour of Barrow; and by sect. 29, after certain deductions, one-half of the residue of certain light duties, to which ships entering or leaving Piel harbour or Piel Channel were liable to contribute, were to be paid to the defendant company, and to be applied by them in "maintaining, buoying, lighting, regulating, and improving Piel harbour and Piel Channel as far as Helpsford Scar, and for no other purpose." The 17th bye-law gave the harbour master power to remove wrecks and obstructions, and to retain anything so removed to defray the expenses of such removal. In 1877 there was passed a general Act to facilitate the removal of wrecks obstructing navigation. Sect. 4 provides, "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 lift 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 and 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." Sect. 5 gives a similar power to the general lighthouse authorities for that part of the United Kingdom in or near which the wreck is situate if there is no harbour or conservancy authority having no power to remove the same. It is argued that the 4th section of this statute, although in terms permissive, imposes a duty upon the harbour or conservancy authorities, and this argument is to some extent strengthened by the 3rd section, which defines harbour and conservancy authority as including all persons or bodies of persons intrusted with the duty or invested with the powers of improving harbours or tidal waters. In the case of an authority intrusted with such duty at least it may be plausibly argued that this addition to their powers implies an additional duty. On the other hand, if sect. 4 imposes this duty upon a harbour authority, it is difficult to avoid the conclusion that sect 5 must impose a like duty upon the lighthouse authority where there is no harbour or conservancy authority. In the case of *The Douglas* (*ubi sup.*), Brett, L.J. during the argument observed that the statute related to the performance of a public duty, and asked whether the word "may" in sect. 4 was not to be read "must." I do not find anything to that effect in his judgment in that case. Lord Coleridge declines to give an opinion upon the point, but Cotton, J.L. intimates that under that section it became the duty of the harbour master to remove a dangerous obstruction.

The reluctance of the court to construe permissive words in a statute as obligatory is shown by the language used by the noble Lords in the case of *Julius* v. *The Bishop of Oxford* (42 L. T. Rep. N. S. 546: 5 App. Cas. 214), in which the principal authorities on the subject are referred to and commented on. It is obviously a strong construction to treat permissive words as imposing a serious obligation which, if neglected, may expose the body so empowered to heavy damages, and I should hesitate to hold on this ground alone that the defendants were liable. Nor do I see, if the owners of *The Brothers* had not become by negligence or otherwise liable for the consequences of the ship being sunk in the Piel Channel, how the harbour authority by simply commencing to remove the wreck can be held to have incurred a duty not otherwise cast upon them. But by the Act of 1879 the defendants were empowered to receive a certain proportion of the light dues from ships entering Piel harbour and Piel Channel, and these dues were to be applied by them in maintaining, buoying, lighting, regulating, and improving Piel harbour and Piel Channel up to and beyond the place of the accident. It seems to me that these words did impose upon them an obligation to remove such an obstruction as this wreck, and to mark its position by buoys until removed, and to apply whatever funds they might receive under the Act for that purpose, and on that ground I think the action against them must succeed. The case, in my opinion, comes within the authority of *The Mersey Docks Trustees* v. *Gibbs* (*ubi sup.*), and judgment must accordingly be given for the plaintiffs for the agreed amount of damages, and for the costs of the action.

Solicitors for plaintiffs, *Chester, Urquhart, Mayhew,* and *Holden,* agents for *Bradshaw,* Barrow-in-Furness.

Solicitors for defendant company, *Tahourdins* and *Hargreaves,* agents for *S. Hart Jackson,* Ulverstone.

Wednesday, May 30, 1883.

(Before POLLOCK, B. and LOPES, J.)

GULLICHSEN *v.* STEWART BROS. (*a*)

Charter-party—Cesser of Liability clause—Bill of lading—"All other conditions as per charter-party."

A clause in a charter-party, whereby the responsibility of the charterer is to cease as soon as cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage, is not applicable to liability for demurraye at the port of discharge; and therefore a charterer, who is also the consignee and receiver of a cargo, under a bill of lading containing the words "paying freight and all other conditions as per charter-party," is not exempted by such clause from liability for such demurrage.

THIS was a special case stated by the parties, pursuant to the Rules of the Supreme Court, Order XXXIV., r. 1, the following being the material parts thereof:—

The plaintiff is a shipowner residing in Norway, and is the owner of the vessel *Alette*. The defendants are timber and general merchants, carrying on business at 3, Fen-court, Fenchurch-street, in the city of London.

This action is brought to recover the sum of 56*l*. 13*s*. 4*d*., for the demurrage of the said vessel.

On the 13th Dec. 1881, a charter-party was entered into between the plaintiff, through his agent, and the defendants, under which the *Alette* was to load from the defendants at Miramichi or Dalhousie a cargo of deals and battens, to be carried at a certain rate of freight to a safe port on the west coast of Great Britain. The charter-party contained the following clauses:

It is agreed that as this charter-party is entered into by the charterers for account of another party, their responsibility ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage. The usual customs of each port to be observed by each party in cases where not specially expressed.

Seventeen days, Sundays and holidays excepted, are to be allowed the merchant (if the ship be not sooner despatched) for lading, and for discharging cargo fifteen like days. Lay days to commence when ship is ready in a proper loading and discharging berth respectively; demurrage at the rate of fourpence per register ton per day to be paid to the ship if longer detained.

Messrs. R. A. and J. Stewart, of Miramichi, shipped on the *Alette*, under the charter-party, a cargo of wood goods in two lots, one consisting of 401,000 pieces of palings, and the other of 20,523 pieces of deal and deal ends, and 274,118 pieces of palings, and two sets of bills of lading were signed in respect of the said cargo, one of them being for the 401,000 pieces of palings, and the other for the 20,523 pieces of deal and deal ends and the 274,118 pieces of palings. By the said bills of lading the goods were made deliverable at the port of discharge on the river Mersey to the defendants or to their assigns, he and they paying freight and all other conditions as per charter-party.

The defendants, on the 28th June 1881, while the vessel was on her voyage, indorsed for value the first of the two bills of lading mentioned in paragraph 5 of this case (that is to say, the bill of lading for 401,000 pieces of palings) over to Messrs. Banks and Ratcliffe, who had purchased these goods for 194*l*. 7*s*. 4*d*., and on or about the 7th July 1881, whilst the vessel was still on her voyage, they for value, viz., for 210*l*. 13*s*. 1*d*., indorsed on the second bill of lading, mentioned in the said paragraph, the following words: "Deliver to Messrs. Harrison, Robinson, and Co., the deals and deal ends, number in all 20,523 pieces, containing 247,085 superficial feet according to other side," and delivered such bill of lading so indorsed, to Messrs. Harrison, Robinson, and Co., who had purchased the said 20,523 pieces of deal and deal ends for 210*l*. 13*s*. 1*d*.

The defendants were the owners and receivers of the 274,118 pieces of palings, the remainder of the cargo.

The ship was ready in a proper discharging berth at Liverpool, and the dicharge was commenced on the 11th July 1881, and was not completed until the 1st Aug. 1881, on which day the discharge of the whole cargo was completed. The discharge of the said 274,118 pieces of palings was not completed until the said 1st Aug. 1881. (The remainder of the cargo could not be discharged until after the said 274,118 pieces had been discharged.) The said vessel was therefore detained five days beyond the said fifteen days. The detention of the vessel arose through no default of the ship.

The court is to have power to draw inferences of fact.

The defendants contend that their liability ceased on the cargo being shipped, and that the plaintiff was bound to exercise his lien.

The question for the opinion of the court is, whether upon the facts above set out the defendants are liable. If the court find for the plaintiff, then judgment is to be entered for him for 56*l*. 13*s*. 4*d*., and costs; but if the court find for the defendants, then judgment is to be entered for them with costs.

French for the plaintiff.—The plaintiff is entitled to recover this demurrage from the defendants under the terms of the charter-party and bill of lading, The words of the bill of lading "all other conditions as per charter-party" incorporate the conditions of the charter-party as to demurrage, and the defendants therefore as consignees are liable under them for this amount:

Porteus v. *Watney*, 4 Asp. Mar. Law Cas. 34; 39 L. T. Rep. N. S. 195; 3 Q. B. Div. 534.

It will doubtless be contended that, as the consignees are in this case charterers also, they are exonerated from liability by the cesser clause, but this clause only exonerates the charterers from claims made against them in their character as charterers, and is not applicable to, and has no effect on, demurrage at the port of discharge. [He was stopped by the court.

Edwyn Jones for the defendants.—The defendants are not liable for this demurrage. They are not liable under the bill of lading, for that contains no provision as to demurrage, and, as to the words, "they paying freight and all other conditions as per charter-party," it was held by the Court of Appeal in *Porteous* v. *Watney* (39 L. T. Rep. N. S. 195; 4 Asp. Mar. Law Cas. 34; 3 Q. B. Div. 534), that this language "imports a liability on the part of the consignee for demurrage co-extensive with the liability of the charterer," and the decisions in *Wegener* v. *Smith* (15 C. B. 285; 24 L. J. 25, C. P.) and in *Smith* v. *Sieveking* (4 E. & B. 945; 5 E. & B. 589; 24 L. J. 257, Q. B.) are to the same

(*a*) Reported by J. SMITH, Esq., Barrister-at-Law.

effect. In this case the charter-party provides, "that, as this charter-party is entered into by the charterers for account of another party, their responsibility ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage." This clause clearly protects the defendants from any liability for demurrage at the port of discharge, the shipowner having expressly discharged them, reserving a lien on the cargo for his own protection. In *Gray* v. *Carr* (25 L. T. Rep. N. S. 215; 1 Mar. Law Cas. 115; L. Rep. 6 Q. B. 522) there was a cesser clause, "the owners to have an absolute lien for all freight, dead freight, demurrage, and average," and the bill of lading contained, as in the present case, the words, "and all other conditions as per charter-party," and there the court held that the shipowners had a right of lien against the consignees for demurrage, but not for damages for detention at the port of loading. It was not argued in that case that the shipowner would have been entitled to recover in an action against the consignees apart from his lien. In *French* v. *Gerber* (36 L. T. Rep. N. S. 350; 3 Asp. Mar. Law Cas. 403; 1 C. P. Div. 737; 2 C. P. Div. 247) it was held that the cesser clause discharged the charterers from liability for giving orders for the ship to discharge at a port which was not a good and safe port (contrary to the stipulations of the charter-party), Mellish, L.J. saying, "the true construction of the charter appears to me to entirely exonerate the charterers in respect of subsequent breaches." Apart from the express words of the bill of lading there is no implied contract rendering the consignee liable to pay demurrage, since it is not stated in the case that more than a fair and reasonable time was occupied in discharging the ship:

Evans v. *Forster*, 1 B. & Ad. 118;
Horn v. *Bensusan*, 9 C. & P. 709.

Synnott, for *French*, in reply.—There is no force in the argument that, because a remedy by lien is given, therefore the remedy by action for breach of contract is gone. [POLLOCK, B.—As you have not alleged that there was unreasonable delay in discharging the ship, you must show a breach of contract on the part of the defendants. We cannot reject the words of the bill of lading, "all other conditions as per charter-party."] Those words incorporate the clauses of the charter-party existing at the time of the alleged breach. They incorporate, therefore, the conditions of the charter-party as to the mode of the discharge of the cargo, but do not incorporate the "cesser" clause, which applies to the charterers in their character as charterers only, and does not apply to them in the character of consignees and dischargers of the cargo. In *Gray* v. *Carr* (1 Asp. Mar. Law Cas. 115; 25 L. T. Rep. N. S. 215; L. Rep. 6 Q. B. 534, 540) Brett, J. says, with respect to similar words in the bill of lading in that case, that they were "satisfied by making them applicable to damages in the nature of demurrage for any delay which may occur through the default of the consignee at the port of discharge." The words therefore only incorporate the conditions of the charter-party which are applicable. The cesser clause is not applicable, because it is a personal clause, the sole object of which is to protect the charterer from personal liability at the port of loading. This is clear from the observations of Cleasby, B. in *Gray* v. *Carr* (*ubi sup.*). "It appears," he says, "clear to me that whether the demurrage days are occupied in the loading of the ship, or in the discharge of it, the charterer is equally discharged from personal liability as soon as a sufficient cargo is loaded." The clause therefore does not affect the liability of the defendants as consignees.

Edwyn Jones called the attention of the court to *Sanguinetti* v. *The Pacific Steam Navigation Company* (3 Asp. Mar. Law Cas. 300; 35 L. T. Rep. N. S. 658; 2 Q. B. Div. 238).

POLLOCK, B.—This action is brought to recover the sum of 56*l.* 13*s*, 4*d.*, claimed for demurrage upon the delay in discharging a ship called the *Alette*, which was chartered under a charter-party of the 13th Dec. 1881, entered into between the shipowners and the defendants to load from the defendants at Miramichi or Dalhousie a cargo of deals and battens to be carried at a certain rate of freight to a safe port on the west coast of Great Britain. In this charter-party there was the usual clause as to the time to be allowed for loading and discharging the cargo, which was: "Seventeen days, Sundays and holidays excepted, are to be allowed the merchant (if the ship be not sooner despatched) for loading, and for discharging cargo fifteen like days. Lay days to commence when ship is ready in a proper loading and discharging berth respectively; demurrage at the rate of fourpence per register ton per day to be paid to the ship if longer detained." The cargo was duly loaded and forwarded to this kingdom, and the bill of lading under which the cargo was actually shipped contained the words, "he and they (*i.e.*, the defendants or their assigns) paying freight and all other conditions as per charter-party." Now, this amount is not claimed against the defendants for undue delay in unloading the vessel, as in the old case of *Randall* v. *Lynch* (2 Camp. 352), because the plaintiff in his statement of claim does not put forward that as the ground of his claim. But the claim is for demurrage due under the bill of lading, which refers in the manner I have just mentioned to the charter-party.

Let us see, then, in what way the consignee is liable under the bill of lading. This appears from the case of *Harman* v. *Gandolph* (Holt. 35), where it is said that "the consignee by taking to the goods contracts with the owners of the vessel to perform the terms upon which they have undertaken to convey and deliver them." That is the way the contract arises. Now, in this case, the words of the bill of lading "paying freight and all other conditions as per charter-party," clearly incorporate into the bill of lading so much of the charter-party as has reference to the receipt of the cargo, and the loading of the ship. This, however is not a claim for demurrage at the port of loading, but at the port of discharge, a fact which becomes important when we come to consider how much of the charter-party is incorporated into the bill of lading. For there is in the charter-party a clause which is called the cesser clause, and which runs: "It is agreed that, as this charter-party is entered into by the charterers for account of another party, their responsibility ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and

demurrage." Now, it is perfectly intelligible that that clause should have full effect in exonerating the charterers from all liability for anything occurring after the shipment of the cargo, because it is very reasonable that they should say that they, being agents for other parties, are not going to be liable for anything that occurs after shipment, the goods being always subject to the shipowner's lien. But it does not follow because the charterer is freed from liability at the port of discharge by that clause, that the shipowner's right to sue the consignee for freight and demurrage is displaced. In answer to this, the defendants contend that if you import the charter-party at all into the bill of lading you must import the whole of it, including the cesser clause. But in this case the shipowner is not suing the defendant as charterer, but as assignee of the bill of lading, and the only part of the charter-party which is important at the present time is that which has reference to the delivery of the cargo, and to my mind it seems unreasonable, as a matter of commercial usage, to say that into whosoever's hands the cargo might come they would not be responsible personally for demurrage under the charter-party.

I am of opinion, therefore, that the consignee is not less liable because he happens to be the charterer, the ground of his being released from liability as charterer being found in his being agent for other parties. But, apart from this consideration, we have the clear authority of Cotton and Thesiger, L.JJ. in *Porteous* v. *Watney* (39 L. T. Rep. N. S. 195; 4 Asp. Mar. Law Cas. 34; 3 Q. B. Div. 534) for saying that a provision similar to that which is found in the bill of lading in the present case only incorporates into the bill of lading so much of the charter-party as is applicable. I think, therefore, that in this case there must be judgment for the plaintiffs with costs.

Lopes, J.—It is important in this case to remember that this is a claim for demurrage not at the port of loading, but at the port of discharge, and not against the defendants as charterers of the ship, but as consignees of the cargo; and the question for us to consider is what is the contract entered into by the bill of lading. That document contains the words "he and they paying freight and all other conditions as per charter-party." The charter-party, therefore, must be looked at, for it would be impossible for us not to give effect to the words "and all other conditions as per charter-party." Those words must be looked at with reference to what the charter-party contains. Now, it is clear from the judgments of Cotton and Thesiger, L.JJ. in *Porteous* v. *Watney* (*ubi sup.*), that these words only import into the bill of lading such of the provisions of the charter-party as are consistent with the circumstances of the case at the time when it becomes necessary to construe the bill of lading. We are bound, therefore, to incorporate the provisions of the charter-party as to demurrage, because those conditions are applicable to demurrage at the port of discharge such as has arisen in this case; but it is equally clear that we cannot import the earlier provisions of the charter-party, which run, "It is agreed that as this charter-party is entered into by the charterers for account of another party, their responsibility ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage," for that provision has reference only to the time when "the cargo is on board," and has no application to the state of things at the port of discharge. I think, therefore, that while the condition as to demurrage is applicable to the circumstances of this case, that which only relates to the time when "the cargo is on board" is not applicable, or, in other words, that the cesser clause has no application here, and I think that there should be judgment for the plaintiff for 56*l.* 13*s.* 4*d.* with costs.

Judgment for the plaintiff.

Solicitors for the plaintiff, *F. Venn* and *Co.*, for *Collins, Robinson*, and *Co.*, Liverpool.

Solicitors for the defendants, *Kearsey, Son*, and *Hawes*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, Jan. 30, 1883.

(Before Sir R. Phillimore).

The Livietta. (*a*)

Salvage—Derelict—Amount of award—Apportionment.

A brig on a voyage from Norway to Cardiff, with a crew of nine hands, fell in with a derelict brig, in risk of imminent loss, between Heligoland and the Dogger Bank, and put a mate and two hands aboard her, who shortly after endeavoured to regain their own vessel, but their boat was swamped and one of the men drifted astern and was rescued by a fishing smack. After great difficulty and much hardship the two men navigated the derelict in safety to within a few miles of Dungeness, when she was taken in tow by a steamship and placed in Dover Basin.

In consolidated actions of salvage brought respectively by the owners, master, and crew of the brig, and by the owners, master, and crew of the steamship, the Court awarded one-half the value of the property salved, out of which three-fifths were apportioned to the salving brig.

These were consolidated actions of salvage brought respectively by the owners, master, and crew of the Norwegian brig *Julie*, and by the owners, master, and crew of the British steamship *Walton*, against the Italian brig *Livietta*, her cargo and freight.

The statement of claim on behalf of the owners, master, and crew of the *Julie* alleged their services to be substantially as follows:

The *Julie*, a brig of 257 tons register, was, on the 13th Nov. 1882 in the North Sea, bound on a voyage from Arendal to Cardiff, laden with a cargo of mining timbers and manned by a crew of nine hands all told. On the same day, at about 9 a.m., when between the Dogger Bank and Heligoland, those on board the *Julie* sighted a brig (which proved to be the *Livietta*) lying to, there being a light easterly wind. The mate and two hands of the *Julie* having boarded the *Livietta*, it was found she was laden with wheat, derelict and in a very crippled condition, there being two and a half feet of water in the hold, the pumps choked, no pump gear and no anchors. The mate and the two hands set sail upon the *Livietta* and proceeded in company of the *Julie*. Meanwhile the wind had increased to a gale from the east with a high sea, and at 10 a.m. on the 14th of November, those on board the *Livietta*, fearing to lose sight of the *Julie* in the boisterous weather, and fearing the *Livietta* would founder as the water was increasing, determined to leave the *Livietta*. In attempting to do so, which involved

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

great risk to the *Julie* by reason of her approaching close to the *Livietta*, the boat was swamped, and the mate and one hand succeeded in getting on board the *Livietta* again, and the other hand drifted astern in the swamped boat and was ultimately rescued by means of a lifebuoy by a fishing smack. After several ineffectual attempts to send the *Julie's* lifeboat to the assistance of the two men on the *Livietta*, the *Julie* endeavoured to keep by the *Livietta*, but lost sight of her during the afternoon. The *Livietta* was then with much difficulty navigated up the English Channel. At 4.30 p.m. the North Hinder light was sighted, and at midnight the South Foreland light, the course being shaped for Dover and flareup lights being burned for a pilot or tug. By this time the water had increased to five feet, the wind had decreased, but the sea had got worse and was running very high. Towards morning on the 15th Nov., the wind having become more northerly, the *Livietta* drifted from the shore, and at 8 a.m. the Varne light was sighted. The *Livietta* was then tacked in towards the land, and at noon Dungeness was sighted, when in answer to a signal of distress the steamship *Walton* came off and towed the *Livietta* off Dover, when she was taken by a tug into the harbour, having at this time five and a half feet of water in her hold amidships.

After the *Julie* lost sight of the *Livietta* she experienced very bad and adverse weather, and in consequence of her being short-handed, by reason of the absence of the mate and two hands, the master and crew underwent much extra fatigue and exertion. She was three times driven back off the Lizard, and on the 23rd Nov. put into Falmouth as a harbour of refuge, having lost her lower foretopsail. She did not arrive at Cardiff till Dec. 16, having lost about 24 days, and being put to considerable expense at Falmouth. Those on board the *Livietta* when attempting to get back to the *Julie* lost their coats, boots, oilskins, and changes of clothing. In consequence they were constantly exposed to the weather and had no change, and their feet being uncovered suffered considerably. Except on one occasion they were unable to light a fire on board the *Livietta* or to cook their food. They had very little to eat or drink, were unable to go to sleep during the whole time they were on board the *Livietta*, and were in constant fear of foundering. In rendering the said services the *Julie* incurred expenses to the amount of 63*l*. 8*s*. 2*d*. The value of the *Julie* was about 2000*l*.

The statement of claim on behalf of the owners, master, and crew of the *Walton* alleged their services to be as follows:

The *Walton*, a steamship of 688 tons register, with engines of 99 horse power nominal, was, on the 15th Nov. 1882 about noon off Dungeness, on a voyage from Algiers to Leith and Newcastle, with a cargo of esparto grass and a crew of nineteen hands all told. At such time those on board the *Walton* sighted the *Livietta*, which was distant about six miles, bearing about S.S.E. and flying signals of distress. The sails were observed to be flying about in great confusion, and she was driving towards the French coast with her head to the westward. The chief mate and four men from the *Walton* boarded the *Livietta* and found her in charge of two men from the *Julie*, who were much exhausted and in want of assistance. After some difficulty, and without assistance from the two men from the *Julie*, the *Walton* was made fast ahead of the *Livietta*, three men from the *Walton* remaining on board the *Livietta* to stow the sails and make her ready for harbour. After about one hour's towing two more hands were put on board the *Livietta* to assist, and at 4.30 p.m. the *Walton* arrived off Dover pier with the *Livietta* in tow, and the *Livietta* was taken into the basin by a tug for 10*l*. At the time of receiving the services, the *Livietta* and the two men on board of her were in a position of extreme danger. The men were too exhausted and had not strength enough to set her sails, which were in a state of confusion, she had no anchors, and her pumps were choked and useless. She had from six to seven feet of water in her hold, and her cargo of grain was wet and deteriorating rapidly.

By the consent of the cargo owners, the cargo was sold by the Marshal of the court for the sum of 1344*l*., which was paid into court. An appearance was entered by the owners of the *Livietta* and of her cargo, and 500*l*. was tendered by the cargo owners, but refused as insufficient. The owners of the *Livietta* did not deliver a statement of defence.

The ship had not been sold and the value had not been ascertained.

In the statement of defence delivered on behalf of the owners of cargo, the allegations in the statement of claim on behalf of the *Julie* were admitted, save that the *Julie* by reason of being short-handed was in any way inconvenienced or put to expense, and that but for the services of the *Julie* the *Livietta* must have been lost; or that by reason of the services, the *Livietta* and her cargo were rescued and brought into a place of safety. With respect to the services of the *Walton*, they were also admitted, except the allegation that at the time of the *Walton's* services the *Livietta* and the two men on board her were in a position of extreme danger.

Jan. 30.—The case came on before the judge on the pleadings, no witnesses being called.

G. Bruce for the owners, master, and crew of the *Julie*.—The services of those from the *Julie* were in the highest degree meritorious. The property salved was saved from certain destruction, and in rendering the services the salvors greatly imperilled their lives, and underwent most unusual exertions. The owners of the *Julie* have been put to great expense by loss of time and damage to property. Under these circumstances 500*l*. is insufficient.

The Rasche, L. Rep. 4 A. & E. 127.

W. G. F. Phillimore for the owners, master, and crew of the *Walton*.—The *Walton* completed the service and so saved the *Livietta* and the lives of the original salvors. Without her assistance the *Livietta* would have been lost. Seeing that the values are small and the claimants many, a large proportion should be given.

Bucknill for the owners of cargo on the *Livietta*.—The tender is over one-third. The services of the two men from the *Julia* were no doubt meritorious, but not efficacious. The *Walton* only towed in calm weather for about two hours.

J. P. Aspinall, for the owners of the *Livietta*, stated that the owners of the ship would pay as salvage a sum bearing the same proportion to the value of the ship as that awarded against the cargo bore to the value of the cargo.

Sir ROBERT PHILLIMORE.—I pronounce against the sufficiency of the tender made by the owners of the cargo of the *Livietta* in this case, and I award a moiety of the value of the property proceeded against as salvage remuneration for the services rendered by the plaintiffs. Of this award I apportion three-fifths to the owners, master, and crew of the *Julie*. The owners, master, and crew of the *Walton* will receive the remainder of the moiety, and I allot two-thirds of this remainder to the owners of the *Walton*.

Solicitors for the owners, master, and crew of the *Julie*, *Waddilove* and *Nutt*.

Solicitors for the owners, master, and crew of the *Walton*, *Ingledew* and *Ince*.

Solicitors for the owners of the cargo of the *Livietta*, *Waltons*, *Bubb*, and *Walton*.

Solicitors for the owners of the *Livietta*, *Stokes*, *Saunders*, and *Stokes*.

Friday, April 27, 1883.

(Before BUTT, J.)

THE STEAMSHIP BENTINCK COMPANY LIMITED *v* W. H. POTTER & SON; THE GEORGE ROPER. (*a*)

Collision—Launch—Necessary precautions—River Mersey.

The duty of persons in charge of a launch, to take reasonable precautions to warn other vessels navigating the river before the vessel is launched, is to be construed as meaning that they are bound to take the utmost possible precautions.

Tugs in attendance on a launch in the river Mersey should be dressed with flags and should give warning to approaching vessels that the launch is about to take place.

THIS was a damage action *in personam* instituted by the owners of the screw steamship *Bentinck* against the owners of the launch *George Roper* to recover damages arising out of a collision between the two vessels in the river Mersey on the 10th Feb. 1883. The defendants counter-claimed.

The facts alleged on behalf of the plaintiffs were as follows: — The screw-steamship *Bentinck*, belonging to the port of Whitehaven, of 555 tons register, and manned by a crew of seventeen hands all told, was, shortly before 1 p.m. on the 10th Feb., proceeding down the river Mersey on the Cheshire side of mid-channel, bound on a voyage from Garston to Belfast with a cargo of coals. The wind was S., the weather fine and clear, and the tide last quarter flood, and a good look-out was being kept on board the *Bentinck*, which was being navigated at slow speed, stopping when necessary to avoid the craft in the river. As the *Bentinck* came down towards Brunswick Dock, her engines were stopped to allow a steamer, the *Merchant*, coming out of Brunswick Dock to straighten down the river. The helm of the *Bentinck* was put to starboard, so as to keep clear of the *Merchant*. The *Merchant*, however, starboarded also, and thereupon these on board the *Bentinck* observed the launch *George Roper* coming across the river stern first, about 300 yards off, and broad on the starboard bow. Previously to the launch being seen an order had been given to go slow ahead, but it was at once countermanded, and the engines of the *Bentinck* were immediately put full speed astern, but the *George Roper's* starboard side came into collision with the stem of the *Bentinck* and the *Bentinck* received considerable damage. The plaintiffs charged against the defendants (1) that the *George Roper* was improperly launched at a time when the river was not clear, and without a proper look-out being had, or proper precautions being taken to see that the river was clear; (2) that a proper, sufficient, and usual notice or warning of the launch was not given before the launch, and proper steps were not taken to apprise those navigating the river that the launch was coming away; (3) that the *George Roper* was not furnished with a proper anchor, or with one ready for letting go, or if there was any such anchor ready, those on board and in charge of her improperly neglected to use it; (4) that the *George Roper* when she got into the river was not properly navigated or towed so as to avoid collision with the *Bentinck*; (5) that the defendants were the builders of the *George Roper*, from whose yard she was launched, and they or their servants had the management of the launching operations; and lastly, that the collision and the damage to the *Bentinck* was caused by the negligence of the defendants and their servants.

The facts alleged on behalf of the defendants were as follows:—On the 10th Feb., the defendants, intending to launch the ship *George Roper* from their building yard, situated on the Liverpool side of the river Mersey, had taken all reasonable steps to indicate to vessels navigating the river that a launch was about to take place. Flags were displayed from poles on board the launch, and a large red flag, a usual and well-known signal on the Mersey that a launch is about to take place, was flying at the end of the building yard. Two steam tugs were also in the river opposite the yard, each flying a large burgee, which is also a well-known signal that they were in attendance upon a ship about to be launched. It was high water about 1.10 p.m., and it is a well-known rule that the launching of vessels takes place at slack tide (high water), and it was notorious on that day that the launch would take place at that time. In these circumstances, at about two minutes to 1 p.m., the river being clear of craft, the defendants launched the vessel, and, whilst she was crossing the river stern first from the Liverpool to the Cheshire side, those on board her observed the *Bentinck* (which they had previously seen nearly a mile distant) coming down the river. There was then plenty of room and time for the *Bentinck* to have avoided the launch, either by going ahead of her, or by easing or stopping and reversing; but the *Bentinck*, coming on apparently under a starboard helm, and without taking any steps to avoid the launch, struck her with considerable violence on the starboard side, doing her considerable injury. Before the collision the *Bentinck* was loudly hailed to go astern.

The defendants charged the plaintiffs with (1) failing to keep a good look-out; (2) failing to ease or stop and reverse in time; (3) and with improperly and negligently omitting to keep out of the way of the launch.

By way of counter-claim the defendants said:

1. They repeat the several allegations hereinbefore made.

2. The defendants have suffered great damage by reason of the collision, and have thereby made themselves responsible, and have become liable to the owners of the launch for a large sum of money in respect of a breach of their (the defendants') contract with the owners, caused solely by the matters herein complained of.

The plaintiffs replied joining issue on the defence, and denying that the defendants had suffered great damage by reason of the collision, or that they had made themselves responsible or had become liable to the owners of the launch for a large sum of money in respect of a breach of their contract with the owners; and upon this reply issue was joined by the defendants.

April 27.—The action came on for hearing, when *viva voce* evidence was given on both sides. The allegations in the statement of claim were substantially proved by the evidence for the plaintiffs. The defendants proved that they had

(*a*) Reported by J. P. ASPINALL, and F. W. RAIKES, Esqrs., Barristers-at-Law.

conducted a very large percentage of the launches in the river Mersey for upwards of twenty-three years, and had hitherto never met with an accident, and that the mode of conducting a launch as alleged by them was their usual method.

Russell Q.C. (with him *W. G. F. Phillimore*) for the plaintiffs.—It is laid down in *The Blenheim* (2 W. Rob. 421) and *The Andalusian* (2 P. Div. 231) what is the duty of those in charge of a launch to take reasonable precautions. Reasonable precautions in the river Mersey can only be the utmost possible precautions. The precautions in the present case are manifestly insufficient, and the fact that the defendants have never before had an accident is immaterial.

Myburgh Q.C. (with him *Bucknill*) for the defendants.—It is unreasonable to cast upon shipbuilders the wide duty of taking the utmost possible precautions. It cannot be said that those precautions must be taken which the highest ingenuity can suggest. In *The Blenheim* (*ubi sup.*) all that is required is reasonable notice, and in that case, where the circumstances were very similar to the present, those in charge of the launch were held free from blame. The defendants have conducted a very large number of launches for upwards of twenty-three years, and this is their first accident, which shows that hitherto their precautions have been sufficient.

Russell, Q.C. in reply.

BUTT, J.—This case does not to my mind present much difficulty, and the Elder Brethren take the same view as myself. Now the first question is, What is the duty of those in charge of a launch in the river Mersey? and this has been laid down in the case of *The Andalusian* (*ubi sup.*). It seems to me that I am bound by that case. I may say I entertain a view quite in accordance with the law as laid down there, and I have no hesitation in stating that that is the law. It is given in these words: "The law throws upon those who launch a vessel the obligation of doing so with the utmost precaution, and giving such a notice as is reasonable and sufficient to prevent any injury happening from the launch; and, moreover, the burden of showing that every reasonable precaution has been taken, and every reasonable notice given, lies upon her and those managing the launch." Mr. Myburgh said that this comes to a question of reasonable precautions as no one is bound to do more than take reasonable precautions, but this is really no more than a change of terms. For what is a reasonable precaution in launching a vessel is in fact the utmost precautions under the circumstances. So, when you set a vessel going, without engines or helm, and with only a tug to manage her, off the ways at the speed of seven knots an hour across the fairway of the river Mersey, the utmost precautions are certainly only reasonable. What, then, are the usual precautions? Now, I venture to say that a usual precaution is to have one tug decorated with a show of flags. This is well known, certainly to all seamen, usually to mean that a launch is taking place. Why this precaution should not have taken place in this instance, I am at a loss to conceive. I am of opinion that they should be taken in all cases of a launch in the Mersey. The defendants chose to trust to something else. Properly enough, no doubt, there were two tugs in attendance, one at the yard, and one out in the middle of the Mersey. Now, as to the decoration of the tugs. When I refer to the evidence of Mr. Potter, one of the defendants, I find he himself says that he thinks it is the custom to have more flags than one to show that the tugs are not engaged in the ordinary way, and that something unusual is going to happen; and if that precaution had been taken it is clear the collision would not have taken place. In *The Andalusian* it was held that it was the duty of one or other of the tugs to give warning to approaching vessels. What, then, is the state of things here? The *United Service*, the tug lying out in the river, sees three vessels coming down a mile off; she knows the launch is likely to come across their course, but, as they get nearer, takes no steps to warn them of the launch. This appears to me to be a clear neglect of duty, for this tug might have steamed up and given warning to the approaching vessels. It further appears that Mr. Potter went to a place where he could see if the river was clear in the vicinity, then descended to the platform and within two minutes, the launch, a vessel of great length and tonnage, was in the water. Mr. Potter was in ignorance that three vessels were coming down the river towards the place where the launch must go, and, not knowing this, he gives the order for the launch to be set off. Both the tug masters, however, were aware that three vessels were under way down the river, but they give no warning, which, as I have said, is a neglect of duty. I cannot help thinking that it is negligence on the part of those in charge of a launch to set her going on the ways without taking all steps to be certain that nothing is approaching the place of the launch at the time. [The learned Judge then considered the evidence with regard to the navigation of the *Bentinck*, and finally pronounced those in charge of the launch alone to blame.]

Solicitors for the plaintiffs, *Hill, Dickinson, Lightbound* and *Co.*

Solicitors for the defendants, *Bateson, Bright*, and *Warr.*

May 25 *and June* 26, 1883.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE YAN YEAN. (*a*)

Salvage — Misconduct of salvors — Forfeiture of award—Counter-claim.

Where salvors, having taken possession of a derelict vessel, whose crew had taken refuge on board the salvors' vessel, improperly refused to put back the crew or take the proffered assistance of a tug, although they themselves had no local knowledge, and then brought the derelict to anchor in an improper place, in consequence of which she was lost, the Court, although the ship and cargo were subsequently raised, and realised 3075l., refused to give any salvage remuneration, and condemned the plaintiffs in costs, but dismissed the counter-claim for damages.

THIS was a salvage action instituted by the owners, master, and crew of the steamship *Kirkstall* against the owners of the steamship *Yan Yean*, her cargo and freight.

The plaintiffs alleged that on the 3rd April the

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Kirkstall, being close to Lavernock Point, fell in with the *Yan Yean*, signalling for assistance. The crew of the *Yan Yean* took refuge on a cutter in tow of the *Kirkstall*. Some of the crew of the *Kirkstall* then boarded the *Yan Yean*, and saved her from drifting on to Lavernock point, and took her towards Cardiff, and anchored her on Cardiff Flats. During the night, in consequence of the severity of the weather, the *Yan Yean* dragged her anchor, came into collision with another vessel, and ultimately foundered. The *Yan Yean* was subsequently raised by her owners and brought into port.

The material allegations in the statement of defence was that in consequence of the negligence of the *Kirkstall's* crew in coming alongside the *Yan Yean*, those on the *Yan Yean*, fearing she would sink, jumped on board a cutter in tow of the *Kirkstall*; that the plaintiffs improperly refused to put back the crew of the *Yan Yean*, or to take the assistance of a tug, although they themselves were not acquainted with the locality; that the plaintiffs brought up the *Yan Yean* in an improper and exposed place, in consequence of which she sank, and so occasioned great expense to her owners; and that the plaintiffs were not entitled to any salvage remuneration.

The defendants claimed 2000*l.* damages.

The further facts fully appear in the judgment.

The value of the ship and cargo when raised amounted to 3075*l.*

The action came on for hearing on *viva voce* evidence.

W. G. F. Phillimore for the plaintiffs.—In this case life and property exceeding in value 3000*l.* have been saved. If the conduct of the salvors was improper, it must be criminal before it would work an entire forfeiture:

The Atlas, Lush. 518; 1 Mar. Law Cas. O. S. 235; 6 L. T. Rep. N. S. 737.

There is no case in which the conduct of the salvors, being analogous to the present case, all remuneration was forfeited. The refusal of the salvors to take the tug was a mere error in judgment, not sufficient to work a diminution, much less a forfeiture. Dr. Lushington in *The Charles Adolphe* (Swa. 153) gave salvage where the salvors had refused to allow the master and crew to return to their vessel. If in this case there was any negligence which diminished the value of the *res*, the salvors will suffer for it, as the court has a smaller value to make an award upon. But undoubtedly the salvors are entitled to some award, seeing that the services have resulted in the preservation of a considerable property, without which services the *Yan Yean* would have been surely lost. The evidence of misconduct must be conclusive, and the onus of proving it is on the defendants:

The Charles Adolphe (*ubi sup.*).

Kennedy for the defendants.—All that the *Yan Yean* required was a towage service, yet the salvors violently took possession of the vessel, and continued their services long after they were necessary. The salvors, knowing nothing of the locality, refused the assistance of the master of the tug and of the master of the *Yan Yean*, both of whom possessed the requisite knowledge. In this case there are present criminal misconduct, negligence, and consequent loss, which, when combined, are amply sufficient to work a total forfeiture of remuneration:

The Charles Adolphe (*ubi sup.*);
The Duke of Manchester, 6 Moo. P. C. C. 91.

Independently of the refusal to take assistance, the consequent loss is alone sufficient to work a forfeiture. *The Atlas* (*ubi sup.*) is not in point, on the ground that remuneration should be given, because in that case there was no refusal to take assistance.

Cur. adv. vult.

June 26.—Sir JAMES HANNEN.—This is a claim for salvage. The casualty out of which this action arose took place as long ago as the 3rd April 1881. The action was commenced on the 8th April, and was languidly pursued till March 1882, when the statement of defence and counter-claim were delivered, and then, to use the language of the clerk to the plaintiff's solicitors, the action "fell asleep," and so continued till it unfortunately occurred to the plaintiffs in February of this year to awaken it.

The facts are these. The *Kirkstall*, a screw-steamer of 238 tons register, was proceeding up the Bristol Channel to Newport with a cargo of pig iron. She had a pilot boat in tow, which had been picked up in a disabled condition. At 5 p.m. she was abreast of Lavernock Point, the wind blowing a fresh gale from the east, when she observed farther out in the Channel a vessel, which turned out to be the *Yan Yean*, a steam barge of 90 tons, bound from Port Talbot, near Swansea, to Bristol, laden with tin plates. The *Yan Yean* had her head to the west; the sea was breaking over her, and she had become unmanageable. Those on board of her were making signals for assistance by holding up a rope, indicating a wish to be towed. The *Kirkstall* endeavoured to approach her, and in so doing by an accident, for which I am advised, and think, no blame is imputable to the *Kirkstall*, the pilot cutter which she had in tow came in contact with the *Yan Yean*. The captain and all his crew in alarm, immediately jumped on board the pilot cutter, and the *Yan Yean* was left with no one on board. In this condition she drifted inside of Lavernock Point to the north into comparatively smooth water, where she would have gone on shore on a hard beach, if the master of the *Kirkstall* had not ordered a boat to be lowered, in which the mate and two of his crew went to the *Yan Yean* and got on board of her. The evidence is conflicting whether an offer was made to the captain of the *Yan Yean* to take him on board his vessel, and whether he refused. I am of opinion that no such offer was made; but that, on the contrary, the master of the *Yan Yean* requested to be taken on board, and that the mate of the *Kirkstall* refused to take him. Those in the *Kirkstall's* boat having boarded the *Yan Yean* let go her anchor, and found that there was very little water in the boiler. The boat was therefore sent back to the *Kirkstall* to fetch an engineer. The second engineer was accordingly sent, and when the boat was passing the pilot cutter, in which the master and crew of the *Yan Yean* still were, the master again requested to be taken on board his vessel; but he was again refused. Apart from the questions arising on this refusal, I am of opinion that the *Kirkstall* had, up to this point, rendered valuable salvage services to the *Yan Yean*, for which she would have been entitled to substantial salvage remuneration. The second

engineer of the *Kirkstall* attended to the boiler and engines of the *Yan Yean*, and she was soon in a condition to steam towards Cardiff. Whilst the *Yan Yean* was at anchor, a steam tug came up and offered to tow the *Yan Yean* to a safe place at Cardiff for 10*l*. The mate of the *Kirkstall* refused to give more than 5*l*. He then took the *Yan Yean* towards Cardiff, and anchored her on the Cardiff Flats. There was no reason why she should not have been taken within the pier-head or the Ely Harbour, in either of which places she would have been in safety. The Cardiff Flats where she was anchored is a place where small vessels are sometimes allowed to take the mud. But it is very exposed, especially to east winds; and I am advised, and think that, as there was nothing to prevent the *Yan Yean* being taken into a secure berth, it was negligent and unskilful to place her on the flats. On the night of the 3rd April the wind increased to a gale from the east, and the mate and the three men who were in charge of the *Yan Yean*, becoming alarmed, left her and took refuge on board a vessel called the *Varna*. The *Yan Yean* afterwards dragged her anchor to the edge of the drain, or passage through the flat, where she sank. The *Yan Yean* was afterwards raised at an expense of 125*l*., but her cargo was seriously damaged by being under water.

In these circumstances I was asked to decree salvage remuneration. I have already said that I consider that valuable services were rendered by the mate of the *Kirkstall* and his companions in going on board the *Yan Yean* and getting her anchor out before she ran ashore at Lavernock Point; but I do not consider that there was any difficulty or risk in doing this. The mate, however, was guilty of very reprehensible misconduct in refusing to take the master of the *Yan Yean* on board his ship. He was further not justified in refusing the aid of the tug for so small a sum as 10*l*., as he had not himself the local knowledge which would have enabled him to take the *Yan Yean* to a place of safety. If the mate had brought the *Yan Yean* into harbour, I have the authority of Dr. Lushington for holding that the refusal to take the master on board would not work a total forfeiture of salvage remuneration. But in this case there can be little doubt that the ultimate loss arose from the mate's refusal to restore the captain of the *Yan Yean*, or to accept the aid of the master of the tug, from either of whom he might have obtained the local knowledge, which it is to be presumed he did not himself possess. It was laid down by the Privy Council in the case of *The Duke of Manchester* (*ubi sup.*) that, if by the negligence of the salvors, a ship is led into peril as great as that from which she has been rescued, all claim to salvage is forfeited. In this case I am advised that the risk of total loss, if the *Yan Yean* had been allowed to drift on Lavernock Point was great. But, on the other hand, it is a matter of the vaguest speculation whether the ship and cargo did not sustain as much damage from the sinking in the "drain" as would have resulted from taking the shore at Lavernock Point. As, therefore, the misconduct of the salvors was great, and has resulted in a loss which cannot clearly be seen to be less than that from which the vessel was saved, I am of opinion that the plaintiffs are not entitled to salvage. I do not, however, consider that the circumstances call for the condemnation of the owners of the *Kirkstall* in damage beyond the forfeiture of salvage; but, as I think that the action ought not to have been brought, the plaintiffs must pay the costs.

Solicitors for the plaintiffs, *Ingledew* and *Ince*.
Solicitors for the defendants, *Waltons*, *Bubb*, and *Walton*.

April 28, 29, *and May* 2, 1883.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE MARGARET. (*a*)

Collision—Thames Conservancy Rules, 1880, *arts.* 22 *&* 23—*Tide—Blackwall Point.*

Where a steamship in the river Thames, having come out of dock and being bound down the river, finds herself with the tide against her on the bend of any of the points enumerated in rule 23 *of the Thames Conservancy Rules, where the river has begun to curve round, and those on board of her see another steamship in the reach below preparing to round the point with the tide, the first steamship is not bound by the* 23*rd rule, as that only applies to the case of a vessel not having reached the point.*

Where a vessel, proceeding down the river against a flood tide and about to round a point under her port helm, is bound to act under rule 23 *of the Thames Conservancy Rules, she does not act inconsistently with rule* 23 *if she ports her helm in compliance with rule* 22.

THIS was a damage action *in rem*, instituted by the owners of the steamship *Clan Sinclair*, against the owners of the steamship *Margaret*, to recover damages arising out of a collision between the two vessels off Blackwall Point in the river Thames. The defendants counter-claimed.

The statement of claim, in substance, alleged as follows:—At about 1.30 p.m. on March 9th, 1883, the *Clan Sinclair*, a screw steamer, of 1911 tons register, and manned by a crew of seventy-five hands all told, left the South West India Dock in charge of a duly licensed Trinity House pilot. The *Clan Sinclair* proceeded down the river in tow of a steam-tug, being bound for Calcutta, *viâ* Liverpool, with a general cargo. The weather was fine and clear, the tide last hour's flood, and running about two to two and a half knots an hour, and the wind was a fresh breeze from the N.E. A good look-out was being kept on board the *Clan Sinclair*. At about 1.34 p.m. the *Clan Sinclair* was proceeding down the river about mid-channel, under her own steam and with the tug ahead, at a speed of about three to four knots through the water, and was about to round Blackwall Point under a port helm. A steamer, which proved to be the *Margaret*, was then seen by those on board the *Clan Sinclair* over the land of Blackwall Point to be coming up the river, and bearing about three to four points on the starboard bow of the *Clan Sinclair*. The *Margaret* appeared to be coming full speed round Blackwall Point, as if under a starboard helm, and as though she intended to pass to the south of the *Clan Sinclair* on her starboard side. When it was seen that the *Margaret* was rounding the point, the engines of the *Clan Sinclair* were stopped and reversed

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

full speed, and the tow-rope of the tug was slipped to enable the *Margaret* to pass to the south of the *Clan Sinclair*, and on her starboard side, but the *Margaret*, when she approached the *Clan Sinclair*, and was still on her starboard bow, ported her helm and attempted to cross the bows of the *Clan Sinclair*, and coming on at full speed, struck the starboard side of the stem of the *Clan Sinclair* with her own port side abaft the midships, and did her great damage.

In the statement of defence and counter-claim delivered on behalf of the defendants, the material allegations were as follows:—At about 1.45 p.m. on March 9, 1883, the wind being about E.N.E., the weather fine and clear, and the tide in the last quarter's flood of about two knots force, the steamship *Margaret*, of 255 tons register, manned by a crew of fifteen hands, and laden with a general cargo, was steaming in mid-channel, up Bugsby's Reach in the river Thames, on a voyage from Boness to London. Her speed was from five to six knots an hour over the ground, her engines were at half speed, and a good look-out was being kept on board her. In these circumstances those on board the *Margaret* saw the masts of the steamship *Clan Sinclair* over the land at Blackwall Point, from half to three quarters of a mile off, and about three points on the port bow. The engines of the *Margaret* were put to dead slow, and shortly afterwards, when the hull of the *Clan Sinclair* was seen, the helm of the *Margaret* was ported and her whistle was blown one short blast, and her engines were stopped. At this time the *Clan Sinclair*, which had a tug attached to her, was on the southern side of the channel, in such a position that it was proper for her and the *Margaret* to pass each other port side to port side. The *Clan Sinclair*, however, canted, with her head to port as if under a starboard helm, and the tide took her on her starboard bow and she cast off her tug, and headed for the *Margaret*, causing danger of collision. When the two vessels were within a ship's length of each other, the *Margaret*, which had hitherto been kept so as to pass on the port side of *Clan Sinclair*, had her engines put full speed ahead and her helm hard-a-starboarded to swing her quarter off. But the *Clan Sinclair* with her stem took the port side of the *Margaret* abaft midships, doing her so much damage that she shortly sank. The defendants alleged that the plaintiffs had failed to comply with rules 14, 22, and 23, of the Rules and Bye-laws for the Navigation of the River Thames.

In the reply the plaintiffs joined issued on the statement of defence and counter-claim.

The Rules for the Navigation of the River Thames referred to are as follows:

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.

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 . . . Blackwall Point, ease their engines and wait until any other vessels rounding the point with the tide have passed clear.

April 28.—The action came on for hearing before the judge, upon *viva voce* evidence. The main questions in dispute were the speed of the respective steamers, and their respective manœuvres after sighting one another. These questions are fully dealt in the judgment.

Myburgh, Q.C. and *Hollams* (with them *Russell*, Q.C.) for the plaintiffs.—The navigation of the *Clan Sinclair* was seamanlike, and in compliance with the Rules for the navigation of the river Thames. Rule 23, as interpreted by the Court of Appeal in *The Libra* was not broken by *The Clan Sinclair*. The circumstances in *The Libra* (L. Rep. 6 P. Div. 139; 4 Asp. Mar. Law Cas. 439; 45 L. T. Rep. N. S. 161) differ in this material circumstance, that from the moment the *Clan Sinclair* left the dock she was on the point, whereas in *The Libra* the *Libra* was coming down the reach which led up to the point. Hence the *Clan Sinclair* being always on the point, could only absolutely obey the rule by going backwards to the reach above the point. What she did, was to go at the slowest possible speed which would enable her to be under command, and by so doing she did her best to comply with the rule. The navigation of the *Margaret* was improper, and she alone to blame.

Hall, Q.C. and *Phillimore* for the defendants.—The *Clan Sinclair* clearly violated rules 22 and 23. The decision in *The Libra* lays it down that a steamship navigating against the tide on approaching any of the points named in the rule, is to wait until vessels approaching it with the tide have passed clear of her, the waiting ship. Yet here those on the *Clan Sinclair*, who avowedly see the *Margaret* across the point, keep their engines going and never attempt to wait.

BUTT, J.—In considering this matter it is important to remember that these are two ships of very different sizes. The *Margaret* is a comparatively small steamer of 255 tons nett; the *Clan Sinclair* is a screw steamer of 1911 tons nett, and she is 355 ft. long between the perpendiculars. This latter is the ship that comes out of the South West India Dock, practically where the curve of Blackwall Point begins, and she has to navigate down against the flood tide, having a tug to assist her.

The first, and possibly the most serious, point that is made against her is this: it is said that whatever else there may be in the mode in which these vessels were navigated, the *Clan Sinclair* must be held to blame for disobedience of the 23rd rule of the Rules and Bye-laws for the Navigation of the River Thames. It is said that she broke that rule, which provides that "Steam-vessels navigating against the tide shall, before rounding Blackwall Point (for I leave out all the other points), ease their engines, and wait until any other vessels rounding the point with the tide have passed clear." Now it is clear this vessel never had her engines going other that at an extremely easy rate from the time she got into the river, and therefore in one sense at all events she had eased, and she was going down very slowly. But then it is said that is not sufficient. It has been laid down, it is said, in the Court of Appeal, that the meaning of the words of that rule are that a vessel going down against the tide, and meeting one coming up, must ease and bring herself practically to a standstill, and so remain until the vessel coming up shall have passed her, or so far to a standstill as this, that the vessel coming up shall have come round the point and have passed her (the vessel

going down) before she has reached the point. The present Master of the Rolls, in *The Libra* (*ubi sup.*), lays down the construction to be put on that rule in these words: "All that the 23rd rule says is, when it is likely that they"—that is, the two vessels—"may meet on the point"—that is. as I understand it, anywhere in the bend where there is a serious curve—"the vessel which is going against the tide shall wait. I think the meaning is, that she shall so far check her speed as to prevent her coming up to the point at the same time when the other vessel would come there. The vessel going against tide is not only to wait until the other has passed the point, but to wait until the other has passed her." Now, that is the interpretation put upon this rule in the Court of Appeal, and by one of the judges of the Court of Appeal, who of all others is most experienced in cases of this kind, and had I not liked the decision in this case, but had I entertained any doubt as to its accuracy, I should feel myself bound explicitly to follow it. But as a matter of fact I have no hesitation about the matter, for I think it is entirely in accordance with the true construction of the rule, and in dealing with this case I am not going to depart by a hair's breadth from what is there laid down.

But there is another question which arises, which is this: Does this rule 23 apply to the circumstances of this case? The rule clearly contemplates two vessels in different reaches, and the one coming down and the other coming up, sighting each other across the point, or if not across the point, at all events at a time when one vessel is in one reach and the other in the other, and it contemplates the vessel which has the tide against her stopping in the reach where she is, until the other has passed her. The words of the rule worthy of remark begin in this way: "Steam vessels navigating against the tide shall before rounding the point;" that is to say, it assumes the case of vessels in different reaches and the measures are to be taken before coming to the point. Now the peculiarity in this case is that this large vessel, the *Clan Sinclair*, has come out of the South West India Dock, and although I do not say she comes out on the pitch of the point, or anything like it, yet she does comes out in a position where she was originally on the bend, and where the river has begun to bend round, and unless she goes astern up the river towards London, instead of pursuing her way seawards, she can never get into the position contemplated by the rule. She cannot stop above the point altogether till the vessel coming up has rounded and passed clear of her. She is not, therefore, within the letter of the rule, and I do not think she is within the spirit of the rule. But this may be, that if she is not in a position to comply entirely and completely with the prescription of the rule, she may still, under the circumstances, do what she can to render obedience to that rule, that is to say, to ease and to wait in the position in which she finds herself. She cannot, as I pointed out, without going astern, wait in the reach above the bend. The nearest compliance she can effect with the rule is to go very easy and wait all she can in the position in which she finds herself. And if the *Clan Sinclair* did that, I think she will have given as much compliance and as much effect to the rule as she could do. Now I think for the reasons which I will give directly, she did that. I think it is clear that those in charge of her had the rule present to their minds at the time, and that they did what they could to comply with it. Now, let us consider for a moment, that being their intention, what they did to carry out that intention. It appears that the vessel had little way on her from the first, and that she materially reduced it, and had brought herself almost to a standstill at the time when this collision happened, and that is no less apparent from the strong evidence given on her behalf, than, as I think, the bulk of the evidence adduced by those who represent the *Margaret*. One must not forget one thing. It is suggested that this vessel might have stopped almost immediately outside the South West India Dock entrance, but a large steamer, 355 feet long, and of the tonnage this vessel is, cannot afford to lose way and get out of command in such a place as the river at Blackwall Point. And although she had a tug in attendance to assist her, it is almost a necessity that she should keep her engines moving, and I think, and the Elder Brethren agree with me in this, that that is about all she did on this occasion. [His Lordship then discussed the evidence as to the speed of the *Clan Sinclair*, and the nature of the blow inflicted on the *Margaret*, and came to the conclusion that the headway of the *Clan Sinclair* was practically off her at the time of the collision]. We think, therefore, that so far as a compliance with rule 23 is concerned, there was as much compliance with it as was possible for this big steamer, coming out where she did, and not having been navigated down the reach above, and that she was not in fault for any disobedience to that rule.

But then it is said rule 22 does not conflict with that. It does not necessarily conflict with it, but it would be rather hard to say that a vessel is not only to stop herself dead in the water, but also to use her helm effectually. I am not venturing to find fault with what has been said in the case of *The Libra* (*ubi sup.*), but I think it is clear that those on the *Clan Sinclair* thought it their duty to bring her as near to a standstill as possible. They ported their helm at the same time, and certainly there is no breach of compliance with rule 22 in porting your helm, because, if you can act under it at all, that is what you are bound to do. Therefore in that respect we do not think any blame whatever attaches to the *Clan Sinclair*. [His Lordship then discussed generally the navigation of both vessels, and came to the conclusion that the *Margaret* had been recklessly navigated, and pronounced her solely to blame for the collision.]

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

Solicitors for the defendants, *Freshfields* and *Williams*.

Thursday, May 24, 1883.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE SUNNISIDE. (*a*)

Salvage—Evidence—Loss of profits—Damage—Practice.

In a salvage action evidence of the loss of profits and damage sustained by the salving vessel is admissible as an element to be considered in awarding remuneration; but evidence of loss of profits is not to be taken in ordinary cases as a fixed figure always to be allowed as in the nature of damages. This rule does not apply with the same force to actual damage sustained. (b)

Where the steamship S., having broken down twelve miles east of Scarborough, was, in twenty-four hours, towed into the Tyne, at different intervals, by the steam trawlers M. and F. A. and the smack S., and the master of the smack S. having entered into an agreement with the master of the steamship S., whereby he was, for the sum of 20*l. to procure assistance, had informed the trawler M. of the whereabouts of the steamship S. only on condition in sharing in the salvage earned by the M., the Court, on a value of* 10,552*l.* 9*s.* 2*d., awarded to the M.* 200*l. in respect of the salvage, and* 100*l. for loss of profits and for repairs, to the S.* 10*l. and to the F. A.* 70*l.*

THESE were salvage actions instituted by the owners, master, and crew of the steam trawler *Monarch;* by the owners, master, and crew of the smack *Sirius;* and by the owners, master, and crew of the steam trawler *Flying Arrow*, against the owners of the steamship *Sunniside*, her cargo and freight, to recover salvage award. The first two actions were consolidated.

In addition to the facts which appear in the judgment it was proved that the master of the smack *Sirius*, having fallen in with the *Sunniside*, agreed, for the sum of 20*l.*, to take a telegram ashore and send off a tug to the assistance of the *Sunniside;* that he did send the telegram and engaged a tug, the *Monarch*, but stipulated with the master of the *Monarch* that he should receive one-third of any salvage remuneration the *Monarch* might earn, and refused, unless his terms were accepted, to give the position of the *Sunniside.*

The value of the *Sunniside* was 10,000*l.*, of her cargo 293*l.*, and of her freight 259*l.*

Gully, Q.C. (with him *Bucknill*) for the *Monarch.*

J. P. Aspinall for the *Sirius.*

W. G. F. Phillimore for the *Flying Arrow.*

Mgburgh, Q.C. (with him *J. Edge*) for the defendants.

During the course of the hearing a question arose as to the admissibility of evidence as to the damage and loss of profit incurred by the *Monarch*, by reason of the services.

Myburgh, Q.C.—Such evidence is inadmissible. Salvors voluntarily give up their earnings and run the risk of damage, owing to the probability of large remuneration if successful. In awarding salvage these two elements are taken into consideration, and if two separate sums are awarded to compensate for loss of profit and damages sustained, the owners of salved property will be paying the salvors twice over in respect of the same thing.

Gully, Q.C. and *Bucknill, contra.*—In order to enable the court to arrive at what sacrifices have been endured by the salvors, and so award due remuneration, evidence as to loss of profits and damage sustained should be admitted:

The Norden, 1 Spk. 185;
The Salacia, 2 Hagg. 262.

Sir JAMES HANNEN.—I am of opinion that this evidence ought not to be altogether excluded, although perhaps it ought not to be taken into consideration as an exact element of consideration. It is to be remembered that it materially assists the court in arriving at an adequate reward.

The evidence was then given, and after the various parties had been heard, judgment was given as follows:—

Sir JAMES HANNEN.—The material facts to which I have to call attention are these:—On Nov. 7, at 10 a.m., the *Sunniside*, a steamer bound for Shields, met with the misfortune of her engines breaking down, and though she put up what sail she could, yet she was not able to be steered. The steering gear was not out of order, but she could not get steerage way in the course she was pursuing with the sails she had. Her position was about twelve miles east of Scarborough, and the wind S.W., and, though it varied during the period that we have to consider, it was always off the shore. On Nov. 8, at 9 a.m., the smack *Sirius*, which had come to the *Sunniside*, was engaged for some particular purpose to render a service to the *Sunniside;* what that service was is to some extent, though very little, in dispute. I find in the log of the *Sunniside*, which has been put in, it is entered "9 a.m., Nov. 8, engaged the smack *Sirius*, to go to Scarborough to engage a tug." The captain's statement of what he did with the master of the *Sirius* was as follows: "I engaged him to take a telegram and send a tug," and in cross-examination, when he was asked what passed, he said, "I said to him, will you take a telegram and send me a tug. He said he would for 20*l.* I told him to send me a tug off. I had the telegram ready made out." The only answer which in any degree tends to modify that, is this: "It might be after giving him the telegram that I mentioned sending the tug. When he came with the tug I told him I did not want his services any more." The master of the *Sirius*' account of it is really not substantially different. He says, "I was to engage a tug;" then he says, in cross-examination, that he saw the telegram which was "I have sent for tug." He also said, "I was to bring the tug. The captain of the *Sunniside* asked me to bring it. I never refused to give information. I said I would place him where the ship was. I was not asked for any information. I thought I had the right to make the bargain I did." The agreement mentions that he was for 20*l.* to take the telegram; but I come to the conclusion that he saw what that telegram was, and he knew what were its words. I draw the inference from his own statement that he perfectly understood that the

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

(*b*) This question has been subsequently discussed by the Privy Council in the case of *The De Bay, post*, p. 156. It is to be noticed that there Sir James Hannen delivers the judgment of the Privy Council.—ED.

service which he was expected to render for that 20*l.*, was not merely to take the telegram ashore and despatch it, but to give information that the ship was in distress, and to direct a tug, if he could find one, to come out to her assistance. In my opinion what he ought to have done would have been entirely within the limits of his rights and duties, viz., to have told the tugman all that he knew. "I have seen a vessel in such and such a position which is in want of assistance and you can go if you like." If he had done that he would not have been called on to do anything more. If he had given this information to the master of the tug, then of course he would have been entitled to make any bargain he pleased, but in doing as he did, in my judgment, he acted quite improperly. For it appears from the evidence of the master of the tug that he came to him and said, "There is a vessel in distress; I shall not tell you anything about it unless you agree to give me one-third." As a matter of fact he did go himself and took his tug with him. This is to be observed with regard to giving information where the vessel was, that it was broad daylight, and they sighted the *Sunniside* within an hour after starting. Then the *Monarch* took the *Sunniside* in tow, and then the *Sirius* had a rope passed from the *Monarch* to her, and the *Sirius* towed or attempted to tow. It is admitted that the master of the *Sirius* was not asked to do that, and when questions were put to him with regard to whether or not his services were ever disclaimed, whether he was ever told that he need not go on towing, he said, "No, he could not have done that, he could not make me hear." He was ahead of the tug and had the matter in his own hands. There was no possibility of preventing him going on rendering such services as he was rendering. However, the towing in this fashion went on until 1.30 a.m., on Nov. 9, and then, as one of the engines had been got to work to some extent, the *Sunniside* was making such way that the towing of the *Sirius* could not be kept up even in appearance, and the *Sirius* was cast off by those on board the *Monarch*.

I should observe that in the meantime a little earlier, the *Flying Arrow* had arrived on the scene, but though she tendered her services they had been refused; but, hoping for the job, she kept accompanying the *Sunniside* until 4 a.m., when her services were undoubtedly engaged. It is clear, therefore, that the services of the *Flying Arrow* were accepted, and there seems to have been a reason for it, for the master of the *Sunniside* says that at that time the wind had shifted, and it had become more difficult to make the Tyne, and I do not doubt that under the influence of those considerations, he engaged the *Flying Arrow* to assist him. But, then, the next question is, how long did she continue to render any service? and I am sorry to say upon this point, as upon some other points—one in particular—there is a difference in the evidence which has been given which can scarcely be accounted for by the different views which the witnesses take of transactions of this kind. The captain of the *Monarch* says that the *Flying Arrow* only towed for ten minutes before her rope broke. The captain of the *Sunniside* says that she towed for twenty minutes, and those on the *Flying Arrow* said she towed for a full hour. However, at the end of whatever time it was, the rope broke, and notwithstanding some efforts to get it again—for that is admitted by those on board the *Sunniside*—they could not get attached again. At 6.30 a.m. the engine had got started again, and then the *Monarch* was cast off. From that time the *Sunniside* was able to dispense with any services, and her own engines brought her close to the Tyne. After 6.30 the *Monarch* never towed again, but was only in attendance, and came up when the *Sunniside* had got to the harbour, and then, as has been explained, attended on her, being ready to render her service in the navigation up the river, and at about 8.30 the harbour was entered. When entering the harbour the *Flying Arrow* was again towing, but the question is how long before had she begun to tow. I am sorry to say that this is a point upon which there is a discrepancy among the witnesses; but I come to the conclusion that all the *Flying Arrow* did was, when the *Sunniside* had practically completed the process of extricating herself from the difficulty and danger she had been in until she got one engine in working order again, that then the *Flying Arrow* was attached for the purpose solely of assisting the *Sunniside* in the navigation up the river. I have described the extent to which I consider these several vessels have rendered services, and I now proceed to say the amount which it appears to me they ought to receive. With regard to the *Monarch*, I consider that she was the vessel which performed the real salvage service.

The question arose at the hearing yesterday as to the admissibility and effect of evidence of what a salving vessel might earn. I was asked to reject that evidence, but that I did not consider myself at liberty to do, because it appears to me it is admissible in evidence as an element to be considered in determining what remuneration should be paid to a vessel which renders salvage service. But I remain of the opinion I expressed yesterday, after considering it further, that it is not to be taken in ordinary cases as a fixed figure always to be allowed as in the nature of damage, and then to superadd to that the amount for salvage service as distinct. I think they must be considered, under ordinary circumstances, together. There are various reasons which recommend themselves to my mind for that course. It is to be remembered that the reason why so high a rate of remuneration is given to salvage services is because of the sacrifices which the salving vessel makes; but to give, as it were, damages for the sacrifices made, and to give a high rate of salvage remuneration, would be giving that remuneration twice over. As a rule, therefore, it appears to me that the loss of trade, and so on, cannot be taken as an actual figure in the calculation of what the salvage is to be. The same remarks apply, though not with the same force, to the question of damage done. But there is a reason in this case why a distinction should be drawn, and I propose to do it for the purposes of this case only. The master of the *Sirius* made the bargain I have mentioned, and with this bargain I have nothing to do in this case. I am of opinion that his own evidence shows that in going out with the *Monarch* he was going out for the purpose of enabling the *Monarch* to earn that money, of which he was to get a share. I consider that the *Sirius* services in the matter are reduced simply to the assistance, such as it was, as she was able to render by towing during those hours that she did tow, and for any further remuneration she has cast in her lot with the *Monarch*, and I have nothing

to say to that. But as it would plainly be wrong that, in getting her one-third, she should have one-third of the money which it would cost to put the *Monarch* in repair again, and as it would plainly be wrong that she should have one-third of any compensation which can properly be attributed to the loss of profits which the *Monarch* might have made in this case, I propose to discriminate and to mention the sum which I think should be given by way of salvage service, pure and proper, and I fix them for the *Monarch* at 200*l.*, and I allow 100*l.* beyond for loss of profit and repairs. To the *Sirius*, in addition to the 20*l.* which she got for this, which is in itself no doubt a salvage service—I am very doubtful myself whether anything more is due, but erring rather upon the side of liberality than otherwise—I assign, in addition to the 20*l.*, 10*l.*, making 30*l.* in all, to the *Sirius*. With regard to the *Flying Arrow*, I consider that though she was not able to render a very great service, yet that she did render some salvage services, and for them I allot her the amount of 70*l.*

A question having arisen as to how the costs were to be borne, the learned Judge stated that he would take time to consider it.

June 26.—Sir JAMES HANNEN.—In this case a question has arisen as to costs. I do not propose to allow any separate costs. I have consulted with Butt, J., and I allow one set of costs only to the *Monarch* and the *Sirius*.

July 9.—A difficulty having arisen as to the interpretation of the judge's order of the 26th June as to costs, the defendants now applied that the *Flying Arrow* should not be allowed separate costs. The Judge directed that the *Flying Arrow* was to be allowed no costs from the delivery of the statement of claim up to the preparation of the brief.

Solicitors for the *Monarch*, *Andrew*, *Wood*, and *Glasier*.

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

Solicitor for the *Flying Arrow*, *W. Batham*.

Solicitors for the defendants, *Botterell* and *Roche*.

June 12 *and* 26, 1883.

(Before Sir JAMES HANNEN.)

THE ANNA HELENA. (*a*)

Life and property salvage—Derelict—Amount of award.

In a case of salvage of a derelict the Court, having out of the proceeds of ship and cargo, amounting to 608*l.*, *awarded one-half to the salvors of property, awarded* 150*l. to life salvors taking off the crew, together with costs to both plaintiffs.*

It is not the general rule in causes, of salvage of derelicts to give one half the value of the property saved, although in some cases where values are small and the services meritorious, it may be proper to do so.

AGAINST the Dutch schooner *Anna Helena* two actions were instituted, one for salvage of ship and cargo by the owners, master, and crew of the smack *John Ellis*, the other for life salvage by the owners, master, and crew of the fishing smack *Lusty*.

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs. Barristers-at-Law.

On the 6th Dec. 1882 the fishing smack *Lusty*, 84 tons register and of the value of 1450*l.*, was lying to about 180 miles N.E. by E. from Spurn, when those on board her, at about 1.30 p.m., sighted the schooner *Anna Helena* flying signals of distress. On coming up with the *Anna Helena*, she was found to be waterlogged, and in a position of great danger. Her crew at once asked to be taken off. Notwithstanding the heavy sea and bad weather, the salvors at once put out their boat, which after much risk succeeded in bringing off the crew of the *Anna Helena*. Efforts were then made to save the vessel, but she was lost sight of in a snowstorm. The crew of the *Anna Helena* were much exhausted from cold, exposure, and want of food. On the morning of the 7th Dec. one of the salvors was washed overboard and lost. The crew of the *Anna Helena* at their request were taken to Hull. The services lasted from the 6th Dec., 1.30 p.m. till the 9th Dec. 5 a.m. and were rendered during very severe weather. By reason of the services the *Lusty* lost her fishing.

The *Anna Helena* was eventually picked up by the smack *John Ellis*, and after a service of about six days was brought into Shields.

On the 3rd Feb. the life salvors commenced an action in the County Court of Northumberland, holden at Newcastle, but, before any steps were taken, the *Anna Helena* was arrested under the warrant of the High Court in a salvage action by the salvors of the ship and cargo, and thereupon upon application an order was made by the judge of the High Court to transfer the action to the High Court.

In the action for salvage of ship and cargo on behalf of the *John Ellis* the *Anna Helena* was sold and the gross proceeds of sale amounted to 608*l.*, without deducting any marshals's or other expenses.

On the 12th June the action on behalf of the property salvors came on for hearing.

J. P. Aspinall, for the plaintiffs, stated the facts.

Sir J. HANNEN.—I have read the pleadings and the affidavit. The value is small, but the services were rendered at some risk, and it is a case in which I think that half the value should be allowed. I award 304*l.* and costs.

June 26.—The life salvage action now came on for hearing as an undefended action.

It appeared that the marshal's expenses in the action were about 100*l.*, and the plaintiffs' costs in the property salvage action about 60*l.*, so that the sum of 464*l.* was, as matters then stood, payable out of the fund in court.

W. G. F. Phillimore, for the life salvors, submitted that the life salvors were entitled to a substantial reward, and that, as the life salvors were entitled to precedence, it ought to be given without reference to the award to the property salvors.

J. P. Aspinall, for the property salvors, submitted that there was enough to pay the life salvors for the services and costs without affecting the award to the property salvors, and that the award ought not to be such as would affect the property salvors' right.

The court was referred to the following cases:

The Cargo ex Fusilier, 2 Mar. Law Cas. O.S. 177; 12 L. T. Rep. N. S. 186; Br. & L. 341;

The Cargo ex Schiller, 3 Asp. Mar. Law Cas. 226; 35 L. T. Rep. N. S. 97; 1 P. Div. 473;

The Cairo, 2 Asp. Mar. Law Cas. 257; L. R. 4 Ad. & E. 184; 30 L. T. Rep. N. S. 535;
The Coromandel, Swa. 205.

Sir JAMES HANNEN.—In a salvage case, recently before me (*The Argonaut*, June 19, 1883) it may be that I used a hasty expression implying that in the case of a derelict, the rule is to give salvors one-half, and my judgment in favour of the property salvors here might confirm that impression. However, I had no intention of so laying down a general rule. Each case must depend upon its own circumstances. Where values are small and services great, it may be proper to give half, and these circumstances existed in these cases. In this case I certainly think if I had known of this present claim I would not have given the property salvors a moiety. In this case the services are highly meritorious. It is impossible to lay down any general rule in salvage actions, but I think I do justice by allowing 150*l.* and costs, in which sum the personal representatives of the salvor who lost his life are to share.

Solicitors for the life salvors, *Brooks, Jenkins, and Co.*

Solicitors for the property salvors, *Clarkson, Greenwell, and Wyles.*

Tuesday, July 10, 1883.

(Before Sir JAMES HANNEN.)

THE WINSTON. (*a*)

Collision—Compulsory pilotage—Passing through the limits of a pilotage district—Exemption—The Merchant Shipping Act Amendment Act 1862 (25 & 26 *Vict. c.* 63), *s.* 41.

Where a steamship is passing through the limits of any pilotage district in the United Kingdom, on a voyage between two places, both situate out of such district, but stops at a port within that district for the purpose of coaling only, the provisions of sect. 41 *of the Merchant Shipping Act Amendment Act* 1862 *do not exempt her from compulsory pilotage, the words "loading or discharging" therein mentioned not being confined to cargo.*

THIS was a damage action *in rem*, instituted by the owners of the steamship *Warwick Castle*, against the owners of the British steamship *Winston*, to recover damages arising out of a collision between the vessels in Dartmouth Harbour, on the 27th Sept. 1882.

The facts shortly were: That the *Warwick Castle*, an iron steamship of 1892 tons register, whilst on a voyage from London to South Africa, with a general cargo, was lying in Dartmouth Harbour, when the steamship *Winston* coming out of the harbour, ran into the *Warwick Castle*, and did her great damage. The owners of the *Winston* admitted that the collision was caused by the improper navigation of their vessel, but claimed exemption from liability on the ground of compulsory pilotage. In the plaintiff's statement of claim it was alleged that the pilotage of the *Winston* was not compulsory, and alternatively, if the *Winston* was compulsorily in charge of a pilot, the collision was not caused by his negligence, but by the negligence or default of the master, officers, or crew of the *Winston*.

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

The defendants in the statement of defence, substantially alleged as follows: The *Winston*, a screw steamer of 911 tons register, belonging to the port of West Hartlepool, bound, with four passengers on board, on a voyage from New York to Newcastle, and laden with a general cargo, had on the 27th Sept., put into Dartmouth Harbour, and anchored alongside of and loaded from the coaling hulk about twenty tons of coal, which she required, to enable her to proceed on her voyage. On the same day at about 2 p.m., she being then in charge of a duly licensed and qualified pilot, who had previously navigated her into the harbour, weighed her anchor and cast off and proceeded down the harbour. Under these circumstances the collision occurred. All the pilot's orders were obeyed and they caused the collision. Dartmouth Harbour, where the *Winston* loaded her coals, and where the collision occurred, is a Trinity House out-port district, and a pilotage district, within which the employment of a pilot is compulsory by law. The *Winston* was not bound to Dartmouth nor to any place within this limit, except so far as she put into Dartmouth in order to obtain coal for the prosecution of her voyage, and she did not discharge or load anything in Dartmouth except the coal.

The plaintiffs admitted that at the time of the collision the *Winston* was in charge of a duly licensed pilot and in a Trinity House outport district.

The Acts of Parliament referred to in the argument were as follows:—

The Merchant Shipping Act 1854:

379. The following ships, when not carrying passengers, shall be exempted from compulsory pilotage in the London district, and in the Trinity House out-port districts; that is to say . . . . (6). Ships passing through the limits of any pilotage district on their voyage between two places, both situate out of such limits, and not being bound to any place within such limits, nor anchoring therein.

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.

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

41. The masters and owners of ships passing through the limits of any pilotage district in the United Kingdom on their voyage between two places, both situate out of such districts, shall be exempted from any obligation to employ a pilot within such district: Provided that the exemption contained in this section shall not apply to ships loading or discharging at any place situate within such district, or at any place situate above such district on the same river or its tributaries.

W. G. F. Phillimore (with him *Raikes*) for the defendants.—Sect. 41 of 25 & 26 Vict. c. 63, enacts that pilotage shall be compulsory where the vessel loads or discharges within a pilotage district. The circumstances of this case clearly come within that section. The *Winston* was loading coal in Dartmouth harbour, which is admitted to be a Trinity out port district. It cannot be contended that the words "loading or discharging" do not apply to the case of a vessel taking on board coal for the purposes of her voyage:

Muller v. *Baldwin*, 2 Asp. Mar. Law Cas. 304; L. Rep. 9 Q. B. 457; 30 L. T. Rep. N. S. 864.

The policy of the Legislature is to enact that such vessels as are mentioned in the section shall not be exempt when they are using

the port, and clearly a vessel uses a port when she goes in to coal just as much as when she loads or discharges cargo. Again, sect. 388 of the same Act exempts shipowners from liability where the pilot is in charge of the ship "within any district where the employment of such pilot is compulsory by law." Dartmouth harbour is a district where the employment of a pilot is compulsory by law, and therefore the owners of the *Winston* are entitled to exemption. Inasmuch as at common law no person is liable for the fault of a servant who is forced upon him by the Legislature, and in whose employment he has no choice, this section would be superfluous unless it has the meaning contended for.

Cohen, Q.C. (with him *Bucknill*) for the plaintiffs.—The words "loading or discharging" must be taken together. Discharging can refer to cargo alone, therefore loading is restricted to the same thing. The argument that the owners of the *Winston* are protected by sect. 388 of the Merchant Shipping Act 1854, is disposed of by the case of *The Lion* (L. Rep. 2 P. C. 525; 21 L. T. Rep. N. S. 41; 3 Mar. Law Cas. O. S. 266).

Phillimore, in reply.

Sir JAMES HANNEN.—On the question of fact, I am of opinion that it is established that this collision arose from the negligence or want of skill on the part of the pilot. It has been proved that the pilot was in charge of the vessel, though the mate was on deck ready to do any duties which were incumbent upon him, and that the crew were there also ready to do whatever was necessary. The captain has said that he gave general orders that the directions of the pilot were to be obeyed, and I think that there was no fault imputable to the captain in having left the deck. I think he was justified in leaving the deck to attend to the providing of coals. Unless, therefore, something definite were suggested to my mind which raised the question whether something had been improperly done or something omitted to be done by the crew, I cannot myself indulge in speculations upon the subject, particularly in the absence of any evidence to rebut the evidence of the defendants. Therefore, on this question of fact, I find that the collision was due solely to the fault of the pilot.

With regard to the first question of law, I feel myself bound to follow the decision of the Privy Council in *The Lion* (*ubi sup.*), but it is unnecessary for me to discuss that point, as I have formed an opinion in conformity with Dr. Phillimore's argument on the other question. I quite agree, however, with Mr. Cohen that it is difficult to define what the policy of these separate enactments may have been. It is, perhaps, true, as Dr. Phillimore has argued, that the changes of words in the statutes on the subject were made to suit the varying circumstances of shipping, and that the draftsman used phrases applicable to one state of facts without thinking of the difficulties of courts of law to apply them to different states of facts. With regard to the exemption, when the Act spoke of vessels anchoring, the idea was that that was a using of the port by the vessel; but so many vessels would have in passing through the pilotage district necessarily to anchor, that it was felt that that was not a definition of the circumstances that was satisfactory as to this particular section which we have under consideration. It seems to me that the idea was that, in case of a vessel passing through a pilotage district along the coast, that then there is no reason why such a vessel should be required to take a pilot. But, if the vessel were to make use of the port, then it was thought that she should not be exempted from compulsory pilotage. But in this section one only of the objects for which the port is used is referred to, though it might well have been supposed that some such general phrase as I have mentioned would have been adopted, for it is difficult to see why, if the vessel comes into harbour, it should not be compulsory to take a pilot, who has given assurances that he is fit to pilot the vessels, and whose employment gives security to other vessels. But the Legislature has not thought fit to use such a general expression, but uses the words, "loading or discharging at any place situate within such district." Now, as the words are so limited, what is to guide us? The Legislature has not said to what extent or for what purpose the words "loading or discharging" are to be taken. It seems to me (so far as I can see) the proper construction is this—if a vessel makes use of a port for the purpose of loading or discharging anything, whether it be cargo or coals, for the purpose of carrying on the voyage, she brings herself within the terms of the Act, and the obligation lies upon her of taking a pilot. For these reasons I am of opinion that it has been established that the exemption of compulsory pilotage applies in this case.

Solicitors for the plaintiffs, *Parker, Garrett*, and *Parker*.

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

Monday, July 16, 1883.

(Before Sir JAMES HANNEN.)

THE PLANET. (*a*)

Practice—Sale of ship—Appraisement—Private contract.

In an action for master's wages and disbursements, where the ship proceeded against was subject to other claims by mortgagees and material men, the Court upon motion, no opposition being offered, ordered an official appraisement of the ship to be made, and the ship to be sold by the marshal by private contract for a sum of money not less than the appraisement, upon proof that the mortgagees assented to such sale, and that notice of the motion had been served upon all the claimants.

THIS was a motion by the plaintiff in an action for master's wages and disbursements against the owners of the steamship *Planet*, for a sale of the ship by private contract.

The action was commenced on the 25th June 1883, in the City of London Court, but transferred by order to the High Court. An appearance was entered for the defendants, who admitted liability, and consented to a reference to assess the amount of their liability.

Five actions for necessaries had also been commenced against the ship, in all of which George Havaldt, a mortgagee, had intervened.

Havaldt was first mortgagee of fifty-four

(*a*) Reported by J. P. ASPINALL, and F. W. RAIKES, Esqrs., Barristers-at-Law.

sixty-fourth shares of the ship, and, on the claims being made against the ship, had taken possession of the ship as respects these shares.

Messrs. Zuluetta were first mortgagees of the remaining ten sixty-fourth shares, and were also second mortgagees of the whole ship.

The owner of the vessel was in embarrassed circumstances, and not in a position to satisfy the claim against the ship.

On the 8th July 1883 the solicitors for the plaintiff served the following notice on the other claimants:

We, Stocken and Jupp, solicitors for the plaintiff in this action, give notice that we shall by counsel, on the 16th day of July, 1883 move the judge in court to direct that the plaintiff in this action be at liberty to sell by auction or by private contract, with the approval of the court, the above-named steamship, her tackle, apparel, and furniture, and pay the proceeds of the said sale into court.

July 16.—The plaintiff now moved for the ship to be appraised by the marshal, and sold by private contract for a sum not less than the appraisement.

J. P. Aspinall, for the plaintiff, in support of the motion.—A sale in the manner proposed will be beneficial to all parties interested, as the offer made will most probably considerably exceed the amount which would be realised by a sale by public auction. [Sir J. HANNEN.—I am told by the officials of the court that sale by private contract is entirely opposed to the practice, and that it enables claimants who are dissatisfied to say afterwards that a larger sum might have been realised by public auction.] Although that might be so in most instances, in this particular case, the mortgagees and owners consent and no opposition is offered, although all claimants have been served with notice of motion. The provision that the offer is not to be taken if it be less than the official appraisement precludes any future objection to the amount realised.

W. G. F. Phillimore, for Havaldt the mortgagee, consented.

Vennell, for the owners of the ship, also consented.

Sir JAMES HANNEN.—I have some hesitation in departing from the practice of the court. But in this case, as I think it will be beneficial to the parties, and assuming that the written consent of the second mortgagees and proof of service of notice of this motion on the other claimants be produced to the registrar, I order that the ship be appraised and sold by the marshal by private contract, if he shall think fit, for a sum not less than the appraisement.

Solicitors for the plaintiff, *Stocken* and *Jupp*.
Solicitors for the mortgagee, *Stocken* and *Jupp*.
Solicitor for the owners, *W. Vant*.

June 26 *and July* 23, 1883.

(Before Sir JAMES HANNEN.

THE HEINRICH BJORN. (*a*)

*Necessaries—Managing owner—Advances—Policy of insurance—*3 *&* 4 *Vict. c.* 65, *s.* 6.

The plaintiffs, shipbrokers, had made advances to the managing owner of a foreign ship for purposes other than the ship. The managing owner applied for a further advance, but the freight of the ship being in the hands of other persons, the plaintiffs refused, but agreed to supply money for necessaries for the ship, provided they could get security for the sums advanced. The plaintiffs handed a cheque for 350*l. to the managing owner as though for the purchase of necessaries, and this cheque the managing owner handed back to the plaintiffs in part payment of the old advance. At the same time the plaintiffs made a further advance of* 200*l. for necessaries to the managing owner, and it was agreed that, in consideration of the amount of the two advances for necessaries supplied, the managing owner should return the amount with interest and charges, and that the plaintiffs should be at liberty to cover the amount by insurance on the ship.*

Held that, under the circumstances, the plaintiffs were entitled to recover so much of 350*l. as had been actually expended in necessaries (semble, because the transaction enabled the managing owner to expend that sum, or part thereof, in necessaries).*

Premiums paid by a shipbroker at the owner's request, to procure insurance on the ship, for the purpose of covering advances for necessaries made by the shipbroker, are not themselves necessaries. (*b*)

THIS was an action for necessaries by Messrs. C. and C. J. Northcote, shipbrokers, against the Norwegian vessel, *Heinrich Bjorn*.

At the time the money claimed by the plaintiffs was alleged to have been advanced on behalf of the ship, she belonged to one Gunder Abrahamsen, and was lying in the port of Liverpool. She was subsequently sold to her present owners, the defendants in this action.

The particulars of the plaintiffs' claim were as follows:—

1882.		£	s.	d.
March 25.	To amount paid for premiums on insurance of 650*l.*	68	6	8
	To amount paid to the owners and master of the vessel in respect of disbursements of which the plaintiffs are unable to give the details, which are known to the defendants	550	0	0
March 27.	To amount paid by the plaintiffs in respect of further disbursements not included in the above sum 550*l.*	64	19	6
		683	6	2

200*l.* of the above 550*l.* was an advance in ordi-

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law

(*b*) It is to be noticed that in *The Riga* (vol. 1, p. 246) Sir Robert Phillimore decided that premiums paid by a shipbroker at the owner's request to procure insurance on freight are necessaries. This is hardly consistent with the present decision. If Sir James Hannen's reasoning on this point be looked at, it would appear to apply with equal, if not greater force, to the facts in *The Riga*.—ED.

nary course to the managing owner. The defendants admitted their liability in respect of the sum of 64*l.* 19*s.* 6*d.*, as being the amount of a bill of exchange drawn by the master of the *Heinrich Bjorn* upon the plaintiffs to procure necessaries, and paid the said sum into court.

The plaintiffs alleged that the advances had been expended in necessaries, but did not prove the dates when they were supplied.

The further facts of the case fully appear in the judgment of the court.

June 26.—At the close of the plaintiffs' evidence, *Myburgh*, Q.C. (with him *Pyke*) submitted that the plaintiffs had made out no case.—All that has been proved is that money has passed from the plaintiffs to Abrahamsen. There is no proof that this money was expended in necessaries on behalf of the ship. The agreement between the plaintiffs and Abrahamsen no doubt speaks of the advance being for necessaries; but it is submitted that this is not sufficient to give the plaintiffs a lien on the ship under 3 & 4 Vict. 65, s 6. The onus is upon them to prove that the money was actually expended in necessaries. With regard to the first item of the claim, viz., the amount paid for premiums on insurance, it cannot be said that the insurance of a vessel comes within the meaning of necessaries.

Hall, Q.C. (with him *Bucknill*) for the plaintiffs.—The word "necessaries" is sufficiently comprehensive to include premiums on insurance:

The Riga, 1 Asp. Mar. Law Cas. 246; 26 L. T. Rep. N. S. 202; L. Rep. 3 Ad. & E. 516.

With regard to the other item, the fact that it was advanced for the purchase of necessaries is sufficient to give the plaintiffs a lien upon the ship. Though the transaction by which the money passed hands may seem strange, that in itself is no bar to the claim, supposing the transaction to have been *bonâ fide*. The defendants bought the ship with a knowledge of the lien upon her. They stand therefore in the shoes of Abrahamsen. In the agreement between Abrahamsen and the plaintiffs it is stated that the advance is for necessaries. The defendants are therefore now estopped from denying that the money is not recoverable as necessaries. Reference was made to

The Perla, Sw. 353:
The Alexander, 1 W. Rob. 346.

Cur. adv. vult.

July 23.—Sir JAMES HANNEN.—This is a suit for necessaries supplied to the ship *Heinrich Bjorn*, a Norwegian vessel. It is sought to be enforced against the defendants, who have purchased the ship since the alleged supply. In March 1882 the *Heinrich Bjorn* was lying in the port of Liverpool in need of certain necessaries. Gunder Abrahamsen, the then owner of five-sixths of the vessel and managing owner, was indebted to the plaintiffs in 398*l.* on a general account unconnected with the ship, and required a further advance. This the plaintiffs refused to make, and pressed Abrahamsen, who was then in England, for payment. The *Heinrich Bjorn* was at that time in the hands of Messrs. Broderson, Vaughan, and Co., ship builders of Liverpool, and they had received, or were about to receive, the freight due on the ship's voyage to Liverpool out of which freight they were to disburse the ship. Abrahamsen, in order to induce the plaintiffs to make the further advance he required, proposed, if they distrusted him, to give them a lien on the ship, and to this the plaintiffs agreed.

The manner in which this arrangement was attempted to be carried out was as follows: The sum which was required for the disbursement of the ship for its outward voyage was estimated at 350*l.* Instead of paying 350*l.* of the debt due, and the plaintiff advancing that sum to Abrahamsen for the purchase of necessaries, it was agreed that this amount should be settled in account between them as though this had been done, and to symbolise the arrangement the plaintiffs handed Abrahamsen a cheque for 350*l.* as for necessaries, which he immediately returned to the plaintiffs in discharge of so much of the debt due to them. The plaintiffs made a further advance of 200*l.* to Abrahamsen, and an agreement was then drawn up of the 23rd March, in which it was stated that in consideration of the plaintiffs advancing an amount of about 600*l.* for necessaries supplied to the *Heinrich Bjorn*, Abrahamsen undertook to return the amount advanced with interest, and all charges on the return of the vessel from her then present voyage, concluded for him by the plaintiffs, and he authorised the plaintiffs to cover the said amount advanced by insurance on the ship, &c., out and home at his cost. The plaintiffs effected this insurance and paid premiums amounting to 68*l.* 6*s.* 8*d.*, and this is the first item in the claim for necessaries now sued for. I am, however, of opinion that premiums for insurance cannot be regarded as necessaries. The expression "necessaries supplied," in the 3 & 4 Vict. c. 65, s. 6, which gave the Admiralty Court jurisdiction over foreign ships, though it is not to be restricted to things absolutely and unconditionally necessary for a ship in order to put to sea (*The Perla*, *ubi sup.*) must still be confined to things directly belonging to the ship's equipment necessary at the time and under the then existing circumstances for the service on which the ship is engaged: (*The Alexander*, *ubi sup.*) But the insurance of a vessel is something quite extraneous to its equipment for sea, and however prudent it may be for an owner to insure, it is a prudence exercised for his own protection, and not for the requirements of the vessel, which is the sense in which the word necessaries is used in the statute.

With regard to the second head of claim for disbursements, I am of opinion that the plaintiffs are entitled to receive so much of the sum of 350*l.* as was in fact expended in necessaries for the *Heinrich Bjorn*. The plaintiffs and Abrahamsen attempted to create a charge on the ship for the further amount of 200*l.* advanced to Abrahamsen, and for the balance of the 398*l.* not discharged by the return of the cheque for 350*l.* and for the premiums of insurance. They thought they could do this by treating the whole account as though it were for necessaries, but it was not competent for them to do so. In whatever other way Abrahamsen might have given a charge on the ship on his shares in it, he could not do so by calling things necessaries which were not so in fact. But, assuming that 350*l.* was *bonâ fide*, required for necessaries, then though the mode of carrying out the arrangement between the plaintiffs and Abrahamsen was peculiar and calculated to excite suspicion, I think that when explained it does establish the plaintiffs' right to recover that amount in this action. If the

plaintiffs had advanced 350*l.* in the purchase of necessaries, their right would have been clear, and I do not think that it was necessary that the additional steps should be gone through, first, of Abrahamsen obtaining the freight from the brokers at Liverpool and paying it over to the plaintiffs, and then of the plaintiffs advancing the sum required for necessaries to Abrahamsen. With regard to the amount, it seems probable that the 340*l.* had been correctly arrived at. The defendant's letter of 30th Aug. 1882 shows that he bought Abrahamsen's share in the ship with a knowledge that the plaintiffs asserted a prior claim upon it for 350*l.* I do not, however, think that this precludes him from disputing the amount, and therefore, if it be desired by the defendant, it must be referred to the registrar and merchants to ascertain how much of the 350*l.* was expended in necessaries.

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

Solicitors for the defendant, *Plews, Irvine,* and *Hodges.*

June 28 *and July* 10, 1883.

(Before Sir JAMES HANNEN.)

THE THYATIRA (No. 3222).

COCKBAIN, ALLARDICE, AND CO. *v.* THE OWNERS OF THE THYATIRA AND HER FREIGHT. (*a*)

Collision—Owners of ship and cargo identical—Advance on account of freight—Assignees of bill of lading—Loss of ship and cargo—Right of action.

Where cargo is shipped on the shipowners' account and money is advanced to them by persons who take as security an assignment of a policy of insurance on the freight, and a bill of lading signed by the master and indorsed by him with a receipt of a sum of money on account of freight named in the bill of lading, and the ship is run down and sunk by the negligence of another vessel, the persons advancing the money as holders of the bill of lading have sufficient interest in the goods and freight to entitle them to recover from the owners of the wrong-doing vessel the sum of money advanced on account of freight.

Where shipowners ship their own goods in their own ship they may, by indorsement of a bill of lading naming the rate of freight, assign under the name of freight the enhanced value of the goods at the port of destination so as to give the assignees a right of action against wrong-doers causing the loss of ship and cargo.

Whether the amount assigned under the name of freight is within the enhanced value is a question for inquiry.

THIS was an action (1882. C. No. 3222. Fo. 283) by Messrs. Cockbain, Allardice, and Co. against the owners of the vessel *Thyatira,* to recover alleged advanced freight, lost by reason of a collision between the *Thyatira* and the *Atmosphere,* the ship in respect of which the freight had been advanced.

The owners of the *Thyatira* admitted that the collision was due to the wrongful navigation of their vessel. At a reference to the registrar in an action (1882, O; No. 125, fo. 125), by the owners of the *Atmosphere* to recover for the loss of their vessel the defendants had been found liable for 576*l.* 7*s.* 6*d.* in respect of disbursements to send the vessel to sea, and other sums as advances, &c., to the crew, in all 783*l.* 14*s.*

The *Atmosphere* and the cargo laden on board of her belonged to the same owners, who had obtained an advance of 1000*l.* from the plaintiffs in the present action, and had given as security an assignment of a policy of insurance on the freight and a bill of lading signed by the master and indorsed by him with a receipt of 1000*l.* on account of freight named in the bill of lading.

The defendants, in the statement of defence, denied that the 1000*l.* advanced was in respect of freight.

The further facts appear sufficiently in the judgment.

June 28.—At the close of the plaintiffs' case, *Grilly,* Q.C. and *Bucknill* submitted that the evidence failed to prove the plaintiffs' right to recover. There has been no advanced freight, and the shipowner cannot by taking out a policy upon something he calls advanced freight thereby create advanced freight. All that happened was a loan by the plaintiffs, and the shipowners, to give security, take out a policy upon so-called advanced freight. The profit which the shipowner hopes to get from carrying his own cargo in his own ship is necessarily a speculative one, and dependent upon the rise and fall of the market where the cargo is sold. This cannot be recovered from the defendants:

The Parana, 3 Asp. Mar. Law Cas. 399, 220; 2 P. Div. 118; 36 L. T. Rep. N. S. 388; 35 L. T. Rep. N. S. 32.

Again, in another action brought by the owners of the *Atmosphere* against the *Thyatira* 783*l.* 14*s.* has been recovered for disbursements. The defendants cannot also be made liable for freight.

Cohen, Q.C., with him *Pollard,* for the plaintiffs.—Whatever the 1000*l.* loss be called, it was so much in the nature of advanced freight that the plaintiffs are entitled to recover it under that name, and were justified in insuring it under that name:

Flint v. *Flemyng,* 1 B. & Ad. 45;
Hall v. *Janson,* 4 E. & Bl. 500; 24 L. J. 97, Q. B.

If the cargo owner and shipowner had been different persons, the defendants would have had no defence, and how can the fact of the cargo owner and shipowner being the same person affect their liability? The case of *The Parana* (*ubi sup.*) is not in point, because here there is no question of accidental variation in price of market, the sum claimed being beyond doubt within the profit which must have been made. This case also differs in being a claim against a wrong-doer, and in such cases it has ever been the policy of the law to exact compensation to the uttermost farthing.

Cur. adv. vult.

July 10.—Sir JAMES HANNEN.—Messrs. S. Vaughan and Co. were the owners of the ship *Atmosphere* in which they shipped a cargo of 1650 tons of their own coal from Liverpool to Valparaiso. The price of coal at Liverpool was 9*s.* per ton, and it would have fetched from 30*s.* to 33*s.* per ton at Valparaiso. Messrs. S. Vaughan and Co., desiring an advance of 1*l.* per ton on this cargo, the

(*a*) Reported by J. P. ASPINALL and F. W. BAIKES, Esqrs., Barristers-at-Law.

plaintiffs, Messrs. Cockbain and Co., agreed to make it on the terms that Messrs. S. Vaughan and Co. should hand them "bills of lading together with policies of insurance to cover them in case of loss." This arrangement was carried out in the following manner. The master of the *Atmosphere* signed bills of lading for 1650 tons of coal deliverable to Messrs. S. Vaughan and Co., or assigns, they paying freight at the rate of 23*s.* per ton, and he indorsed on the bill of lading a receipt for 1000*l.* on account of freight. An insurance was effected in the Thames and Mersey Marine Insurance Company, described as "advanced freight, valued at 1000*l.*" This policy, together with another on cargo and the bill of lading, duly indorsed, were handed to the plaintiffs on their making an advance of 1650*l.* The *Atmosphere*, while on her voyage to Valparaiso, was run down and sunk by the *Thyatira*.

This action is brought by the plaintiffs against the owners of the *Thyatira* to recover compensation for the loss occasioned to them by the sinking of the *Atmosphere*, "whereby," as alleged in the statement of claim, "the said advanced freight of 1000*l.* became and was wholly lost." The action is in fact brought for the benefit of the insurance company, who have paid the amount of 1000*l.* insured by them. This, however, can in no way affect the rights or liabilities of the parties in this action. The defendants deny their liability to the plaintiffs, contending that no freight in advance was in fact paid, and so that none has been lost. If Messrs. Vaughan and Co. had had on board the *Atmosphere* a cargo belonging to other persons they would not have had the cargo, together with the freight to be earned by carrying it, to offer as security for the proposed advance, but as they were the owners of the cargo they had not any claim to freight, properly so called, to offer as security. They had, however, the prospective benefit to be derived from the carriage of the coal in their own ship; that is, the enhanced value of the coal when conveyed to the port of delivery, and this, though not strictly freight, is so like it that it has been held (*Fint* v. *Flemyng*, 1 B. & Ad. 45) that it may be insured under that name. It was perfectly competent for Messrs. S. Vaughan and Co. to transfer the benefit of this enhanced value under any name whatsoever to the plaintiffs. If it be regarded from the point of view of the shipowner, it is freight; but if regarded from the point of view of the cargo owner, it is freight paid in advance, because the holder of the bill of lading would have been entitled to receive the cargo at Valparaiso without paying any freight. The plaintiffs, who are the holders of the bill of lading, have been deprived of this benefit by the wrongful act of the *Thyatira*, and for this they are entitled to compensation. What is the proper amount of that compensation? It is not to be computed according to the rate of freight mentioned in the charter-party, because that might only be an imaginary sum exceeding what would have been obtained as freight, or as increased value by reason of not having to pay freight, but there is nothing to contradict the evidence that the enhanced value of the cargo at Valparaiso would have been at least 21*s.* per ton, or 1732*l.*; more, in fact, than the amount sought to be recovered in this action as the equivalent for advanced freight. It cannot, therefore, be contended that the benefit which would have been derived from carrying the cargo to Valparaiso is estimated in this action at an exaggerated amount.

The case of the *Parana* (*ubi sup.*) was relied on by the defendants. It was there held that damages cannot be recovered for delay in the carriage of goods on a long voyage by sea, where there has been an accidental fall in the price between the time when the goods ought to have arrived and the time when they did arrive. But no question of rising or falling market occurs in this case. The plaintiffs' estimate of loss is not based on the highest price that could in any circumstances be obtained at Valparaiso, but on uncontradicted evidence that that which they have lost, namely, the increased value of the cargo free of freight, would have been far more than the 1000*l.* claimed in this action. It was further contended by the defendants that, if the 1000*l.* now claimed is to be regarded as freight, Messrs. S. Vaughan and Co. have claimed, in another action brought by them against the *Thyatira* and her owners, the disbursements made in order to earn the so-called freight, and that the defendants ought not to be called on to pay both disbursements and freight. This however is no defence to this action, in which the plaintiffs are suing as holders of the bill of lading, and cannot be prejudiced by what has passed without their concurrence between Messrs. S. Vaughan and Co. and the defendants. Messrs. S. Vaughan and Co. are not before me on this occasion, and I therefore abstain from expressing an opinion whether they are or are not entitled to recover the disbursements they claim.

Solicitors for the plaintiffs, *Freshfields* and *Williams*.

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

July 12 *and* 23, 1883.

(Before Sir JAMES HANNEN.)

THE CLAN MACDONALD. (*a*)

Merchant Shipping Act Amendment Act 1862 (25 *&* 26 *Vict.* 63), *s.* 67—*Landing—Warehousing charges—Notice to consignees—Duty of shipowner.*

The 7th sub-section of the Merchant Shipping Act Amendment Act 1862, *s.* 67, *entitling the owner of goods to twenty-four hours' notice in writing of the shipowner's readiness to deliver the goods does not apply where the goods are landed under sub-sect.* 6 *of the same section for the purpose of convenience in assorting the same.*

In such latter case it is the duty of the owner of goods, who receives notice that the goods landed under sub-sect. 6 *of the same section are ready for delivery, to take them within a reasonable time after the notice, and, if he fails to do so, he will be liable for the charges occasioned by his delay.*

Notice to a lighterman employed to take the goods is notice to the owner of the goods.

The steamship M. having arrived, on the 12*th Dec., in dock in the port of London, with a general cargo, began to unload on the quay on the* 13*th, and had unloaded a portion of cargo belonging to certain consignees, when their lighter arrived to receive their cargo. On the* 14*th the lighterman and lighter again attended, but could get no*

(*a*) Reported by J. P ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

information as to when the particular cargo would be delivered. On the 14th the owners of the M. received a letter from the firm of lightermen employed by the consignees, stating that they had made application at the M. for delivery of their cargo, and that they refused to be liable for any dock or landing charges, the cargo having been shipped under a bill of lading directing it "to be delivered from the ship's tackles." On the 15th, the landing and sorting of the cargo being completed, the plaintiff's lighterman was informed that the cargo would be delivered to him the next day. The goods were not taken away until the 29th, when the plaintiffs paid the dock company's charges under protest.

In an action by the assignees against the shipowners to recover such sum the Court held that, inasmuch as the plaintiffs had had notice on the 15th that they could have the goods on the following day, they had been guilty of unreasonable delay in not taking delivery before the 29th, and could not recover the dock charges from the shipowners.

THIS was an action by assignees of cargo against the owners of the steamship *Clan Macdonald* to recover 26*l* 12*s*., dock charges incurred through the alleged default of the defendants.

The action had been instituted in the City of London Court, but had been transferred to the High Court.

The facts and points in dispute sufficiently appear from the judgment of Sir James Hannen.

July 12.—At the hearing the defendants attempted to prove that the discharge of the cargo was effected according to the custom of the port of London, with regard to the discharge of vessels in dock, viz., by the cargo being unloaded by the dock company's servants, and by them landed upon the dock quay, and sorted ready for removal by the parties entitled to take delivery of the goods from the vessel. This alleged custom the evidence failed to establish.

Bucknill for the plaintiffs. — The contract between the shipowner and the owners of cargo is contained in the bill of lading. It is there said that the jute is "to be delivered from the ship's tackles." The defendants, for no valid reason, have chosen to disregard the bill of lading, and have landed the goods on the quay. They are therefore liable for any charges arising out of their so acting:

Marzetti v. *Smith*, W. N. 1883, p. 119.

No satisfactory evidence has been given of any custom to establish their right to violate the bill of lading, and land the jute on the quay. Our lighter attended two consecutive days, and yet could get none of the cargo, the defendants insisting upon landing the whole upon the quay. *Wilson* v. *London, Italian, and Adriatic Steam Navigation Company, Limited* (L. Rep. 1 C. P. 61; 13 L. T. Rep. N. S. 435; 2 Mar. Law Cas. O. S. 279) decides that 25 & 26 Vict. c. 63, s. 67, does not empower shipowners to land all the cargo, because part has been landed before the consignees are ready to take delivery. Even assuming that 25 & 26 Vict. c. 63 s. 67, applies, the plaintiffs are entitled to succeed. Under sub-sect. 7, under the circumstances of this case, the shipowner is bound to give twenty-four hours' notice in writing of his readiness to deliver the goods. This he has not done. The mere verbal notice to the lighterman is not sufficient, nor is the letter of the 16th the notice contemplated by the Act.

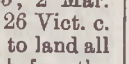
Pollard for the defendants.—This case is governed by the 67th section of 25 & 26 Vict. c. 63. The sub-sections there enumerated are only to apply when there has been a failure on the part of the goods owner to make entry, or having made entry to land or to take delivery of the goods. The owner of the goods has failed to take delivery:

The Energie, L. Rep. 6 P. C. 306; 2 Asp. Mar. Law Cas. 555; 32 L. T. Rep. N. S. 579.

The sub-section which applies is the 6th, and not the 7th, that applying to the cargo being discharged overside. But here, as contemplated by the 6th sub-section, the goods were landed for assortment. All that the 6th sub-section requires is that the goods shall, if demanded, be delivered to the owner within twenty-four hours of assortment, and this we were ready to do. Even assuming that the 7th sub-section applied, would this entitle the owners of the goods, after it had come to their knowledge that they could have the goods, to leave them at the dock for any length of time at the shipowner's expense?

Bucknill in reply.

Cur. adv. vult.

July 23.—Sir JAMES HANNEN.—The plaintiffs were owners of a consignment of jute in the ship *Clan Macdonald*, under bills of lading containing the following clauses: "500 bales of jute, to be delivered subject to the exceptions and conditions hereinafter mentioned, and from the ship's tackles." "The goods are to be discharged from the ship as soon as public intimation shall be given that she is ready to unload, and if not thereupon removed without delay by the consignee, the master or agent is to be at liberty to land the same, or, if necessary, to discharge into hulk, lazaretto, or hired lighters, at the risk and expense of the owners of the goods." The ship arrived in the East and West India Docks on the 12th Dec., and began to unload on the 13th. The whole of the cargo, which was a general one, was landed on the dock quay, and there sorted. Twelve of the bales of jute were landed on the morning of the 13th, and on the afternoon of that day the lighterman employed by the plaintiffs attended with a barge to receive the jute, but was informed that it was not ready, and that the whole cargo would be landed. On the 14th the lighterman again attended, but could get no further intimation as to when the jute would be delivered. The cargo was then being discharged, and parcels of the jute, as they were come to, were from time to time landed on the quay, and there sorted. On the 14th the plaintiffs wrote the following letter to the defendants: "We have made application at the ship *Clan Macdonald* for delivery of 500 B/, 80 B/, and 115 B/, jute marked respectively E P  , but, having failed to obtain delivery or correct information of the time when delivery could be given, we have lodged on board the usual notices, duplicate of which we inclose." The inclosed notice was as follows: "To the owners of the ship *Clan Macdonald*. With reference to the 500 bales jute per the above vessel as per particulars at foot, we hereby give you notice that in compliance with the provisions of the Merchant Shipping Act

Amendment Act 1862, we have made due entry and sent craft (with documents in proper order) alongside the above-named vessel, and have offered and been ready to take delivery of the above-mentioned goods, and you having failed to make such delivery, and you having also failed at the time of our said offer to give us correct information of the time when such goods can be delivered, we hereby give you notice, and require you to give us twenty-four hours' notice in writing of your readiness to deliver the said goods; and further, that we will not be responsible for any dock or landing charges on the same. And we give you further notice that in the event of any further default in making complete delivery at the proper time of the aforesaid goods, we shall claim from you 12*s.* 6*d.* per day for detention of lighterman and craft, whether such detention be caused by your making default in delivery at the proper time of a part of such goods, or of the whole quantity thereof." To this the defendants replied as follows: "We return documents received from you this morning. The dock company state that every despatch is being given your craft alongside our steamers *Clan Macdonald* and *Clan Mackenzie*, and further state that if any delay is caused it is caused on account of your not having sufficient men to receive the goods. We can, therefore, admit of no liability in the matter." Some further correspondence followed, and on the 16th the defendants wrote as follows: "Your favour of yesterday to hand inclosing documents, which we again beg to return, as we can admit of no liability in the matter. On making further inquiries of the dock company, we are informed that they arranged with your man to go at 8 a.m. this morning, and that up to 12.30 neither the man nor the craft had put in an appearance." On the 15th the landing and sorting of the cargo was completed, and the plaintiffs' lighterman was informed on the afternoon of that day that the jute would be delivered to him on the following morning, and that a gang of men would be in attendance to deliver the goods into his barge. The men were in fact ready to do so, but the lighterman did not attend. If he had attended at any time during business hours on the 16th the jute would have been delivered to him free of charge; but, as the goods were not taken away on the 16th, the dock company from that time held them for charges, without payment of which the goods could not have been delivered. The goods were not taken away until the 29th, when the dock company's charges had amounted to 26*l.* 12*s.* This sum was paid by the plaintiffs, and they now seek to recover it from the defendants.

The plaintiffs contend that the defendants were bound, under the terms of the bill of lading, to deliver the jute over the side of the ship, and that having neglected to do so, and landed the cargo, they remained liable for any charge to which the jute was subject, unless they had given twenty-four hours notice in writing that it was ready for delivery. The defendants, on the other hand, allege that the cargo was discharged according to the custom of the port of London with regard to the discharge of vessels in port, viz., by the cargo being unloaded by the dock company's servants, and by them landed upon the dock quay, and sorted ready for removal by the parties entitled to take delivery of the goods from the vessel. They further rely upon the provisions of the Merchant Shipping Act Amendment Act 1862, sect. 67. The alleged custom was not established by the evidence. The real question in dispute between the parties, as appears from the correspondence, turns on the proper construction and application of the 67th section of the Merchant Shipping Act Amendment Act of 1862. By that section it is enacted that "when the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or having made entry thereof, to land the same or take delivery thereof, and to proceed therewith with all convenient speed by the times severally hereinafter mentioned, the shipowner may make entry of and land or unship the said goods at the times in the manner and subject to the conditions following." Then follow seven sub-sections setting forth various cases in which the section becomes applicable. The 6th and 7th are the material ones, which enact (6) "If any goods are, for the purpose of convenience in assorting the same, landed at the wharf where the ship is discharged, and the owner of the goods at the time of such landing has made entry and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, such goods shall be assorted at landing, and shall, if demanded, be delivered to the owner thereof within twenty-four hours after assortment; and the expenses of and consequent on such landing and assortment shall be borne by the shipowner. (7.) If at any time before the goods are landed or unshipped the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or wharehouse other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time to give the owner of the goods correct information of the time at which such goods can be delivered, then, the shipowner shall, before landing or unshipping such goods, under the power hereby given to him, give to the owner of the goods or of such wharf or warehouse as last aforesaid twenty-four hours' notice in writing of his readiness to deliver the goods, and shall if he lands or unships the same without such notice, do so at his own risk and expense."

The first question which arises on this section is the meaning of the words, "When the owner of any goods fails to make entry and to take delivery thereof and to proceed thereof with all convenient speed." These words no doubt include a case of default on the part of the owner of goods to take delivery of them, but they also apply to cases in which the goods owner is not in default, where he from any cause fails to obtain delivery. This is pointed out in the case of *The Energie* (*ubi sup.*). It is there said: "Their Lordships conceive that the word 'failed' need not be taken to imply wilful default in the cargo owner, but that, upon the true construction of the section, the shipowner is at liberty to land the goods under it whenever the delivery of them to the owner within the proper time has been prevented by the force of circumstances, whether the latter is or is not to blame. They think that this construction is

justified by some of the provisions of the section, which in certain cases throw the cost and expense of the landing upon the shipowner." I do not think in the present case there was any wilful default on the part of the goods owner, but in fact he had no barge in attendance to take delivery of this jute when the first twelve bales had to be disposed of, and, in considering the question which afterwards arose, it is to be remembered that if the jute had been delivered overside it would have caused the detention of the barge during the whole time that the ship was being discharged, because the bales came to hand at intervals down to the end of the three days during which the unloading was proceeding. But I am of opinion that there was a failure on the part of the goods owner to take delivery by the time mentioned in the 6th sub-section of the 67th section, that is, the time when it becomes necessary for the purpose of convenience in assorting the goods to land them at the wharf. The shipowner was therefore entitled under that sub-section to land the jute at his own expense, and he became bound within twenty-four hours after assortment to deliver them to the goods owner if demanded. This would have been on the 16th, and if the plaintiffs had demanded the goods on that day they would have received them without charge. On the other hand, it was the duty of the plaintiffs to take delivery of the goods within a reasonable time after they knew that they could receive them. This would not necessarily be on the 16th, and, if the plaintiffs had been in ignorance that they could receive them on the 16th, I should not consider that their failure to demand them within twenty-four hours after their assortment would render them at once liable to the charges arising from their remaining on the dock quay. But it is clear that the failure of the plaintiffs to take delivery did not arise from ignorance that they could have the goods, but from a preconceived determination to try the question whether or not they were entitled to insist on a twenty-four hours' notice in writing under the 7th sub-section of the 67th section. I am of opinion that where goods are landed under the 6th sub-section the 7th is not applicable. That sub-section relates to the case of a vessel discharging overside where the necessity to land for sorting does not arise. Even if the 7th sub-section were applicable, I do not think it would make any difference in the position of the parties. Where the several conditions enforced on the goods owner by the 7th sub-section have been complied with, it becomes the duty of the shipowner to give the goods owner twenty-four hours' notice in writing of his willingness to deliver the goods, with the consequence that if he lands or unships the goods without such notice, he does so at his own risk and expense. But this does not mean that the goods are to remain at his risk and expense for any time that the goods owner thinks fit to leave them at the wharf, though he has notice that he may receive them by sending for them; and there is no necessity for this notice being in writing. The notice in writing referred to in the 7th sub-section is only required as a condition of the shipowner's right to land the goods at the goods owner's risk and expense. If without this notice the goods are landed, this would be done at the shipowner's risk and expense, but the duty of the goods owner remains to take away the goods within a reasonable time after he has notice, whether written or verbal, that he can receive them. In the present case notice was given to the lighterman on the 15th that he might have the goods on the 16th, and I have no doubt that he knowingly left the officers of the dock company under the impression that he would then come and fetch them, but being aware of the dispute which had arisen as to the necessity for a written notice, he abstained from going to receive the goods.

It was contended for the plaintiffs that the lighterman was not their agent to receive notice when the goods would be ready for delivery, but I am of opinion that, as he was sent by the plaintiffs to receive the goods, information as to the time when they would be delivered was so connected with the service for which he was employed that the plaintiffs are bound by the notice given to him. But, in any case, the letter of the 16th did give the plaintiffs notice that they could receive the goods by sending for them. The plaintiffs were bound to act on this notice within a reasonable time, but the correspondence shows that the plaintiffs refused to act upon this, or any notice other than some special twenty-four hours' notice in writing, to which they considered themselves entitled under the 7th sub-section. The charges, therefore, to which the goods became subject, arose, not from the plaintiffs' ignorance of the time when they could receive the goods, but from their voluntarily allowing them to become and remain subject to charges in order that they might test their view of the law, in which I consider them mistaken. I am therefore of opinion that the defendants are entitled to judgment with costs.

Solicitors for the plaintiffs, *J. A.* and *H. E. Farnfield.*

Solicitors for the defendants, *Freshfields* and *Williams.*

July 30 *and Aug.* 6, 1883.

(Before Sir JAMES HANNEN.)

THE LIVIETTA. (*a*)

Solicitor's lien—Salvage—Italian Code—Priority—Seamen's wages—23 *&* 24 *Vict. c.* 127, *s.* 28—17 *&* 18 *Vict. c.* 104, *s.* 205.

Solicitors for defendants in a salvage action against a foreign ship, who are entitled to a charge upon the ship, or the proceeds thereof, for their costs and expenses incurred in the preservation of the property, do not take priority of the claim of the foreign Government, who, on the abandonment of the ship by her owners, are entitled, by the provisions of their Code, to a lien upon the ship, or the proceeds, for the expenses of sending back the ship's crew to their own country.

An Italian ship was brought into a British port by salvors. A salvage action having been instituted, the ship was sold by order of the court, and a sum was awarded out of the proceeds to the salvors. After payment of that sum, and the costs of the plaintiffs, a balance of 60*l.* 10*s.* 3*d. remained in court. The defendants' solicitors had incurred expenses in pumping the ship, paying the marshal's possession fees, &c., and claimed a*

(*a*) Reported by J. P. ASPINALL, and F. W. BAIKES Esqrs., Barristers-at-Law.

charging order upon the balance in court for such expenses, and sought payment out of such balance to them. The Italian Government, through their consul in this country, had sent home the crew of the ship, and had incurred expenses by so doing. By Italian law such last-mentioned expenses are a lien upon the ship. The Italian consul opposed payment out to the defendants' solicitors, and claimed priority for the lien of the Italian Government.

Held, that the Italian Government was entitled to such priority.

THIS was an application in a salvage action against an Italian brig by the defendants' solicitors for payment out of 60*l.* 10*s.* 3*d.* (being the remainder of the proceeds of the ship in court) in satisfaction of their costs.

The ship was brought into an English port by salvors, and at their suit she was arrested, and an action instituted against her.

After the institution of the action the ship was definitely abandoned by her owners as a total loss.

The ship was sold by order of the court, and the proceeds paid into court. On the hearing of the action on the 30th Jan. 672*l.* was awarded. After payment from such proceeds of the amount awarded for salvage, together with the plaintiffs' costs of action, the balance remaining in court amounted to 60*l.* 10*s.* 3*d.*

The crew of the *Livietta* had been, in accordance with the provisions of sect. 56 of the Italian Code, sent back to Italy by the Italian consul in London, and the expenses thereby incurred were paid by the Italian Government, who were opposing the present application on the ground that they were entitled by virtue of the provisions of the Italian Code to a lien upon the proceeds in court in respect of the cost of sending the crew back to Italy, such cost amounting in all to 62*l.* 7*s.* 4*d.*

The defendants' solicitors, who had been instructed by the agents of the Italian underwriters to whom the ship had been abandoned, were now applying for payment of their costs out of the fund in court. The defendants' solicitors had incurred expenses by giving a personal undertaking that bail should be put in by paying the marshal's possession fees, and by pumping the ship, &c.

The sections of the Italian Code referred to are as follows:

Art. 56. The owners and charterers are also responsible jointly for payment of the taxes and other maritime dues, for premiums and wages, and for retention of wages due to the *cassa degli invalidi* of the mercantile marine for the expenses of board and return to their country of the men composing the crew, and for every outlay made on their behalf by Government agents if such expenses are to be chargeable against the ship.

The liability to refund the expenses of board and return to their country of the men forming the crew ceases in cases of shipwreck and abandonment of the vessel, but repayment of the same shall be effected out of the salvage or the value thereof with privilege, according to the terms of article 133.

For reimbursement of the expenses referred to in this article, harbour masters may issue injunctions, which shall be rendered executory by decree of the President of the Civil Tribunal saving appeal to the said tribunal within the term of twelve days, and on payment of the amount, for which the appellant must produce a receipt attached to his appeal, without which it will be inadmissible.

Art. 133. Out of the proceeds of the sale of the ship and cargo will be privileged in the following order: First, the expenses of sale; secondly, the expenses of salvage and safe keeping of the effects wrecked, including the remuneration of the persons who effected the salvage, and the expenses of conveyance of the harbour *employés*.

Out of the residue of the ship, and out of the freight, will be privileged the keep of the captain and crew, indemnities for their return to their country, and the wages of the said crew, and afterwards privileged debts in accordance with the commercial laws.

The 205th section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) referred to in the case, is as follows:

Wherever any British ship is transferred or disposed of at any place out of her Majesty's dominions, and any seaman or apprentice belonging thereto does not in the presence of some British consular officer, or if there is no such consular officer there, in the presence of one or more respectable British merchants residing at the place, and not interested in the said ship, signify his consent in writing to complete the voyage if continued; and whenever the service of any seaman or apprentice belonging to any British ship terminates at any place out of Her Majesty's dominions, the master shall give to each such seaman or apprentice a certificate of discharge in the form sanctioned by the Board of Trade as aforesaid, and, in the case of any certificated mate whose certificate he has retained, shall return such certificate to him, and shall also, besides paying the wages to which such seaman or apprentice is entitled, either provide him with adequate employment on board some other British ship bound to the port in Her Majesty's dominions at which he was originally shipped, or to such other port in the United Kingdom as is agreed upon by him, or furnish the means of sending him back to such port, or provide him with a passage home, or deposit with such consular officer, or such merchant or merchants, as aforesaid, such a sum of money as is by such officer or merchant deemed sufficient to defray the expense of his subsistence and passage home; and such consular officer or merchants shall indorse upon the agreement of the ship which the seaman or apprentice is leaving the particulars of such payment, provision or deposit; and if the master refuses or neglects to comply with the requirements of this section, such expenses as last aforesaid, if defrayed by such consular officer, or by any other person, shall, unless such seaman or apprentice has been guilty of barratry, be a charge upon the ship to which such seaman or apprentice belonged and upon the owner for the time being thereof, and may be recovered against such owners with costs, at the suit of the consular officer or other person defraying such expenses, or, in case the same has been allowed to the consular officer out of the public moneys, as a debt due to Her Majesty, either by ordinary process of law, or in the manner in which seamen are hereby enabled to recover wages; and such expenses, if defrayed by the seaman or apprentice, shall be recoverable as wages due to him.

The 28th section of 23 & 24 Vict. c. 127, referred to, is as follows:

In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon, against, and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bona fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right; provided always, that no such order shall be made by any such court or judge in any case in

which the right to recover payment of such costs, charges, and expenses is barred by any Statute of Limitations.

July 30.—At the hearing it appeared that the defendant's solicitor had obtained a charging order from the judge without all the facts being before him, and it was thereupon agreed that the matter should be argued as if no such order had been obtained.

W. G. F. Phillimore in support of the solicitors' application.—The 23 & 24 Vict. c. 127 gives solicitors a charge upon property recovered or preserved by their instrumentality. In this case property has been preserved by the solicitors. Dr. Lushington has in several cases preferred the solicitor's claim to others of very high rank. The solicitor's should be preferred on the principle that the last lien takes precedence of all others, because without it the other liens would be lost:

The Soblomsten, L. Rep. 1 Ad. & Ec. 293; 2 Mar. Law Cas. O. S. 436; 15 L. T. Rep. N. S. 393;
The Jeff Davis, 2 Mar. Law Cas. O. S. 555; 17 L. T. Rep. N.S. 151; L. Rep. 2 Ad. & Ec. 1;
The Heinrich, L. Rep. 3 Ad. & Ec. 505; 1 Asp. Mar. Law Cas. 260; 26 L. T. Rep. N. S. 372.

J. P. Aspinall, contra, on behalf of the Italian Government.—None of the cases quoted support the priority of the solicitors' charge to the claim of the Italian Government. They no doubt are cases where the solicitor's claim took high rank, but the circumstances were very different from the present. Moreover, the Legislature never contemplated including such a case as the present under 23 & 24 Vict. c, 127, s. 28. In the Merchant Shipping Act 1854, s. 205, we find a provision, very similar to the provision in the Italian Code, empowering the British consul to send home British sailors under circumstances like the present, and giving the consul a charge upon the ship for the money so expended. The money so expended is in the nature of viaticum, and as such has always taken high rank in the Admiralty Court. By way of reciprocity, the lien given by Italian law should rank the same as that given by ours. At the time when the property was being preserved by the defendants' solicitors the lien of the Italian Government had already attached. The solicitors are therefore only entitled to a charging order subject to this lien, and such lien is not to be superseded by a charging order subsequently obtained. In *The Gustaff* (1 Mar. Law Cas. O. S. 230; Lush. 506; 6 L. T. Rep. N. S. 660) viaticum took precedence of a shipwright's lien, and it was then laid down that the shipwright's lien was subject to all existing obligations then complete and due against the vessel. So here the solicitor's lien must be subject to the existing lien of the Italian Government. In *The Heinrich* (*ubi sup.*) it is to be noticed that the master was a part owner, and in consequence of this it was that his wages were postponed to the solicitor's charge. In *The Jeff Davis* (*ubi sup.*) the solicitor's claim was given precedence of a claim quite unconnected with the ship.

Cur. adv. vult.

Aug. 6.—Sir JAMES HANNEN.—Two actions were instituted by the steamship *Walton* and the brig *Julie* for salvage services rendered by them to the Italian brig *Livietta*. Messrs. Thomas Cooper and Co., solicitors, were instructed by the agents of the Italian underwriters, to whom the *Livietta* had been abandoned, to appear in these actions and defend their interests. In the result the *Livietta* was sold by order of the court, and the salvage and costs due to the plaintiffs having been paid out of the proceeds of the sale, a balance of 60*l.* remains in court. Messrs. Cooper and Co. assert that this sum has been preserved through their instrumentality, and claim to be entitled under the 23 & 24 Vict. c. 127, s. 28, to a charge upon the amount now in court for their costs, charges, and expenses in the said action, amounting to 92*l.* 7*s.* 11*d.* I do not consider that the whole sum remaining in court has been preserved by Messrs. Cooper and Co.'s services; but they have, by payments which they have made, and by giving bail, saved the fund in court from some charges which would otherwise have fallen upon it. The Italian Government, through its consul, prefers a claim to be paid out of the proceeds of the ship remaining in court the expenses it has been put to in sending back to Italy the crew of the *Livietta*; and proof has been given that by the law of Italy the Italian Government is enabled, in case of shipwreck and abandonment of the vessel by the owners, to be repaid out of the salvage the expenses of sending the crew home, "after payment (1) of the expenses of sale, and (2) of the expenses of salvage and safe keeping of the effects wrecked, including the remuneration of the persons who effected the salvage, and the expenses of conveyance of the harbour *employés*."

The question is, whether the claim of the Italian Government is to be preferred to that of Messrs. Cooper and Co. The Italian law on this subject is very similar to our own. By the 205th section of the Merchant Shipping Act 1854 the expense of sending seamen belonging to a British vessel home from a place abroad where their services have terminated, is to be paid by the master, and, if not paid by him, may be defrayed by the consular officer, and shall in that case be a charge upon the ship, and may be recovered against the owners with costs; and if allowed to the consular officer out of the public moneys, may be recovered as a debt due to Her Majesty either by ordinary process of law or in the manner in which seamen are enabled to recover wages. The same measure which we should expect to be meted in similar circumstances by the Italian tribunals to our Government ought to be applied in this case to the Italian Government. The object of the 28th section of 23 & 24 Vict. c. 127 is to prevent the client who has had the benefit of his solicitor's services from carrying off the spoils of victory without applying them toward the remuneration of these services. It was not, I conceive, intended to give the solicitor priority over claims giving a lien which could have been enforced in the suit by other persons against the property which was the subject of litigation. A mortgage created by the client to a person having no notice of the litigation would not be superseded by a charging order subsequently obtained by the solicitor, and a charge created by the law must, I think, be put on an equal footing with one arising out of the contract of the client. Such charges in effect diminish the property or the value of the property which could be recovered or preserved by the solicitor's instrumentality. In the present case the *Livietta*, when it came within British jurisdiction, was already by the law of its flag subject, in the events which had happened, to a charge in favour of the Italian Government for the expense of conveying its crew to Italy. It appears to me that

this charge should, on general principles, as well as by analogy with our own statute, rank as high as wages. Where the law imposes on the ship, in the event of shipwreck, a charge for the expenses of the seamen's reconveyance to their own country, this must be looked upon as a part of the terms upon which the seamen engage for the voyage, and is another form of remuneration for the services the sailors rendered up to the time of the wreck.

In *The Gustaf* (*ubi sup.*) Dr. Lushington held that the claim of seamen for their wages earned before a ship came into a shipwright's hands took precedence of the shipwright's common law right of lien for repairs; and, in the case of foreigners, that they were entitled, in addition to their wages, to priority for what the learned judge terms the "ordinary allowance for return to their country." In support of the solicitors' charge reliance was placed on *The Soblomsten* (*ubi sup.*), where Dr. Lushington ordered the funds in court to be applied, first, in satisfaction of the proctor's costs, and, secondly, of a shipbroker's claim for necessaries supplied after the arrest of the ship. But, as the learned judge had pointed out in *The Gustaf* and other cases, the "supplying of necessaries does not give *ab origine* a lien, but only a statutory remedy against the *res*, which is essentially different." The same observation applies to the case of *The Heinrich* (*ubi sup.*), where the claim of a solicitor was preferred to one for necessaries, with this additional circumstance, that the necessaries were there supplied after the institution of the original suit. Priority was also given in that case to the solicitor's claim over that of the master's claim for wages, but it appeared that he was a part owner, and had himself instructed the solicitors to defend the suit, and on this ground it was held that he could not enforce his claim to wages, to the prejudice of the solicitors. In *The Jeff Davis* (*ubi sup.*) priority was given to the claim of the solicitor over that of the holder of a garnishee order; but there the claim of the solicitor was preferred to a debt of the client wholly unconnected with the ship. This does not appear to me to tend to show that Sir R. Phillimore would have preferred the solicitor's claim to that of seamen for their wages, to which the present case must, I think, be likened. For the reasons above given, I am of opinion that the Italian Government is entitled to an order for payment out of the sum in court of the expenses of sending back the crew of the *Livietta* to Italy.

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

Solicitors for the Italian Government, *Deacon, Son,* and *Gibson.*

Tuesday, Nov. 6, 1883.

(Before Sir JAMES HANNEN.)

THE EILEAN DUBH. (*a*)

Collision—Practice—Reference—Amount of claim—Amount allowed—Costs.

Where a plaintiff in a reference in a collision action withdraws a large item of his claim at the reference and not before, and he recovers less than two-thirds of the amount originally claimed, but more than two-thirds of the amount which remains after his withdrawal of the above item, the original amount of his claim before withdrawal is the claim upon which costs are to be given, and he is not entitled to his costs.

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

THIS was a motion by the defendants, in an action *in rem*, for damage by collision, that the plaintiffs should be condemned in the costs of the reference, on the ground that their claim had been disallowed by more than one-half.

The action was brought by the owners of the steamship *Marie* against the steamship *Eilean Dubh* to recover damages in respect of a collision between the two vessels. The defendants counter-claimed in respect of the damage occasioned by the collision to their steamship the *Eilean Dubh.*

On the 6th March 1883 the court found both vessels to blame, and condemned the defendants in half the plaintiffs' claim, and the plaintiffs in half the defendants' counter-claim. A reference was ordered to the registrar and merchants to assess the amount of the respective damages.

The plaintiffs' claim sent in for the reference amounted to 1253*l.* 19*s.* 5*d.*, the defendants' claim to 822*l.* 12*s.* 11*d.* At the hearing of the reference on July 26 the plaintiffs withdrew certain items of their claim, amounting in all to 464*l.* 18*s.* 11*d.*, on the ground that such items had been inserted by mistake, owing to the fact that the *Marie* had been in a collision with another vessel on the same day as the collision with the *Eilean Dubh*, and such items were chargeable to the other steamer, and not to the *Marie.* By the above withdrawal the plaintiffs' claim was reduced to 789*l.* 0*s.* 6*d.*

On the 9th Aug. the registrar issued his report, and therein allowed 565*l.* 9*s.* to the plaintiffs, and 620*l.* 3*s.* 3*d.* to the defendants. The defendants had claimed 259*l.* 11*s.* 3*d.* for demurrage and loss of freight, and had been allowed 72*l.* The registrar had left each party to bear their own costs.

Roscoe, on behalf of the defendants, in support of the motion.—The rule in cases of this sort has always been that the plaintiff pays the costs of the reference, if the registrar disallows more than one-third of his claim:

The Empress Eugenie, Lush. 138.

In this case the claim was for 1253*l.* 19*s.* 5*d.*, and the sum allowed is 565*l.* 8*s.*, so that more than half has been disallowed. The fact of the items being withdrawn at the reference does not affect the rule. The object of the rule is to prevent exorbitant claims, and so prevent expenditure in supporting and opposing such claims. The withdrawal at the reference reduces the claim only after this expenditure has been incurred.

Nelson, on behalf of the plaintiffs, against the motion.—It is submitted that inasmuch as the items withdrawn were inserted by mistake, the amount which remains after the items have been deducted is the claim upon which costs are to be given, and if so, less than one-third of our claim has been struck off. With regard to expenditure, this reference must have been fought out even if our original claim had been what it was after the withdrawal of the above items, because the plaintiffs had made such an excessive claim upon us for demurrage and loss of freight. They actually claimed 259*l.* 11*s.* 3*d.* and only got 72*l.* The rule referred to is not universal, and this is a case where an exception should be made:

The Gleaner, 3 Asp. Mar. Cas. 582; 38 L. T. Rep. N. S. 650.

Roscoe in reply.—Whatever was struck off our claim for demurrage and loss of freight, the fact remains that we claimed 822*l.* 12*s.* 11*d.* and got 620*l.* 3*s.* 3*d.*

Sir JAMES HANNEN.—I understand from the registrar that the point which much influenced him at the reference was the withdrawal of these items, and he accordingly appears to have left each party to bear their own costs, thinking that the withdrawal, by diminishing the claim of the plaintiffs, brought them within the protection of the rule referred to. I, however, am of opinion that, if the original claim was persisted in up to the hearing of the reference, the withdrawing of certain items then ought not to make any difference. The case had already come into the hands of counsel, and expenses had been incurred in regard to the excessive claim, whereas, if these items had never been inserted, a fair offer might have been made by the defendants and accepted by the plaintiffs. I therefore think if an improper claim is withdrawn merely at the reference, it ought to make no difference, and the usual rule must be applied as if the original amount had been adjudicated upon. I accordingly condemn the plaintiffs in the costs of the reference and of this motion.

Solicitors for the plaintiffs, *Lowless* and *Co.*

Solicitors for the defendants, *Keene, Marsland,* and *Bryden.*

Tuesday, Nov. 13, 1883.

(Before Sir JAMES HANNEN.)

THE ISIS. (a)

Salvage—Practice — Form of Pleadings — Order XIX., rr. 4, 5 *and* 7.

In a salvage action where the plaintiffs had delivered a statement of claim in the form No. 6, *sect.* 3 *of appendix C. to the rules of the Supreme Court* 1883, *the Court, on motion by the defendants, ordered the plaintiffs, under Order XIX., r.* 7, *to deliver a further and better statement of the nature of their claim, and ordered the costs of the motion to be costs in the cause.*

The forms of pleading under Order XIX., r. 5, *are not under all circumstances to be rigidly complied with, but are rather to be taken as the class of pleading it is desired to introduce.*

In salvage actions it may be proper in some cases, owing to the practice of the court that where the defendants admit the facts alleged in the statement of claim, the plaintiffs are not allowed to give any evidence at the hearing, to use a fuller form of statement of claim than that given in the example in the appendix to the Rules of the Supreme Court 1883, *and approaching more nearly to the old form.*

THIS was a motion by the defendants in a salvage action for an order that the plaintiffs should deliver a further and better statement of the nature of their claim, and be condemned in the costs of the motion.

Salvage services having been rendered by the plaintiffs to the steamship *Isis,* they on the 4th Sept. 1883 instituted an action for salvage against the owners of the *Isis,* her cargo and freight, and on the 5th Nov. 1883 delivered the following statement of claim :—

The plaintiffs, William Hodds and sixteen others above named, are the owners, masters, and crew of the yawl *Band of Hope,* of Winterton, in the county of Norfolk. The plaintiffs, Charles Larter and nineteen others above named, are the crew of the Royal National Lifeboat Institution's lifeboat *Husband,* of Winterton aforesaid. The other plaintiffs are the Great Yarmouth Steam-tug Company, Limited, who are the owners of the steam-tugs *United Service, Express,* and *Meteor,* and the masters and crews thereof respectively.

The said plaintiffs rendered salvage services to the derelict steamship *Isis,* on the Hasbro' Sands, and off the coast of Norfolk, during the 19th, 20th, 21st, and 22nd of Sept. 1883. Particulars :

	£	s.	d.
1. Value of the *Isis* at the time of the services... ... ... Value of cargo... ... ... Freight			
2. Value of *Band of Hope*	200	0	0
3. Value of *United Service*	2500	0	0
4. Value of *Express*	2000	0	0
5. Value of *Meteor*	2500	0	0
6. Damage sustained by *United Service*	30	0	0
7. Damage sustained by *Express*	15	0	0

The plaintiffs claim such amount of salvage as may be just. Delivered the 5th day of Nov. 1883, by Pritchard and Sons, agents for C. H. Wiltshire, plaintiffs' solicitor.

The defendants thereupon served the plaintiffs with the following notice of motion :

We, Thomas Cooper and Co., for the defendants in this action, give notice that we shall by counsel on the 13th Nov. 1883 move the judge in court to direct the plaintiffs to deliver a further and better statement of claim, or such particulars as will give the defendants sufficient information of the nature and circumstances of the alleged salvage services rendered by the respective plaintiffs to the said steamship *Isis,* to enable the defendants to have the opportunity of making a tender in the action, and why the defendants should not have ten days for delivering statement of defence after such further and better statement of claim for particulars have been delivered, and why the plaintiffs should not be condemned in the costs of this application.

Nov. 13.—The motion now came on before the judge in court.

Phillimore, for the defendants, in support of the motion.—The form of salvage statement of claim in the appendix to the Rules of the Supreme Court 1883 is not applicable to this case. Upon this statement of claim we are quite unable even to approximate to the value of the services. We are therefore unable to make an adequate tender, and so settle the matter. It has been the practice in many salvage actions for the defendants to admit the statement of claim, and thereby the expense of witnesses at the trial is saved.

J. P. Aspinall for the plaintiffs, *contra.*—I admit that further information should be given than is provided for by the form. The rule, however, says that any longer forms shall be deemed prolix. [Sir JAMES HANNEN.—But it says they must be sufficient.] We have complied with the form, and if not sufficient, the plaintiffs have the remedy of applying for particulars. [Sir JAMES HANNEN.—The very object of the rules is to avoid these constant applications for particulars.] Then the only alternative is to go back to the old form of pleading in these actions. [Sir JAMES HANNEN.—It is extremely likely that may be so. That, however, must be left to the pleaders, and it will be a matter for taxation. The rule only requires that these forms shall be used where they are sufficient, and if it be that *per incuriam* enough had not been put in, the rules provide for further particulars. The object was to secure as much succinctness of statement as was considered

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

necessary for information. I am sure, if the Profession will carry it out in this spirit, it will be feasible. But I am of opinion that in this case sufficient particulars have not been given. I think counsel practising in this court might shorten salvage pleadings very easily. I am sure, if they apply their minds to it, they will be quite able to give particulars. *Phillimore.*—The difficulty in this case is that the rule says these forms shall be sufficient. Sir JAMES HANNEN. — Quite the contrary. It implies that there may be cases in which it may not be sufficient, and you must not take it that you are slavishly to adhere to the words and forms of these specimens. They are only to be taken as indications of the character of pleading which it is desired to introduce. You must try seriously to give the material information in a succinct form.] It has always been the practice of this court, if the defendants chose to admit the facts as set out in the statement of claim, to go to trial on the admitted facts. By so doing the plaintiffs are bound down to those facts, and are not allowed at the hearing to give any evidence. For this reason, unless the practice of the court is deviated from, the setting out of the minutest details of a salvage action is essential.

Sir JAMES HANNEN.—That is no doubt a very serious difficulty. I really must say, while I wish it to be understood that my decision only applies to this particular case, that it appears to me probable that it will be found necessary in many cases to make use of a form of pleading more nearly approaching to the old form of statement of claim, than the example which is given in the appendix to these rules. Because undoubtedly the general object of these rules is to save expense, and I can speak from my own experience, though it is slight, that the defendants in these salvage actions do frequently assent to the statements made in the statement of claim, and the case proceeds to trial upon that basis. It would certainly lead to a very great additional expense if the plaintiffs in salvage actions were obliged to keep their witnesses for the purpose of proving at the trial the facts which were summarised in the statement of claim, and which would also make it necessary that the defendants should also keep their witnesses for the purpose of meeting some possible state of facts of which they would have had no sort of information from the statement of claim. Therefore, while my decision applies to this particular case, my observations have a wider scope. I accordingly direct this statement of claim to be amended, and order the costs of the motion to be costs in the cause. (*a*)

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *T. Cooper* and *Co.*

(*a*) In consequence of this order the plaintiffs delivered a statement of claim in the form given in the appendix to the Rules of the Supreme Court 1883, under which particulars of the service were given under the heads of—(1) Description of salvors; (2) Position and condition of the salved ship; (3) Nature of the services; (4) State of the weather; (5) Risk, Fatigue, and Exposure; (6) Special service; (7) Duration of services; (8) Effect of the services; (9) Values; (10) Damage sustained. The action came on for hearing on Dec. 14, when Butt, J. awarded 1700*l.* on a value of 17,000*l.* In commenting upon the above form of statement of claim, his Lordship remarked that, if in salvage actions full particulars of the services were to be given, he considered the old form of statement of claim to be the best, as it told the story consecutively, and not in the disjointed way occasioned by particulars.—ED.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

May 29, 30, 31, *and June* 30, 1883.

(Present: The Right Hons. Sir BARNES PEACOCK, Sir ROBERT P. COLLIER, Sir JAMES HANNEN, Sir RICHARD COUCH, and Sir ARTHUR HOBHOUSE.)

WILLIAM BIRD AND OTHERS *v.* THOMAS GIBB AND OTHERS; THE DE BAY. (*a*)

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF MALTA.

Salvage—Amount—Damage—Loss of profit—Separate award for damages—Evidence.

Where in rendering salvage services a ship has sustained actual damage and loss which is capable of being accurately ascertained, evidence of the amount thereof is admissible on behalf of the salvors, and the court should, where there is a fund sufficient for the purpose without depriving the owner of the benefit of the salvage, award to the salvors the amount of such loss and damage in addition to the salvage reward.

Interest on the amount of loss and damage is not recoverable by salvors.

Salvors are entitled to recover for general depreciation in the value of a salving ship in consequence of the damage sustained, and for loss of charter-party if proved.

In a service of considerable merit lasting for sixty-two hours, where the court below on a value of 67,200l. had awarded 5000l. for the service, and 3535l. 1s. 6d. for damages and expenses arising ont of the service, the Court reduced the award to a lump sum of 6000l.

THIS was an appeal from a judgment of the Vice-Admiralty Court of Malta in an action of salvage instituted by the respondents, the owners, master, and crew of the steamship *Mary Louisa*, for the recovery of salvage in respect of services rendered to the steamship *De Bay* and her cargo in the Mediterranean.

The services consisted in towing the *De Bay* from close to Sicily to Valetta in Malta for sixty-two hours under the circumstances set out in their Lordships' judgment.

At the time of rendering the services the *Mary Louisa* was bound from Marseilles to Girgenti in ballast, under a charter-party dated 7th Dec. 1881, whereby it was agreed that the *Mary Louisa* should, after discharge of her cargo at Marseilles, proceed to Girgenti and other ports named in the charter-party and load a certain cargo and deliver the same at New York or Baltimore, on being paid the lump sum of 2800*l.* for any four of the above ports, charterers having the privilege of using one or two additional ports, paying 50*l.* for each additional port used, 25*l.* to be deducted for each loading port less than four not used. It was also agreed that should the steamer not arrive and be ready to receive her cargo at her first loading port on or before 20th Dec. 1881 the charterers were to have the option of cancelling the charter-party. In consequence of the salvage services the *Mary Louisa* not being able to arrive at Girgenti on or before 20th Dec. her owners telegraphed to the charterers the circumstances, and in reply received a telegram that the

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

charterers cancelled the charter-party. Thereupon another charter-party dated 28th Dec. 1881 was entered into for the *Mary Louisa*, whereby it was agreed that the vessel should proceed to Italian, Sicilian, or Spanish ports and there load a certain cargo and deliver the same at New York or New Orleans for a lump sum of 2600*l.* for freight for any four of the loading ports taken in rotation, charterers having the privilege of using one or two additional ports, paying 50*l.* for each additional port used, and should any of the four ports named as loading ports not be used, the sum of 50*l.* should be deducted from amount of charter for each one not so used. The *Mary Louisa*, accordingly, when repaired, loaded her cargo at certain ports in Sicily and then proceeded to New York and duly discharged her cargo. The owners of the *Mary Louisa* now claimed damages against the owners of the *De Bay* as follows:

The difference between the lump sum of 2800*l.* for freight under the charter-party dated 7th Dec. 1881, and the sum of 2600*l.* for freight under the second charter-party dated 28th Dec. 1881—200*l.*

Five per cent. commission on freight and demurrage under cancelled charter-party of 7th Dec. 1881—140*l.*

Loss sustained as follows: As vessel only used two ports for loading and as under second charter-party 100*l.* has been deducted where under first or cancelled charter-party the amount for two ports would only have been 50*l.*—50*l.*

The value of the *De Bay* was agreed at 27,000*l.*, her cargo at 38,000*l.*, and the freight at 2200*l.*

On the 30th June 1882 the Judge of the Vice-Admiralty Court gave judgment, and after fully detailing all the facts of the case, and the contentions on both sides, stated that the nautical experts, who had the confidence of both parties, had agreed on the vouchers before them, that the loss or disbursement sustained by the *Mary Louisa* from demurrage, from cancellation of her charter-party, from destruction of her stores and provisions, and for costs of repairs with other incidental expenses, amounted to 2035*l.* 15*s.* 6*d.*, and that the depreciation of the *Mary Louisa* taken at 5 per cent. on 30,000*l.*, her estimated value, was 1500*l.*, and the learned judge adopting these conclusions took the loss and damages suffered by the *Mary Louisa* at 3535*l.* 1*s.* 6*d.* and he awarded the sum of 5000*l.* for salvage services, and pronounced for the respondents in the sum of 8535*l.* 1*s.* 6*d.* and costs, and condemned the defendants and their bail therein.

The particulars of the damage and expenses incurred by the *Mary Louisa* (referred to in the judgment as at p. 116 of the Appendix) were as follows.

Demurrage from 14th Dec. 1881, day on which *Mary Louisa* took *De Bay* in tow to that of her departure from Malta 31st of same month at 40*l.* per day—680*l.*

Depreciation in *Mary Louisa's* value by over straining, racing of engines, &c., 30,000*l.* at 5 per cent.—1500*l.*

Loss on charter commission on freight &c., as per documents—390*l.*

Cancelling charter and Lord Mayor's fees as per documents exhibited—4*l.* 16*s.* 7*d.*

Cost of repairs and expenses in Malta as per account—645*l.* 5*s.* 8*d.*

Cost of bosses left to be replaced in England about—200*l.*

Sundry telegrams, about 12*l.*

Six months interest on the above items amounting to 3423*l.* 2*s.* 3*d.* at 6 per cent per annum—102*l.* 19*s.* 3*d.*

From the decision below the defendants appealed. The case on behalf of the appellants submitted that the judgment was wrong and should be reversed for the following among other reasons:

1. Because the amount awarded is so large as to be excessive and unreasonable.
2. Because the learned judge in making up the amount has included items which ought not to be included, and has allowed some of these items twice over, and has allowed too large a sum to many of the items and amounts which were not proved nor substantiated and which are not proper to be allowed as substantive claims in actions for salvage.
3. Because the evidence does not support the findings and conclusion of the learned judge.
4. Because the sentence or judgment in awarding the sum awarded is wrong, and so wrong that it should be corrected on appeal.

In the case on behalf of the respondents it was submitted that the judgment below should be affirmed for the following amongst other reasons:

1. Because the respondents by their services, rescued the *De Bay*, her cargo, and freight, and passengers from total loss.
2. Because the services of the *Mary Louisa* were well and efficiently performed, and were attended with much labour and fatigue to her master and crew.
3. Because the sum awarded was arrived at by the court below after the most careful consideration of all the evidence given and the facts of the case.
4. Because the award is neither exhorbitant nor excessive.
5. Because the said award is in full accordance with the law and practice of the courts of Admiralty and Vice-Admiralty in salvage actions.

May 29.—The appeal came on for hearing.

Webster, Q.C. and *W. G. F. Phillimore* (with them *J. G. Alexander*) for the appellants.—The sum of 8535*l.* 1*s.* 6*d.* is out of all proportion to the services rendered. Moreover it has never been the practice to award one sum in respect of losses and expenses sustained by the salving vessel, and another for her services. The items upon which the learned judge below based his award are in many instances incorrect, and some of them never should have been taken into consideration at all. Sir Robert Phillimore has often, in making awards, declined to consider the amount of coals consumed. The fact that in rendering salvage services the salving vessel is delayed is always taken into consideration in fixing the amount of the award, and demurrage should not therefore be allowed as a separate item in addition. Loss of charter-party ought not to be considered:

The Cybele, L. Rep. 2 P. Div. 224; 3 Asp. Mar. Law Cas. 478, 532; 37 L. T. Rep. N. S. 165, 773;
The Star of India, 3 Asp. Mar. Law Cas. 261; 1 P Div. 466; 35 L. T. Rep. N. S. 407;
The Martha, 3 Hagg. 434.

There is no case except derelicts where so large a proportion of the property saved has been awarded as in this. Salvage was originally considered as compensation for personal skill and services. The reward to the owners was subsequently introduced in consequence of the risk run by their ships, especially as regards steamships:

The Enchantress, Lush. 93.

The following cases were cited in support of the contention that the award was out of proportion to the services:

The Ellora, Lush. 550; *The Rochester*, Mitchell's Maritime Register, Dec. 23, 1881, p. 1615: *The Viking*, Ib., Dec. 24, 1880, p. 1646; *The Rhynland*, Ib., March 25, 1881, p. 368; *The Batavia* Ib., May 13, 1881, p. 590; *The Celtic Monarch*

Ib., July 15, 1881, p. 904; *The Avlona*, Ib., March 10, 1882, p. 303.

Cohen, Q.C. and *J. P. Aspinall* for the respondents.—The cases cited out of Mitchell's Maritime Register merely contain the allegations in the pleadings, and do not give the findings of the judge upon which the award is based. The facts in *The Ellora* (*ubi sup.*) bear no analogy to the present case. It is an unprecedented course to take objection to the items, when no objections have been taken in the court below, moreover those items are correct. In a large number of cases similar to the present, an almost proportionate award has been made:

The Lancaster, 8 P. Div. 65; 5 Asp. Mar. Law Cas. 58; 48 L. T. Rep. N. S. 679;
The Kenmure Castle, 7 P. Div. 47; 5 Asp. Mar. Law Cas. 27; 48 L. T. Rep. N. S. 661;
The City of Chester, Mitchell's Maritime Register, Jan. 28, 1881, p. 111.

A large amount of salvage should be awarded on grounds of public policy, and the sum awarded is not so excessive as to induce this court to alter it:

The Amerique, L. Rep. 6 P. C. 468; 2 Asp. Mar. Law Cas. 460; 31 L. T. Rep. N.S. 854.

It is to be remembered that salvage services are in this peculiar position, that, if unsuccessful, there is no reward, and therefore the award should be high. If the 5000*l.* given for the services pure and simple were held to be enough, the owners of the *Mary Louisa* would be entitled to deduct the damages sustained by their vessel before apportioning the salvage amongst the officers and crew. If the damages are 3500*l.*, then only 1500*l.* would be left for division among officers and crew, which is manifestly insufficient for such a service. In several cases a separate award has been made by this court in respect of damage and loss sustained. Reference was made to the following cases:

The Cuba, Lush. 14;
The Chetah, L. Rep. 2 P. C. 205; 3 Mar. Law Cas. O. S. 177; 19 L. T. Rep. N. S. 621;
The Saratoga, Lush. 318;
Scaramanga v. *Stamp*, 5 C. P. Div. 295; 4 Asp. Mar. Law Cas. 161, 295; 42 L. T. Rep. N. S. 840.

Newson for some of the crew of the *Mary Louisa*.

Phillimore replied, citing *The Farnley Hall* (4 Asp. Mar. Law Cas. 499; 46 L. T. Rep. N.S. 216).

Cur. adv. vult.

June 30.—Their Lordships' judgment was delivered by Sir JAMES HANNEN.—The *Mary Louisa*, a new steamer of 1287 registered tonnage, with engines of 200 horse power, and a crew of twenty-six hands, left Marseilles on 11th Dec. 1881, in ballast, bound for Girgenti, in Sicily, under charter-party, to load from that and other ports a cargo of fruit for New York or Baltimore. At 8 p.m. of the 13th Cape Gianitola, in Sicily, was sighted, and at 10 p.m. three vertical red mast-head lights of a steamer were seen on the starboard bow, the signal indicating that she had broken down, and rockets were also being fired from her. This steamer proved to be the *De Bay*, which had lost her propellor, and was heading towards the coast of Sicily at a distance of about ten miles. The *De Bay* was a screw steamer of 1085 tons register, of 160 horse power, and a crew of thirty-seven hands, with a general cargo, and five adult passengers and three children, bound for Rangoon. The master of the *De Bay* requested to be towed to Malta. The master of the *Mary Louisa* hesitated, as he would thereby be deviating from his voyage to Girgenti, then nearly accomplished, and might forfeit his charter-party; but, in consideration of the risk to the *De Bay*, and the lives of those on board of her if assistance were not given, he ultimately consented to take the *De Bay* in tow to Malta. At 2.30 a.m. of the 14th the towage commenced, a steel hawser from the *De Bay*, and a new thirteen inch Manilla rope of the *Mary Louisa* being used. The wind gradually increased to a gale, causing great difficulty in the towing; and, ultimately, at 3.20 p.m. of the 14th, the steel hawser parted, and soon after the Manilla tow rope also gave way, and great danger arose of the propellor of the *Mary Louisa* becoming fouled in the hawsers. It was impossible to renew the towage that afternoon, and the *Mary Louisa*, at the request of the *De Bay*, endeavoured to remain by her during the night, but, in consequence of the violence of the storm the vessels lost sight of one another. At 9 a.m. of the 15th the *Mary Louisa*, which had been in search of the *De Bay*, again sighted her, and at 10.45 came up with her. The steel hawser and Manilla rope were again made fast, and the towage was resumed; the steel hawser, however, parted, and the towage was continued with the Manilla hawser throughout the rest of that day and the following night; and on the 16th, at 5 p.m., the two vessels arrived at Valetta. The services thus rendered to the *De Bay* lasted altogether during a period of sixty-two hours. In the earlier part of this time these services were rendered in circumstances of great difficulty and some danger, and during the twenty hours in which they were interrupted the *Mary Louisa* showed great perseverance in standing by the *De Bay*, and seeking her in order to renew the efforts for her assistance. The agreed value of the *De Bay*, her cargo and freight, is 67,000*l.*

A suit for salvage was instituted by the *Mary Louisa* in the Admiralty Court at Malta against the *De Bay*. The court was assisted by two experts, Captain Keston, chosen by the plaintiffs, and Captain Dyer by the defendants. Captain Keston places a much higher estimate than Captain Dyer does on the value of the services rendered by the *Mary Louisa* to the *De Bay*, but Captain Dyer stated that in his opinion "the service rendered by the *Mary Louisa* to the *De Bay* was most important and valuable, being conducted with much perseverance." He further says, "The captain and crew of the *Mary Louisa* should be well considered, for they showed much perseverance in sticking by the *De Bay*, and they had a most trying and anxious time throughout." Captain Bird, in a declaration made before a notary, on the 21st Dec., stated that the *Mary Louisa* prolonged her voyage and "suffered considerable damages consequent on the services rendered," and that his own "vessel was in a perilous condition, being unmanageable and near the land and reefs." Upon this and other evidence in the cause their Lordships think that the judge was well warranted in finding that the *De Bay*, and her cargo, crew and passengers were "rescued from a serious danger of total loss, though without any serious danger incurred by the *Mary Louisa*." For these

services the learned judge awarded the sum of 8535*l.* 1*s.* 6*d.* It was objected on behalf of the defendants that this sum is excessive, and the decision of the learned judge was specially impugned on the ground that he has allowed the specific amount of 3535*l.* 1*s.* 6*d.* for the damage, losses, and expenses alleged to have been incurred by the *Mary Louisa*, to which he has added 5000*l.* for salvage services. The particulars of the damage, losses, and expenses will be found at page 116 of the appendix. It was contended that some of these items ought not to be taken into consideration at all, as, for instance, the loss on charter; and it was further contended that in no case ought the items of loss or damage to the salving vessel to be allowed, as "moneys numbered," but that they should only be generally taken into account when estimating the amount to be awarded for salvage remuneration. Their Lordships are of opinion that this objection is not well founded. It was argued that, by allowing the several items of the account, and then a further sum for salvage, the salvors would receive payment for their losses twice over, but this is only on the supposition that the court below, after giving the amount of the alleged losses specifically, has considered them again generally in awarding 5000*l.* for simple salvage services. It is not to be presumed that the learned judge has fallen into such an error, and, indeed, it appears that he has not done so, but that he considered the 5000*l.* a reasonable amount for salvage reward, wholly irrespective of damage and expenses. Their Lordships are of opinion that it is always justifiable and sometimes important, when it can be done, to ascertain what damages and losses the salving vessel has sustained in rendering the salvage services. It is frequently difficult and expensive, and sometimes impossible, to ascertain with exactness the amount of such loss, and in such cases the amount of salvage must be assessed in a general manner upon so liberal a scale as to cover the losses, and to afford also an adequate reward for the services rendered. In the assessment of salvage, regard must always be had to the question whether the property saved is of sufficient value to supply a fund for the due reward of the salvors, without depriving the owner of that benefit which it is the object of the salvage service to secure to him. If, as in the present case, the fund is ample, it is but just that the losses voluntarily incurred by the salvor should be transferred to the owner of the property saved, for whose advantage the sacrifice has been made, and, in addition to this, the salvor should receive a compensation for his exertion, and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual; for, if no more than a *restitutia in integrum* were awarded, there would be no inducement to shipowners to allow their vessels to engage in salvage services. If there be a sufficient fund, and the losses sustained by the salvors are ascertained, it would be unreasonable to reject the assistance to be derived from that knowledge when fixing the amount of salvage reward, and their Lordships are unable to appreciate the argument that that which is known may be taken into account generally, but not specifically. There are several reported cases in which the Court of Admiralty has, besides awarding salvage services, decreed payment of damage and losses sustained by the salvor, and has directed them to be ascertained and reported on by the registrar and merchants: (*The Salacia*, 2 Hagg. 270; *The Oscar*, 2 Hagg. 261; *The Watt*, 2 W. Rob. 72; *The Saratoga*, 1 Lush. 322.)

Their Lordships are therefore of opinion that the learned judge below has not adopted an erroneous principle in first estimating the amount of loss sustained by the *Mary Louisa*, and then adding to it an amount for salvage services, but their Lordships are not prepared to accept all the items of loss which have been allowed in the court below. For example, their Lordships do not consider that the loss on charter-party was established by the evidence. This item as to 200*l.* appears to have been arrived at by simply deducting the difference of freight payable under the substituted charter-party which the *Mary Louisa* obtained, from that which she would have received under the one which she lost. But these charter-parties were for different voyages and under different conditions. The sum to be paid under the original charter-party included remuneration for proceeding from Marseilles to Girgenti in ballast, which the *Mary Louisa* had not to do under the second charter-party. With the exception of the loss of commission on the freight under the first charter-party, which is alleged to have been paid, though the proof of this loss is not very satisfactorily established, there is nothing to show that the second charter-party was not as profitable as the first. Their Lordships think that the item of interest ought not to have been admitted, and there are other items in the account which their Lordships would feel disposed to disallow if the matter were now being investigated for the first time before them, but no objection appears to have been taken to these in the court below, and they do not in their aggregate amount to a sufficient sum to warrant the variation of the judgment appealed from. It is only where the amount awarded is grossly in excess of what appears to be right that their Lordships would feel justified in overruling the decision of a court below on a question of salvage. There is one item, however, of the claim for losses which calls for special notice; it is the sum of 1500*l.* for general depreciation of the *Mary Louisa*. Their Lordships consider this a very large amount to allow for the depreciation of the vessel beyond the damage actually ascertained and repaired at Malta. This sum was arrived at on the assumption that the overstraining of the vessel and racing of the engines during the towage would be equivalent to six months' ordinary wear and tear of the vessel. Captain Keston was disposed to fix it at a higher amount. Mr. Hinchcliffe, a surveyor called for the plaintiff, fixed the amount of general depreciation at 5 per cent. Captain Baines, another surveyor, stated that the general depreciation would amount to four or five months' wear and tear, or, at the utmost, six months. Captain Dyer ultimately joined with Captain Keston in reporting that the explanation given at a conference they had with the surveyors allowed them to come to the conclusion that the wear and tear might amount to 5 per cent., which, upon the estimated value of 30,000*l.*, would give 1,500*l.* It appears, therefore, that it was not disputed by the defendants and it seems probable that some depreciation of the ship beyond the damage which could be actually seen

would arise from straining, and upon the evidence before the court at Malta, their Lordships are not in a position to hold that the sum of 1,500*l.* awarded was grossly excessive, still less to hold that the claim for general depreciation should be altogether disallowed.

But, while their Lordships are of opinion that the learned judge has not erred in the principle upon which he has based his judgment, and that the amount which he has allowed for loss and damage is not so excessive as in itself to call for an alteration of the judgment, it is obvious that when the claim of loss, damage, and expenses have been ascertained and allowed, as in this case, with assumed exactness the rate of salvage remuneration pure and simple to be allotted in addition must be estimated on a more moderate scale than where the amount of losses, &c., cannot be fixed with precision, and their Lordships are of opinion that in awarding the sum of 5000*l.* in addition to the estimated losses, the learned judge has adopted too high a standard of remuneration, and that the amount ought to be reduced. Their Lordships have the less hesitation in diminishing the amount awarded, as they are able to see that the learned judge has proceeded upon what their Lordships consider an erroneous view of the evidence with regard to this sum of 5000*l.* The *Mary Louisa* arrived in Valetta on the 14th Dec. On the 17th she was surveyed by Messrs. Hinchcliff and Stacey for the plaintiffs, and they gave a written report in which, in addition to the specific damages they pointed out, they state that the vessel was much strained and damaged in decks and upper works by the heavy work she had done. After this survey, the two captains had a conversation, in which Captain Bird, the captain of the *De Bay* asked Captain Gibb, the master of the *Mary Louisa*, "what he thought would be a reasonable compensation for what he had done." Captain Gibb replied, "Do you think 5000*l.* remuneration would be unreasonable?" Captain Bird said, "Not at all, I think it very fair indeed," and on the 20th Dec. he telegraphed to his owners: "*Mary Louisa* amicably demands 5900*l.*; considering important salvage rendered, amount reasonable. Wire instructions." The learned judge observes upon this evidence that he thinks that this must have been meant to be only for the reward and not including the expenses, because it does not appear that on the 21st, when the conversation took place and the telegram was forwarded, they had any knowledge of what the expenses would come to, and that he cannot believe they would have seriously made to their respective owners a proposal of 5000*l.* intended to cover a loss exceeding 3500*l.*, leaving for apportionment a sum less than 1500*l.* Their Lordships are of opinion that, although the captains did not know the exact amount of the damages, they knew their general nature, and that they did intend the 5000*l.* to include the whole claim. As this was never agreed to it was not binding either on the parties or on the court, but the learned judge appears to have taken it as a fair amount to be awarded for salvage in addition to expenses, because, he says he "did not think that there was reason for reducing the sum which Captain Bird declared in his opinion was a fair and reasonable proposal." Their Lordships think that this is not the true construction of Captain Bird's language and telegram, and therefore that undue weight has been given to the supposed agreement of the captains. Taking all the circumstances into consideration, their Lordships are of opinion that 6000*l.* is a sufficient amount to award, and they will humbly advise Her Majesty that the judgment should be varied by reducing it to that amount. Each party will bear his own costs of the appeal.

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *T. Cooper* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

April 6 and 28, 1883.

(Before BRETT, M.R., COTTON AND BOWEN, L.JJ.)
SANDERS BROTHERS *v.* MACLEAN AND CO. (*a*)

Sale of goods—Payment against bills of lading—Bill of lading in triplicate—Tender of two only—Time of tender.

Where goods are bought abroad, payment to be made in London in exchange for bills of lading, and one of a set of bills of lading made in parts is tendered to the vendee, while the goods are still on the voyage, he is not entitled to refuse to accept the bill of lading merely on the ground that he, by taking one, runs the risk of the shipper or other person dealing fraudulently with the other parts, but is bound to accept the goods and pay for them in accordance with the terms of his contract.

Per Brett, M.R.: In a contract for the sale of goods to be carried by ship to their destination it is implied that the shipper will forward the bill of lading with reasonable diligence, and if the shipper do so, the purchaser cannot refuse to accept the goods because he gets the bill of lading after the arrival of the ship, and after charges in the nature of demurrage have been incurred.

M. and Co., the defendants, bought goods from S., the plaintiff, to be shipped from Sebastopol to Philadelphia; payment to be made in London in exchange for bills of lading. The bills of lading were made out in triplicate, two of which sets were forwarded by the shipper to the plaintiff in London, and one retained by himself. The plaintiff tendered the two bills to the defendants duly indorsed, but the defendants refused to accept them or pay for the cargo, on the ground that they were entitled to all three. The plaintiff telegraphed for the third part, and afterwards tendered all three, but the defendants refused to accept them and pay for the cargo, on the ground that, in consequence of the delay, expenses and demurrage would be incurred.

Held, that the defendants were not entitled to refuse to accept the two bills of lading when first tendered:

Held further (per Brett, M.R.), that the defendants were not entitled to reject the cargo on the grounds stated for refusing to accept the second tender of all the parts of the bill of lading.

THIS was an action for not accepting a quantity of old iron rails, sold by the plaintiff to the defendants. The bought note which was addressed to

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

the defendants, Messrs. Maclean, Maris, and Co., was as follows :—

London, May 7, 1880.

Gentlemen,—We have this day bought for your account, by your authority, from Messrs. Sanders Brothers, of 25, Abchurch-lane, 2000 (say two thousand) tons of old iron flange rails at the price of 82s. (say eighty-two shillings) per ton, including cost, freight, and insurance to Philadelphia, U.S.

Shipment to be made during the months of July and (or) August next.

Payment to be made in net cash in London in exchange for bills of lading and policies of insurance of each cargo or shipment. A sworn weigher's certificate to be given for each cargo with the shipping documents, or sellers to be answerable for United States Customs weights.

In pursuance of this contract the plaintiffs, on the 17th July 1880, caused to be shipped on the steamship *Coronilla*, at Sebastopol, 1136 tons of old iron rails, for Philadelphia, U.S. The master of the ship delivered a set of three bills of lading in respect of the shipment to a Mr. Mollivo, the shipper of the rails. Mollivo forwarded two of these bills of lading from St. Petersburg to the plaintiffs in London, retaining the other in his hands, but dealing with it in no way.

On the 3rd Aug. 1880 the plaintiffs tendered the two bills of lading, duly indorsed, to the defendants in London, but the defendants refused to accept them, or to pay for the cargo, on the ground that the bill of lading appeared to be made out in triplicate, and they were entitled to refuse to accept unless all three were offered them.

The plaintiffs having obtained the third part of the bill of lading, tendered all three on the 9th Aug. 1880, but the defendants refused to accept them or pay for the cargo, because the vessel had so far proceeded on her voyage that she would arrive at Philadelphia before the bill of lading could be sent there by the defendants, and that warehouse and other expenses would be incurred in consequence.

The cause was tried before Pollock, B. in London, in Dec. 1881, and the learned judge then asked the jury the following questions :—1. Has a custom been proved that in the case of a contract such as was made between the plaintiffs and the defendants the vendee is bound to accept bills for his goods when only two bills of lading are tendered? 5. Has a custom been proved that in the case of a contract such as was made between the plaintiffs and the defendants the vendee is bound to accept bills against shipping documents, although they are tendered at a date when the cargo, having gone forward to America by steamer, will arrive before the bills of lading can arrive?

The jury answered the first question thus: "The custom has not been proved by the evidence, but it is the unanimous opinion of the jury that it is the usual practice of the City of London to do so." And they answered the second question thus: "The custom has not been proved by the evidence, but it is the unanimous opinion of the jury that where due diligence has been employed, and in this instance they believe that the plaintiffs did exercise such diligence, the vendee is bound to accept such bills of lading."

After argument upon further consideration the learned judge directed the verdict and judgment to be entered for the defendants.

The plaintiffs appealed.

Sir *F. Herschell* (S. G.) and *Shiress Will* for the plaintiffs.—The first tender was good. The defendants rely upon *Glyn, Mills, and Co.* v. *East and West India Dock Company* (7 App. Cas. 591; 4 Asp. Mar. Law Cas. 580; 47 L. T. Rep. N. S. 309), but that case has not altered the law as laid down in *Barber* v. *Meyerstein* (L. Rep. 4 H. L. 317; 3 Mar. Law Cas. O.S. 449; 22 L. T. Rep. N.S. 808). Any one of a set of bills of lading duly indorsed and delivered passes the property, and therefore the tender of 3rd Aug. 1880 was a good tender apart from any custom. But if not, then the tender of 9th Aug. 1880 was a good tender.

There is no implied warranty that the bills of lading shall reach the defendants in time for them to forward them to America before the arrival of the goods.

Webster, Q.C. and *Moulton* for the defendants.—The defendants are entitled to have the cargo delivered to them free of all expense. A delivery of shipping documents is not a sufficient delivery if it appears that the cargo is subject to liens and charges in favour of bailees: (Benjamin on Sales, 3rd edit. p. 688). It appears by the bills that they are in triplicate, the purchaser may therefore refuse to accept two:

Glyn, Mills, and Co. v. *East and West India Dock Company*, 7 App. Cas. 591, at p. 600

Sir *F. Herschell* (S.G.) in reply.

Cur. adv. vult.

April 28.—Brett, M.R.—The action in this case was brought for the non-acceptance of a cargo of railway iron. The contract was a contract of sale of the railway iron for forward deliveries of shipments to be made within certain months. Payment was to be made in London against bills of lading. The vessel containing the cargo in question sailed from Sebastopol for Philadelphia, but before she arrived there the defendants declared that they would not accept the cargo, and the question is whether they were justified in this refusal. The refusal arose in this way: On the 3rd Aug. the plaintiffs offered to the defendants two copies of the bill of lading duly indorsed in favour of the defendants, but the defendants refused to accept them, because it appeared that the bill of lading had been drawn in triplicate, and that, therefore, they were entitled to all three copies, and to refuse to accept the cargo and to decline payment until all three copies were in their hands. The third copy of the bill of lading was still in the hands of a gentleman in St. Petersburg, who was the original shipper of the cargo from Sebastopol. Upon the refusal of the defendants to pay against the bills of lading offered to them the plaintiffs wrote to St. Petersburg and obtained the third copy of the bill of lading, and afterwards upon the 9th Aug. they tendered all three parts to the defendants, but the defendants again refused to accept them. On this second occasion the refusal was on these grounds: By the 9th Aug. the ship had got so far on its voyage to Philadelphia that it would arrive there before the bills of lading could be forwarded from London to reach the defendants' agents in Philadelphia, and therefore, there being no one there authorised to receive the cargo, the captain would have a right to land and warehouse it at the expense of the consignee, or, if his ship was detained in consequence, he would be entitled to demurrage under the charter-party or bill of lading.

I do not know that either of the reasons

given by the defendants for refusing the cargo are the real reasons, but, if they are good and legal grounds for the refusal, the defendants have a right to rely upon them. Now the learned judge, Pollock, B., asked the jury at the trial whether after the objection taken on the 3rd Aug. the plaintiffs made all reasonable efforts to obtain all the copies of the bill of lading in time and the jury found that they did so; the learned Baron, however, directed the verdict and judgment to be entered for the defendants on the ground that it was a good and legal ground for refusing to accept a cargo under such a contract as this that all the existing copies of the bill of lading were not offered to the defendants; and he held further that the tender of the 9th Aug. had not cured the defect in the tender of the 3rd Aug. Now I cannot agree in this opinion as to either of those tenders, and I think both of those tenders good. With reference to the first the question is this: whether, where payment for shipments of goods sold under a contract of sale is to be made against the bill of lading of the shipment, it is a part of that contract that the vendor must offer all the existing copies of the bill of lading in order to entitle himself to be paid. Now, if only one copy of the bill of lading has been dealt with and indorsed, it is known law that a delivery of such indorsed bill of lading, with an intention to pass the property, passes the property, and will entitle the person to whom it is delivered to demand the goods upon their arrival. Moreover it is known law that under these circumstances no subsequent indorsement of any of the other copies of the bill of lading has any effect upon the property in the goods. It was urged, however, not that this view of the law had been altered, but that a difficulty had arisen which rendered it unsafe for a vendee to accept the first indorsed copy of the bill of lading only, because, if the shipper kept in his possession any other copy of the bill of lading, he might fraudulently indorse it, and present it so fraudulently indorsed to the captain, and obtain possession of the goods, and the shipowner would then be absolved as against the real owner of the goods for having delivered them up upon such a bill of lading, the indorsement of which was fraudulent. This was so decided in the House of Lords in the case of *Glyn, Mills, and Co.* v. *East and West India Dock Company* (*ubi sup*). I say nothing about that decision except that it is to be loyally followed. I think it was inevitable, upon that decision, that a practical difficulty would arise, and that someone would avail himself of it as an excuse for rejecting a cargo. That has now happened, and the question is, whether there is anything in that case to alter the old law. Now, in the case referred to, the House of Lords distinctly stated that the old law was not altered, and that the first copy of the bill of lading properly indorsed for value, and delivered with the intention to pass the property, passes the property, and that no subsequent indorsement of any other copy is of any effect. All that they decided was that, although the true owner of the goods could sue the person who had obtained possession of the goods, yet he could not sue the captain or the shipowner, because, when he took the first indorsed copy of the bill of lading he took it subject to this contingency, that if the goods were delivered by the captain to someone else upon a subsequent copy of the bill of lading fraudulently indorsed by the consignor he could not sue the shipowner, but he could sue anyone else who had dealt with the goods which were his property. If this be true, could it be the intention of this contract, which states expressly that payment is to be made against bills of lading, that, although the bill of lading presented would be presented according to the custom of merchants, with a view to pass the property in the cargo, yet that the vendee should have a right to reject the cargo because all the three copies of the bill of lading were not presented to him? I do not think that such is the effect of the decision of the House of Lords, and it would certainly be contrary to the known principles of mercantile law and to the practice of merchants with respect to bills of lading. Therefore I cannot agree with the decision of the learned judge upon this point.

This is of itself sufficient to decide this case, but because the second point was argued, and is an importanf point in mercantile law, I desire to say for myself that I think the second tender of the 9th Aug. was a good tender, even assuming that the first was bad. It was argued that all three copies of the bill of lading were not presented until so late a date that the vessel would arrive at Philadelphia before it would be possible to forward there the bills of lading, and that in such a contract as this there is an implied condition that the bills of lading should be delivered to the consignee or vendee in time for him to send them forward, so that they should be at the port of arrival at the time the vessel arrived there, and that if this condition was not fulfilled the vendee had a right to reject the cargo. It was argued that, if we did not go this length, we must at least hold that it was an implied condition that the bills of lading should be delivered to the vendee in time to be forwarded to the port of arrival before any charges or expenses were incurred, and that if this condition was not fulfilled the vendee had a right to reject the cargo. The first objection to this contention seems to me to be this, that we have no right to import anything into a contract which it is not clear was present to the minds of the parties at the time the contract was made and agreed to by both of them. Let us consider these contentions separately. Take the case of a cargo worth 20,000*l.*: if the bill of lading were to arrive the day after the vessel, it would be monstrous to hold that the vendee might reject the whole of this cargo, though no damage had been done to anyone. In the same way, a cargo of 20,000*l.* might be shipped to a place where it would be for the benefit of the vendee to have it, but where it would be ruin to the vendor if he had to sell it again there, and yet because charges of 10*l.* had been incurred, the vendee would have a right to reject the whole cargo. Even supposing there was an express stipulation in the contract that the bills of lading should be delivered to the vendee in time to be forwarded to the port of arrival before any charges are incurred, yet the rule is not to construe a stipulation to be a condition unless so expressly stated, or unless it goes to the whole value of the contract, and obviously the breach of such a stipulation would not go to the whole value of the contract. If, therefore, an express stipulation of this nature in the contract would not amount to a condition, no such condition can be implied.

On the other hand, it cannot be intended by merchants that, after a cargo has been shipped to a purchaser, the consignor should keep the bills of lading in his hands for as long as he pleases; the question, therefore is, what stipulation with regard to this must be implied. The stipulations to be implied in all mercantile contracts are always that the parties will do what is mercantilely reasonable, and obviously, after a shipper has destined a cargo to a purchaser, it is reasonable that he should not keep the bills of lading in his pocket, but should forward them with all reasonable speed to his vendee. What is reasonable speed must depend upon the circumstances of each case. If in the present case the bills of lading had been in London, I should have thought they ought to have been delivered sooner than if they had to be obtained from St. Petersburg. The jury found expressly that all reasonable exertions had been made to deliver the bills of lading in time, and therefore, even if I had thought the first tender was bad, I should have come to the conclusion that the second was good. In either view of this case, then, I am of opinion that the judgement of Pollock, B. cannot be supported and must be reversed.

Cotton, L. J.—This was an action by the vendors upon a contract entered into between them and the defendants for the sale of a cargo of iron. I will only say generally that the cargo was to be paid for in London upon delivery of bills of lading, and that when two of a set of three bills of lading were tendered to the defendants they refused to accept them on the ground that all three parts were not forthcoming. The question for our decision is, whether the plaintiff did perform all that he was bound to do under his contract in order to entitle him to payment for the cargo. By the terms of the contract, "Payment is to be made in London in cash in exchange for bills of lading and policies of insurance." As a fact the third part of the bill of lading was in St. Petersburg in the hands of the shipper of the cargo, to whom the cargo originally belonged, and from whom the plaintiffs had ordered it, but he had in no way dealt with this part, and the two parts tendered to the defendants were in every way effectual to pass the property in the cargo.

It is argued on the part of the defendants that the third part of the bill of lading being outstanding, they were not secure, and that is no doubt true to this extent, that it did enable the person in whose hands the outstanding part was to commit a fraud if he were so minded, and by presenting this part of the bill to obtain the cargo and defeat the defendants. Therefore, this fact did without doubt expose the defendants to some risk, but the question was whether what was done on this occasion of the 3rd Aug. was in accordance with the terms of the contract. There is no stipulation in the contract other than what I have read, namely, that payment shall be in exchange for bills of lading, which I take to mean, that payment shall be made upon delivery to the purchaser of a duly indorsed bill of lading effectual to pass the property in the cargo. If the parties had intended to make any stipulation of the sort contended for or to insure the purchaser against all risks they should have put it in the contract, but they have not done so. Now although without doubt, if the third part of a bill of lading is indorsed and parted with to someone before the tender of the other parts, the tender of those parts would not be a tender complying with the contract, because they would not be effectual to pass the property in the goods, yet, if the person to whom they are tendered refuses to accept them because he does not know whether the third part has been dealt with or not, he does so at his own risk, and if it afterwards turns out that the tender made to him was a good tender, in compliance with the contract, of a bill of lading effectual to pass the property, then he has committed a breach of the contract in refusing to accept such tender, and to pay for the cargo. Therefore I think the tender of the 3rd Aug. was a good tender, and ought to have been accepted by the defendants, and this really decides the case, as there is no question but that the tender of this date was made in amply sufficient time. I give no opinion upon the other point, which arises out of the tender of all three parts of the bill of lading on the 9th Aug., as it becomes unnecessary to decide it in consequence of my opinion on the other point. I will only say that I do not in any way look favourably upon the contention that, in this or any other similar contract, there is an implied condition that bills of lading should be tendered in time to be sent out to the port at which the ship is to arrive before the time of her arrival there. For the reasons I have given I think the judgment of the learned Baron cannot be sustained, and that this appeal must be allowed.

Bowen, L.J.—On the 3rd Aug. 1880 the plaintiffs tendered to the defendants two of the set of bills of lading which the plaintiffs had received from St. Petersburg from the shipper of the goods. The third of the set had been retained in St. Petersburg by the shipper, and it is an admitted fact in the case that it never was in any way dealt with or attempted to be dealt with. The defendants refused to accept the tender so made on the 3rd Aug., and the first question is, whether they were entitled to refuse it as not in accordance with the contract. It was contended before us that, under the present contract, a tender of the bill of lading was imperfect unless it included not merely those bills of lading which had been effectually dealt with, and were sufficient to pass the property, but also a third bill of lading, which was not in England, and which had still remained in the Russian shipper's hands. This is a question of construction of the contract, although the contract is in common form, and our decision, therefore, may possibly affect other cases than that immediately before us. The cargo had been shipped upon the 17th July 1880 at Sebastopol. The captain of the vessel had retained one copy of the bill of lading for himself; and had delivered a set in triplicate to the shipper. The set of three had been sent to St. Petersburg for the purpose of obtaining a consular certificate. The shipper had thence forwarded two out of the set of three to the plaintiffs, his correspondents and vendees, keeping one of the set in his own hands, of which, however, no sort of use was made. The point for our decision is, whether in tendering the two bills of lading received by them, without the third so retained in St. Petersburg, the plaintiffs were entitled to payment of the price of the goods under the contract.

I am of opinion that the first tender of the

3rd Aug. was perfectly good. The law as to the indorsement of bills of lading is as clear as, in my opinion, the practice of all European merchants is thoroughly understood. A cargo at sea, while in the hands of the carrier, is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading by the law merchants is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as, under similar circumstances, the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods, and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which, in the hands of a rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be. The above effect and power belong to any one of the set of original bills of lading which is first dealt with by the shipper. Except in furtherance of the title so created of the indorsee, the other originals of the set are as against it perfectly ineffectual and have no efficacy whatever, unless they are fraudulently used for the purposes of deceit. By inveterate practice among most of the commercial nations of Europe, bills of lading have long been drawn by the shipowner in sets of three or more. Sometimes one of the set is retained by the captain, the others being transferred by the captain to the shipper. Sometimes the whole of the set are handed, upon shipment, to the merchant, the captain retaining a copy only. This practice of drawing bills of lading in triplicate may be at the present day, and under the altered conditions of communication between one part of the world and another, less valuable than it was when originally introduced, but it certainly had its distinct uses in the early stages of European commerce, and it still survives. If it survives it is probable that the commercial world still finds it more convenient or less troublesome to preserve it than to change it. And it is plain that the purpose and idea of drawing bills of lading in sets—whatever the present advantage or disadvantage of the plan—is that the whole set should not remain always in the same hands. The possibility of its separation is intentionally devised for the purpose not of fraud, but of protecting honest dealing. The separation may conceivably afford opportunities of fraud if the holders choose to be dishonest, but on the whole the commercial world is satisfied to run the risk of this contingency for the sake of the compensating advantages and conveniences which merchants, rightly or wrongly, have, till lately at all events, believed to be afforded by the system of triplicates or quadruplicates. The shipper or his vendees may prefer to retain one of the originals for their own protection against loss, or to transfer it to their correspondents. In such case they are in the habit of treating the remainder of the set as the effective documents, and as sufficient for all purposes of negotiating the goods comprised in the bill of lading.

The question we have to decide is whether the tender to the vendee of the only effective originals of the set is a sufficient tender under their contract, notwithstanding the absence of a third original, which is outstanding in the hands of the shipper, but which it is admitted in the present case has been in no way dealt with by him, and which has always remained in his hands as an ineffective and innocent triplicate. If we were to hold that such a tender is not adequate, we must, as it appears to me, deal a fatal blow at this established custom of merchants, according to which, time out of mind, bills of lading are drawn in sets, and one of the set is habitually dealt with as representing the cargo independently of the rest. If the set for purposes of contract like the present must always be kept together, the whole object, be it wise or unwise, of drawing bills of lading in triplicate is frustrated; for, if one of the set were lost, or had been forwarded by the shipper or any subsequent owner of the cargo to his correspondent by way of precaution, the cargo becomes unsaleable. The only possible object of requiring the presentation of the third original must be to prevent the chance, more or less remote, of fraud on the part of the shipper or some previous owner of the goods. But the practice of merchants, it is never superfluous to remark, is not based on the supposition of possible frauds. The object of mercantile usages is to prevent the risk of insolvency, not of fraud; and anyone who attempts to follow and understand the law merchant will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contrary is the case. Credit, not distrust, is the basis of commercial dealings; mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communication is no more based on the supposition of fraud than it is on the supposition of forgery. It appears to me accordingly that a tender is, at all events, in compliance with the present contract, by which all effective bills of lading in existence are tendered. If, indeed, the absent original had been misused so as to defeat the title of the indorsees of the tendered residue of the set, the tender would have been bad. But the vendee was not entitled to reject the tender of the only effective documents on the bare chance that a third effective bill of lading might possibly have been dealt with when in fact it had not. The person who rejects effective and adequate documents of title on the ground that another document may possibly be outstanding, does so at his own risk. If his surmise turns out to be well founded, his rejection of the tender would be justified. But if it is a mere surmise, and has no foundation in fact, he has chosen, by excess of caution, to place himself in the wrong. The bill of lading, I have said, may be regarded as the key of the warehouse where the goods are. Can a person who has contracted to pay on delivery of the keys of the warehouse refuse to accept the keys tendered to him on the ground that there is still a third key in the hands of the vendor which, if fraudulently used, might

defeat the vendee's power of taking possession? I think business could not be, and is not, carried on upon any such principle.

The argument has been pressed upon us that, in the absence of the St. Petersburg original, there might be a difficulty in negotiating the two bills of lading out of the set of three. People who lend money upon or who purchase bills of lading can make their own terms. Whether they will trust to the current bills of lading produced in any case is a matter for themselves, and one upon which they would probably be guided by their faith in or distrust of their customer. But I do not believe that such suspicion, when it exists, is the natural or necessary consequence of the presentation of the two bills of lading without the third. We have had also pressed upon us in argument the decision in the House of Lords in the case of *Glyn, Mills, and Co.* v. *East and West India Dock Company* (*ubi sup.*); but that decision did not profess to alter the established usage of European merchants. It only showed that it was attended, in the case of fraud, with a risk which had not hitherto been sufficiently understood. If the mercantile world, having its attention called to this risk, chooses to alter its mode of doing business, that is a matter for its own decision. It may not think the disadvantage of the risk, even when explained, sufficient to justify a departure from the known and recognised modes of transacting commercial business. But until and unless it alters its method of dealing, and the forms of the well-known contracts by which it is done, I can only interpret its usages and its contracts as I find them, and as I am satisfied they are understood by the commercial world. I entertain no doubt that in the present instance the tender of the only effective bills of lading in existence was a sufficient tender, and that it would be so considered by any jury of merchants. As, in my judgment, the tender of the 3rd Aug. was sufficient, it becomes unnecessary to discuss the validity of the later tender of the 9th Aug. I in no way dissent from what the Master of the Rolls has said, but I do not think it necessary to decide or to express a final opinion about it. *Judgment reversed.*

Solicitor for plaintiffs, *Clements.*

Solicitors for defendants, *Maples, Teesdale,* and *Co.*

Nov. 27 *and Dec.* 3, 1883.

(Before Brett, M.R., Baggallay, and Bowen, LJJ.)

The Palermo. (*a*)

Collision—British and foreign ships—Inspection of documents—Depositions before Receiver of Wreck—Board of Trade—Privilege.

In a damage action, arising out of a collision between a British and a foreign ship, copies of depositions made before the Receiver of Wreck by the crew of the British ship, and obtained from the Board of Trade by the owners of the British ship for the purposes of the action, are privileged, and inspection of them cannot be obtained by the owners of the foreign ship, even although the Board of Trade, on the ground that no such depositions have been made by any member of the foreign crew, has refused to allow the foreign owners to see them.

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

This was an appeal from a decision of Butt, J. given in a motion by the defendants in a damage action for inspection of copies of depositions made by the master and certain of the crew of the plaintiff's ship before the Receiver of Wreck.

The collision occurred between the British steamship *Rivoli* and the foreign steamship *Palermo*, on Aug. 25, 1883. On the 27th Aug. an action *in rem* was instituted by the owners of the *Rivoli* against the *Palermo*. The defendants applied on the 10th Oct. to the Board of Trade for copies of the depositions of the master and crew of the *Rivoli*. In reply they were informed that, as no depositions had been made by anyone belonging to the *Palermo*, the Board of Trade declined to furnish copies of the depositions made by those from the *Rivoli*. The defendants' solicitors thereupon applied to the plaintiffs' solicitors, asking them whether they had in their possession any copies of depositions made by the master and crew of the *Rivoli*.

Being unable to obtain such information, the defendants applied to the registrar for leave to administer interrogatories to the plaintiffs, asking them if they had copies of the depositions in their possession. The registrar referred the matter to the judge, and on the 13th Nov. the application came before Sir James Hannen in court, who directed interrogatories to be administered. In answer to such interrogatories, the plaintiffs admitted that depositions had been made before the Receiver of Wreck by the master and crew of the *Rivoli*, and said as follows: "I am informed by my solicitors, and believe, that after the proceedings in this action had been commenced by my said solicitors, they, for the purpose of advising me and my co-owners as to our rights against the defendants in this action, and for the purpose of this action and for their own use therein, obtained copies of such depositions, and that such copies are in their possession."

Nov. 17.—The motion now came on in court before Butt, J.

Dr. *Stubbs*, for the defendants, in support of the motion.—These depositions do not come within the compass of privileged documents:

Bustros v. *White*, L. Rep. 1 Q.B. Div. 423; 34 L. T. Rep. N. S. 835.

The original depositions are not privileged, and can it be said that copies of them are? These depositions were made before the action came into existence, and were in no way made for the purposes of the action. Again, this is not *res integra*, as Sir Robert Phillimore, in the case of *The Turgot* (not reported), under very similar circumstances, ordered inspection of depositions made before the Receiver of Wreck by members of the crew of a British ship, whose owners were plaintiffs in that action.

W. G. F. Phillimore, contra.—*The Turgot* is not in point. In that case the owner of the British ship inserted the depositions in their affidavit of documents as unprivileged. The copies now in question were got by the defendants' solicitors for the purposes of the action, and for the purpose of forming part of the brief. That being so, they are privileged:

Bustros v. *White* (*ubi sup.*);

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

Stubbs, in reply, cited

Nordon v. *Defries*, 8 Q. B. Div. 508.

Butt, J.—In this case I am not disposed to order discovery of these documents, which are copies of depositions made for purposes of the Board of Trade. In the first place, I am not at all sure that the Board of Trade would not be right in refusing copies of such documents as these in question. I do not myself clearly know what these documents are. I know there are documents taken by the Board of Trade officials for various statistical purposes, and I think it very undesirable that such reports should be disclosed, because the consequence would be that owners of ships would instruct their masters to give as little information as possible to the Board of Trade, and so the public interest would be injured. I am therefore not at all disposed to go out of my way to force disclosure of the copies of these documents. In the next place, I think that the doctrine of discovery has gone quite far enough. I do not presume to think that the authorities on this subject have gone too far, but I myself do not intend to go an inch further. Now, what are the facts here? Discovery is sought of copies of certain depositions made for the purposes of the Board of Trade. These copies, of which discovery is sought, were obtained for the purposes of this suit, and are, as the phrase is, to form part of the brief. That being so, I think they come within the term "privileged," and I will not go out of my way to inquire what the originals might be, as it is the copies of which discovery is sought, and not the depositions themselves. Therefore this motion must be dismissed, and the costs made costs in the cause.

From this decision the defendants appealed.

Dec. 3.—The appeal came on for hearing.

C. Hall, Q.C. (with him *Stubbs*) for the defendants.

W. R. Kennedy, for the plaintiffs, was not called upon.

The arguments in support of the appeal were substantially the same as those used in the court below.

Brett, M.R.—I agree with the learned judge below, for the reasons he has given. This appeal must therefore be dismissed with costs.

Baggallay and Bowen, L.JJ. concurred.

Solicitors for the plaintiffs, *T. Cooper* and *Co.*

Solicitors for the defendants, *Stokes, Saunders*, and *Stokes*.

March 3, *and June* 19, 1883.

(Before Brett, M.R., and Lindley and Fry, L.JJ.)

Marzetti *v.* Smith and Son. (*a*)

Carriage of goods—Bill of lading—"From the ship's tackles"—Discharge on to quay—Custom of port.

Goods were shipped under a bill of lading at Calcutta to be delivered in like good order and condition from the ship's tackles (where the ship's responsibility shall cease) at the port of London, &c. On arrival in the port of London the consignee demanded overside delivery into lighters immediately from the ship's tackles. The shipowner landed them on the dock wharf, and was ready to deliver them thence into the consignee's lighters, but the consignee carted them away, thereby becoming liable to and paying certain dock charges. In an action by the consignee against the shipowner to recover the amount so paid, the jury found that there was a custom for steamships having a general cargo (the defendants' ships being such) coming into the port of London, and using the docks, to discharge the goods on to the quay and thence into lighters.

Held, that the custom found was not inconsistent with the terms of the bill of lading, and that the shipowner was entitled to discharge the goods on to the quay, and was not liable for the charges sought to be recovered.

In this case a rule *nisi* was obtained upon the part of the plaintiff calling upon the defendants to show cause why the verdict obtained from them at the trial of the action at the Guildhall before Cave, J. should not be set aside, and a new trial had on the ground of misdirection.

The action was brought by Charles Thomas Marzetti, a bonded warehouseman carrying on business in the city of London, against George Smith and Son, shipowners, to recover 102*l.* 2*s.*, which the plaintiff alleged he had been compelled to pay to the London and St. Katherine Docks Company in order to obtain delivery of certain chests of tea.

The plaintiff, in his statement of claim, alleged that he was the consignee of certain chests of tea shipped on board the defendants' ships at Calcutta, under bills of lading which were so far as material to the following effect:

Shipped in good order and condition by Messrs. Cresswell and Co., of Calcutta, or received in good order and condition for shipment on board the steamship *City of* . . . . lying in the port of Calcutta, and bound for London, chests of tea being marked and numbered as per margin; and to be delivered, subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition, from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of London, or so near thereto as she may safely get, unto order, or to his or their assigns. . . . The following are the exceptions and conditions above referred to: . . . . The goods are to be discharged from the ship as soon as public intimation is given that she is ready to unload, and if not thereupon removed without delay by the consignee, the master or agent is to be at liberty to land the same; or if necessary, to discharge into bulk, lazaretto, or hired lighters, at the risk and expense of the owners of the goods. . . .

That on the arrival of each of the respective ships the plaintiff passed an entry for delivery of the tea overside into his lighters, and demanded of the owners delivery into his lighters, but that the defendants in each case wrongfully, and contrary to the direction of the plaintiff, discharged and landed the same on the wharf or quay belonging to the London and St. Katharine's Docks Company; that the plaintiff thereupon applied to the dock company for delivery, but the company refused to deliver until payment by him of certain amounts for rent, landing, wharfage, and delivery, amounting in all to 102*l.* 2*s.*, which the plaintiff was compelled to pay to obtain delivery of the tea, and these were the sums which the plaintiff claimed to recover from the defendant.

The defendants, in their statement of defence, pleaded (*inter alia*) that the said teas were delivered from the ship's tackles at the port of London within the true intent and meaning of the

(*a*) Reported by J. Smith and A. A. Hopkins, Esqrs., Barristers-at-Law.

bills of lading for the same, according to the usage of the port of London with respect to the delivery of goods from general ships arriving in the Victoria Docks, in accordance with which usage the docks company take all the goods on board out of the ship and put them on to the quay alongside the ship.

The case came on for trial at the Guildhall, in May 1880, before Huddleston, B., who nonsuited the plaintiff.

A rule for a new trial having been granted by Grove and Mathew, JJ., the case was tried a second time in Dec. 1882, at the Guildhall, before Cave, J., when the jury found that there was a well-known custom and usage for steamships having a general cargo (the defendants' ships being such) coming into the port of London and using the docks to discharge the goods on to the quay and thence into lighters, and not to discharge them directly into lighters, and the learned judge thereupon gave judgment for the defendants.

A rule *nisi* for a new trial was thereupon obtained on the part of the plaintiff calling upon the defendants to show cause why the verdict should not be set aside, and a new trial had, on the ground that, if there was a custom proved as alleged, the same could not and did not control the contract contained in the bill of lading, and that the learned judge misdirected the jury in telling them that it was not inconsistent with the contract.

The 67th section of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 13) referred to in the argument is as follows:

67. Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or having made entry thereof to land the same or take delivery thereof, and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of and land or unship the said goods at the times, in the manner, and subject to the conditions following (that is to say):

(5) If, at any time before the goods are landed or unshipped, the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed so to do, and his entry shall in such case be preferred to any entry which may have been made by the shipowner:

(6) If any goods are, for the purpose of convenience in assorting the same, landed at the wharf where the ship is discharged, and the owner of the goods at the time of such landing has made entry and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, such goods shall be assorted at landing, and shall, if demanded, be delivered to the owner thereof within twenty-four hours after assortment; and the expense of and consequent on such landing and assortment shall be borne by the shipowner.

Butt, Q.C. (with him *Wood Hill*), for the defendants, showed cause.—The case of *Petrocochino* v. *Bott* (2 Asp. Mar. Law Cas. 310; 30 L. T. Rep. N. S. 841; L. Rep. 9 C. P. 355) is conclusive in this case. It has now been found as a fact that it is the custom for general ships coming into the port of London and using the docks to discharge the goods on to the quay, and thence into lighters. No distinction can be drawn between the words of the bill of lading in that case "from the ship's deck" and the words in the present bill of lading "from the ship's tackles." Brett, J. there says: "If delivery is by the usage of the port to be made in a certain manner, a delivery in that manner satisfies the shipowner's undertaking to deliver at the port, unless there be something in the terms of the contract inconsistent with it," and "it seems to me that this bill of lading could not more accurately describe the mode of delivery from the ship's deck to an intermediate place of delivery." There is nothing in the bill of lading in this case inconsistent with the custom of the port. The condition therein providing that the goods are to be discharged from the ship as soon as public intimation is given that she is ready to unload, and if not thereupon removed without delay by the consignee, the master or agent is to be at liberty to land the same, cannot be construed as forbidding the shipowner to land the goods according to the usual custom, because the shipowner brings his lighters alongside, and is ready to take immediate delivery overside.

F. O. Crump (with him *C. Russell*, Q.C.) in support of the rule.—The point in this case differs from that raised in *Petrocochino* v. *Bott* (*ubi sup.*). In that case no demand was made by the consignee for delivery into lighters immediately from the ship's deck, and the question was whether the goods having been discharged on to the quay with the view of being delivered thence into the consignee's lighters, without any objection on the part of the consignee, the ship's responsibility ceased when the goods had been placed on the quay, or continued until they had been placed in the consignee's lighters. In this case the consignee asked for overside delivery directly from the ship's tackles into his lighters, in accordance with the terms of the bill of lading. This the shipowner refused, and is seeking to set up a custom of the port inconsistent with the written contract contained in the bill of lading, contrary to the decision of the Court of Appeal in *Hayton* v. *Irwin* (4 Asp. Mar. Law Cas, 212; 41 L. T. Rep. N. S. 666; 5 C. P. Div. 130). It is on this case that the plaintiff relies, the case of *Petrocochino* v. *Bott* not being in point. Secondly, the plaintiff on the arrival of the ship passed an entry for delivery of the tea overside, and thereupon the 5th sub-section of the 67th section of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63) came into operation. That sub-section provides that "if at any time before the goods are landed or unshipped the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed so to do, and his entry shall in such case be preferred to any entry which may have been made by the shipowner." Under that sub-section the plaintiff was clearly entitled to delivery overside in accordance with his entry. Even if the custom is to be imported into the bill of lading, it cannot be imported into the Act of Parliament. [MATHEW, J.—Does not the 6th sub-section apply here?] No; the plaintiff was willing to wait till his goods were arrived at in the course of unloading, and could be delivered to him in the regular course. The effect of the 5th sub-section is that the mode of discharge elected by the consignee is to be preferred to that elected by the shipowner, and in this case the shipowner, notwithstanding that the consignee has done everything to comply with the Act of Parliament, has insisted on landing them on the quay.

Butt, Q.C. was heard upon the effect of the Act of Parliament.—The 67th section does not apply at all in this case. It only applies where the owner "fails to make entry" of the goods, "or having made entry thereof fails to land the

same or take delivery thereof and to proceed therewith with all convenient speed." At any rate it was not the object nor is it the effect of the Act to derogate from the shipowner's rights or to interfere with the custom of the port. If the section does in any sense apply, the shipowner then has a right to land the goods under the 6th sub-section for the purpose of assorting them. It must be remembered that the shipowner was ready to deliver the goods from the quay into the plaintiff's lighters free of charge, but the plaintiff preferred to remove them in carts by land, whereby he incurred these charges which he is now seeking to recover.

Grove, J.—I am of opinion that this rule must be discharged. The sole question, although for the purposes of the argument it has been subdivided into others, is whether the custom assumed in this case is to be imported into the bill of lading and into the Act of Parliament. Is then the bill of lading so framed as to exclude the customary mode of delivery in the port of London? The words in the bill of lading providing for delivery are these, "to be delivered subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition, from the ship's tackles (where the ship's responsibility shall cease), at the aforesaid port of London, or so near thereto as she may safely get, unto order or to his or their assigns." Now it is said that, if by the custom of the port of London, by which goods are not delivered direct from the ship's tackles, the goods are placed upon the quay even for a minute, the plaintiff does not get the benefit of the contract into which the defendant has entered with him. I do not read the contract from this narrow point of view, and moreover I read this clause as having been inserted for the benefit of the shipowner. It is clearly to protect him and to enable him to oblige the owner of the goods. Usually where a clause is inserted in a contract for the benefit of one of the parties to it, that party can dispense with it, and the other party cannot oblige him to take notice of it, unless it is for the benefit of both. This is the rule which we must apply in this case. The plaintiff's construction of the clause makes it obligatory on the shipowner whether it is easy or whether it is difficult, whether it is customary or whether it is not, to deliver the goods to him directly from the ship's tackles, and the contract, he says, is not performed unless the goods are handed literally from the ship's tackles to the particular barge of the consignee. There is nothing in the words of the clause which requires this application of it. I read it as meaning "to be delivered from the ship's tackles in the usual mode adopted in the port of delivery," not in the most different mode from it that there can be. The owner might, for instance, invert the present case, and in a port where it was the custom to discharge into lighters might insist on the ship approaching a jetty and delivering his goods direct from the ship's tackle, and refuse to have them brought to him in lighters although it cost him nothing. The plaintiff, in fact, wants to insert in the contract the word "immediately" before the words "from the ship's tackle." I think that the words are sufficiently complied with, provided the owner is put to no expense, if the goods are put on to the wharf and thence into lighters. In this case they are delivered in the port of London, and the usual mode of delivery is to place them first on to the quay. It is almost necessary to do this, from a commercial point of view, for the convenience of sorting them, for some portions of the cargo must of necessity be placed under others, and you cannot sort the various portions on deck properly. What then can be more convenient than to put them all on to the quay and sort them, and to allow the ship to deliver them from her tackle on to the quay as soon as possible? Possibly, if there were no other means of taking away the goods from the wharf than overland, the defendants might be liable for the expenses; but in this case the ship was willing to deliver them into barges as the plaintiff wanted them. I see nothing, therefore, to exclude the ordinary custom which is universal in that locality from this bill of lading, the principle being that, unless the terms of the bill of lading are repugnant to the ordinary custom, the custom must be read into it.

But it is said that among the exceptions in the bill of lading is this, "the goods are to be discharged from the ship as soon as public intimation is given that she is ready to unload, and if not thereupon removed without delay by the consignee the master or agent is to be at liberty to land the same, or if necessary to discharge into hulk, lazaretto, or hired lighters, at the risk and expense of the owners of the goods." Mr. Crump has founded an argument on those words, but they simply mean that, under the circumstances there mentioned, the shipowner may do what is most convenient for the ship, and may land them if landing them is more convenient to the ship, and on the other hand if less convenient may deposit them in lighters. They show that the shipowner may do what is most convenient if he takes proper care of the goods, and does not put the owner of them to unnecessary expense. In this case the shipowner did not insist on the consignee's taking the goods overland; on the contrary, he was ready to put them into the means of conveyance the consignee wanted without putting him to any expense, and doing it in a way which insured accuracy, and did away with any liability to mistake. There were very similar words in the bill of lading in the case of *Petrococchino* v. *Bott* (2 Asp. Mar. Law Cas. 310; 30 L.T. Rep. N.S. 841; L. Rep. 9 C.P. 355). In that case it is true the words were "from the ship's deck;" but there is practically no difference between the words "deck" and "tackle," inasmuch as the goods are moved from the deck by the tackle. There the majority of the court considered that, if delivery is by the usage of the port to be made in a certain manner, a delivery in that manner satisfies the shipowner's undertaking to deliver at the port, unless there be something in the contract inconsistent with it. This is an express decision in point, putting aside the statute, the bearing of which was not mentioned in the case.

And now I pass to the statute 25 & 26 Vict. c. 63, the material part of which is the 5th sub-section of the 67th section, which is, "Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or having made entry thereof, to land the same or take delivery thereof, and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of and land or unship the said

goods at the times, in the manner, and subject to the conditions following: that is to say, (5) If at any time before the goods are landed or unshipped the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed so to do, and his entry shall in such case be preferred to any entry which may have been made by the shipowner." That section again must be subject to the natural or incidental conveniences of landing. Its object is not to oblige the shipowner to do that which is inconvenient and calculated to derange the whole course of traffic, but to allow him to carry on his business in the usual and proper manner. That it has that meaning the 6th sub-section of the same section is strong evidence. That sub-section provides that, "if any goods are, for the purpose of convenience in assorting the same, landed at the wharf where the ship is discharged, and the owner of the goods at the time of such landing has made entry, and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, such goods shall be assorted at landing, and shall, if demanded, be delivered to the owner thereof within twenty-four hours after assortment; and the expense of and consequent on such landing and assortment shall be borne by the shipowner." Now within the evidence in this case we should assume that it is more convenient to sort the goods on the wharf than on the deck. Possibly in the case of small coasting vessels such a course of business might be possible, but in a large ship such as this it is quite obvious that it is impossible to sort the various parcels on the deck of the vessel, and the shipowner therefore lands them for the purpose of sorting them and delivering them to the plaintiff expeditiously. Custom in all these cases is of the essence of the matter, and must come in in every case, varying in each according to local considerations, and I see nothing to lead us to make a rigid rule irrespective of custom and practical convenience. Construing then the bill of lading and the sections of the Act as narrowly as I can, I am of opinion that judgment must be entered for the defendants.

Mathew, J.—I am of the same opinion, and I regret that in such a case as this a second trial should have been necessary. The case came before us by reason of a non-suit having been entered at the first trial before Huddleston, B., and we thought it right to send it down to ascertain the existence or non-existence of a custom, and whether the mode of delivery adopted in this case is the mode usually adopted in the docks of the port of London, and it has now been found that it is. Is there any difficulty, then, in reading the custom into the bill of lading? I see none whatever, and it must therefore be interposed after the words "to be delivered from the ship's tackles," so as to make the bill of lading read "from the ship's tackles in the customary manner;" that is, from the ship's tackle on to the quay and thence into lighters or otherwise at the option of the consignee. There is nothing inconsistent with this in the following words of the clause, and I know of no principle under which the words of the other clause contained in the exceptions can be said to prohibit this customary delivery. I think that the case of *Petrocochino* v. *Bott* (*ubi sup.*) is precisely in point. The subject-matter of that case, and the words of the bill of lading are similar to the present; and Brett, J. there said: "Thus the mode and manner of delivery of goods according to the usage of the port of London is, not an immediate delivery from the ship to the consignee, but from the ship to the quay, and from the quay to the consignee. Having regard to that usage the bill of lading is drawn. It seems to me that it could not more accurately describe the mode of delivery from the ships deck to an intermediate place of delivery."

But it has been contended that the bill of lading must not be construed in this way, because the Act of Parliament prescribes an imperative mode of delivery, and that the object of the statute is to direct delivery overside at the option of the consignee, but on turning to the Act it is obvious that the Act says nothing of the kind. Its object is to provide for the shipowner's lien for freight, and on the other hand to secure delivery to the consignee free from charge unless he makes default and is not ready to take the goods in due course. It does not, therefore affect the question, and as my interpretation of the bill of lading is entirely in favour of the defendants, I think that judgment must be entered for them.

Rule discharged.

From this decision the plaintiff appealed, and the appeal was heard on the 19th June.

F. O. Crump (*Charles Russell*, Q.C. with him) for the appellant.

Cohen, Q.C. and *Wood Hill*, for the respondents, were not called on.

Brett, M.R.—In this case the plaintiff sued the shipowner for refusing to deliver the cargo in accordance with the interpretation put by the plaintiff upon the terms of the bill of lading. The facts are, that the ship arrived in a London dock and took a quay berth, her other side being open to the water in the dock, so that she could be approached by lighters in the dock. The plaintiff insists that he has a right under the terms of the bill of lading to have his goods delivered upon the water side of the vessel into lighters lying alongside, while the defendants contend that no such interpretation can be placed upon the words of the bill of lading, and that there is a well-known custom for vessels such as this coming into the port of London and using the docks to discharge the goods on to the quay and thence into lighters, and not to discharge them directly into lighters. This custom the jury found to exist, at the trial. The question is, which of these two contentions is well founded, and that question depends upon what is the true construction to be placed upon the terms of the bill of lading, and whether those terms are so distinct as to render the evidence of the custom given at the trial inadmissible on the ground that it contradicts the express terms of the contract between the parties,

A further question arises upon the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), because it is argued by the plaintiff that, inasmuch as he passed an entry for the delivery of his goods overside into lighters, sub-sect. 5 of sect. 67 of that Act comes into operation, and that sub-section is in these terms: "If at any time before the goods are landed or unshipped the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed so to do, and his entry shall in such case be

preferred to any entry which may have been made by the shipowner." I will deal with the point made under the statute at once. I do not think that this sub-section will bear the construction contended for by the plaintiff. The section is dealing with the case of a consignee failing to be ready to take delivery when the shipowner is ready to land his goods; and the Act provides that, as long as the consignee is present and ready to take delivery, delivery shall be made to him, but otherwise the shipowner may land the goods himself; but there is nothing in the section of the Act which has been relied upon to oblige the shipowner to deliver to a consignee, who is ready to take delivery, in any way he may please and in a manner opposed to the custom of the port at which the vessel may be. The section referred to simply gives power to a shipowner to deliver goods not to a consignee personally, subject to certain conditions, one of which is the condition in the sub-section relied upon that the consignee shall be entitled to personal delivery if he is ready and willing to take it. As to the question upon the construction of the bill of lading, the words of the bill of lading are, "to be delivered . . . . from the ship's tackles." I should think the proper construction to be placed upon these words would be doubtful in the absence of proof of any custom of the port of delivery; but when it is shown that the custom of the port of delivery is that ships which have a quay berth shall deliver upon the quay only, then I think we must read into that bill of lading the words "upon the quay," and if we do so, then nobody can say that they, by their addition, contradict the contract between the parties; they only explain it. It appears to me, therefore, quite impossible to say that evidence of the custom could properly have been excluded on the ground that it contradicted the express terms of the bill of lading.

Lindley, L.J.—I am of the same opinion. The plaintiff claims under the bill of lading to have his goods delivered to him in a manner that is not in accordance with the custom of the port of delivery, and it is argued on his behalf that the terms of the bill of lading are so express as to exclude evidence of the custom which it is said, contradicts them. The way to test that contention seems to me to read the proved custom into the bill of lading, and then to see if it becomes in its terms contradictory. If we follow that test, I think it is plain that by adding after the words "from the ship's tackles" the words "on to the quay," or some similar words, we in no way make the bill of lading at all inconsistent; and therefore I think that the plaintiff must take delivery of his goods according to the custom of the port of delivery. I think the decision of the Divisional Court was right, and must be affirmed.

Fry, L.J.—I am of the same opinion.

Judgment affirmed.

Solicitors for the plaintiff, *Elmslie, Forsyth,* and *Elmslie.*

Solicitors for the defendants, *Gellatly, Son,* and *Warton.*

Tuesday, Nov. 20, 1883.

(Before Brett, M.R., Baggallay and Bowen, L.JJ.)

The United Service. (*a*)

Towage contract—Implied warranty—Notice restricting liability—Negligence—Statutory bye-law — Damage — Stranding — The Harbours, Docks, and Piers Clauses Act 1847*—The Great Yarmouth Port and Haven Act* 1866.

A term in a towage contract, by which tug-owners exempt themselves from liability for damage or loss occasioned by the negligence or default of their servants, covers damage occasioned in consequence of the act of the master taking in tow too many vessels at a time in contravention of a statutory bye-law of the port in which the towage takes place, although the number of vessels causes the tug to be of insufficient power for the service.

The steam-tug U.S. was engaged to tow the R. R. down the river at Y., and out to sea. As the U. S. proceeded she took other vessels in tow, eventually having seven to tow at the same time. By a regulation made by the harbour or pier master under the Harbours, Docks, and Piers Clauses Act 1847*, and the Great Yarmouth Port and Haven Act* 1866*, a tug is forbidden to take more than six vessels in tow at the same time. The owner of the R. R. had, previously to the towage, received a notice from the owners of the U. S. exempting them from any liability in respect of any damage caused by the negligence or default of their servants, which was admitted to form part of the towage contract. On the way out to sea the pier master warned the master of the tug that he had too many vessels in tow. The tug nevertheless proceeded, and when at the entrance of the harbour, by reason of the tug being unable to command the seven tows, the R. R. stranded, and became a total wreck. In an action for the damage to the R. R.:*

Held (*confirming the judgment below*), *that the owners of the U. S. were protected by their notice from liability.*

This was an appeal by the plaintiffs from a judgment of Sir Robert Phillimore, dated Jan. 23, 1883, by which he had found in favour of the defendants.

The action was brought by the appellants for damage sustained by their fishing smack the *Red Rose*, whilst being towed out of Great Yarmouth Harbour by the defendants' tug the *United Service*. A term of the towage contract was a notice given by the defendants to the plaintiffs stating that they would not be responsible for any damage occasioned to the tows by the negligence or default of their servants. The master of the tug after commencing to tow the *Red Rose* took in tow other vessels, amounting in all to seven. By a regulation made under the Harbours, Docks, and Piers Clauses Act 1874, and the Great Yarmouth Port and Haven Act 1866, it is enacted as follows: "No steam vessel used for the purpose of towing vessels shall, at any one and the same time, tow or have in tow, or aid, or assist in towing, more than six vessels."

By reason of the number of vessels in tow the *United Service* was unable to keep the tows in their proper course, and the *Red Rose* in consequence stranded and was lost.

(*a*) Reported by J. P. Aspinall, and F. W. Raikes, Esqrs., Barristers-at-Law.

The other facts of the case fully appear in the report of the case below (5 Asp. Mar. Law Cas. 55; 48 L. T. Rep. N. S. 486; L. Rep. 8 P. Div. 56).

W. G. F. Phillimore for the appellants.

Webster Q.C. and *Witt*, for the respondents, were not called upon.

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

The following authorities were cited in argument:

The Julia, 14 Moo. P. C. 210; Lush. 224;
Steel v. *The State Line Steamship Company*, 37 L. T. Rep. N. S. 333; L. Rep. 3 App. Cas. 72; 3 Mar. Law Cas. 516;
The Minnehaha, 4 L. T. Rep. N. S. 811; Lush. 335; 1 Mar. Law Cas. O. S. 111;
Worms v. *Story*, 11 Ex. 427.

Brett, M.R.—In this case we see no difficulty. An action has been brought against the owners of the tug *United Service* for damage to the *Red Rose* whilst being towed by the *United Service*. A term of the contract was, that the owners of the tug would not be responsible for damage caused by the negligence or default of their servants. A local statutory bye-law says, no tug shall take in tow more than six vessels at a time. The tug master here took in tow more than six vessels, and more than his tug could manage, and by so negligently acting caused the mischief complained of. The duty of the captain of the tug was to take in tow as many vessels as he could manage. If he took more, and did so negligently or unskilfully, no doubt his owners would have been liable if there had not been this notice. It has been argued that the tug owners are liable, because it is said there was an implied warranty that the tug should be fit to perform the towage, and that the master would act in conformity with the statutory bye-law. But this action could only have been maintained *primâ facie* on the ground of negligence, and against this the owners have protected themselves. This appeal must, therefore, be dismissed with costs.

Baggallay and Bowen, L.JJ. concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Ingledew* and *Ince*.

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

Monday, Dec. 3, 1883.

(Before Brett, M.R., Baggallay and Bowen, L.JJ., assisted by Nautical Assessors.

The Benares. (a)

Collision—Regulations for preventing collisions—Infringement—Lights—36 & 37 *Vict. c.* 85, *s.* 17.

Departure from the Regulations for Preventing Collisions at Sea is justifiable under article 23, *where the departure is the only chance of avoiding the collision, and is, in fact, the best manœuvre under the circumstances.*

A steamship approaching another vessel so as to involve risk of collision is justified in keeping her engines going full speed ahead where she is placed in a position of unexpected danger by the neglect of the other vessel to exhibit one of her lights whilst showing the other in an improper place, and where such going ahead is, in fact, the only chance of avoiding n collision.

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

This was an appeal by the defendants in a damage action from a judgment of Sir Robert Phillimore, by which he had found the defendants' barque *Benares* alone to blame for the collision.

The collision took place between the steamship *Gerarda* and the barque *Benares* in the English Channel at about 3.30 a.m. on the morning of 24th Oct. 1882. The learned judge below found that the *Benares* was to blame for not having a red light duly exhibited, and that the *Gerarda*, by reason of this departure from the regulations on the part of the *Benares*, was justified by article 23 of the Regulations for Preventing Collisions at Sea in starboarding and keeping on at full speed. The facts of the case are reported in the court below (48 L. T. Rep. N. S. 127; 5 Asp. Mar. Law Cas. 53).

C. Hall, Q.C. and *Bucknill* (with them *W. R. Kennedy*) for the defendants, in support of the appeal.—[During the course of the argument their Lordships stated that, acting on the advice of their nautical assessors, they had come to the conclusion that the *Benares* was in fault, and that the captain of the *Gerarda* had, in starboarding his helm and keeping his engines full speed adopted the only chance of escape, and had in fact, by so doing, executed the best manœuvre under the circumstances.] Even so, the *Gerarda* is to blame for infringing the Regulations for Preventing Collisions, as interpreted by the House of Lords:

The Khedive, 43 L. T. Rep. N. S. 610; L. Rep. 5 App. Cas. 876; 4 Asp. Mar. Law Cas. 360.

The 18th article of the regulations directs that a steamship, when approaching another so as to involve risk of collision, shall slacken her speed or stop and reverse. The 23rd article, however, allows a departure from the 18th article under special circumstances. These two articles were both fully considered in *The Khedive* (*ubi sup.*), and, as there interpreted by the House of Lords, the circumstances of the present case did not justify the *Gerarda* in infringing article 18. Their Lordships, in *The Khedive*, most strenuously upheld the necessity of rigidly obeying these rules, and the only justification for departing from them is where the vessel departing is threatened by some immediate danger, external to herself and the approaching ship, as, for instance, a peril of the sea. The argument that, if that be so, the Legislature has commanded captains, rather than disobey these rules, to seek certain death in obedience to them, although there is just a chance of escape by disobeying them, is not quite accurate. The Legislature knows that no sane and reasonable captain would, however much the Legislature might direct him, commit his ship and crew to certain destruction rather than disobey the regulations. But what they say is, that it is so important that no encouragement whatsoever should be given to captains to disobey these regulations, that even where a captain takes the only means of avoiding a disastrous collision and disobeys the regulations, his owners must be held liable. No doubt the result of this is, that in particular cases hardships will occur, but it is more beneficial to the community at large, that this at first sight harsh construction should be upheld rather than that obedience to these regulations should be in any way left to the discretion of the captains. The

consequences of a less harsh construction would be that masters would be continually departing from the regulations, and so cause a great increase in the number of shipping disasters.

Finlay, Q.C. and *W. G. F. Phillimore*, for the respondents, were not called upon.

Brett, M.R.—In this case there has been a collision between the barque *Benares* and the steamer *Gerarda*, and what the Court of Admiralty has to do under such circumstances is to come to a decision as to what were the real circumstances and the real positions of these vessels when they approached each other. It has been urged that the court is bound to take the evidence exactly as it is given on the one side or the other. But the Court of Admiralty knows how difficult it is for witnesses, even if they intend to state the exact truth, to tell the circumstances exactly. The court has to determine from the evidence on both sides and from the circumstances of the case, which cannot be contradicted and cannot be doubted, what were the positions of these vessels. In this case it is said by the appellants that those on board the *Gerarda* have given the actual bearings of these ships with regard to each at the time when first seen—the actual bearings of the ships and not the appearance of the lights. In my opinion that evidence cannot be correct. If that evidence were correct, the collision never could have taken place in the manner in which it did. These vessels appeared to those on the *Gerarda* to be approaching end on, or nearly end on, and it would seem that they considered that the *Benares* was somewhat on the port side of the *Gerarda*. In my opinion these vessels were, in fact, approaching each other port side to port side. But the *Gerarda* was led into a mistaken view of the condition of things by the misconduct and negligence of those on board the *Benares*. The *Gerarda* had a right to the assistance, considering the state of the night, of the lights of the *Benares*, in order to enable her to know exactly where the *Benares* was. The court below has come to the conclusion that, by negligence on board the *Benares*, that assistance was not given, and so far as the evidence goes it seems to me that that is the right conclusion. It is clear that no red light could be seen. I have the strongest suspicion that the green light was not in its place, and that it could be seen without the starboard side being exposed. If the *Benares* had had a red light the other vessel would have seen it, but by a want of a red light, and very likely by want of both lights, she gave no notice of where she was. Therefore it seems to me that the vessels had approached very close, by the fault of the *Benares*, and by her fault alone, when the *Gerarda* acted as she said she did. The conclusion therefore to which I arrive, and to which those who assist us have arrived, is that, when the *Gerarda* saw the *Benares* the vessels were very much closer than has been stated by the *Gerarda*. That was due to the fault of the *Benares*. Now, supposing the green light of the *Benares* was seen either by the fault of the *Benares* in its not being in its proper place, or by her being thrown off the wind (if it was seen at all), the *Gerarda* did no wrong in starboarding. It was impossible for her to see that at the time the green light was disclosed to her, she was so near to the other vessel that if she starboarded that would not be sufficient without stopping her engines. There was nothing to show her that there was then danger of collision, whereas there ought to have been. But eventually the vessels came so near to each other that the *Gerarda* could see, notwithstanding the want of lights, the position in which she was, and the fact that the other vessel was showing her port side. Under these circumstances, what was her captain to do, it being always remembered that this position is brought about by the fault of the *Benares?* By the 18th article of the present Regulations for Preventing Collisions, there being nothing else in the circumstances, he ought to have stopped and reversed. Therefore, unless he was within some other rule, he comes within the terms of that rule, and has broken it. But the rules of navigation are not contained in one rule, but in all the rules, and the 23rd rule is as much to be observed as the 18th, and the navigation of a steamer is to be conducted, not upon the 18th rule alone, but upon the 18th and the 23rd. It is true, as I understand the case of *The Khedive* (*ubi sup.*) that though the *Benares* had put the *Gerarda's* officer into such a position that any reasonable man would have done what the officer of the *Gerarda* did, yet if, nevertheless, the court upon the whole facts could not come to the conclusion that the case was brought within the 23rd rule, then the owner of the *Gerarda* must be liable, although his servant had done that which every reasonable man would have done. I accept that proposition as the law laid down by the House of Lords in the case of *The Khedive* (*ubi sup.*), harsh as it may seem. Then we come to see whether this case is brought within the 23rd rule. It is brought within the 23rd rule, and therefore taken out of the 18th rule, if the necessity of the particular case was such, and the circumstances were so special, that they rendered a departure from the 18th rule necessary in order to avoid immediate danger. We are advised that in this case the ships were in such a position at the moment when the 18th rule would have applied, that the only chance and the best thing to do on the part of the *Gerarda* was to put her helm hard-a-starboard and to proceed at full speed and more than that, that as a fact, and not merely in the thought of the captain, it was the only means of avoiding a dangerous collision. If the circumstances of the vessels at the time when the 18th rule would have applied, were such, that the only thing to avoid, and the only means of avoiding an immediate and dangerous collision, was not to act upon the 18th rule, but to act in the way the captain did, then in my opinion it was necessary, within the meaning of the 23rd rule, to do what this captain did, in order to get the chance of avoiding and to avoid immediate danger. If that be so, this case is within the 23rd article, and is taken, by reason of its being in the 23rd, out of the 18th. Now, it is said that that is not so, even if it be true that it was the best thing to do, and the only means of avoiding danger to these two vessels, and in that sense necessary to avoid immediate danger; because it is said that the meaning of this rule is, that the danger spoken of in article 23 is not the danger to either of the vessels approaching each other, but some outside danger. It is certain that the House of Lords never said that in *The Khedive* (*ubi sup.*). They were not called upon to decide such a thing in *The Khedive*, and never did decide such a thing.

It is suggested that Lord Blackburn did use that language. I do not believe it. I would almost say I cannot believe that that was his judgment. Enough for me to say that I do not believe he said so. It cannot be the opinion of the House of Lords, because if it was, it would make the rule absolutely ridiculous. Therefore, upon the advice given to us, and acting upon that advice, I think that this case was within the 23rd rule, and therefore that the *Gerarda* was the innocent vessel and the *Benares* solely to blame.

Baggallay, L.J.—I am of the same opinion, and in the few observations I shall make I will follow the argument of Mr Hall on the case of *The Khedive* (*ubi sup.*). What was decided in *The Khedive* according to the marginal note is this: "The Regulations for Preventing Collisions at Sea, made under the authority of the Merchant Shipping Acts 1854 to 1873,, must under sect. 17 of 36 & 37 Vict. c. 85, be strictly followed. Actual necessity, not considerations of discretion and expediency, even though skilfully acted upon, can alone excuse their non-observance." Now, I think it is clear, upon a consideration of this case. that each one of the three learned Lords in *The Khedive* based his decision entirely upon the circumstances of the case. It was clearly proved that there had been a departure from the strict rule imposed by the 16th article of the old rules, requiring that, "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed or, if necessary, stop and reverse." It was proved, but not admitted, that what was done was not strictly correct, inasmuch as the captain of the *Khedive* did not stop and reverse or even slacken his speed, and therefore there had been a departure from the rule. But it was sought to be said there was no departure from the 23rd rule. The argument of counsel on the one side was that, assuming there had been a departure from the rule, nevertheless the *Khedive* was exculpated by article 23, and therefore there was no liability. On the other hand it was said that article 23 did not absolve the owners of the *Khedive*. In the course of the judgment of Lord Blackburn, he referred to the question put to the assessors by the present Master of the Rolls in the court below in the following words: "If this order which he gave was not absolutely right under the circumstances (that is, the order 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?" The answer in the affirmative was relied upon by the counsel for the *Khedive* as sufficiently justifying the departure from the regulation.

The argument chiefly turned upon the 17th section of 36 & 37 Vict. c. 85, 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 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." Of course, when you are trying to see whether any regulation has been infringed you must look at the whole body of regulations applicable to the particular case, and not say because one regulation has been infringed there has necessarily been an infringement. I will not refer in detail to the judgments of the three lords. I merely call attention to the fact that they all concur in the mode of dealing with this question. Reference has been made to Lord Hatherley's judgment, and I will just refer to the following passage: "Therefore, my Lords, 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 will 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." Therefore the question was not whether the circumstances were such as to make it necessary, in order to avoid danger, that the rule must be departed from, but whether, having actually been departed from, the circumstances were such that the master might be excused in taking the course he did. In the present case I think you must read the 23rd article in connection with the 18th article and, acting on the advice of those gentlemen who assist us, I have come to the conclusion that this case does fall within article 23, and that there was sufficient justification for the departure from article 18.

Bowen, L.J.—I am of the same opinion, and I will only add a few words as to the points of law argued by Mr. Hall and Mr. Bucknill. It seems to me that the case of *The Khedive* decided that it is no answer, when the rule has been infringed, to say that the person infringing acted with the best motives, and according to the best lights of his profession. The question here is, whether the rules have been obeyed. Article 18 provides, "Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse if necessary." If that rule stood alone, it might be said (though I will not say that even then some other doubt might not arise) probably with accuracy, that that rule had been infringed. But we must also look to article 23, which is to be read with article 18. and enacts that, "In obeying and construing these rules due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary, in order to avoid immediate danger." The House of Lords has pointed out, and I cheerfully and willingly accept their view, that this article is to be read by the light of the words of sect. 17 of the Merchant Shipping Act of 1873, which provides that, "Unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the rule necessary," the ship infringing shall be deemed to be in fault. This enactment, that it must be shown to the satisfaction of the court, if there has been an infringement, that the circumstances of the case made a departure from the rule necessary, is not unlike in words to article 23, which says that, in considering the question whether an infringement has taken place or not, "regard is to be had to the special circumstances which may render a departure from the rules necessary in order to avoid immediate danger."

First of all, in order to excuse non-compliance with article 18 it must be shown that what the captain did was reasonable. That I agree with. Again, it is not enough to show that what he did was advisable. I agree with that also. But then comes the question whether departure from the rule is to be excused when departure is necessary. The law says it must then be excused. Then was it necessary here? Can it be said that it is not necessary even when it is the only chance of safety? Mr. Hall argued, though not with such force upon this particular point as upon the others, that success is the only justification. But that hardly stands, because sect. 17 of 36 & 37 Vict. c. 85 assumes there has been a collision. But then Mr. Hall says, to justify a departure, there must be some risk other than mere danger of collision, as a peril of the sea or land. But just let us consider what extraordinary results would ensue if this were so. A man when he is placed in a position of danger by some peril of the sea may refrain from stopping, and yet to escape from imminent loss of life and ship by collision he may not. I put an extreme case, but putting an extreme case is the fairest way of testing the law, so as to see whether the rule of law contended for would not reduce the rule to an absurdity. The truth is that, unless you adopt some limitation of the rule, it is a captain's duty to sail blindly, or rather with his eyes open, into the jaws of death. If he obeys the rule, let us assume it is certain death for his passengers and crew. He has just one chance; he may, by disobeying the rule, possibly save them. If it is true that that is just the only one chance, then it seems to me it ought to be a case in which a departure from the rule is necessary, otherwise a captain at sea may be trained in the impression that he is better off with his passengers and crew at the bottom of the sea and the rule obeyed, than in taking the one chance of safety remaining to him. I cannot believe that this was the view of the House of Lords. I am of opinion that departure from article 18 is justified when such departure is the one chance still left of avoiding danger which otherwise is inevitable.

Appeal dismissed.

Solicitors for the plaintiffs, *T. Cooper* and *Co.*

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

Friday, Dec. 7, 1883.

(Before Brett, M.R., Baggallay and Bowen, L.JJ. assisted by Nautical Assessors.

The Lancaster. (*a*)

Salvage—Award—Amount—Appeal—Privy Council.

In salvage appeals, the Court of Appeal, following the rule of the Privy Council, will not interfere, with the amount of the award, unless the amount has been estimated on wrong principles or on a misapprehension of the facts, or unless, assuming the principles and facts to be correct, the amonnt of salvage is, in the opinion of the Court of Appeal, exorbitant in the sense of being beyond all reason.

Where the Admiralty Court on a value of 62,000*l. awarded* 6000*l. to a steamship, which, at great risk to herself, got another steamship off a coral reef in the Red Sea, ninety-five miles from Suez, and so saved her from probable total loss, and then at her request towed her within a few miles of Suez, the Court of Appeal refused to reduce the amount of the award.*

This was an appeal by the defendants from a judgment of Sir Robert Phillimore in a salvage action by which he had on a value of 62,000*l.* awarded 6000*l.* to the salvors.

The services consisted in getting a steamship off a coral reef in the Red Sea, and towing her within a few miles of Suez. The facts of the case fully appear in the report below (48 L. T. Rep. N. S. 679; L. Rep. 8 P. Div. 65; 5 Asp. Mar. Law Cas. 58).

Cohen, Q.C. (with him *J. P. Aspinall*) for the appellants.—The award is so excessively large as will warrant this court in reducing it. An agreement had been made that the salvors should be paid 100*l.* a day whether successful or not. There, therefore, was not present that element of risk usually run by salvors of getting nothing if unsuccessful. Further, the *Ossian* ran no risk of vitiating her policies of insurance, and being in ballast, was under no liability to owners of cargo in case of mishap.

Myburgh, Q.C. (with him *L. E. Pyke*), for the respondents, was stopped by the court.

Brett, M.R.—The rule of the Privy Council, which was formerly the Court of Appeal in Admiralty actions, and whose rules we, as the now Court of Appeal, follow as nearly as we can, was that, where an appeal was brought against the amount awarded, either because it was too large or too small, the Court of Appeal would not interfere unless it was shown that the amount of salvage had been estimated on wrong principles, or on a misapprehension of the facts as to the difficulty or danger of the service, or unless, assuming the facts and the principles to be right, the amount of salvage was, in the opinion of the court, exorbitant in the sense of being beyond all reason. In this case the two ships were of considerable value. The facts of the case show, and we are advised by our assessors, that the position of the *Lancaster* was extremely perilous, and that if she had not been got off she would in all probability have gone to pieces, and become an absolute loss. Therefore she was saved from probable total loss. The *Ossian* also was put into great peril of being placed in the same position as the *Lancaster*, because she might, if her cables had parted or from some other accident, have gone on to the coral reef herself. The *Ossian*, therefore, was not only in danger of slight damage, she was in danger of loss herself. If that is so, there are present the two great elements on which the court awards large salvage remuneration. We think, therefore, the learned judge has acted upon right principles, and that the governing facts were rightly decided, and it is to be noticed, in accordance with the opinion of each of his assessors.

In the present case, then, asuming the learned judge has acted on right principles, and on a true apprehension of the facts, can we say that the amount awarded is unreasonably exorbitant? It is a large award, but we do not say it is too large. But it is not necessary for us to consider whether we might differ from it if the matter had been originally before us; we can only alter it if we think it exorbitant as being

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

unreasonable. We, however, do not consider it unduly exorbitant. Having regard to what I have said, this appeal must therefore be dismissed with costs.

Baggallay and Bowen, L.JJ. concurred.

Appeal dismissed.

Solicitors: for the plaintiffs, *Plews, Irvine,* and *Hodges*; for the defendants, *Pritchard* and *Sons.*

Friday, Dec. 21, 1883.

(Before Brett, M.R. and Bowen, L.J.)

Aste, Son, and Kercheval *v.* Stumore, Weston, and Co. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Discovery—Interrogatories—Security for costs of discovery—R. S. C. 1883, *Order XXXI., rr.* 25, 26.

The court or a judge is not bound under Order XXXI., r. 25, *to make an order dispensing with security for costs of discovery because both parties consent to dispense with such security.*

This was an action by the holders of a bill of lading against the shipowners to recover a sum of 100*l.* which had been paid by the plaintiffs for dock charges, and which they alleged was payable by the shipowners as landing charges. The contention on the part of the defendants was, that the charges in question were warehouse and storage charges, which they were not liable to pay.

On the summons for direction an order was made by the Master that both sides should answer interrogatories, and should give discovery of documents, and the question as to requiring a deposit as security for the costs of discovery under Order XXXI., rr. 25, 26, (*b*) was referred to the judge, and came on before Field, J. at chambers, when both parties consenting to waive any claim to security, an application was made for an order dispensing with the deposit. Field, J. refused to make such an order, and his refusal was affirmed by the Divisional Court, Lord Coleridge, C.J. and Stephen and Mathew, JJ.

The plaintiffs appealed.

(*a*) Reported by P. B. Hutchins, Esq., Barrister-at-Law.

(*b*) By the Rules of the Supreme Court 1883, Order XXXI., r. 25: In every cause or matter the costs of discovery, by interrogatories or otherwise, shall, unless otherwise ordered by the court or a judge, be secured in the first instance as provided by rule 26 of this order, by the party seeking such discovery, and shall be allowed as part of his costs where, and only where, such discovery shall appear to the judge at the trial, or, if there is no trial, to the court or a judge, or shall appear to the taxing officer to have been reasonably asked for.

Rule 26. Any party seeking discovery by interrogatories shall, before delivery of interrogatories, pay into court to a separate account in the action, to be called "Security for Costs Account," to abide further order, the sum of 5*l.*, and if the number of folios exceeds five, the further sum of 10*s.* for every additional folio. Any party seeking discovery otherwise than by interrogatories shall, before making application for discovery, pay into court, to abide further order, the sum of 5*l.*, and may be ordered further to pay into court as aforesaid such additional sum as the court or a judge shall direct. The party seeking discovery shall, with his interrogatories or order for discovery, serve a copy of the receipt for the said payment into court, and the time for answering or making discovery shall in all cases commence from the date of such service. The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment has been made.

Pyke for the plaintiffs.—The decision of the Divisional Court amounts to this, that there is no power under any circumstances to dispense with security. The effect so holding would be to deprive the words in rule 25 "unless otherwise ordered by the court or a judge" of all meaning. There is therefore power to dispense with security, and Field, J. so held in the present case, and in *Hall* v. *Liardet*, No. 2 (L. T. 17th Nov. 1883, p. 42; W. N. 17th Nov. 1883, p. 175), and in *Burr* v. *Hubbard* (L. T. 1st Dec. 1883, p. 77; W. N. 1st Dec. 1883, p. 198). Here the deposit ought to be dispensed with, for both parties consent, and they are competent to waive the provisions of the rules which were introduced for their own benefit. Rules 1 and 12 of Order XXXI. are sufficient to prevent abuse of the process of discovery.

Barnes, for the defendants, supported the same contention, and referred to

Compagnie &c., Du Pacifique v. *Guano Company*, L. T. 10th Nov. 1883, p. 24; W. N. 10th Nov. 1883, p. 166.

Brett, M.R.—In this case an application was made to Field, J. at chambers for an order to dispense with the security for costs of discovery which is directed to be given under Order XXXI., rr. 25, 26. The learned Judge inquired the grounds on which the order was asked for, and he was told that the other side assented to the security being dispensed with. He thought that this was not sufficient in the particular case before him, and he exercised his discretion by refusing to make the order asked for. There was an appeal to the Divisional Court, and the decision appealed from was affirmed, but the court took higher and stronger grounds than the judge at chambers, and not only said that in this particular case ought the order to be refused, but said that what was asked for could not be done in any case. They said that the terms of rule 26 are absolute, and that rule 25 does not give a discretion. There is an appeal to us, and it is argued that by reason of the consent any discretion which might otherwise be given by rule 25 is done away with, and Field, J. was bound to make the order asked for. Now before the Rules of 1883 came into operation what used to happen? There can be no doubt that the practice of delivering interrogatories was greatly overdone. They were delivered in many cases when they were quite unnecessary, and the answers were not often read at the trial. The rules were made not merely to protect clients who wish to be protected, but also to protect feeble clients in spite of themselves, and in order to introduce a mode of checking a gross abuse which had previously prevailed. To my mind the right construction is obvious on the face of the rules. It is said that the Divisional Court decided that the rules are not elastic, and there must be a deposit in all cases, and the judge cannot do away with it under any circumstances. It is not necessary to decide the question, but I cannot, as at present advised, agree to that view, for it takes away the whole effect of rule 25. As at present advised I should adhere to what Field, J. said in the case which was cited to us in argument (*Hall* v. *Liardet*, No. 2, Weekly Notes, 17th Nov. 1883, p. 175), and to say that there is a discretion. I have a strong opinion as to this, but what I have said is not to be taken as a decision. Then if rule 25 allows the exercise of discretion,

can we say that Field, J. was wrong in the present case in holding that he was not prevented by the consent of both parties from ordering security to be given. I am of opinion that the point is clear, and I have no doubt that the consent of the parties does not deprive the judge of the power to refuse to make an order dispensing with security. The rule was made for the protection of the ultimate client, whether he consents to dispense with security or not. I am of opinion that the decision of Field, J. in the present case cannot be found fault with.

BOWEN, L.J.—Before the Judicature Acts there was on the one side the old Chancery system, under which the principles of discovery were applied widely and liberally, and on the other side there was the common law system, under which the same liberal view of the right to discovery was not taken, and it was more difficult to obtain discovery by interrogatories. Then came the Judicature Acts and Orders, which introduced on the common law side (whether for good or for evil may be doubted) more machinery for the purpose of obtaining discovery, and placed within the reach of litigants and solicitors a perfect but expensive means of attaining this object. The result was a great increase of interlocutory proceedings, and therefore, on the ground of public policy, and with the view of checking the unnecessary expenditure thus occasioned, the new rules have provided certain restrictions. In the present case Field, J. was asked to dispense with the costs of discovery; that is, otherwise to order within the meaning of rule 25, and the party making this application produced the consent of the other side. The learned judge said this was not enough, and refused to make the order asked for, and the question which we now have to decide is whether he was bound to make that order because both parties wanted it. In my opinion, by the new rules protection is given to all litigants for the sake of the poorer class. The conclusion at which Field, J. arrived was, that he would not consider it enough that both sides had consented, and I think he was right; I think he exercised his discretion rightly. The Divisional Court affirmed his decision, but on the ground that he had no discretion to dispense with security. I have great doubt whether that is right, but I do not wish to decide as to this. We do not decide that security may not be dispensed with, but what we do decide is that under Order XXXI., r. 25, a judge is not bound otherwise to order simply because both parties choose to consent that he shall do so.

Appeal dismissed.

Solicitors for plaintiffs, *W. A. Crump* and *Son.*

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

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Monday, Dec. 10, 1883.

(Before GROVE, J., HUDDLESTON, B., and HAWKINS, J.)

GRUMBRECHT AND OTHERS *v.* PARRY. (*a*)

Practice—Loss of cargo—Interrogatories—Application to strike out under Order XXXI., r. 7.

In an action by the shipper of goods against the shipowner to recover damages for non-delivery the defendant admitted that the goods were not delivered, and alleged that he was prevented from delivering them by the perils and casualties excepted in the bill of lading. The plaintiffs delivered interrogatories for the purpose of showing that the ship was unseaworthy when she left the port, and sank soon afterwards in consequence of a pipe or cock having been left open.

The defendant applied, under Order XXXI., r. 7, to strike out the interrogatories on the ground that they were unnecessary, prolix, and oppressive.

Held, that the interrogatories could not be allowed; they were not based upon facts which must inevitably occur in the ordinary course of the voyage, and there was nothing to show they were not purely hypothetical; they were also objectionable upon the ground that the plaintiffs' case was complete on the admission by the defendant of non-delivery, and they were put for the purpose of finding out and anticipating what the defendant's case was.

Bolckow, Vaughan, and Co. *v.* Fisher (47 *L. T. Rep. N. S.* 724; 5 *Asp. Mar. Law Cas.* 20; 10 *Q. B. Div.* 161) *distinguished.*

THIS was an action to recover damages for the non-delivery of certain goods shipped by the plaintiffs on the defendant's ship *William Hartmann,* to be carried from Glasgow to Lisbon.

The statement of claim alleged that in the month of Dec. 1882 the plaintiffs delivered to the defendant certain goods to be carried from Glasgow to Lisbon upon the terms of a bill of lading, by which the goods were to be delivered at Lisbon in the like good order and condition in which they were shipped, certain perils and casualties excepted; that the goods were not delivered and the defendants were not prevented from delivering them by any of the excepted perils and casualties. The plaintiffs further alleged that at the time the vessel sailed she was not seaworthy, and not reasonably fit to carry the goods to their destination.

The defendant admitted in the statement of defence that the goods were not delivered at Lisbon, but denied that the vessel was unseaworthy or not reasonably fit for the voyage, and further alleged that amongst the perils and casualties excepted by the bill of lading were accidents from machinery, boilers, steam, and any other accidents of the seas, rivers, and steam navigation of whatever nature and kind soever; and the defendant was prevented from conveying the said goods in the said voyage and delivering them at Lisbon by reason of such excepted perils and casualties, and not otherwise.

The plaintiffs delivered twelve interrogatories

to the defendant for the purpose of showing that the vessel sank in consequence of some pipe or cock having been left open when the vessel left the port. The defendant took out a summons under Order XXXI., r. 7 (*a*), calling upon the plaintiffs to show cause why nine of the interrogatories should not be struck out. The learned judge at chambers refused to strike them out, affirming the refusal of the master, and thereupon the defendant appealed to the Divisional Court.

The interrogatories objected to were as follows:

3. Did not the *William Hartmann* leave Glasgow and depart on the voyage in the said bill of lading mentioned between 7 and 8 p.m. of the 20th Dec. 1882, or at some other and what time?

4. Did not the master shortly after, and whether or not at about 9 p.m., discover that the vessel had taken a list to port, and did he not about five minutes later, or at some other and what time, find that there was water over the stoke-hole plates, and that the port side of the engine-room platform was flooded? Were not the fires shortly after washed out by the water? Was not the vessel some distance above Dowling when the list was discovered?

5. Was not a tug engaged by the master, and did not the tug tow the *William Hartmann* as far as Carlsdyke Bay, near Greenock, and did not the vessel there sink at about midnight, or at some other and what time and place?

6. Did not the master on the following day engage a diver, and did not the diver go down into the engine-room, and did he not close the injection cock, or some other and what cock or aperture, and whether or not which he found open?

7. State exactly what the diver did, and what steps were taken by him with a view to stopping the entrance of water and enabling the ship to be floated?

8. Was not the ship then pumped out and floated, and taken to the Albert Quay, Greenock? Did she make any, and what water after the cock or aperture found by the diver had been closed by him, and if so state to the best of your knowledge, information, and belief, the cause of the leak which remained.

9. Describe exactly to the best of your knowledge, information, and belief, the aperture through which the water which caused the vessel to sink entered, and explain how the water had entered the vessel by means of such aperture. If the water did not enter the vessel directly from the aperture, state through what pipes, tubes, cocks, or other apparatus the water passed before it could escape into the bilges of the vessel.

10. Give the diameter or size of the aperture and also the diameter or size of the smallest pipe, tube, or cock through which the water would have to pass before it could escape into the bilges of the vessel.

11. Was the vessel surveyed at Greenock and elsewhere to ascertain the cause of her sinking? State to the best of your knowledge, information, and belief, how the aperture by which the water had entered the vessel came to be open, and state on what facts or appearances you base your opinion.

12. If you are unable to answer the above interrogatories from your personal knowledge, you are required to make full inquiry of the master, officers, and crew of the steamer, or such other of your servants as may be cognisant of the matters inquired after, and to make answer from the information so obtained from them.

Fox for the defendant.—The plaintiffs' case is complete upon the pleadings, and the burden of proof is upon the defendant to show that the cause of the loss was within the excepted perils. Interrogatories are admissible on two grounds—to obtain information, and to facilitate proof; but the plaintiffs cannot bring these interrogatories within either of those rules. They have all the information as appears from the interrogatories, and they do not want to prove anything, because the defendant admits that the goods were shipped at Glasgow, and not delivered at Lisbon. The plaintiffs will rely on *Bolckow, Vaughan, and Co.* v. *Fisher* (5 Asp. Mar. Law Cas. 20; 47 L. T. Rep. N. S. 724; 10 Q. B. Div. 161), but in that case the interrogatories had been answered, and the only question was the sufficiency of the answer. Here we are applying to strike out the plaintiffs' interrogatories, and refuse to answer them at all. Under the old rules we should have had to take the objection in answer, but the new rule is much wider. I submit they are unnecessary, prolix, and oppressive within the meaning of Order XXXI., r. 7.

Barnes for the plaintiff.—I contend that the interrogatories are necessary for the plaintiffs' case, and also that they are not within rule 7 of Order XXXI. A main issue in the case is, whether the vessel was seaworthy when she left the port, and the interrogatories are necessary to prove that she was not. The defendant cannot take advantage of the excepted perils if the ship was unseaworthy when she left the port, and the plaintiffs have alleged that in the statement of claim:

Steel v. *The State Line Steamship Company*, 3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. N.S. 333; 3 App. Cas. 72.

If the defendant can bring his case within the excepted perils the burden of proof is shifted back on to the plaintiffs, and the interrogatories are necessary for the purpose of rebutting the proof that the vessel was seaworthy. A party may interrogate in order to meet a case which he anticipates will be the case of the defendant. [HAWKINS, J.—The owners have no knowledge of these facts, and if they merely say that they have been told that certain circumstances existed, and that they believe it to be true, could you put that in evidence in support of your case?] Yes, every person who is interrogated is bound to answer to the best of his belief, and if he states that he believes a certain thing to be true it is an admission. The case of *Bolckow, Vaughan and Co.* v. *Fisher* (*ubi sup.*) is directly in point. He also cited

Eade v. *Jacobs*, 37 L. T. Rep. N.S. 621; 3 Ex. Div 335;
Attorney-General v. *Corporation of London*, 2 Mac. & G. 247;
Phillips v. *Routh*, 26 L. T. Rep. N.S. 845; L. Rep. 7 C. P. 287;
Attorney-General v. *Gaskill*, 47 L. T. Rep. N.S. 566; 20 Ch. Div. 519.

GROVE, J.—In this case certain interrogatories are objected to by the defendant, who asks that they may be struck out under Order XXXI., r. 7, which provides that interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous. I am of opinion that these interrogatories have been exhibited unreasonably, and that they are vexatious, and to some extent oppressive. They throw upon the defendant an unreasonable burden, and on these grounds I think that on the whole they should be struck out. I do not say that some parts of

(*a*) Order XXXI., r. 7: Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or vexatiously, or struck out on the ground that they are prolix, oppressive, unnecessary, or scandalous; and any application for this purpose may be made within seven days after service of the interrogatories.

them may not be admissible, but, if I was to go through them for the purpose of dissecting them and say what particular part was good and what bad, I should be taking upon myself the burden of settling the interrogatories, and that is not any part of the business of this court. We must deal with them as a whole, and on a question of principle. There are twelve interrogatories, and ten of them are objected to. I need not go through them all, but I will read those which are most objectionable. [The learned Judge read most of the interrogatories.] Now are these reasonable? They do not ask whether certain things happened or were done which might be expected in the ordinary course of navigation, but they assume that a cock was left open, and that a diver went down to examine it without giving in the slightest degree the source of their information. The plaintiff might have obtained the information upon which he bases these interrogatories from a newspaper. It is said that, if this is so, and the facts are not true, the defendant has only to deny them; but it is to be deemed a part of our system that a man may ask his opponent anything which he chooses even from his imagination, and not only ask him, but compel him to make inquiry from other persons? It appears to me that would be carrying interrogatories to a most unreasonable and oppressive extent, and would add to the expense and defeat the object of interrogatories altogether.

I do not feel myself bound by the case of *Bolckow, Vaughan, and Co.* v. *Fisher* (*ubi sup.*), because I think it may be distinguished on two grounds. The main distinction is, that in that case they had answered, but insufficiently, and it was shown by their answers that, although they had no personal knowledge of the facts, they did know by their servants; then again, in that case there was no application to set aside the interrogatories, and therefore the party interrogated had undertaken to answer them, and the objection was taken by the other side that the answers were insufficient. The interrogatories in that case were not based upon a mere hypothetical state of facts as in the present case, but were directed to those circumstances which must occur in the ordinary course of navigation, and to the inevitable events which must have happened in the ordinary course of the voyage. That is entirely different from the present case, where there is no reason to believe that the facts were not invented by the plaintiff, except perhaps that a person would not be likely to put a series of interrogatories without some foundation. For these reasons I do not consider myself bound by the case of *Bolckow, Vaughan and Co.* v. *Fisher* (*ubi sup.*), and I am of opinion that this appeal should be allowed.

Huddleston, B.—I have some difficulty in arriving at a conclusion in this case, in consequence of the decision of the Court of Appeal to which my brother Grove has referred. I think in all these cases it is a matter of discretion of the judge, and he must be guided by the information he is able to obtain as to the facts, and whether the interrogatories will facilitate proof. The real object of these interrogatories appears to be to anticipate the defendant's case, or to meet the case which the plaintiff anticipates the defendant will set up. The plaintiff's case is complete on the proof of shipment and non-delivery which is admitted by the defendant. Then the defendant relies upon the exception in the bill of lading, and in order to meet that, and for the purpose of finding out what the defendant's case will be, these questions are asked by the plaintiff. I do not think that is allowable, and I therefore am of opinion that these interrogatories cannot be allowed. Now comes the difficulty to which I referred, namely, the case of *Bolckow* v. *Fisher* (*ubi sup.*) which was decided by the Court of Appeal, and which seems to embrace all the points in this case, and I own I do not see clearly the distinction between that and the present case, which my brother Grove has pointed out. I have no doubt that these interrogatories ought not to be allowed, and although I feel pressed by the case of *Bolckow* v. *Fisher*, I think there may be a distinction, and I do not, therefore, dissent from the judgment of my brother Grove, and I am of opinion that the interrogatories should be struck out.

Hawkins, J.—I am of the same opinion, and I think these interrogatories should be struck out, on the ground that they are prolix, unnecessary, and vexatious under Order XXXI., r. 7. Long before these rules the law on this subject was laid down by James, L.J. in the case of *Saull* v. *Browne* (30 L. T. Rep. N.S. 697; L. Rep. 9 Ch. App. 346) in the following terms: "The rule is quite clear that a person answering is obliged to answer fully, unless he can make out an exceptional case, viz., that the discovery is sought vexatiously or oppressively, or is discovery which it will be burdensome or injurious to the defendant to give, and which probably may never be used at all. The court in such a case, as was said in *Elmer* v. *Creasy* (29 L. T. Rep. N.S. 129 & 632; L. Rep. 9 Ch. App. 73), may be trusted to exercise a proper control over any attempt on the plaintiff's part to press for any such minuteness of discovery as would be either vexatious or unreasonable, as indeed it can do in every case in which it is satisfied that any kind of discovery is required vexatiously or oppressively." I am of opinion, therefore, that the interrogatories should be struck out.

Appeal allowed.

Solicitors for the plaintiffs, *Waltons, Bubb, and Walton.*

Solicitors for the defendants, *Parker, Garrett, and Parker.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, July 30, 1883.

(Before Sir James Hannen.)

The Thyatira (No. 125). (*a*)

Collision — Consequential damage — Registrar's report—Objections—Practice.

A report of the registrar and merchants does not necessarily stand confirmed by reason of the defendants failing to take objection thereto within the time provided for in rule 117 *of the Admiralty Court Rules* 1859, *so as to absolutely entitle the plaintiffs to payment to them by the defendants of a sum of money which the court is of opinion*

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

ought not to have been allowed them in the report.

The court has power to extend the time within which objection to the report of the registrar and merchants may be taken.

In a case of total loss at sea by collision, a ship-owner who has cargo of his own on board is entitled to recover, in lieu of freight, what would have been the enhanced value of the cargo at its destination, less the expenses of earning that value, and that is the proper form of claim, and not a claim for expenses in making the ship fit for sea, &c.

THIS was a motion by the plaintiffs in a damage action (1882 O. No. 125, fo. 125) for an order that the registrar's report, dated 11th July 1882, should be confirmed, and that the defendants should pay to the plaintiffs the sum of 1000*l.*, being the balance of the sum by the said report found due from the defendants to the plaintiffs, together with interest thereon, and that in default of such payment within fourteen days the plaintiffs should be at liberty to sign judgment, and issue execution for the said amount and interest.

The action arose out of the loss of the vessel *Atmosphere* and her cargo in consequence of a collision between her and the vessel *Thyatira* on the 27th Jan. 1882. On the 27th April the defendants admitted liability, and agreed to a reference to the registrar and merchants to assess the amount of the damage.

The plaintiffs thereupon brought in a claim for the value of the *Atmosphere* and her cargo, and the costs of the necessary disbursements to send her to sea.

The report of the registrar was as follows:

Whereas the defendants have admitted liability for the damage caused to the plaintiffs by the collision in question in this action, subject, however, to a reference to the registrar assisted by merchants, to assess the amount thereof. Now I do most humbly report that I have, with the assistance of Messrs. Sidney Young and Thomas Sellar, of London, merchants, carefully examined the claim filed by the plaintiffs, together with the accounts and vouchers, and the papers and proceedings brought in, and having on the 6th July 1882 heard the evidence of John Starr de Wolf, H. E. Betts, and John Herron on behalf of the plaintiffs, and also what was urged by the solicitors on both sides, I find that there is due to the plaintiffs, for the damages proceeded for, the sum of 6269*l.* 1*s.* 7*d.*, together with interest thereon at the rate of 4 per cent. per annum, as stated in the schedule here annexed.

Schedule.

	Claimed.	Allowed.
Value of the ship *Atmosphere*, 1378 tons	£4455 0 0	£4100 1 0
Necessary disbursements to send vessel to sea	602 11 8	576 7 6
Advances paid to crew	71 5 0	71 5 0
Balance of wages paid to crew	144 1 6	144 1 6
Cargo	823 7 10	823 7 10

[The balance of the sum found due was in respect of the effects of the crew, which is not material.]

After this report had been issued, but before the money found due therein had been paid over to the plaintiffs, Messrs. Cockbain, Allardice, and Co. made a claim upon the owners of the *Thyatira* for 1000*l.* in respect of advanced freight, under the following circumstances: The owners of the *Atmosphere* had, at the time of the collision, on board the *Atmosphere* cargo belonging to themselves. This cargo had been lost by reason of the collision. Previous to the collision 1000*l.* had been advanced to the owners of the *Atmosphere* by Messrs. Cockbain, Allardice, and Co., who took as security an assignment of a policy of insurance on the freight, and a bill of lading, signed by the master of the *Atmosphere*, and endorsed by him with a receipt of 1000*l.* on account of freight named in the bill of lading. Messrs. Cockbain, Allardice, and Co. now claimed that they were entitled to recover this 1000*l.* from the owners of the *Thyatira*, by whose wrongful act they alleged it had been lost.

In consequence of this claim it was arranged (as seen by the correspondence hereinafter set out) that the amount found due by the report, less the sum of 1000*l.*, should be paid to the owners of the *Atmosphere*, and that the 1000*l.* should be deposited in a bank pending the action (1882 C. N. 3222, fo. 283) brought by Messrs. Cockbain, Allardice and Co. The sum of 1000*l.* was accordingly deposited in the joint names of the parties' solicitors.

The following is the correspondence referred to:

On the 7th March 1883 the plaintiffs' solicitors, Messrs. Stokes, Saunders, and Stokes, wrote to the defendants' solicitors, Messrs. Pritchard and Sons, as follows:

21, Great St. Helens, London, E.C., 7th March 1883. Dear Sirs.—*Thyatira.*—We wish you to distinctly understand that, although we have consented to the deposit of the 1000*l.* in the joint names of our Mr. Stokes and Mr. Freshfield, we do not admit, and never did intend to admit, that that sum, which was recovered in the damage action, can be applied to the payment of Messrs. Cockbain's claims. You will please therefore accept this as notice that, whatever be the result of the action by Messrs. Cockbain, we shall apply to the Admiralty Division for an order for the payment to our clients of the 1000*l.* deposited.—Yours, truly, STOKES, SAUNDERS, and STOKES. Messrs. Pritchard and Sons.

To this Pritchard and Sons replied as follows:

9, Gracechurch-street, London, E.C., 7th March, 1883. Dear Sirs.—*Thyatira.*—We quite understand this deposit is made on the terms mentioned in your letter of this day's date, and that should Messrs. Cockbain, Allardice, and Co. succeed in their claim (which by the way we do not at all anticipate), a question may arise between you and us as to the payment of the deposit.—Yours truly, PRITCHARD and SONS. Messrs. Stokes, Saunders, and Stokes.

The action of Messrs. Cockbain, Allardice, and Co. was heard on the 38th June 1882, by Sir James Hannen, who, after consideration, delivered judgment on 9th July in favour of the plaintiffs, finding that the 1000*l.*, although not strictly speaking advanced freight, was enhanced value of the cargo at its destination, and as such might be recovered by the plaintiffs: (5 Asp. Mar. Law Cas. 147; 49 L. T. Rep. N.S. 406; L. Rep. 8 P. Div. 155.)

The Admiralty Court Rule (1859), No. 117, referred to in the argument, is as follows:

A proctor intending to object to the registrar's report shall within six days from the filing of the report file in the registry a notice, a copy of which shall have been previously served on the adverse proctor, and within a further period of twelve days he shall file his petition in objection to the report. (*a*)

J. P. Aspinall for the plaintiffs, in support of the motion.—Under the terms of the Admiralty Court Rule (1859) No. 117, it is now too late for the defendants to take objection to the registrar's report, which has become confirmed by lapse of time and the practice of the court. By the

(*a*) The words of Order LVI., r. 11, of "The Rules of the Supreme Court 1883" are the same with the exception of the word "solicitor" being substituted for proctor.—ED.

report it has been found that we are entitled to this 1000*l.* Moreover, the defendants cannot go behind that report, which finds that this 1000*l.* is due to us.

Bucknill, for the defendants, *contra*.—The very fact of this application by the plaintiffs is conclusive that the report does not stand confirmed by mere lapse of time. This 1000*l.* was to be kept back until the liability of the defendants to Messrs. Cockbain, Allardice, and Co. had been ascertained. They have been found liable for 1000*l.* to Messrs. Cockbain, Allardice, and Co., and their liability to the plaintiffs in the damage action, having regard to the decision in Messrs. Cockbain's action, should be re-investigated.

Aspinall, in reply.

Sir JAMES HANNEN.—This application is made to me now, and I have to consider whether or not I can see any reason why I should make the order which I am called upon to make. If, as Mr. Aspinall has suggested, but not argued—certainly has not supported by authority—it was not necessary to come to me, he can do whatever the practice of the court allows him to do. But judging by analogy derived from the practice of those courts with which I have been conversant during all my professional life, I can only say that if I am called upon to make an order I must see that it is right that I should make it. As the facts stand in this case, I am of opinion that it is not right that I should make the order confirming the registrar's report. With regard to the periods of time that have been referred to in the practice, these are not absolutely binding upon the court. The court can for good reason extend the time, and had I been asked, when the parties began to see what questions might arise in this case, to extend the time in order that these questions might be raised, I should certainly have done so; but as a matter of fact, when the parties did begin to see what questions might arise, they came to an agreement between themselves that this 1000*l.* should be deposited to abide the determination of the very question which I have to determine to-day. I therefore consider that it is "at large," and I am entitled to consider what is right to be done between these parties. Now it is plain from my point of view (I may be wrong, in which case I shall be set right by a superior authority) that the owners of ship and cargo brought in their claim on a mistaken footing, and that they take credit to themselves as it were, I find from the registrar's report, for not claiming anything in respect of freight, and so they brought in, instead of a claim in respect of freight, a claim for expenses in making the ship fit for sea and so on. In my judgment the proper form of claim would have been for enhanced value in lieu of freight. Of course from that would have to be deducted the expenses of earning that enhanced value in lieu of freight. The registrar has not made his report upon that footing at all, but, misled by the form of the contention between the parties at that time, has awarded a sum for making the ship fit for sea and so on.

Now, having arrived at the conclusion that I have, viz., that 1000*l.* of the enhanced value has to be paid to those to whom it has been assigned as security, there remains the balance of the enhanced value, which may be recovered. What that will be is a question of figures, and I will not enter at all or attempt to enter into the computations which Mr. Aspinall has been instructed to lay before me. They may be correct, but, as I see that the registrar proceeded upon what I consider an incorrect basis in his original report, I decline to confirm it. I therefore send it back to him to report in conformity with the principle in the case which I have already decided of *The Thyatira* (*ubi sup.*), and with the further light which may be derived from the observations I have made on this occasion.

Solicitors for the plaintiffs, *Stokes*, *Saunders*, and *Stokes*.

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

Tuesday, Nov. 13, 1883.

(Before Sir JAMES HANNEN.)

THE EPPOS. (*a*)

Practice—Bottomry action—Default action—Affidavit of service—Writ—Order XIII., r. 2.

A plaintiff in an undefended bottomry action must, before he can obtain judgment by default, in addition to filing an affidavit of service in the Registry, as provided by Order XIII., r. 2, *annex thereto the original writ.*

THIS was a motion for judgment by the plaintiffs in an undefended bottomry action instituted upon two bonds against the foreign ship *Eppos*. No appearance had been entered in the action.

The plaintiffs were now moving the court to pronounce for the validity of the two bonds and for condemnation of the defendants in the sums due thereon and costs.

Order XIII., r. 2, provides that

> Where any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance under any of the following rules of this Order, or under Order XV., r. 1, he shall, before taking such proceeding upon default, file an affidavit of service, or of notice in lieu of service, as the case may be.

In compliance with this rule the plaintiffs had filed an affidavit of service, but had not annexed the writ.

F. W. Raikes, for the plaintiffs, in support of the motion.—No appearance having been entered by the defendants, the plaintiffs have satisfied the requirements of Order XIII., r. 2, and now move for judgment.

Sir JAMES HANNEN.—I am told that hitherto the practice of the registry has been that the plaintiff should, on filing the affidavit of service, annex to it the original writ. I allow the motion on condition that the plaintiffs file in the registry a fresh affidavit of service and annex the original writ.

Solicitors for the plaintiffs, *Ingledew* and *Ince*.

(*a*) Reported J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Tuesday, Dec. 4, 1883.

(Before Sir JAMES HANNEN and BUTT, J.)

THE HUMBER. (*a*)

Practice—Appeal from County Court—Court of Passage—31 & 32 Vict. c. 71, ss. 26, 27—38 & 39 Vict. c. 50, s. 6.

The power conferred by sect. 27 of the County Courts Admiralty Jurisdiction Act 1868 to extend the time within which an instrument of appeal may be lodged, provided sufficient cause be shown, is not altered or curtailed by sect. 6 of the County Courts Act 1875, this latter section merely providing an alternative mode of appeal.

THIS was a motion before the Divisional Court of the Probate, Divorce, and Admiralty Division by the plaintiffs in a damage action for leave to file a notice of appeal from the decision of the judge of the Court of Passage at Liverpool, and for leave to adduce further evidence at the hearing of the appeal.

The collision which gave rise to the action occurred between the Russian schooner *Siber*, belonging to the plaintiffs, and the steamship *Humber*. At the time of the collision the *Humber* was in charge of a pilot by compulsion of law.

The action came on for trial on the 17th Oct. 1883 in the Court of Passage at Liverpool, before the judge, assisted by nautical assessors. The learned judge found the pilot of the *Humber* solely to blame, and pronounced against the plaintiffs' claim and the defendants' counter-claim. Against this decision the plaintiffs appealed.

Immediately after this decision the plaintiffs, who were resident abroad, were telegraphed to by their solicitors for instructions. Their answer, received on the 26th Oct., was to appeal at once. On the next day, which was the tenth day after the trial, and therefore the last day for lodging the instrument of appeal, the plaintiffs' and defendants' solicitors attended before the deputy-registrar of the Court of Passage for the purpose of fixing the amount of security for costs to be given under 31 & 32 Vict. c. 71, s. 26. The question of security was then discussed and adjourned by the deputy-registrar, without prejudice to the plaintiffs' right to lodge notice of appeal on that day. Notice of appeal was accordingly lodged in the Admiralty District Registry at Liverpool on the 27th Oct., and a cross-notice of appeal was also lodged by the defendants. An order was subsequently made for security to be given by both parties by cash deposit in court of 40*l.*, and such deposit was made. The defendants subsequently gave notice of their objection to the plaintiffs' notice of appeal on the ground that it was bad, as the security had not been given before the notice was lodged.

With regard to fresh evidence it was alleged in an affidavit filed on behalf of the plaintiffs that the only witnesses from the deck of the *Humber* called by the defendants were the pilot and master, although at the time of the collision there were others of the crew on deck, and that after the trial two members of the crew of the *Humber* who had been on deck at the time of the collision had made statements to the plaintiffs' solicitor which strongly supported the plaintiffs' contention that the collision was due to the negligence of the crew of the *Humber*, and not to the pilot.

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES Esqrs., Barristers-at-Law.

The sections in the Acts of Parliament referred to are as follows:—

The County Courts Admiralty Jurisdiction Act (31 & 32 Vict. c. 71) 1868, ss. 26, 27:

Sect. 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 cost being first given, and subject to such other provisions as such orders shall direct.

Sec. 27. No appeal shall be allowed unless the instrument of appeal is lodged in the registry of the High Court of Admiralty within ten days from the date of the decree or order appealed from; but the judge of the High Court of Admiralty may, on sufficient cause being shown to his satisfaction for such omission, allow an appeal to be prosecuted, notwithstanding that the instrument of appeal has not been lodged within that time.

The County Courts Act 1875 (38 & 39 Vict. c. 50):

Sect. 6. In any cause, suit, or proceeding, other than a proceeding in bankruptcy, tried or heard in any County Court, and in which any person aggrieved has a right of appeal, it shall be lawful for any person aggrieved by the ruling, order, direction, or decision of the judge, at any time within eight days after the same shall have been made or given, to appeal against such ruling, order, direction, or decision by motion to the court to which such appeal lies, instead of by special case, such motion to be *ex parte* in the first instance, and to be granted on such terms as to costs, security, or stay of proceedings as to the court to which such motion shall be made shall seem fit. And if the court to which such appeal lies be not then sitting, such motion may be made before any judge of a superior court sitting in chambers. And at the trial or hearing of any such cause, suit, or proceeding the judge at the request of either party shall make a note of any question of law raised at any such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision of the cause, suit, or proceeding, and he shall at the expense of any person or persons, being party or parties in any such cause, suit, or proceeding, requiring the same for the purpose of appeal, furnish a copy of such note, or allow a copy to be taken of the same by or on behalf of such person or persons, and he shall sign such copy, and the copy so signed shall be used and received on such motion and at the hearing of such appeal.

W. G. F. Phillimore, for the plaintiffs, in support of the appeal. [At the close of the plaintiffs' arguments in support of fresh evidence being adduced, their Lordships informed Dr. Phillimore that he had failed to show sufficient reasons to justify them in acceding to that part of his application, and requested him to argue the other point, viz., whether or not their power to extend the time within which the instrument of appeal is to be lodged was taken away by 38 & 39 Vict. c. 50, s. 6.]—The court still has discretion under 31 & 32 Vict. c. 71, s. 27, to enlarge the time within which the instrument of appeal may be lodged. This power is not taken away by 38 & 39 Vict. c. 50, s. 6, which merely provides an alternative mode of appeal. There is nothing in the later Act which in terms repeals the mode of appeal provided in the earlier Act. Since the later Act has been in operation, appeals have been brought under the provisions of the earlier Act:

The Amstel, 2 P. Div. 186.; 3 Asp. Mar. Law Cas. 488; 37 L. T. Rep. N. S. 138;
The Ganges, 4 Asp. Mar. Law Cas. 317; 5 P. Div. 247; 43 L. T. Rep. N. S. 12.

Myburgh, Q.C. (with him *T. T. Bucknill*) for the defendants.—In neither *The Amstel* (*ubi sup.*) nor *The Ganges* (*ubi sup.*) was this point argued or decided. Seeing the importance or uniformity of practice, it is unreasonable to contend that the

only effect of the later Act is to provide a new form of appeal. There is authority for saying that the court has no power to extend the time for moving by way of appeal against a decision of a County Court beyond the eight days limited by sect. 6 of the County Courts Act 1875:

Tennant v. *Rawlings*, 4 C. P. Div. 133.

The PRESIDENT (Sir J. Hannen).—I am of opinion that we still have discretionary power to extend the time within which the instrument of appeal may be lodged, and that we ought to grant this application, because it is plain that this difficulty has arisen from a mere slip, the circumstances of which were known to the defendants at the time. Therefore no wrong will be done by extending the time. It is not as if the parties had been lying by, and then made this application as an afterthought. I think, therefore, there ought to be an extension of the time. I myself cannot see what answer there is to this, that by sect. 27 of the earlier Act discretion is given to the court to extend the time, and there is nothing in the later Act which says this is repealed.

BUTT, J.—I am of the same opinion. I am under the impression that the Act of 1875 merely provided a new mode of appeal, but did not take away the then existing form of appeal. In that I am fortified by an existing order referred to in Mr. Pitt-Lewis's County Court Practice, at page 577. He says: "In reference to appeals by motion under the County Courts Act 1875, s. 6, it is provided by the County Court Rules 1876 as follows: 'The foregoing rules in this Order shall not apply to appeals by motion, but such appeals may be had under the provisions of sect. 6 of the County Courts Act 1875.' Order XXIX., r. 12." Now what does that show? Why, that there is another mode of appeal, that is, the old mode under the County Courts Admiralty Jurisdiction Act of 1868. Therefore, as the President has said, the section conferring this discretion is not repealed by the Act of 1875, and accordingly I agree with him, and think the time should be extended.

It was accordingly ordered that the notice of appeal and cross-notice of appeal should be lodged within three days.

Solicitors for the plaintiffs, *Stone, Fletcher*, and *Hull*.

Solicitors for the defendants, *Hill, Dickinson, Lightbound*, and *Dickinson*.

HOUSE OF LORDS.

June 8, 11, 12, *and July* 16, 1883.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN and FITZGERALD.)

MILDRED, GOYENECHE, AND CO. *v.* MASPONS Y HERMANO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Principal and agent—Undisclosed principal—Foreign consignor—Privity of contract—Set-off—Factors Act (6 *Geo.* 4, *c.* 94).

Where goods are consigned to persons who, knowing that the consignor is acting for an undisclosed principal, insure the goods whilst on their voyage in their own names for the benefit of all parties interested, and on the ship carrying the goods being totally lost, receive the money due on the policy, the undisclosed principal is entitled to recover this money (less expenses in respect of the insurance) against the consignees, who cannot set it off against the balance of their general account with the consignor.

The appellants, an English firm, traded with a Spanish shipping agent at Havannah, and a cargo of goods was consigned to them through him by the respondents, who were Spanish merchants at Havannah.

The appellants knew that the agent was acting for an undisclosed principal. They insured the cargo in their own names for the benefit of all parties interested, and, on the ship being totally lost, received the money due on the policy.

The shipping agent having become insolvent, the respondents claimed the whole sum, less premiums and expenses. The appellants claimed a lien on the amount for the balance due to them from the agent on their general account with him.

Held (affirming the judgment of the court below), that there was privity of contract enabling the respondents to bring an action against the appellants, and that the latter had no right to any such lien as they claimed.

Semble, that the case was within sect. 1 *of the Factors Act* (6 *Geo.* 4, *c.* 94).

THIS was an appeal from a judgment of the Court of Appeal (Jessel, M.R., Lindley, and Bowen, L.JJ., reported in 9 Q. B. Div. 530, and 47 L. T. Rep. N. S. 318), reversing a judgment of Manisty, J.

The facts appear from the head-note, and also from the judgment of Lord Blackburn, and are set out in the report in the court below.

Cohen, Q.C., *Davey*, Q.C., and *Arbuthnot* appeared for the appellants, and contended that there was no privity of contract between the parties, and therefore the plaintiffs, the present respondents, could not recover:

New Zealand Land Company, v. *Watson*, 7 Q.B. Div 374; 44 L. T. Rep. N. S. 675;
Armstrong, v. *Stokes*, L. Rep. 7 Q. B. 598; 26 L. T. Rep. N. S. 872;
Hutton, v *Bullock*, L. Rep. 9 Q. B. 572; 30 L. T. Rep. N. S. 648;
Elbinger Actien Gessellschaft v. *Claye*, L. Rep. 8 Q.B. 313; 28 L. T. Rep. N. S. 405.

Secondly, the defendants had a right to set off their claims against the agents, Demestre and Co.:

Story on Agency, sect. 111;
Godin v. *London Assurance Company*, 1 Burr. 490
2 Duer on Insurance, 285;
1 Arnould on Insurance, 5th edit., 210;
Mann v. *Forrester*, 4 Camp. 60;
Westwood, v. *Bell*, 4 Camp. 349;
Xenos v. *Wickham*, L. Rep. 2 H. of L. 296; 16 L. T. Rep. N. S. 800;
Power v. *Butcher*, 10 B. & C. 329.

The case is not to be determined by Spanish law, but that law is material as showing the authority given by the respondents to Demestre and Co. See the Spanish Commercial Code, ss. 118, 119.

The *Solicitor-General* (Sir F. Herschell, Q.C.) and *Barnes*, for the respondents, argued that the evidence showed the relationship between the respondents and Demestre was that of principal and agent, and that the appellants knew that Demestre had an undisclosed principal. The

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

contention of the appellants goes beyond any existing decision. In addition to the authorities cited on the other side, they referred to

Man v. *Shiffner*, 2 East, 523;
Kaltenbach v. *Lewis*, 24 Ch. Div. 54; 48 L. T. Rep. N. S. 844;
Fish v. *Kempton*, 7 C. B. 687;
Semenza v. *Brinsley*, 18 C. B. N. S. 467;
Lanyon v. *Blanchard*, 2 Camp, 597;
Pannell v. *Hurley*, 2 Coll. 541;
Bodenham v. *Hoskins*, 21 L. J. 864, Ch.;
Ex parte Kingston, L. Rep. 6 Ch. 632; 25 L. T. Rep. N. S. 250;
Ex parte Cooke, 4 Ch. Div. 123; 35 L. T. Rep. N. S. 649;
Knatchbull v. *Hallett*, 13 Ch. Div. 696; 42 L.T. Rep. N.S. 421.

The Spanish law has not the effect contended for by the appellants.

Davey, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 16.—Their Lordships gave judgment as follows:

Lord BLACKBURN.—My Lords: I have come to the conclusion that the order appealed against is right, and should be affirmed. The dispute arises out of the insolvency of Demestre, Chia, and Co., a firm of merchants carrying on trade at the Havannah. The appellants, Mildred and Co., are merchants, trading in London, and were correspondents of Demestre, Chia, and Co., who, at the time they stopped payment, on the 18th Sept. 1880, were largely indebted on the balance of the account between them to Mildred and Co. On the 28th July 1880 Mildred and Co, received from Demestre and Co. a telegram in the following terms:—"Insure all risks, 8000*l*. Cargo tobacco, Spanish schooner *Bachi*, first veritas; destination Gibraltar; consigned to you." Their answer by letter was: "In accordance with your instructions, we have opened a *provisional* policy for said amount, at the premium of 60 shillings per cent. sailing on 1st Aug., 80 shillings per cent. sailing on 20th Aug., 6*l*. 6*s*. after last date. To pay particular average if it amounts to 5 per cent. on each series of ten bales running numbers on landing. On receipt of shipping documents, we will have the policy duly extended." On the 3rd Aug. they received a further telegram, dated 31st July: "*Bachi* despatched to day, will sail to-morrow; insure 3000*l*. more." And they accordingly increased the provisional insurance to 11,000*l*. No explanation was given at the trial as to what a provisional policy was, and I do not recollect ever to have met with the phrase before; but this much is plain, that all the terms of the policy were agreed on, but that Mildred and Co. were not to make themselves liable to the underwriters for the premiums until they had in their possession the shipping documents, so as to have something on which they had a hold; and that they did make themselves liable for the premiums as soon as, and not till, they had got those shipping documents. On the 9th Aug. they received a letter from Demestre and Co., inclosing the charter-party of the *Bachi*. I shall have to read that letter afterwards. I need at present only say that the charter-party was in the name of Demestre and Co. On the 17th Aug. they received a letter dated 31st July, which I shall also have to read. It is enough at present to say that it inclosed the bills of lading and invoice of the cargo of tobacco per *Bachi*, and that both of these were in the name of Demestre and Co., and that the letter repeated the telegram, stating that "the *Bachi* was despatched to-day, Saturday, will sail to-morrow." Mildred and Co., now having the shipping documents, proceeded to have the policies, to use their own phrase, extended. The first was a policy with the Royal Exchange Assurance Company, in the ordinary form of the policies of that company: "Mildred, Goyeneche, and Co., as well in their own name as for and in the names of every other person or persons to whom the same doth, may, or shall appertain in part or in all, doth make assurance and causeth themselves and them and every of them to be assured, lost or not lost, at and from Havannah to Gibraltar," on tobacco, valued at 11,000*l*., per *Bachi*. The policy then proceeded, in the usual form of such policies, to specify that the premium was to be 3 per cent. on 3500*l*., part of the 11,000*l*., and the seal of the company was affixed on the 18th day of (*a*) August 1880. Mildred and Co. seem to have shown the telegram of 31st July, and from it it was naturally but erroneously thought that the *Bachi* sailed on the 1st Aug., and that the premium therefore was to be 3 per cent. It was discovered afterwards that she did not sail till the 4th Aug., and, therefore, that the premium ought, according to the terms provisionally agreed upon, to have been 4 per cent. This error was corrected by an indorsement, under the seal of the company, bearing date the 29th Sept. 1880. But the policy itself bore the date the 18th Aug. Two other policies, one in the Universal Marine for 3500*l*., and another in the Marine Insurance for 4000*l*., were executed on the same 18th Aug. They were in the forms adopted by those companies, and therefore differed slightly in form, but in substance were precisely the same as that with the Royal Exchange Assurance Company. Each was "lost or not lost" each was for a premium of 3 per cent. and on each was a memorandum rectifying this mistake. The position of Mildred and Co. was that they held the charter-party, invoice, and bills of lading of the tobacco by the *Bachi*, all made out in the name of Demestre and Co. They also held three policies on this tobacco to the aggregate amount of 11,000*l*., insured in their own names, lost or not lost, and for the premiums on which they had pledged their credit to the companies. That being so, the *Bachi* was lost on the 12th Aug., and news of this event arrived in London on the 23rd Aug. Mildred and Co. proceeded to make claims on the insurance companies. They were adjusted as a total loss, and on the 8th Oct. the companies paid to Mildred and Co. 10,881. 13*s*. 11*d*. It is not explained, and is not now material, why they did not pay 11,000.

In the meantime Demestre and Co. stopped payment on the 18th Sept., the balance of the account between Demestre and Co. and Mildred and Co., being heavily in favour of Mildred and Co. The respondents, Maspons and Brother, who were a firm trading at Havannah, gave notice to Mildred and Co. that the Maspons were owners of the cargo by the *Bachi*, and claimed the insurance money. The precise date is not, I think, given,

(*a*) In the report in the court below the date is erroneously given as Sept. 18th.

but it was admitted at the trial that it was before any portion of the money was received by Mildred and Co, It was never, I think, disputed by any one that Mildred and Co. had a right to retain so much of the insurance money as would repay them the premiums, stamps, and commission in respect of this transaction of insurance; but Mildred and Co. claimed a right to retain the whole money until they were repaid all for which they could establish a lien against Demestre and Co. This was denied by Maspons, and the action was brought to try that question. I pass by, at present, all questions about the form of the pleadings, and about privity of contract and agency, on which a good deal of argument has been employed, both in the court below and at your Lordships' bar. I will say a few words on those points afterwards. For the present I address myself exclusively to the question on the merits, which not only is of importance to the parties as involving a large sum of money, but is of great public importance as affecting the very extensive business carried on by merchants dealing with foreign correspondents, who are entrusted on commission, by others with goods for consignment or sale, and ship them in their own names. I think, however, when the documents proved, and the answers of the jury to the questions asked them at the trial are considered, this question on the merits, though very important, is not of much difficulty. Maspons and Brother were a firm trading at Havannah. They had had previous dealings with Demestre and Co., entrusting them with goods for consignment, on which Demestre and Co. sometimes made them advances. Demestre and Co. had shipped those goods in their own name to their own correspondents, who conducted the transactions abroad according to the orders they had received from Demestre and Co. The returns always were consigned to Demestre and Co., who accounted for them to Maspons and Co., and for all this Demestre and Co. charged Maspons and Co. a commission. This is a common course of business. One great object in conducting business thus is, that as the returns pass through the commission merchant's hands he has a security for any advance he may have made; and the entrusting party often, if not always, gets an advance which he would not otherwise obtain. Maspons not only knew that Demestre and Co. had a correspondent in London, but they knew the name of that correspondent to be Mildred and Co., and that they were a house in good repute. They never, however, had any communication with them direct until they made the claim on the policies; and Mildred and Co. did not till then know the name of Maspons at all. Maspons had entrusted Demestre and Co. with a small quantity of tobacco for sale in Gibraltar, by way of trying the market, which Demestre and Co. had shipped in their own names; and Maspons were contemplating a greater adventure if that small sample fetched a good price. I mention this as explanatory of the letters which I shall presently read, on which, in my mind, the question depends. Maspons and Brother, having made up their minds to enter on this greater adventure, purchased the tobacco, which was afterwards shipped by the *Bachi*. They applied, partly by word of mouth and partly in writing, to Demestre and Co. to conduct this consignment for them on commission. They evidently expected that Demestre and Co. would, besides making the necessary shipping disbursements which they did, make them a large advance, but, probably owing to their stoppage, no such advance was in fact made. They negotiated for arrangements that the tobacco should be sold under the superintendence of Mildred and Co., whom they knew to be Demestre's English correspondents, and that the proceeds should be transmitted by Mildred and Co. to Demestre and Co., but, the tobacco having perished at sea, those arrangements never came into operation. Maspons (it is not now material to inquire what influenced them to do so) having arranged with the captain of the *Bachi* the terms of the charter, caused it to be made out by him, with Demestre and Co., in their own name. The invoice was also made out in Demestre and Co.'s name, as shipped by them to Mildred, Goyeneche, and Co., London, for account and risk of whom it might concern. The bills of lading also were made out in the name of Demestre and Co., deliverable to their order. Maspons at first requested Demestre and Co. to insure the goods with the Lloyd Habanero, but changed their minds, and requested them to have them insured in London, which was accordingly done, as I mentioned before. And then the two letters were put in evidence, that of the 24th July, which inclosed the charter-party, and that of the 31st July, which inclosed the invoice and bills of lading. Of those I will now read the part bearing on this transaction, from the translation from the Spanish: "Although we have not received advice from you with regard to the bales of tobacco which we shipped to you by way of trial, in view of news of the rise of tobacco in the German markets, the *interesado* has decided on making the shipment which he proposed to make previously. To that end we have chartered the Spanish brig *Bachi*, Captain Uribe, for Gibraltar and Marseilles, on the conditions stated in the inclosed charter-party. The cargo will consist of 1500 tierces leaf tobacco, and about 550 quintals picadura (cigarette tobacco), which we are going to ship to your consignment with B/Lading to order, that you may order the reshipment in Gibraltar of the whole or a part to whatever destination you may judge most convenient. You will also consign the ship, forwarding to your correspondents in Gibraltar the charter-party. The cargo, in order to please the *interesado*, we will insure here with the Lloyd Habanero. It may be found convenient to keep some tierces of tobacco and picadura in Gibraltar, and ship by the same vessel 250 quintals picadura for Marseilles. In that case you will give your orders accordingly, and have the remaining tierces reshipped. We will forward you in due course the invoice and B/Lading, and we propose despatching the vessel in about eight days. Messrs. Mildred Goyeneche and Co. London.

"Havana. 31st July 1880.—We confirm our letter of the 24th instant, of which we inclose duplicate, with that of the invoice of drafts of the B/L of spars per *Eduardo* and charter per *Bachi*. . . . We are despatching the *Bachi*, which sails to-morrow for its destination, and we inclose B/Lading and invoice of its cargo, comprising: M. G. C. 1/1500 tierces leaf tobacco, 1/156 barrels ground picadura, 1/154 bags tobacco, 1/50 boxes pressed picadura, which you will please sell for the best, as if it were your own affair, in accordance with our

letter of the 24th inst. The invoice amounts to §50,854. 61 gold, and against this shipment we propose to value upon you for the present 3000*l.*, to 4000*l.* at 60 $^{a}/_{s}$ sight. We mentioned to you in our last that, to oblige the *interesado*, we would effect here with the Lloyd Habanero the insurance on said shipment, but, having convinced him of the convenience of effecting it with you, we requested you, on the 26th inst., per cable, to do so as follows: 'Insure all risk, 8000*l.*, cargo, tobacco, Spanish brig *Bachi*, first veritas; destination, Gibraltar; your consignment,' which we confirm, and, having cost more than we thought, we are going to cable you again. *Bachi* despatched to-day, Saturday, will sail to-morrow; insure 3000*l.* more.—We are, &c. (Signed) Demestre and Chia Co."

Manisty, J., who tried the cause, left to the jury nine questions. I do not quite make out why the ninth question was asked. The special jury answered them, and I do not see how, on the evidence, they could have answered them in any other way than they did. The questions and answers were as follows: "1. Were the goods which constituted the cargo in question the property of the plaintiffs?—Yes. 2. Were the defendants employed by the plaintiffs to sell the goods in question for them, and to account to them for the proceeds, and did the defendants accept that employment?—Not employed directly for plaintiffs, and defendants did not accept such employment. 2. Or were the defendants employed by Demestre and Co. to sell the goods and account to them for the proceeds, and did they accept that employment?—Yes. 4. Did the defendants know or have reason to believe that Demestre and Co. were acting as agents for some other person or persons not named?—Yes. They knew or had reason to believe it. 5. Were the defendants employed by the plaintiffs to receive the amount of the insurances for them, and to account to them for the same, and did they accept that employment?—No. 6. Did the defendants receive the amount of the insurances as agents for and on account of the plaintiffs, or as agents for and on account of Demestre and Co?—They received it for and on account of Demestre and Co. and the individual interested. 7. Did the plaintiffs authorise Demestre and Co. to ship and consign the goods to the defendants in their own names, and were they so shipped and consigned?—Yes. 8. On whose behalf and for whose benefit were the insurances effected?—For all parties whom it might concern. 9. Is there a usual ordinary and well-known course of business between freight consignors and merchants in London, for the latter to make advances to the former against goods and usual shipping documents, on the terms that the London merchants are to be entitled to hold the proceeds of all the goods so consigned, or if they are lost by the perils of the seas the insurance money against any balance that may be due to them on their general account current with the consignors?—There is not sufficient evidence to enable the jury to decide." Manisty, J., seems to have felt that he was not able to do justice in the case without taking an account between Maspons and Demestre and Co., or their representatives, and not seeing how to do this he entered judgment for the defendants. That difficulty was got over in the Court of Appeal, which, by the order now appealed against, directs such an account to be taken. If their order was in other respects right, it is not appealed against because of their ordering that account to be taken, which indeed seems to have been done at the instance of the defendants, now appellants.

It is somewhat singular that neither the learned judges below nor the very able counsel who argued below and at your Lordships' bar, seem to have remembered that for the last sixty years the subject with which we are now dealing has been regulated by statute. (*a*) Yet it is so. The first of what are commonly called the Factors Acts (4 Geo. 4, c. 83, which received the Royal assent on the 18th July 1823) dealt entirely with the subject of consignees. It was re-enacted, with some slight alterations, in the first section of the 6 Geo. 4, c. 94 (Royal assent 5th July 1825), of which I will read so much as bears on the present case: "From and after the passing of this Act (5th July 1825), any person or persons intrusted for the purpose of consigment or of sale with any goods, and who shall have shipped them in his own name, shall be deemed and taken to be the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money, &c., advanced by such consignee to or for the use of the person in whose name such goods shall be shipped, or on any money, &c., received by him to the use of such consignee in the like manner, to all intents and purposes as if such persons were the true owners of such goods, provided such consignee shall not have *notice by the bill of lading or otherwise*, at or before the time of such advance of money, &c., or of such receipt of money, &c., in respect of which such lien is claimed, that such person so shipping in his own name is not the actual and *bonâ fide* owner of such goods." That enactment has never been altered, and its provisions have, in practice, been found to work so harmoniously with the practice of merchants that I am not aware that any case has ever arisen requiring a court of law to construe it, which probably is the reason why an Act of such importance is not familiar to every one; but so it is, that it was only almost at the end of the argument at your bar that a member of this House recollected this Act, and asked if it did not affect the question. Lord Tenterden's abstract of these two Acts is quoted in *Cole* v. *North-Western Bank* (L. Rep. 10 C. P. 354; 32 L. T. Rep. N. S. 733.) This statute renders it unnecessary to consider the decisions previous to that enactment, most of which are cited in the judgment of the Court of Appeal. I may say, however, that I think that the enacting part merely confirms what had been previously decided, and what the Court of Appeal have (without having their attention called to the statute) again decided to be the law. The proviso may, however, have the effect of extending the rights of consignees. For I take it that the common law was that knowledge, however obtained, that the goods were not the property of the person dealing as a principal, prevented the advancer from having a lien for the advances made after such knowledge, on the ground that it was unjust, with knowledge, to take one man's goods to pay another's debts. Those who promoted the Factors's Acts thought that this principle ought to be modified for the convenience of

(*a*) It is understood that the Acts were not referred to in argument, because the appellants based their claims on grounds outside the provisions of the Acts.

commerce. It is said (Paley on Agency, by Lloyd, 226), and though I do not know how it was, it is probable, that in the Bill which afterwards became the 4 Geo. 4, c. 83, as it was introduced, the proviso was that the consignee should not have notice by *the bill of lading*, and that Lord Eldon in committee added the important words, *or otherwise*. Still it is *notice* and not merely knowledge; and notice and knowledge are not necessarily the same. The fourth question was not framed with this distinction in view.

I should be unwilling, without more consideration, to decide either way, whether knowledge, however acquired, did or did not deprive the consignee of his rights of lien for advances made subsequent to the acquiring of that knowledge, and it is unnecessary to decide that question now, for notice undoubtedly does so deprive him. In the present case the knowledge was conveyed by the two letters I have read, inclosing the one the charter-party and the other the invoice and the bills of lading. And I think knowledge conveyed by the consignor to the consignee in such letters is *notice*. It is not necessary that there should be notice of the name of the person who has an interest, but only that there is a person having such an interest, or as in the Spanish letter he is called an *interesado*; that is enough to give the consignee notice that the consignor "is not the actual and *bonâ fide* owner of such goods," or rather of the whole interest in such goods. But so far as the consignor has an interest by way of lien or otherwise paramount to that of the *interesado* he is the actual owner, and the consignee has his lien. The order appealed against is, therefore, I think, right, as far as the merits go.

I will now proceed to make a few remarks on what I may call the technical points. The plaintiffs, in their statement of claim, say: "The plaintiffs claim (1) 11,000*l.*, with interest, until payment; (2) a declaration that the said sum of 11,000*l.* is the money of the plaintiffs as against the defendants; (3) such further and other relief as the nature of the case may require." This seems to me to be exactly what would have been more briefly stated on the old system of pleading under a count for "money had and received to the use of the plaintiffs." The first eighteen paragraphs of the statement of defence amount to saying that the money was not had and received to the use of the plaintiffs, but to the use of the defendants and other persons who had a lien paramount to the plaintiffs. That would, under the old system of pleading, have amounted to the general issue; and under it the defendants could have raised the whole question decided on what I have called the merits. It was, I think, at your Lordships' bar contended that the plaintiffs could not have maintained money had and received, even if there had been no lien at all, as suppose that the balance between the plaintiffs and Demestre and Co. had been in favour of the plaintiffs, and the balance as between the defendants and Demestre and Co. had been in favour of Demestre and Co., still it was said that money had and received would not have lain, for the defendants received the money to the use of Demestre and Co. exclusively. Had their relation to them been that of servant to master, as in *Stephens* v. *Badcock* (3 B. & Ad. 354), that would have been so. I am not able to understand how that could be maintained after the answers of the jury to the sixth and eighth questions. By the 19th and 20th paragraphs of the defence it is alleged: "19. The city of Havannah, where the plaintiffs are carrying on business, is in the island of Cuba, a colony of Spain, and governed by the law of Spain, and the plaintiffs, and their factors and agents, the said Demestre Chia and Co., who also carry on business in Havannah aforesaid, conducted all the business relating to the shipment of the said cargo of tobacco to the defendants in Havannah aforesaid, and subject to the said law of Spain. 20. By the law of Spain, whenever an agent deals in his own name with the business intrusted to him by his principal, a third person with whom such agent contracts *is bound to consider the agent as a principal entitled to deal with the subject-matter of the contract as his own property*, and the principal of such agent has no right of action against the third party, unless the principal obtains an assignment from the agent, and the third person so contracting with the agent, as aforesaid, has no right of action against the principal. It was under this law of Spain that the defendants, who have had long experience in commerce with Spain and her colonies, accepted the consignment of the said cargo." No evidence whatever was given of that part of the allegation as to the law of Spain which I have marked in italics. The portions of the Spanish Code cited seem to me to go far to show that the law of Spain does differ from the law of England to some extent. Article 119 of the Spanish Code seems to show that the law of Spain does not establish privity of contract between a principal and those with whom his agent has made a contract to the same extent as the law of England. But the plaintiffs' case in no respect depended on the existence of any privity of contract between the plaintiffs as principals of Demestre and Co. and the defendants. They had a right, so long as the goods remained in specie, a right consequent on their property, to demand and take their goods from Mildred and Co., on satisfying whatever lien paramount to their right there was on the goods; this depended not on agency nor on privity of contract, but upon property. And the defendants having effected the insurance for the benefit of all whom it concerned, they had the same right to demand the insurance money that they would have had to demand the goods. They must satisfy every lien on the policy, paramount to their own, but after doing so are entitled to the surplus. It was contemplated by Maspons and Demestre that the tobacco was to be sold, and the proceeds were to be remitted. Had this been done questions might have arisen, for the solution of which it might have been necessary to consider whether there was privity of contract, and to discuss the doctrines laid down in the cases cited in the judgment of the Court of Appeal. Should any such questions arise in some other case, the reasoning in the judgment will be well worthy of consideration. But the goods perished at sea, when the only thing done had been to effect the insurance. With great respect to Lindley, L.J., I will not follow him in discussing questions which do not arise. I think, therefore, that the order appealed against should be affirmed, and the appeal dismissed, with costs.

The LORD CHANCELLOR (Selborne).—My Lords:

I agree with the conclusion of my noble and learned friend. The fact that the appellants had notice of the respondents' interest is enough, in my opinion, to decide this case. There is one observation of my noble and learned friend as to a possible distinction between "notice" and "knowledge" as to which I should desire to reserve the expression of any opinion on my own part until some case arises in which the question whether actual knowledge, however acquired, is or is not notice, may become material.

Lord FITZGERALD.—My Lords: I concur in the conclusion at which Lord Blackburn has arrived. There were but two questions in the cause when the facts came to be properly understood, though some other matters were very elaborately discussed. The first question was whether the plaintiffs could in their own names maintain any action against the defendants: for the present I pass that question by. The second question was as to the extent of the defendant's lien, which went to the whole merits of the action. That the defendants had a lien for their outlay and commission in respect of the policies of insurance was not disputed. Lindley, L.J., in delivering the judgment of the Court of Appeal, says, with accuracy, that this question of lien must be determined by English law, and depends on a question of fact, namely, whether the defendants knew before their alleged lien accrued that Demestre and Co. were acting for a principal whose name was not disclosed. I think this is correct, whether the rights of the parties are to be determined by the Factor's Act, or by analogy to it, or at common law. On this question of fact there is no opening for any doubt. The lien, if any, of the defendants never attached, speaking accurately, on the cargo of the *Bachi*, for they never had possession, or the right to the possession, of the cargo, or made any advances on it. Both ship and cargo had perished before the bill of lading and other shipping documents reached the defendants, and before any insurance had been effected. Assuming that the policies represented the cargo, they were not effected till the 18th Aug., 1880, and before that day the defendants had received Demestre and Co.'s letter of the 24th July, 1880, in which occur the passages, "the *interesado* has decided on making the shipment which he proposed to make previously. To that end we have chartered the Spanish brig *Bachi*," and "the cargo, in order to please the *interesado*, we will insure here with the Lloyd Habanero." We have thus a clear intimation to the defendants that there was a party interested, and such party is described as the *interesado* making the shipment, at whose desire it had been intended to effect the insurances with the Lloyd Habanero. The notice to the defendants is in effect that there is a third party, who apparently had the whole interest in and control over the cargo. The Factors Act, sect. 1, deals with the apparent ownership of goods, and provides that for certain purposes, and under certain circumstances, the apparent owner shall be deemed to be the true owner, so as to entitle his consignee to a lien for advances, but notice to the consignee deprives him of the statutable protection. It may be open to argument and consideration whether that enactment directly embraces, or is applicable otherwise than by analogy to the case before us, but it being quite clear that the defendants had notice that Demestre and Co. were not the actual and *bonâ fide* owners of the cargo, the defendants can have no benefit from the statute, and if they claimed their alleged lien on the proceeds of the policy at common law, the notice equally excludes that lien.

On the question as to whether the plaintiffs had a right to intervene, and in their own names sue the defendants for the money received on foot of the policies of insurance, I think there never was an opening for doubt. The defendants having notice of "the *interesado*" effect the policies "as well in their own names as for and in the name and names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance, and causeth themselves, and them and every of them, to be assured." Prior to the effecting of these insurances they had received the invoice of the goods, headed thus: "Invoice of the following goods shipped by us on board the Spanish brigantine *Bachi*, Captain Uribe, for Gibraltar, and consigned to Messrs. Mildred, Goyeneche and Co., London, for account and risk of whom it might concern." Before the receipt of any part of the insurance moneys the defendants had notice that the plaintiffs were the *interesado*, and if the plaintiffs are entitled to recover any part of the proceeds, as your Lordships hold that they are, then the money so received by the defendants is money had and received by the defendants for the use of the plaintiffs, which, in justice and good conscience, they ought to pay over, and an action lies at the suit of the plaintiffs to recover it.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Freshfields* and *Williams*.

Solicitors for the respondents, *Waltons*, *Bubb*, and *Walton*.

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 17 *and* 18, 1883.

(Before BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.)

BURTON AND CO. *v.* ENGLISH AND CO. (*a*)

Charter-party—Deck load at merchant's risk—Jettison—General average.

Words in a charter-party providing that a deck load of timber is to be carried at full freight, but "at merchant's risk," do not preclude the owner of the deck load from recovering general average contribution if the cargo be carried on deck by the custom of trade and jettisoned.

The plaintiffs' deck cargo of timber on board the defendants' steamship was jettisoned on a voyage from the Baltic to London.

The charter-party contained a clause that the steamer should be provided with a deck load, if required, at full freight, but at merchant's risk.

Held (*reversing the judgment of Cave and Day, JJ.*) *that these words did not prevent the plaintiffs from recovering a general average contribution from the defendants.*

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

This was an appeal from a judgment of Cave and Day, JJ. upon a special case, reported 5 Asp. Mar. Law Cas. 84; L. Rep. 10 Q. B. Div. 426; 48 L. T. Rep. N. S. 730.

The Divisional Court gave judgment in favour of the defendants.

The plaintiffs appealed.

Cohen, Q.C. and *Barnes* for the plaintiffs.

Webster, Q.C. and *Myburgh*, Q.C. for the defendants.

The arguments used in the court below were repeated. The following cases were cited:

D'Arc v. *London and North-Western Railway Company*, L. Rep. 9 C. P. 325; 30 L. T. Rep. N. S. 763;
Hall v. *Great Eastern Railway Company*, L. Rep. 10 Q. B. 437; 33 L. T. Rep. N. S. 306;
Steel and others v. *State Line Steamship Company*, 3 Asp. Mar. Law Cas. 516; L. Rep. 3 App. Cas. 72; 37 L. T. Rep. N. S. 333;
Taylor v. *Liverpool and Great Western Steam Company*, 2 Asp. Mar. Law Cas. 275; L. Rep. 9 Q.B. 546; 30 L. T. Rep. N. S. 714;
Macawley v. *Furness Railway Company*, 27 L. T. Rep. N. S. 485; L. Rep. 8 Q. B. 57;
Wright v. *Marwood*, 4 Asp. Mar. Law Cas. 451; 45 L. T. Rep. N. S. 297; 7 Q. B. Div. 62;
Austin v. *Manchester, Sheffield, and Lincolnshire Railway Company*, 21 L. J. 174, C. P.

Brett, M.R.—In this case the plaintiffs were timber merchants, who, at a Baltic port, shipped upon a vessel belonging to the defendants a cargo of timber, part of which was, according to the contract, stowed upon the deck, and part in the hold, and also a cargo of iron. The vessel was taken up by the plaintiffs under a charter-party, and the goods were put on board under a bill of lading which incorporated the charter-party. During the voyage, and in a case of necessity, part of the timber which was stowed on the deck was jettisoned by the captain of the vessel for the safety of the adventure. This action was then brought by the plaintiffs to obtain from the defendants general average contribution in respect of the cargo so jettisoned. It is said that the defendants, the shipowners, are not liable to make this contribution by reason of a stipulation which is contained in the charter-party, or in the bill of lading which incorporates the charter-party. In the first place, I wish to point out that this is not a general ship; it is a ship taken up by the charterer for the purpose of carrying two or three different sorts of cargo, but it is not a general ship. The clause in the charter-party which is relied upon by the defendants is as follows: "The steamer to be provided with a deck load, if required, at full freight, but at merchant's risk." Now, the first remark which arises upon that stipulation is, that it is obviously made in favour of the shipowner; it gives him leave to carry some cargo upon deck so that he can earn a larger freight, and it absolves him from some of the risks which he would otherwise be open to as a carrier.

Cave, J. has held that these words absolve the shipowner from this liability upon which he is sued in this action, and the question before us is, whether he was right in so holding. That which seems to have most weighed upon his mind to lead him to this decision seems to have been this, that to hold that the shipowner was liable for this contribution would lead to the anomaly that the shipowner would be liable to general average contribution where, as here, the deck cargo was properly jettisoned, but would be free from liability if it was unnecessarily and improperly jettisoned; at first sight that seems a captivating point, and I do not wonder that it led the learned judge to the decision at which he arrived, and the question is, whether we can agree with his view. This stipulation contained in the charter-party is clearly a limitation of the liability of the shipowner in respect of his contract of carriage, and is a stipulation in his favour; therefore, according to the general rule, we must construe it, if we have any doubt, against the person in whose favour it is made. I now come to consider by what right the owner of the cargo claims a general average contribution; does he claim it in any way under the contract of carriage or under some other right? It seems to me that this stipulation in this charter-party is intended to cover every act of the master which, being done as servant of the shipowner, would make the shipowner liable, but for the words of the stipulation. Therefore, it would cover the case of improper jettison by the captain, it would cover the case of collision brought about by the negligence of the captain or crew, or the case of loss caused by stranding the vessel by reason of the negligence of the captain or crew. And I think that if the liability of the shipowner to pay this contribution can be properly said to arise in consequence of an act done by the captain or crew as his servants, then it follows that the shipowner is free from liability under these words.

How, therefore, does the claim for this contribution arise? It does not arise in consequence of an act done by the captain or crew as servant of the shipowner, because, if it did, the claim of the cargo owner would be a claim for the whole value of the lost cargo, and not for a contribution towards that value. The theory of the thing is, that the captain does this act of jettison, not as the servant of the shipowner, but as the servant of the cargo owner; it is taken to be a voluntary sacrifice for the safety of the whole adventure, to which the cargo owner consents. By what law or right, then, does a claim for general average contribution arise? It has been hinted by Lord Bramwell (*Wright* v. *Marwood*, 4, Asp. Mar. Law Cas. 451) that it may arise from an implied contract between the parties, and although I always differ from any opinion of Lord Bramwell with great doubt, I can hardly agree with this view. It seems to me that it does not in any way arise upon contract. There is no such right in a contract of carriage by land; if goods are in a warehouse and are on fire, and are carried out to save the building, no claim for general average can arise. It seems to me that the right arose at the time of the making of the Rhodian laws, it is a consequence of the peculiarity of sea danger, and has become incorporated into the municipal law of England as a law of the ocean and of marine risk, because when two parties were jointly in danger of the same misfortune, natural justice required that any loss falling upon one party for the safety of the whole adventure should be recouped by the other party in proportion. Now, if this is so, and if this liability does not arise upon the contract of carriage, it will not be covered by the words in the contract of carriage, and for these reasons I venture to disagree with the judgment of the learned judge who tried this case.

It seems to me that his difficulty does not, in reality, arise; because the act of the captain in making an improper jettison of the deck cargo, and his act in making a proper jettison as here, for the safety of the whole adventure, is an act done in each case in a different capacity. In the one case it is done in his capacity as servant of the shipowner and, but for these words, would render the shipowner liable; in the other case it may be said to be done as servant of the cargo owner, for the safety of the whole adventure, and the general maritime law then gives the cargo owner, quite apart from the contract, a right to general average contribution at the hands of the ship owner. For these reasons I cannot agree with the judgment of Cave, J., and I think this appeal should be allowed.

Baggallay, L.J.—The question in this case arises in consequence of a stipulation which is contained in the charter-party, and I will very concisely state the reasons which lead me to differ from the conclusion at which the learned judges in the court below arrived. I do not in any way dissent, and I do not think the learned judges below dissented from the principle laid down by Lush, J. in the two cases to which Cave, J. refers in his judgment, that the office of the bill of lading is to provide for the rights and liabilities of parties in reference to the contract to carry, and is not concerned with liabilities for general average, and that, unless the contrary appear, the words must be construed with reference to the contract to carry. Adopting that principle, the learned judges in the court below applied it to this case; I in no way differ from the principle, but from the facts of this case I draw a different inference from that which was drawn by Cave and Day, JJ., and I think that this appeal must be allowed.

Bowen, L.J.—This case raises a question of the proper construction of a charter-party, and I therefore look to see whether any rules of construction have been laid down which will help us to a right conclusion in this case. Now, we are presented with a canon of construction by the late Lush, L.J., which he laid down in the case of *Schmidt* v. *The Royal Mail Steamship Company* (45 L. J., 646 Q.B.) in these terms: "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." Now, the first remark I have to make about that principle is, that it is not a rule of law; it is really in the nature of a wise observation brought to bear upon the construction of mercantile documents from the experience of those who were very conversant with such documents. The next rule of construction which we have to follow is this, that if the provision in question is a stipulation in favour of one party or the other, we must so construe it as not to give it any extension in favour of that party beyond what is fairly necessary upon the words of the clause in question. Now, the words in the charter-party are these: "The steamer to be provided with a deck load, if required, at full freight, but at merchant's risk." That is clearly a stipulation in favour of the shipowner, and *primâ facie* it is clearly meant to relieve him from some of the risks which would otherwise fall upon him as a carrier under his contract of carriage.

It seems to me clear that these words would cover the case of the negligence of his captain or crew, by reason of which negligence the cargo was damaged or lost; but the question is, does it cover this case, which is a claim for general average contribution, in consequence of what was a general average act? How, then, does this claim arise? It arises in this way—it is part of the law of the sea, of the law maritime which is incorporated into the municipal law of England, and it arises in consequence of an act done by the captain upon the theory that the cargo owner consents to that act being done, on the assumption that he shall be indemnified against the loss thus occasioned upon a general average basis. I do not think the words relieve the shipowner from contribution to such a claim as this; the point, however, is not very clear. I find it difficult not to think that the persons who drew this charter-party were thinking of the deck cargo and of its risk of jettison, but they have not expressed it clearly, and of one thing I am quite certain that if shipowners wish to make it appear that they absolve themselves by their charter-parties from this liability in the case of deck cargoes, they can make it appear clearly on the words. My judgment is based upon the ground that in this case that intention is not clear enough.

Appeal allowed.

Solicitors for the plaintiffs, *Waltons, Bubb,* and *Walton.*

Solicitors for the defendants, *H. C. Coote, for H. A. Adamson,* North Shields.

July 4 and 30, 1883.

(Before Brett, M.R. and Fry, L.J.)

Haigh and others *v.* Royal Mail Steam Packet Company. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Carriage of passengers—Loss or damage—Death by negligence—Wrongful act, neglect or default—Exemption from liability—Lord Campbell's Act (9 & 10 Vict. c. 93), s. 1.

The ticket of a passenger by a steamer of defendants contained a notice that the defendants would not be responsible for any loss, damage, or detention of luggage under any circumstances; and that they would not be responsible for the maintenance or loss of time of a passenger during any detention of their vessels, nor for any delay arising out of accidents, nor for any loss or damage arising from perils of the seas, or from machinery, boilers, or steam, or from any act, neglect, or default whatsoever of the pilot, master, or mariners.

Held (affirming the judgment of Cave and Day, JJ., on demurrer), that this provision exempted the defendants from liability in an action for the loss of life of a passenger by negligence of the defendants' servants in a collision with another ship.

Appeal by the plaintiffs from the judgment (5 Asp. Mar. Law Cas. 47) of Cave and Day, JJ. in favour of the defendants on demurrer to a statement of defence.

The plaintiffs, who were the executors of the will of Charles Schwind, deceased, sued for the benefit and on behalf of his wife and children, for

(*a*) Reported by P. B. Hutchins, Esq., Barrister-at-Law.

damages caused (as alleged) by the negligence of the defendants' servants on board the defendants' steamship *Douro*, whereby the said steamship, having come into collision with another ship, was sunk, and the said Charles Schwind lost his life.

The defendants, amongst other defences, alleged that the contract of carriage between themselves and the said Charles Schwind exonerated them from liability for the alleged negligence.

The defendants relied on the following clause which was contained in the ticket given by them to Charles Schwind when he paid his passage money:

> The company will not be responsible for the maintenance of passengers, or for their loss of time, or any consequence resulting therefrom, during any detention consequent upon the occurrence of any cause to prevent the vessels from meeting at the appointed places, nor for any delay arising out of accidents, nor for any loss or damage arising from perils of the sea, or from machinery, boilers, or steam, or from any act, neglect, or default whatsoever of the pilot, master, or mariners, &c.

The rest of the conditions contained in the ticket will be found in the report of the case in the court below (5 Asp. Mar. Law Cas. 47; 48 L. T. Rep. N. S. 267).

By Lord Campbell's Act (9 & 10 Vict. c. 93), s. 1:

> Whensoever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

A. T. Lawrence (*Cohen*, Q.C. with him), for the plaintiffs, in support of the appeal.—The cause of action is not within the exception contained in the clause printed on the ticket. The words "loss or damage" do not apply to personal injury, and certainly not to personal injury resulting in death:

> *Smith* v. *Brown*, 1 Asp. Mar. Law Cas. 56; 24 L. T. Rep. N. S. 808; L. Rep. 6 Q. B. 729;
> *The Franconia*, 3 Asp. Mar. Law Cas. 415, 435; 36 L. T. Rep. N. S. 445, 640; 2 P. Div. 163.

Any contract which the deceased may have entered into by taking the ticket cannot bind his wife and children, or take away the right of his executors to sue under Lord Campbell's Act for their benefit. The case of *Griffiths* v. *The Earl of Dudley* (47 L. T. Rep. N. S. 10; 9 Q. B. Div. 357) is distinguishable, for there the workman had contracted for himself and his representatives, and any person entitled in case of death, not to claim compensation, and moreover the decision turned partly on the words of the Employers' Liability Act 1880 (43 & 44 Vict. c. 42).

Charles Russell, Q.C. and *Phillimore* for the defendants.—The party injured could not have maintained an action if death had not ensued, and therefore the executors cannot recover under Lord Campbell's Act. The words of the contract expressly exclude the defendants' liability, and the decisions in *Read* v. *The Great Eastern Railway Company* (28 L. T. Rep. N. S. 82; L. Rep. 3 Q. B. 555), and *Thompson* v. *The Royal Mail Steam Packet Company* (June 1875, Exchequer, before Kelly, C.B., Bramwell and Cleasby, B.B., not reported), are strong authorities in their favour. The words "loss or damage" are sufficient to cover loss of life or personal injury. The word "damage" is used in that sense in the New Testament: "I perceive that this voyage will be with hurt and much damage, not only of the lading and ship, but also of our lives:" (Acts of the Apostles, chap. xxvii., v. 10.) (*a*)

A. T. Lawrence replied.

Cur. adv. vult.

July 30, 1883.—The judgment of the court was delivered by

Brett, M.R.—The question to be determined in this case is whether the executors of a person named Schwind can maintain an action against the defendants under Lord Campbell's Act (9 & 10 Vict. c. 93) on behalf of the widow and children of the deceased. They certainly can, unless they are prevented by something beyond the mere law of negligence. The defendants rely upon a contract entered into between themselves and the deceased, by virtue of which, if the accident had happened without causing his death, he would not have been entitled to recover against them. For the plaintiffs it was argued that the representatives of the deceased could recover on behalf of the widow and children, although if he had survived he might not have been entitled to recover. I am of opinion that this contention is inconsistent with the obvious interpretation of Lord Campbell's Act, and that it is clear, under the statute, that the executors can recover only where the deceased himself could have recovered if he had not been killed.

The question, therefore, is whether the contract between the defendants and the deceased would have prevented him from maintaining an action against them for personal injury caused to him by the negligence of their servants. That question depends upon the construction of the passenger's ticket, which formed the contract relied upon by the defendants. The ticket was given to the deceased as a receipt for the passage money paid by him for the carriage of himself and his luggage, and applied both to the person and the luggage of the passenger. With regard to the luggage, this stipulation contained in the ticket, was that the defendants would not be responsible "for any loss, damage, or detention of luggage under any circumstances." In *Thompson* v. *The Royal Mail Steam Packet Company* (*b*), the court construed a stipula-

(*a*) In the Revised Version the words are, "I perceive that the voyage will be with injury, and much loss, not only of the lading and the ship, but also of our lives."

(*b*) COURT OF EXCHEQUER.

June 4, 1875.

(Before Kelly, C.B., Bramwell and Cleasby, BB.)

Thompson *v.* Royal Mail Steam Packet Company.

This was an action brought by a passenger on board the defendants' s.s. *Elbe* to recover damages for the loss of his box, while on a voyage from Southampton to Colon.

Among the conditions printed on the ticket which the plaintiff had signed were that "the company will not be responsible for any loss or damage to luggage in any circumstances," and that the company should be at liberty to land any passenger suffering from an infectious disease. Some days after the *Elbe* sailed the plaintiff fell ill of typhoid fever, and was landed at Kingston, Jamaica, insensible. His box was also landed on the wharf by the defendants, but the plaintiff never heard or saw anything of it afterwards.

At the trial at Guildhall, the learned judge directed a nonsuit, but gave the plaintiff leave to move to enter the

tion which was in very similar terms to that contained in the ticket in the present case. The words there were "the company will not be responsible for any loss or damage to luggage in any circumstances," and the court held that the words "in any circumstances" applied to loss or damage to luggage occasioned by negligence. It had been previously decided that a stipulation that the company would not be responsible for any loss or detention of goods did not include loss occasioned by negligence; but, after this point had been so decided, the words "under any circumstances" were inserted in the contract, in addition to the words which had been held insufficient to cover a loss occasioned by negligence. I agree with the decision of the Court of Exchequer, and I think these words must have been intended to carry the case further, and that they would be sufficient to include loss or damage to luggage occasioned by negligence. If that is so, the ticket in the present case would cover the case of loss or damage to luggage.

The ticket, however, is also a passenger ticket, and contains the stipulation against responsibility with regard to passengers on which the defendants rely. I confess this seems to me to be a somewhat odd stipulation, for I cannot understand how there can be any loss or damage to a passenger, as such, exclusive of loss or damage to his property, for which the shipowner could be liable if it were caused by perils of the sea. Again, by reason of the words "from machinery, boilers, or steam," if damage were caused by the accidental explosion of a boiler, or from some accident not occasioned by negligence, the shipowners would not be liable. Therefore, if we exclude the words which are inapplicable to the present case, the stipulation as to passengers will read as follows: "The company will not be responsible for any loss or damage arising from any act, neglect, or default whatsoever of the pilot, master, or mariners." It has been suggested on the part of the plaintiffs that the word "damage" cannot be correctly applied to personal injury, and certainly it is not a very usual expression to say that a man is damaged; it seems more natural to say that he is hurt. Personal injury cannot be included under the word "loss;" but, although "injury" would have been a more apt word, I think there can be no doubt that "damage" may include personal injury. Here the sentence in which the word occurs appears to be solely applicable to passengers personally, and we are unable to come to the conclusion that personal injury is not covered by the words of the stipulation; and we think that personal injury to a passenger, caused by the negligence of the pilot, master, or mariners, is an injury from which the defendants have relieved themselves by the contract contained in the ticket. After careful consideration of the case, and after considerable hesitation, we have come to the conclusion that we cannot differ from the decision of the Divisional Court, and we think that if the passenger had not been killed, but only injured, he could not have recovered for the injury. If this is so, it follows that his executors cannot recover under Lord Campbell's Act. We are, therefore, of opinion that this appeal ought to be dismissed.

Judgment affirmed.

Solicitor for plaintiffs, *C. W. Dommett*, for *Slater* and *Turnbull*, Manchester.

Solicitors for defendants, *Wilson, Bristows*, and *Carpmael*.

verdict for 79*l.* 14*s.* 9*d.* if he was entitled to recover. The plaintiff had accordingly obtained a rule *nisi*, against which the defendants now showed cause.

Ledgard (with him *Day*, Q.C.) for the defendants.

Thesiger Q.C. (with him *Webster*) for the plaintiff.

Kelly, C.B.—The words of the contract are clear. No doubt can exist as to their meaning. The contract is to convey the passenger and his luggage from port to port with the stipulation that the company will not be responsible for loss of luggage "under any circumstances." Putting aside the authorities, the company are not liable "under any circumstances," and this court cannot make them so. Cases may have been decided where wilful negligence made the company liable in spite of the exceptions. I will not say that there was not some degree of negligence in this case. However, I will not hold the company liable without the authority of the House of Lords that such stipulations are wholly void. This rule must therefore be discharged.

Bramwell, B.—I concur. This contract must be construed strictly. Now we are asked to say that people cannot make their own bargains, but that the court must make them for them. Cases have arisen when legislation was necessary to protect the poorer and more ignorant classes, as for instance the Truck Act. Steamboat companies and passengers are however rational beings. If these were improper agreements, they would not be entered into. It would be unreasonable to prohibit such agreements. These companies have to protect themselves against bad servants and false claims, though perhaps the stipulations are too strong for honest cases. If these stipulations pressed hardly on the public, companies would soon be started to insure the safety of luggage on special terms. It would be most mischevious to upset the conditions of carriage. It can make no difference that the clause relating to illness comes after the luggage clause. The words are too plain to admit of doubt.

Cleasby, B.—I am of the same opinion. The court in this case has to deal with the effect of this stipulation. The plaintiff's contention is that when the obligation is particular, the exception is removed, and that, under the peculiar circumstances of the case, the defendants should be liable for negligence. It is not, however, made out that any new duties arose so as to make the company liable. There is nothing in this case analogous to deviation. Some care may have been necessary, but no special obligation arises.—Ed.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Friday, Nov. 2, 1883.

(Before Butt, J., assisted by Trinity Masters.)

THE SEATON. (*a*)

Collision—Overtaking and crossing ship—Duty of—Regulations for Preventing Collisions at Sea 1880, *arts.* 16, 20.

Where one of two ships is at the same time crossing and overtaking the other, art. 20 *of the Regulations for Preventing Collision at Sea* 1880 *applies, so as to render it the duty of the former to keep out of the way of the latter, notwithstanding the rule as to crossing ships, which in such cases does not apply.*

This was an action *in rem* instituted by the owners of the Italian steamship *Polcevera* against the British steamship *Seaton* and her freight to recover damages sustained by the *Polcevera* in a

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

collision, which took place between that vessel and the *Seaton* on the 31st Jan. 1883 in St. George's Channel. The defendants counter-claimed.

The allegations on behalf of the plaintiffs were as follows:

The *Polcevera*, a steamship of 1734 tons register, bound at the time of the collision on a voyage from Greenock to Cardiff, in ballast, with a crew of twenty-eight hands, was between 2 and 3 p.m. on the 31st Jan. off Cardigan Bay in St. George's Channel, the wind being east and the weather fine and clear. The *Polcevera* was at the time under steam, making about nine or ten knots an hour, and heading about S.W. by S. Under these circumstances those on board the *Polcevera* observed the *Seaton* about eight or nine miles distant, and from four to five points on the port bow, apparently on a rather more westerly course than the *Polcevera*. About 3.30 p.m., when the South Bishop Rock Lighthouse was bearing about S., and from ten to twelve miles distant, the course of the *Polcevera* was altered to south half-west in order to pass between the Grassholm and Scomer Islands. The *Seaton* was then from three to four miles distant. The course of the *Polcevera* was then kept, and the vessels got down to South Bishop Light, and were drawing nearer together, when the *Seaton* was seen to be porting her helm, and coming off to starboard and causing danger of collision. As the collision became imminent, the helm of the *Polcevera* was put hard a-port; but the *Seaton* continued to approach under a port helm and at considerable speed, and with her starboard bow struck the portside of the *Polcevera* about midships and did her great damage.

The allegations on behalf the defendants were as follows:

The steamship *Seaton*, bound on a voyage from Garston to Cardiff, was, shortly before 4.30 p.m., in St. George's Channel off the South Bishop Rock, proceeding under steam and sail on a S.W. by S. course, and making about eight knots an hour. Under these circumstances the *Polcevera*, which had been observed by those on board the *Seaton* from the time when she first came into sight on the *Seaton's* starboard quarter, had overtaken and was passing the *Seaton* on the latter's starboard side, and at such a distance and in such a direction as to have done so in safety, when suddenly and without any warning, the helm of the *Polcevera* was improperly starboarded, and she attempted to cross the bows of the *Seaton* from starboard to port, rendering thereby a collision inevitable. The helm of the *Seaton* was at once hard-a starboarded, and her engines were stopped and reversed full speed, and the *Polcevera* was loudly hailed, but she kept on and struck the *Seaton* on the starboard bow with her own port side amidships, doing her damage.

Nov. 2.—The action came on for trial on *viva voce* and documentary evidence.

The following of the Regulations for Preventing Collisions at Sea were referred to during the argument:

Regulations of 1863, art. 17:

Every vessel overtaking any other vessel shall keep out of the way of the last-mentioned vessel.

Regulations of 1880, arts. 16 and 20:

16. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

20. Notwithstanding anything contained in any preceding article, every ship, whether a sailing ship or a steamship, shall keep out of the way of the overtaken ship.

W. G. F. Phillimore, with him *W. R. Kennedy*, for the plaintiffs.—Although the *Polcevera* was originally an overtaking ship, she had for a considerable period of time before the collision virtually overtaken the *Seaton*. In this state of affairs she, at the distance of from three to four miles, and in the ordinary course of navigation, starboards. The *Polcevera* and the *Seaton*, then, are at a distance of over three miles on intersecting courses, and hence it was the duty of the *Seaton*, under art. 16 of the Regulations for Preventing Collisions at Sea, she having the *Polcevera* on her starboard side, to have kept out of the way. [BUTT, J.—Is that so? Article 17 of the Regulations for Preventing Collisions of 1863 seems to have left a doubt in some cases as to the relative duties of ships, one of which is both overtaking and crossing at the same time. To remove such doubt art. 20 of the Regulations of 1880 was passed. And as this latter regulation is the one in force, it is the overtaking and not the crossing rule that is to prevail where there is any doubt. Now, the *Polcevera* was clearly an overtaking ship, though it is quite true she may have been at the same time a crossing one. A vessel may be both overtaking and crossing, as when she is on an intersecting course, and is also overtaking the other vessel.] In this case the *Polcevera* had ceased to be an overtaking ship at the time where she was put on a course to cross the *Seaton*. It would be unreasonable to contend that because a vessel was at some remote period of time abaft the beam of another, the overtaking rule is to continue to apply until the overtaking ship has passed the other, without any regard to the lateral distance between the two vessels:

The Cayuga, 14 Wallace (Amer.) 270. (*a*)

The opinion expressed by Brett, L.J., in *The Franconia* (3 Asp. Mar. Law Cas. 295; L. Rep. 2 P. Div. 8; 35 L. T. Rep. N. S. 721), to the effect

(*a*) The head-note to this case, which was decided by the Supreme Court of the United States in 1871, is as follows:—"Although where two steamships are running in the same direction—the ship astern sailing faster than the ship ahead—the ship astern is in general bound to adopt the necessary precautions to avoid a collision, the rule does not in general apply in a case where the ships are running on intersecting lines and the faster sailer is thus coming up. In such a case the 14th article governs, and the ship which has the other on her own starboard side must keep out of the way." The article 14 referred to is in terms identical with article 16 of our present Regulations for Preventing Collisions. The reasoning of the learned judge (Clifford, J.) seems to be that there may be many cases of one ship overtaking and crossing another where the necessity for precaution only arises when the two ships are abreast of one another. In other words, there is no necessity for the application of the Regulations for Preventing Collisions until the overtaking ship has ceased to be an overtaking ship. The question of overtaking is then a thing of the past, and the crossing rule is to be applied. It should be remembered that this case was decided in 1871 prior to the operation of the present rules. But even so, there seem grave objections to this decision. In the first place there is introduced in all cases a difficult question as to the exact bearings of the vessels at the time when precautions first become necessary. And further, neither vessel would know until the last moment what her duty was or what course the other vessel proposed to adopt. Mr Justice Butt's decision, on the other hand, lays down a clear rule applicable to all cases, and so prevents any chance of vacillation, a course productive of so many collisions.—ED.

that where two steamships are on converging courses, but one abaft the beam of the other and going at a greater speed than the other, they are not to be treated as crossing ships, was much doubted by the Court of Appeal in the later case of the *Peckforton Castle* (3 Asp. Mar. Law Cas. 533; 37 L. T. Rep. N. S. 316; L. Rep. 3 P. Div. 11).

Hall, Q.C. (with him *T. T. Bucknill*), for the defendants, was not called upon.

BUTT, J.—It seems to me and the Elder Brethren that this is a very clear case. These two vessels were originally steering pretty nearly parallel courses, and if they had kept on the same courses there would have been no danger. But a new state of things is brought about by a manœuvre at some time or other on the part of the *Polcevera*, which instead of continuing her course alters considerably to the south. By so doing she assumes a course, which, if she be the quicker ship, will cause her to intersect the course of the other vessel. In other words she starboards her helm, so as to throw herself across the bows of the *Seaton*. Now what is her answer to this charge? I confess I do not understand her alleged justification. It does not, however, follow from this that she is wholly to blame. The plaintiffs allege that when the ships were approaching one another, the *Seaton* was seen to port, and they say that that was the cause of the collision. There is evidence on their part that the *Seaton* did port, but it does not affect my judgment, for I think the evidence is clear enough that the position of great and imminent danger was brought about by the original starboarding of the *Polcevera*. I hold that the latter was an overtaking ship, and that she threw herself across the bows of the English ship, and is therefore, for the reasons I have given during the argument, in fault for this collision.

Solicitors for the plaintiffs, *Ingledew* and *Ince*, agents for *Ingledew*, *Ince*, and *Vachell*.

Solicitors for the defendants, *Turnbull*, *Tilly*, and *Mousir*.

Tuesday, Nov. 27, 1883.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE BERYL. (a)

Collision—Crossing ships—Regulations for Preventing Collisions at Sea, Arts. 16, 18, 22.

The steamships A. and B. were on courses crossing one another at right angles, the A. having the other on her starboard hand. As they approached one another the B., seeing the A. was taking no steps to keep out of the way, at a distance of from a quarter to half a mile, eased her engines and whistled.

As they got nearer, the A. still not altering her course, the engines of the B. were stopped and reversed full speed astern, but the vessels came into collision.

It was admitted that the A. was to blame, but it was contended by the A. that the B. was also to blame for not stopping and reversing when she first saw there was risk of collision and that the A. was not getting out of her way.

Held, that, although it was the duty of the B. to keep her course, it was still her duty to stop and reverse in due time, and that, under the circumstances, she had stopped and reversed in due time, and that the A. was alone to blame for the collision.

THIS was an action *in rem*, brought by the owners of the steamship *Abeona* against the owners of the steamship *Beryl* to recover damages occasioned by a collision between the two vessels on the 10th Sept. 1883. The defendants counter-claimed.

The material facts alleged on behalf of the plaintiffs were as follows:—Shortly before 11.30 p.m. on the 10th Sept. the *Abeona*, on a voyage from Rotterdam ta Sunderland, was in the North Sea, steering north-east, and making about seven and a half knots an hour. Her regulation lights were duly exhibited and burning, and a good look-out was being kept on board her. In these circumstances those on board the *Abeona* saw the masthead light of the *Beryl* about two miles off, and bearing about abeam on the starboard side. Shortly afterwards the green and red lights were seen. The *Abeona* kept on, expecting the *Beryl* would pass astern; but the *Beryl* ported her helm and shut out her green light and caused danger of collision, coming on at a great rate. The engines of the *Abeona* were thereupon stopped and reversed full speed, and her helm was put hard-a-starboard; but the *Beryl* with her stem and port bow struck the *Abeona* on the starboard fore-rigging, doing her so much damage that she sank in a few minutes. The plaintiffs (*inter alia*) charged the defendants with neglect of art. 18 of the Regulations for Preventing Collisions at Sea.

The facts alleged on behalf of the defendants were as follows:—At the place aforesaid the *Beryl*, on a voyage from Wyburg to London, was steering south-west by south, and making about eight knots an hour, when those on board of her observed at a distance of about four miles, the masthead light of the *Abeona* bearing about three points on their port bow. Shortly afterwards the green light became visible. The *Beryl* was kept on her course, but the *Abeona*, instead of keeping out of the way of the *Beryl*, approached, and although the whistle of the *Beryl* war twice blown, and her engines were eased, and when a collision became imminent were stopped and reversed full speed astern, the *Abeona* with her starboard bow struck the stem and port bow of the *Beryl*, doing her considerable damage.

The action came on for hearing on Nov. 27 before the judge, assisted by Trinity Masters. At the close of the plaintiffs' case, the judge having intimated that he was unable to accept the evidence of the plaintiffs, and considered the *Abeona* to be to blame, the plaintiffs' counsel admitted that the *Abeona* was in fault, but contended that the *Beryl* was guilty of contributory negligence in not stopping and reversing her engines in due time.

It was proved that, when the vessels were distant from one another between a quarter and half a mile, the *Beryl* whistled and eased her engines, and still seeing the *Abeona* kept her course, stopped, and reversed her engines full speed astern.

Hall, Q.C. (with him *W. G. F. Phillimore*) for the plaintiffs.—The house of Lords has laid down in the most emphatic terms the duty of strictly and immediately complying with the Regulations for Preventing Collisions at Sea:

The Khedive, 4 Asp. Mar. Cas. 360; 43 L. T. Rep. N. S. 610; L. Rep. 5 App. Cas. 876.

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

In this case the *Beryl* has admittedly failed to comply with art. 18. Her duty was, the moment there was danger of collision, to stop and reverse. All she does is to ease, and only stops and reverses when a collision is inevitable. By so acting she has infringed the rule.

Myburgh, Q.C. (with him *Kennedy*) for the defendants.—The navigation of the *Beryl* was most careful, and strictly in accordance with the Regulations for Preventing Collisions. Her duty under art. 22, by which she is bound when she first sees the *Abeona*, is to keep her course. This she does, at the same time easing her speed. She has a right to assume that the *Abeona* will keep out of her way. The moment she sees that the *Abeona* is determined to neglect that duty, she at once, in compliance with art. 18, stops and reverses full speed astern.

The Regulations for Preventing Collisions at Sea referred to in the argument are as follows:

18. Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse if necessary.

22. Where by the above rules one or two ships is to keep out of the way, the other shall keep her course.

BUTT, J.—In this case we see no difficulty in finding the *Abeona* solely to blame. The plaintiffs' counsel having admitted the *Abeona* to be in fault, has argued that the *Beryl* was also to blame for not easing or stopping and reversing in due time. Discarding the evidence from the *Abeona*, which I do not accept, it seems that these vessels were on crossing courses at about right angles, the *Beryl* being on the starboard side of the *Abeona*. It was therefore the duty of the *Abeona*, in accordance with art. 16 of the Regulations for Preventing Collisions at Sea, to keep out of the way of the *Beryl*, and the corresponding duty of the *Beryl*, under art. 22, to keep her course. Now, what happens? The plaintiffs admit that the *Beryl* kept her course, but it is said that she kept it too long. In other words, the counsel for the plaintiffs contended that, though art. 22 was applicable, yet she should not have disregarded art. 18, and that, in accordance with the latter article, she should have stopped and reversed. I agree that art. 22 is not to override art. 18, and that in the position in which these ships were placed both articles must be considered to be applicable.

Now, how are the facts? These two vessels being at some considerable distance from one another, those on the *Beryl*, seeing the *Abeona* is keeping her course, whistle, and soon after whistle a second time. Thereupon the engines of the *Beryl* are eased, and this is done from a quarter to half a mile distant from the *Abeona*. The master of the *Beryl* had thought that the *Abeona* would port her helm and go under his stern, and he acts rightly in keeping on for some time, in order to give the *Abeona* the opportunity of so doing, because, if she had done so in proper time, the speed of the *Abeona* would have assisted this manœuvre. It was the duty of the master of the *Beryl* to suppose that the *Abeona* would act in accordance with the regulations for preventing collisions, and it was not for him to suppose that those in command of the *Abeona* would disobey the article of the regulations by which they were bound. But when at a distance of from a quarter to half a mile the master of the *Beryl* found that the *Abeona* was not keeping out of his way, the engines of the *Beryl* were eased. If the *Abeona* had not then also eased, no collision even then would have occurred, because the relative positions of the vessels were such that, if the *Abeona* had then kept on, she would have passed clear. But by easing she counteracted the *Beryl's* manœuvre. Then the *Beryl* stopped and reversed her engines when close to the *Abeona*, as did the latter; but it was too late, and a collision occurred. I am therefore clearly of opinion that from first to last the navigation of the *Abeona* was reckless and wrong; and, on the other hand, that the *Beryl* was properly navigated in accordance with the regulations.

Solicitors for the plaintiffs, *Ingledew* and *Ince*.
Solicitors for the defendants, *Cooper* and *Co*.

Wednesday, Dec. 12, 1883.

(Before BUTT, J.)

THE TYNE STEAM SHIPPING COMPANY LIMITED *v.* BRITISH SHIPOWNERS COMPANY LIMITED.

THE WARKWORTH. (*a*)

Limitation of liability — Collision — Defect in machinery — Improper navigation — The Merchant Shipping Act Amendment Act 1862 (25 *&* 26 *Vict. c.* 63), *s.* 54.

Where a ship is held liable for a collision caused by a defect in her machinery, and such defect is due not to the master or crew, but to the negligence or default of other persons who are employed by the shipowner to repair the machinery on shore before the commencement of the voyage, and for the purposes of the voyage, the collision is nevertheless occasioned by "improper navigation" within the meaning of sect. 54, *sub-sect.* 4 *of the Merchant Shipping Act Amendment Act* 1862 (25 *&* 26 *Vict. c.* 63), *so as to entitle the owner to limit his liability under the provisions of that Act.*

In an action for limitation of liability, where the defendants raised an issue which was decided against them, the Court ordered the plaintiffs to pay all the costs of the action, except the costs incidental to the raising of such issue, as to which each party was to pay his own costs.

THIS was an action for limitation of liability brought by the Tyne Steam Shipping Company Limited, the owners of the screw steamship *Warkworth*, against the owners of the vessel *British Enterprise*.

The collision in consequence of which this action was instituted occurred on the 17th April 1883. At the time of the collision the *British Enterprise* was lying in the river Tyne moored at buoys taking in cargo. The persons in charge of the *Warkworth*, which was steered by a steam-steering apparatus, saw the *British Enterprise* in due time and took proper steps to keep out of her way. Owing, however, to a defect in the steering apparatus, the *Warkworth* failed to answer her helm, and came into collision with the *British Enterprise* which shortly afterwards sank. An action was thereupon instituted by the owners of the *British Enterprise* against the *Warkworth*. The defendants pleaded inevitable accident.

On the 29th June 1883 the damage action was tried before Sir James Hannen, and it was proved

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES Esqrs., Barristers-at-Law.

that the steering apparatus had been inspected at Rotterdam six months before the collision, that the cause of the defect was the using of an improper pin which came out of its place in the apparatus, that the pin in question had been lost subsequently to the collision, and that it was not the duty of the ship's engineer to overhaul the apparatus,

Sir JAMES HANNEN found the *Warkworth* solely to blame, and delivered the following judgment:—The defendants lie under insuperable difficulties in the case probably from the negligence of some one or other, because they have unfortunately allowed the pin, the all important object in this transaction, to be lost, and therefore we are unable to see what its nature was, and to judge whether there was any impropriety in its use, and then to endeavour to ascertain to whom the use of it is to be attributed. But there is also another difficulty which the defendants have made, that is, that while they take credit for having had an inspection during the period that this vessel has been in their possession, they have not given us any evidence of the result of that inspection. We are left therefore to conjecture. It is a misfortune of course of employers that they are responsible for the acts of those whom they employ, although they themselves may have done all that is right. Of course I have nothing to say against the defendants themselves, but they are responsible for those whom they employ. The evidence in this case lies in a very narrow compass. A proper steering gear of well recognised and approved principles was adopted, and the maker of that apparatus has been called, and he has told us that he has distinct recollection of this particular pin, and it is not merely because it is his practice to make use of a particular kind of pin, but he recollects in this particular instance a split pin was used for the purpose of keeping this nut in its place. It is obvious that all things must wear out and that there must be therefore an inspection from time to time to guard against something unforeseen taking place. The first question in the case no doubt is, whether or not there has been an inspection at a sufficiently short series of intervals—on this the evidence stands thus: One gentleman has said that he thinks that an apparatus of this kind should be inspected every two months. The master himself says that he thinks there should be an inspection every six months. An inspection took place at Rotterdam six months before the collision. If that is so, so far as the period would go, the evidence of Mr. Nicholl would tend to establish that there was a sufficient time. Of course the inspection cannot be taking place every week or every fortnight, the same as there is of the gear on the deck, but I certainly myself am disposed to think, and the Trinity Brethren who assist me are also of opinion, that the inspection ought to take place more frequently than once in six months. But I do not propose to rest my decision upon that, but I rest it upon these grounds: It being proved that there was a split pin in originally, the pin having now being lost, and the evidence of the only person who speaks to the condition of that pin before it was lost being that it was not, so far as he recollected, a split pin, coupled with the fact that there was a taking off of the cover, and inspection at Rotterdam, leads me to the inference that from some cause or other the original and proper pin had been taken out and an improper pin had been put in, and that this has been the cause of the accident. That being my view, I think the defence is not established, and that the plaintiffs are entitled to recover.

Dec. 12.—The limitation of liability action now came on for hearing.

The evidence in the damage action was put in and two witnesses were called on behalf of the plaintiffs the owners of the *Warkworth*, to prove that it was the duty of the ship's engineer to look to the steering apparatus when the ship was away from her home port, although at the hearing of the damage action their own ship's engineer had stated it was not his duty to do so.

The 54th section of the Merchant Shipping Act 1862, on which the argument turned, 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 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 steamships the gross tonnage without deduction on account of engine room.

Finlay, Q.C. and *Barnes* for the plaintiffs, the owners of the *Warkworth*.—The words "improper navigation" cover a case like the present. The meaning of these words has already been considered in *Good* v. *The London Steamship Owners Mutual Protection Association* (L. Rep. 6 C. P. 563), where it was held that a loss occasioned in consequence of a steam-cock being left open was a loss within the meaning of these words. If this defect in the steering apparatus had been due to the ship's engineer, the collision would clearly have been due to "improper navigation." Can it make any difference if it is due to a marine engineer, who is equally a servant of the owners? Whatever be the strict technical meaning of navigation, the Legislature never meant to exclude such a case as the present from the operation of the statute.

Webster, Q.C. and *W. G. F. Phillimore* for the defendants.—The contention of the plaintiffs amounts to this, that improper construction is improper navigation. *Primâ facie* improper navigation is the negligent government of the ship by her master and crew, and inasmuch as this is a statute which confers a privilege on a wrongdoer at the expense of an innocent sufferer,

the words of the statute must be construed strictly and in no way strained to embrace a state of circumstances not clearly within their meaning:

The Ettrick (sub nomine *Prehn* v. *Bailey*), 4 Asp. Mar. Law Cas. 465; 45 L. T. Rep. N. S. 399; L. Rep. 6 P. Div. 127;
The Andalusian, 4 Asp. Mar. Law Cas. 22; 39 L. T. Rep. N. S. 204; L. Rep. 3 P. Div. 182;
Gale v. *Laurie*, 5 B. & Cr. 156;
Chapman v. *Royal Netherlands Steam Navigation Company*, 4 Asp. Mar. Law Cas. 107; 40 L. T. Rep. N. S. 433; L. Rep. 4 P. Div. 157.

Yet the plaintiffs are here seeking to say that the improper act of a marine engineer before the voyage commences brings this case within the meaning of "improper navigation." In *Steel* v. *The State Line Steamship Company* (3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. N. S. 333; L. Rep. 3 App. Cas. 72), although one of the exceptions in the bill of lading was damage caused by navigation, the House of Lords held that all the exceptions must be taken to refer to a period subsequent to the sailing of the ship. If so, the neglect of the marine engineer before the ship sails cannot come within the meaning of "improper navigation."

Finlay, Q.C. in reply.—In *Steel* v. *The State Line Steamship Company*, the House of Lords did not decide that navigation was confined to the action of the master and crew after the ship had sailed. What they did decide was that the parties to the contract contained in the bill of lading meant the exceptions to apply only to a period subsequent to the sailing of the ship. In other words, their Lordships decided what was the intention of the parties, and not the meaning of navigation.

BUTT, J.—This is an important case, and a case involving a very considerable difficulty. I think it being pretty certain that whatever way I decide, it will go to the Court of Appeal, I therefore do not see that anything would be gained by my reserving judgment. In the first place I do not agree with what has been said in disparagement of the Acts allowing limitation of liability. I do not agree that they are anything but valuable Acts of Parliament, and I do not agree with the contention that, because they are said to interfere with what have been called common law rights, they are therefore to be construed differently to other statutes. In approaching this particular statute it seems to me that the intention of the Legislature in all these Acts of Parliament has been to relieve shipowners from the liability caused by the negligent acts of their servants. When I say relieve them from their liability, I do not mean altogether but to some extent only. *Primâ facie* I do not see why the amount of relief should be limited to a case in which damage has occurred through the negligence of the master and crew, and why the Act should not apply to the negligence of persons other than the master and crew employed by the shipowner to attend to the ship in preparation for the voyage, as for example, a marine engineer, employed while the ship is in port to overhaul the machinery. It seems to me that this conclusion is strengthened by the wording of the two first sub-sections which omit the words "improper navigation," and allow limitation of liability generally where the loss occurs without the actual fault or privity of the owners. It seems to me that this shows an intention to relieve the shipowner in all cases where damage has been caused by the negligence of his servants, and he himself has not been to blame. But it is said that might be all very well if it were not for the positive wording of the sub-section in question, and that in this particular case it is sub-sect 4 which applies, and that sub-section prevents limitation of liability from applying, except in a case where the loss or damage is by reason of the "improper navigation" of such ship. It is said that "improper navigation" cannot be made to include anything other than the negligence of the master and crew in the course of the voyage. *Primâ facie* it would seem to me improper navigation for a steamship to run into a vessel at anchor. Improper navigation in such a case may be, for example, caused by the negligence of the persons in charge of the ship, or by improper loading of the stevedore; but, assuming a case in which the ship is so negligently loaded by the stevedore that it is found after the voyage has commenced, and too late to remedy it, that the vessel will not answer her helm, and she runs into another vessel through no fault of the master or crew, I confess I do not see why that is not improper navigation. I suggested during the course of the argument other possible states of circumstances, as where persons at the order of the shipowner supply improper coals to the ship, and the engineers are unable to keep steam in their boilers, and in consequence a collision occurs. Why is not that "improper navigation?" The words "improper navigation" do not necessarily exclude that state of circumstances.

Let us now suppose that an accident has occurred from the falling out of such a pin as in the present case, and that that pin has been put in by the chief engineer during the course of the voyage. It would not be contended that that was not "improper navigation." Let us now go a step further, and suppose that the ship's engineer had put the pin in while in port an hour before the ship started on her voyage. Could it be said then that the collision was not caused by improper navigation? Now, suppose that while the ship is in port a marine engineer is sent by the owners to overhaul the machinery, and he, in the ordinary course of his business, puts in the pin. Why would that be less improper navigation if it be put in by the marine engineer than by the ship's engineer? I therefore have a strong feeling that this case is within the intention of the Act, and feeling that, I do not hesitate to say I feel strengthened in refusing any interpretation of the Act which would thwart that object. I therefore come to the conclusion that I am not prevented from saying that there has been a loss by reason of the improper navigation of this ship, and I am of opinion that this Act applies. I accordingly grant a decree for the plaintiffs in the terms prayed for.

Barnes.—It is submitted that, as the defendants have failed to establish the issue they have raised, the plaintiffs are entitled to costs:

The Empusa, L. Rep. 5 P. Div. 6; 4 Asp. Mar. Law Cas. 135; 41 L. T. Rep. N. S. 333.

BUTT, J.—It being the ordinary practice of the court to order the plaintiffs in these actions to pay all the costs, I shall order them to pay all the costs of the action, less the costs incidental to the raising of this issue, as to which each party is to pay his own.

Solicitors for the plaintiffs, *T. Cooper* and *Co.*

Solicitors for the defendants, *Gregory, Rowcliffes*, and *Co.*

Tuesday, Dec. 18, 1883.

(Before BUTT, J.).

THE SPERO EXPECTO. (*a*)

Collision — Practice—Default action in rem.—Motion for judgment—Order XXVII., r. 11.

As under Order XIII., r. 12, *default actions in rem are to proceed as if the defendant had appeared, Order XXVII., r.* 11, *as to setting down an action on motion for judgment where the defendant makes default in pleading applies to such actions and judgments therein is to be obtained under the provisions of that rule.*

Where in an action in rem for collision the defendant makes default, the plaintiff should on moving for judgment, support his claim by affidavit.

THIS was a motion under Order XXVII., r. 11, by the plaintiffs, in an undefended damage action *in rem*, asking the court to "pronounce for the plaintiffs' claim for damage, and to condemn the vessel *Spero Expecto* in the said damage and in costs, and to refer the said claim to the registrar, assisted (if necessary) by one merchant, to report the amount thereof, and to order the said vessel to be appraised and sold."

The action was instituted on the 16th Oct. 1883, by the owners of the fishing lugger *Undine* against the French fishing smack *Spero Expecto*, in consequence of the latter vessel having sailed into the fishing nets of the *Undine*, which were, in consequence, lost.

The writ was served on the *Spero Expecto* on the 10th Nov. No appearance was entered by or on behalf of the defendants. The plaintiffs' preliminary act and statement of claim were filed in the registry on the 24th Nov. Affidavits verifying the statement of claim, and as to service of writ, were also filed.

W. G. F. Phillimore, for the plaintiffs, in support of the motion.—As no appearance has been entered by the defendants, the plaintiffs, under the provisions of Order XIII., r. 12, have filed an affidavit of service and a statement of claim. That being done, the same rule says the action may proceed as if the defendant had appeared. The plaintiffs, therefore, under Order XXVII., r. 11, have set down the action on motion for judgment. That order empowers the plaintiff in certain actions where the defendant makes default to set down the action on motion for judgment, and appears to apply to an Admiralty action *in rem*. [BUTT, J.—I see that by Order XL., r. 1, it is provided generally that, unless otherwise provided, the judgment of the court shall be obtained by motion. What do you say as to the application of that rule?] That order does not strictly apply to the circumstances of the plaintiffs' case, whereas the one under which they are moving does. In support of the allegations in the statement of claim we have affidavits. [BUTT, J.—Are affidavits necessary?] Sir Robert Phillimore considered them to be so:

The Sfactoria, 35 L. T. Rep. N. S. 431; 3 Asp. Mar. Law Cas. 271; L. Rep. 2 P. Div. 3.

Moreover, Order XXXVII., r. 2. provides that in default actions *in rem* evidence may be given by affidavit. That appears to bear out Sir R. Phillimore's view. [BUTT, J.—Yes, I think that rule makes it clear.]

BUTT, J. accordingly gave judgment for the plaintiffs, with a reference to the registrar, assisted by one merchant.

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

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Jan. 11, 12, *and* 22, 1884.

(Before Sir JAMES HANNEN assisted by TRINITY MASTERS.)

THE CAMELLIA.

Salvage—Ineffectual attempts—Right to award—Costs.

Where a vessel engaged in rendering salvage services is compelled in consequence of the nature of her cargo to abandon the service before it is completed, she is not deprived of her right to reward if by the services already rendered she has brought the vessel she is assisting from a position of danger into a position of comparative safety, and the vessel is ultimately saved.

THIS was an action for salvage instituted by the owners, master, and crew of the steamship *Victoria* against the owners of the steamship *Camellia*, her cargo and freight.

The services consisted in towing the *Camellia*, which was found in the Atlantic Ocean by the *Victoria*, disabled and flying signals of distress, a distance of about eighty-five miles. The hawser then parted, and, although the master of the *Camellia* was desirous of the towing being continued, the master of the *Victoria*, considering that by attempting to do so he would endanger his own cargo, and also being of opinion that by his past services the *Camellia* had been put into a safe position to continue her voyage under sail, he determined to cease rendering further assistance. The *Camellia* was ultimately towed into Queenstown by a tug which had been sent out in search of her. The defendants (*inter alia*) pleaded that the salvors by abandoning the *Camellia* had forfeited all claim to salvage. The further facts of the case appear in the judgment of the court.

Jan. 11.—The action now came on for hearing on documentary and *viva voce* evidence before Sir J. Hannen assisted by Trinity Masters.

Cohen, Q.C. (with him *French*) for the plaintiffs, —The plaintiffs have rendered salvage services, and are entitled to a substantial reward in respect of them. The salvors abandoned the *Camellia* because they could not have continued their services without endangering their cargo, and because, when they left the *Camellia*, she by their services had been brought into such a position that she was able in safety to continue her voyage without further assistance. It has never been laid down that where salvors, after they have rendered substantial assistance, discontinue doing so out of consideration for the safety of their own ship, and in the *bonâ fide* belief that the other ship has been put into a position of continuing her voyage in safety, are to be deprived of all reward. Moreover, salvage has been awarded by this court to salvors whose efforts have proved ineffectual:

The Undaunted, 2 L. T. Rep. N.S. 520; Lush. 90; *The Melpomene*, 2 Asp. Mar. Law Cas. 122; 29 L. T. Rep. N. S. 405; L. Rep. 4 Adm. & Ecc. 129.

It is to be remembered that the present services

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

did in fact contribute to the ultimate safety of the ship, inasmuch as she was towed a considerable distance on her course, and nearer to the tug sent for her.

Dr. *Phillimore* (with him *Kennedy*) for the defendants.—The plaintiffs in this case have rendered no salvage services. Neither *The Undaunted* (*ubi sup.*) nor *The Melpomene* (*ubi sup.*) is in point. In *The Undaunted* the services, although ineffectual, were performed under an agreement between the salvors and the master of the salved ship. Again in *The Melpomene* (*ubi sup.*) the salvors went out in answer to signals of distress, and were only prevented from rendering services by causes over which they had no control. In the present case there is a voluntary abandonment of the *Camellia*, and, as the defendants submit, an improper one. Hence on the authorities, these plaintiffs can have no claim to salvage :

The E. U., 1 Spinks, 63 ;
The Edward Hawkins, Lush. 515 ;
The Nellie, 2 Asp. Mar. Law Cas. 142 ; 29 L. T. Rep. N. S. 516 ;
The Killeena, 4 Asp. Mar. Law Cas. 472 ; 45 L. T. Rep. N. S. 621 ; L. Rep. 6 P. Div. 193 ;
The Yan Yean, 5 Asp. Mar. Law Cas. 135 ; 49 L. T. Rep. N. S. 187 ; L. Rep. 8 P. Div. 147.

Cohen, Q.C. in reply. *Cur. adv. vult.*

Jan. 22.—Sir JAMES HANNEN.—The material facts of this case are as follows : The *Camellia*, an iron screw steamship of 880 tons register, rigged as a two-masted schooner, with a crew of twenty hands all told, left Baltimore on the 11th June 1883, on a voyage to Londonderry. The value of the ship, cargo, and freight was 23,419*l.* On the 25th June the tail of the propeller shaft broke, and the propeller became useless. The *Camellia* proceeded under canvas until the 30th June, by which time she had sailed 126 miles to the eastward, and had reached lat. 49° 29′ N., long. 21° 20′ W., when she fell in with the *Victoria*. The *Victoria* was a steamship of 3989 tons gross, 2449 nett, with engines of 400 horse-power, and a crew of fifty-four hands all told, on a voyage from Boston to Liverpool. She had on board a cargo of 616 cattle, 2752 sheep, besides dead meat, and a general cargo of American produce. The value of the ship was 35,000*l.*, of the cargo 41,536*l.*, and freight 4692*l.* The *Camellia* was flying signals of distress, and requested to be taken in tow.

The first question in dispute is as to the condition of the *Camellia* at this time. For the *Victoria* it is alleged that the wind was west, and that the *Camellia* was lying nearly head to wind quite out of her course, and that her master was vainly trying to pay her head off to the eastward. For the *Camellia* it is denied that she was lying nearly head to wind, or that her master was vainly trying to pay her head off to the eastward, and it is alleged that she was heading northward, a position in which she had been voluntarily placed by putting her helm to starboard, and backing her yards when the *Victoria* was seen. She had just split her foresail, and another was about to be bent. On this point I am of opinion that the contention of the *Camellia* is well founded, and that there was nothing to have prevented her paying off to the eastward again without the assistance of the *Victoria*. The *Victoria* took the *Camellia* in tow at about 8.10 p.m. on the 30th, and continued towing until 7.45 a.m. the next morning, when the hawser broke. The *Camellia* signalled to the *Victoria* to take her in tow again, but the latter, in consequence of the risk there would have been of damage to the cattle and sheep in turning round to connect the vessels, and seeing that the *Camellia* was able to proceed on her voyage under sail, left her, signalling that she would report her.

In these circumstances it is contended on behalf of the *Camellia* that the *Victoria* rendered her no salvage services, and that she improperly abandoned the attempt to salve, and therefore that the suit should be dismissed. I am of opinion, however, that salvage services to some extent were rendered. It is obvious that a steamer whose propeller is broken, though she may have sailing power, is subject to greater risks than she is in ordinary circumstances expected to encounter. She is exposed for a longer time to the dangers of bad weather, and she is not able to beat up against unfavourable winds with the same facility as a vessel constructed for navigation with sails alone. She is liable, therefore, to be driven out of her course if a change of wind should occur, and it becomes of great importance to her that the time and distance during which she may be exposed to these dangers should be shortened as much as possible. In the present case the *Camellia* was towed on her course a distance of eighty-five miles ; but, what is of more importance, she was hastened on her voyage about seventy hours, whereas up to the time of her being taken in tow she was sailing only at the rate of one mile an hour. She was also brought from ten to fourteen miles to the north, and so to that extent nearer to her proper track from which she had been carried somewhere about thirty miles. I am advised that there was nothing in the weather during the towing which would indicate any difficulty or danger in the course of the service. But it is contended that the *Victoria* by abandoning the *Camellia* has forfeited all right to claim for salvage services. I find as a fact that the *Victoria* did not leave the *Camellia* because she was unable to see that the *Camellia* was signalling to be again taken in tow, but because, from the nature of her cargo, she would have run a considerable risk of loss and damage to it by turning round to windward to connect the two vessels, and I am advised that this was a reasonable apprehension. I am also advised that, though the weather was worse after the towing ceased than when it commenced, there was nothing in it which made it unreasonable on the part of the master of the *Victoria* to consider that the *Camellia* could proceed on her voyage under sail without any other than that general risk which I have referred to as attending any steamer which has lost her steam power. I am advised and I think that there was no misconduct on the part of the master of the *Victoria*, and that, balancing the risk to the interests which were committed to his charge with that to which the *Camellia* was still exposed, he did not act improperly in going on when the hawser broke.

Several cases were cited in support of the defendant's contention that the plaintiffs were entitled to nothing. There can be no doubt that services, however meritorious, which do not in any way contribute to the ultimate safety of the ship are not entitled to salvage reward. That

was the case of *The Edward Hawkins* (*ubi sup.*). There the vessel taken in tow was after the parting of the hawser driven away by a gale towards a dangerous coast, from which she was saved by her own anchors. The towing in no way assisted her, and therefore no salvage was earned. On the other hand, in *The E. U.* (*ubi sup.*), Dr. Lushington puts the case of a vessel in a disabled state being brought on its way and then abandoned by the salvors in consequence of the tempestuous weather or other circumstances, and afterwards being saved by other salvors. He says that it is by no means to be laid down as clear law that the original salvors are not entitled to some reward. Again, in *The Killeena* (*ubi sup.*), Sir Robert Phillimore says, "Now, there is no doubt that where a set of salvors have done some acts which tend to the ultimate salvage of a vessel they are usually entitled to some remuneration," and he then proceeds to consider the facts which he thinks show that the alleged salvors had improperly abandoned the ship in danger. In the case of *The Nellie* (*ubi sup.*) Sir Robert Phillimore held that where in consequence of a *bonâ fide* mistake towing was not resumed after the hawsers had parted, yet, as beneficial services had been rendered, the salvors were entitled to be paid. Also in *The Melpomene* (*ubi sup.*) Sir Robert Phillimore says: "There are no cases which stand in the way of my adopting as a principle this, which appears to me to be of considerable importance to the interests of commerce and navigation, namely, that where a vessel makes a signal of distress, and another goes out with the *bonâ fide* intention of assisting that distress, and, as far as she can, does so, and some accident occurs which prevents her services being as effectual as she intended them to be, and no blame attaches to her, she ought not to go wholly unrewarded." In *The Yan Yean* (*ubi sup.*) I was of opinion that the salvors had by negligence brought the salved vessel into as great peril as that from which they had rescued her, and therefore that no claim for salvage existed. I am of opinion that the principle laid down by Dr. Lushington and Sir Robert Phillimore in the cases I have referred to, namely, that services which have contributed to the ultimate safety of a vessel, if interrupted before completion, without default of the salvors, are entitled to some remuneration, is applicable not only to the case of a vessel saved from imminent risk of wreck, but also to a case like the present where the vessel is brought into a position of greater comparative safety than that in which she was when she asked for assistance.

I was asked by the plaintiffs to take into consideration, when estimating the amount of salvage to be awarded, certain damage alleged to have been done to the *Victoria's* machinery, and loss consequent upon this. I am of opinion that it is not established that the damage was occasioned by the salvage services, and it is therefore unnecessary to consider whether to any and to what extent special damage should be taken into account in estimating salvage. I have now given my view of the facts. They lead me to the conclusion that a moderate sum ought to be awarded, and that sum I fix at 200*l.*, of which I give two-thirds to the owners, and one-third to the crew.

Jan. 30.—The plaintiffs applied for the costs of the action.

Cohen, Q.C. (with him *Roscoe*), in support of the application, referred to *Garnett* v. *Bradley* (3 App. Cas. 944; 39 L. T. Rep. N. S. 261) and *The Fenix* (Swa. 13).

Phillimore (with him *Kennedy*), *contra*, referred to *The Silesia* (4 Asp. Mar. Law Cas. 338; 5 P. Div. 177; 43 L. T. Rep. N. S. 319).

Sir JAMES HANNEN.—I am of opinion that some costs should be given to the plaintiffs, as the case was of some difficulty. The question raised was one which it was desirable should be tried in the High Court. The salvors therefore are entitled to the general costs of the action, but not to those occasioned by the claim for special damage.

Solicitors: For the plaintiffs, *Walker, Son*, and *Field*; for the defendants, *Cooper* and *Co.*

Friday, Feb. 1, 1884.

(Before Sir JAMES HANNEN.)

THE HARDWICK. (*a*)

Salvage—Practice—Pleadings—Admission of facts—Evidence—Order XIX., rr. 4, 5.

In salvage actions the plaintiffs in their statement of claim should state fully the material facts of the service, and if such facts are admitted by the defendants, the court will not allow the plaintiffs at the hearing to amplify them by evidence, except on special grounds.

THIS was a salvage action instituted by the owners, master, and crew of the steam trawler *Flying Sprite*, against the owners of the steamship *Hardwick* and freight.

On the 11th Dec. 1883 the plaintiffs delivered their statement of claim, in which the facts of the service were set out at length. The defendants in the statement of defence, with the exception of denying the values as stated by the plaintiffs, admitted the allegations in the statement of claim.

The services were shortly as follows:—

On the 13th Sept. 1883 the *Flying Sprite* found the *Hardwick* in the North Sea in a sinking condition occasioned by collision with another vessel. The *Flying Sprite* thereupon took the *Hardwick* in tow, and grounded her on the North Beach at Scarborough. Temporary repairs were there effected to her, and she was on the 18th Sept. taken into Hartlepool.

At the hearing the plaintiffs' counsel proposed to call evidence to amplify the statement of claim by proving that the place where the *Hardwick* had been grounded was in fact the best place the salvors could have taken her to. To this evidence the defendants objected.

Hall, Q.C. (with him *Bucknill*) for the plaintiffs in support of the evidence.—Though it may be the general practice of this court to preclude evidence in a salvage action where the defendants have admitted the allegations in the statement of claim, yet it is not the universal practice. The court has a discretion, and should in this instance exercise it in favour of the plaintiffs.

Dr. *Phillimore* (with him *Raikes*), for the defendants, *contra*.—If evidence is to be given where the defendants have admitted the allegations in the statement of claim, the advantage of setting out

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

fully the facts in the statement of claim is done away with. The double expense of lengthy statements of claim and evidence will thereby be incurred. In this particular case no good reasons have been shown why the practice of the court should be departed from.

Sir JAMES HANNEN.—It is suggested that I have a discretion as to admitting evidence in a case like the present. In that I agree. I think that, if anything material to the decision of the case is omitted in the statement of claim, I might possibly admit evidence by allowing the statement of claim to be amended and admitting evidence in support of the amendment. I may perhaps here say that this and other cases which have recently been before me show the advantage of adhering to the old practice in regard to statements of claim in salvage actions. Much expense is saved by the admission of facts, and by the court giving its decision on such admissions. But this valuable practice of admitting the facts alleged in the statement of claim would become useless if, notwithstanding that the material facts are set out by the plaintiffs, and admitted by the defendants, evidence in addition were to be admitted. The result would be that neither the court nor the defendants would be sure that all the facts were before them, nor whether the defendants' admissions were final or not. It must therefore be taken that such facts are alleged in a salvage statement of claim that, if admitted, they will constitute the whole of the plaintiffs' case, and, further, that evidence will only be admitted subject to the discretion of the court, and on special grounds. In this particular case I see no reason why the proposed evidence should be admitted, and I accordingly reject it.

Solicitors for the plaintiffs, *Rollitt* and *Sons*.

Solicitors for the defendants, *Waltons, Bubb*, and *Walton*.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 30 *and* 31, 1884.

(Before Lord COLERIDGE, C.J., BRETT, M.R., and BOWEN, L.J.)

GULLICHSEN *v.* STEWART BROTHERS. (*a*)

Charter-party—Cesser clause—Bill of lading—Incorporation of conditions of charter-party in bill of lading.

A charter-party contained stipulations in the usual form for payment of freight and demurrage, and also a stipulation that "as this charter-party is entered into by the charterers for account of another party their liability ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage."

The charterers having placed the cargo on board at the port of loading, a bill of lading was signed whereby the goods were made deliverable to themselves at the port of discharge, "they paying freight and all other conditions as per charter-party."

In an action by the shipowner against them, as consignees of the cargo, for demurrage in respect of delay at the port of discharge.

Held (affirming the judgment of Pollock, B. and Lopes, J.), that the words of the bill of lading incorporated the terms of the charter-party only so far as they were consistent with the bill of lading, and that the cesser clause being inconsistent with the bill of lading was not incorporated, and, therefore, that the plaintiff was entitled to maintain the action.

THIS was an appeal from the judgment of the Divisional Court (consisting of Pollock, B. and Lopes, J.) reported 5 Asp. Mar. Law Cas. 130; 49 L. T. Rep. N. S. 198.

A special case was stated by the parties, pursuant to the rules of the Supreme Court 1875, Order XXXIV., r. 1, the following being the material parts thereof:

The plaintiff is a shipowner residing in Norway, and is the owner of the vessel *Alette*. The defendants are timber and general merchants, carrying on business at 3, Fen-court, Fenchurch-street, in the city of London.

This action is brought to recover the sum of 56*l.* 13*s.* 4*d.* for the demurrage of the said vessel.

On the 13th Dec. 1881 a charter-party was entered into between the plaintiff, through his agent, and the defendants, under which the *Alette* was to load from the defendants at Miramichi or Dalhousie a cargo of deals and battens, to be carried at a certain rate of freight to a safe port on the west coast of Great Britain.

The charter-party contained the following clauses:

It is agreed that as this charty-party is entered into by the charterers for account of another party, their responsibility ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage. The usual customs of each port to be observed by each party in cases where not specially expressed.

Seventeen days, Sundays and holidays excepted, are to be allowed the merchant (if the ship be not sooner despatched) for lading, and for discharging cargo fifteen like days. Lay days to commence when ship is ready in a proper and loading and discharging berth respectively, demurrage at the rate of fourpence per register ton per day to be paid to the ship if longer detained.

Messrs. R. A. and J. Stewart, of Miramichi, shipped on the *Alette*, under the charter-party, a cargo of wood goods in two lots, one consisting of 401,000 pieces of paling, and the other of 29,523 pieces of deal and deal ends, and 274,118 pieces of palings, and two sets of bills of lading were signed in respect of the said cargo, one of them being for the 401,000 pieces of palings, and the other for the 20,523 pieces of deal and deal ends, and the 274,118 pieces of palings.

By the said bills of lading the goods were made deliverable at the port of discharge on the river Mersey to the defendants or to their assigns, "they paying freight and all other conditions as per charter-party."

Whilst the ship was on her voyage the defendants indorsed for value the first of the two bills of lading to a purchaser, and having sold a portion of the cargo comprised in the second bill of lading they indorsed on that bill of lading an order for delivery to the purchasers of that portion of the cargo, the defendants themselves being the owners and receivers of the remaining portion.

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

The ship was ready in a proper discharging berth at Liverpool, and the discharge was commenced on the 11th July 1881, and was not completed until the 1st Aug. 1881, on which day the discharge of the whole cargo was completed. The said vessel was therefore detained five days beyond the said fifteen days. The detention arose through no fault of the ship, but because the remainder of the cargo could not be delivered to the purchasers thereof until after the delivery to the defendants of their portion.

The court is to have power to draw inferences of fact.

The claim was made against the defendants as consignees of the cargo. The defendants contend that their liability ceased on the cargo being shipped, and that the plaintiff was bound to exercise his lien.

The question for the opinion of the court is, whether, upon the facts stated, the defendants are liable.

If the court find for the plaintiff, then judgment is to be entered for him for 56*l.* 13*s.* 4*d.* and costs; but if the court find for the defendants, then judgment is to be entered for them with costs.

After hearing argument the Divisional Court gave judgment in favour of the plaintiff.

The defendants appealed.

Edwyn Jones, for the defendants, repeated the arguments used in the court below. He cited

Porteous v. *Watney*, 4 Asp. Mar. Law Cas. 34; 39 L. T. Rep. N. S. 195; 3 Q. B. Div. 534;
Gray v. *Carr*, 1 Asp. Mar. Law Cas. 115; 25 L. T. Rep. N. S. 215; L. Rep. 6 Q. B. 522;
Sanguinetti v. *Pacific Steam Navigation Company*, 3 Asp. Mar. Law Cas. 300; 35 L. T. Rep. N. S. 658; 2 Q. B. Div. 228.

Synnott, for the plaintiff, was not called upon to argue.

Lord Coleridge, C.J.—I must say that I think this case becomes perfectly clear when the document upon which the action is founded is critically considered. Now, the action is brought upon the contract contained in the bill of lading, which contains these words, "consignee paying freight and all other conditions as per charter-party. Here, then, the express contracts contained in the charter-party as to the payment of freight and demurrage are incorporated into the bill of lading and bind the consignee just as much as if the very words of the charter-party with respect to this had been written into the bill of lading. But then it is said that there is a condition in the charter-party providing for a cesser of the liability of the charterers as soon as the cargo is on board, and that this cesser clause must likewise, by the words I have referred to, be taken to be incorporated into the bill of lading; it is also said that here the charterers and the consignee are the same persons, and that therefore by virtue of the cessor clause their liability ceased as soon as the vessel was loaded. Now, it is true that the charter-party contains such a cessor clause, and it is also true that the charterers and consignees are the same persons, but it seems to me that you cannot incorporate, by means of these words in the bill of lading, such of the conditions contained in the charter-party as are inconsistent with the bill of lading; the bill of lading must incorporate such parts of the charter-party as are consistent with it. Now, it would be quite inconsistent with the contract of a bill of lading that the liability of the consignee to pay freight and demurrage should cease upon the loading of the vessel, and therefore, when there is an express contract in the charter-party providing for this payment, I think it is impossible to incorporate into a bill of lading which refers to the charter-party an inconsistent cesser clause providing for the ceasing of that liability. I think that this appeal must be dismissed.

Brett, M.R.—In this case there was a charter-party signed by R. A. and J. Stewart Brothers, as charterers, and probably it was so signed by them as to make them liable upon it, if it were not for the cesser clause contained in it. But Messrs. Stewart being only agents for other parties, a cessor clause, providing for the ceasing of their liability on the charter-party, is inserted. Now, if the charterers had done nothing more, then of course their liability on the charter-party would have ceased, in the terms of the cesser clause, upon the loading of the vessel. But they did something more; the goods being shipped, they took two bills of lading, by which the goods were deliverable at the port of discharge to them or their assigns. Now, that contract upon the bill of lading, it must be borne in mind, is quite distinct from the contract upon the charter-party; by the bill of lading the defendants contract not as charterers but as shippers, and it is upon the contract contained in the bill of lading to pay freight and demurrage, by incorporation from the charter-party, they are sued. Therefore we must have regard to the contract contained in the bill of lading only. Now, if every word which ought to have been incorporated out of the charter-party into this bill of lading had been written therein, then it becomes absurd to suppose the cesser clause could possibly have been written into this bill of lading, because the effect of that cesser clause would be to make every part of the contract on the bill of lading cease the moment the bill of lading was given. That would be absurd. Then, how much of the contract contained in the charter-party must be read into this bill of lading? Clearly, as much of it as is consistent with the contract of the bill of lading. Now, there is a contract in the charter-party for the payment of freight and demurrage which is consistent with the bill of lading, and must therefore be read into it, under the words in the bill of lading which incorporate the charter-party; and, therefore, I think the defendants are liable upon the contract made in the bill of lading. I think the decision of the Divisional Court was right and must be affirmed.

Bowen, L.J.—I think this case is quite clear. The contract sued upon is the contract made by the terms of the bill of lading. That document provides that the goods shall be deliverable to the defendants or their assigns, &c., he and they paying freight and all other conditions as per charter-party." That seems to me to incorporate the charter-party to some extent—the question is to what extent? Surely the answer must be to the extent of incorporating all that can properly be incorporated without destroying the bill of lading. But the cesser clause cannot be incorporated without making the whole bill of lading

useless, and therefore I think it cannot be read into the bill of lading.

Appeal dismissed.

Solicitors for the plaintiff, *F. Venn* and *Co.*, for *Collins, Robinson*, and *Co.*

Solicitors for the defendants, *Kearsey, Son* and *Hawes.*

Nov. 21, 23 *and Dec.* 21, 1883.

(Before Brett, M.R., Baggallay and Bowen, L.JJ.)

Ocean Steamship Company *v.* Anderson, Tritton, and Co.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Voluntary sacrifice to save ship and cargo—Towage agreement—General average contribution—Liability of owners of cargo.

Where the captain of a ship which is in danger, in order to save a ship and cargo, agrees to pay a sum of money, for assistance, if it is reasonable to make the agreement and the amount paid is under the circumstances reasonable, the shipowner is entitled to recover a general average contribution from the owner of the cargo, although the agreement under which the money is paid is a towage, and not a salvage, agreement.

A ship was aground and in peril, and the captain signalled to another ship and obtained assistance, whereby the ship and cargo were saved. An arrangement existed, which was known to the captain when he signalled, and to which the owners of both ships were parties, that for services rendered under such circumstances a sum of 2500*l. should be payable in all cases, whether the services proved beneficial or not.*

In an action by the shipowners against owners of cargo to recover a general average contribution in respect of the sum of 2500*l. so paid, the jury found that what the captain did was reasonable, and that the sum paid was reasonable under the circumstances.*

Held that, as the 2500*l. was payable whether the services rendered proved beneficial or not, the agreement was a towage agreement, but that, as there was extraordinary danger and the payment was a voluntary sacrifice made in order to save the ship and cargo, it gave rise to a general average contribution, and the plaintiffs were entitled to recover.*

Judgment of Grove, Lopes, and Mathew, JJ. reversed.

This action was brought by the plaintiffs, the owners of the steamer *Achilles* against the defendants, who were owners of a portion of the cargo, to recover a sum of 162*l.* 11*s.* 7*d.*, alleged to be due as a general average contribution. The *Achilles* ran aground on a bank in the Hankow river, in China, and her captain, finding that the ship and cargo were in danger, signalled for assistance to the captain of another steamer called the *Shanghai.* The *Shanghai* came to the assistance of the *Achilles*, and after some difficulty succeeded in getting her off the bank, and the ship and cargo were saved. A claim was afterwards made on behalf of the owners of the *Shanghai* against the owners of the *Achilles* for a sum of 2500*l.*, alleged to be due for the services rendered by the *Shanghai* in consequence of an arrangement existing between the owners of different ships trading on the Hankow river, and to which both the plaintiffs and the owners of the *Shanghai* were parties. The effect of this arrangement was that a charge of 2500*l.* should be made in all cases for assisting ships which were in distress on the river for any period not exceeding twenty-four hours; this sum was payable whether the services rendered proved beneficial or not. The captain of the *Achilles* was aware of the existence of this agreement when he signalled for assistance. The plaintiffs having paid the sum of 2500*l.* to the owners of the *Shanghai* sued the defendants to recover the sum of 162*l.* 11*s.* 7*d.* as a general average contribution in respect of their proportion of the cargo. The defendants denied that the amount claimed was due, but paid a smaller sum into court.

At the trial before Cave, J. the jury found that the captain of the *Achilles* intended to make the plaintiffs liable to pay the 2500*l.*, and that he signalled to the *Shanghai*, knowing that this was the charge for assistance, and, further, that what he did was a reasonable course for him to pursue, and that the charge of 2500*l.*, was reasonable under the circumstances.

Cave, J. gave judgment for the plaintiffs. The Divisional Court (Grove, Lopes and Mathew, JJ.) directed judgment to be entered for the defendants, and the plaintiffs appealed.

Nov. 21 *and* 23, 1883.—The appeal was argued by *H. Matthews*, Q.C. and *Gainsford Bruce* (*H. D. Greene* with them) for the plaintiffs (apps.), and by *Cohen*, Q.C., and *J. G. Barnes* for the defendants (resps.).

The arguments, so far as they relate to the point of law decided are sufficiently noticed in the judgments. The following authorities were referred to:

Kemp v. *Halliday*, 2 Mar. Law Cas. O. S. 370; 14 L. T. Rep. N. S. 762; L. Rep. 1 Q. B. 520; 34 L. J. 233, Q. B.;
Birkley v. *Presgrave*, 1 East, 120;
Newman v. *Walters*, 2 B. & P. 612;
The True Blue, 2 Wm. Rob. 176;
Moran v. *Jones*, 7 E. & B. 523;
The Pyrennee, Br. & Lush. 189;
The British Empire, 6 Jur. 608;
The Medina, 3 Asp. Mar. Law Cas. 305; 35 L. T. Rep. N. S. 779; 1 Prob. Div. 272;
The Peace, Swabey, 115;
The E. U., 1 Spinks Ecc. & Adm. Rep. 63;
Aitchison v. *Lohre*, 4 Asp. Mar. Law Cas. 168; 41 L. T. Rep. N. S. 323; 4 App. Cas. 755;
MacAndrews v. *Thatcher*, 3 Wall. (Sup. Ct. U. S.) 347. (*a*)

Cur. adv. vult.

(*a*) Reported by P. B. Hutchins, Esq., Barrister-at-Law.

(*a*) On reference to this case we find that Clifford, J. is there reported to have said on the question raised in this case as follows: "The settled rule is, that when the ship is accidentally stranded in the course of her voyage, and by labour and expense she is set afloat and completes her voyage with the cargo on board, the expenses incurred for that object, as it produced benefit to all, so it shall be a charge upon all, according to the rates of apportioning general average." This proposition appears to cover the present case, and it is to be noticed generally that the tendency of the American decisions seems to be to consider such expenses as those incurred in the present case to be within general average, while the English authorities on the whole appear to incline to the other view. The expediency and justice of holding the present sacrifice to be general average are obvious; and moreover it is important to notice that the three great requisites necessary to bring a sacrifice within general average are present, viz., that the sacrifice should be voluntary, necessary and effectual. The mere fact that th

Dec. 21.—The following judgments were delivered:—

Brett, M.R.—In this case an action was brought by shipowners against the owners of the cargo to recover a general average contribution. The case was tried before Cave, J. and a jury, and at the trial it was proved that the plaintiffs' ship had got aground on a bank in the river Hankow, in China, and was in such a position that the ship and cargo were in danger. The captain thereupon signalled to another ship which came to his assistance, and ultimately towed the plaintiffs' ship off the bank, and so saved the ship and cargo. It was also proved that there existed an old agreement between the owners of different ships in the river Hankow, by which it was agreed that no assistance should be given by one ship to another for any less sum than 2500*l.* This no doubt is a large sum, but the fact of the existence of such an agreement shows the unusual danger of the river to both ships, that is, both to the ship requiring and to the ship affording assistance, so I think it is questionable whether we could say that it was an unreasonable agreement. In the present instance both captains were aware of the existence of the agreement; the captain of the plaintiffs' ship, who signalled, says he meant the owners of the other ship to be paid, and the other captain gave no indication that he did not mean to act on the agreement, and he had no right to risk his owners' ship by agreeing to give assistance to another ship on his own terms. The jury found there was an agreement to pay this sum of 2500*l.*, and I should say so too, if I had to decide the question, in the first place because it is impossible to say that the captain of the *Shanghai* meant to commit a breach of his duty towards his owners; but, secondly, if we were to suppose that he did mean this, he gave no indication of his intention. But the jury have found that there was an agreement to pay the money, and I agree with their finding. It is clear, to my mind, that there was a contract.

Then there arises a dispute as to the nature of the contract. For the plaintiffs it is urged that it was a salvage contract, and that there must be contribution, while on the other side it is said that it was a towage contract, and that there can be no contribution. I am of opinion that, as the sum of 2500*l.* was to be paid, whether the vessel was towed off the bank or not, therefore it was a towage contract. Then there remains the question whether contribution can be payable in the case of a contract for towage. The owners of the ship which was assisted could not get contribution from the owners of the cargo unless they themselves were bound to pay the money demanded from them as the price of such assistance. We must consider the following questions. Did the contract bind the owners of the ship which was assisted? Did the circumstance authorise the making of a contract? Was it a reasonable contract? It is not a reasonable contract unless the circumstances were such as to make it reasonable to make a towage contract, and unless the amount is reasonable. The jury have found that it was reasonable in both these respects, and I agree with their finding. This being so, can it give rise to a general average contribution? Wherever there is extraordinary danger, and a voluntary sacrifice is made in order to save ship and cargo, and both are saved, the party making such sacrifice is entitled to call on the other party for a general average contribution. The present case comes within that proposition, and I know of no authority which says that such a towage contract is not the subject of general average. Therefore, although I think this was a towage contract, I nevertheless think the plaintiffs are entitled to a general average contribution. The point was not taken in the Divisional Court, where it was held that, notwithstanding the verdict of the jury, there was no contract at all. For the reasons I have given, I am of opinion that the plaintiffs are entitled to judgment, and that this appeal ought to be allowed.

Baggallay, L.J.—I am of the same opinion. There are four questions: First, was there an agreement made; secondly, was it reasonable to make an agreement; thirdly, were the terms of the agreement reasonable; and, fourthly, was the expenditure justified? I think all these questions should be answered in the affirmative.

Bowen, L.J.—I am of the same opinion. In the first place, was there an agreement to pay this sum of 2500*l.*? The captain of the plaintiffs' ship knew that his owners would have to pay it, and as against this all that can be said is that, although everyone else knew that the services were to be paid for, the captain of the ship which rendered those services had an idea that the owners would not charge for them. If he had communicated this idea to the plaintiffs' captain there might have been some foundation for the respondents' contention, but he concealed it, and therefore this idea of his is wholly immaterial. For the reasons given by the Master of the Rolls, I think there was a contract, and that it was a towage contract, and the jury thought it was right that such a contract should be made, and therefore the contract was binding. There was a general average act, for there was a voluntary sacrifice, and therefore I think the owners of the cargo are bound to contribute. The point was not made in the court below, nor was it made effectually in this court until the reply.

Judgment reversed.

Solicitors for plaintiffs, *Flux, Son,* and *Co.*

Solicitors for defendants, *Waltons, Bubb,* and *Walton.*

---

sacrifice, if it possesses these characteristics, is towage and not salvage, seems immaterial. Of course where there is salvage the presumption that there was extraordinary danger to justify the sacrifice is stronger than in the case of towage, which usually is a mere incident in the carriage of the goods, and which *primâ facie* it is the duty of the shipowner to provide at his own expense. It is, however, clear that the towage service here rendered does not in any sense come within the ordinary course of navigation, a fact which obviates the difficulty that not unfrequently arises under circumstances like the present in determining whether the alleged sacrifice was part of the shipowner's general duty to carry the cargo safely to its destination. If so, it not being a sacrifice, but a duty, the cargo owner cannot be made liable to a general average contribution.—Ed.

Feb. 25, 26, *and* 27, 1884.

(Before Brett, M.R., Baggallay and Lindley, L.JJ., assisted by Nautical Assessors.)

The Margaret. (*a*)

ON APPEAL FROM BUTT, J.

Collision—Thames Conservancy Rules, art. 23—*Blackwall Point—Tide.*

Where a steamship in the river Thames having come out of dock, and being bound down the river finds herself with the tide against her on the bend of any of the points enumerated in art. 23 *of the Thames Conservancy Rules, where the river has begun to curve round, and those on board of her see another steamship in the reach below preparing to round the point with the tide, the first steamship is bound by the* 23*rd article to ease her engines and wait until the other vessel has passed clear.*

Art. 23 *of the Thames Conservancy Rules applies during the whole time a steamship is rounding against the tide any of the points therein enumerated, and is not confined to the case of a vessel in the reach adjoining the point, and before she has begun to round it, sighting another vessel in the reach on the other side of the point.*

The words "rounding a point," as used in art. 23 *of the Thames Conservancy Rules, begin to apply when a vessel having to round is obliged to use her steering gear for the purpose of continuing her course round it, and cease to apply when that necessity terminates.*

This was an appeal by the defendants in a damage action *in rem* from a decision of Butt, J., in which he found that the steamship *Margaret* was alone to blame for a collision between the *Margaret* and the steamship *Clan Sinclair* in the river Thames on the 9th March 1883.

The facts were that the *Clan Sinclair*, having come out of the South-West India Docks on the bend of Blackwall Point, proceeded down river under her own steam with a tug ahead at a speed of three to four knots through the water against a flood tide of two to two and a half knots. The *Margaret* was coming up the river, and when in Bugsby's Reach the masts of the *Clan Sinclair* were seen over the land on the port bow. The *Margaret* proceeded to round the point under a starboard helm, and on approaching the *Clan Sinclair* attempted unsuccessfully to pass port side to port side, and the two vessels came into collision. The *Clan Sinclair* failed to reduce her speed till immediately before the collision, when her engines were stopped and reversed.

The further facts of the case are fully set out in the report of the case below: (*ante*, p. 137; 49 L. T. Rep. N. S. 332; 8 P. Div. 126.)

Butt, J. had found that art. 23 of the Thames Conservancy Rules did not apply to the circumstances of the case, and that, assuming it did, the *Clan Sinclair* had complied with it so far as was possible.

The rules for the navigation of the river Thames referred to are as follows:

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.

22. When two steamships 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 . . . . Blackwall Point, ease their engines, and wait until any other vessels rounding the point with the tide have passed clear.

Webster, Q.C. and *Hall*, Q.C. (with them Dr. *Phillimore*) for the appellants, the owners of the *Margaret*.—The interpretation put by the learned judge below upon rule 23 of the Thames Conservancy Rules, is wrong. The rule covers a case like the present where those on the *Clan Sinclair*, while she is on the point, sight the *Margaret*, about to round the point with the tide. If the rule applies, she has failed to comply with it, inasmuch as she did not ease and wait within the meaning of the rule. Moreover, the *Clan Sinclair* failed to comply with rule 22, which directs that ships, one going up and the other down the river, when approaching so as to involve risk of collision, shall pass port side to port side.

Russell, Q.C. and *Myburgh*, Q.C. (with them *Hollams*) for the respondents, the owners of the *Clan Sinclair*.—The 23rd rule says that vessels "before rounding the following points" shall ease and wait. In this case the *Clan Sinclair* had already commenced to round the point, and therefore the rule does not apply:

The Libra, 4 Asp. Mar. Law Cas. 439; 45 L. T. Rep. N. S. 161; 6 P. Div. 139.

Assuming the rule applied, the *Clan Sinclair* complied with it, seeing that she was going as slow as was possible under the circumstances.

Brett, M.R.—In this case the owners of two vessels bring cross-actions in respect of a collision off Blackwall Point in the Thames, and the learned Judge of the Admiralty Division, assisted by Trinity Masters, has found that, in respect of the collision, the *Margaret* was solely to blame, and that the *Clan Sinclair* was not at all to blame. It becomes necessary to consider what are the rules of navigation applicable to the two vessels. This is a collision in the Thames off what is called Blackwall Point. Now, the navigation of steamships off Blackwall Point is partly to be governed by the 23rd rule of the Bye-laws for the Navigation of the River Thames. The question to be considered is, What is the meaning of the rule which says that "steam-vessels navigating against the tide shall, before rounding the following points, viz.: . . . . Blackwall Point, ease their engines, and wait until any other vessels rounding the point with the tide have passed clear"? It seems to me that the first thing to be considered is, what is the meaning of "point?" Now, it is clear that the officers of this vessel knew what was meant. This is a nautical rule, and is written, therefore, in nautical language, and it is written with regard to a winding river where there are what sailors call "points," that is, where the land goes from a straight line into the river, so that the river is obliged to wind round the point. Therefore the point is not a mathematical point, and it seems to me that the proper way of defining the "point," under these circumstances, is this: that the point begins where a vessel having to go round it, either up or down the river, would, if there were nothing in the way, be obliged to use its steering gear for the purpose of continuing her course, and that it ends where the

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

necessity of using the steering gear ceases. Therefore the point lies within the limits.

The next question is, what is the meaning of "before rounding the following points"? Is it before a vessel begins to round, or is it before she has finished getting round, what I call the point? It seems to me that it applies from the time when, if there was nothing in the way, a vessel begins to use her steering gear for the above purpose, and ends at the place where she would cease using her steering gear and would go straight on her course as before. Therefore, where the vessel is going against the tide, it seems to me that the words "before rounding" mean before the vessel has finished rounding the point in the sense in which I have described the point—that is to say, that the rule applies, not only before the vessel begins to round the point, but it applies during the whole time that she is rounding it. In the case of *The Libra* (*ubi sup.*), the circumstances were, that the vessel navigating against the tide sighted the other, while in the reach above the point, and before she had begun to round. It is now suggested that the rule does not apply to the circumstances of the present case, because it is said that this court said in *The Libra* that the rule would not apply to the case of a vessel already on the point. That does not seem to me to be the effect of the decision in *The Libra*. I think that the rule applies, even if the vessel is on or off the point, at the time when those on board of her ought first to see the other vessel. The application of the rule must of course differ according to circumstances. Now, clearly, if the vessel is not already on or off the point she ought, as much as she can, not to go on to the point until the other vessel comes round and is clear. But if she is already on the point what is she to do? She cannot then stay so as to enable the other vessel to have cleared the whole point before she clears it herself. It seems to me, therefore, that she ought, under those circumstances (it is a little difficult to express it), to remain as nearly as she can in the same place with respect to her course up and down the river. I do not say that if she is in the middle of the river she is bound to stay in mid-river, or that if she is on one side of the river she is bound to stay on that side; but she is bound not to go further than she can help on a course which, if she goes on, will be taking her further round the point. If that be so, in order to obey this 23rd rule, under the circumstances of the present case, the *Clan Sinclair* should not have gone lower down the river, when she ought first to have seen the *Margaret*, than it was necessary she should go so as to enable her to be safe both as to herself and other craft. I mean to say that she was not bound to stop so as to lose all command over herself and thus become a source of danger to herself and other vessels. The rule does not say "stop," but "ease," and the question is, how much ought she to have eased. I think that, being in the position she was, she ought to have eased so much as to prevent herself, as far as she could with safety, from going down the river farther than was necessary. If she had eased as the learned judge and The Trinity Masters in the court below found, that is, if she had eased as much as she could with safety, I should think she obeyed the rule. But if she did not ease as much as that, then I think she disobeyed the rule. This is a very strict reading of the rule, but, as I understand it, it ought to be read so in order to prevent collisions off these points, which are precarious points for navigation in the river.

Now, reading the rule in this way, the next question to consider is, whether this rule replaces other rules. To my mind, as I said in the case of *The Libra* (*ubi sup.*), it does not. If the circumstances of the case are such that any other rules would apply, I think they apply on these points or off these points just as much as if the vessel were anywhere else. But, as a fact, if a ship is brought as near to a standstill as she can be with safety, it will be found difficult, so far as she is concerned, to apply any other rules to her. They may or they may not apply. It having been said that the *Clan Sinclair* ought to have stopped so as to take all way off her, I put the question to our assessors, because, if she could have brought herself to a dead stop with safety, I should say she ought to have done so. Therefore, I put this question: "Could the *Clan Sinclair*, with safety to herself and the navigation of the river—assuming that she had little way on her at the beginning—do more than reduce her speed, so as to keep her engines moving her to enable her to steer?" They answer, "No." She was not bound therefore, to bring herself to such a standstill. If she did all that could be done with safety to keep herself in the same place in which she was with respect to her position up and down the river, then she did all that was required of her. The learned judge and the Trinity Masters have found that she did that, and if we can uphold that finding, then his decision is right. Now, there seems to me to be evidence in words in support of either view of the question. I mean there is evidence in words as to the number of minutes and as to the distances traversed in those minutes, and as to the opinions and views of people looking on. If the only evidence had been that evidence in words, inasmuch as there is a conflict of evidence, I do not think we could have overruled the finding of the learned judge; but it seems to me that there are facts which determine that conflict of evidence in words. Upon that I have asked the gentlemen who assist us this further question, "Is there anything in the nautical facts of this case to make you differ from the learned judge and the Trinity Masters in finding that from the time the *Clan Sinclair* left the dock until the collision she did no more than keep her engines merely moving?" They answer that the nautical facts of the case show that this vessel did more than keep her engines merely moving. Then I put them this question, so as to make the matter perfectly clear, "Could the *Clan Sinclair* have gone slower, and yet kept herself under command?" They answered that she could. If so, it seems to me that she broke the 23rd rule, according to the strict interpretation that I have put upon it, because she, as a fact might have kept herself higher up the river than she did between the time when she ought to have first seen the *Margaret* and the time of the collision. A great deal has been argued about the want of a look-out. As far as my judgment is concerned, I think the *Margaret* ought to have been seen sooner than she was. But I do not think it makes any difference in the decision, for, assuming she ought not to have been seen sooner than she in fact was, even upon that

assumption our assessors do not think that the *Clan Sinclair* did all she possibly could to wait in the river where she was, so as to keep herself from meeting the *Margaret* on or off any part of the point sooner than she did. Therefore, although I think it is very strict law as applied to the *Clan Sinclair*, because, according to all the ordinary rules of navigation I cannot see that she did anything wrong, but think she was, as a fact navigating with all the care that was necessary, yet, beccause she has broken this rule according to its strict interpretation, I think she must be held partly to blame for this collision. I put this strict interpretation upon the rule because I think it was intended that it should be construed strictly, and also because I think it is right that the court should hold a very firm hand over sailors who are navigating this river, in order to prevent, if possible, two vessels coming near each other at all whilst they are off these difficult points of navigation.

With regard to the *Margaret* I have no doubt that her navigation was of the most rash description. It seems to me clear that she broke the rule which says that when a steamship is approaching another ship so as to involve danger of collision, she ought to stop and reverse. That does not mean that she ought to stop and reverse at the last moment, but that she ought to do so the moment the danger is disclosed. It is clear to my mind that she did not, but came on as nearly as possible at the same pace till the collision. The rule applied the moment there was danger of collision, whether or not she was on or off the point. But I am not at all prepared to say that the rule of passing port side to port side does not apply off these points. It may or may not. It is difficult to say that if a vessel going against the tide has brought herself to such a standstill as to be only just under command the rule is to apply to her. Unless she is stopped at some particular part of the point the rule can hardly apply. For instance, if the *Margaret* had come round under a sharp starboard helm, the two vessels would never have been in a position to pass port side to port side. The result is, with regard to the *Clan Sinclair*, that she has, by breaking the 23rd rule in its strictest interpretation, made herself partly to blame, and, although the *Margaret* was ten times more to blame, nevertheless the legal result is that the damages between the two vessels are to be calculated according to the ordinary mode of calculating such matters. According to the rule we have laid down, each party must bear their costs, both in the court below and on appeal.

BAGGALLAY, L.J.—I concur in the judgment of the Master of the Rolls. As to rule 23, I may say that I think it by no means a clear rule, and one couched in terms too vague and general. The question which arises on reading it is, what is a point? As to that, I think the definition given by the Master of the Rolls is correct It scems to me that it commences, when a vessel begins to use her steering gear for the purpose of getting from one reach to another, and ends when the necessity for so doing ceases. Then what does "wait" mean? It does not mean to come to an actual standstill, but rather means to go as slow as is consistent with safety. Now, I am strongly of opinion that the *Clan Sinclair* did more than keep her engines merely moving, and I may say that I do not think the navigation of the *Clan Sinclair* was so careful as the Master of the Rolls does. I however agree that the *Margaret* was also much in fault, and therefore the result is that both must be held to blame.

LINDLEY, L.J.—I also concur. It is clear from the established facts of the case that the *Clan Sinclair* did more than merely keep her engines moving. She therefore did not ease and wait within the meaning of the rule. That being so, I think she was to blame.

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

Solicitors for the defendants, *Freshfields* and *Williams*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Tuesday, March 11, 1884

(Before DAY and SMITH, JJ.)

TATTERSALL *v.* NATIONAL STEAMSHIP COMPANY LIMITED. (*a*)

Bill of lading—Limitation of liability—Neglect of duty to provide a ship fit for its purpose.

Certain cattle were shipped on board a steamer for conveyance from London to New York under a bill of lading which provided "that these animals being in sole charge of shippers' servants, it is hereby expressly agreed that the National Steamship Company, or its agents or servants, are as respects these animals in no way responsible either for their escape from the steamer or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than 5l. for each of the animals."

Held that the above clause limiting the liability of the shipowners to 5l. for each of the cattle did not apply to loss or damage arising from a breach of the shipowner's duty to provide a ship fit for its purpose as it only applied to matters occurring during the voyage, and that therefore the defendants were liable for the cattle being infected with foot-and-mouth disease, which was occasioned by the negligence of their servants in not cleansing the ship before receiving the cattle on board.

THIS was an action brought by the plaintiff as owner of certain cows to recover from the defendants damages alleged to have been sustained by the plaintiff through the said cows having caught the foot-and-mouth disease whilst being carried in the defendant's steamer from London to New York.

In pursuance of a judge's order the following case was stated for the opinion of the court.

On the 6th Jan. 1881 the plaintiff shipped on board the defendant's steamer *France* ten head of cattle, amongst other animals, to be carried from London to New York, upon the terms contained in a bill of lading.

During the voyage some of the cattle were affected with foot-and-mouth disease, and were so affected on being landed at New York.

On her voyage from New York to London immediately preceding the voyage in question, the

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

France had on board cattle affected with foot-and-mouth disease, and it was admitted, for the purposes of the case that the plaintiff's cattle caught the foot-and-mouth disease while on board the *France*, owing to the negligence of the defendants' servants in not properly cleansing and disinfecting the steamer before receiving the cattle on board and signing the bill of lading. By reason thereof the plaintiff sustained damage amounting to more than 5*l.* for each of the said cattle.

The question for the court was whether or not in the circumstances the defendants were liable for more than 5*l.* for each of the said cattle.

The following were the material parts of the bill of lading:

Shipped upon the *France* eight stallions, twenty-six mares, six colts, and ten cows, seven dogs, to be delivered (subject to the following exceptions and conditions): These animals being in sole charge of shippers' servants, it is hereby expressly agreed that the National Steamship Company, Limited, or its agents, or servants, are, as respects these animals, in no way responsible for either their escape from the steamer or for accidents, disease, or mortality, and that under no circumstances shall they be held liable for more than five pounds for each of the animals; all dogs to be placed wherever the captain may appoint, but at the sole risk of the shipper and (or) owner; the act of God, the Queen's enemies, pirates, robbers, thieves by land or at sea, barratry of masters or mariners, restraint of princes, rulers, or people; loss or damage resulting from heat, boilers, steam and steam machinery, including consequences of defect therein, or damage thereto, collision, stranding, straining, or other perils of the seas, rivers, steam and steam navigation; and all damage, loss, or injury arising from the perils or matters above mentioned, and whether such perils or matters arise from the negligence, default, or error in judgment of the pilot, master, mariners, engineers, stevedores, or other persons in the service of the shipowner.

Petheram, Q.C. (*J. C. Erle* with him) for the plaintiff.—The bill of lading came into operation when the cattle were put on board. It is admitted that the ship was infected, and infected through the negligence of the defendants. The limitation of liability to 5*l.* only applies to the causes of loss or damage expressly mentioned in the bill of lading and arising during the voyage. In all other cases of loss or damage the parties are remitted to their common law rights. The words "disease or mortality" mean disease or mortality in ordinary cases, that is, caused by ordinary circumstances. The loss here arose from negligence prior to the voyage, and so the bill of lading does not exempt the defendants from full liability:

Steel v. *State Line Steamship Company*, 3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. N. S. 333; 3 App. Cas. 72.

J. Fox for the defendants.—It is conceded that the defendants are not protected from liability for disease if caused by their negligence. But the defendants are not liable beyond 5*l.* per head of cattle. A shipowner can make a contract that he will not be liable for the negligence of his servants, and this will cover negligence before or after the commencement of the voyage. Therefore a shipowner is in much the same position as a railway company was in before the passing of the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31), s. 7. Hence the cases that affect the liability of a railway company before that Act are relevant, and these cases show that the fact that the act of negligence occurred before the transit commenced makes no difference. *McManus* v. *Lancashire and Yorkshire Railway Company* (33 L. T. Rep. O. S. 259; 4 H. & N. 327), was a case decided after the passing of that Act, but if the special contract had been made before the Act the court would have held that the defendants were not liable. The words of exemption in that case were, "damage or injury however caused," which correspond with the words, "under no circumstances," used in the present bill of lading. In that case the horse-box was insufficient for its purpose, and so the negligence occurred before the commencement of the journey; and yet, except for the Act, the court would have held the defendants free from liability. *The Warkworth* (*ante*, p. 194; 49 L. T. Rep. N. S. 715; 9 P. Div. 20) also shows that the negligence contemplated in this bill of lading may include negligence prior to the voyage. The saving clause in the bill of lading exempts the defendants from liability for the negligence of any person in their service. This includes the crew in the ship, and also the servants on shore, and this is shown by the introduction of the word "stevedores" in the clause, as their duties are performed before the voyage commences. The defendants, therefore, are not responsible to a greater extent than 5*l.* per head for disease however caused, even by negligence before the commencement of the voyage. He also cited

Brown v. *Manchester, Sheffield, and Lincolnshire Railway Company*, 8 App. Cas. 703;
Shaw v. *York and North Midland Railway Company*, 13 Q. B. 347; 18 L. J. 181, Q. B.

Day, J.—In this case I am of opinion that judgment should be entered for the plaintiff. It is quite clear, according to the opinion of Lord Blackburn in *Steel* v. *State Line Steamship Company*, that where there is a contract to carry goods in a ship there is a duty on the part of the shipowner to furnish a ship that shall be reasonably fit for its purpose, unless there is a contract or agreement to the contrary. Now, the ship in this case was not reasonably fit for its purpose, and hence there was a breach of duty in this respect on the part of the defendants, and in consequence of that breach of duty the plaintiff has suffered damage. But it is said that 5*l.* for each of the animals is all that the plaintiff is entitled to. I have looked in vain through the bill of lading for words which restrict the amount for which the shipowner is liable by reason of his breach of duty to provide a ship fit for its purpose. The bill of lading applies to the carriage of the cattle, but does not by its terms deal with a breach of duty on the part of the shipowners to provide a fit ship for the carriage of the cattle. If the damage had occurred through sea perils by reason of the defendants' negligence, during the course of the voyage, in a ship originally fit for its purpose, then I agree that the limitation of 5*l.* a head would have applied. But these cattle were not damaged by any thing occurring during the course of the voyage, but by reason of the defendants' servants neglecting their preliminary duty of seeing that the ship was fit for the purpose for which it was used. The defendants, therefore, have been guilty of a breach of duty from which damage has happened to the plaintiff, and so we must answer the question in favour of the plaintiff.

Smith, J.—This is an action by the plaintiff against the National Steamship Company to

recover damages for injuries to his cattle, and the question arises as to the true meaning of a very special bill of lading; that is, special in the sense that is applied to a special class of goods, namely, horses, cows, and dogs; and the question which we have to determine is, whether the plaintiff is entitled to recover more than 5*l.* for each of the animals. It is conceded that the damage arose through the shipowners' negligence in allowing their ship to become infected before the voyage commenced. Now, it was the duty of the shipowners to have their ship in a fit state for the purpose for which it was to be used: (*Steel* v. *State Line Steamship Company, ubi sup.*) That, then, being their duty, does the bill of lading exempt them from liability for breach of that duty? In my opinion, certainly not. The bill of lading deals with the contract of carriage from London to New York, and it does not by its terms deal with anything that took place before the commencement of the voyage. Mr. Fox argued that because the word "stevedores" is introduced into the clause in the bill of lading exempting the defendants from liability arising from the negligence of their servants, and because the stevedore is a landsman engaged on duties that arise before the commencement of the voyage, therefore the negligence contemplated by the bill of lading would include negligence arising before the voyage commenced. But the word "stevedore" is introduced because the stevedore may very often have been negligent in packing or stowing the goods, and damage may result therefrom, owing to perils of the sea during the voyage; so this argument in no way advances Mr Fox's case. Then it is said that as under the bill of lading the animals were in the sole charge of the shippers' servants, the steamship company were to be in no way responsible for disease or mortality, and under no circumstances whatever creating any liability were they to be liable for more than 5*l.* per head. Now, it is conceded that the words "in no way responsible for disease or mortality," mean in no way responsible unless the disease or mortality is brought about by the negligence of the master or crew. Then follow the words, "under no circumstances shall they be liable for more than 5*l.* for each of the animals;" and in my opinion the whole passage ought to read thus: The steamship company are in no way responsible for disease or mortality, unless it is brought about by the negligence of the master or crew during the voyage, and even then they shall not be liable for more than 5*l.* per head. This seems to me the proper reading of this bill of lading, and as this disease was caused by neglect to provide a ship reasonably fit for its purpose before the voyage commenced, the damage is not limited to 5*l.* per head, and the question asked of us must be answered in the affirmative. There must, therefore, be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Bailey, Shaw,* and *Gillett.*

Solicitors for the defendants, *Parker, Garrett* and *Parker.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Thursday, Dec. 20, 1883.

(Before Butt, J.)

The Immacolata Concezione. (*a*)

Priority of liens — Wages — Necessaries—Subsistence money—Viaticum—Possessory lien—Costs.

Material men who have a possessory lien on a foreign ship are entitled to be paid out of the proceeds of the sale of such ship in priority to other material men having no such lien, notwithstanding that the latter have recovered judgment against the ship before the material men having the lien have recovered judgment against the ship.

Where, owing to the proceedings of one of several claimants against a ship, she is sold and the proceeds paid into court, so as to be available for all the claims, the party at whose instigation the ship is sold, though his claim is postponed after the others, will have his costs up to and inclusive of the sale.

As against material men having a possessory lien a mariner's claim for wages earned before that lien commenced, viaticum, subsistence money for the time between leaving the ship and returning home, and the costs of the action to recover such wages, &c., rank before the claim of the material men, but aliter as to the claim for wages earned after the possessory lien commenced.

This was a special case stated by the registrar for the opinion of the court as to the order in which the several claims against the foreign steamship *Immacolata Concezione* were to rank. The ship had been sold in the action (mentioned below) instituted in the City of London Court, by Walker and Co., and the proceeds, amounting to 2328*l.* 6*s.* 7*d.*, paid into court. This sum was insufficient to satisfy the various claims against the ship.

The special case was as follows:—

1. The *Immacolata Concezione* is a foreign steamship, and one of which no owner or part owner was at any of the dates hereinafter mentioned domiciled in England or Wales.

2. On the 15th Sept. 1882, Edmund Walker and others instituted a suit against the steamship in the City of London Court to recover the sum of 105*l.* for necessaries supplied to the said steamship. At the time of such supply and of the institution of such suit the said vessel was in the graving dock of Alfred Carter as hereinafter mentioned, and within the jurisdiction of the said court. The said steamship was arrested in the said dock on the 15th Sept. 1882 by the bailiff of the said court, and on the 20th Sept. 1882 Mr. Gaillard entered an appearance in the said suit as owner of the said steamship. The suit came on for trial in the City of London Court on the 11th Oct. 1882, and it was then adjudged that the plaintiffs do recover against the said Mr. Gaillard and the said steamship the sum of 105*l.*, together with the costs of action. On the 17th Oct. 1882 a warrant of execution was issued on the said judgment, and on the 27th Oct. 1882 the bailiff of the said court seized the said steamship under the said execution; copies of the said judgment and warrant of execution are annexed hereto and

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs. Barristers-at-Law.

form part of this case. The plaintiff paid fees to the high bailiff of the City of London Court for such arrest and execution of judgment, amounting to 16*l.* 7*s.*

3. By an order of this division of the High Court of Justice, made on the 3rd Nov. 1882, the bailiff of the City of London Court being still in possession of the said steamship under the said execution, the said suit was transferred as 1882, No. 2571, fo. 380, to the High Court of Justice, without prejudice to the rights of priority, if any, possessed by the said plaintiffs.

4. On the 31st March 1882, the steamship being then in the port of London and in need of repairs to hull and engines, was placed in the dry dock of the plaintiff Alfred Carter, by desire of A. Gaillard, the managing director of the company to which the said ship belongs, for the purpose of such repairs, it being arranged with the said A. Gaillard that Seaward and Co. should execute the engineering and iron work and the said Alfred Carter the shipwright's and wood work, and after the said steamship was put into the said dry dock work was done upon her in the dock by Messrs. Seaward and Co., and by the said Alfred Carter as hereinafter stated.

5. On the 18th Sept. 1882 the plaintiffs Seaward and Co. instituted an action 1882, S. No. 4198, fo. 327, in this division of the High Court of Justice, against the owners of the said vessel, claiming for certain equipments, repairs and necessaries made and supplied to the said vessel in and subsequent to the month of April 1882, to the alleged amount of 251*0l.* 4*s.* 3*d.* with interest from the 1st Aug. 1882 and costs. At the time of the making and supply of such equipment, repairs, and necessaries, and at the time of the institution of the said action, the said vessel was in the graving dock of Alfred Carter. The said plaintiffs arrested the vessel on the 18th Sept. 1882 while still in the said graving dock by a warrant of this court, and she remained under arrest of this court till the date of her sale by the court as hereinafter stated. On the 19th Dec. 1882 the said plaintiffs obtained judgment in this action subject to a reference as to the amount to the registrar and merchants together with costs, and the judge of this division condemned the said vessel in the amount due in respect of such claim, but without prejudice to other claims against the said vessel.

6. On the 21st Sept. 1882 the plaintiff Alfred Carter instituted an action in this division, 1882, C. No. 4674, fo. 331, against the owners of the said vessel, to recover the sum of 157*0l.* 10*s.* 3*d.* in respect of certain necessaries, alterations, and repairs supplied, made, and done by him to the said vessel in the months of April, May, and June 1882. The said plaintiff also claimed 69*6l.* for dock rent from the 1st April till the date of his bringing his action, and a further sum for dock rent from that time forward till judgment or removal of the said vessel. On the said 21st Sept. the vessel was arrested in this action.

7. The said plaintiff Alfred Carter is a shipwright, and is owner of a graving dock at Millwall in the county of Middlesex, and the said vessel was placed in his dock, as stated in paragraph 4, on the 1st April 1882, and remained in the said dock from the said 1st April 1882, when his work on her began, to the 24th June, when work on the vessel was discontinued, and thence-forward to the date next hereinafter mentioned, on or about the 26th Sept. the said vessel, which was then in possession of the marshal under the warrants dated the 18th and 21st Sept. 1882, and was also in the custody of the bailiff of the City of London Court under the warrant from that court, was by the order of the 25th Sept. 1882 removed by the marshal from the plaintiffs' dock into Millwall dock. Such order was expressed to be made without prejudice to the possessory lien of the said plaintiff Alfred Carter on the said vessel. The expenses of such removal were paid by the marshal and have been deducted by him from the proceeds of the sale. On the 19th Dec. 1882 the said plaintiff obtained judgment in favour of his claim subject to a reference as to the amount to the registrar and merchants, together with costs, and the judge condemned the said vessel in the amount due in respect of the said claim and costs, but without prejudice to other claims against the said vessel.

8. On the 31st Oct. 1882 the plaintiffs Corbriere and others the officers and crew of the vessel instituted an action 1882, C. No. 5089, fo. 391, in this division, claiming for wages and disbursements and passage home a total sum of 473*l.* 11*s.* 5*d.*, also a further claim to have their wages and disbursements allowed them from the date of the writ until payment of the principal sum claimed, together with any further sum found to be due. The dates during which the said master stated his wages to have been earned and his disbursements to have been made were from the 27th May to the 9th Oct. 1882, that is during the time that the said vessel was in the dry dock of the plaintiff Carter, or during her subsequent custody by the court. As regards the seamen, two of the said plaintiffs began their service on the 22nd Feb., and the remainder on the 27th March 1882; all the said seamen, save one who was paid off in September, stated that their services lasted till the 9th Oct. The said plaintiffs on the 30th Jan. 1883 obtained judgment, the said judge pronouncing in favour of their claim subject to a reference to the register and merchants, together with costs, and condemning the said vessel in the amount due in respect of their said claim, but without prejudice to other claims against the said vessel.

9. On the 12th March 1883 the plaintiffs Robertson and Co. instituted an action in this division, 1883, R. No. 603, fo. 132, against the owner of the said vessel, for necessaries supplied to the said vessel in the months of May and June 1882, to the amount of 39*l.* 6*s.*, and on the 19th March 1883 they served the writ on the assistant registrar, the proceeds of the sale of the said vessel being then in court, but they have not proceeded further therein.

10. The said vessel was on the 21st Nov. 1882, by an order made by the judge in action No. 2571, fo. 380, ordered to be appraised and sold, and all questions as to priority of payments out of the proceeds of such sale were reserved. The said vessel was accordingly sold, and the net proceeds of such sale now in court amount to the sum of 232*8l.* 6*s.* 7*d.*

12. The said sum in court being admittedly quite insufficient to meet the claims of all the plaintiffs in the above-mentioned actions, by direction of the registrar this case has been

stated so as to obtain the decision of the court on the questions of the priority of claims of the different plaintiffs before he should proceed to the references ordered in the said several judgments, and none of the references to the registrar and merchants ordered by the court have yet been held.

13. The owners of the said vessel entered appearances in the actions mentioned in the 2nd 4th, and 6th paragraphs of this case, but afterwards withdrew from them and abandoned their defence. L'Armament Compagnie Nationale D'Assurances on the 27th Oct. 1882 entered an appearance in each of the actions mentioned in the 2nd, 5th, and 6th paragraphs of this case claiming to be mortgagees of the said vessel, and defended such actions, The said mortgagees, who are a foreign corporation not carrying on business with the jurisdiction, were by the judgments in the said two actions No. 4198 and 4674 condemned in the costs occcsioned by their said intervention. The other actions in the High Court have been undefended.

14. It is admitted by all the parties to this special case that, subject to the rights of the plaintiffs in the suit instituted in the City of London Court under their execution the seamen are entitled to their wages earned up to the 2nd April 1882 in priority to the other claims but no further. The questions for the decision of the court are: (1) In what order the several claims of the several plaintiffs are to be paid out of the fund in court. (2) In what order the costs of the plaintiffs in the said several actions are to be paid. (3) How the costs of and incidental to this special case are to be borne.

Gainsford Bruce for Walker and Co.—Messrs. Walker have obtained judgment in a court of competent jurisdiction. None of the present claimants appeared in that action. They are bound by that action. If so, this court has no right to withhold from my clients what has been decreed to them by a competent court. [BUTT, J.—I do not at all agree with that proposition. The judgment in your favour entitles you to your money, provided there are no other claimants before this court who have prior claims to you.] At any rate Messrs. Walker should have the costs of their action. Had it not been for their action the ship could not have been sold. [BUTT, J.—Inasmuch as your proceedings have subserved the interest of the other parties, I think you are entitled to your costs up to and inclusive of the sale of the ship.]

W. G. F. Phillimore for A. Carter.—The mere fact of the City of London Court judgment being in favour of Messrs. Walker gives them no priority over my client, who has a common law possessory lien. [BUTT, J.—I have made up my mind to decide against Mr. Bruce's contention on that point, except as to costs to which I think he is entitled.] Whatever his rights as to costs may be he should not be allowed the costs of keeping the officer of the City of London Court in possession of the ship after she had been arrested by the marshal of this court. That is already settled by authority:

The Rio Lima, L. Rep. 4 Ad. & Ec. 157; 2 Asp. Mar. Law Cas. 143; 29 L. T. Rep. N. S. 517.

I do not contend that Messrs. Seaward's claim ranks after Carter's, but admit that it ranks equal with Carter's. As to the seamen, their claim for wages earned after Carter's possessory lien attached should be postponed to my claim. As to their claim for subsistence money, that is part of the wages earned subsequently to the possessory lien, and if those wages are precluded the subsistence money is also precluded:

The Gustaf, 1 Mar. Law Cas. O. S. 230; I L. T. Rep. N. S. 660; Lush. 506.

T. T. Bucknill (with him *Nelson*) for Messrs. Seaward and Co.—By reference to paragraph 4 of the special case, it will be seen that Messrs. Seaward are in the same position as Carter, and therefore have a possessory lien. [BUTT, J.—I do not at all consider that paragraph 4 discloses that you have a possessory lien.] Mr. Gaillard arranged with my clients that it should be so, Carter always understood it to be so, and his counsel now admits it is so. If, however, the special case does not sufficiently disclose it, the evidence in the action brought by us against the ship amply proves it. [BUTT, J.—I cannot now go behind what is in the special case. Although very loth to do so, I must send the case back to the registrar to find whether or no this alleged agreement existed. To save expense, I shall allow costs only to one of the other parties to oppose you. Subject to this question, I will to-day deal with the priorities of the other parties.]

Roscoe for the master and seamen.—The seamen are entitled to their wages prior to Carter's possessory lien. They ought also to get subsistence and passage money home:

The Gustaf (*ubi sup.*);
The Carolina, 3 Asp. Mar. Law Cas. 141; 34 L. T. Rep. N. S. 399.

Pyke for Robertson and Co.—At the time of the arrest of the ship, the sails, in respect of which Messrs. Robertson claim, were in their possession. They, therefore, had a possessory lien. The marshal of the court under the authority of the court took them from Robertson and Co. This fact does not appear in the special case. [BUTT, J.—If that be so, it is a question which must be sent back to the registrar. As I think it has arisen out of a misunderstanding, your client need not pay any costs incurred by this question being referred to the registrar.] It is unnecessary to send the matter to the registrar, as the court has power under Order XXVIII., r. 12, to amend the case if it thinks fit.

BUTT, J.—In this case the claims of the respective parties, wherever it may be necessary, will be referred to the registrar, assisted by merchants, to ascertain the amounts due. In dealing with the matter now I am only going to address myself to the order in which they are to rank against the fund in court. It appears to me that the fund in court has been practically placed in court in a position to be available to these various claimants who have rights of action against it, by Messrs. Walker and Co. the plaintiffs in the City of London Court. That being so, I think they are entitled to the costs of their action up to and inclusive of the costs of sale in priority to other claimants; but inasmuch as they chose to keep the officer of the City of London Court in possession of the ship after she was taken possession of by the marshal of this court, I think the expenses of the officer of the City of London Court cannot

be allowed them. I think, therefore, as to costs, that they are entitled to be paid in priority to all the rest, subject to the exception I have mentioned. I next consider the claim of Alfred Carter. He received the ship into his dock on the 31st March 1882, for repairs, and had a possessory lien on her. But for *The Gustaf* (*ubi sup.*), I should not be quite sure that his possessory lien did not take precedence over every other claim. I should not be quite sure whether any claim should compete with his common law lien. But *The Gustaf* is an authority to the contrary, and one by which I am bound and on which I mean to act. I shall, therefore, give priority to Carter's claim over all the other claims except the costs of the plaintiffs in the City of London Court, and except that part of the claim of the mariners which represents their wages earned before the ship came into the possession of Carter, and except perhaps the claim of Seaward and Co. Now *The Gustaf* is a clear authority to this effect, that the claim of mariners to their wages has priority over a shipwright's common law possessory lien, so far as it is for wages accrued due to the mariners previous and up to the time when the possessory lien commences. Therefore, up to 2nd April, the wages of the mariners must be allowed, whatever the amount may be found due by the registrar, and allowed in priority to the claims of Messrs. Carter and Seaward and Co. With regard to their claim for wages earned subsequently to the possessory lien of Carter, that will not rank before, but after, Carter's claim.

With regard to the claim for subsistence money, I have already intimated that the sailors have no claim to it except perhaps for the period of time between the date when they left the ship and the date when they did or might have reasonably returned to their country. What that amount may be I shall leave to the registrar to determine. I think I have said that they are entitled to the cost of their passage home, if found due by the registrar, and that the cost should take rank with their wages. But I do not decide that any passage money is due to them. That is a question for the registrar. It may well be that, having regard to the terms of their contract or for some other good reason, they are disentitled to any. Therefore, their passage money and subsistence money may rank with their original claim for wages, that is, that part of their wages earned previously to the possessory lien of Carter. Now as regards Robertson and Co., the sailmakers, it seems to me clear that there has been a misunderstanding, and this is a question on which further evidence should be taken, and the case must therefore be sent back in order that it may be taken. If the sails or any of them were in Messrs. Robertson's possession at the time of the arrest of the ship by the marshal, and he then under the authority of this court got possession of the sails from Robertson and Co., I think they had a possessory lien, and it would be an act of injustice to deprive them of their right. Therefore I will ask the registrar to inquire of the marshal how that matter stands, and if as a fact Robertson and Co. had possession of the sails, they must rank before all other claims except wages. If it can be ascertained what were the net proceeds of the sails, then they will be entitled to have their lien satisfied to that amount. I hardly think it worth while, as the amount is small, to trouble about this interfering with the claim for wages, and it would be as well, if no opposition is offered, to give them what the sails realised.

That disposes of everything except costs. With regard to them I give costs in each case, and they are severally to rank with the respective claims, except in the wages action, in which case the costs are to rank with that portion of the wages earned previously to Messrs. Carter's lien. With regard to Messrs. Seaward's claim, that must go back to the registrar, and he must find one way or the other whether it was arranged by Gaillard, Seaward and Co., and Carter, that this alleged agreement was made by which Carter was to protect Seaward and Co.'s claim. If so, there will be a decree for the amount found due to Seaward and Co., and a declaration that they are entitled to rank with Carter. If, on the other hand, it is found by the registrar that no such arrangement was made, then Seaward and Co. will be postponed to Carter. Should there be any opposition before the registrar to Seaward and Co. making out this alleged agreement, I will order them to pay the costs of only one opponent, and will leave it to the parties to decide who that shall be.

Solicitors for Walker and Co., *Stocken* and *Jupp*.

Solicitors for Alfred Carter, *Thomas Cooper* and *Co.*

Solicitors for Seaward and Co., *Lowless* and *Co.*

Solicitors for master and crew, *Argles* and *Argles*.

Solicitors for Robertson and Co., *Plews, Irvine*, and *Hodges*.

Feb. 10 *and* 14, 1884.

(Before Sir JAMES HANNEN.)

THE STORK; THE NEVER DESPAIR. (*a*)

Collision—Practice—County Court action—Transfer to High Court—Consolidation—Conduct of action.

Where a County Court action, instituted to recover damages arising out of a collision with the defendants' vessel, is, at the instance of the plaintiffs, transferred to the High Court, and there consolidated with an action instituted in the Admiralty Division of the High Court by the defendants in the former action against the plaintiffs in that action subsequently to the institution of the County Court action, the plaintiffs in the County Court action being the first to institute proceedings, will have the conduct of the consolidated actions.

THIS was an appeal under sect. 50 of the Judicature Act 1873 from the judge in chambers to the judge in court.

On the 15th Jan. 1884 the General Steam Navigation Company's steamship *Stork* came into collision with the brig *Never Despair*, which was riding at anchor in the river Thames. On the 26th Jan. the General Steam Navigation Company entered an action (1884, Fo. 44, M. No. 2811.) in the City of London Court against the owners of the *Never Despair* claiming 100*l.* damages. In the deposition of the master of the *Stork* made before the Receiver of Wreck, the damage to the *Stork* was stated to be about 5*l.*

(*a*) Reported by J. P. ASPINALL, and F. W. RAIKES, Esqrs., Barristers-at-Law

On the 29th Jan. the owners of the *Never Despair* instituted an action (1884, M. No. 359 Fo. 40) in the Admiralty Division of the High Court against the owners of the *Stork*, claiming 600*l.* damages sustained by them in the same collision.

The plaintiffs in the City of London Court thereupon took out a summons, calling on the defendants, the owners of the *Never Despair*, to show cause why the City of London Court action should not be transferred to the Admiralty Division of the High Court, and the action instituted in the High Court consolidated with the transferred action, and why the plaintiffs in the City of London Court should not have the conduct of the consolidated actions.

The summons came on in chambers on the 5th Feb. before the judge, who ordered the transfer of the City of London Court action and its consolidation with the High Court action, giving the conduct of the consolidated actions to the plaintiffs in the action instituted in the High Court.

Feb. 10.—The plaintiffs in the City of London Court action (1884, Fo. 44. No. 2811) now moved the judge in court "to reverse or vary the order made herein dated the 5th Feb. 1884, whereby it is amongst other things ordered that this action be consolidated with action 1884, M. No. 359, Fo. 40, and the plaintiffs herein ask that action 1884, M. No. 359, Fo. 40, be consolidated with this action, and that they have the conduct of the actions when so consolidated and the costs of this application."

Dr. *Phillimore* (with him *E. Pollock*), for the General Steam Navigation Company, in support of the motion—The plaintiffs in the City of London Court being the first to institute proceedings should have the conduct of the consolidated actions. It has been the practice of this court to so order under circumstances like the present. We very properly brought our action in the County Court, having regard to the amount of our damage. Had we in the first instance brought our action in the High Court, we of right would have had the conduct. On the owners of the *Never Despair* instituting an action in the High Court, we, in order to save the expense of two actions, rightly apply for a transfer and consolidation. Therefore by the force of circumstances we have virtually been compelled to come to this court, and, seeing that we were the first to institute proceedings, we should have the conduct of the consolidated actions.

Nelson on behalf of the owners of the *Never Despair, contra.*—The transfer and consolidation having been obtained at the instance of the plaintiffs in the City of London Court, they should accept things as they find them in the High Court—in other words, at the date of the transfer there was then an action in the High Court, and that action should be the principal action. Moreover, having regard to the fact that the *Stork* only suffered damage to the value of 5*l.*, and that the collision is caused by her running into the *Never Despair* while at anchor, it is unreasonable to say that the owners of the *Stork* should have the conduct.

Cur. adv. vult.

Feb. 14.—Sir JAMES HANNEN.—In a motion recently before me, in which a suit of damage having been instituted in the City of London Court, and a suit afterwards instituted in this court in respect of the same collision, and the City of London Court action having been transferred to this court, and the two suits consolidated at the instance of the plaintiffs in the City of London Court, the question arose whether the conduct of the consolidated suits should be given to the plaintiffs in the City of London Court, or to the plaintiffs in the High Court. When this question first came before me on the application in chambers, I acted upon the view that the plaintiffs in the City of London Court suit having been the parties who took the step by which that suit was transferred to this court, must accept the position of affairs they found when their suit was brought into this court, and that consequently the suit which was already in this court when the order of transfer was made must be deemed the principal one, and the plaintiffs in that suit have the conduct of the consolidated suits.

On the question being brought on appeal to me in court, I took time to consider in order that I might be informed as to what the practice had been. I have had several instances submitted to me, and I may refer especially to one in 1882, the circumstances of which were very similar to the present case. (*a*) In the case I refer to there was one suit instituted in the City of London Court on the 11th Aug. 1882, and another suit instituted in this court on the 12th Aug. 1882. The suit in the City of London Court was transferred to this court, and on a summons taken out by the plaintiff in the City of London Court an order was made in the registry consolidating the two suits, and giving to the plaintiff in the City of London Court action the conduct of the consolidated actions. On appeal to the judge of this court (Sir Robert Phillimore) he rejected with costs the application of the appellants, the plaintiffs in the

(*a*) The following is a copy of the memorandum of the previous decisions furnished to Sir James Hannen by the Registrar:—*The Cosmopolitan* (1874).—First action in the City of London Court instituted by the owners of the *Cosmopolitan* against the *Vialka*. The second action in the High Court of Admiralty instituted by the owners of the *Vialka* against the *Cosmopolitan*. On motion by the plaintiffs in the second action, the judge (Sir Robert Phillimore) transferred the first action to the High Court and made it the principal cause. *The Bjorn* (1882).—First action in the City of London Court, brought by the owners of the *Wear* against the *Bjorn* on the 11th Aug. 1882. The second action in the High Court of Justice, instituted by the owners of the *Bjorn* against the *Wear* on the 12th Aug. 1882. On summons on behalf of the plaintiffs in the first action it was transferred to the High Court, and the second action was consolidated with it, the transferred action being made the principal one. A corresponding order was made on a cross-summons taken out on behalf of the plaintiffs in the second action on the same day. An appeal from such order was afterwards rejected with costs by Sir Robert Phillimore." The opinion first formed by Sir James Hannen would appear more consonant with justice and reason than the practice laid down by Sir Robert Phillimore. The accidental circumstance that the plaintiff in the County Court has been the first to institute this action hardly seems in itself sufficient reason for giving him the conduct of the consolidated actions, where he, to suit his own convenience, has had his action transferred to the High Court, and where his alleged damage, as in the present case, is but a trifling sum. According to Sir J. Hannen's first view, the plaintiffs in the City of London Court having been the parties who took the step by which their suit was transferred to the High Court should accept the position of affairs which they found when their suit was brought into the High Court, and it is to be hoped that, should the question come before the Court of Appeal, it will take a similar view.—ED.

action in the High Court, to give them the conduct of the consolidated suits. As in this case the practice of the court on the point was clearly settled by Sir Robert Phillimore, it is not my intention to differ with the view of that learned judge who had such great experience of the practice of this court. I therefore must vary the order I made in chambers by giving the conduct of the consolidated action to the plaintiffs in the suit instituted in the City of London Court.

In accordance with this decision the following order was drawn up: "The President, having maturely deliberated, varied the order of the 5th instant so far as regards the consolidation of these actions, by directing that action Fo. 40 be consolidated with action Fo. 44, in lieu of action Fo. 44 being consolidated with action Fo, 40."

Solicitors for the owners of the *Stork, Wm. Batham.*

Solicitors for the owners of the *Never Despair, Lowless* and *Co.*

Feb. 22 *and* 23, 1884.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE HARTON. (*a*)

Collision—Thames Conservancy Rules, Art. 14—*Regulations for Preventing Collisions at Sea—Merchant Shipping Act* 1873 (36 *&* 37 *Vict. c.* 85), *s.* 17.

The Thames Conservancy Rules are not regulations "made under or contained in" the Merchant Shipping Acts 1854 *to* 1873, *and consequently sect.*17*of The Merchant Shipping Act* 1873 *does not apply to such rules, and therefore a vessel is not to be "deemed to be in fault" in an action for collision unless it be shown that in fact the infringement did contribute to the collision.*

THIS was a damage action *in rem* instituted by the owners of the sailing barge *George and Jane* against the owners of the steamship *Harton,* to recover damages arising out of a collision between the two ships on Friday, the 5th Oct. 1883, in Gravesend Reach.

The facts alleged on behalf of the plaintiffs were as follows:—At nine p.m. on the 4th Oct.; the sailing barge *George and Jane* in ballast and manned by a crew of two hands, came to anchor in the Thames just above Coal House Point, close to the Oven's Buoy and near to the north shore. The anchor light was thereupon hoisted and was burning brightly at the time of the collision. At about 12.30 a.m. on the 5th Oct. the tide being first quarter flood, the weather squally, and the wind N.N.W. The steamship *Harton* came into collision with the *George and Jane,* doing her so much harm that she shortly after sank. The plaintiffs charged the defendants with failing to keep a good look-out or to stop and reverse their engines in accordance with Art. 14 of the Thames Conservancy Rules 1880.

The facts alleged on behalf of the defendants were as follows: At about 12.15 a.m. on the 5th Oct. 1883 the steamship *Harton,* of 326 tons registered, with a crew of fifteen hands all told, and in the course of a voyage from Newcastle-on-Tyne to London, was in the river Thames, rounding at the speed of about four knots, Coal House Point, to the north of mid-channel. The night was dark but clear, the tide flood, and the wind N.N.W., and the *Harton* had her regulation lights duly exhibited and burning brightly. Under these circumstances the look-out reported a vessel (which proved to be the *George and Jane*) right ahead but with no lights, and though the helm of the *Harton* was at once ported and her engines stopped, she struck the *George and Jane* with her port bow, and caused her to sink. The defendants charged those on board the *George and Jane* with lying at anchor in an improper place, and failing to exhibit a light.

Articles 7 and 14 of the Thames Conservancy Rules are as follows:

7. A steam-vessel, a sailing vessel, or a barge when at anchor in the river, shall carry where it can be best seen at a height not exceeding 20ft. above the hull, a white light in a globular lantern of not less than 5in. in diameter, and so constructed as to show a clear uniform and unbroken light visible all round the horizon at a distance of at least one mile.

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.

Feb. 22.—At the hearing the evidence of the defendants that the barge had no light was corroborated by the evidence of the master and mate of the steamship *Black Boy,* which had gone up the river just ahead of the *Harton.*

The defendants admitted that they did not reverse their engines.

T. T. Bucknill on behalf of the plaintiffs.—The barge being at anchor, and it being sufficiently proved that she had a light, the steamer is to blame. Assuming the barge had no light, the steamer is to blame for not having reversed her engines when first the barge was reported. It is submitted that a breach of the Thames Conservancy rules is in itself *prima facie* evidence of negligence.

Dr. *Phillimore* on behalf of the defendants, the owners of the *Harton.*—The evidence proves the barge had no light; hence, those on the steamer were only able to first see her at such a distance that the master of the steamer had no time to consider the question whether reversing was advisable or not, and further, as a fact, if the engines had been reversed, it was then useless. By reason of the negligence of those on the barge, the steamer is unexpectedly placed in such a position that her master should be excused for not reversing, assuming it was his duty to do so:

The Bywell Castle, 4 Asp. Mar. Law Cas. 207; 41 L.T Rep. N.S. 747; 4 P. Div. 219.

[BUTT, J.—Is not the decision of the House of Lords in *The Khedive* (4 Asp. Mar. Law Cas. 360; 43 L. T. Rep. N. S. 610; L. Rep. 5 App. Cas. 876) opposed to *The Bywell Castle*?) No; *The Bywell Castle* is expressly approved by Lord Blackburn. *The Bywell Castle* (*ubi sup.*) is also distinguishable from *The Khedive.* In *The Khedive* the master had time to make up his mind, but made it up wrongly. In *The Bywell Castle* the master had no time to make up his mind at all. Moreover, an infringement of the Thames Conservancy Rules should not be visited with the consequences that result from an infringement of the Regulations for

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Preventing Collisions, because the Thames Conservancy Rules are neither "contained in or made under the Merchant Shipping Acts 1854 to 1873:" (36 & 37 Vict. c. 85, s. 17.)

Bucknill in reply.—*The Bywell Castle* (*ubi sup.*) is not in point, seeing that the master of the steamer here deliberately refrained from reversing his engines. As to the effect of the infringement of the Thames Conservancy Rules, reference was made to the following cases:

The Condor, 4 Asp. Mar. Law Cas. 115; 40 L. T. Rep. N. S. 442; 4 P. Div. 115;
The Lady Downshire, 4 Asp. Mar. Law Cas. 25; 39 L. T. Rep. N. S. 236; 4 P. Div. 26.

BUTT, J.—In this case the first question which arises is this, had the barge any light at the time of the collision? Before dealing with that there is, however, one observation I wish to make, and in which the Trinity Masters concur, viz., that this barge was anchored too far out in the river. On the question of the light I come to the conclusion that the barge had no light exhibited at the time of collision. No doubt a light had been up in the course of the night. The captain knew nothing beyond this, that over an hour before the collision a light was burning. The mate's evidence is that he saw the light burning just at the moment of collision. The account that he gives is that he went up to have a look at the weather. But the account given by the master before the Receiver of Wreck is that the mate went to see if the lamp was burning brightly. This fact throws considerable doubt on the rest of the mate's evidence. On the other side it is sworn positively that this barge was reported without a light, which is corroborated by the master and mate of the steamer *Black Boy*. On the whole, I think that the defendant's story is true, and that the barge was without a light. Now, that being so, the barge is clearly to blame.

The question then arises is the steamer also to blame? It has been contended that she should be held to blame for not reversing her engines the moment that the barge was reported. The witnesses on behalf of the steamer have said that the state of the night was such that it was only possible to see a vessel without a light at about one ship's length off. Witnesses from the steamer *Black Boy* have said that they made out the barge at two ship's lengths. The truth evidently lies somewhere between the two. Taking that to be so, the question arises, ought the master of the steamer at once to have reversed his engines? There is some difference of opinion on this point between my assessors and myself, but I think he ought to have done so. It is to my mind not sufficient excuse to say that it would have thrown his vessel athwart the stream, and so caused danger. On this point, however, we are agreed, viz., that it would have made no difference, and that no beneficial effect would have been then produced by reversing. That being so, am I bound to condemn the steamer for infringement of the Thames Conservancy Rules, assuming my view as to this master's duty to be correct? I do not think I am so bound. I have not here to apply any statutory provisions so as to draw an inference of that blame, which would arise under sect. 17 of the Merchant Shipping Act from disobeying Regulations for Preventing Collisions at Sea. It seems to me clear that this rule is not one of those regulations within the meaning of sect. 17. (*a*) I therefore think I am not bound, and that I cannot apply that section. It follows, therefore, that, as the omission of reversing would have made no difference, the steamer is not to blame. I would only just say in conclusion that, if a vessel will choose to lie in such a position as this without a light, the court ought not to strain matters against another vessel which runs into her owing to her position and the absence of her light. On the other hand, I, of course, think that the court ought always to look with jealousy on the working of a steamer's engines. For these various reasons I think the barge was alone to blame.

Solicitors for the plaintiffs, *Keene, Marsland,* and *Bryden.*

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

Wednesday, Feb. 27, 1884.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE OWNERS OF THE STEAMSHIP WELLFIELD *v.* ADAMSON AND SHORT; THE ALFRED. (*b*)

Towage agreement—Master's authority—Agent of owners.

The steamship W. having found the steamship A. on the 12th Feb. off Cape Finisterre in a disabled condition, towed her in heavy weather until the 14th Feb., when, in consequence of the condition of the A., the master of the W. proposed to abandon her. However, at the desire of the master of the A. it was agreed in writing that the W. should "stand by the A. as long as possible, and that the W. and owners are to be paid for the time and towing already done and to be done from the 12th Feb. 1883." The W. thereupon again took the A. in tow, but on the 16th Feb., owing to stress of weather, it was found necessary to abandon her, after which she was totally lost. In an action for towage against the owners of the A., the Court held that the agreement entered into by the master of the A, was a reasonable one, and one which, in his position of agent ex necessitate for his owners, he had an authority to enter into, and awarded the plaintiffs the sum of 400l. in respect of the services rendered prior to and after the agreement.

THIS was an action *in personam* brought by the owners, master, and crew of the steamship *Wellfield* against the owners of the late steamship *Alfred* for towage services.

The facts alleged on behalf of the plaintiffs were as follows:

(*a*) This decision confirms what has long been the opinion of Admiralty practitioners. The same question arose in *The Condor* (vol. 4, p. 115), but was not decided. This case is a striking instance of the unequal penalties imposed by the Legislature upon wrongful acts of equal magnitude. Thus disregard of one of the Regulations for Preventing Collisions (referred to in sect. 17 of the Merchant Shipping Act 1873) in the open sea is visited with liability, whereas disregard of identically the same regulation in a crowded river like the Thames is immaterial, unless it is shown that the breach of the regulation did in fact contribute to the collision. If a breach of a regulation in the open sea is to be visited with the drastic consequences of sect 17 of the M. S. A, 1873, it certainly seems unjust and unreasonable not to exact the same penalties for a breach of the same regulation in a crowded river, where the utmost care in navigation is at all times so important.—ED.

(*b*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs. Barristers-at-Law.

The steamship *Wellfield*, of 1235 tons nett, while on a voyage from Cardiff to Aden, fell in with the steamship *Alfred* off Cape Finisterre on the 12th Feb. 1883. The *Alfred* was flying signals for assistance, and on coming up with her it was found that her engine-room and stokehole were half full of water, and that she was generally unmanageable. The *Alfred* was a steamship of 1062 tons gross register, and was on a voyage from the Black Sea to the United Kingdom with a cargo of grain.

At the request of the master of the *Alfred*, she was, with considerable difficulty and danger, taken in tow by the *Wellfield* and towed towards Corunna until the evening of the 14th Feb. During the towage the *Alfred* sheered violently, and the hawsers twice parted, and the *Wellfield* was exposed to considerable danger by reason of the heavy weather.

On the 14th the master of the *Wellfield* proposed to abandon the *Alfred* in consequence of her unmanageable condition and the danger run by his own ship. The master of the *Alfred*, however, persuaded him to make another attempt to save the *Alfred*, and the following agreement was entered into by the two masters:

I, J. O. Landells, master of the steamer *Alfred*, of Newcastle, on behalf of owners, insurance, etc., etc., agree with master, and owners of the *Wellfield*, that she, the said ship, stands by the *Alfred* as long as possible, and that the *Wellfield* and owners are to be paid for the time and towing already done and to be done from the 12th Feb. 1883. (Signed) J. O. LANDELLS,
Master steamship *Alfred*.

The *Wellfield* accordingly continued towing till 11 p.m. on the 14th, when, owing to the severity of the weather, the hawser again broke. Towing was renewed at noon on the 15th, but on the 16th it was found necessary to abandon the *Alfred*, which was ultimately lost. The *Wellfield* was detained six days on her voyage, and the plaintiffs claimed 1000*l.* or such other sum as the court should think fit to award.

The statement of defence, so far as is material, was as follows:

3. The defendants deny that the master of the *Alfred* promised the master or crew of the *Wellfield* that the owners of the *Alfred* should pay the master or crew of the *Wellfield* for their services rendered or to be rendered whether or not they should ultimately succeed in saving the *Alfred*, or that he made any such promise. If the master of the *Alfred* made any such promise as alleged, which is denied, he had no authority to make the same, or to bind the defendants thereby.

4. If the master of the *Alfred* ever signed the agreement alleged in the 10th paragraph of the statement of claim, which is not admitted, he did not sign, and had no authority to sign, the same on behalf of the defendants or as their agent, or to bind the defendants thereby.

5. If the alleged agreement was entered into by the master of the *Alfred*, which is not admitted, it was not entered into by him as the agent of the defendants. The said master of the *Alfred* had no authority to enter into the said alleged agreement as the agent or on behalf of the defendants. The alleged services, work, and labour were not, nor were any of them, rendered or done for the defendants, or at the request of the said master. As their agent the said master had no authority to make any such request on behalf of the defendants as alleged.

6. The said alleged services were rendered and the said work was done by the master and crew of the *Wellfield* with the object and intention of salvage services being claimed therefor, and not otherwise. The *Alfred* was abandoned by the *Wellfield*, and afterwards foundered and was totally lost. No benefit was derived from the said alleged services or work.

8. The defendants deny that they are under any liability to the plaintiffs in respect of any of the matters in the statement of claim alleged.

Dr. *Phillimore* (with him *Beaufort*) for the plaintiffs.—The agreement is a reasonable one, and, if so, it is binding on the owners of the *Alfred* Having regard to the position in which the master of the *Alfred* was placed, he only acted reasonably in promising to pay the *Wellfield* for services which if successful would have saved property of considerable value. The plaintiffs therefore are undoubtedly entitled to be paid for the whole of their towage services, both before the agreement was entered into and after.

Gainsford Bruce, Q.C. (with him *Edge*), for the defendants.—Had the plaintiffs succeeded in bringing in the *Alfred*, their action, instead of being for towage, would have been for salvage. Having failed to save the *Alfred*, they now seek to make her owners liable for these alleged towage services. As to the agreement it is submitted that it is so unreasonable, and was entered into under such duress, that the court will give no effect to it. It cannot be said that the master of the *Alfred* had any authority to agree on behalf of his owners that payment should be made in respect of the services which had been rendered prior to the towage agreement. Those services were clearly contemplated as being salvage, and as such cannot be converted into towage by this agreement.

BUTT, J.—The first question which arises in this case is, whether the agreement made between the masters of these two vessels, representing their owners, is a binding one. There seems to be no doubt as to the terms of the agreement. When the agreement was entered into, the *Wellfield* had towed the *Alfred* for two days, and there was then great doubt as to whether any further efforts would be successful. Under these circumstances the master of the *Wellfield*, having come to the conclusion that it was not worth his while going on if his services were to be unsuccessful, made up his mind to leave the *Alfred*, unless some agreement were entered into to induce him to stay and continue his assistance. It is clear that the master of the *Alfred* thought that things were not hopeless at that time. If he had thought so he never would have offered a single penny for further assistance. What does he do? He enters into an agreement by which he, on behalf of his owners, assents to pay a few hundred pounds in the hope of saving a great many thousands. *Primâ facie*, that is not an unreasonable thing to do. This being a towage suit and not a salvage suit we have no evidence of the value of the *Alfred*. She is a vessel of 1062 tons gross register. It is for the chance of saving this vessel, probably worth 15,000*l.*, that the agreement is entered into. It must also be remembered that she had a cargo of barley on board. Acting upon the best view I can take of the circumstances, I shall award 100*l.* a day for the time the *Alfred* was being towed, making in all 400*l.* Had the *Wellfield* brought the *Alfred* into dock on salvage terms she would have had a very large award. But 400*l.*, in my view, is a fair towage remuneration. The position of the master of the *Alfred* was that at an expenditure of 400*l.* he obtained for his owners the chance of saving 15,000*l.* or 20,000*l.* That does not look like an unreasonable agreement, and I fail to see anything in the evidence to the contrary

There is nothing to show that if the weather had moderated the *Alfred* might not have been saved. The agreement therefore is not unreasonable, and it is clear as a matter of law, that the master being the agent *ex necessitate* of his owners was authorised to enter into this agreement. But it is said even so he has no right to enter into an agreement to pay for towage in the past. But it seems to me that if it was reasonable to make the agreement for future towage, it was not unreasonable to agree to pay for the towage that had been done. On the whole, therefore, I think that the master acted reasonably. It is clear that he thought he was acting reasonably, and that there was some chance of saving this valuable property. This he did for the comparatively small sum of 400*l.*

Solicitors for the plaintiffs, *Turnbull, Tilly,* and *Mousir.*

Solicitors for the defendants, *H. C. Coote.*

Thursday, Feb. 28, 1884.

(Before BUTT, J.)

THE GEORGE GORDON. (*a*)

Salvage—Arrest of ship in excessive amount—Bail—Costs—Practice.

In a salvage action in which the plaintiffs arrested the salved ship in the sum of 3000*l. and the court on a value of* 14,000*l. awarded* 450*l., the salvors were ordered to pay all the costs and expenses of finding bail for* 3000*l., such sum being in the opinion of the court unreasonably excessive.*

THIS was a salvage action instituted by the owners, masters, and crews of the steamtugs *Fylde* and *Wyre,* against the owners of the steamship *George Gordon.*

The services consisted in towing the *George Gordon* off the Furness Bank, where she had taken the ground in a fog. During the rendering of the services there was a strong wind with a heavy sea. The plaintiffs instituted the action in the sum of 3000*l.* for which amount bail was required and given. The value of the *George Gordon* was 14,000*l.*

Dr. *Phillimore* and *T. T. Bucknill* for the plaintiffs.

Myburgh, Q.C. and *F. W. Raikes,* for the defendants.

The Court after hearing the evidence awarded 450*l.*

Raikes applied that the expenses of finding bail might be borne by the plaintiffs. Having regard to the services and the value of the property salved, the *George Gordon* was arrested in an exorbitant sum. The defendants have been put to considerable expense in finding bail, and it is submitted that the cost of their so doing should be borne by the plaintiffs.

Phillimore, contra.—It is to be remembered that the sum of 3000*l.* is to cover not only the award, but also the costs of the action. Moreover salvors cannot but help putting a higher value upon their services than the court does. The defendants never asked to have the bail reduced.

BUTT, J.—Parties should not arrest a ship for an exorbitant sum; but if they do so it is no excuse to say that the defendants did not as it were struggle to get free by applying to have the bail reduced, nor that the solicitors were ignorant of the facts of the case at the time of the arrest. Where it is possible, they should ascertain the circumstances before the ship is arrested. I never will sanction the course taken in this case, and I therefore order that the plaintiffs do pay all the costs and expenses to which the defendants have been put by finding bail.

Solicitors for the plaintiffs, *Hill, Dickinson, Lightbound,* and *Co.*

Solicitors for the defendants, *Waltons, Bubb,* and *Walton.*

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

Monday, March 10, 1884.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE EMMY HAASE. (*a*)

Collision—Regulations for Preventing Collisions at Sea, art. 18—*Merchant Shipping Act* 1873 (36 *& 37 Vict. c.* 85) *s.* 16.

Where a steamship is approaching another vessel so as to involve risk of collision, her master is not bound on making out the risk to instantly stop and reverse the engines in compliance with art. 18 *of the Regulations for Preventing Collisions at Sea, but he is to be allowed a reasonably short time to judge what the best manœuvre is under the circumstances, though if he exceeds that time he will be held to blame for the collision.*

The duty to render assistance under sect. 16 *of the Merchant Shipping Act* 1873 *is not confined to rendering actual assistance; but if a vessel whose duty it is to render assistance is so injured that the only assistance she can render is to burn rockets or hoist a globe light so as to indicate her position, she is bound to do so, and in default of so doing, she is, in the absence of proof to the contrary, to blame for the collision.*

THIS was an action *in rem* instituted by the owners of the steamship *Mulgrave* against the owners of the steamship *Emmy Haase* to recover damages occasioned by a collision between the two vessels in the North Sea, on the 2nd Feb. 1884. The defendants counter-claimed.

The facts alleged on behalf of the plaintiffs were as follows:—Shortly before 5.40 a.m. on the 2nd Feb. 1884, the steamship *Mulgrave,* of 1106 tons net register was in the North Sea heading S.E. ½ S., and making abont eight knots an hour. Her regulation lights were duly exhibited, and burning brightly, and a good look-out was being kept. The weather was dark, the tide ebb, and the wind a gale from the North East. Under these circumstances the masthead light of a steamship which proved to be the *Emmy Haase* was seen right ahead about two miles distant. The helm of the *Mulgrave* was ported, so that the vessels might pass port to port, but when the *Emmy Haase,* which exhibited no side lights, had approached so near that her hull was visible, she was seen to be crossing the bows of the *Mulgrave* from port to starboard. The engines of the *Mulgrave* were immediately stopped, and her helm put hard-a-starboard, and in order that she might

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

answer her helm more readily, and as the only chance of avoiding a collision, her engines were not reversed. Notwithstanding these manœuvres the vessels came into collision, doing one another considerable damage. The anchor of the *Mulgrave* was swept off the deck in the collision, and brought her up, and she there remained at anchor for over an hour. The plaintiffs charged the defendants, amongst other things, with not easing, stopping, or reversing their engines in due time.

The facts alleged on behalf of the defendants were as follows:—Shortly before 5.30 a.m. the steamship *Emmy Haase* of 1082 tons net register was in the North Sea, steering a course of N. by W. ¾ W., and making about nine knots per hour. Her regulation lights were properly exhibited, and a good look-out was being kept on board of her. Under these circumstances the masthead and green lights of a steamer which proved to be the *Mulgrave* was seen about half a point on the starboard bow of the *Emmy Haase*, and distant between two and three miles. The helm of the *Emmy Haase* was starboarded a little and then steadied. When the *Mulgrave* had approached to within about 400 yards of the *Emmy Haase* she was seen to shut in her green light and open her red. The engines of the *Emmy Haase* were thereupon stopped, and immediately afterwards an order was given to reverse the engines, but before the engines could be reversed the two vessels came into collision, both sustaining great damage. The defendants amongst other things charged the plaintiffs with failing to render assistance after the collision as provided by sect. 16 of 36 & 37 Vict. c. 85.

Sect. 16 of 36 and 37 Vict. c. 85 is as follows:

In every case of collision it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew, and passengers (if any) to stay by the other vessel until he has ascertained that he has no need of further assistance, and to render to the other vessel, her master, and crew, and passengers (if any) such assistance as may be practicable, and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master or person in charge of the other vessel the name of his own vessel and of her port of registry, or of the port or place to which she belongs, and also the names of the ports and places from which and to which she is bound.

If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

Art. 18 of the Regulations for Preventing Collisions at Sea is as follows:

Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or shall stop and reverse if necessary.

It was proved that those on the *Mulgrave* had not attempted to render any assistance whatsoever by burning rockets to indicate her position or otherwise. One of the main points in dispute was as to the duration of time between the moment when the master of the *Emmy Haase* saw that there was danger of collision and the time when he ordered his engines to be reversed. It is found by the court to have been something considerably more than a minute.

Hall, Q.C. (with him *Bucknill*) for the plaintiffs.—Having regard to the fact that the *Mulgrave* was brought to anchor involuntarily, and moreover, that she sustained considerable damage, it was impossible that she should render assistance to the *Emmy Haase*. It is established by the evidence that those on board the *Emmy Haase* saw there was danger of collision some few minutes before her engines were reversed. That being so, she has broken art. 18 of the Regulations for Preventing Collisions at Sea. With regard to that article the House of Lords have said in *The Khedive* (4 Asp. Mar. Law Cas. 360; 43 L. T. Rep. N. S. 610; L. Rep. 5 App. Cas. 876) that, under such circumstances, a master's duty is to obey the rule instantly. [BUTT, J.—I doubt whether any court ever said that. Surely one must allow a master some short time to judge what he is to do. It may be that his duty is to go ahead, and not to reverse his engines.] Even so, the master here, after he has taken in the situation, fails to reverse until the very last moment.

Dr. *Phillimore* (with him *Raikes*) for the defendants.—The *Mulgrave* might have rendered assistance by burning rockets to indicate her position, and by failing to do so has made herself liable under the Act. The master of the *Emmy Haase* only refrained from reversing during a reasonably short period of time in order that he might judge what rule of navigation applied to the circumstances of the case:

The Khedive (*ubi sup*):
The Benares, 5 Asp. Mar. Law Cas. 171; 49 L. T. Rep. N. S. 702; 9 P. Div. 16.

BUTT, J.—In this case I and the Trinity Masters think it quite clear that the evidence satisfactorily establishes that the *Emmy Haase* carried proper regulation lights, which were burning at the time of collision, and that they ought to have been seen by those on board the *Mulgrave* at a considerably greater distance than they in fact were. The conclusion, therefore, to which I have come is that the cause of the collision was a bad look-out, leading to a very wrong manœuvre on the part of the *Mulgrave*, and, therefore, that the *Mulgrave* was to blame I have no doubt.

I think also that the *Mulgrave* was to blame with reference to the statutory enactment as to rendering assistance in cases of collision. We think it is impossible that the lights burnt on the *Emmy Haase* could not have been seen by those on board the *Mulgrave*; and though the injury to the *Mulgrave* may have been so great that she could not render assistance by standing by after the collision, yet I think it would have been rendering assistance within the meaning of the Act of Parliament if she had sent up rockets or hoisted a globe light (*a*). I think,

(*a*) In *The Adriatic* (vol. 3, p. 16) Sir Robert Phillimore held that the duty imposed by the statute is not complied with, where it being practicable and safe for a steamer to lower a boat to render assistance, although possibly dangerous to stay by the injured ship, she continues her voyage without lowering her boat and merely hails and signals for other vessels to go to the assistance of the injured ship. Under this section the question arises whether a vessel, having rendered assistance in compliance with the statute, is entitled to recover salvage in respect of such assistance. Where the necessity for such assistance is brought about by the negligence of the assisting ship, it is only in accordance with the usual principles governing salvage that she should receive no remuneration. Where, however, the necessity for the assistance is brought about by the negligence of the assisted ship, it would hardly appear reasonable to refuse the innocent vessel remuneration for services which were rendered necessary by the wrongful act of the other ship. However, under these circum.

therefore, that the *Mulgrave* is also to blame for this, the consequence being that she is to blame both for improper navigation and for disobedience to the enactment requiring her to render assistance.

We now come to the question whether the *Emmy Haase* reversed her engines in due time. That is a matter on which I myself have had very considerable doubt, and I am not quite certain whether if I had been left to myself I should have decided as I am going to do. It is, however, the opinion of the Trinity Masters that, having regard to the manœuvres of the *Mulgrave*, and taking the evidence on both sides, there must have been a want of exercise of proper vigilance on the part of those on the *Emmy Haase*, or the wrong manœuvre of the *Mulgrave* would have been observed by them in sufficient time to have enabled them to stop and reverse their engines with effect. We cannot accept the story that only one minute or something less elapsed between the time when the red light of the *Mulgrave* was seen and the time of the collision. We think there must have been more, and something considerably more. If that is so we do not think the *Emmy Haase* did right in not sooner reversing her engines.

Although the question does not now arise, I may say that I believe in all these cases where it is necessary to stop and reverse that instantaneous stopping and reversing, in compliance with art. 18, the very instant there is danger of collision, is not what is required. A man has to judge whether stopping and reversing is necessary, and he has also to judge whether any other rule applies. I do not think that a court of justice can say that a man has acted wrongly in not stopping and reversing instantaneously; some short time must be allowed. If in this case I had been alone I might have decided that the engines of the *Emmy Haase* had been stopped and reversed in due time, and that this short period of time had not been exceeded; but the Trinity Masters have so strong a view on this point, that I do not feel myself entitled to differ from them. The result is, I must hold both these vessels to blame.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

Solicitors for the defendants, *Botterell* and *Roche.*

Wednesday, April 9, 1884.

(Before BUTT, J.)

THE AVENIR. (*a*)

Practice—Default action in rem—Bottomry—Order XIII., r. 12.

In default actions in rem, before the plaintiff can obtain judgment under Order XIII., r. 12, *the ten days within which the defendants might have pleaded must have elapsed, and notice of trial must have been filed in the registry.*

THIS was a motion for judgment by the plaintiffs in a default bottomry action *in rem.*

An affidavit of service and statement of claim had been filed by the plaintiffs in accordance with Order XIII., r. 12, but the ten days within which, by Order XXI., r. 6, the defendant must plead had not yet elapsed.

W. J. Stewart, for the plaintiffs, in support of the motion.—The plaintiffs have complied with all the necessary formalities and now ask for judgment. [BUTT, J.—I notice that Order XIII., r. 12, says that where the affidavit of service and statement of claim have been filed, "the action may proceed as if such party had appeared." That involves the lapse of a certain period of time before you can ask for judgment. So far as I see that time has not elapsed.] That is so. We have neither given notice of trial nor waited for the time to elapse within which a defendant, who had appeared, might deliver his statement of defence. But it is within the power of the court to dispense with both these matters if it sees fit. If, however, the court should think otherwise I would ask for judgment subject to the defendant's not pleading within the proper time.

BUTT, J.—The plaintiffs must wait for the full time to elapse within which the defendant might plead, and they must also give notice of trial in the registry before they can get judgment. It is, in my opinion, most undesirable that ships should be seized and sold in great haste, and I therefore think that the fullest time should be allowed between the seizure and sale. With regard to the conditional judgment that I cannot consent to.

April 21.—Notice of trial having been filed in the Registry and the required time having elapsed, Sir J. Hannen now gave judgment for the plaintiffs.

Solicitors for the plaintiffs, *Stone, Fletcher*, and *Hull.*

Saturday, May 10, 1884.

(Before Sir J. HANNEN.)

THE HORACE. (*a*)

Salvage—Practice—Costs on higher scale—Order LXV., r. 9.

In the absence of special circumstances of difficulty or urgency, costs on the higher scale will not be allowed.

In a salvage action, where the value of the salving ship, together with cargo and freight, was 80,000*l.*, *of the property salved* 42,000*l.*, *and the award* 2400*l.*, *the court refused to allow costs on the higher scale.*

THIS was an application by the plaintiffs in a salvage action for costs on the higher scale.

The services consisted, shortly, in the steamship *Historian* towing the steamship *Horace* about 140 miles for three days in the Atlantic Ocean during severe weather.

The value of the *Historian*, her cargo and freight was in all 80,000*l.* The value of the property salved was 42,000*l.* The court awarded 2400*l.*, of which 1900*l.*, was apportioned to the

stances, Butt, J. in *The Peter Graham* (see *post*) refused to give the innocent vessel salvage, apparently on the ground that, as the duty is obligatory under the statute, the assistance rendered cannot come within the scope of salvage, lacking as it does the important element of being voluntary. It may, however, be noticed that the point was not argued, and it is therefore to be hoped that the learned judge will more maturely consider the matter should the question again arise. With reference to this subject see *The C. S. Butler*, vol. 2, p. 237.—ED.

(*a*) Reported by J. P. ASPINALL, and F. W. RAIKES, Esqrs., Barristers-at-Law.

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs. Barristers-at-Law.

owners of the *Historian*, and the remainder given to her master and crew.

Dr. *Phillimore* on behalf of the plaintiffs,—It is submitted that this is a case in which costs should be allowed on the higer scale. By Order LXV., r. 8, costs on the higher scale may be allowed "on special grounds arising out of the nature and importance, or the difficulty or urgency of the case." It is submitted that this case is so important, having regard to the value of the property salved, that costs on the higher scale should be allowed. The value of the property saved is 42,000*l.*, the services were most meritorious, and the award is 2400*l.*—facts which are sufficiently special to warrant the allowance of the higher scale.

Sir JAMES HANNEN.—Until some rule is laid down by higher authority upon the subject, it must be taken that something special must be brought to my notice. It must be remembered that the new scale of costs has been drawn up with a view to uniformity, and it was intended to do away with the old rule of thumb higher and lower scale. Formerly there was a diversity of practice. In the Court of Chancery, if the matter in dispute was above 1000*l.*, then, however simple the question might be, costs were given on the higher scale. That was not thought to be just. On the other hand, in the common law courts, although there was power to give costs on the higher scale, I may say, from my experience, that it was very rarely done. I myself do not remember it ever being done. Taking into account that diversity of practice, there has been a new standard scale prepared; but, as there may be in some cases circumstances of urgency or difficulty, it was thought right to bestow upon the judges the power of giving costs on the higher scale. Those circumstances of urgency must however be clearly shown to exist. In ordinary circumstances it must be taken that the scale which has now been made is the one to be usually adopted. I see nothing to distinguish this from the ordinary case, and must therefore refuse the application.

Solicitors for the plaintiffs, *W. W. Wynne* and *Son*.

Solicitors for the defendants, *Turnbull*, *Tilly*, and *Mousir*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Nov. 20 *and* 21, 1883.

(Present: The Right Hons. Lord FITZGERALD, Sir BARNES PEACOCK, Sir ROBERT P. COLLIER, Sir JAMES HANNEN, and Sir ARTHUR HOBHOUSE.)

EMERY *v.* CICHERO; THE ARKLOW. (*a*)

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF NEW BRUNSWICK.

Collision—Regulations for preventing Collisions at Sea—Infringement—Lights—Merchant Shipping Act 1873, *s.* 17.

The barque A. while sailing on the port tack sighted the barque B. on the port bow, showing no lights. Those on the A. thinking that the B. was heading the same way as the A. kept on, when suddenly it was seen that the B. was heading for the A., and although the helm of the A. was put hard-a-port, the vessels came into collision, the stem of the A. striking the starboard side of the B.

In an action for collision the Court held that the B. was carrying no lights, and that this being a breach of the regulations which might possibly have contributed to the collision, the C. was to blame; and further, that, having regard to the difficulty occasioned by the absence of the B.'s lights, there was no negligence on the part of the A. in not sooner taking steps to keep out of the way of the B.

THIS was an appeal by the defendants in a damage action from the judgment of the judge of the Vice-Admiralty Court of New Brunswick, finding the bargue *Arklow* alone to blame for the collision.

The collision took place in the Atlantic Ocean between the barques *Bunin* and *Arklow*, at about 2 a.m. on the 30th March 1881.

The case on behalf of the appellants, the owners of the *Arklow*, was that the *Arklow* was on the port tack, steering about E. by S., and having her regulation side lights burning brightly; that under these circumstances the *Bunin* was made out on the port bow of the *Arklow*, and having no lights visible, it was concluded she was going the same way as the *Arklow*, and that the *Arklow* was kept on her course, when suddenly it was seen that the *Bunin* was heading for the *Arklow* under a starboard helm, and, although the helm of the *Arklow* was put hard-a-port, the *Bunin* struck the *Arklow*, doing her damage. The appellants charged the *Bunin* with neglecting to display proper lights, and with improperly starboarding shortly before the collision.

The case on behalf of the respondent, who was the plaintiff in the court below, was that the *Bunin* was sailing close-hauled on the starboard tack with her regulation lights duly exhibited and burning brightly when the red light of the *Arklow* was seen on the starboard bow of the *Bunin*; and that the *Arklow*, although she was sailing free, failed to take any steps to keep out of the way of the *Bunin*, and came into collision with her, doing her so much damage that she was wholly lost. The respondent charged the *Arklow* with having improperly failed to keep out of the way of the *Bunin*.

The further facts of the case appear in their Lordships' judgment.

At the trial below the learned judge, who was assisted by nautical assessors, after finding that the *Arklow* was to blame, dealt as follows with the question of the lights of the *Bunin*: "I consider the point whether the *Bunin* carried proper lights left in so much doubt by the conflict of evidence that I am of opinion that the lights of the *Bunin* were not fairly visible to the *Arklow*, but I agree with the shipmasters that the omission of these lights is immaterial, as it clearly appears that the absence of lights did not contribute to or cause the collision."

From this decision the owners of the *Arklow* were now appealing and they submitted that it was wrong, and should be reversed for the following among other reasons:

1. Because the inability of the *Arklow* to see the *Bunin's* lights caused or contributed to the collision.

2. Because it was not and could not have been decided that the inability of the *Arklow* to see the *Bunin's* lights

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs. Barristers-at-Law.

might not by possibility have caused or contributed to the collision.

3. Because the *Bunin* did not keep her course.

4. Because the learned judge has not decided whether the *Bunin* did or did not keep her course.

5. Because the learned judge has not considered the provisions of the Merchant Shipping Act 1873 in this behalf and has not himself decided or asked the assessors the question or found upon the points required by this Act.

6. Because upon the evidence before the court, a decree in favour of the plaintiff (the respondent) cannot be supported.

The respondent submitted that the decree appealed from should be confirmed for the following among other reasons:

1. That the collision and the losses and damage consequent thereon was solely due to the negligence of those on board the *Arklow*.

2. That the *Arklow* being on the port tack and having the wind free, did not keep out of the way of the *Bunin*, which was on the starboard tack and close hauled, in accordance with the 14th rule for Preventing Collisions at Sea.

3. That the evidence sufficiently established that the *Bunin* before and at the time of the collision was carrying her proper regulation lights.

4. That those on board the *Arklow* did not keep a proper and sufficient look out.

5. That no blame is to be attached to those on board the *Bunin*, and that she did not cause or contribute to the collision by neglect to carry proper lights or otherwise.

6. That the said decree was in accordance with the evidence.

Myburgh, Q.C., and *W. G. F. Phillimore*, on behalf of the owners of the *Arklow*, in support of the appeal, referred to

The Englishman, 3 Asp. Mar. Law Cas. 506; 37 L. T. Rep. N. S. 412; 3 P. Div. 18;
The Fanny M'Carvill, 2 Asp. Mar. Law Cas. 565; 32 L. T. Rep, N. S. 646.

Hall, Q.C. and *Bucknill*, on behalf of the owners of the *Bunin*, *contra*.

Nov. 21, 1883.—Their Lordships' judgment was delivered by Sir JAMES HANNEN.—The case presented on behalf of the *Bunin*, the complaining vessel below, was as follows: That on the 30th March 1881, as she was proceeding on a voyage from Havre to Baltimore, at two o'clock in the morning, the weather being dark but clear and the wind from the north-west, she was steering a course south-west by west half-west, close-hauled, on the starboard tack; that her lights were properly burning; and that she was proceeding at the rate of six and a half knots an hour when the red light of a ship, which proved to be the *Arklow*, was seen on the starboard bow; that she, the *Bunin*, kept her course; but that the *Arklow*, by some unaccountable mismanagement, as it is stated, ran into the *Bunin*, striking her about the fore rigging on the starboard side with her stem. On the other hand, for the *Arklow*, it was alleged that she was steering a course east by south half-south, the wind being in the north, when a vessel was seen a point and a half on her port bow showing no lights whatever; that she was thought to be going the same way as the *Arklow*, but that, after examination through the glass, and watching her for some appreciable time, it was discovered that she was approaching the *Arklow* under a starboard helm; that then the *Arklow's* helm was put hard aport and her after sails taken off. In confirmation of the statement that there were no lights visible upon the *Bunin*, it is alleged and stated by several witnesses that a green light was seen moving upon the *Bunin* just before the collision; and in confirmation of the statement that the *Bunin* did not keep her course, but approached under a starboard helm, it is stated that her spanker jibed from port to starboard—it is said, indeed, just before the collision. Now, in the circumstances alleged on the one side and on the other, it was undoubtedly the duty of the *Bunin* to keep her course, and it was primarily the duty of the *Arklow* to keep clear; but the *Arklow* alleges, by way of excusing herself for not having kept clear, that there was no light visible on the *Bunin*, and that it was therefore impossible to know in what direction she was sailing, and therefore impossible to take measures for the purpose of preventing the collision with her.

The first question of importance in the case is, whether or not the lights of the *Bunin* were burning for any serviceable purpose, On this point the learned judge in the court below, after consulting the assessors, says: "I consider the point whether the *Bunin* carried proper lights left in so much doubt by the conflict of evidence, that I am of opinion that the lights of the *Bunin* were not fairly visible to the *Arklow*;" and then he goes on to deal with the case upon that footing. The peculiar language which is used by the learned judge about their not being fairly visible may possibly have reference to the evidence which has been given that a green light was seen not in its proper place, but moving on the *Bunin*, immediately before the collision. Their Lordships agree in the view which was taken by the learned judge below upon this point that the lights of the *Bunin* were not in such a position as to be visible to those on board the *Arklow*, and that those on board the *Bunin* are responsible for that departure from the proper rules of navigation. Their Lordships arrive at this conclusion upon an examination of the evidence on the one side and on the other. It is very much to be regretted that the court below was obliged to rely solely upon affidavits which, from their language and general contents, it is pretty plain were drawn by somebody with a view to the supposed facts of the case, and were then laid before the witnesses for the purpose of getting their evidence, and leaving them, as it were, to take exception to anything which they found in those statements. Thus all the witnesses but one on behalf of the *Bunin* say, in general terms, that lights were burning according to the regulations, but there is only one of them who speaks to the fact of his having actually seen that the lights were burning at the time of the collision, and that is the witness Lazzarini, whose duty it appears to have been to light and trim the lamps, which he says he had done at eight o'clock. He does, indeed, say that when he was called on deck by hearing that something wrong had happened he did not see that the lights were burning. On the other hand, the witnesses for the *Arklow* all agree that there was no light visible on the *Bunin*; and they make that statement with certain particularity which impresses their Lordships in favour of their statements as against the general statements, with the exception mentioned, of those on board the *Bunin*. For instance, it is stated that, the vessel having been reported by the look-out man, and the mate and another of the crew who was with him having seen the

vessel looming in the distance, the mate fetched the captain's glasses for the purpose of examining it more carefully. That is a particularity which cannot be disregarded, except on the supposition that the mate and the witness who confirms him are deliberately stating that which they must know to be false, and going much further than a mere assertion that they were doing their duty. In addition to that, there are several witnesses who say that they saw a green light moving on the vessel immediately before the collision as though the green light had, either for the purpose of being trimmed or from some other accident, not been in its place, but that when the vessels were found to be approaching one another the green light was being moved from one place to another. Their Lordships, therefore, come to the conclusion that the lights of the *Bunin* were not properly burning. But the learned judge below says that this question of the lights is immaterial when it appears that their absence did not cause the collision. On this part of the case their Lordships are unable to concur with the judgment of the learned judge below. The principle in cases of this kind, where there has been a departure from an important rule of navigation, is this, that if the absence of due observance of the rule can by any possibility have contributed to the accident, then that the party in default cannot be excused. (*a*) On this point their Lordships can entertain no doubt that the absence of proper lights must have occasioned an entire change in the course of events which followed upon the *Bunin* being visible to the *Arklow*. Without those lights the statement made by the witnesses on board the *Arklow* commends itself at once to credence, that they did not know in what direction this vessel was going, and that it took an appreciable time before a judgment could be formed upon that subject, during the whole of which time it must have remained a matter of pure chance whether it would be right to take one manœuvre or another. Their Lordships are therefore of opinion that the *Bunin* was clearly to blame, and that she was to blame in a matter which makes her responsible.

The only question that remains, therefore, is whether or not it has been shown that the *Arklow* was also to blame. It lies on the *Bunin*, which is shown to have been in default, to establish, to the satisfaction of the tribunal that has to determine it, that the *Arklow* was in fault. Now, on this part of the case it is to be observed that the time which has to be dealt with is very short. The vessels were approaching at a speed which would bring them together at the rate of a mile in five minutes. Reference has been made to the marginal note upon the diagram furnished by the *Arklow*, in which it is said that when first seen the *Bunin* was about six cables' distance, which would be a distance of 1200 yards. One of the witnesses for the *Arklow* says the *Bunin* was seen about four minutes before the collision. It is obvious that these statements as to time and distance cannot be dealt with as exact computations, but only indicate the rough conjectures which the witnesses were able to make at the time. But it is obvious that some space of time must have been occupied in fetching the glasses, which would diminish the period of time with which we are dealing. Secondly, it is stated, and no reason to doubt it is suggested, that the helm of the *Arklow* had been ported before the collision; that is to say, that a step had been taken for the purpose of avoiding the approaching danger: and Nilson, one of the witnesses, says that the *Arklow* had under her port helm come round two points, and that this had been done when it was seen that the *Bunin* was approaching under a starboard helm. It is clear, therefore, that we have but a very short space of time indeed during which the hesitation on the part of those on the *Arklow* was manifested as to what course they should take. Considering the difficulty occasioned by the absence of lights on board the *Bunin*, which prevented the possibility of seeing what course she was steering, their Lordships are of opinion that it has not been established that there was negligence on the part of those on board the *Arklow* in not sooner porting the helm, as it is clear she had to some extent done before the collision. Another point has been discussed, which was not dealt with in the court below, and that is whether or not the *Bunin* kept her course. Her witnesses allege that she did keep her course. On the part of the *Arklow* it is alleged that she came round under a starboard helm, and so came down upon the *Arklow*. In support of that statement it is alleged that she jibed; and it has been argued that credence ought not to be given to that statement because it is said the *Arklow* had gone off only to the extent of half a point, while it is represented that the *Bunin* had got round a great number of points—the exact number it is not necessary to specify, but so as to bring her head pointing south before it would be possible that she would jibe. It is to be observed, however, that the two periods of time that were referred to by Mr. Hall are not properly to be compared, because the evidence on the part of the *Arklow* is that it was discovered that the *Bunin* was, to

(*a*) We notice that in the report of this case, both in the Law Reports (9 App. Cas. 136) and in the Law Journal (53 L. J. 9, Priv. Co.), this proposition is given as the head-note to the case. However, notwithstanding the generality of the words here used, it is to be presumed that the proposition only applies to the circumstances of the present case, that is, where the "departure from an important rule of navigation" is a departure from the Regulations for Preventing Collisions at Sea, referred to in sect. 17 of the Merchant Shipping Act 1873. In other words, by an important rule of navigation, their Lordships must mean a rule of navigation contained in any of the Regulations for Preventing Collisions. If the proposition is not meant to be so restricted in its application, the result would be that in many cases shipowners would be held liable for collisions where the accident was not occasioned by the negligence of their servants, and where there had been no breach of the regulations. Thus it is an important rule of navigation to have a good look-out. Yet it is possible to conceive that in many cases the court might find, as a fact, that the absence of the look-out did not contribute to the collision; but applying the words of the Privy Council in their strict sense, the party in default could not be excused, because the absence of due observance of this important rule of navigation might by possibility have contributed to the accident. The principle laid down by the Privy Council in cases where there has been a departure from the Regulations for Preventing Collisions is, that the party infringing the regulation is to be held to blame, unless he shows that the infringement could not, by any possibility, have contributed to the collision: (*The Fanny M. Carvill*, vol. 2, p. 565.) Having regard to the circumstances of the present case, in which the main issue was as to the exhibition of the lights required by the regulations, it is to be assumed that it was to this principle that their Lordships were referring.—ED.

use the expression of the witnesses, coming down upon them under a starboard helm, and that it was apparently which showed the direction which the *Bunin* was taking, and it was then, after that had been seen, that the helm of the *Arklow* was ported. There was, therefore, some time before the porting of the helm during which the starboarding of the helm of the *Bunin* had taken place. But, further than this, it is to be observed that where a collision of this kind occurs the exact succession or occurrence of events is not accurately noted by the witnesses, and it may well be that the jibing of the spanker, which is referred to by the witnesses as taking place immediately before the collision, may in fact have taken place at the time of the collision, and in consequence of the collision, by the head of the *Bunin* being driven sharply round. On the whole, their Lordships are of opinion that it has been established that the *Bunin* was to blame, and that it has not been established that the *Arklow* was to blame; and their Lordships will, therefore humbly advise Her Majesty that the decision of the court below should be reversed with costs.

Appeal allowed.

Solicitors for the appellants, the owners of the *Arklow*, *Stokes*, *Saunders*, and *Stokes*.

Solicitors for the respondent, the owner of the *Bunin*, *Thomas Cooper* and *Co.*

Wednesday, Feb 6, 1884.

(Present: The Right Hons. Lord BLACKBURN, Sir BARNES PEACOCK, SIR ROBERT COLLIER, Sir RICHARD COUCH, and Sir ARTHUR HOBHOUSE.)

UNION STEAMSHIP COMPANY OF NEW ZEALAND *v.* MELBOURNE HARBOUR COMMISSIONERS. (*a*)

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Practice—Damage—Notice of action—Sufficiency—"Person"—Corporation.

Where a notice of action is required, the notice given should not be construed strictly, but a letter, which merely states that damage has been sustained for which the defendants will be held responsible, is not a notice of action.

Where harbour commissioners were constituted by Act of Parliament, and a section of the Act required notice of action to be given to "any person for anything done by him under this Act:"

Held (affirming the decision of the court below), that the fact that this section occurred in a part of the Act headed "Officers" could not be held to limit it to acts done by officers of the commissioners, but that the commissioners, as a body, were entitled to notice of action.

Eastern Counties Railway Company *v.* Marriage (9 *H. L. Cas.* 32; 3 *L. T. Rep. N. S.* 60) *distinguished.*

THIS was an appeal from a judgment of the Supreme Court of the colony of Victoria (Stawell, C.J., Williams and Holroyd, JJ.), overruling a demurrer to a plea of the respondents (the defendants below) and discharging a rule to show cause why a verdict entered for them should not be set aside, and a verdict entered for the plaintiffs pursuant to leave reserved.

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

The action was brought to recover damages for injuries sustained by the appellants' steamship *Rotorua* in consequence of the alleged negligence of the respondents.

The action was tried before Holroyd, J. and a jury, who found all the issues of fact in favour of the plaintiffs, the appellants, and assessed the damages at 5210*l.* 14*s.* 1*d.*, but the learned judge directed the verdict to be entered for the defendants on the ground that no notice of action had been given to them as required by sect. 46 of the Melbourne Harbour Trust Act 1876.

The facts of the case appear sufficiently from the judgments of their Lordships.

Macnaghten, Q.C., and *J. D. Wood* (*H. Davey*, Q.C. with them) appeared for the appellants, and contended that the letter of Oct. 21, 1881 (set out in the judgment) was a sufficient notice of action: See

Smith v. *West Derby Local Board*, 3 C. P. Div. 423; 38 L. T. Rep. N. S. 716;
Jones v. *Bird*, 5 B. & Ald. 837;
Jones v. *Nicholls*, 13 M. & W. 361; 14 L. J. 42, Ex.

Further, the section requiring notice does not refer to the commissioners themselves, but only to their officers; it is qualified by the preceding heading:

Eastern Counties Railway Company v. *Marriage*, 9 H. L. Cas. 32; 3 L. T. Rep. N. S. 60.

Webster, Q.C. and *Malleson*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants, their Lordships' judgment was delivered by

Sir ROBERT P. COLLIER.—The facts of this case, as far as they are material, may be shortly stated. The cause of action is that a vessel belonging to the plaintiffs, and going into Melbourne Harbour, fell foul of a cable attached to the anchor of a dredge which was in the middle of the stream, having been placed there by the defendants, and thereby sustained considerable damage. The declaration contained two counts, one alleging negligence on the part of the defendants in mooring the dredge where they did, and the second complaining that they had not given notice whereby the danger might have been avoided. To this declaration there were many pleas by the defendants, denying their liability, and also denying most of the allegations in the declaration; and there was a further plea, in these terms: "And for an eighth plea to the said declaration, the defendants say that the alleged grievances were committed by the defendants after the passing of the Melbourne Harbour Trust Act 1876, and were committed by the defendants under and by virtue of the said Act; and no notice in writing of the intention to sue out the writ in this action was delivered to the defendants or left at their usual place of abode one month before the suing out of the said writ, pursuant to the said Act." The plaintiffs demurred to that plea, and also joined issue upon all the allegations contained in it. Upon the case going down for trial the jury found all the questions which may be said to relate to the merits of the case in favour of the plaintiffs; but the judge, nevertheless, thought that a verdict should be entered for the defendants upon this plea. The jury therefore, by his direction,

assessed damages contingently; and leave was given to the plaintiffs to move to enter a verdict for them for the amount of those damages. That rule, coming before the Supreme Court, was discharged, and judgment was entered for the defendants. Against that judgment the present appeal is brought.

The argument upon this appeal has been restricted to two questions, with which alone their Lordships propose to deal. The first question was whether assuming a notice of action to be necessary, one was given; and, secondly, whether a notice of action was necessary. The 46th section of the Melbourne Harbour Trust Act is in these terms: "All actions to be brought against any person for anything done under this Act shall be commenced within six months after the act complained of was committed, and no writ shall be sued out against nor any copy of any process served upon any person for anything done by him under this Act until notice in writing of such intended writ or process shall have been delivered to him or left at his usual place of abode by the agent or attorney of the party who intends to cause the same to be sued out, or served at least one month before the suing out or serving the same. Such notice shall clearly and explicitly set forth the nature of the intended action and cause thereof, and on such notice shall be indorsed the name and place of abode of the party intending to bring such action, and the name and place of business of his attorney or agent." Then it goes on to say that the defendant may plead the general issue, and that he may tender evidence. It is contended that a letter written by Messrs. McMeckan, Blackwood, and Co., agents of the plaintiffs, on the day after the accident occurred, is a sufficient notice of action under this Act. The letter is as follows:—"Union Steamship Company of New Zealand Limited, Melbourne, 21st October 1881. The Secretary, Melbourne Harbour Trust Commissioners.—Sir, we have the honour to bring under your notice a very serious accident that happened to *Rotorua* steamer, owned by this company. When coming up the river yesterday morning, and close to the Junction Point, and a little way below the *Platypus*, she struck the chain of that dredge, it being laid in mid-channel. The damage sustained is of an extensive character." Then the damage is specified. "The surveyors are now surveying, and may yet discover further damage. Possibly you may desire to send some of your officers to view the extent of the mischief, all of which we must hold the commissioners responsible for." It appears to their Lordships that the court below were right in holding that this was not a notice of action in compliance with the statute. It was clearly not intended to be. It does not give notice of any intended writ or process whatever; it does not clearly and explicitly set forth the cause or nature of the action; it does not give the name or place of business of the attorney or agent who is to bring the action. It appears to want all the necessary characteristics of a notice of action as prescribed by the statute. Some cases have been quoted for the purpose of showing that notices of action are not to be construed with extreme strictness, a rule to which their Lordships subscribe. Cases have been quoted in which notices of action have been upheld which would have been bad upon special demurrer, or perhaps upon general demurrer; but those cases have no bearing on the present, where the notice of action is not, in form or substance, a compliance with the Act.

The question which remains is whether or not the defendants are entitled to a notice of action. "In the construction and for the purposes of this Act the following terms shall, if not inconsistent with the context or subject-matter, have the respective meanings hereby assigned to them." Then come these words: "Person shall include a corporation." It, therefore, lies upon the counsel for the plaintiffs to show that to hold that a person in sect. 46 includes a corporation is inconsistent with the context or subject-matter. The argument to this effect is that sect. 2 declares the Act to be divided into parts, and part 2 is headed "Officers"; that when we come to part 2, in sect. 33 we find the heading "Officers" and a number of sections grouped together under that heading; that, therefore, the word "person" in sect. 46 must be confined to "officers." The case in the House of Lords, of *The Eastern Counties and London and Blackwall Railways* v. *Marriage* (9 H. L. Cas. 32), has been cited as an authority for this argument on the part of the plaintiffs. It should be observed as to that case, which dealt with the construction of the Lands Clauses Act, that in that Act were several headings so drawn as to be applicable grammatically to the sections which followed them. The heading then in question was this: "And with respect to small portions of intersected land, be it enacted as follows." Then came two sections: first, the 93rd, relating to lands not being situated in a town; and then the 94th, beginning with "If *such* land shall be so cut through and divided." It was held by the House of Lords that "*such* land" referred, not to land mentioned in sect. 93, but referred back to the heading before sect. 93; namely, "with respect to small portions of intersected land, be it enacted as follows." That case appears to their Lordships to have no application to the present. Here the heading "Officers" is not such a heading as could be grammatically read into any of the sections which follow. It seems to their Lordships to have been inserted for the purpose of convenience of reference, and not intended to control the interpretation of the clauses which follow. It may be, indeed, that the fact of a clause being found in a certain group may in some cases possibly throw some light upon its meaning; but it appears to their Lordships that the construction contended for on the part of the plaintiffs that the term "officers" controls the meaning of the word "person" in sect. 46, applying it solely to officers and negativing its application to a corporation is untenable. If we examine the clauses which follow under the head of "Officers," we find that they do not relate solely to officers or to their powers or to their duties. The very first section which follows this heading (sect. 33) gives to the commissioners power "from time to time to appoint a secretary, treasurer, and clerk, and appoint or employ such engineers, surveyors, collectors, and other officers, servants, and persons to assist in the execution of this Act as the commissioners shall think necessary or proper." This section, therefore, under the heading "Officers," confers not merely powers upon officers, but a most important power upon the commissioners; a power without which

they would be unable to act, for a corporation can only act through its officers. There are further provisions in sect. 40, enabling them to appoint a harbour-master and so on. It appears to their Lordships that, powers having been given to the commissioners under these sections to appoint officers, and they being capable only of acting through their officers, it was a very proper and convenient place to insert a section which determined under what circumstances actions should be brought against them in respect of the acts of their officers. Accordingly, sect. 46 appears to their Lordships to be quite in its proper place, putting the interpretation upon it that it refers to actions brought not only against officers for anything done under the Act, but against the commissioners themselves for anything done by their officers on their behalf; and all reasoning and probability would point to this having been the intention of the Legislature. It would be almost impossible to give any good reason why officers should be entitled to a notice of action, and the commissioners not; or why officers should be entitled to tender amends, and the commissioners should not. Their Lordships will humbly advise Her Majesty that the judgment of the court appealed against be affirmed, and that this appeal be dismissed. The appellants must pay the costs of the appeal.

Solicitors for the appellants, *Wild, Brown,* and *Wild.*

Solicitors for the respondents, *Wadeson* and *Malleson.*

Nov. 20, 21, 1883, *and Feb.* 9, 1884.

(Present: The Right Hons. Lord FITZGERALD, Sir BARNES PEACOCK, Sir ROBERT COLLIER, Sir JAMES HANNEN, Sir RICHARD COUCH, and Sir ARTHUR HOBHOUSE.)

LAWS AND OTHERS *v.* SMITH; THE RIO TINTO. (*a*)

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF GIBRALTAR.

Necessaries — Material men — Maritime lien — British ship—3 & 4 *Vict. c.* 65—*Admiralty Court Act* 1861—*Vice-Admiralty Courts Act* 1863 (26 *Vict. c.* 24), *s.* 10.

Material men supplying necessaries to a British ship in a possession in which a Vice-Admiralty court is established, do not, under the Vice-Admiralty Courts Act 1861, *s.* 10, *sub-sect.* 10 *acquire a maritime lien, and the ship when in the hands of subsequent purchasers for value without notice of the debt cannot be made chargeable with the necessaries.*

THIS was an appeal by the defendants in a necessaries action from a judgment of the Vice-Admiralty Court of Gibraltar of the 2nd Feb. 1883, whereby the appellants and their bail were condemned in the sum of 312*l.* 0*s.* 9*d.* and costs.

The action was instituted by the respondent, W. J. S. Smith, on the 27th Dec. 1881, against the owners of the British steamship *Rio Tinto* to recover the price of certain necessaries supplied to the vessel at Gibraltar.

During the years 1879 and 1880 the *Rio Tinto* was on four occasions at Gibraltar, and there supplied with coals and other necessaries by W. J. S. Smith, the respondent, the date of the first supply being the 18th Oct. 1879, and the date of the last the 10th July 1880.

At the time when these necessaries were supplied the owner and master of the *Rio Tinto* was James Hough. On the 17th Sept. 1880 Hough sold the *Rio Tinto* "free from incumbrances," to one Henry James Baldwin, and on the 14th Oct. 1881 Henry James Baldwin sold her to the present appellants by bill of sale containing a covenant that the vessel was "free from incumbrances."

After the last supply of coals on the 10th July 1880 the *Rio Tinto* did not return to Gibraltar until the 27th Dec. 1881, when she was arrested in the present suit.

The learned judge of the Vice-Admiralty Court gave judgment on the 2nd Feb. 1883 in favour of the respondent (the plaintiff below), treating his right as a maritime lien, and holding therefore that it survived the transfer of the vessel to the appellants. He further held that in the circumstances the respondent used all due diligence in asserting his lien.

From this judgment the owners of the *Rio Tinto* appealed, and it was submitted on their behalf that the judgment was wrong, and should be reversed for the following among other reasons:

1. Because there was no maritime lien and no right to seize the vessel in the hands of innocent purchasers for value.
2. Because the title of the appellants as purchasers for value prevailed over any title of the respondent.
3. Because, assuming there was a maritime lien, the respondent did not use diligence in asserting it.

In the case on behalf of the respondent it was submitted that the judgment below was correct and ought to be affirmed for the following among other reasons:

1. That the coals were supplied and the disbursements made by the respondent, and not by the respondent as agent for Lambert Brothers.
2. That the coals were supplied and the disbursements made on the credit of the vessel and not on the credit of Captain Hough.
3. That the case is within the meaning and purport of 26 Vict. c. 24 as regards "necessaries."
4. That the lien of the respondent was not forfeited by any laches.

Cohen, Q.C. and Dr. *Phillimore* for the appellants, the owners of the *Rio Tinto.*—It is submitted that the Vice-Admiralty Courts Act 1863, s. 10, sub-sect. 10, which gave the Vice-Admiralty Courts jurisdiction in respect of necessaries, created no maritime lien. If so, the *Rio Tinto,* being in the hands of purchasers for value without notice of any incumbrance, cannot be made liable. It may be argued by the respondents that the Vice-Admiralty Courts Act 1863, s. 10, sub-sect. 10 is *in pari materiâ* with 3 & 4 Vict. c. 65, s. 6, which gave the High Court of Admiralty jurisdiction over claims for necessaries supplied in England to foreign ships. On the construction of this latter Act it has been held that a maritime lien is created by it in the case of necessaries supplied to foreign ships:

The West Friesland, Swa. 454;
The Ella A. Clark, 1 Mar. Law Cas. O. S. 325; 8 L. T. Rep. N. S. 119; Br. & Lush. 32;
The Two Ellens, 1 Asp. Mar. Law Cas. 208; 26 L. T. Rep. N. S. 1; L. Rep. 4 P. C. 161.

It is true that in both Acts the words are the court "shall have jurisdiction." But the reason given by the courts for holding that 3 & 4 Vict.

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

c. 65 gives a maritime lien is not the use of the words "the High Court of Admiralty shall have jurisdiction," but it is the fact that the Legislature, after saying the court shall have jurisdiction in the case of salvage and collision, places necessaries next. By so doing the Legislature strongly indicates that, as there is a maritime lien in the case of salvage and collision, there is also to be one in the case of necessaries supplied to foreign ships. That reason does not exist in the Vice-Admiralty Courts Act 1863. The particular sub-section (10) conferring jurisdiction in respect of necessaries immediately follows one conferring jurisdiction in respect of disputes between co-owners, in which case it cannot be maintained for a moment that a maritime lien is given. Moreover, 3 & 4 Vict. c. 65 applied to foreign ships, in which case there were peculiar reasons for deciding that a maritime lien was created by the statute. In the present case the ship proceeded against is British, and those reasons are therefore wanting. Notwithstanding the dictum in *The Bold Buccleugh* (7 Moo. P. C. 267), that "in all cases where a proceeding *in rem* is the proper course there a maritime lien exists," the words "shall have jurisdiction" are not in themselves sufficient to create a maritime lien. The *Bold Buccleugh* was, moreovor, a damage case, and the proposition quoted is but a dictum. Moreover, subsequent decisions have limited the comprehensive language of that dictum:

The Gustaf, 1 Mar. Law Cas. O. S. 230; Lush. 506; L. T. Rep. N. S. 660;
The Two Ellens (*ubi sup.*);
The Pacific, 2 Mar. Law Cas. O. S. 21; 10 L. T. Rep. N. S. 541; Br. & Lush. 243;
The Mary Ann, 2 Mar. Law Cas. O. S. 294; 13 L. T. Rep. N. S. 384; L. Rep. 1 Ad. & Ec. 8.

For instance, both mortgagees and material men can proceed *in rem* against a British ship, and yet in neither case is there a maritime lien. The fact is that the Vice Admiralty Courts Act 1863, s. 10, sub-sect. 10, is *in pari materiâ* with the Admiralty Court Act 1861, s. 5. No maritime lien is created by sect. 5 of the Admiralty Court Act 1861, and so with the Vice-Admiralty Courts Act, which was passed only two years later. If not, Vice-Admiralty courts would have greater jurisdiction than the High Court, which is improbable. It is to be noticed that the only Vice-Admiralty court in which the action can be instituted is the Vice-Admiralty Court which is in the possession where the necessaries were supplied. This limitation is incompatible with the essential characteristics of a maritime lien, which should be capable of being enforced by all courts of competent jurisdiction. Even assuming that a maritime lien exists, the respondent has lost it by laches:

The Bold Buccleugh (*ubi sup.*);
The Europa, 1 Mar. Law Cas. O. S. 337; 8 L. T. Rep. N. S. 368; Br. & Lush. 89;
The Charles Amelia, 3 Mar. Law Cas. O. S. 203; 19 L. T. Rep. N. S. 429; L. Rep. 2 Ad. & Ec. 330.

Meadows White, Q.C. and *Bigham*, Q.C. for the respondent. — It is submitted that the Vice-Admiralty Courts Act 1863 has conferred the same jurisdiction within the limits of sect. 10, sub-sect. 10, as the High Court of Admiralty was given in the case of necessaries supplied to foreign ships. The wording of the two Acts is similar, and if the one creates a maritime lien so does the other. Moreover, the reasons why a maritime lien should exist in the case of foreign ships supplied with necessaries in England also exist here. The *Rio Tinto*, *quâ* Gibraltar, was a foreign ship. It is also to be noted that sub-sect. 10, sect. 10 of the Vice-Admiralty Courts Act 1863 speaks of necessaries supplied to "any ship," making no distinction between British and foreign ships. The conclusion to be drawn from this is that, inasmuch as there should undoubtedly be a maritime lien in the case of foreign ships, the Legislature, by drawing no distinction, indicates that a maritime lien is given in the case of British ships which, as pointed out before, are in many cases foreign, *quâ* the possession. And should it be laid down that no maritime lien is created by the statute in the present case—which is that of a British ship—the Court cannot, in subsequent cases, decide otherwise in the case of foreign ships, which will give rise to palpable hardships. Notwithstanding what has been said adverse to the proposition in *The Bold Buccleugh* (*ubi sup.*), yet where a proceeding *in rem* is given, in the absence of strong reasons to the contrary, a maritime lien is created:

The Alexander, 1 W. Rob. 288; 1 N. of Cas. 188.

The chief reason for deciding in *The Two Ellens* (*ubi sup.*) that the Admiralty Court Act 1861, s. 5, does not create a maritime lien in the case of necessaries supplied to a colonial vessel in England does not exist here. According to the wording of the Admiralty Court Act 1861 jurisdiction is only given over necessaries, provided that, at the time of the institution of the suit, no owner is domiciled in England or Wales; and hence, if there were a maritime lien, it would be liable to be extinguished or revived by the domicile of the owners at the institution of the suit. That objection does not exist in the case of the Vice-Admiralty Courts Act 1863, s. 10, sub-sect. 10. The reason why the suit must be instituted in the Vice-Admiralty Court in the possession in which the goods are supplied is merely one of expediency and in no way inconsistent with the creation of a maritime lien. The reason is the saving of expense which would be caused by bringing witnesses from a distance to any Vice-Admiralty Court in which the plaintiff might choose to sue. As to the question of laches, there has been no such delay as should take away the lien.

Dr. *Phillimore*, in reply, referred to 30 & 31 Vict. c. 114, s. 31, and argued that if a maritime lien was created by the Vice-Admiralty Courts Act, it was also created by 30 & 31 Vict. c. 114, which gave jurisdiction to the Court of Admiralty in Ireland over necessaries.

The following Acts of Parliament were referred to during the argument:—

3 & 4 Vict. c. 65, s. 6:

Be it enacted 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, or damage received by, any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered or damage received, or necessaries furnished in respect of which such claim is made.

The Admiralty Court Act 1861, sect. 5:

The High Court of Admiralty shall have jurisdiction over any claim 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.

The Vice-Admiralty Courts Act 1863, sect. 10:

The matters in respect of which the Vice-Admiralty Courts shall have jurisdictions are as follows: (9) Claims between the owners of any ships registered in the possession in which the court is established, touching the ownership, possession, employment, or earnings of such ship; (10) claims for necessaries supplied in the possession in which the court is established to any ship of which no owner, or part owner, is domiciled within the possession at the time of the necessaries being supplied.

The Court of Admiralty (Ireland) Act 1867, sect. 31:

The Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs.

Cur. adv. vult.

Feb. 9.—Their Lordships' judgment was delivered by

Sir JAMES HANNEN.—The *Rio Tinto*, a British steamer, of which George Hough was owner and master, was, in the year 1879, engaged in the Mediterranean trade. In October of that year she put into Gibraltar, and, being in want of coal, obtained from a firm there, trading under the style of the London Coal Company, of which the respondent, W. J. Smith, was the managing partner, a supply to the amount of 72*l.* 10*s.* 9*d.*, and, on subsequent occasions, obtained further supplies, as follows: 1879, Nov. 13th, 107*l.* 11*s.* 8*d.*; 1880, May 6th, 132*l.* 14*s.* 11*d.*; July 10th, 56*l.* 6*s.* 1*d.* In August 1880 she again required coals, but, as the previous quantities had not been paid for, the agent of the London Coal Company refused to furnish more, but ultimately did so to the extent of 67*l.* 1*s.* 5*d.*, upon a guarantee for that amount being given by the ship's broker in London. This sum was afterwards paid. The *Rio Tinto* did not again put into Gibraltar while Hough remained owner or master. On the 17th Sept. 1880, Hough sold the vessel to one Baldwin, who, on the 14th Oct. sold it to the appellants. Both Baldwin and the appellants purchased without notice of any claim against the vessel in respect of the coals supplied by the respondent's firm. On the 27th Dec. 1881 the *Rio Tinto* again put into Gibraltar, when she was arrested in the Vice-Admiralty Court of that place at the suit of the respondent for the coals supplied in October and November 1879 and May and July 1880. At the hearing af the cause in February 1883 the learned judge of the Vice-Admiralty Court pronounced for the claim of the respondent for the coals as necessaries, holding that this claim created a maritime lien which attached to the ship from the time of the supply, into whosesoever possession she might come, and could be enforced in the Vice-Admiralty Court as against a subsequent purchaser withont notice, and he further held that the respondent had not by laches on his part lost the right to enforce his claim.

Several questions were raised by the appellants in the court below, which have been abandoned before their Lordships. It is not now disputed that the coals were supplied by the respondent on the credit of the owners, and it is admitted that the coals were necessaries; but it is contended (1) that no maritime lien attached to the ship, and (2) that if it did, it was lost by laches. The case, in so far as it affects the jurisdiction of Vice-Admiralty Courts, is of considerable importance, and as the decisions bearing on the subject are not uniform it may be advisable to review them with some minuteness. It was long ago decided in the courts of common law, and finally held by this tribunal, in the case of *The Neptune* (3 Knapp, 94), that material men never had any lien on the ship itself in respect of supplies furnished in England, and the language of Lord Tenterden in his treatise on shipping was adopted as correct. "A tradesman who has furnished ropes, sails, provisions, or other necessaries for a ship is not, by the law of England, preferred to other creditors, nor has he any particular claim or lien upon the ship itself for the recovery of his demands," and the reason of this, as the learned author states in an earlier passage, is because the law of England never had adopted the rule of the civil law with regard to necessaries furnished here in England. It has also been held by this tribunal that Vice-Admiralty Courts had not (apart from statute) more than the ordinary Admiralty jurisdiction, "that is, the jurisdiction possessed by Courts of Admiralty antecedent to the passing of the statute 3 & 4 Vict. c. 65, which enlarged it." It follows, therefore, that (apart from statute) a Vice-Admiralty Court had not jurisdiction to enforce any claim by way of maritime lien on the ship itself for necessaries supplied in the circumstances of this case. But it is contended for the respondent that such jurisdiction has now been conferred by the 10th section of the Vice-Admiralty Act 1863 (26 Vict. c. 24), subsect. 10, by which jurisdiction is given in respect of "claims for necessaries supplied in the possession in which the court is established to any ship of which no owner or part owner is domiciled within the possession at the time of the necessaries being supplied."

Before considering the effect of this subsection, it is necessary to examine some previous kindred enactments, and the first of these is the 3 & 4 Vict. c. 65, s. 6: "the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going 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 when the services were rendered, or damage received, or necessaries furnished, in respect of which such claim is made." The effect of this enactment first came under consideration in *The Alexander* (1 W. Rob. 288; 1 Notes of Cas. 188). The necessaries were supplied to a foreign ship prior to the passing of the Act. Proceedings were subsequently taken under the 6th section, and it was held that the court had jurisdiction. Some remarks of Dr. Lushington have a bearing on the present question; he says: "In the first place the statute does not create a lien at all," and, after reading the section, he proceeds, "the court shall have jurisdiction; it simply gives the court jurisdiction in any and every lawful mode which the court has the power of exercising. I wish to draw attention particularly to the fact that no lien whatever is established by the Act." The next

case to which it is necessary to call attention is *The Bold Buccleugh* (7 Moo. P. C. 267). That was an action for damage done by a Scotch steamer to an English vessel in the Humber. The vessel was arrested at Hull, after sale to a purchaser without notice of the claim against her in respect of the damage, and it was held by this tribunal that damage creates a maritime lien on the ship causing the damage, and that such lien travels with the thing into whosesoever possession it may come, and when carried into effect by a proceeding *in rem*, relates back to the period when it first attached. It is to be observed that this was a suit for damage, as to which there is now no doubt that it creates a maritime lien. Upon this point their Lordships remark: "But it is further said that the damage confers no lien upon the ship, and a dictum of Dr. Lushington, in the case of *The Volant* (1 W. Rob. 387) is cited as an authority for this proposition. By reference to a contemporaneous report of the same case (1 Notes of Cas. 508), it seems doubtful whether the learned judge did use the expression attributed to him by Dr. W. Robinson. If he did, the expression is certainly inaccurate, and being a dictum merely, not necessary for the decision of the case, cannot be taken as a binding authority." The decision, therefore, in *The Bold Buccleugh* that damage confers a maritime lien, valid against a subsequent purchaser without notice, and that this lien may be enforced under the 6th section of the 3 & 4 Vict. c. 65, does not govern the present case, where the question is whether the mere conferring upon Vice-Admiralty Courts jurisdiction over claims for necessaries in certain cases carries with it the creation of a maritime lien for such necessaries. Some passages, however, in the judgment in *The Bold Buccleugh* appear to have led Dr. Lushington to the conclusion that he was bound by that decision to hold that the 6th section of the 3 & 4 Vict. c. 65 did create a maritime lien in the case of necessaries as well as in the case of damage. In *The West Friesland* (Swa. 454) he held that coals supplied to a foreign steamship were necessaries, and that they created a lien under 3 & 4 Vict. c. 65, s. 6, which continued notwithstanding the sale of the ship, if there were no laches. And in *The Ella A. Clarke* (Br. & L. 32; 32 L. J. 211, P. M. & A.), the same learned judge held that a claim for necessaries supplied to a foreign ship might be enforced by proceedings *in rem* under the 6th section, notwithstanding a subsequent and *bonâ fide* transfer to a British owner and he says (p. 36): "It is true that in *The Alexander* I am reported to have said that the Act of 3 & 4 Vict. did not create a lien, though it gave a remedy against the ship. I intended to state that there might be a distinction between a provision for proceedings by arrest of the ship and the express creation of a lien, and to leave all such questions open. The case of *The Bold Buccleugh*, however, renders the discussion of this question useless."

With regard to these cases, their Lordships have only to repeat what was said of them in the judgment of this tribunal in the case of *The Two Ellens* (1 Asp. Mar. Law Cas. 108; L. Rep. 3 A. & E. 345; L. Rep. 4 P. C. 161): "These decisions may be supported upon the ground that though it is perfectly true that the only words used in the section are 'that the High Court of Admiralty shall have jurisdiction' (which words seem hardly sufficie t in themselves to create a maritime lien), yet, looking at the subject-matter to which that section relates, it appears designed to enlarge the jurisdiction which the Court of Admiralty already had in matters forming the subject of maritime lien. There are strong grounds for holding that as respects salvage and as respects collisions, which already gave a maritime lien when they occurred on the high seas, it was intended that they should also when they occurred in the body of a county equally give a maritime lien, and that being so as to salvage and collision it might well be said that necessaries immediately following, it was intended that the same rule should apply in the case of necessaries." In the present case, however, it will be found that the creation of the alleged maritime lien is made to depend solely on the words "the High Court of Admiralty shall have jurisdiction," which, as their Lordships in *The Two Ellens* pointed out, are not sufficient in themselves to create a maritime lien.

The Admiralty Court Act 1861 (24 Vict. c. 10), and the decisions upon it, must next be considered. By the 5th section, it is enacted that the High Court shall have jurisdiction over any claim 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. Dr. Lushington was at first disposed to hold, on the supposed authority of *The Bold Buccleugh*, that this section gave material men a maritime lien (*The Skepwith*, 10 Jur. N. S. 445; 2 Mar. Law Cas. O. S. 20), but he afterwards in *The Pacific* (Br. & L. 243) gave a considered judgment to the effect that the 5th section of the Act of 1861 confers no maritime lien on the material men, but only the right to sue the ship. In *The Mary Ann* (L. Rep. 1 Ad. & Ec. 8) he developed his views on the subject more fully. He there says (p. 11): "There is a clear distinction between a maritime lien and a claim the payment of which the court has power to enforce from the ship and freight. A maritime lien springs into existence the moment the circumstances give birth to it, as damage, salvage, and wages; but it does not follow that because a claim may by Act of Parliament be enforceable against the parties that, therefore, it created a maritime lien. Besides, looking at the whole Act, it is impossible to maintain that a maritime lien is created by every one of the numerous sections which commence with the words, 'The High Court of Admiralty shall have jurisdiction.' In some of the sections these words are accompanied by a proviso incompatible with a maritime lien, as is pointed out by Mr. Maclachlan in reference to the 4th section, and as the court has held with regard to the 5th section in the case of *The Pacific*. So, also, it could hardly be argued that it was intended to create a maritime lien by the 8th section, in favour of co-owners, or by the 11th section in favour of mortgagees. In my opinion the words 'the High Court of Admiralty shall have jurisdiction' mean only what they purport to say, neither more nor less, that is that the court shall take judicial cognisance of the cases provided for. By themselves the words leave open the question whether or not a mari-

time lien is created. The answer to this question depends on other considerations." It appears to their Lordships that this reasoning, which was adopted by this tribunal in the case of *The Two Ellens*, is applicable to the question now under consideration. The 10th section of the Vice-Admiralty Act 1863 is divided into eleven sub-sections. The 10th, relating to necessaries, is immediately preceded by one relating to claims between owners, as to which it cannot be supposed that it was intended to confer a maritime lien, yet the two sub-sections are equally governed by the same introductory words: "The matters in respect of which the Vice-Admiralty Courts shall have jurisdiction are as follows." It has been argued that a different construction to that which the 5th section of the Admiralty Act 1863 has received, should be put on the 10th sub-section of the 10th section of the Vice-Admiralty Act 1863, because by the latter the jurisdiction is made to depend on there being no owner domiciled in the possession at the time of the necessaries being supplied. But in the absence of a domiciled owner credit is probably given to the ship, and there is, therefore, in such a case reason for giving the Vice-Admiralty Court of the place jurisdiction, which would include the power to proceed *in rem*, but it does not suggest a reason why the fresh incident of a maritime lien should attach from the time of the supply—a lien which is to travel with the ship into whosesoever hands she may pass, yet only capable of being enforced at one place. Their Lordships are thus led to the conclusion that there is nothing from which it can be inferred that by the use of the words "the court shall have jurisdiction" the Legislature intended to create a maritime lien with respect to necessaries supplied within the possession. Adopting this view, it becomes unnecessary to determine whether or not, if such a lien had existed, it was lost by any laches on the part of the respondent. Their Lordships will humbly advise Her Majesty that the judgment of the Vice-Admiralty Court be reversed, with the costs of this appeal and the costs in the courts below.

Appeal allowed.

Solicitors for the appellants, *E. Flux* and *Leadbitter*.

Solicitors for the respondent, *Stocken* and *Jupp*.

Supreme Court of Judicature.

COURT OF APPEAL.

May 1 *and* 7, 1884.

(Before Brett, M.R., Bowen and Fry, L.JJ.)

Spiller *v.* The Bristol Steam Navigation Company. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Third Party—Indemnity—Order XVI., r. 48*—Damage to cargo.*

Where a defendant claims to be entitled to indemnity over against a person not a party to the action leave will not be given under Order XVI., r. 48, *to serve a third-party notice unless the claim is on a contract of indemnity.*

An owner of cargo sued the charterers of the ship for damage to the cargo. Defendants applied for leave to serve a third-party notice on the ship-owner, alleging that the damage to cargo was caused by a breach of warranty of seaworthiness contained in the charter-party.

Held (*affirming the order of Grove, J. and Huddleston, B.*), *that, as no contract of indemnity was shown, leave must be refused.*

Pontifex *v.* Foord (49 *L. T. Rep. N. S.* 808; 12 *Q. B. Div.* 152) *approved.*

This was an action brought to recover damages for injury alleged to have been caused to certain sugar belonging to the plaintiff while it was being conveyed on a voyage from Amsterdam to Bristol, on board the steamship *Dale*, of which the defendants were charterers.

It was suggested on the part of the defendants that the damage, if any, was caused by the breach of a warranty of seaworthiness alleged to be contained in the charter-party by which they hired the ship from the shipowner, who was named Aitken, and was resident in Scotland.

Bucknill for the defendants.—If the ship was unseaworthy, as alleged in the statement of claim, the defendants have a right to be indemnified by Aitken, who is the owner of the ship, and who had given an undertaking to keep the vessel seaworthy during the time of the charter. I make this application under Order XI., r. 1, sub-sect. (*g*) (*a*). In the case of *Lenders* v. *Anderson* (12 Q. B. Div. 50) it was decided that there was no power to grant leave to serve a writ where the defendant is domiciled and ordinarily resident in Scotland or Ireland, but that decision was upon sub-sect. (*e*) of the same rule. The words of sub-sect. (*g*) are wide enough to include this case. [Huddleston, B.—Why should a person be brought in as a third party when he could not be made a defendant?] He need not appear, if he is served with a notice. [Huddleston, B.—But if he does not he admits the validity of the judgment, and his own liability to indemnify.] He may not be a "necessary party," but I submit he is a "proper party" to the action within the meaning of the rule. [Grove, J.—I do not read the words "proper party" in the sense of a person against whom the defendant has a right of action, but a "proper party" to the action by the plaintiff.] If the defendant is liable to the plaintiff by reason of the unseaworthiness of the ship he clearly has a right of action against Aitken, who is a proper party to the action because he is bound to indemnify the defendant.

Grove, J.—This case is not free from difficulty, but I think we should be arriving at a very extravagant conclusion if we decided that, although a person domiciled in Scotland cannot be served with a writ of summons, he may be served with a third-party notice, and so be brought in as a party to the action. Supposing the case stands as it is, the defendant has a remedy against Aitken. Before the Judicature Act there would have been

(*a*) Reported by P. B. Hutchins, Esq., Barrister-at-Law.

(*a*) Order XI., r. 1; "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever:

"(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

two separate actions, and of course there may be now. Aitken cannot be made a defendant because he is domiciled in Scotland, but if Mr. Bucknill's contention is right he may be made a third party and be bound by the judgment if he does not appear and defend the action. This seems to be a very extraordinary proposition, and would get rid of the decision in *Lenders* v. *Anderson* (*ubi sup.*). In my opinion the words "proper party to an action," in Order XI., r. 1, sub-sect. (*g*), do not mean any person who may be brought in as a third party for collateral purposes, but any person against whom the action may be properly brought. Aitken is not a defendant, although the verdict may bind him if he is brought in as a third party, and I do not think he is "a necessary or proper party to the action," within the meaning of the rule. By granting this application we should virtually contravene the spirit of the Act in allowing a Scotchman or Irishman to be brought to England in an action to which he was not an immediate party, while a defendant liable could not be brought. Therefore this appeal must be dismissed.

Huddleston, B.—I am of the same opinion. The only power to allow the service of a writ out of the jurisdiction is now derived from the Judicature Acts. The Court of Chancery formerly had jurisdiction to grant leave to serve a writ out of the jurisdiction in all cases which the court thought proper; but it was decided by the late Master of the Rolls in *Eager* v. *Johnstone* (47 L. T. Rep. N. S. 685; 22 Ch. Div. 86) that the old practice as to service out of the jurisdiction is no longer in force, and that no leave to serve a defendant out of the jurisdiction can be given except in the cases specified in Order XI., r. 1. In the case of *Lenders* v. *Anderson* we decided that there is no power to allow service of a writ out of the jurisdiction in actions for breach of contract under Order XI., r. 1, sub-sect. (*e*), where the defendant is domiciled or ordinarily resident in Scotland or Ireland, but Mr Bucknill says that a person may nevertheless be served with a third-party notice under Order XVI., rr. 48 and 49. If this argument is right it can only be under sub-sect. (*g*) of Order XI., r. 1, and therefore we must look at the words of that rule. Service of a writ of summons may he allowed where any person out of the jurisdiction is "a necessary or proper party to the action." Is Aitken "a necessary or proper party?" He is clearly not a necessary party, and I think he is not a proper party. If he is served with a notice he must either come in and dispute the plaintiff's claim in the action against the defendant, or in default of his so doing he shall be deemed to admit the validity of the judgment against the defendant, and his own liability to contribute or indemnify as the case may be. I am of opinion that Order XI., r. 1, sub-sect. (*g*), does not apply to third-party procedure, and I think that it is not applicable to a third party domiciled or ordinarily resident in Scotland or Ireland.

From these judgments the defendants appealed.

By Order XVI., r. 48:

Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may by leave of the court or a judge issue a notice (hereinafter called the third party notice) to that effect, stamped with the seal with which writs of summons are sealed. A copy of such notice shall be filed with the proper officer and served on such person according to the rules relating to the service of writs of summons.

Service out of the jurisdiction is provided for by Order XI.

Gaskell, for the defendants, moved by way of appeal.—The defendants have a claim against the shipowner within the meaning of Order XVI., r. 48, and ought therefore to be allowed to serve him in Scotland under Order XI., r. 1. [Brett, M.R.—This cannot be a claim for contribution; is it a claim for indemnity over? There is no contract of indemnity; how then can it come within Order XVI., r. 48?] The word "contract" is not to be found in the rule. This court is not bound by the decision of the Divisional Court in *Pontifex* v. *Foord* (49 L. T. Rep. N.S. 808; 12 Q. B. Div. 152.) The measure of damages against the third party would be the same as against the defendants, and therefore the case is within the rule.

Brett, M.R.—The rule relating to giving notice to third parties has been altered. The old rule (R. S. C. 1875, Order XVI., r. 18) provided that "Where a defendant claims to be entitled to contribution, indemnity, or other remedy or relief over against any person not a party to the action, he may by leave of the court or a judge issue a notice, &c." Now, what was the meaning of the word "indemnity" there, and when was a person entitled to indemnity under that rule? Only when there was a contract of indemnity, either express or implied; there could be no right to indemnity in any other case. Therefore, to bring a case within the meaning of the word in the old rule, it was necessary to show a contract. It is true that the old rule also contained the words "or other remedy or relief," but in the present rule (R. S, C. 1883, Order XVI., r. 48) the words are, "Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, &c." We must put the same meaning on these words in this rule as the same words bore in the old rule, and therefore the present rule only applies where the third party is bound to indemnify the defendant, and in order that he may be so bound there must be a contract either express or by implication. In the present case there is no contract to indemnify. It is true that here apparently the shipowner must have anticipated that there would be a claim over, and therefore the damages recoverable from him in the event of the defendants' case against him being made out would probably be the same as the damages recoverable by the plaintiff from the defendants; that, however, is a mere accident, and this is not enough to give the defendant a right to serve the third party, for there must be a contract. The other words which occurred in the old rule have been struck out in Order XVI., r. 48, and the case does not come within the meaning of the word "indemnity" within that rule. Then, if the case does not come within the words of the rule where it is sought to serve a third party who is resident in England, it follows that it is not within the rule when it is sought to serve a third party resident in Scotland. What the mode of trial of the two actions should be we need not say, but I have come to the conclusion that the defendants are not entitled to bring in a third party in this action. I am of opinion that the construction put upon Order XVI., rr. 48, 52

by Pollock, B. in *Pontifex* v. *Foord* (12 Q. B. Div. 152) is right, and that the present application ought to be refused.

Bowen, L.J.—I am of the same opinion. I agree with the decision in *Pontifex* v. *Foord* (12 Q. B. Div. 152), and with the observations of Pollock, B. in that case. The old rule gave a wider power than the present. That was found to work inconveniently, and the rule was altered deliberately. The words were chosen with reference to the class of business which usually gives rise to these questions, and the words of the new rule are such as to include only cases of contribution or indemnity. Here, as against Aitken, the shipowner, there was no contract of indemnity, nor was there any indemnity, as such, because there was no contract. The fact that the damage in both cases would probably be the same is an accident, and cannot convert the claim into a claim for indemnity.

Fry, L.J.—I am entirely of the same opinion. This is not strictly a legal claim to indemnity. Mr. Gaskell said that the rule applies wherever the measure of damages against the third party would be the same as the measure of damages against the defendants. I am unable to accede to this contention, and am of opinion that the word "indemnity" in Order XVI., r. 48, should have its strict legal construction.

Application refused.

Solicitors for defendants, *Lowless* and *Co.*

Thursday, March 13, 1884

(Before Brett, M.R., Baggallay and Lindley, L.JJ.)

The Sea Insurance Company v. Hadden and Another. (a)

Marine insurance—Ship and freight insured with different underwriters—Payment for total loss on ship—Right of underwriters on ship to recover the damages paid to the assured by the wrong-doing vessel in respect of loss of freight.

The defendants effected with the plaintiffs a policy of insurance upon a vessel belonging to the defendants, and also insured the freight with other underwriters.

Before any freight had been earned, but while the vessel was proceeding to her port of loading under charter-party, she was run into and damaged by another ship. The defendants abandoned her to the plaintiffs, who paid as for a total loss. Afterwards the defendants recovered in the Admiralty Division against the owner of the other ship damages in respect of the loss of the ship and of the loss of freight. In an action by the plaintiffs to recover the damages so paid to the defendants in respect of the loss of freight:

Held, that the plaintiffs were not entitled to recover these damages, as freight which has not been earned is not an incident of the ownership of the ship and does not pass to the underwriters on the ship upon abandonment.

This was an appeal from a judgment of Day, J. on further consideration, after trial at Liverpool.

The facts of the case sufficiently appear from the judgment.

(a) Reported by A. A. Hopkins, Esq., Barrister-at-Law.

At the trial before Day, J., at Liverpool, there was no dispute as to the facts, and the questions of law raised were reserved by his Lordship for further consideration. The questions of law having been argued before him, the learned judge gave judgment in favour of the defendants.

The plaintiffs appealed.

Cohen, Q.C. and *Barnes* (*C. Russell*, Q.C. with them) for the plaintiffs.—The question is whether the plaintiffs, who were the insurers of the ship and paid as for a total loss, are entitled to recover the amount which has been recovered by the shipowner in respect of unearned freight. No freight was earned, and damages were recovered by the defendant in the Admiralty Court against the wrongdoer in respect of the loss of power to earn freight. The plaintiffs are entitled to these damages. The fact that the freight is insured is immaterial. [Brett, M.R.—Take the case of the ship and freight both being insured. Then you say that the shipowner may go to the Admiralty Court and get damages in respect of both heads of loss, and hand all over to the insurer of the ship and leave the insurer on the freight out altogether.] Yes; because the insurer on the ship, who pays as for a total loss, takes the ship with all its incidents, and freight is incident to the ship:

Potter v. *Rankin*, 2 Asp. Mar. Law Cas. 65; 29 L. T. Rep. N.S. 142; L. Rep. 6 E. & I. App. 83;
The North of England Insurance Association v. *Armstrong*, 3 Mar. Law Cas. O.S. 330; 21 L. T. Rep. N. S. 822; L. Rep. 5 Q.B. 81;
Simpson v. *Thompson*, 3 Asp. Mar. Law Cas. 567; 38 L. T. Rep. N. S. 1; 3 App. Cas. 279;
Castellain v *Preston*, 49 L. T. Rep. N.S. 119; 2 Q. B. Div. 380;
Stewart v. *The Greenock Marine Insurance Company*, 2 H. L. Cas. 159;
Morrison v. *Parsons*, 2 Taunt. 407;
Case v. *Davidson*, 5 M. & S. 79;
Randal v. *Cockran*, 1 Ves. Sen. 98;
Darrell v. *Tibbets*, 42 L. T. Rep. N. S. 797; 5 Q. B. Div. 560.

Crompton, Q.C. and *W. R. Kennedy* for the defendants.—Unearned freight is not incident to the ship; there is no authority for that proposition. The insurers on the ship are of course entitled to the damages recovered in respect of the loss of the ship, but the freight is already insured and subject to the rights of the underwriters on the freight. To uphold the contention of the appellants would be to make a contract of insurance more than a mere contract of indemnity. They cited:

Hickie v. *Rodocanachi*, 4 H. & N. 455;
Keith v. *Burrows*, 3 Asp. Mar. Law Cas. 481; 37 L. T. Rep. N. S. 291; 2 App. Cas. 636.

Cohen, Q.C. in reply.

Brett, M.R.—In this case the shipowner insured his ship and also his freight with different underwriters. The ship was damaged by collision; and, in respect of that collision, the damage caused to the ship was so serious that she was abandoned to the underwriters on the ship, and the property in the ship therefore passed to the underwriters on the ship, who paid as for a total loss. Now, the ship was under charter. That being so, the shipowner sues the owner of the colliding ship in the Admiralty Court, in respect of the damage caused by the collision. What, then, does he sue him for? For the

injury he has suffered by the negligence of the colliding ship. What has he suffered? He has suffered the damage done to his ship and another loss beside, which is this—he had a contract of charter-party, and, in consequence of the collision, he has been deprived of the opportunity of making profit by earning freight. Now, the underwriters on the ship, having paid for a total loss, have sued the shipowner to recover whatever the shipowner has recovered by way of salvage out of his loss, and they claim to have everything that the shipowner has recovered from the owners of the wrong doing vessel in the Admiralty Court. But they are only entitled to what comes to the shipowner as salvage in respect of the loss of his ship. Therefore, the question arises, Is the contract of affreightment, when it is in some way saved out of the loss, to be regarded as a salvage on the loss of the ship? If it is, then, when the underwriter on the ship pays as for a total loss, if the contract of affreightment is salvage, he is entitled to the contract, and therefore he might sue upon it. There is no authority for any such proposition as that. If he might sue upon the contract of affreightment, he might sue for the breach of it—this it is clear he cannot do. Therefore, if this case is put upon the doctrine of salvage, it is plain, I think, that the contract of affreightment does not pass to the underwriters on the ship.

But it is said, further, that it does pass to them because it is incident to the ownership of the ship. Now, is that true? is a contract of affreightment incident to the ownership of the ship? Whether or not a certain ship is under a contract of affreightment is a mere accident; that contract is an independent contract of which the ship is not the subject-matter, and which is no part of the ship and which is, in fact, wholly independent of the ship. Therefore, it seems plain that such a contract is not within the definition of an incident of ownership of the ship. The absence of the contract of affreightment does not diminish the value of the ship, nor does its existence, as was pointed out by Bramwell B. in *Hickie* v. *Rodocanachi* (*ubi sup.*), increase its value. It is therefore a contract independent of the ship, although it can only be performed by the ship. Now, if authority be wanted upon the question of what is incident to the ship and passes with it when the property in the ship passes, I turn to the judgment of Lord Bramwell, then Bramwell, B., in the case of *Hickie* v. *Rodocanachi* (*ubi sup.*). That learned judge there says: "The case was very ably argued on both sides before us on the 4th May, when Mr. Blackburn, for the defendant, claimed that benefit as a matter of principal as well as of authority. He said that a contract of insurance was one of indemnity; that an insurer was in the nature of a surety, and entitled to the benfit of all the securities the insured possessed. But, in truth, this argument tells against him. The common insurance on a ship is in no way concerned with the freight in course of being earned. It is an insurance on the absolute value, not on that and the vessel's adventitious advantages. If any question of the value of the ship arose, the insured could not include the freight as an item in the calculation, any more than he could the prospect of winning a wager that he had made, that she would arrive at her port of destination. It is the goods, not the ship, which are increased in value by the arrival of the ship, or rather their arrival, and if they arrive the freight is earned. But the matter needs no argument; it is enough to refer to the practice of separate insurance on freight." That puts very clearly that by the practice of merchants the ship and her freight are two entirely separate things. Then Bramwell, B. goes on: "If, then, the loss of freight is no part of the loss of the ship, consequently the insurer of ship ought to have no benefit from the earning of freight unless he helps to earn it." I will deal with that shortly. Then, at the end of his judgment, he says—"On these grounds we are satisfied that the captain, in such a case as the present, acts for the owners of the ship, and not for the underwriters; and that they are not entitled to any benefit from the freight acquired: that the underwriters may indeed, be entitled to advantages attached to the ship, but not to those arising from contracts the fulfilment of which can be, and is, detached from the ship." Now, the contract of affreightment can be, and often is, detached from the owner of the ship; for instance, the shipowner may fulfil it by means of another ship. That judgment which I have just read seems a strong authority for the proposition that a contract of affreightment is not incident to the ownership of the vessel.

Again, Mr Kennedy's argument tends strongly in the same direction. If the vessel is insured by one set of underwriters and the freight is insured by another set, then whatever is salvage from the loss of the ship goes to the underwriters of the ship, and whatever is salvage from the loss of the freight goes to the underwriters of the freight. How, then, are the damages which have been recovered in this case from the owners of the colliding vessel made up? They are made up of damages given in respect both of the loss of the ship and of the loss of freight; therefore one set of damages ought to go to one set of underwriters and the other set to the other. It seems to me to be conclusive that the underwriters on the ship cannot recover what they here claim, because it seems clear that this recovery of damages in respect of the loss of freight is not a salvage which is a salvage out of the loss of the ship. But it is said, and a great deal is founded on this, that, where the ownership of the ship is transferred, either by sale or abandonment to underwriters after the voyage has commenced, and where the goods which have been shipped on board originally are carried to their destination by the underwriters, the underwriters or the vendee of the ship can sue the owners of the goods for freight. It seems to me that is under a totally different head of law. It is the law of England that goods having been carried to their destination, the owner of these goods cannot be allowed to have the benefit of the carriage of the goods on board the ship without paying for it. To whom has he to pay? He cannot be made to pay by the person with whom he made the contract of carriage, if that person has not fulfilled it. Whom, then, must he pay? He must pay the person who is the owner of the ship at the moment when the payment becomes due—that is, the moment when the goods are delivered; and, inasmuch as that cannot be the former owner of the ship, it must be the existing owner. But that does not seem to me a payment under the original contract of affreightment; it is a payment for work and labour done, which, where there has been an original contract of affreightment, is

invariably taken by the tribunal which tries the question as the measure of the value of the work and labour done. I think, therefore, the judgment given by Day, J. was right, and ought to be affirmed.

Baggallay, L.J.—Agreeing as I do with the judgment of the Master of the Rolls, I will only say a few words as to the argument used by Mr. Kennedy. Supposing that so much of the amount as has been assessed by the registrar and merchants had not been paid over to the underwriters on freight, it might then be considered that two parties are claiming, each by virtue of having paid sums of money in respect of their insurance. Then, says Mr. Kennedy, on what grounds is the underwriter on freight to be deprived of his right to be recouped the sum which he has paid under his contract of insurance? To hold so would be in direct opposition to the reasoning in the judgments in the case of *Castellain* v. *Preston* (*ubi sup.*). None of the cases cited to us carry the principle to the extent which has been contended for by the appellants. The case of *Simpson* v. *Thomson* (*ubi sup.*), which was perhaps most relied upon by the appellants, turned upon the circumstances of the case and certain dicta only could be relied upon, because the actual decision was adverse to the claim of the appellants.

Lindley, L.J.—I am of the same opinion. It appears to me that it lies upon the plaintiffs to show on what principle they are entitled to the sum of money which was assessed in the Admiralty proceedings by way of compensation for loss of freight. They put the case in two ways. Let us first look at it as a question of contract, apart from all questions of ownership of the vessel. Then it is obvious that an insurance on the ship and an insurance on the freight are two different things, and that the ship does not include freight at all. An insurer on ship is not liable for the loss of freight. How, then, is an underwriter of the ship entitled to anything received by the shipowner in respect of the loss of his freight? Looked at from this point of view, the argument of Mr. Kennedy is quite unanswerable. Then it is said that, having regard to the abandonment, the underwriter on the ship has become the owner, and, as such owner, is entitled, not only to the freight, but also to anything that the owner may get by way of compensation for the freight never having been earned. As regards that, I agree with what has been said by the Master of the Rolls, and I will only add this further observation. At what time does the insurer of the ship become the owner? Upon abandonment. At that time what has become of the freight? The freight is already subject to the rights of other persons with whom it has been insured. The argument is that the underwriter on the ship is, because he is entitled to the ship, also entitled to the freight, throwing out of sight all the contracts to which the freight is already subject. It appears to me that the insurer on the ship is, in this point of view, claiming more than he can establish any right to; for, on the one hand, he is asking for the freight, and, on the other, he is repudiating the claims of those who have already acquired a right to the freight by reason of the policy on the freight as distinguished from the ship. I am of opinion that the judgment below was right, and must be affirmed. *Appeal dismissed.*

Solicitors for the plaintiffs, *Field, Roscoe*, and *Co.*, for *Bright, Bateson*, and *Warr*, Liverpool.

Solicitors for the defendants, *Gregory, Rowcliffe*, and *Co.*, for *Stone, Fletcher*, and *Hull*, Liverpool.

Dec. 13, 14, 15, 17, 1883, *and April* 9, 1884.

(Before Brett, M.R., Baggallay and Bowen, L.JJ.)

Svendsen *v.* Wallace.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

General average—Perils of the sea—Putting into port to repair—Landing cargo—Expenses of reloading and leaving port.

Where a vessel laden with cargo is compelled to put into port to repair an injury which is the subject of particular average, the expense of reloading the cargo, necessarily unloaded for the purpose of repairing the injury and expenses incurred for port charges, pilotage, and other charges subsequent to reloading, are not chargeable to general average.

A ship sprang a leak on a voyage, and was compelled to put into port. In order to repair the ship it was necessary to land the cargo. The repairs were executed, and the ship was reloaded and completed the voyage.

Held, by Brett, M.R. and Bowen, L.J. (*Baggallay, L.J. dissenting*), *that the expenses incurred in respect of reloading, port charges, pilotage, and other charges subsequent to reloading were not chargeable to general average, and therefore the shipowners were not entitled to recover contribution from the owners of the cargo in respect of such expenses.*

Judgment of Lopes, J. reversed.

This was an appeal by the defendants from the judgment of Lopes, J., which is reported *ante* p. 87; 48 L. T. Rep. N. S. 795; 11 Q. B. Div. 616.

Dec. 13, 14, 15, *and* 17, 1883.—*Webster*, Q.C., *Myburgh*, Q.C. and *Barnes* for the defendants.

Charles Russell, Q.C., *Cohen*, Q.C., and *Warr* for the plaintiffs.

The facts and arguments are fully stated in the judgments.

Cur. adv. vult.

April 9, 1884.—The following judgments were delivered:

Brett, M.R.—This was an action brought by the plaintiffs, owners of a Norwegian ship, against the defendants, owners of cargo on board, to recover a general average contribution in respect of expenses incurred. The facts stated to have been proved in evidence were as follows: The cargo was shipped at Rangoon to be carried to Liverpool. During the voyage the ship, by reason of tempest, sprang a dangerous leak; the captain, for the safety of ship and cargo, put into Port Louis, in the Mauritius, to repair. When in port it was necessary, in order to repair the ship, but not otherwise necessary, that the cargo should be landed, and it was landed; the cargo was warehoused: the ship was repaired; the cargo was reloaded; the ship was piloted out to sea; the ship arrived safely at Liverpool. Upon demand the defendants acceded to pay contribution in

respect of the towage, pilotage, and port dues inwards, and in respect of the unloading of the cargo, and admitted their liability to pay the warehouse rent of the cargo, but refused to contribute towards the reloading of the cargo, or the pilotage or port dues outwards. The items in dispute, therefore, in the action were the items charging contribution in respect of the reloading, and the pilotage and port charges outwards. The case was tried before Lopes, J. without a jury, and the learned judge gave judgment in favour of the plaintiffs for all and each of the items in dispute, on the ground that the case was governed by the decision in *Atwood* v. *Sellar* (4 Asp. Mar. Law Cas. 153; 41 L. T. Rep. N. S. 83; 4 Q. B. Div. 342; affirmed, 4 Asp. Mar. Law Cas. 283; 42 L. T. Rep. N. S. 644; 5 Q. B. Div. 286), either as being directly within the decision in that case, so as to bind this court now, or as being within the principles on which that case was decided. It is to be remarked that in this case the original damage was caused by perils of the sea; that the first act of sacrifice was the incurring of expenses in taking the ship and cargo into port for the safety of both ship and cargo: that the unloading of the cargo was necessary in order that the ship might be repaired, but not necessary on account of any danger or damage to be suffered, or of any damage already incurred by the cargo; that the warehousing was probably necessary for the safety of the cargo; that the reloading and outward expenses were necessary for the purpose of carrying the voyage to a successful termination.

It was contended before us on the part of the plaintiffs that the case was completely bound by the decision in *Atwood* v. *Sellar* (*ubi sup.*), because the putting into port to repair in this case was a general average act, and all the subsequent acts were the consequences of that act, just as much as all the acts subsequent to cutting away the mast were the consequences of that act in *Atwood* v. *Sellar* (*ubi sup.*). It was further contended that if the case was not absolutely bound as by the authority of, yet it was within the principles on which the judgment in *Atwood* v. *Sellar* (*ubi sup.*) was based. It was argued that there is no distinction between the cases of a ship putting into a port of distress for the safety of both ship and cargo after a damage in itself a general average sacrifice, or after a damage caused by perils of the sea or other accident; and that in all cases all such items as were in dispute in this action must follow the decision in *Atwood* v. *Sellar*. It was contended on behalf of the defendants that none of the disputed items could entitle the plaintiffs to a general average contribution, because they were incurred in order to enable the plaintiffs to earn their freight, and were incurred when neither ship nor cargo was in danger. In order to support the argument on the part of the plaintiffs Mr. Russell enunciated the following proposition as governing all questions of general average expenditure. The proposition, he said, which is affirmed by the decision in *Atwood* v. *Sellar* (*ubi sup.*) is, that all extraordinary expenses are to be allowed as matters for general average contribution, which were reasonably incurred for the benefit and safety of the whole adventure, or were the reasonable and natural consequences and results following upon an act done in view of danger to the whole adventure, and for the benefit of the whole adventure. If this is a true proposition, in the sense in which it was intended by Mr. Russell that it should be accepted by us, it rules the case in favour of the plaintiffs. In order to determine whether we can adopt it in that sense, it is necessary to criticise it very carefully. It does not speak of expenses incurred merely for safety or preservation, but for benefit and safety. It does not speak of safety of ship and cargo, but of safety of the whole adventure. It does not speak of the expenses of an act of sacrifice done for safety, or of expenses incurred for safety, but of expenses which were the reasonable and natural consequences and results following upon an act done for safety. If "benefit" means the same as "safety," the phrase in which the word is used is tautologous; if benefit means more than safety, we must determine whether any other benefit than that of safety can be vouched in order to sustain a claim for general average. If by "the whole adventure" is meant only "ship, freight, and cargo," it is but an equivalent phrase for "ship, freight, and cargo;" but if more is meant, if it is intended to bring in a benefit to "the adventure of carrying the goods to their destination," we must determine whether such larger meaning can be recognised. We must further determine whether the description of the expenses which may be brought into account is not too expansive.

It was urged that even if the proposition is stated in terms larger than have hitherto been recognised in English law, yet it ought now to be adopted in order to bring the principle of English law on the subject into consonance with the laws of all other countries. But to this I cannot agree. It is useless to inquire whether the law is, as stated, the same in all European countries. For if it is, yet no English court has any mission to adapt the law of England to the laws of other countries; it has authority only to declare what the law of England is. And even if we could do what is suggested, I should doubt the expediency of making the law of the greatest commercial and maritime country in the world bend to the law of other countries where commercial operations are far less extensive, and where commercial adventure is far more timid. As to the cognate law of America, it has been declared over and over again that the English and American courts have diverged upon this particular head of law, the law of general average. The question therefore must be, what is the law of England in this matter. The governing principle or proposition, which has been adopted in its terms by a succession of English courts as the true statement of the governing principle, is that which was stated by Lawrence, J. in *Birkley* v. *Presgrave* (1 East, 220). It has been considered to be one of the many happy expositions of mercantile law made by that learned person, in terms so broad and yet so accurate, as show that he was one of the greatest mercantile lawyers who has ever adorned our profession in this country. His proposition is thus expressed: "All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionably by all who are interested." This proposition, read with regard to expenses, will read thus: All loss which arises

in consequence of extraordinary expenses incurred for the preservation of the ship and cargo comes within general average. But the loss which arises from an expense is the expense itself. Therefore we must read thus: Every expense incurred for the preservation of the ship and cargo comes within general average. Applying this rule in its ordinary sense to each item successively claimed as an item of expenditure in respect of which a general average contribution in any given case is due, the question must be: "Was this item of expenditure, at the moment it was incurred, incurred for the safety of both the ship and cargo? The word "benefit" is not used by Lawrence, J., but it is used by Lord Kenyon in the same case. He says, "for the benefit of the whole concern." But the word "benefit," thus used by him with regard to the same facts in the same case in a judgment agreeing with the judgment of Lawrence, J. sitting by his side, must have been intended to mean the same as the word "preservation" used by that learned judge. The words have been usually used as equivalent. Thus, Mr. Arnould, in stating the definition of a general average loss, says: "A general average loss may be defined to be a loss arising out of extraordinary sacrifices made, or extraordinary expenses incurred for the joint 'benefit' of ship and cargo." And for his authority he cites: "per Lawrence, J. in *Birkley* v. *Presgrave*" (*ubi sup.*), where the word used is "preservation." In almost the next sentence, Arnould says: "In order to entitle the party sustaining such loss to a general average contribution, it must appear to have been incurred with a view to the general safety of the whole adventure, *i.e.*, of the ship, cargo, and freight." It is obvious on reading Arnould that he constantly uses the words as equivalent. And so have many judges from time to time. Mr. Russell used the word "benefit" in his argument as having in his proposition a larger meaning than "safety" or "preservation," and therefore his proposition is in this respect intended to be, and is larger than the proposition of Lawrence, J. Again Lawrence, J. says, "for preservation of 'ship and cargo;'" but Mr. Russell says, "for the whole adventure." Lord Kenyon speaks of "the whole concern." Arnould speaks of "the whole adventure, *i.e.*, of the ship, cargo, and freight," thus giving his own equivalent. The point was distinctly argued in *Job* v. *Langton* (6 E. & B. 779). Mr. Mellish says: "It is contended on the other side, that all extraordinary expenses incurred for the preservation of the whole maritime adventure, that is, for bringing the ship and goods safely to their destination, are general average. That is too wide a proposition." Mr. Blackburn argues: "The primary object is the arrival of the ship with her cargo at her destination. Ordinary acts done to bring this about are done by the shipowner as part of his duty; but extraordinary acts done for this object give rise to general average." Lord Campbell, dealing with this contention, says: "Mr. Blackburn's position, that the end in view of every maritime adventure being the arrival of the ship with her cargo at her destination, extraordinary acts done to effectuate this give rise to general average, would justify him in contending that these expenses do not constitute particular average; but unfortunately for him the expenses incurred in repairing the ship would according to this reasoning equally be general average." In that case, therefore, the point being distinctly raised, it was determined that the use of the phrase for the benefit of "the whole adventure," with the meaning given to it as used in his own proposition by Mr. Russell in his argument, in this case, is contrary to the law of England. Here again, therefore, the proposition of Mr. Russell is too large. Again Lawrence, J. speaks of every expense incurred for the safety of the ship and cargo, meaning, as I have said, that the question as to each separate item claimed must be: was this item of expenditure, at the moment it was incurred, incurred for the safety of both ship and cargo? But Mr. Russell says all extraordinary expenses which were reasonably incurred for the benefit and safety of the whole adventure, or were the reasonable and natural consequences and results following upon an act done in view of danger, &c. The question under this as to an item would be, was this item of expenditure a reasonable and natural result in the ordinary course of business following upon some other act of sacrifice, or some other act of expenditure? The difference is, that under the rule of Lawrence, J. no act or item of expenditure could be allowed which was not itself directly done or incurred for the preservation of the ship and cargo; whereas under Mr. Russell's rule an expenditure would be allowed, which itself was not incurred for the preservation of the ship and cargo, if in the usual and natural course of business it would be incurred after some act of sacrifice done or some other act of expenditure incurred, which act was done or which other expenditure was incurred, directly for the safety of ship and cargo.

It is obvious that the proposition of Mr. Russell is larger than the rule of Lawrence, J. But if the proposition of Lawrence, J. is the true and accepted law of England, as I think it is, no court now existing has power to alter that principle while it is the law. We must reject the proposition suggested in argument, and abide by the proposition decided in judgments. We have to apply the rule as stated by Lawrence, J. to the case of a ship putting into a port of distress for repairs in consequence of damage done by sea perils. If there is danger to the preservation of both ship and cargo from destruction, if the ship remains at sea, the act of putting into port to repair is an extraordinary act which may well be called a general average act. If in order to do that act, an expenditure is reasonably incurred, that expenditure is a general average expenditure. If in order to do that act, towage, pilotage, or inward dues must be paid, those expenditures are all and each general average expenditures. When the ship is in the port of distress for repair, other acts are often done, and other expenditures are often incurred, which must each be considered. Each of these must be considered as if it were the sole act or expenditure, and also whether it may be treated as a part of another act or expenditure. When the ship is in the port of distress, it often happens that the cargo is unloaded and warehoused or otherwise protected, and if necessary manipulated; the ship is repaired, the cargo is reloaded, the ship is taken out to sea and proceeds on her voyage. When the ship and cargo are in the port, both may still be in danger of destruction, or the ship alone, or the cargo alone. If both ship and cargo are in danger, it is impossible

to conceive, as a fact, that anything which can substantially be called repairs can be done to the ship whilst the cargo is in her. The cargo must then be landed for the safety of both. But the ship alone may be in danger, as for instance, of breaking her back on a falling tide if the cargo be left in her, though the cargo, from its nature, would not be in danger. In such a case the cargo must be landed solely for the safety of the ship. The cargo alone may be in danger, as if the injured ship be on the ground and safe, but the cargo be perishable if wetted; then the cargo must be landed, but solely for the safety of the cargo. Or it may be necessary to land the cargo, though neither it nor the ship be in immediate danger, or though the ship only be in danger, because the injury to the ship cannot be repaired without the removal of the cargo. In the first case the cost of unloading, treating the unloading as within itself the sole act done, is clearly a general average expenditure. In the second, third, and fourth cases the expenditure, treated as if it were the cost of the sole act done, cannot be a general average expenditure. But we must consider whether any of the three can be treated as part of another act which is a general average act. The only act to which they can be referred is the act of going into port to repair. In the second and third cases which arise, whether the repairs to the ship could or could not be done as a matter of carpentering without the cargo being removed, it cannot be truly said that the landing of the cargo is a part of the act of going into port to repair. In the fourth case, if you take the act of sacrifice to be not merely the going into port, but the going into port to repair, and if the one act be the going in to repair, and the repair cannot be done without the landing of the cargo, which is the hypothesis, then the landing of the cargo is a part of the act of going into port to repair. It is a part of the act which is done in order to put the ship into such a position that she can be repaired, which is the real meaning of the colloquial maritime phrase "going in to repair." The expression, then, is going in for repairs. The real accurate meaning is going in to be repaired, or going in so as to be in a position which will enable her to be repaired. The landing of the cargo in such a case is upon the hypothesis so necessary a part of the act of taking the ship into port so as to be in a position to be repaired, that such act cannot be said to be usefully completed until the cargo is landed. This fourth case has always been treated as if the going into port to repair were one act, and as if that were the one act of sacrifice. The cost of unloading has consequently in such case always been allowed as a general average expenditure. Treated in this way, which seems to be a not unreasonable way of treating the case as matter of business, the allowance of the item is not against the principle of law, and therefore is rightly allowed. When the cargo is landed, it may or may not, according to its own nature, or the circumstances of the locality, require to be warehoused or otherwise protected. It may, in consequence of partial damage already suffered, or from its own nature, require for its own safety to be manipulated, as, for instance, to be unpacked or dried; but such acts cannot possibly be necessary for the safety or preservation of the ship. She is at that moment safe or unsafe. But these acts cannot contribute in any way to her safety if she is unsafe. They cannot be said to be a part of the act of going into port to repair, they have no reference to the act of repairing, or of putting the ship into a position in which she can be repaired. They are therefore not within the principle. The repairing of the ship has nothing to do with the safety of the cargo. It is done in respect of the ship alone. The reloading of the cargo and the outward expenses are expenses of acts done when both ship and cargo are safe from existing danger, and are therefore not within the rule. They cannot be said to be a part of the act of placing the ship in a position to be repaired.

Unless, therefore, we are bound by authority to hold otherwise, I am of opinion that, according to the law of England, when a ship is obliged, for the safety of ship and cargo, to go into and goes into a port of distress in order to repair damage done by sea-peril, the expenses of going into the port are general average expenses; that if it is necessary for the safety of both ship and cargo to unload the cargo, or if it is necessary to unload the cargo in order to repair the ship, though it is not necessary for the safety of the cargo, the expense of unloading the cargo is a general average expense; but if the unloading of the cargo is not for either of these causes the expense of unloading is not a general average expense. I am of opinion, in the same way and in the same case, that the expense of warehousing, guarding, or manipulating the cargo, of repairing the ship, of reloading the cargo, of taking the ship out of port, of the charges of going out of port, are not general average expenses. It is said, however, that we are bound by the decision of the Court of Appeal in *Atwood* v. *Sellar* (*ubi sup.*), or that we ought to decide this case according to the principles on which that case was decided. And if within ordinary rules that case binds us, I will not hesitate to obey it, though with deference I could not have agreed with it. In that case the vessel was obliged to put into port in order to repair the loss of a mast cut away in severe weather, in order then to save the ship and cargo from immediate danger. "The question," says the judgment, "is whether in the case of a vessel going into port in consequence of an 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" (5 Q. B. Div. 288). "We have, therefore," it is afterwards said at page 294, "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 puts in for repair of damage caused by peril of the seas." "It is not necessary," it is said at p. 297, "for us to decide in the present case whether *Hall* v. *Janson* (4 E. & B. 500; 24 L. J. 97, Q. B.) 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." After these quotations it is impossible, in my opinion, to say that the decision in that case binds us by authority in this case. The Court expressly stated that it did not decide what would be the law applicable to a case like the present. I purposely abstain from entering into all the observations made in the judgments of Cockburn, C.J., in 4 Q. B. Div., and Thesiger, L.J., in 5 Q. B. Div. I do not think that the real ground of the decision in *Atwood* v. *Sellar* (*ubi sup.*) in the Court of Appeal was that all the acts done in a port of distress are one continued act. What is the one act? By what name can it be expressed? Warehousing the cargo, reloading it, going out of port, cannot be said to be parts of the act of taking the ship into port in order to enable her to be repaired. Reloading the cargo and taking the ship out of port, when the ship is repaired, cannot be parts of the act of repairing the ship. The real ground of the decision was, I think, that where the putting into port for repairs is the necessary consequence of a previous general average sacrifice, the law of England is as elastic in respect of the subsequent acts done and expenses incurred in the port as the American and other laws are stated to be in all cases of a ship necessarily putting into a port of distress to repair. And for that proposition there were before the decision in *Atwood* v. *Sellar* (*ubi sup.*) many weighty dicta by English authors of authority and English judges; but all which dicta drew a distinction between the going into a port of distress in consequence of a voluntary sacrifice, and of putting into port in consequence of a particular average damage. I adopt that distinction, because I do not think that we are bound in the present case by the decision in *Atwood* v. *Sellar* (*ubi sup.*), and the propriety of that decision with reference to the facts on which it was decided, we are not at liberty to question. I have carefully examined all the cases cited to us. I do not think that any of them are decisive of the case before us. I therefore think it useless to enter, in this judgment, into a minute discussion of them. I have looked carefully into valuable books written by great average staters, but cannot accept their views on either side as authority. No one can study the law successfully without reading them. No one can give judgment without referring to them for valuable aid, but they must not rule the decisions of courts as by authority. The only further reference I think it useful to make to former cases is, that in my opinion the decisions in *Da Costa* v. *Newnham* (2 Term Rep. 407) and *Moran* v. *Jones* (7 E. & B. 523) cannot be supported. I am of opinion that the appeal should be allowed, and that judgment should be entered for the defendants.

BAGGALLAY, L.J.—I have had an opportunity of perusing and considering the judgment which has just been delivered by the Master of the Rolls, and also that which will presently be delivered by Bowen, L.J., and I regret that I am unable to agree with them in thinking that this appeal should be allowed. I regret it because I think it very undesirable that so important a principle as that which will be affirmed by their judgments should have any doubt thrown upon its soundness by reason of any dissent on my part from the views expressed by them. I am very sensible that in saying this I am attributing too much importance to my own views upon a subject with which they are much more familiar than I am; but, having been a party to the judgment delivered by Thesiger, L.J. in *Atwood* v. *Sellar* (4 Asp. Mar. Law Cas., 283; 42 L. T. Rep. N. S. 644; 5 Q. B. Div. 286), which was the subject of much consideration by the judges on whose behalf it was delivered, and having, since the arguments on this appeal were concluded, carefully reconsidered that judgment, I feel bound to express the opinion at which I have arrived, and to state concisely the reasons by which I have been influenced in forming that opinion. In doing so I propose, in the first place, to compare the circumstances under which the decision in *Atwood* v. *Sellar* (*ubi sup.*) was arrived at with those with which we have to deal on the present appeal. For conciseness and convenience of comparison I will refer to the ships as *A.* and *B.*, and will deal with them as having encountered the same storm and as having sought the same port of refuge. The circumstances may be then stated as follows: Two ships, *A.* and *B.*, each on a voyage from a foreign port to Liverpool, and having a valuable cargo on board, encountered a violent storm; the master of *A.*, to avoid a more serious injury, cut away one of his masts; *B.* sprung a dangerous leak; both, for the safety of ship and cargo, put into a port of refuge to repair the injuries they had sustained; to effect such repairs and to enable the ships to prosecute their respective voyages, it became necessary in the case of each ship to discharge the whole or a portion of her cargo; in addition to the port dues and other expenses incident to her entering the port, further expenses were incurred in respect of each ship in unloading, warehousing, and reloading her cargo whilst she remained in port, and for pilotage and other charges on leaving the port to prosecute her voyage. The only difference between the circumstances of *A.* and those of *B.* was in the nature or character of the injury which occasioned her putting into port. The cutting away of one of the masts of *A.* was the subject of general average; in other words, her putting into the port of refuge was occasioned by a general average sacrifice; whilst the putting into port of *B.* was occasioned by her springing a dangerous leak, which was a particular average loss. But in each case the putting into port for the safety of the ship and cargo was an act of sacrifice, giving rise to claims for general average contribution. In the case of *A.* this act of sacrifice followed, or was a continuation of, the original act of sacrifice, whilst in the case of *B.* it was itself the original act of sacrifice; in each case the proximate cause of the extraordinary expenses incurred was the putting into the port of refuge. If it had been left to average adjusters, previously to the decision in *Atwood* v. *Sellar* (*ubi sup.*), to adjust the losses in respect of the expenses incurred by the two ships, they would, in accordance with a practice of many years' duration, have dealt with them as follows: In respect of each ship they would have treated the expenses incurred in entering the port and of discharging the cargo as general average, those incurred in warehousing the cargo as particular average on the cargo, and the pilotage and other charges incidental to leaving the port as particular average on freight; the fact that in the case of *A.* the putting into port was occasioned by a general

average sacrifice, whilst in the case of *B.* it was occasioned by a particular average loss, would in no way have affected the adjustment of the losses incurred by reason of the putting into port; and properly so, if I am correct in the view which I have expressed, that in each case the putting into port was an act of sacrifice and the foundation of a claim for general average contribution. That the practice of the average adjusters was based upon the principle that the putting into port to refit is in itself an act of sacrifice, is evidenced by their treating the expenses incidental to entering the port of refuge and of discharging the cargo as the subject of general average contribution; upon no other principle could the practice be supported. But the decision in *Atwood* v. *Sellar* (*ubi sup.*) established that, whilst the practice of the average adjusters was in accordance with legal principles, so far as it treated the expenses of entering the port of refuge and of discharging the cargo as the subject of general average contribution, it was erroneous in the case of *A.* in limiting the expenses, which were the subject of general average contribution, to those last-mentioned, and that the expenses of warehousing and reloading the cargo and those incidental to leaving the port were equally the subject of general average contribution. But if, in the case of *A.*, the expenses of warehousing and reloading the cargo, and of leaving the port were properly held to be the subject of general average contribution, I am unable to suggest any reason satisfactory to myself, why the like principle should not be applied in the case of *B.*; in that case the expenses of unloading, warehousing, and reloading of the cargo and the coming out of port were as consequent upon the putting into port as they were in the case of *A.*; if they ought not to be treated as the subject of general average contribution in the case of *B.* they ought not, according to the view which I take of the circumstances of the two cases, to have been so treated in the case of *A.*

It has been pressed upon us in argument that in the judgment which was delivered in *Atwood* v. *Sellar* (*ubi sup.*) care was taken to avoid intimating any opinion as to how a case similar to that now under consideration should be dealt with. I cannot assent to this view of the scope of the judgment; it is doubtless true that it was not intended to express any decided opinion upon the question referred to, but attention is distinctly directed (see 5 Q. B. Div. p. 289) to the case of a ship which has been damaged by perils of the sea, and has subsequently put into a port of refuge, and a distinction as regards any claim to general average contribution is drawn between a case in which the goods are unshipped and in safety, and the common danger consequently at an end, before the ship puts into port, and one in which the goods are not unshipped until after the ship has put into port, and in which there is consequently a common danger at the time when the ship put into port. And similar views are indicated in the comments upon the case of *Job* v. *Langton* (6 E. & B. 779). For the reasons which I have thus concisely stated, I am of opinion that Lopes, J. arrived at a correct conclusion, and that the appeal should be dismissed.

Bowen, L.J.—This case raises the important question whether certain port of refuge expenses incurred by a vessel which, in consequence of a particular average loss, has put into port to repair, are properly a subject of general average contribution. The plaintiffs are the shipowners and the defendants the owners of cargo. The vessel, in her voyage from Rangoon to Liverpool, met with heavy weather and sprang a dangerous leak. The captain, for the sake of the preservation of ship and cargo, took refuge in the Mauritius, and was there compelled, in order to prosecute his voyage, to execute certain repairs upon the ship. In order to enable such repairs to be made the cargo was landed, warehoused, and reloaded, after which the vessel sailed for Liverpool. The expenses of unloading cargo have been accepted by the defendants as the subject of general average contribution, and the defendants have admitted their liability to pay the whole storage or warehouse rent of the cargo. The action was brought to recover general average contribution from the cargo in respect of its reloading, and port charges, pilotage, and other claims subsequent to the reloading. The cause was tried before Lopes, J., who held that the plaintiffs were entitled on all the items in question to succeed, and this appeal is brought from his judgment in their favour. It is essential at the outset to bear in mind two things, the nature of every general average sacrifice, and the object of every general average contribution. A general average sacrifice is an extraordinary sacrifice voluntarily made in the hour of peril for the common preservation of ship and cargo. There is no difference in principle between a mast voluntarily cut away, an extraordinary expenditure voluntarily incurred, and extraordinary loss of time and labour voluntarily accepted, provided that in each case the sacrifice is made for the common safety in a time of danger. Next as to the object of general average contribution. It is to indemnify the person making the general average sacrifice against so much of the loss caused directly thereby as does not fall to his own proportionate share. This *pro ratâ* indemnity will not be complete without including in the calculation expenses which, though not themselves within the definition of voluntary sacrifice, nevertheless are directly caused by a voluntary sacrifice, and must therefore be recouped if the loss which the sacrifice causes is to be borne *pro ratâ*. "All loss," says Lawrence, J., in the case of *Birkley* v. *Presgrave* (1 East, 228), "which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested." The question whether extraordinary expenditure after the entry into a port of refuge is rightly chargeable to general average, necessarily depends on the circumstances of each case. Each item of expenditure which is challenged must be considered on its own merits with reference to two tests. The first test is whether such item itself fulfils, as against some or all of the interests to be considered, the definition of a general average sacrifice; the second is whether such item, though not itself a general average sacrifice, is nevertheless an expenditure caused or rendered necessary by one. No supposed conveniences of calculation and no practice of average adjusters can justify taking one man's money to pay what by law is

another man's individual loss. It has, however, been urged by the respondents' counsel that a more liberal view ought to be taken of the principles that regulate general average: and in particular with regard to port of refuge expenses. It is not necessary, it has been argued, that the expenditure or sacrifice should have been made for the common safety of ship and cargo, if it is made for the benefit of both, and in order to enable the vessel to bring her voyage and the common adventure to a successful issue. This doctrine has been advocated by various writers, and has engrafted itself upon the law of more than one foreign country; but whatever its theoretical value, it is not the law of England (see *Harrison* v. *Bank of Australasia*, 1 Asp. Mar. Law Cas. 198; 25 L. T. Rep. N. S. 944; L. Rep. 7 Ex. 39). Exceptional cases, such as those suggested in the judgments delivered in *Job* v. *Langton* (27 L. T. Rep. O. S. 218; 6 E. & B. 779) and *Walthew* v. *Mavrojani* (22 L. T. Rep. N. S. 310; 3 Mar. Law Cas. O. S. 382; L. Rep. 5 Ex. 116), may be imagined in which the safety of the ship and cargo, and the safety of the common commercial enterprise would be almost convertible terms, and with reference to such cases it is possible to conceive that expenses after the ship and cargo were in safety from the sea, might, on the ground of a physical danger common to both, be brought into general average. But (exceptional cases apart) it is not sufficient, according to English law, that an expenditure should have been made to benefit both cargo-owner and shipowner. The idea of a common commercial adventure as distinguished from the criterion of common safety from the sea, would lead to the inclusion in general average of, at all events, temporary repairs of the ship caused by particular average loss, and would enable the shipowner to complete his part of the contract of affreightment by means of a money contribution levied perforce upon the cargo owner. The chief English case of note in which language occurs that seems at first sight to favour the notion that a common adventure is the true criterion, is *Hall* v. *Janson* (4 E. & C. 500; 24 L. J. 97, Q. B.), where it was held that the unloading and reloading of cargo, for the sake of effecting repairs upon the ship, might give rise to a liability to contribution on the part of freight. Since freight perishes if the voyage is frustrated, it may not have been unreasonable to hold that freight ought to contribute to the expenses incurred in unloading and reloading a cargo, the unloading of which is solely undertaken for the sake of repairing the ship. This limited proposition, with which alone *Hall* v. *Janson* (*ubi sup.*), was concerned, by no means warrants the conclusion that the cargo ought in turn to contribute whenever any expenditure is incurred, not of saving the vessel and its contents, but merely for the sake of prosecuting the voyage. In the subsequent case of *Walthew* v. *Mavrojani* (*ubi sup.*), the English doctrine has been restated and explained, and the language of the court in *Harrison* v. *Bank of Australasia* (*ubi sup.*) is to the same effect.

We have been asked on another and a different principle to depart from the strict English theory in favour of port of refuge expenses following upon a particular average loss, upon the ground that they all form part of a continuous operation, the whole of which was contemplated by the captain at the time when he put into port. The intentions of the captain are no doubt material in considering the question whether the act done by him was performed only for the benefit of his ship, or for the common preservation of both ship and cargo. But it does not follow, because his intentions are examinable to this extent, that everything which the captain intended in his own mind to do after common safety should have been attained, also ought to be chargeable to general average. Intentions which go beyond what is needed for common salvation only show that, in addition to intending that which was a general average sacrifice, it was intended further to do something which was not a general average sacrifice, nor directly caused by one. On such a ground repairs of the ship in port ought themselves to be included, for the captain probably intended these, though he intended them as a means, not of saving the cargo, but of earning his own freight. In my opinion, the two tests which I have enunciated cannot be qualified or extended so as to embrace any such considerations. The next step is to apply these two tests to the case before us, the damage which the vessel here received, and which compelled her to put into a port of refuge, being a particular average loss. And, first, as to the expenses of putting into port. Two views may theoretically be taken of the act of putting into port in a case like the present, though such expenses are now universally accepted as general average charges. These expenses might conceivably be considered as an exception to the general law, in virtue of which exception, though the bearing up for port was not a general average act of sacrifice in itself, its expenses are, for the sake of public policy, universally recognised as a subject-matter of contribution. The other and more general view is, that the bearing up for a port is to be treated as an act of general average sacrifice, because it is undertaken, as a rule, in the hour of danger for the common safety of ship and cargo: (Benecke, p. 192.) For the purpose of the present argument, I will assume that the latter view, which was pressed upon us by the respondents' counsel is the more correct. We come then to the unloading of cargo when the port of refuge has been reached. In practice it has in recent times become common to carry these unloading expenses to general average, both where the repairs of the vessel have been rendered necessary by a general average act and where they are rendered necessary by a particular average loss. Nor is it necessary to discuss a practice which may have become inveterate, and which is found adequate. Still, if strict theory were to be in each case relied upon, such unloading ought, as it seems to me, to be dealt with specifically in every instance by applying to it the two tests I have named. If necessary for the common preservation of both ship and cargo, the unloading will be in itself a general average sacrifice: (see *The Copenhagen*, 1 Chris. Rob. 289.) If not so necessary, it will not in itself amount to a general average sacrifice at all, but it may nevertheless be properly included as a subject-matter of contribution whenever the expenditure is directly caused by some antecedent act of general average sacrifice. It has been maintained by some that the unloading,

which is effected to enable the ship to be repaired after a particular average loss, may properly be treated as an act done for the common safety of ship and cargo, on the ground that if the cargo were not unloaded, ship and cargo would both be locked up indefinitely, and the voyage placed permanently in suspension. Reserving to one's self the right to consider any special circumstances in other cases arising from the character of the cargo or otherwise that might render unloading necessary for the preservation of both cargo and ship within the meaning of such test, I am unable to adopt the theoretical view that unloading becomes an act of sacrifice simply because it releases cargo and ship from the dead-lock that would otherwise ensue. Physical safety has been attained, and it appears to me to be the duty of the shipowner, under his contract of affreightment, either to proceed with his voyage or else to land his cargo, unless it is to be transhipped direct. In the case of *Plummer* v. *Wildman* (3 M. & S. 482), the unloading of the cargo, which was necessary for the repairs, was charged to general average, but in that case the repairs, owing to an antecedent sacrifice which necessitated them, were themselves held to be general average. In the case of *Hall* v. *Janson* (*ubi sup.*), where the unloading was spoken of as chargeable to general average, the question at issue in the action was as to the liability to contribute not of cargo but of freight. In the present case the unloading expenses have been by common consent and in comformity with a very common practice dealt with as the subject of general average contribution; and it is therefore unnecessary to decide what would be in other cases the law on the point. The goods having been landed there is an end of all danger common to ship and cargo.

The contest between the parties and the present instance turns wholly on items of expenditure subsequently incurred. These cannot be brought into general average on the ground that they are general average sacrifice in themselves, for the hour of danger and of sacrifice is over. They can only become so chargeable if it can be shown that they are part of the loss which some antecedent act of sacrifice entails. The first item in controversy which we are asked to consider relates to the warehousing of the cargo. Now, *primâ facie* warehousing the cargo is a charge that ought to be borne by the cargo, which benefits exclusively by it. It may, conceivably, in some cases have been rendered necessary by an antecedent sacrifice so as to fall within the definition of the loss caused thereby. But the only antecedent sacrifice in the present case was the putting into port for refuge, and it is difficult to see how as between ship and cargo the warehousing of the cargo was caused by the mere putting into port. The defendants have admitted their liability to bear the charge in full. In my opinion there is no reason to treat the warehousing in the present case as other than a charge on cargo. We come next to the reloading. Reloading is not an act of sacrifice, for long before it occurs both ship and cargo are safe. Is it then caused by any act of sacrifice, or is it part of the loss, in other words, which an antecedent act of sacrifice involves? Where, for example, a ship has cut away a mast and has put into port to repair the damage so caused, and been compelled, in order to repair this special damage, to unload and to reload the cargo, it may follow, according to the decision in *Atwood* v. *Sellar*, that such expenses are all part of the loss involved in the original sacrifice. But in the present instance the only sacrifice has been the putting into port, and the reloading expenses are not part of the loss which putting into port has caused, but a loss caused by the captain's decision to repair his ship, and to unload and reload the cargo for that purpose. The charges of reloading in such a case ought in principle to fall upon the freight, or else upon the freight and the ship together if the two interests are severed. I come next to the charges outward, and this seems to me to raise a more difficult question. Expenditure of this description is not in itself a general average sacrifice, but may it not be said that it has been caused by one, on the ground that a ship which goes into port will have to come out again, and that the former operation directly causes the latter? If strict theory is to be applied there might seem to be a difference between the cases in which the vessel has done nothing in the port of refuge beyond availing herself of a temporary shelter and the cases where she puts in in order to repair damage and because it was not safe for her to continue her voyage without such repairs. In the former case, where shelter alone is sought the vessel might plausibly be said to come out simply because she previously went in. In the latter case, where she puts in for repairs, the proximate cause of her coming out is not that she put in, for she could not have resumed her voyage had not the necessary repairs been effected upon her while in harbour; but that the master when in harbour decided, in the discharge of his duty and in the interest of his owners, on repairing the ship, reloading the cargo, and carrying on the voyage. The outward expenses ought, therefore, as it seems to me, in the present instance to fall on freight. I proceed, lastly, to consider the authorities with a view of inquiring whether any of them are inconsistent with the conclusions at which I have arrived above. The authority of *Da Costa* v. *Newnham* (2 Term. Rep. 407) has been so shaken by subsequent decisions that it cannot any longer be relied on. In *Plummer* v. *Wildman* (3 M. & S. 482) the question arose as to repairs and disbursements. The vessel had met with a collision which broke her false stern and her knees, and the master was in consequence obliged to cut away part of the rigging of her bowsprit and to return to port to repair the damage sustained by the accident and the cutting away. The ship could not have prosecuted her voyage nor kept the sea with safety without returning and repairing in Jamaica. On her return thither the cargo was relanded and warehoused in order that such temporary repairs might be done as would enable her to prosecute her voyage, and part of the disbursements consisted in the defrayment of these expenses. The plaintiffs in an action for general average contribution claimed, amongst other things, disbursements for pilotage inwards, for surveying, ascertaining, and repairing the damage necessary for her to resume her journey, and the expenses of landing and warehousing, and reloading, and crimpage to replace deserters during repairs. Lord Ellenborough and the rest of the court allowed as general average so much of the expenses of repairs as were absolutely necessary to enable the ship to prosecute her voyage, but disallowed the captain's

expenses in port. Le Blanc, J. adds that the unloading might be general average if it was necessary to repair the ship. But the language of the court in this case can only be considered as consistent with later authority as it is explained and interpreted in *Power* v. *Whitmore* (4 M. & S. 141). The vessel in *Power* v. *Whitmore* had suffered sea damage in a storm, and for the safety of ship and cargo put into Cowes, where she lay four days. She repaired her damage at Cowes, and sailed again the next day; but the day after was driven back by adverse winds and tempestuous weather, and remained at Cowes a fortnight farther. The question raised was whether the owner of cargo was liable to general average contribution in respect of the following items: (1) wages of the captain and crew at Cowes; (2), provisions consumed there; (3) repair of her bowsprit, and (4) supply of three coils of rope. All these charges were disallowed. Lord Ellenborough doubted the correctness of the language of Beawes cited in *Da Costa* v. *Newnham* (2 Term. Rep. 407), and distinguished *Plummer* v. *Wildman* (3 M. & S. 482), on the ground that the repairs of the ship were there rendered necessary to repair the original act of sacrifice: (see *Harrison* v. *Bank of Australasia* (25 L. T. Rep. N.S. 944; 1 Asp. Mar. Law Cas. 198; L. Rep. 7 Ex. 39). In the case of *Hallett* v. *Wigram* (15 L. T. Rep. O. S. 137; 9 C. B. 580) the question of general average contribution arose upon demurrer. It appeared upon the pleadings that the ship had encountered a storm and been compelled to return to Adelaide for repair. It was alleged upon the pleadings that the return to Adelaide, the unloading of the cargo, and the repair of the damage, were all necessary for the preservation of the ship and cargo, and that the repairs were necessary for the completion of the voyage and for the conveyance of the cargo to the port of delivery, which could not otherwise have got there, and that the master, being unable to raise money for the payment of the repairs, sold a portion of the cargo to enable him to do so. The Court held that the repair of the sea damage must be borne by the shipowner. Wilde, C.J. quotes with approval the following passage from Abbott; "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 and 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 shipowner 'to keep his vessel tight, staunch, and strong' during the voyage for which she is hired." *Hall* v. *Janson* (4 E. & B. 500; 24 L.J. 96, Q.B.) has been cited by the counsel for the respondents as an authority to prove that the expenses of unloading and reloading cargo constitute a claim to general average contribution, though the original cause of putting into port was a particular average loss. The real question raised in *Hall* v. *Janson*, which was a case decided on demurrer, was whether the declaration set out facts from which a liability of the freight to contribute to general average might arise. All that was necessary for the purpose of the decision was the proposition that under circumstances such as those set forth in the declaration, freight might be liable to contribute to general average. The expressions of Lord Campbell as to the liability of cargo, when the expenditure has been necessary for the purpose of prosecuting the voyage are *obiter dicta* and at variance with later authority. That the unloading and reloading were necessary for the repairs of the ship may be an argument to show that freight ought to contribute—but this argument is inapplicable, as it seems to me, to the case of the cargo, which has not necessarily anything to do with the repairs of the ship. In *Job* v. *Langton* (6 E. & B. 779) the ship with a general cargo on board had run ashore on the coast of Ireland, and it became necessary to discharge the whole of the cargo and ballast before she could be got off. The question which arose was whether the expenses incurred in getting off the ship and taking her to Liverpool for repair after the entire cargo was discharged were chargeable to general average or to particular average to the ship alone, and the court had power to draw inferences of fact. Lord Campbell and the Queen's Bench decided that the expenses were particular average on the ship, having been incurred after the cargo had been safely discharged and warehoused, and pointed out that if the learned counsel's position for the defendants were true, that the end in view of every maritime adventure being the arrival of the ship with her cargo at her destination, extraordinary acts done to effectuate this gave rise to general average, it would follow by a parity of reasoning that expenses incurred in repairing the ship at Liverpool ought equally to be general average. A question arose in *Moran* v. *Jones* (7 E. & B. 523) as to the liability of the cargo owner to general average. The inferences of fact drawn by the Court of Queen's Bench may or may not have been correct, but the decision has reference only to the special facts of that case. In *Walthew* v. *Mavrojani* (22 L. T. Rep. N. S. 310; 3 Mar. Law Cas. O.S. 382; L. Rep. 5 Ex. 116) it was decided that extraordinary expenses incurred in getting off a stranded ship after the cargo has been removed to a place of safety are not, in the absence of exceptional circumstances, general average. Bovill, C.J. in his judgment refers with approval to *Hallett* v. *Wigram* (9 C.B. 580), and the judgment of Wild, C.J., as also to the decision in *Job* v. *Langton* (6 E. & B. 779), and distinguishes *Moran* v. *Jones* (7 E. & B. 523). "The claim," he says, "has been put upon 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 of general average." "The proposition," says Sir James Hannen, "that general average includes all extraordinary expenses incurred for the purpose of continuing the voyage, is not warranted by the principle which governs contribution to general average." In *Harrison* v. *Bank of Australasia* (25 L. T. Rep. N. S. 944; 1 Asp. Mar. Law Cas. 198; L. Rep. 7 Ex. 39) a question arose as to the

right of the shipowner to charge the cargo with general average contribution in respect of spars and wood cut up by the captain in an emergency to burn with his coal, of extra coal purchased from a passing vessel, and of injury done to a donkey engine through its being continuously employed for pumping. The court unanimously held that no claim to contribution arose in respect of the coals or the donkey engine, but differed on the question of fact whether there was such an imminent peril as to justify the sacrifice of the spars and wood. But all agreed as to the principles which regulate the law of general average. Cleasby, B. expressed himself as follows: "Some difficulty is created in this case by referring to American authorities on this subject, and (to Stevens on Average, and other works of a similar nature. The law in America does not in all respects agree with ours on the subject of general average (as will be pointed out shortly), and the other works referred to do not, in my opinion, correctly state the English law on the subject. We were pressed with many authorities to show that imminence of danger was not necessary to make the expenses incurred by a vessel in going into port to repair, a subject of general average. It is undoubted that when some sacrifice has been made (for example, cutting away masts, &c.), the expenses consequent upon going into port after the danger is over to repair this loss are in England the subject of general average; because going into port, though there is no imminent danger at the time, yet being rendered necessary by the sacrifice made in imminent danger, stands upon the same footing as the sacrifice itself. But the expenses attending the going into port to repair sea damage caused by a storm when no sacrifice has been voluntarily made, do not, it is submitted, form items of general average according to English law, although they are regarded as doing so in America: 3 Kent's Commentaries (10th edit.), p. 329, and note." Kelly, C.B., in delivering the judgment of himself and Bramwell, B., adds that the ingredients of a case of general average are,—peril of the seas imminent, certain loss in a short time unless something not to be anticipated should intervene, and a sacrifice of the property of one for the benefit of all. And he proceeds to cite as the true principle applicable to these cases the passage from Abbott on Shipping referred to by Wilde, C.J. in the case of *Hallett* v. *Wigram* (9 C. B. 580), which I have already mentioned.

We have, however, been asked to consider the present case as governed by the judgment of the Court of Appeal in *Atwood* v. *Sellar*, where it was held that port of refuge expenses of the same character as those now in issue were properly chargeable to general average. The broad and obvious distinction is that in *Atwood* v. *Sellar* there was a general average sacrifice of a portion of the ship herself which rendered necessary the repairs of the vessel in port, and the unloading, warehousing, and reloading of the cargo for that purpose. The Court of Appeal in terms abstained from pronouncing on the question that has now arisen, and unless it follows as a necessary implication from their judgment that the port of refuge expenses ought to be similarly treated where there is no general average act which renders necessary any unloading or repairs in port, the matter is not concluded by that authority. The principle of law, however, that appears to be the basis of the decision in *Atwood* v. *Sellar* is, that an expenditure directly caused by a general average sacrifice is part of the loss that it entails, and becomes the subject of general average contribution. The port of refuge expenses which the present respondents claim to treat as general average have not been caused by the putting into port, and there was no still earlier general average sacrifice to cause them, as in *Atwood* v. *Sellar*. They cannot, therefore, in the present case, be said either to be general average sacrifices themselves, nor caused by any general average sacrifice. In my opinion the judgment of Lopes, J. ought to be reversed, and the action dismissed with costs here and below.

Judgment reversed.

Solicitors for plaintiffs, *Field, Roscoe* and *Co.*

Solicitors for defendants, *Waltons, Bubb,* and *Walton.*

Aug. 3, 1883, *and April* 30, 1884.

(Before Brett, M.R., Bowen, and Fry, L.JJ.)

The Notting Hill. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Collision—Carriage of goods—Late delivery—Loss of market—Damages for delay in contract and in tort—Measure of damages.

Where by reason of a collision between two steamships, occasioned by the negligence of one, goods carried by the other are delayed in transit, damages for loss of market are not recoverable as being too remote by reason of the uncertainty of the duration of a sea voyage.

The Parana (3 *Asp. Mar. Law Cas.* 220, 399; 36 *L. T. Rep. N. S.* 388; 2 *P Div.* 118) *followed.*

This was a motion in the Probate, Divorce, and Admiralty Division before the President, Sir James Hannen, by the plaintiffs, owners of cargo, in a consolidated action brought by the owners of the steamship *Clymene*, and the owners of her cargo, against the steamship *Notting Hill*, to refer back the report of the registrar and merchants on the grounds hereinafter set out.

The action arose out of a collision which occurred in Gibraltar Bay, and, after the institution of the suit, the defendants admitted their liability, and the plaintiffs' claims were thereupon referred to the registrar and merchants.

The claims brought into the registry by the owners of cargo, together with the facts of the case, were set out by the registrar in the following report:

On the 27th Nov. 1882 the steamship *Clymene*, bound from Salonica to London with a cargo of maize and barley, arrived at Gibraltar. She was to have resumed her voyage on the 28th after taking in coal and water, but about 9.30 on that morning, as she lay moored alongside of a hulk taking in coal, she was run into by the steamship *Notting Hill*, which struck her on the port side, making a large hole abaft the fore rigging. In order to beach the vessel, her moorings were cut and her engines were put on full speed ahead, but she took the ground with nineteen feet of water round her, and the water rapidly flooded her from the stokehole bulkhead to the collision bulkhead and subsequently her forepeak, but did not enter her afterhold. The grain in the forehold was much damaged by the sea water, and when the hole in

(*a*) Reported by J. P. Aspinall, and F. W. Raikes, Esqrs. Barristers-at-Law.

the vessel's side had been pitched by divers the water was pumped out and the damaged portion of the cargo was discharged into lighters with so much of the sound cargo as was deemed necessary to lighten the ship. The discharge of the cargo occupied about a fortnight, and the vessel having been temporarily repaired, the dry portion of the cargo was reshipped and the *Clymene* left Gibraltar on the evening of the 30th Dec.

She arrived in London on the 5th Jan., and on or about the 15th, her remaining cargo having been discharged, the ship was put into Limekiln Dock for permanent repairs, which were completed on the 2nd Feb. 1883.

Claims for damage were brought in by the owners of the *Clymene* and the owners of her cargo. The shipowners claimed (1) For the delay and temporary repairs at Gibraltar; and (2) for the permanent repairs and for the time occupied by them after the arrival of the vessel in the port of London. The charges at Gibraltar were found on the whole to be necessary and reasonable, and little deduction has been made from them except from the remuneration claimed for the services of the ship's agents there, the total amount charged for which exceeded 2600*l.* Of the expenses in London the charges for repairs in the engine room have been for the most part disallowed, as they were not proved to be consequent on the collision and apparently would have been needed independently of it in order to conform with the regulations under which the classification of the vessel could alone be maintained. Some deductions have also been made from the ships' chandlers' account for items which seemed not wholly chargeable to the collision, and for the value of damaged ropes and canvas, for which it was considered that credit ought to have been given. On the cargo-owner's claim an important question arises. The cargo consisted of 4319 quarters of maize and 5309 quarters of barley, which had been shipped at Salonica in Nov. 1882. Of the maize 3317 quarters had been sold for arrival to Messrs. E. Gripper and Sons, and 1002 quarters to Messrs. Lock and Co. at the price of 34*s.* 10½*d.* per quarter less freight and discount. Both sales were included in one contract made on the 20th Nov., seven days before the *Clymene* reached Gibraltar, by the terms of which the purchase money was payable on the 20th Feb. 1883, but in fact it was paid on the 6th Dec. preceding, the amount actually paid, after deducting freight and discount, being 6518*l.* 4*s.* 9*d.*, or nearly at the rate of 30*s.* 2*d.* per quarter net. It should be added that of the maize so bought Messrs. Gripper and Sons had, on the 24th Nov., sold for arrival 100 quarters at 38*s.*, and on the 27th Nov. 370 quarters at 38*s.* 6*d.* per quarter, but next day news having come of the collision the sales were necessarily discontinued.

Of the entire shipment of maize little more than one-half (2317 quarters) was delivered in London, the portion damaged by immersion having, by the advice of the surveyors, been sold by auction at Gibraltar, where the net proceeds realised by the sale amounted to only 7060*l.* 7*s.* 8*d.*, or, at the exchange of 3*s.* 10¼*d.* to the dollar, 1360*l.* 10*s.* 5*d.*

A further loss was sustained on the maize which was delivered in London. At the end of November, and early in December, the supply of maize in the London market was very small, and the prices were proportionately high, but from about the middle of December—chiefly in consequence it was stated, of importations of maize from America—there was a rapid and continued fall in prices, and consequently the maize, with which the *Clymene* arrived on the 8th Jan., only realised prices varying from 31*s.* 9*d.* to 33*s.* a quarter—in all 3714*l.* 9*s.* 2*d.*, of which, after payment of freight and other expenses, there remained a balance of only 3256*l.* 9*s.* 2*d.*, being at the rate of a little more than 28*s.* a quarter.

The result was that the whole cargo of maize for which the claimants had paid 6518*l.* 4*s.* 9*d.* realised only: (1) The damaged maize sold at Gibraltar, 1360*l.* 10*s.* 5*d.*; (2) The remainder delivered in London, 3256*l.* 9*s.* 2*d.* = 4616*l.* 19*s.* 7*d.*; showing a loss of 1901*l.* 5*s.* 2*d.*

But the owners of the maize claimed a much larger sum. In estimating their loss they put the sound value of the cargo not at the price at which it had been bought, which was 34*s.* 10½*d.* less freight and discount, but at 40*s.* per quarter, on the ground that they might have obtained that price for it if there had been no collision, and if consequently the *Clymene* had arrived in London early in December instead of in January; accordingly they claimed the difference between the value of the maize at 40*s.* per quarter (less freight and other charges which they would have had to pay on arrival) and the price actually realised, and they estimated the loss so sustained at 3116*l.* 10*s.*

As regards the maize which was delivered in London, whether the loss sustained by the owners be taken at the difference between the price paid by them for the cargo and the amount realised in London, viz., as the difference between that amount and the price which might have been obtained if the delivery of the cargo had not been delayed by the collision, it appears to me that in neither case can the claim be allowed consistently with the decision of the Court of Appeal in the case of *The Parana* (3 Asp. Mar. Law Cas. 220, 399; 36 L. T. Rep. N. S. 388; 2 Prob. Div. 118). In that case the arrival of the ship having been delayed for more than a month in consequence of the defective state of her engines, the owners of part of her cargo consisting of bales of hemp claimed the difference between the market value at the time when the hemp might have been sold if the ship's arrival had not been delayed by the condition of her engines, and the market value at the time when the hemp was actually ready for sale, and it was held by the Court of Appeal (reversing the decision of the judge of the Admiralty Court, and confirming the registrar's report) that the claim for loss of market could not be allowed.

It was objected by the plaintiff's solicitor that the claim in the case of *The Parana* (*ubi sup.*) was for damage arising from breach of contract, not, as in this case from a tort, and that consequently one of the grounds of the decision of the Court of Appeal, viz., that a fall in the market price could not have been in contemplation of the parties when the contract was made, does not exist in the present case. It was also urged that, as Messrs. Gripper and Sons had before hearing of the collision begun to sell the maize purchased by them at 38*s.* or 38*s.* 6*d.* per quarter, they would certainly, but for the collision, have continued to sell it at the same, or even a higher price, and would have disposed of all the maize before the market price fell—that the maize was in fact as good as sold at that price before the collision. But however great the probability that if the arrival of the *Clymene* had not been delayed by the collision the whole of the maize would have been sold at a considerable profit, it appears to me that the loss of that profit is a loss of market which cannot be allowed unless the decision in the case of *The Parana* is applicable only to a claim for damages arising from a breach of contract, and not to a claim for damages arising from a tort. Looking to the grounds of that decision, I do not think that it is so restricted, for in either case the loss of market is an accidental loss, not necessarily or naturally consequent upon the delay in the arrival in the cargo, whether that delay has arisen from the defective condition of the carrying ship, or from a collision caused by the wrongful act of another vessel. The allowance of such a claim would also be contrary to the long-established practice of the Admiralty Court. In the case of *The Parana*, Mr. Rothery, then registrar of the Admiralty Court, reported that, although the case of the loss of markets through the delay in the delivery of goods must frequently have arisen in the Admiralty Court, as for instance, when a vessel has been run into by another, and the delivery of the cargo has been delayed by the vessel having to put into port for repairs (the very case now under consideration), yet he might say with certainty that no such claim had ever yet been preferred, certainly not during his experience of nearly twenty-four years as registrar of the court. This statement is referred to as follows in the judgment of the Court of Appeal: They (the registrar and merchants) said that it had never been the practice in the Court of Admiralty to give such damages, and though it constantly happened that by accident such as collisions goods were delayed in their arrival it had never been the custom to include in the damages the loss of market, and we are of opinion that the conclusion which the registrar and merchants came to was right." I should add that I know of no later case in which such a claim has been allowed. In accordance, therefore, with the conclusion of the registrar in that case I have only allowed in respect of that portion of the maize which was delivered in London a sum which was considered sufficient to compensate the owners for the loss of interest on their capital during the delay in delivery.

To the damaged maize which was sold at Gibraltar a different rule applies. On that portion of the cargo the cost price has been allowed, with the addition of a sum to represent the merchant's profit less the proceeds realised by the sale at Gibraltar. It might perhaps have been an equitable adjustment of the claims for the maize delivered in London, if the loss had been estimated in the same way by allowing a reasonable profit in addition to the cost price, deducting, of course, the proceeds realised; but although this is a usual mode of computing the compensation due for cargo which has been totally lost, or which in consequence of a collision has been sold in damaged state, I am not aware that it has ever been adopted where the cargo has only been delayed in delivery; and in view of the decision in the case of *The Parana* I do not feel myself at liberty to apply it to that portion of the maize which the *Clymene* ultimately brought to London. The claim of the owners of the barley which formed the remainder of the cargo has been dealt with in the same manner as the claims in respect of the maize. But on the barley the loss sustained through fall of market was comparatively insignificant, the market price having fallen only from 26*s*. 3*d*. to 25*s*. 3*d*. per quarter during the detention of the *Clymene*, consequently the disallowance on the claim of the barley owners is comparatively small. On the other hand, the claim for maize has been very largely reduced. This, however, is a case in which the reduction has been occasioned not by the fictitious or exaggerated character of the claim, but by the owners having included in it a loss of market actually sustained and for which they may not unnaturally have thought that they are entitled to compensation. In these circumstances I am of opinion that the owners of the maize as well as the other claimants in the case may be allowed the costs of the reference. J. G. Smith, Assistant Registrar.

The following were the sums claimed and allowed to the plaintiffs:

	Claimed.	Allowed.
	£ s. d.	£ s. d.
Messrs. Gripper and Co. (maize) } Messrs. Lock and Co. (do.)	3116 10 0	1800 0 0
Messrs. Sturdy Bros. (barley)	2538 15 5	2270 0 0

To this report Messrs. Grippper and Lock objected by way of motion, and filed the following objections:

1. Because by the said report the plaintiffs are not allowed the profit in the said report called the loss of market actually sustained by them on the cargo of the *Clymene*, the plaintiffs will contend that they are entitled to 3116*l*. 10*s*. or such other sums as the registrar and merchants may find or the actual profit or loss of market sustained by them in consequences of the said collision.

2. The plaintiffs contend in the alternative that the registrar's report finding that they sustained an actual loss of 1901*l*. 5*s*, 2*d*. (being the difference between the amount paid and the amount received by them for the sale of the cargo of maize), they are in any event entitled to be awarded the sum of 1901*l*. 5*s*. 2*d*. instead of 1800*l*. or 101*l*. 6*s*. 2*d*. more than is due to them by the said report.

3. The plaintiffs will also contend as an alternative to objection No. 1, that in addition to the said sum of 101*l*. 5*s*. 2*d*. they are further entitled to the sum of 40*l*. 3*s*. 1*d*. and 154*l*. 3*s*. 4*d*., together 194*l*. 6*s*. 5*d*., being the actual profit made by them as stated in the said report on the sale of 100 quarters of maize at 38*s*., and 310 quarters at 38*s*. 6*d*.

4. The plaintiffs will also contend as a further alternative to No. 1, that in addition to the sums of 101*l*. 5*s*. 2*d*. and 194*l*. 6*s*. 5*d*. they are entitled beyond those sums to a sum named in the registrar's report as the merchants profit on the cargo sold at Gibraltar beyond the sums of 1901*l*. 5*s*. 2*d*.

J. P. Aspinall (with him *Nelson*) in support of the motion.—The plaintiffs are not excluded in this case from recovering for loss of market by the ruling in *The Parana* (3 Asp. Mar. Law Cas. 220, 339; L. Rep. 2 P. Div. 118: 35 L. T. Rep. N.S. 32; 36 L. T. Rep. N. S. 388). *The Parana* was a case of contract; this is a case of tort, and as such the tort feasor should be made liable to the last farthing of damage arising from the tort. In *The Parana* it appeared that the arrival of the ship at the port where the goods were to be sold was incapable of being approximately ascertained. In that case and the present it is said that no such damage has been allowed in the Admiralty Registry. That arises from the fact that until recent years the Mediterranean carrying trade was done entirely by sailing vessels the date of whose arrival could in no way be estimated. Now the trade is done by steamers, and their arrival can be estimated within a few hours, and they are for the purposes of the market as punctual as the railway goods service, and in the carriage of goods by railway the respondents would clearly be entitled to damages for loss of market:

O'Hanlan v. *Great Western Railway Company*, 6 B. & S. 484.

Damages for loss of charter-party by collision have been allowed in the Admiralty Registry:

The Star of India, 1 P. Div. 466; 45 L. J. 102, Adm.; 35 L. T. Rep. N. S. 407; 3 Asp. Mar. Law Cas. 261;

The Consett, 5 P. Div. 229; 42 L. T. Rep. N. S. 33; 49 L. J. 24, Prob.; 4 Asp. Mar. Law Cas. 230.

This is in the nature of damages for loss of profits, and is an answer to the argument that no contingent profit should be allowed because an accident might occur preventing the arrival of ship and goods, and consequently the earning of the profit. These goods were sold to arrive, and hence there was in existence an actual contract whereby the consignees would derive a profit in the same manner as shipowners would derive profit from a charter-party actually entered into.

W. F. Phillimore and *Barnes* in support of the report.—The principle adopted by the registrar is the only correct one, when one looks at the decision of the Court of Appeal in *The Parana* (*ubi sup.*). It will be seen that the decision there includes such cases as the present. The cases of *The Star of India* (*ubi sup.*), and *The Consett* are on quite a different footing from the present case, inasmuch as in those cases contracts had been entered into that a fixed sum should be paid for the carriage of goods. Here the amount sought to be recovered is too speculative. As pointed out in *The Parana*, loss of market under similar circumstances must have arisen thousands of times in the Admiralty Registry, and yet never once has it been allowed.

J. P. Aspinall in reply.—Although similar cases of loss of market may have come before the registrar, and never been allowed, if they have arisen since the steam carrying trade came into existence, it is submitted that this practice has been formed upon a mistaken view of the law. We are now trying to correct that mistake.

Sir James Hannen.—I have no hesitation in saying that if I considered this case free from authority I should hold that the registrar's report could not be supported. The difficulties which have been suggested in argument, and which were suggested in the case of *The Parana* (*ubi sup.*), I confess appear to me to be very far from conclusive upon the subject. There are unfortunately difficulties in every judicial investigation, but it is the duty of the tribunal, whether judge or jury, to overcome those difficulties and arrive at the conclusion which they consider proper.

And I must say it appears to me that the passage which has been read from Lord Blackburn's judgment in *O'Hanlan* v. *The Great Western Railway Company* (*ubi sup.*) is applicable to all these cases where the question is what amount of damages should be allowed. He says: "Setting aside all special damage," and no question of special damage was left to the jury, "the natural and fair measure of the damages is the value of the goods at the place and time at which they ought to have been delivered to the owner. Now the value of the goods at the place of delivery must be the market price if there is a market there for such goods. If there is not, either from the smallness of the place or the scarceness of the particular goods, the value at the time and place of delivery would have to be ascertained as a fact by the jury, taking into consideration various matters, including any addition to the cost price and expenses of transit, the reasonable profits of the importer which are adjusted by what is called the higgling and bargaining of the market." And so with regard to all these other cases which have been put, it would be a question for the jury or for the registrar and merchants to say whether they had the materials upon which to arrive at the conclusion as to what would have been the price realised had the vessel not been interrupted in her voyage in the manner in which she was.

Nor can I regard the possibility of some other collision taking place as being worthy to be taken into consideration. That is a contingency which would happen in every case, and it would be competent for every wrong-doer to say, "Oh! If I had not done you a wrong somebody else might have done it." But I consider, as I have already said, that with regret I feel myself bound by the authority of *The Parana* (*ubi sup.*). Undoubtedly that case was one of contract, and therefore there is a distinction between the present case and that, and if the present case should be taken to the Court of Appeal, I shall be very glad if that court should feel itself justified in treating the distinction I have mentioned as a valid one. But the reason why I do not feel myself justified in so treating it here is, that I find that it was directly under the consideration of the court. In Mr. Rothery's report he goes into the practice of the Admiralty Court during the whole time that he had been registrar, and refers to cases of collision, and his and the merchant's opinion is adopted and sanctioned by the Court of Appeal. "They said," I quote from the report, "that it had never been the practice im the court of Admiralty to give such damages, and though it constantly happened that by accidents such as collisions goods were delayed in their arrival, it never had been the custom to include in the damages the loss of market, and we are of opinion that the conclusion which the registrar and merchants came to was right." Therefore, as I say, the distinction was directly under the attention of the court, and though the decision to this extent in *The Parana* is certainly not in accordance with my own view of the law, and I should decide this motion differently had I been free, yet I do not feel that I should be justified in acting in contravention to what seems to me to be laid down in that case.

With regard to the other points which have been made, I do not think that that evidence supports them. I was struck at first with the fact that the registrar shows a loss of 1901*l.*, whereas he only gives 1800*l.*, but that is explained. He is lumping together the two transactions when he works it out, showing a loss of 1901*l.*, and there is nothing to show that his computation is incorrect, if you separate the two portions of maize, viz., that which was sold at Gibraltar being damaged from that which was sold in London. He has in effect said, considering himself bound by the decision in *The Parana* (*ubi sup.*): "It is impossible to establish any loss on the goods which were brought to London, because whatever they sell for is to be treated as their proper price, and so there never could be a loss." That is one of the anomalies, shall I say, which the rule of law, as laid down, leads to. But then, with regard to the maize sold at Gibraltar, he has allowed a profit with interest. Why he has done so it is not shown, and has only been worked out by Dr. Phillimore from conjecture; but there is nothing to show that he has not done that which he alleged he has done, and I do not doubt therefore he has done it, viz., allowed on the maize sold at Gibraltar a profit with interest. Then with regard to the portions which were resold, that really rests upon the conjecture of Mr. Aspinall. There is nothing to show that there has been any actual loss on the sale in any other sense than that there has been a loss on the whole cargo in not being able to get that which buyers would have been willing to give if it had arrived in time. The phrase "on arrival" would naturally import that such goods only were sold as should arrive in that ship. If it were so, then I do not know any reason why these goods should not have been taken by the buyer, but it is sufficient to say that there is nothing to show that there has been any legal loss which can be put on the same footing as a loss of charter-party, which has been already entered into. That disposes of all the points in the case, and for the reasons I have given I must confirm the registrar's report, and I suppose I must say with costs.

From this judgment the plaintiffs now appealed.

April 30.—*Aspinall* and *Nelson* (*C. Hall*, Q.C. with them) for the appellants.—The learned judge in the court below based his judgment on the case of *The Parana* (*ubi sup.*), which he considered applicable to this case, and therefore binding upon him. But the distinction between that case and the present is, that that case was one of contract and this is one of tort. This distinction the learned judge considered to be a valid one, but nevertheless a distinction to which he felt unable to give effect on account of *The Parana*. In this case the goods were being sold to arrive, and they arrived long after the time at which, but for the collision, they would have arrived; in the meantime the market had gone down. [Bowen, L.J.—And therefore, if when goods arrive by sea they are not necessarily to be sold on arrival, damages in that case do not flow. Brett, M.R.—But if the market goes up instead of falling, would not the damages be less?] Where a person bought goods and resold them at a profit before delivery, and the goods were not delivered, the vendor was held entitled to recover the price at which he had resold them:

France v. *Gaudet*, L. Rep. 6 Q. B. 199.

The distinction between carriage of goods by sea and by land is one of degree, not one of principle. The regularity with which steam-vessels arrive within a few hours of a calculated time has reduced this distinction to a vanishing point. There is no doubt that in the carriage of goods by land damages for delay are recoverable:

O'Hanlan v. *Great Western Railway Company (ubi sup.).*

Such damages ought therefore to be recoverable in cases like the present. There are cases recorded in the Admiralty Registry where such damages have been allowed by the registrar and merchants. The other cases cited below were also mentioned.

W. G. F. Phillimore and *Barnes*, for the respondents, were not called upon.

Brett, M.R.—The only question in this case is whether the damages claimed for delay in the arrival of the goods are too remote. The rule with regard to questions as to remoteness of damage is precisely the same whether the damages are claimed in respect of contract or in respect of tort, and it has been so laid down in *Hadley* v. *Baxendale* (9 Ex. 341; 23 L. J. 179, Ex.) and other cases. In Mayne on Damages, p. 39, it is thus laid down: "The first and in fact the only inquiry in all these cases is, whether the damage complained of is the natural and reasonable result of the defendant's act; it will assume this character if it can be shown to be such a consequence as in the ordinary course of things would flow from the act, or in cases of contract if it appears to have been contemplated by both parties." The latter part of this is only a repetition of the phrase in *Hadley* v. *Baxendale* (*ubi sup.*) which has since been frequently criticised. In that case the goods were delivered to a carrier with notice of a contract which made the delivery of the goods within a certain time an essential part of the contract. We have to apply that rule here, as to the point whether the damages are too remote.

The very point was dealt with in *The Parana* (*ubi sup.*), where the question arose as to the application of the rule in the case of loss of market through delay, occasioned by a collision, though it was not the point in the actual decision. Mellish, L.J. there said that loss of market in the sense that you are entitled to the difference between the price when the goods arrived and the price when they ought to have arrived is on an ordinary voyage so uncertain that it cannot be the natural and reasonable consequence in every case. And I am of opinion therefore that it is not the natural and reasonable result of a collision at sea. He said that loss of market by delay arising from a collision was too remote to be taken into account as a head of damage when damages are claimed in respect of a collision. That is an authority absolutely binding upon us. For my part I do not wish to say that if I had had to decide that case I should have decided it differently. I can see no distinction between the principles there laid down and those which we have now to apply. It is true, that was an action of contract, and here the question arises in tort; but in the passage I have quoted from Mayne on Damages, which is founded on the case of *Hadley* v. *Baxendale* (*ubi sup.*), no distinction is made between the two kinds of actions in considering the natural and reasonable result of an act. I say therefore, upon the question of remoteness of damage, there is no difference between actions upon contract and those not upon contract. As to the question whether the market value of the goods is to be taken upon the day of collision, it appears to me that it cannot be so taken—certainly not in this case, because no damage has been done which has not been allowed for except damage by delay, and that damage by delay does not occur upon the day of collision.

Bowen, L.J.—I am of the same opinion.

Fry, L.J.—I am of the same opinion, considering myself bound by the case of *The Parana*.

Appeal dismissed.

Solicitors for the appellants, *Lowless* and *Co.*

Solicitors for the respondents, *Stokes, Saunders*, and *Stokes*, agents for *Hill, Dickinson*, and *Lightbound*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

May 6, 8, *and* 12, 1884.

(Before Bacon, V.C.)

Phelps, Stokes, and Co. *v.* Comber. (*a*)

Bills of exchange—Counterfoils—Bills of lading—Consignor and consignee—Appropriation of shipments to meet bills—Agent of two firms—Notice.

Johnston, Pater, and Co., merchants, of Pernambuco, ordered goods of their agents Samuel Johnston and Co., of Liverpool, the principle partner in both firms being the same individual.

The Liverpool firm sent the order to their agent at New York, who bought the goods, and sent them and the bills of lading to Pernambuco.

In order to pay for the goods, the agent drew bills of exchange on the Liverpool firm, and sent the bills with counterfoils attached to Liverpool.

Each counterfoil was headed as follows, "Advice of draft. To Messrs Samuel Johnston and Co., Liverpool," and after stating the number, date, and amount of the draft, and the shipments against which it was drawn, concluded as follows, "Please protect the draft as advised above and oblige drawer."

Samuel Johnston and Co. accepted the bills, and detached the counterfoils.

The agent sold the bills to bankers in New York shortly before the Liverpool firm stopped payment.

The agent gave notice, by telegram, of the failure, to the Pernambuco firm.

The Pernambuco firm received the proceeds of the sale of the goods, and applied them in payment of the balance due to them from the Liverpool firm.

Held, on action by the bankers against the Pernambuco firm for payment of the bills, or an account, that there was no appropriation of the shipments, nor of the proceeds of the sale thereof, to meet the bills of exchange.

The plaintiffs in this action were bankers at New York, and the defendant, at the time of the transaction in dispute, was carrying on business as a merchant at Pernambuco under the name of Johnston, Pater, and Co., and at Bahia under the name of Johnston, Comber, and Co. In May 1879 Samuel Johnston and Co. were the bankers and agents at Liverpool of Johnston, Pater, and Co. and Johnston, Comber, and Co., and R. B. Borland

(*a*) Reported by Francis E. Ady, Esq., Barrister-at-Law.

was general agent in New York of all the three firms.

In May 1879 the Pernambuco firm ordered the Liverpool firm to send certain goods to them for some of their customers in Brazil; the Liverpool firm sent the order to R. B. Borland, who bought the goods in New York.

R. B. Borland sent the goods, and the bills of lading, by the steamship *Glensannox*, to Pernambuco, and to pay for the goods drew three bills of exchange upon the firm of Samuel Johnston and Co. One numbered 401 was dated the 9th May 1879, and was drawn for a sum of 1500*l.* payable on the 23rd July 1879 and the other two, numbered respectively 402 and 404, were dated the 16th May 1879, and drawn for sums of 1500*l.* and 2000*l.* respectively payable on the 30th July 1879.

There was attached to each of the said bills, at the time when the same was drawn, a counterfoil, with a perforated line between the bill and the counterfoil.

Each counterfoil was headed as follows, "Advice to draft. To Messrs Samuel Johnston and Co., Liverpool," and after stating the number, date, and amount of the draft, and the shipments against which it was drawn, concluded as follows, "Please protect the draft as advised above and oblige drawer."

R. B. Borland sent the bills of exchange, and copies of the bills of lading, to Samuel Johnston and Co., and meantime sold the bills to Phelps, Stokes, and Co. in New York.

Samuel Johnston and Co. accepted the bills, and detached and retained the counterfoils.

On the 10th June 1879 Samuel Johnston and Co. stopped payment, and immediately on ascertaining this fact the plaintiffs and the said R. B. Borland telegraphed to Pernambuco, informing Johnston, Pater, and Co. (who had been previously instructed as to the purchase and shipment of the goods, and as to the three bills being drawn against and charged on the said goods) that they must hold the said shipments by the *Glensannox*, and the proceeds of the sale thereof, as security to the plaintiffs as the holders of the bills. The telegram was as follows:

Having pledged documents and shipment *Glensannox* hold proceeds subject order Phelps, Stokes, and Co. and Bank British North America.

The *Glensannox* arrived at Pernambuco, and the defendant, or his firm of Johnston, Pater, and Co., after receiving the telegram, obtained possession of the goods, transferred them to the Brazilian purchasers, and received the proceeds and applied the same in the payment of the balance due to them from the Liverpool firm.

The plaintiffs claimed payment of the bills, or an account, and an order for payment out of the proceeds of the goods, and a receiver.

The defendants denied that R. B. Borland was agent of the three firms, or had authority to pledge the goods.

By an agreement made the 11th Dec. 1877, between Carruthers Charles Johnston, of Liverpool, of the one part, and Robert Bell Borland of the other; after reciting that C. C. Johnston was desirous of appointing the said R. B. Borland as agent to represent the partnership firms of Samuel Johnston and Co. of Liverpool, Johnston, Pater, and Co. of Pernambuco, and Johnston, Comber, and Co. of Bahia, on commission in the United States of America for the term of five years from the 1st Jan. 1878, upon the terms and conditions hereinafter contained, it was agreed between the parties thereto as follows:

That the said R. B. Borland shall for and during the period of five years from the said first day of Jan. 1878, enter into the service of the said C. C. Johnston, and well and faithfully act for him as agent on commission, as may from time to time be required by him the said C. C. Johnston, in the United States of America, and shall and will, during the said term, diligently attend the business concerns of the said C. C. Johnston, and the said firms of Samuel Johnston and Co., Liverpool, Johnston, Pater, and Co., Pernambuco, and Johnston, Comber, and Co., Bahia. That all business transactions by the said R. B. Borland on behalf of the said firms shall be charged by commission only, in conformity with the rates which have been heretofore charged by the said R. B. Borland since Jan. 1, 1873, under a written agreement and power bearing date 28th Dec. 1872. Provided, however, that in cases of mutual agreement, the scale of commissions may be modified by the parties to this agreement as circumstances warrant.

That the said R. B. Borland shall not enter into any speculative business whatever, but confine himself entirely to that of commissions only, and in case of any other commissions being offered to him by other firms, he shall first submit the same for the approval of the said C. C. Johnston, in writing, before proceeding with the transaction thereof.

That the said R. B. Borland shall be at liberty to make advances on shipments of produce consigned to the said C. C. Johnston, to the extent of not exceeding three-fourths of the net value thereof, and he is hereby authorised and empowered to draw on the said Samuel Johnston, and Co. for the amount of all such advances, and also for the amount of any orders given by the said firms of Samuel Johnston and Co., Johnston, Pater, and Co., and Johnston, Comber, and Co.

That the said R. B. Borland shall use his best endeavours and utmost exertions in obtaining consignments of and orders for produce, in connection with the said firms.

Charles Carruthers Johnston was alleged by the plaintiffs to be the chief partner in all the three firms, and the evidence of W. H. Brown, the broker who sold the bills of exchange, and of S. P. Slater, clerk of the plaintiffs who bought them, and also of one of the partners of the plaintiffs' firm, was taken in New York before examiners, with a view to show that the plaintiffs bought the bills on the understanding that the goods shipped by the *Glensannox* were appropriated to meet the bills.

The evidence of R. B. Borland was also taken on this point, and on behalf of the defendants, to show that pressure was put upon him by the plaintiffs to send the telegram of the 10th June 1879.

C. C. Johnston, Thomas Comber, and Thomas Comber Griffiths were also examined in England with regard to the connection of the three firms, and the authority of R. B. Borland to act as agent for them, or to pledge the goods.

R. T. Reid, Q.C., M.P. and *Northmore Lawrence* for the plaintiffs.—The question to be decided in this action is, whether Borland had authority to create any charge on the goods consigned by the *Glensannox*, or on the proceeds of the sale of them, whether he purported to create such charge, and whether the plaintiffs bought the bills of exchange on the faith of his making such charge. The agreement of the 11th Dec. 1877 made Borland agent of the three firms, and under it he had authority to pledge the goods, and the evidence of Brown and Slater showed that the bills of exchange were purchased on the faith of Borland pledging the goods, and being authorised to do so. In *Frith* v. *Forbes* (7 L. T. Rep. N. S. 261; 4 De G. F. & J. 409) the court held that there was appro-

priation of cargo to meet bills of exchange. *Ex parte Carruthers* (3 De G. & Sm. 510) was a different case. In *Robey and Co. Perseverance Ironworks* v. *Ollier* (27 L. T. Rep. N. S. 362; L. Rep. 7 Ch. App. 695) *Frith* v. *Forbes* was discussed, and the references to that case in the judgments of James and Mellish, L.JJ. are in our favour. Then the defendant received the goods, after notice that they were purchased by means of the bills of exchange, and that they were pledged to meet the bills. It was not competent for them to receive the goods and dishonour the bills. There was a clear intention that there should be an equitable lien on the cargo. All the three firms had notice of the transactions.

Marten, Q.C. and *F. Thompson* for the defendants.—The letters of advice on the counterfoils, if purporting to pledge the goods, were only a security to Samuel Johnston and Co. The letters of advice were detached by Samuel Johnston and Co. when they accepted the bills, and could confer no benefit upon the plaintiffs. The plaintiffs had nothing to rely upon but the credit of the acceptors of the bills. If the bills of lading are not annexed to the bills of exchange, the only security is the credit of the acceptors:

Robey and Co. Perseverance Ironworks v. *Oliver*, 27 L. T. Rep. N.S. 362; L. Rep. 7 Ch. App. 695.

In the present case the bills of lading had gone to Pernambuco. [BACON, V.C.—The question I have to decide is, whether from all the documents Borland had the power to make, and did make, an equitable assignment.] The advice and draft on the counterfoil does not amount to an equitable assignment. The bills of lading and the goods went to Pernambuco; it is clear that no charge was intended:

Re Entwistle; Ex parte Arbuthnot, L. Rep. 3 Ch. Div. 477.

Ex parte Banner; Re Tappenbeck, 34 L. T. Rep. N. S. 199; L. Rep. 2 Ch. Div. 278.

There was no appropriation to meet the bills, therefore no equity arose in favour of the holders of the bills to have the proceeds applied in payments of the bills under the doctrine of *Ex parte Waring* there referred to. No specific lien was given to Borland on the goods or the proceeds of the sale of them:

Thomson v. *Simpson*, L. Rep. 5 Ch. App. 659.

As to Brown and Slater, a conversation between them could not alter the letter of advice:

Citizens Bank of Louisiana v. *First National Bank of New Orleans*, L Rep. 6 E. & Ir. App. 352.

As to the agreement of the 11th Dec. 1877, there was no authority given by that to Borland to give any pledge in respect of goods bought by him in New York on commission. In executing orders Borland might draw to the full amount, but he had no authority to pledge the goods. The evidence of Carruthers Charles Johnston showed that he never authorised Borland to make any pledge or charge in respect of the goods ordered, or in respect of the proceeds of the sale of the goods. The counterfoils were merely letters of advice, as between the drawer and drawee of the bills of exchange, and the plaintiffs could not have the benefit of them. Mr Johnston said that, though he was partner in all the three firms, he did not communicate the agreement of the 11th Dec. 1877 to the Pernambuco and Bahia firms. *Primâ facie* there was no intention of appropriation. As to the conversation between Slater and Brown, general information was given to Slater, the buyer, on behalf of Phelps, Stokes, and Co., that the bills were drawn against consignments for the purpose of showing that the bills represented *bonâ fide* transactions, but no specific information was given by Brown, the broker, as to shipment against which the bills were drawn. The mere fact of the bills being drawn against goods does not of itself create a charge; and, in this case, the parties never intended, and never did create a charge.

R. T. Reid, Q.C. in reply.—*Frith* v. *Forbes* (*sup.*) is in our favour, and *Robey and Co. Perseverance Ironworks* v. *Ollier* (*sup.*) differs from the present case in that here it was impossible for the bills of lading to be sent with the bills of exchange; the bills of lading had to accompany the goods to Pernambuco. In *Ex parte Banner; Re Tappenbeck* (*sup.*) the doctrine of *Ex parte Waring* was introduced by the circumstances of the bankruptcy. He referred to

Re Entwistle; *Ex parte Arbuthnot* (*sup.*);
Rankin v. *Alfaro*, 36 L. T. Rep. N.S. 529; L. Rep. 5 Ch. Div. 786.

As to the counterfoils, why were they appended except to show that the bills were drawn against the shipments? As to the evidence, both Brown and Slater thought that the bills were drawn against shipments, and that there was an hypothecation. If on the facts it was the intention of Brown and Slater that there should be an hypothecation, that disposes of the question of law. Then the defendant says that Borland had no authority to pledge the goods, but by the agreement, and on the evidence, he clearly had authority, and all the firms had notice. Then the defendant, if he refuses to pay the bills of exchange, ought to give up the bills of lading:

Shepherd v *Harrison*, 1 Asp. Mar. Law Cas. 66; 24 L. T. Rep. N. S. 857; L. Rep. 5 H. of L. 116.

If the principal takes the bills of lading from his agent, he must take the bills of lading subject to the charge made by the same agent in favour of the acceptors of the bills of exchange. Borland was entitled to raise money by pledging the goods, and his principals are bound by his acts.

BACON, V.C.—The course of mercantile business with regard to specific appropriation is well known, and in the present case I must rely upon the facts, the law upon the subject being plain. Johnston and Co. were merchants at Liverpool, and also at Pernambuco under another firm name. They employed Borland as their agent in New York. The firm at Pernambuco wrote to the firm at Liverpool desiring a purchase to be made in the United States, and the Liverpool firm sent the necessary instructions to Borland. He without any funds or credit that I know of, had to pay for the goods purchased and ship the goods to Pernambuco. Acting within the scope of his authority, he drew bills on the Liverpool house, and to each of these bills was attached a counterfoil stating the particulars of the draft, and of the shipments against which it was drawn. His duty being to charge the Liverpool firm with a commission, he drew the bills and sent them to that firm for acceptance. In the meantime he sold the bills of exchange to the plaintiffs in New York, and he had to transmit the bills of lading to his principals at Pernambuco. It was impossible that the bills of lading could go to Liverpool, for

they had to accompany the goods to Pernambuco. There was no hypothecation of the bills of lading to the plaintiffs or any one else. It was said the plaintiffs had a charge on the proceeds of the goods, but there was no intention on the part of any of the three firms, or their agent, to create a charge in favour of the plaintiffs. By his letter Borland merely said, "You may properly accept the bills of exchange because I have shipped the goods." The plaintiffs relied on the solvency of the Liverpool firm, and the counterfoils only meant that the shipments had been made. When the bills were presented for acceptance, Samuel Johnston and Co., as the drawees of the bills, kept the counterfoils. The firm at Pernambuco did not receive any notice of the particulars of the bills. They only knew the goods had been purchased, for they received the goods, and the bills of lading, which were indorsed in favour of the purchasers, who it appeared paid the money to the firm at Pernambuco. The plaintiffs said that the Pernambuco firm should have applied the proceeds of the goods in discharge of the bills, but there was no contract whatever to this effect. The evidence of Brown and Slater, and the telegram of the 10th June 1879, carry the case no further. I find nothing in the shape of an appropriation for payment of the bills out of the proceeds of the goods.

It appears to me that the case is entirely covered by the decision of the Court of Appeal in *Ex parte Banne; Re Tappenbeck* (34 L. T. Rep. N. S. 199; L. Rep. 2 Ch. Div. 278). As regards the counterfoil, it is impossible to say that it has in terms any application to particular goods. The only meaning of it is that "when you have accepted the bills you will have become purchasers of the goods I have ordered for you," In my opinion it is quite clear that a charge by the counterfoil upon the goods cannot be sustained, and is altogether contrary to established law. I much regret the decision at which I have to arrive in this case, for it is fair justice and honesty on the one side, and law on the other. What is the real nature of the case? Johnston and Co. of Pernambuco on the one side, and Johnston and Co. of Liverpool, the same Johnston on the other; Johnston and Co. of Pernambuco received the proceeds of these goods, and thereout paid the debt due to them from Johnston and Co. of Liverpool, and ignored the plaintiffs' just claim altogether. A more unfair and unjust transaction could not be, but I feel bound by authority to hold that there is not sufficient in the case to amount either to an hypothecation of the goods, or a charge on the goods, though I am very sorry so to decide. The action must therefore be dismissed.

Marten, Q.C.—With costs?

BACON, V.C.—Samuel Johnston has acted two parts, and the defendant has got the money in his pocket, and has succeeded in retaining it. I dismiss the action, but will make no order as to costs, for the whole transaction is a plain dishonesty, and I hope the example will not be followed; Samuel Johnston of Pernambuco, and Samuel Johnston of Liverpool, have received the plaintiffs' money, and kept it.

Solicitors: *Hollams, Son, and Coward; Field, Roscoe, and Co.*, for *Bateson, Bright, and Warr*, Liverpool.

QUEEN'S BENCH DIVISION.

March 10 and May 30, 1884.

(Before Lord COLERIDGE, C.J. and MATHEW, J.)

THE MERSEY DOCKS AND HARBOUR BOARD *v.*
THE OVERSEERS OF LLANEILIAN. (*a*)

Lighthouse — Poor-rate — General lighthouse authority — Part of tower used as telegraph station—"Beneficial occupation" — Adjoining buildings—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *s.* 430.

The appellants appealed against a poor rate made by the respondents in accordance with a supplemental valuation of rateable hereditaments in the parish of Llaneilian, wherein the appellants were assessed in respect of a lighthouse, telegraph station, houses, buildings, and land at Point Lynas, at the gross estimated value of 305l., and rateable value of 244l.

The appellants were incorporated as a body of public trustees by the Mersey Docks and Harbour Act 1857, *and the property, powers, rights, and privileges of the Liverpool Dock Trustees, including the right to levy certain harbour and light dues on vessels entering the port of Liverpool, were vested in the appellants. The tolls were so fixed that with the other receipts of the appellants applicable to conservancy purposes they should not be higher than necessary for conservancy expenditure, and therefore no profits were receivable by the appellants from the occupation of any of the property.*

The lighthouse consisted of a tower and a dwelling-house adjoining. In the tower there was the light-room, which contained the flash-light with clock-work for regulating the flashes, and also a room used for working a telegraph wire which was one of the connections of the wire from Birkenhead to Holyhead, maintained by Her Majesty's Postmaster-General for the exclusive use of the appellants under an agreement. The dwelling-house adjoining the tower and the other premises were occupied by the light-keepers as servants of the appellants.

The tower of the lighthouse had no occupation value except as a lighthouse and as a telegraph station.

The appellants contended that it was not rateable, on the ground that it was exempted by the 430th section of the Merchant Shipping Act 1854, *and that it was not and could not be the subject of any beneficial occupation, and they contended that the premises other than the tower ought to be assessed upon their value to be let from year to year, supposing they were not used for the light or telegraph, but were disconnected therefrom and applied to any other purposes for which they might be available.*

The respondents contended that the whole of the premises ought to be assessed upon their existing value to the existing occupiers.

Held, that the tower was incapable of profitable occupation as a lighthouse, but it being also used as a telegraph station, it was in that respect capable of a beneficial occupation, and therefore rateable, and that, with respect to the adjoining houses, it having been found as a fact that their value was enhanced from being used in connection with the tower, the assessment made on that footing was correct.

(*a*) Reported by H. D. BONSEY, Esq., Barrister-at-Law.

Held, also, that the 430th section of the Merchant Shipping Act 1854 did not apply, and was applicable only to lighthouses under the control of general lighthouse authorities.

Case stated under 12 & 13 Vict. c. 45, s. 11, the material part of which is as follows:—

1. In Aug. 1879 the respondents made a supplemental valuation list of rateable hereditaments in the parish of Llaneilian, in the county of Anglesey, and therein assessed the appellants in respect of a lighthouse, telegraph station, houses, buildings, and land, at Point Lynas, at the gross estimated value of 305*l.*, and a rateable value of 244*l.* The assessment committee of the Anglesey Union confirmed the assessment.

2. On the 19th May 1882 the respondents made a poor rate for the said parish, in accordance with the said supplemental valuation list. The appellants gave notice of appeal to the quarter sessions for the county of Anglesey against the rate, whereupon this case was stated by the consent of the parties and by order of one of the judges of the Queen's Bench Division.

3 and 4. Prior to the year 1857, the docks at Liverpool were vested in the corporation, under the name of the Trustees of the Liverpool Docks, who were empowered to levy certain dues on vessels entering the port of Liverpool, and amongst others, certain harbour and light dues. The appellants were incorporated as a body of public trustees by the Mersey Docks and Harbour Act 1857, and amongst other matters the property powers, rights, and privileges of the Liverpool Dock Trustees, including the right to levy dues as aforesaid, were transferred to the appellants, who are now regulated by the said Act of 1857; the Mersey Dock Acts Consolidation Act 1858; the Mersey Docks (Ferry Accommodation) Act 1860; the Mersey Docks (Various Powers) Act 1867; the Mersey Docks (Liverpool River Approaches) Act 1871; the Mersey Docks Act 1874, and other statutes.

5. By sect. 54 of the said Act of 1857:

The following account shall be kept separately, and shall be dealt with as distinct sources of income and expenditure (that is to say):

(1.) An account of all sums received and disbursed by the board in respect of the following matters, and hereinafter called "conservancy receipts" and "conservancy expenditure;" that is to say, in respect of the maintenance of buoys, landmarks and telegraphs, the expense of lights and lifeboats, the expense of the marine surveyor, the expenses to be incurred as hereinafter mentioned, with the consent of the Commissioners for the Conservancy of the River Mersey, in improving of the port of Liverpool, or the navigation of the river Mersey, the expenses to be incurred in the exercise of the jurisdiction hitherto vested in the corporation of appointing a water bailiff and removing sunken vessels and other impediments to the navigation.

(2.) An account of all sums received and disbursed by the board in the exercise of the powers hitherto vested in the Liverpool Pilotage Commissioners, hereinafter called "pilotage receipts" and "pilotage expenditure."

(3.) An account of all other sums received and disbursed by the board in pursuance of this Act, and hereinafter called "general receipts" and "general expenditure."

By sect. 55 of the same Act:

The board may, with the consent of the Conservancy Commissioners, apply any portion of their general receipts, after providing for the expenses and charges incidental to the Mersey Dock estate, in improving the port of Liverpool or the navigation of the river Mersey; they may also increase or diminish and again increase any rates or dues leviable by them in pursuance of this Act, either generally or in respect of any particular articles.

And sect. 56 of the same Act:

The following rules shall be observed by the board with respect to the moneys received by them under this Act (that is to say):

(1.) The conservancy expenditure shall be defrayed out of the conservancy receipts.

(2.) The pilotage expenditure shall be defrayed out of the pilotage receipts.

(3.) No portion of the conservancy receipt or pilotage receipts shall be applied in aid of the general expenditure.

(4.) No sums shall be payable in respect of docks by any vessel that does not use the same.

(5.) Save as by this Act provided no moneys receivable by the board shall be applied to any purpose, unless the same conduces to the safety or convenience of ships frequenting the port of Liverpool, or facilitates the shipping or unshipping of goods, or is concerned in discharging a debt contracted for the above purposes.

6. Certain lighthouses, lightships, buoys, beacons, landmarks, seamarks, and lifeboats, and lifeboat-houses became vested in the appellants on their incorporation. By sect. 104 of the said Act of 1858, the appellants were empowered to purchase land in convenient situations for the erection of lighthouses, and by sect. 156 of the same Act they are empowered to establish and to alter or remove floating lightships in or near the sea channels within or near the port of Liverpool, subject as to the erection or removal of lighthouses, and the placing or removal of lightships, to the sanction of the Trinity House. Under the said Acts, and the Merchant Shipping Act 1854, s. 394, the appellants may not discontinue any of their lighthouses without the sanction of the Trinity House.

10. By sect. 238 of the said Act of 1858, certain rates called harbour rates, specified in schedule D. to that Act, were made payable to the appellants in respect of all vessels coming into or going out of the port of Liverpool, and not entering into the docks, according to their tonnage, burthens, and to their respective voyages. By sect. 3 of the Mersey Docks Act 1874 the harbour rates set forth in the schedule to that Act were substituted from and after 1st Oct. 1874 for the said rates in schedule D. to the Act of 1858, and it was provided that the appellants might when and as they should deem it expedient so to do from time to time lower and again advance these rates, but so that the same should never exceed the amounts mentioned in the schedule to that Act, and so that the same when so lowered or advanced should not be with the other receipts of the board applicable to conservancy account higher than was necessary for the purposes of conservancy expenditure. The harbour rates actually levied have been about one half of those mentioned in the said schedule.

11. By sect. 230 of the said Act of 1858, certain dock tonnage rates shown in schedule B. to that Act were made payable to the appellants on all vessels entering into or leaving the docks, according to their tonnage, burthens, and according to their respective voyages. These rates included dock dues, lighthouse dues, and floating-light dues, as shown in the said schedule. By sect. 270 of that Act the appellants were empowered from time to time to lower all or any of the rates mentioned in the said schedule B., and again to advance them. The lighthouse dues and floating-light dues included in the dock tonnage

rates were kept separate from the dock dues and were carried to conservancy account and applied for conservancy purposes, but by sect. 5 of the said Act of 1874 it was provided that they should no longer be so dealt with, and should be deemed part of the receipts applicable to the general expenditure.

12. By sect. 6 of the said Act of 1874:

From and after the passing of this Act, all sums received by the board in respect of harbour rates and the conservancy portion of the dock tonnage rates, whether under the Act of 1858 or under this Act, and all sums disbursed by the board in respect of conservancy expenditure as defined by sect. 54, sub-sect. 1 of the Act of 1857, shall be deemed to be conservancy receipts or conservancy expenditure as the case may be, and shall be accordingly thenceforward included in the separate account of conservancy receipts and conservancy expenditure which by that section the board are required to keep, and such account shall be called the conservancy account.

14. All the accounts of the appellants are annually audited by a special auditor appointed for the purpose by the Board of Trade under sect. 8 of the Mersey Docks Act 1867.

15. With the consent of the special auditor, a sum of 500*l.* is annually debited to the conservancy account in respect of a portion of certain general expenses of the appellants, which the appellants allege are partly incurred on conservancy account, such as the salaries and office expenses of the general secretary, treasurer, accountant, solicitor, and auditor, and their clerks. There is no permanent debt incurred on conservancy account, though the account is occasionally in arrear owing to larger expenses than usual being incurred in the erection of lighthouses and the undertaking of other structural works. On the 1st July 1881 there remained in hand a surplus of conservancy receipts over conservancy expenditure, amounting to 22,875*l.* The conservancy expenditure for the year preceding was 26,294*l.*, and the receipts 44,430*l.* (including a balance of 5782*l.* carried forward on 1st July 1880). The surplus or deficit on the account in any year is carried forward to the same account in the year following.

16. The lighthouse at Point Lynas, on the north coast of the island of Anglesey, in respect of which the appellants have been assessed as aforesaid, is one of the lighthouses which were maintained by the trustees of the Liverppol Docks and the lease of which for a term of twenty-one years expiring in 1862 became vested in the appellants on their incorporation as aforesaid. The appellants have always since worked and maintained the lighthouse for the convenience and safety of ships frequenting the port of Liverpool, but the light is also of use to other vessels navigating the eastern ports of the Irish Channel.

17. Prior to 1872 poor rates were paid in respect of the lighthouse and lightkeeper's house upon an assessment of 12*l.*, and from 1872 to 1877 (when the present dispute first arose) upon an assessment of 20*l.*, and from 1877 to 1879 upon an assessment of 50*l.* net rateable value. None of the private Acts by which the appellants are regulated contain any express provision exempting the lighthouse or the other assessed premises from the payment of poor rates.

18. Between Nov. 1877 and Aug. 1879 the appellants purchased the freehold of the site of the said lighthouse and of some adjoining land, together about sixteen acres, at a cost of about 3000*l.*, and they spent a sum of about 5600*l.* in structural improvements of the lighthouse in constructing new lighting apparatus, and in erecting two four-roomed houses for the lightkeepers, and a stable. The two houses are in an exposed situation, and partly on that account and partly with a view to making a handsome group of buildings they were built more substantially and expensively than ordinary dwelling-houses with similar accommodation usually are. The said houses, stable, and land, if not used in connection with the lighthouse, might be let by the appellants to other tenants at a rent.

19. The lighthouse consists of a tower and a dwelling-house adjoining. In the tower is the light-room, which contains the flash-light, with clockwork for regulating the flashes, all fitted on cast-iron columns, and on a circular cast-iron base for the light attached to the freehold, and also a room used for working a telegraph wire, which is one of the connections of the wire, from Birkenhead to the south stack, Holyhead, maintained by Her Majesty's Postmaster-General for the exclusive use of the appellants, as mentioned in paragraph 8. The said room is one of the telegraph stations of the appellants within the meaning of the agreement referred to in paragraph 8, and the telegraph wire therefrom is worked by them as mentioned in paragraph 7 and 8. The dwelling-house adjoining the tower and the other premises are occupied by the lightkeepers as servants of the appellants.

21. The tower of the lighthouse has no occupation value except as a lighthouse and as a telegraph station, and the appellants under the present circumstances are the only persons to whom it is of value for those purposes. The appellants contend that it is not rateable on the grounds that it is exempted by the 430th section of the Merchant Shipping Act 1854, and that it is not and cannot be the subject of any beneficial occupation, and they contend that the premises other than the said tower ought to be assessed upon their value to be let from year to year, supposing they were not used for the light or telegraph, but were disconnected therefrom and applied for any other purposes for which they might be available.

22. The respondents contend that the whole of the premises ought to be assessed upon their existing value of the existing occupiers.

23. If this court shall be of opinion that the appellants are rateable in respect of the tower and the other premises as used at present for and in connection with the light and telegraph, the present assessment of the appellants' premises is to stand. If in respect of the tower as a telegraph station only, and not as a lighthouse, and the other premises at their value as now used and occupied, the gross estimated rental is to be reduced to 95*l.*, and the rateable value to 76*l.* But if the appellants are rateable in respect only of the premises other than the tower upon their value supposing they were not used for the light or telegraph but were disconnected therefrom, then the gross estimated rental is to be reduced to 45*l.*, and the rateable value to 40*l.*

Carver (*Bigham*, Q.C. with him) for the appellants.—The lighthouse belongs to the appellants in

their capacity of harbour authority, and it is not capable of a profitable occupation; they are expressly restricted by statute from making any profit. In *Reg.* v. *The Metropolitan Board of Works* (19 L. T. Rep. N. S. 348; L. Rep. 4 Q. B. 15) it was held that the sewers were not rateable to the poor rate, on the ground that they were not the subject of a beneficial occupation; and that case was followed in *The Metropolitan Board of Works* v. *The Overseers of West Ham* (L. Rep. 6 Q.B. 193). The tower of the lighthouse is incapable of having a beneficial occupation, even if the adjoining buildings are. It is submitted that the lighthouse is exempt from rates by the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) s. 430. (*a*)

The following cases were also cited:

Mersey Docks v. *Cameron*, 12 L. T. Rep. N. S. 643; 11 H. of L. 443;

Corporation of Worcester v. *The Droitwich Assessment Committee*, 34 L. T. Rep. N. S. 288; 2 Ex. Div. 49;

The Mayor of Lincoln v. *Holmes Common*, L. Rep. 2 Q. B. 482;

Hare v. *Overseers of Putney*, 45 L. T. Rep. N. S. 337; 7 Q. B. Div. 223;

Lewis v. *Churchwardens of Swansea*, 25 L. J. 33 M. C.

Marshall (*McIntyre*, Q.C. with him) for the respondents.—Sect. 430 of the Merchant Shipping Act 1854 applies only to lighthouses under the general lighthouse authorities, and not to a lighthouse under a local authority as in this case; the fact that the property is used for public purposes is no ground of exemption:

Greig v. *The University of Edinburgh*, L. Rep. 1 H. of L. Sc. App. 438.

There is nothing to prevent a tenant renting the whole of the Mersey Docks estate, and the lighthouse would increase the value of the estate; it is one of the means by which they obtain dues. This case is distinguished from the cases of *Reg.* v. *The Metropolitan Board of Works* and *The Metropolitan Board of Works* v. *The Overseers of West Ham* (*ubi sup.*) because, as payment was made for the use of the sewers, there is no suggestion that a profit could have been made out of the whole system in the sewers cases. It does not follow that, because you cannot get a hypothetical tenant, the property is not rateable.

May 30.—The judgment of the court (Lord Coleridge, C.J. and Mathew, J.) was delivered by

Mathew, J.—The assessment appealed against seems to have been made on a calculation of what a landlord might charge by way of rent for the premises rated, and not upon an estimate of the rent at which the premises might reasonably be expected to let from year to year, and we are of opinion that the assessment cannot be maintained. It appears from the statement in the special case that the funds out of which the lighthouse and adjoining premises have been acquired and are maintained are chiefly obtained from tolls levied by the appellants under their statutory powers upon vessels using the Mersey Docks or entering the port of Liverpool. These tolls are directed to be so fixed that with the other receipts of the appellants applicable to conservancy purposes they shall not be higher than is necessary for conservancy expenditure. No profits are therefore receivable by the appellants from the occupation of any of the property in question, and if none of the property rated were capable of being used except upon the conditions imposed on the appellants, it would seem that no assessment could be made: (see *Corporation of Worcester* v. *Droitwich*, 2 Ex. Div. 49.) But, as has been settled by the well-known decisions cited in the course of the argument (the *Mersey Docks* v. *Cameron*, 11 H. of L. Cas. 443; *The Governors of St. Thomas's Hospital* v. *Stratton*, L. Rep. 7 H. of L. 477; *Greig* v. *University of Edinburgh*, L. Rep. 1 H. of L. Sc. App. 348), the fact that profits are not earned by the appellants would not extinguish the rateable character of the premises in question if it could be shown that the property was capable of being beneficially occupied in the hands of a tenant from year to year. The question, therefore, seems to be whether any, and if any what, portion of the property is thus capable of a beneficial occupation. With respect to the tower, even if the tolls were received in Liverpool as part consideration for the maintenance of the lighthouse it would seem that the payment would not be a ground for treating this part of the property as rateable: (see *Rex* v. *Coke*, 5 B. & C. 797) But the tolls are not so receivable. The lighthouse is a charge upon the funds created by the appellants' statutes. It represents not income but expenditure. In the hands of an ordinary tenant it would yield no return, and would be incapable of profitable occupation as a lighthouse. That it represented an outlay of capital would not render it assessable any more than the property of an analogous character held not to be rateable in *Reg.* v. *The Metropolitan Board of Works* (L. Rep. 4 Q. B. 15), and in *The Metropolitan Board of Works* v. *The Overseers of West Ham* (L. Rep. Q. B. 193). But the lighthouse is also used as a telegraph station, and for that purpose it seems to have been found as a fact that it is capable of beneficial occupation. In this respect, upon the authority of the decisions last referred to, it would seem to be rateable, and the rateable value we gather has been fixed at 96*l.* We see no reason for differing from this conclusion.

Then with respect to the adjoining houses, it seems also to have been found as a fact that their value is enhanced from their being used in connection with the tower, and we think that the assessment made on this footing should stand at the rateable value of 76*l.* It remains to deal with the point which was made, but not much insisted upon by the learned counsel for the appellants viz., that the property was exempted from being rated under sect. 430 of the Merchant Shipping Act. It seems clear that the Act only applies to lighthouses in charge of the general lighthouse authorities referred to in the statute, and not to those which like the lighthouse at Point Lynas are under the control of a local authority. We direct the rate to be amended in accordance with our judgment, without costs.

(*a*) 17 & 18 Vict. c. 104, s. 430: All lighthouses, buoys, beacons, and light dues, and all other rates, fees, or payments accruing to or forming part of the said fund, and all premises or property belonging to or occupied by any of the said general lighthouse authorities, or the Board of Trade, which are used or applied for the purposes of any of the services for which such dues, rates, fees, and payments are received, and all instruments or writings used by or under the direction of any of the said general lighthouse authorities or the Board of Trade, in carrying on the said services, shall be exempted from all public, parochial, and local taxes, duties, and rates of every kind.

Solicitors for the appellants, *F. Venn* and *Co.*, agents for *A. T. Squarey*, Liverpool.

Solicitors for the respondents, *Ravenscroft* and *Co.*, agents for *William Fanning*, Amlwch.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

June 19 *and* 20, 1883.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE ZADOK. (a)

Collision—Fog—Steam whistle—"Moderate speed"—Regulations for preventing Collisions, Arts. 12 *and* 13.

It is the duty of a steamship or sailing vessel, in accordance with art. 13 *of the Regulations for Preventing Collisions, when she is in a fog, passing across a course where it is to be expected that numerous vessels may be navigating, to reduce her speed to as low a rate as is consistent with her keeping good steering way.*

Where a sailing ship in a fog hears repeated whistles of an approaching steamship, indicating possible risk of collision, she is bound to take precautions, such as stationing men at the braces ready to put the sails aback, so as to stop her way in the event of a collision becoming imminent.

The fact of a foghorn, alleged to have been blown on board a sailing ship, not being heard by those on an approaching ship, is not of itself proof that such foghorn was not blown, nor is it necessarily proof that there was negligence on board the approaching ship in not hearing it, as the direction in which the sound would be transmitted is uncertain.

A steamship which was proceeding dead slow in a fog, sighted the sails of a sailing ship about two points before the starboard beam of the steamship and about a ship's length distant. The helm of the steamship was immediately starboarded, and her engines set full speed ahead, but the sailing ship struck the steamship about amidships on her starboard side. The Court, having been advised by the Trinity Brethren that it would have been useless and improper for the steamship to have stopped her engines, and that the best chance of escaping the casualty was to put the engines full speed ahead:

Held, that the steamship was justified in departing from the regulation as to stopping and reversing.

THIS was a damage action *in rem*, instituted by the owners of the steamship *Iduna* against the owners of the barque *Zadok*, to recover damages occasioned by a collision between the two vessels, on the 25th May 1883 in the English Channel. The defendants counter-claimed.

The facts alleged on behalf of the plaintiffs were as follows: Shortly after 7 a.m., on the 25th May 1883, the steamship *Iduna*, of 547 tons net register, manned by a crew of eighteen hands all told, and bound on a voyage from South Shields to Malaga, was in the English Channel, off the Isle of Wight. At this time there was a thick fog, with a fresh wind from about east. The *Iduna* with her engines at dead slow, was steering W. by S. ½ S., and making between two and three knots an hour. Her whistle was being duly sounded at proper intervals, and a good look-out was being kept on board her. In these circumstances, those on board the *Iduna* saw the loom of the sails of the barque *Zadok* about two points before the *Iduna's* starboard beam and about a ship's length distant. The helm of the *Iduna* was immediately put to starboard and her engines were set full speed ahead to clear the *Zadok* if possible; but the *Zadok*, which was under a press of canvas, approached at great speed and came into collision with the *Iduna*, the barque's stem striking the *Iduna's* starboard side abreast of the boilers. The plaintiffs charged the defendants, *inter alia*, with breach of arts. 12 and 13 of the Regulations for Preventing Collisions at Sea.

The facts alleged on behalf of the defendants were as follows: Shortly before 7 a.m. on the 25th May 1883, the barque *Zadok*, of 602 tons register, manned by a crew of sixteen hands, and bound on a voyage from Iquique to Hamburg, was in the English Channel, off the Isle of Wight. At this time the wind was very light from about the east, and there was a thick fog. The *Zadok* was close hauled on the port tack, heading about S.E. by S., and making about two or two and a half knots an hour. Her mechanical foghorn was being sounded at short intervals, and a good look-out was being kept on board her. In these circumstances those on board the *Zadok* heard three times the whistle of a steamer, apparently on the port bow, and each time the whistle was immediately answered by the foghorn of the *Zadok*, which was kept on her course. Very shortly afterwards those on board the *Zadok* perceived the *Iduna* about two points on the port bow apparently three or four ships' lengths off and approaching quickly. The foghorn of the *Zadok* was again blown, but the *Iduna* came on rapidly and collided with the *Zadok*, the stem of the *Zadok* and the starboard side of the *Iduna* coming into contact. The defendants charged the plaintiffs, *inter alia*, with breach of art. 13 of the Regulations for Preventing Collisions at Sea.

The Regulations for Preventing Collisions, above referred to, are as follows:

Art. 12. 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.

Art. 13. Every ship, whether a sailing ship or steam ship, shall in a fog, mist, or falling snow, go at a moderate speed.

The plaintiffs called evidence to prove that the *Zadok* was under a press of canvas at the time of the collision. They also put in the log of the *Zadok*, which showed that, with the same wind blowing and with the same sails set as at the time of the collision, the *Zadok* had previously

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

been making five knots and more in the hour. The plaintiffs further proved that, at the time of the collision, their vessel was only making between two and three knots an hour.

Myburgh, Q.C. (with him Dr. *Phillimore*) for the plaintiffs.—The navigation of the *Iduna* was in every way careful and proper. Her steam whistle was duly sounded in accordance with art. 12 of the Regulations for Preventing Collisions, and her speed was moderate within the meaning of art. 13. The *Zadok*, on the contrary, was not going "at a moderate speed." It is to be remembered that she was under a large press of canvas, that the wind was a fresh breeze, and that at the place where the collision occurred numerous vessels would be passing to and fro. She was probably making six knots, which cannot, under the circumstances, be called "a moderate speed." Again, the fact that those on board the *Iduna* heard no foghorn is strong proof that no foghorn was blown. No precautions seem to have been taken to put the sails aback in the event of collision, though it was known that another vessel was in the immediate vicinity.

Webster, Q.C. and *Bucknill* for the defendants.—It being primarily the duty of the steamer to keep out of the way of the *Zadok*, the court, in the absence of strong proof to the contrary, should find the plaintiffs to blame. It is submitted that the *Zadok* was being navigated as slowly as was possible to enable her to answer her helm. She was, therefore, going at a moderate speed. The fact that those on board the *Iduna* did not hear the barque's foghorn bears out the allegation that there was a want of due vigilance on the part of those on the *Iduna*.

Myburgh, Q.C. in reply.

Sir JAMES HANNEN.—It is common ground in this case that there had been foggy weather, off and on, for some time before the collision; and that there had come down, on the spot where the collision took place, a bank of fog, for some considerable time before the collision occurred, which of course made it necessary for both vessels to take proper precautions. Now the evidence satisfies me that on board the steamer care had been taken some time before the collision. Of course that does not prove that at the time of collision, and immediately before, care was being taken; but, at any rate, it has a tendency to show that those on board the *Iduna* were alive to the necessity of taking proper precautions against casualties arising through the fog, and the evidence proves that those on board the *Iduna* were discharging the duty imposed upon them under the rules on the subject of blowing their steam whistle every two minutes or so. That is admitted by those on board the *Zadok*. It was the duty of both vessels to go at a moderate speed, and it appears to me that the object with which that rule of conduct is imposed is, not merely that they should be going at a speed which will lessen the violence of a collision, but also that they should be going at a speed which will give as much time as possible for making any proper manœuvres which may become necessary under unforeseen circumstances—for in a fog it cannot be told exactly from what quarter danger may come. Now, the evidence of the *Zadok* establishes that on the *Iduna* the whistle was being blown properly, and it is to be observed that the whistle was heard certainly three times, and that it was heard on each of those two occasions within intervals of something approaching two minutes from a direction bearing about on the same point from the *Zadok*, namely, from one to one and a half points on her port bow. The evidence is all one way upon that subject, viz., that the sound of each of those whistles was heard, and that finally the *Iduna* herself was seen with about that bearing from the *Zadok*. That tends strongly to corroborate the evidence of those on board the *Iduna*, that that vessel was going at a moderate speed, for, if she had been going at the rate of speed which she is represented by those on board the *Zadok* to have been going, it is obvious that during those five or six minutes during which those several signals were heard, she would have had an opportunity of greatly changing her position with regard to the *Zadok*, which it appears she did not do. The *Zadok*, however, we know was approaching the *Iduna* with her stem towards her. I therefore think that this evidence corroborates the evidence of those on board the *Iduna*, that she had been brought to a rate of speed as slow as it was possible for her to be brought to without stopping altogether. Now, on the other hand, with regard to the *Zadok*, the entries in the log carry the case thus far: they satisfy me—and I may say in passing, that, though I speak of my own judgment, wherever it relates to any nautical matter I am speaking on the advice and with the concurrence of The Trinity Masters—that this vessel, under similar conditions to those in which she was sailing at the time of the collision, *i.e.*, close-hauled and with a moderate breeze, was capable of going at a much greater rate than the witnesses from the *Zadok* have represented her to be going. Those entries establish that she was capable of going, and that she had gone, five knots an hour under similar conditions, and I am bound to say that the impression left upon my mind by the evidence is that she was at the time of the collision going faster than that.

At present there is a degree of uncertainty as to what construction is to be put upon the phrase that steamers and sailing vessels are to go "at a moderate speed in a fog," and I am disposed to think that no absolute statement of rate of speed can be fixed upon. But it appears to me that the object of the rule is this, that when a fog comes on, it is the duty of the ship, whether she be a sailing vessel or a steamer, to moderate her speed as much as she can, yet leaving herself with the capacity of being properly steered. Of course, in the case of a sailing vessel, we know that she must have way on, and her sails full, otherwise she will not have the power of controlling her movements; but, subject to that, in a fog, where she cannot see her way, it is her duty to moderate her speed down to this standard. Of course some margin must be allowed for the particular circumstances of the case, and it is not to be said that exactly the same rule would apply to a sailing vessel out in mid-ocean; but when one has to deal with a case like this, of a vessel which is passing across a course in which it is to be expected that numerous vessels may be, it is her duty to reduce her speed, as I have said, to as low a rate as is consistent with her keeping good steerage way on her. In this case it is proved that the

Zadok, if she had not literally every stitch of canvas set, yet she had very nearly all the canvas set she could carry. I come to the conclusion, therefore, that she was going at a speed which, in the circumstances, was not moderate and that therefore she has infringed the rule. In addition to that I am advised that the course pursued by the *Zadok* was not proper and seamanlike in this, that, though the whistle of the *Iduna* was heard once, twice, and thrice, yet no precaution whatever was taken on board the *Zadok* to guard against a contingency which she was warned might happen. I am advised that men should have been stationed so as to work on the braces and to put the foresails aback by letting the braces fly. However, no precaution was made to do anything on board the *Zadok*. Those on board her seem to have thought that she, being a sailing vessel, and the *Iduna* being a steamer, the *Zadok* had a right to keep her course and do nothing. That is not the view I take, nor the view which I am advised should be taken.

There now remain two other points to be dealt with. First, as to the foghorn. There is a body of evidence that this foghorn was blown; on the other hand there is ample evidenee that those on board the *Iduna* were alert and on their guard specifically against the dangers likely to happen in a fog, and they all swear that they did not hear the foghorn. Now, I have only to repeat what I said in the case of *The Elysia* (not reported), namely, that proof that a foghorn was blown, yet was not heard at a distance it might be expected to be heard, cannot be accepted as proof that there was negligence on the part of those who did not hear it. The conditions under which sound is transmitted are not yet known with sufficient certainty, and no evidence has been given me upon the subject. But, speaking on it as a matter of general knowledge, I do not consider that the fact of those on board the *Iduna* not hearing a foghorn proves that no foghorn was blown. On the other hand, I do not consider that the proof that the foghorn was blown establishes that those on board the *Iduna* were negligent in not hearing it. It is easy to imagine that this foghorn, though blown, was not blown with its full force, and it may have been that, from the quarter in which the wind was, the sound would be carried away. I therefore come to the conclusion that it was from no want of proper vigilance on the part of those on board the *Iduna* that the foghorn was not heard, and that therefore their conduct must be judged precisely as though no foghorn had been blown at all. Then, the condition of things was this: that the *Zadok* suddenly made her appearance on the starboard side of the *Iduna*, coming directly towards her, and then comes the question, What ought to have been done on the part of the *Iduna?* It has been strenuously argued by Mr. Webster that the duty was imperatively imposed upon her of stopping and reversing her engines. I am advised by the Trinity Brethren that, in the condition of things represented by those on board the *Iduna*—which I accept as the true version of the facts—it would have been useless and improper on their part to have stopped and reversed. As things then appeared, the best chance of escaping from the casualty was to put the engines full speed ahead and starboard the helm. I am, therefore, led to the conclusion that the *Zadok* is solely to blame for this collision.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

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

March 10, 11, 18, *and April* 18, 1884.

(Before BUTT, J.)

THE VERA CRUZ. *(a)*

Collision—Both ships to blame—Lord Campbell's Act (9 & 10 Vict. c. 93)—Board of Trade—Contributory negligence—Breach of Regulations for preventing collisions—Division of damages—The Merchant Shipping Act 1854 *(17 & 18 Vict. c. 104), s. 512—The Merchant Shipping Act* 1873 *(36 & 37 Vict. c. 85), s. 17.*

Sect. 512 of the Merchant Shipping Act 1854, *disentitling a party to bring an action to recover damages for loss of life or personal injury caused by a collision, unless the Board of Trade has completed or refused to institute an inquiry into the disaster, does not apply to foreign ships.*

Sect. 17 of the Merchant Shipping Act 1873, *providing that in cases of collision a ship which has infringed any of the Regulations for preventing collisions, contained in or made under the Merchant Shipping Acts* 1854 *to* 1873, *shall be deemed to be in fault unless the circumstances of the case made departure from the regulations necessary, is applicable to the case of a master whose ship has infringed such regulations, so that in an action under Lord Campbell's Act, to recover damages resulting from the death of the master, he will be deemed to be in fault for a breach of the regulations, and therefore guilty of contributory negligence, so as to affect the plaintiff's right of recovery.*

The ships A. and V. C. came into collision, for which both were found to blame, the A. for breach of the statutory regulations for preventing collisions referred to in sect. 17 of the Merchant Shipping Act 1873, *the V. C. for improper navigation. The master of the A. was drowned. His personal representative brought an action in rem under Lord Campbell's Act against the owner of the V. C. to recover damages for his loss.*

Held, that though the deceased was deemed to have been guilty of contributory negligence by reason of the breach of the regulations, the Admiralty Court rule as to the division of damages was applicable, and the plaintiff was entitled to recover half the damages sustained by the loss of the deceased.

THIS was an action *in rem* brought under the provisions of Lord Campbell's Act by Mary Seward, the widow and administratrix of William Seward, deceased, late master of the British schooner *Agnes*, against the owners of the Spanish steamship *Vera Cruz*, to recover compensation for the injury sustained by the plaintiff by reason of William Seward's death, which was occasioned by a collision between the *Agnes* and the *Vera Cruz* on waters within Her Majesty's dominions. The collision took place in the Crosby Channel near the entrance to the river Mersey between the Crosby

(a) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

and Formby Lightships on the night of the 12th Aug. 1882; and by reason of the collision the *Agnes* was sunk and her master and some of her crew and passengers were drowned.

Another action *in rem* had been brought against the *Vera Cruz* by the owners of the *Agnes* to recover damages for the loss of the *Agnes*. In this last-mentioned action the Court had found both ships to blame, the *Vera Cruz* for negligent and improper navigation, the *Agnes* (which was at anchor at the time of the collision) for a breach of 37 & 38 Vict. c. 52, s. 1 (An Act to make Regulations for Preventing Collisions in the Sea Channels leading to the river Mersey), in not having the after light of her two anchor lights at double the height of the other. (*a*) At the hearing of the last-mentioned action it was arranged that the evidence taken should be received as evidence in the life action.

The defendant had filed a petition on protest against the jurisdiction of the court to entertain the action. On the petition coming on for hearing, the learned judge being bound by the decision in *The Franconia* (3 Asp. Mar. Law Cas. 435; 36 L. T. Rep. N. 640; 2 P. Div. 163) dismissed it. (*b*)

The plaintiff's solicitors had failed to give notice to the Board of Trade of her intention to bring her action as required by sect. 512 of the Merchant Shipping Act 1854, which is as follows:

In cases where loss of life or personal injury has occurred by any accident in respect of which the owner of any such ship as aforesaid is or is alleged to be liable in damages, no person shall be entitled to bring any action, or institute any suit or other legal proceeding in the United Kingdom, until the completion of the inquiry (if any) instituted by the Board of Trade, or until the Board of Trade has refused to institute the same; and the Board of Trade shall for the purpose of entitling any person to bring an action or institute a suit or other legal proceeding be deemed to have refused to institute such inquiry whenever notice has been served on it by any person of his desire to bring such action or institute such suit or other legal proceeding, and no inquiry is instituted by the Board of Trade in respect of the subject-matter of such intended action, suit, or proceeding for the space of one month after the service of such notice.

Gainsford Bruce, Q.C. and *French* for the plaintiff. — With regard to sect. 512 of the Merchant Shipping Act 1854, it is submitted that its application is confined to British ships, and that therefore, it would not apply to the *Vera Cruz*, which is a Spanish ship. The section speaks of the inquiry being held in respect of "any such ship as aforesaid." To ascertain the meaning of these words, it is necessary to refer to sects. 503 and 504, which are repealed sections allowing shipowners to limit their liability. It has been decided that these sections only apply to British ships:

The Wild Ranger, Lush. 553;
Cope v. *Doherty*, 4 K. & J. 367; 27 L. J. 600, Ch.

Therefore "any such ship as aforesaid" is a British ship. True it is that the Merchant Shipping Act 1862 extends limitation of liability to foreign ships, and that it is thereby enacted that that Act "shall be construed with and as part of the Merchant Shipping Act 1854." But this does not prove that the Legislature in 1862 meant in extending limitation of liability to foreign ships to also extend the inquiry mentioned in sect. 512 to foreign ships, and therefore, in the absence of express words, the section should be construed as only applying to British ships. Moreover, having regard to the mode of procedure incidental to the inquiry, it is to be assumed that it was meant that the section should be confined in its application to British ships. Again, the right of proceeding *in rem*, as the plaintiff is here doing, was given in 1861 by sect. 7 of the Admiralty Court Act of that year. It was in 1854 that the above-mentioned sect. 512 became law, at which time the only proceeding was *in personam*. Can it therefore be said that sect. 512 is to be applied to a proceeding which was not in existence when sect. 512 came into operation?

The Mullingar, 1 Asp. Mar. Law Cas. 252.

Though both these ships have been held to blame, it cannot be said that the deceased was guilty of contributory negligence so as to affect the rights of the plaintiff. By reason of sect. 17 of the Merchant Shipping Act 1872 the *Agnes* was held to blame because her lights did not comply with the regulations. But it has not been found that the infringement of the rule did in fact contribute to the collision. The section is in its nature penal, and therefore in the absence of express words it should be confined to the owners of the statutory wrong-doing ship, and not extended to the master:

Thorogood v. *Bryan*, 8 C. B. 115;
Armstrong v. *Lancashire and Yorkshire Railway Company*, L. Rep. 10 Ex. 47; 33 L. Rep. N. S. 228.
The Milan, Lush. 388;
The Khedive, 4 Asp. Mar. Law Cas. 360; 43 L. T. Rep. N. S. 610; L. Rep. 5 App. Cas. 876.

Even assuming that the deceased was guilty of negligence, yet, inasmuch as those on the *Vera Cruz* by the exercise of ordinary care and diligence might have avoided the collision, the defendants are not entitled to take advantage of the deceased's statutory negligence, so as to escape liability:

Radley v. *London and North-Western Railway Company*, L. Rep. 1 App. Cas. 754; 35 L. Rep N. S. 637;
Davies v. *Mann*, 10 M. and W. 546;
Tuff v. *Warman*, 5 C. B. N. S. 573.

The Admiralty Court rule as to the division of damages does not apply in the present case. By sect. 25, sub-sect. 9 of the Judicature Act 1873, it is enacted that where both ships are found to blame, "the rules hitherto in force in the Court

(*a*) Sect. 1 is as follows: 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 (2) Every ship at anchor in the said sea channels or approaches, within the limits aforesaid, shall carry the single white light prescribed by article 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 best be seen.—ED.

(*b*) On appeal, the Court of Appeal has since this date reversed this decision, and held that the High Court of Justice (Admiralty Division) has no jurisdiction to entertain an action *in rem* brought under Lord Campbell's Act: (see *The Vera Cruz*, *post*.)—ED.

of Admiralty," if in conflict with the rules of common law, shall prevail. Inasmuch as at present there is no Admiralty rule in respect of a case of this kind, the court is invited to follow the common law rule and give full damages and not a moiety:

The Chartered Mercantile Bank of England v. *The Netherlands Indian Steam Navigation Company*, 5 Asp. Mar. Law Cas. 65; 48 L. T. Rep. N. S. 546; 10 Q. B. Div. 521;
The George and Richard, L. Rep. 3 A. and E. 466; 1 Asp. Mar. Law Cas. 50; 24 L. T. Rep. N. S. 717;
Hay v. *Le Neve* 2 Shaw's Scott, App. Cas. 395;
Webster v. *Manchester, Sheffield, and Lincolnshire Railway Company*, L. Rep. W. N. Jan. 5 1884; (*a*)
The Laconia, 1 Mar. Law Cas. O. S. 378; 9 L. T. Rep. N. S. 34; B. & L. 146.

If, however, the court should think fit to apply the Admiralty Court rule, then the question of contributory negligence is immaterial, and the plaintiff recovers half the damage she has sustained:

The Milan, Lush. 388.

Dr. *Phillimore* and *Bucknill* for the defendants.—The court has no jurisdiction to entertain this action:

Smith v. *Brown*, L. Rep. 6 Q. B. 729; 1 Asp. Mar. Law Cas. 56; 24 L. T. Rep. N. S. 808;
The Guldfaxe, L. Rep. 2 A. & E. 325; 3 Mar. Law Cas. O. S. 201; 19 L. T. Rep. N. S. 748;
The Explorer, L. Rep. 3 A. & E. 289; 3 Mar. Law Cas. O. S. 507; 23 L. T. Rep. N. S. 604;
The Franconia, 3 Asp. Mar. Cas. 435; 36 L. T. Rep. N. S. 640; L. Rep. 2 P. Div. 163.

It is true that, in order to ascertain the meaning of "any such ship" in sect. 512 of the Merchant Shipping Act 1854, one must look to sect. 505, which is the section as to limitation of liability. But it has been decided that Part IX. of the Merchant Shipping Act 1854, within which is sect. 512, is applicable to the case of damage done to a foreign ship by collision with a British ship within Her Majesty's dominions, as was the case here:

The General Iron Screw Colliery Company v. *Schurmanns*, 4 L. T. Rep. N. S. 158; 29 L. J. 876, Ch.

Moreover by reason of the Merchant Shipping Act 1862, which is to "be construed with and as part of the Merchant Shipping Act 1854," sect. 504 of the Act of 1854 is replaced by 54 of the Act of 1862, which extends limitation of liability to foreign ships. Therefore the "any such ship" mentioned in sect. 512 covers both British and foreign ships, and if so, the plaintiff has not complied with the requirements of that section, and hence is debarred from prosecuting this action. With regard to the objection that the mode of procedure incidental to the inquiry could only be conveniently applied to British ships, the same objection applies to colonial vessels, and yet undoubtedly the section covers them. Although it was not until 1861 that the right of proceeding *in rem* was given in a case like the present, and sect. 512 became law in 1854, yet the words used "no person shall be entitled to bring any action, or institute any suit or other legal proceeding "are sufficiently wide to cover a proceeding *in rem*, which it is to be noticed is not a new right of action, but merely a more effective means of enforcing a right of action already existing in 1854. By reason of sect. 17 of the Merchant Shipping Act 1872 the *Agnes* had been held to blame for infringement of a statutory regulation. In other words, her master was guilty of statutory negligence. Where a ship is found to blame for breach of a statutory regulation, the rights of owners of cargo are affected thereby. If so, it follows that a master who has been guilty of the breach is affected. Inasmuch as there is no Admiralty Court rule as to division of damages under circumstances like the present, the common law rule applies. If so, the plaintiff is debarred from recovering anything, inasmuch as the deceased has been found partly to blame for the collision in failing to obey the regulations:

Thorogood v *Bryan* (*ubi sup.*);
Butterfield v. *Forrester* 11 East, 60;
Bridge The Grand Junction Railway Company, 3 M. and W. 244;
Dowell v. *General Steam Navigation Company*, 5 Ell. and B. 195;
The George and Richard, L. Rep. 3 A. & E. 466;
The Milan, Lush. 388.

The doctrine that the negligence of the plaintiff is immaterial, if the defendant by the exercise of reasonable care and caution might have avoided the accident, is but a dictum of Lord Truro in *Radley* v. *London and North-Western Railway Company*, and is not supported by authority.

G. Bruce, Q.C. in reply.—The case of *The General Iron Screw Colliery Company* v. *Schurmanns* is not in point, inasmuch as there the wrong-doing ship was a British ship, and the question was whether her owners could limit their liability as against the owners of the foreign ship which had been damaged by the collision.

Cur. adv. vult.

April 18.—BUTT, J.—On the night of the 11th Aug. 1882 the schooner *Agnes* was run into and sunk by the Spanish steamship *Vera Cruz* near the Crosby Lightship, outside the entrance of the river Mersey. William Seward, the master, and three others of the crew of the *Agnes* were drowned. Before and at the time of the collision the *Agnes* had two anchor lights burning, one on the forestay and one on the topping lift aft. These lights were good lights, but the one aft was some feet lower than it should have been pursuant to the regulations in force at the place of collision, one of which directs that the fore-

(*a*) This was a summons in judges' chambers by the plaintiff in an action instituted in the Queen's Bench Division under Lord Campbell's Act, calling upon the defendants to show cause why a preliminary act should not be filed.

The action was brought *in personam* against the Manchester, Sheffield, and Lincolnshire Railway Company, by a widow to recover damages due to the death of her husband which had been occasioned by a collision at sea.

Jan. 1, 1884.—*F. W. Raikes*, for the plaintiff, in support of the summons.—By Order XIX., r. 28, it is ordered that preliminary acts shall be filed "in actions in any division for damage by collision between vessels." The present case is therefore covered by that order.

Bucknill, for the defendants, *contra*.—The word "damage" does not apply to an action for personal injury.

BUTT, J.—I am unable to see why if it is right that a preliminary act should be filed where damage is done to goods by a collision, a preliminary act should not be filed if the damage is done to the person. No good reason can be suggested for such a distinction, I shall therefore make the order unless the rule prevents me. The rule speaks of "actions for damage by collision." Can it be argued that there was not damage by collision "in this case?" It is said that a technical meaning is to be given to the word "damage," but I do not think so. I shall therefore order the preliminary act to be filed.

Solicitors for the plaintiff, *Dollman* and *Pritchard*.
Solicitors for the defendants, *Thomas Cooper* and *Co.*

most of the two lights shall be carried at a height not exceeding 20 feet above the hull, and the light aft at double the height of the other. The 17th section of the Merchant Shipping Act 1873 provides: "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 the departure from the regulation necessary." It is admitted that this section applied to the *Agnes*. Two actions *in rem* were brought against the *Vera Cruz*. In the first action the plaintiffs were the owners of the schooner in a suit for damages occasioned by the collision. In the second action the plaintiff is the administratrix of William Seward, the master of the *Agnes*. She claimed damages for the loss of her late husband and of her son, Thomas Seward, who was an apprentice on board, and who was also drowned; but at the trial of the action the claim for damages in respect of her son's death was abandoned. The first action came on for trial on the 7th March 1884, when it was arranged that the evidence taken in that action should be received as evidence in the second action also. The defendants, amongst other matters, relied on the plea of compulsory pilotage. The court decided that the collision was caused by the negligence of those on board the *Vera Cruz*, and that such negligence was not the negligence of the pilot alone. It also held both vessels to blame in conformity with the cases prescribing the effect to be given to sect. 17 of the Merchant Shipping Act 1873, namely, that, if the infringement of the regulation might by possibility have caused or contributed to the collision, the ship by which they are infringed shall be deemed to be in fault. The question now under consideration is whether the defendants are liable in the second action to any, and, if so, to what extent, for the damage occasioned by the loss of the said William Seward. I find, as a fact, that the death of the said William Seward was occasioned by the negligence of the defendants' servants. As a question of contributory negligence on the part of the said William Seward arises, it should be stated that he was on the deck of the *Agnes* when her riding lights were hoisted, and that he saw the position in which they were placed.

The defendants contend, in the first place that no action *in rem* will lie under Lord Campbell's Act. This question was not argued before me, it being admitted by the defendants' counsel that for the purposes of to-day this matter is concluded by authority, and that such authority is against them: (*The Franconia*, *The Guldfaxe*, *The Explorer*.) Secondly, the defendants contend that this action cannot be maintained, because the Board of Trade has neither instituted nor refused to institute the inquiry mentioned in sect. 512 of the Merchant Shipping Act 1854. If this section applies to the present case it is clear that the action must fail. But I am of opinion that it has no application to cases of loss of life caused by a foreign ship. It seems clear that none of the sections of the Act of 1854, from sect. 502 to sect. 512 inclusive, had originally any application to foreign vessels. But it was contended on behalf of the defendants that the joint effect of sects. 1 and 54 of the Merchant Shipping Act 1862 makes sect. 512 applicable to such cases as the present. There is, no doubt, some foundation for this contention. But I am informed that the Board of Trade, almost from the outset, abandoned all notion of instituting the proceedings contemplated by the 507th and following sections of the Act of 1854, even in the case of British ships, and I do not believe that when the Act of 1862 was passed it was intended to make any such proceedings applicable to foreign ships. At all events I do not think there are words which compel me to hold that this has been done, and I therefore decline to dismiss the suit on such grounds.

The next question I have to consider is, whether a defence to the whole or any part of the plaintiff's claim on the ground of contributory negligence on the part of the deceased William Seward has been established. Both sides have argued that the old common law rule, as opposed to the Admiralty Court rule in cases of damage to ships, is applicable to this case, counsel for the defendant asserting that there was contributory negligence on the part of William Seward, which bars the plaintiff's right to recover at all, and counsel for the plaintiff maintaining that the facts of the case do not support such a defence, and that the plaintiff is therefore entitled to recover full damages. It is urged that, inasmuch as one of the statutory rules was infringed, I must, by virtue of sect. 17 of the Merchant Shipping Act 1873, hold contributory negligence to have been proved, and dismiss the suit. On the other hand, it is said that, even if negligence must by virtue of the statute be imputed to the husband of the present plaintiff, yet inasmuch as by the exercise of ordinary care the defendants' servants might have avoided the collision, the plaintiff is, by the old common law rule at all events entitled to recover full damages. The judgment of the House of Lords in *Radley* v. *The London and North-Western Railway Company* was cited as an authority for that proposition. No doubt there is a passage in Lord Penzance's judgment in that case which favours such a contention. The passage is as follows: "But there is another proposition equally well established, and it is a qualification upon the first, viz., that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." I think this passage, if it is to be understood in the sense for which the plaintiff in the present case contends, which I doubt, went beyond what the House of Lords intended. A decision to that effect would have put an end to the doctrine of contributory negligence altogether. Defendants are not liable in an action of this nature unless they or their servants have been guilty of negligence, or, in other words, have failed to exercise "ordinary care and diligence." What becomes of the doctrine of contributory negligence on the part of a plaintiff if a mere want of "ordinary care and diligence" on the

part of a defendant is an answer to it when in all cases, where the question of contributory negligence arises, there is *ex hypothesi* a want of such ordinary care and diligence on the part of the defendant? In the passage of the report immediately following that which I have quoted, Lord Penzance goes on to say: "This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies* v. *Mann*, supported in that of *Tuff* v. *Warman* and other cases, and has been universally applied in cases of this character without question." Now the case of *Davies* v. *Mann* certainly does not support such a proposition, neither, so far as I am aware, do any of the other cases, with the exception, perhaps, of *Tuff* v. *Warman*. The judgment of the court delivered by Wightman, J. in that case contains the following passage: "It appears to us that the proper question for the jury in this case, and, indeed, in all others of the like kind, is, whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on his part, the misfortune would not have happened. In the first place the plaintiff would be entitled to recover, in the latter not, as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover unless it were such, that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened, nor if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff. This appears to be the result deducible from the opinion of the judges in *Butterfield* v. *Forrester* (11 East, 60); *Bridge* v. *The Grand Junction Railway Company* (3 M. & W. 246); *Davies* v. *Mann* (10 M. & W. 548); and *Dowell* v. *The General Steam Navigation Company* (5 Ell. & B. 206)." I have looked at the cases there cited, but they contain nothing to support the last part of the proposition. What those cases really decide is, that, although there may have been negligence on the part of the plaintiff, yet, unless he, the plaintiff, might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. If, by ordinary care, he might have avoided them, he is the author of his wrong: (cf. the judgment of Parke, B. in *Davies* v. *Mann*.) This doctrine, it will be seen, is a different thing from that for which the plaintiff is here contending, and I think, therefore, that her contention on that head cannot be maintained.

But then comes the question, am I bound to hold that there was, under the circumstances, contributory negligence on the part of the deceased, William Seward? Apart from the statute, contributory negligence would mean negligence actually conducing to the collision. Now, as a matter of fact, there is no evidence to show, neither is there reason to believe, that such an alteration of the relative position of the lights of the schooner as would have been a compliance with the rule would have avoided the collision. Unless, therefore, by force of the statute, I am bound to impute contributory negligence to the deceased, the plaintiff is entitled to recover the whole amount of damage she has sustained by the loss of her husband. Has sect. 17 such effect? I have already given that effect to it in the first of these actions—that between the owners of the *Agnes* and the present defendant. It is said that the enactment is in its nature penal and that I ought not to apply it unless its words are clear and distinct; that by its terms the ship, or at most the shipowner, is to be deemed to be in fault, and that, therefore, no similar inference is to be drawn against the captain. So to decide in the present case would be to hold the owner responsible for the negligent acts of their servant, the captain, and in the same breath to exempt him from the consequences of his negligence. This I cannot do. I therefore decide that the loss of the life of William Seward was occasioned by the negligence of the defendants, and that there was contributory negligence on his part, contributory negligence conducing to the result.

What consequences are to follow? Am I to apply the old common law rule and dismiss the suit, or am I, in conformity with another contention of counsel, to decree for the plaintiff half the damage sustained by her by the loss of her husband, to be paid by the defendants? In the judgment of the Privy Council in the case of *The Laconia* there is the following passage: "The judge found both parties to blame, and he ordered that the damage sustained by each should be added together, and each party pay one-half. The effect on the present occasion would be a loss to the *Laconia* of about 20,000*l*. But it is not to the effect we must look; we must direct our attention to other considerations. Had the rule prevailing at common law been adopted, each party would have had to bear his own loss. Opinions may differ, and indeed do differ, as to what course is most consonant to justice. This question we are not called upon to decide; but what we have to decide is, when the proceeding is *in rem*, what ought to be the rule—what was the intention of the authority which sanctioned and made legal the exercise of the jurisdiction *in rem*. Could it be intended to constitute a jurisdiction *in rem* with a common law remedy? We think that no such anomaly could be intended, and therefore concur in the view of the Consular Court." The course there indicated is that which I shall take. True it is that the exact mode of assessing the damages contemplated in that case cannot be followed in the present action, because, as between the present plaintiff and the defendant, the damage is all on one side. But I think that the case of *The Milan* is in principle sufficiently analogous to allow of my following the judgment of Dr. Lushington in that suit, and decreeing that the plaintiff do recover a moiety of the damage she has sustained, and I refer it to the registrar and merchants to ascertain the amount.

Solicitors for the plaintiff, *Jackson* and *Evans*, agents for *Robert B. D. Bradshaw*, Barrow-in-Furness.

Solicitors for the defendant, *Gregory, Rowcliffes, and Co.*, agents for *Hill, Dickinson, Lightbound, and Dickinson*, Liverpool.

Monday, May 5, 1884.

(Before Sir JAMES HANNEN and FIELD, J., assisted by TRINITY MASTERS.)

THE RONA. (*a*)

Damage to cargo—Stranding—Duty of master to repair—Negligence in not repairing—Caulking decks.

If a vessel after she has started on her voyage receive damage, the master, in considering what steps he shall take in regard to carrying on the cargo or first repairing the ship, is bound to consider not one individual interest, but the interests of all concerned, and to do that which a prudent master would do under the circumstances, whether it be to return to his port of loading and repair, or repair at the nearest possible place before proceeding, or go on without repairing; but if it be in his power to effect the repairs without any great delay or expense to the interests intrusted to his charge it is his duty to repair before proceeding.

The R., a wooden vessel under a charter-party from the port of New York to London with a cargo of grain and flour, left her moorings and was towed down the New York river, and on her way stranded on the Craven Shoal, which is about ten miles below New York.

A tug towed at her for an hour and three-quarters before she was got off, during that time her decks and waterways were much strained, and she was then found to be making five inches of water per hour; but the master did not examine her or cause any repairs or caulking to be done, but proceeded on her voyage and encountered very severe weather.

On her arrival in London the flour of the plaintiff, which was immediately beneath the deck, was found to have been damaged by the sea water making its way through the deck, the grain at the bottom of the ship being uninjured.

Held, that the master was negligent in not repairing; that is, in not caulking the deck before he proceeded on his voyage, that the ship was more liable thereby to sustain damage and to injure the cargo, and that the defendants were liable for the damage occasioned thereby.

Cohn *v.* Davidson (36 *L. T. Rep. N. S.* 244; 2 *Q.B. Div.* 455; 46 *L.J.* 305, *Q.C.*; 3 *Asp. Mar. Law Cas.* 374) *distinguished.*

THIS was an appeal from the City of London Court by the defendants, judgment having been given against them.

The action was originally brought by the plaintiffs, the holders of a bill of lading on a cargo of flour, against the *Rona* for damages to the said cargo alleged to have been caused by the negligence of the shipowner, and first came on for hearing in the City of London Court on the 28th April 1881.

After the examination of the plaintiffs' witnesses the defendants raised two objections: First, that the plaintiffs were not entitled to sue; and, secondly, that the court had no jurisdiction to try the action. The first objection was not then disposed of, the plaintiffs applying for leave to amend by adding a plaintiff, but on the second objection the learned judge decided that he had no jurisdiction to try the case, and therefore refused to proceed any further with it.

From this decision the plaintiffs appealed to the Admiralty Division of the High Court of Justice, and the appeal was allowed by deciding that the court below had jurisdiction to try the action, and the action was then remitted for trial: (see 4 Asp. Mar. Law Cas. 520; 7 P. Div. 241.)

On the 15th May 1882 the action came on for hearing the second time in the City of London Court, and judgment was given for the plaintiffs with a reference to the registrar to assess the amount of damage, the consignee Strange having been added as a plaintiff with his consent.

From this judgment the defendants now appealed.

The facts of the case were shortly as follows: The *Rona*, a wooden vessel, shipped at New York for London a general cargo, partly consisting of grain and flour, for which bills of lading (of which the plaintiffs were holders) were given, and thereby the goods were to be delivered to the shippers' order or assigns, "dangers by sea and fire only excepted." She left her moorings in New York on the 27th Dec. 1879, and was towed down the New York river by a tug, and proceeded in safety until she came to the Craven Shoal within the entrance to the river, and there she got aground and stuck fast. From the log of the *Rona* (kept by the mate) it appeared that, previous to the ship leaving New York she was making no water, even after she had shipped her cargo; that when she struck the shoal there was a considerable swell on; that the ship rolled about and strained; that the tug towed at her for one hour and three-quarters, during which time a nine-inch hawser was broken up; and that when the tide flowed, with the assistance of the tug, she was got off the shoal. She proceeded on her voyage, but on sounding the pumps it was found that the ship was making more water than before, that she was apparently strained about the waterways and decks, and at 7 p.m. she was found to be making five inches of water per hour. On the 29th she began to encounter heavy weather, which increased in violence, doing the vessel considerable damage, and shipping such quantities of water that the pumps had to be kept constantly going. The weather continued till the 12th Jan. 1880, when it somewhat abated, and she eventually arrived in safety at her destination. Upon her arrival it was found that the ship and cargo had sustained considerable damage. A survey was held on the ship by Lloyd's surveyor, and he found that a few sheets of metal had been torn off the bottom, and that the decks were strained and leaky throughout. A survey was also held on the flour cargo, and, from the evidence of this surveyor, it appeared that he had found the decks and waterways much strained, and the decks saturated with sea water, and gave it as his opinion that the damage to the flour was occasioned by sea water coming through the deck where the caulking had become defective and opened the decks, and that such straining and defects could not have arisen from the bad weather alone. On the part of the defendants it was admitted that the goods were shipped in good order and condition, that on arrival at their destination they were found to have been damaged with sea water, but they maintained that the damage was caused by perils

(*a*) Reported by J. P ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

of the sea due to the violence of the weather encountered in crossing the Atlantic, and within the exceptions in the bill of lading.

The master stated that in his opinion the fact of her making five inches of water per hour was not of itself sufficient to necessitate his doing anything to the ship, because she had already been making three inches in harbour, and that he never saw that the decks and waterways were strained. The statement as to the water in harbour was contradictory to the entries in the ship's log, the master himself having signed the protest containing the same words as the log, as to straining.

Upon the close of the evidence three questions were put by the learned judge to the assessors, namely: (1) Was there negligence in going to sea without repairing? (2) Did it contribute to the damage sustained by the cargo? Both of these the assessors answered in the affirmative. And (3) Would the cargo have been equally damaged if the ship had not stranded in the river? To this they answered "Not so much." The learned Commissioner in giving judgment said that he differed from the assessors as to this last point, in that he considered that if she had gone on without touching on the Craven Shoal, she still would have done the damage. But the nautical assessors having more experience in such matters than himself, he should, on the finding of the facts by the assessors, give judgment in accordance therewith for the plaintiffs. From this the defendants now appealed.

Myburgh, Q.C. and *Kennedy* for the appellants. —Mr Strange is not the proper person to sue; he became the consignee of the goods after they had been delivered. Under such circumstances he is not the "consignee" or "indorsee" within the meaning of these words in the Bills of Lading Act (18 & 19 Vict. c. 111), s. 1. Indorsement after delivery makes the bill of lading a mere *chose in action*. [FIELD, J.—I think the authorities are against you on that point: *Meyerstein* v. *Barber* (2 Mar. Law Cas. O.S. 518; 16 L. T. Rep. N. S. 569; L. Rep. 2 C. P. 38, 661); *Burdick* v. *Sewell* (10 Q. B. Div. 363). Sir J. HANNEN. —It is obvious that the judge below intended to add the name of any plaintiff who was entitled to sue, and, if the right parties have not been added, we shall certainly add them. Is it worth while to press that point?] Then, on the other point, the damage sustained by the flour was caused by perils of the seas. This appears from the survey of Lloyd's surveyor. The bottom of the vessel was in reality not damaged at all. The vessel was making nearly as much water before she touched the shoal as she was making afterwards. If the master had honestly but unnecessarily put back for the purpose of repairing the damage, and there had been no actual danger, there would have been no general average. As to the question of seaworthiness, the warrant applies only to the time when the voyage commences, and as soon as the voyage has commenced the warranty is at an end:

Cohn v. *Davidson*, 2 Q. B. Div. 455; 36 L. T. Rep. N. S. 244; 3 Asp. Mar Law. Cas. 374; 46 L. J. 305; Q. B.;
Steel v. *State Line Steamship Company*, 37 L.T. Rep. N. S. 333; 3 App. Cas. 72; 3 Asp. Mar. Law Cas. 516.

There is no case which decides that when a vessel has incurred damage at sea, and the master proceeds on his voyage acting honestly, that such action on his part amounts to negligence. [FIELD, J. cited *Worms* v. *Storey*, 11 Ex. 430; 25 L.J. 1, Ex.] That case was decided on demurrer. In *Cohn* v. *Davidson*, Lush, J., in summing up to the jury, told them that it was not the duty of a master to go back if he then honestly although erroneously believed that he could accomplish the voyage; and, that, if the master acted honestly, the shipowners were not liable for negligence, and in the judgment of the court they appear distinctly to have approved that direction. Whatever might be the duty of a master, if he were close to his point of departure, he cannot be justified in putting back where he has several interests intrusted to his charge and such putting back would be detrimental to those interests as a whole, though possibly beneficial to one.

J. P. Aspinall and *Raikes* for the respondent. —The ship not having left the port of New York, the voyage had not commenced and the warranty of seaworthiness was not complied with. [Sir J. HANNEN.—Can it be contended that the voyage does not commence when the ship first starts from her mooring berth? I shall certainly so hold until I am convinced to the contrary.] Secondly, even assuming that the master had only the alternative of proceeding on his voyage or of returning to port, and so incurring heavy general average charges, he has no right to proceed if he thereby incurs a risk of damage which will fall on even one portion of the cargo alone. He must do the best for each individual interest. By this bill of lading he undertakes to deliver unless prevented by perils of the sea. If he puts to sea in a damaged condition, whereby the cargo receives injury which it would not have sustained if his ship was sound, the injury is not occasioned by perils of the sea, but by the act or default of the master, provided that he had the opportunity of repairing. If he has such opportunity he is bound to repair:

Worms v. *Storey*, 25 L. J. 1, Ex.; 11 Exch. 430;
Notara v. *Henderson*, 1 Asp. Mar. Law Cas. 278; L. Rep. 7 Q. B. 225.

Here the master might have put back to New York, or even he could have remained at anchor where he was, and could have caulked his ship. *Cohn* v. *Davidson* was a Nisi Prius decision only on the point above mentioned, and it does not appear that it was approved by the Court. A carrier is bound to do his utmost to protect goods committed to his charge from loss or damage, and if he fails to do so he is liable:

Nugent v. *Smith*, 1 C. P. Div. 423, 436; 3 Asp. Mar. Law Cas. 87, 198.

The shipowner cannot excuse himself from liability for damage caused by his negligence by showing that some damage could have happened through perils of the sea if no act of negligence had been committed:

Nitro Phosphate, &c., Comnany v. *London and St. Katherine's Dock Company*, 9 Ch. Div. 503.

Myburgh, Q.C. in reply.

Sir J. HANNEN.—It is obvious that it lies upon those who impeach the judgment of the learned commissioner to establish that it is wrong. Some observations have been made upon expressions that fell from him indicating that he did

not entirely agree with the assessors who assisted him, but that cannot affect our judgment. We put ourselves in his position, and upon these facts, with the assistance we have derived from the Trinity Brethren who are with us, we have to say whether we can see that his judgment is wrong. A preliminary point was taken, but has apparently been abandoned, and I think very properly, by Mr. Myburgh, with regard to the title to sue. It is obvious that the learned commissioner intended to make any amendment that would be necessary in order to get the right parties on the record, and Mr. Strange (I think is the name) appears to have been mentioned as consignee, and no question was raised at the time and we do not consider that this is a point which is now open to the appellants to take. It has been passed by, and I see no reason to doubt that Mr. Strange is the right person to sue.

Now, with regard to the facts of the case. We have already intimated our opinion that this voyage must be considered to have commenced from the time when the ship started from whatever were her moorings, with her cargo on board, for the purpose of proceeding down the New York harbour and out to sea, and that therefore the warranty of seaworthiness had been fulfilled. But, as to the facts which followed, the first question which arises is whether the vessel had been making any water before she struck on the shoal; and I must say, speaking for myself, that I greatly doubt the veracity of the captain's statement that she was making three inches of water before that time. I am very much inclined to think that that was stated by him to lead up to the five inches; but the reason why I reject his statement is that I find in the log a distinct statement that she was making no water; but however that may be, whether she was making three inches of water or none immediately after she struck on this shoal, she is recorded to have made five inches of water. Suggestions have been thrown out that the log had been tampered with and made up in a different ink, and so on, for which I really see no foundation whatever. It is quite certain that the master has never repudiated this log; he has adopted it. He has made statements in the protest upon the basis of it, and I, for my part, entertain no doubt that he did know perfectly well that the mate had recorded that the vessel was making five inches of water after she touched; and, more than that, the log shows that a certain damage done to the vessel was apparent, viz., that the waterways and decks were strained. This being the condition of things, the first question which was put to the assessors in the court below and which we have thought it right to put to the Trinity Brethren who assist us is, whether that indicated such an amount of damage to the vessel, as made it necessary for the master to consider whether he should put back or what other steps he should take for the purpose of remedying the mischief that had been done, or mitigating its consequences, and I may say at once that the Trinity Brethren who assist us here, and who very properly have been appealed to so often in the course of this discussion as those who would give us advice and who would be able to correct the assessors below, entirely agree with the assessors below.

The question then arises, what should be done under such circumstances? Now, I must say that I am not prepared to hold, according to the argument put forward by Mr. Aspinall, that the instant it becomes clear that by going on some mischief will be done to some portion of the cargo, that it becomes the duty of the captain to go back, and perhaps put all concerned to a very enormous expense; neither, on the other hand, can I assent to the proposition that the liability of the owner depends upon the honesty of the belief of the captain that what he proposes to do is the right thing, and so far as I know, and so far as the argument before us to-day has informed my mind, I am not aware of any authority for the proposition, except the supposed authority of *Cohn* v. *Davidson*. I think it perfectly clear from the context (my learned brother who will deliver judgment will probably know more than I of the facts), and I infer from the judgment, that so far from the court in that case not adopting the language of Lush, L.J., that what they were seeking to do was to show that the parties had not been prejudiced by a hasty expression of Lush, L.J., and to show that the facts corrected that, and that the rest of his summing up prevented the jury being under any misconception. But, passing from that, I must say that I am inclined to think that the argument which has been so forcibly put by Mr. Kennedy is correct, that the master is entitled to take into consideration the whole venture. He must not consider only the question of the ship, he must consider the question of the whole venture. Well, you can no doubt introduce a very large number of elements for his consideration, and the question what would be right for him to do would of course depend on the distance he has gone from the port. I put an extreme case by way of testing it. It seems to me, what it would be plainly a man's duty to do, if he was only half a mile or a mile from the port, would be something very different if the ship had gone twenty miles, or any other distance you might suppose; but the question in every case, in my judgment, which has to be considered is this, whether or not, taking all the circumstances into consideration the master has been guilty of negligence. Of course, that must be judged by the opinion of the tribunal which has to determine upon it. We cannot take the uncertainty of his mere judgment as a test; we have to consider whether a properly constituted captain in that position would have done what this captain has done. Upon this point we have taken the opinion of those who are with us, and they are of opinion that this captain did not do all he ought to have done, and that he has been guilty of negligence in one manifest respect. Before mentioning what he might have done, I may say it appears to me in this case that the captain did not exercise any judgment at all. He did not take into account what he was to do, but he blindly and promptly went on his way without considering what should be done under the circumstances which had arisen, and his excuse now is one which I do not believe, namely, that he was not conscious that he was in any exceptional position; that he thought he might go on and might treat the result of getting on the shoal, and the fact that he was drawing five inches of water in an hour, as of no importance. We are advised that one obvious thing which he might have done

was this, that when he saw, as I am assuming that he did, that the vessel had been so strained and had received such a shock that her waterways and decks were strained, and that in some way or other she was making five inches of water per hour, that ought to have indicated that he should, at least, have taken the precaution of having the waterways and the decks caulked for the purpose of preventing the water getting through, as it was able to do, if she encountered any bad weather such as she did encounter at that season of the year.

There is, therefore, in the judgment of those who assist us, one plain element of negligence which would, if it had not been committed, from the precaution which has been mentioned, have had a tendency to prevent the saturation of the deck with water and the penetration of water into the hold. "But," says Mr. Myburgh, "there being no damage shown to have been done to the bottom, therefore that shows that this damage cannot have resulted from the negligence that is imputed." I really have not been able to follow that. It is obvious that if she made more water after she touched on the shoal than she did before—if we draw the inference that the touching on the shoal was the cause of her making more water—then, if there was no damage to her bottom, it is plain that something was done which caused her to take in water, and which may have equally had the effect of rendering her waterways and her decks less capable of resisting the water which she shipped afterwards in the course of her voyage. There being some negligence established, it lies upon the shipowner to distinguish, if he can, what portion of the damage which has arisen did not arise from the negligence which has been established against him—that is, against the person who has been guilty of negligence; and, if it is a sufficient cause for the injury which has resulted, then it lies upon the person accused to show that it did not, in fact, arise from this sufficient cause, but arose from some other sufficient cause. We are of opinion that the negligence of not caulking has, in itself, contributed largely to the damage which has resulted, and that, therefore, there is sufficient basis upon which this judgment can be maintained.

FIELD, J.—I quite agree with the President in coming to the conclusion that the judgment of the court below ought not to be disturbed. This is a form of action I am not accustomed to, but still the principles are the same in this court as in those courts in which I have the honour to preside. I understand this to be an action for damage to cargo brought by the owner and consignee of goods received under a bill of lading, and by which it became the duty of the defendants to carry the goods to the port of discharge, and there deliver them "in the like good order" as when received, perils of the sea excepted. It is admitted that the goods were put on board in good condition. It is admitted that they arrived at their port of discharge in bad condition and damaged. It is admitted that the damage was caused by sea water; that, therefore, the damage must have occurred some time or other whilst the goods were under the charge of the master. Then it is said that, although, no doubt the proximate cause of the damage to the goods was sea water caused by shipping seas in very bad weather, that the deck of the ship, which ought to have protected the cargo against the shipping of the seas, was in such a defective condition as that it permitted the seas to pass through; and that that defective condition (although in itself originally also due to perils of the seas) was one which it was the duty of the master to have known of and ascertained, and that he ought not to have proceeded on his primary duty, of going to the port of discharge, without taking steps to ascertain whether his cargo would receive damage, or whether there was anything which could, and might, and ought to have been done to prevent that. That is the shape the case assumes. Now, then, it is certain, therefore, that the goods were received sea-damaged. It is clearly admitted also now that she started seaworthy, and, if anything had happened at all to her, Mr. Aspinall could not have been here supporting the judgment. But what did happen to her? When she was at a good distance from New York, from where she had started, she ran on a shoal, and she appears to have got on stem foremost, and, without going through it at length, it is obvious there was a great deal of tugging and pulling at her. A hawser was broken; they were an hour and three-quarters trying to get her off; and no man who has been at sea will doubt that such an operation will have a tendency to strain a heavy ship with a heavy cargo of grain and flour on board. And not only would that have called the attention of a prudent master, but we find that the man on board next in charge of the ship—the mate—actually saw the condition of the deck. He describes how the ship was strained, and the master says so too in the protest—and a most careful master, because he takes uncommon care not to put anything into the protest which his owner would not like, because he writes to him and asks him whether it should be put into the protest or not. The mate is a most careful man; he saw the ship was strained, saw the waterways, and that was the place where the deck was strained and where it was injured, and where the water would be likely to get through. What does that show? Surely that, at least, it ought to put on the master the duty of ascertaining and considering and examining. He did nothing whatever. He says he did not notice the deck; but his mate did, and he must have seen the log, when the mate made up the log. Under these circumstances, what was it his duty to do? Mr. Myburgh says it was his duty to proceed; so it was, primarily, but also to proceed with care, and not to proceed if dangerous. He would not have to proceed if he knew that a hostile fleet were in front of him, and that there was danger of war. It was his duty to take care of his ship and cargo, and to see that his ship was never in such a position as would be likely to damage his cargo, and if she was, to see if anything might be done, so that he might safely proceed in the direction he required. What had he before him? A North Atlantic voyage in midwinter. I should like to know where the master is to be found who would not know what quantities of sea he would have to ship in the course of such a voyage as that. If so, what was it his duty to do? His first duty would have been to have called up the carpenter, and he might have said that they had no tow on board, and could not proceed in that weather.

All that might have been done, but nothing of the kind was done, and it seems to me therefore that the captain does not come within the protection—if there is a protection—which there is said to be from the summing up of Lush, L.J. in the case of *Cohn* v. *Davidson*. For myself I may say, I know of no authority for saying that the master of a ship, or anyone else who has a duty under contract to exercise due care and skill, may excuse himself by saying, "I did not exercise care and skill, but I honestly thought I did." I know of no such case. There are, no doubt, many cases in which if a wrongdoer puts you into a position of danger, so that you are called upon hastily to take some steps, and you do happen then to take the wrong course, that there you are excused as against the wrongdoer. In the well-known case of the railway passenger, who being carried on, believing honestly and fairly that she was being carried on beyond her station, and thereupon got down hastily, and contributed probably by her mode of getting down to the injury, it was held that there the company were still responsible, though she might have done a wiser thing, namely, to have stopped in the carriage and gone on to the next station and come back again by the next train. But these are very different cases from this. I myself do not believe that Lush, L.J. intended to lay down any such doctrine, that a passenger whose duty it is to use due care and skill, may be excused for a breach of that duty simply if he honestly exercises a judgment in doing it. That certainly was not the view which the court (of which I had the honour of being a member) took of that; but we considered in that case, although the question itself was made a strong point by the Solicitor-General, that it might possibly, taken by itself, have misled the jury; yet, when accompanied by the observations of the Lord Justice in summing-up to the jury, it showed that no such damage was sustained. That was the true effect of *Cohn* v. *Davidson* in my opinion. I cannot see that in the present case the master brings himself within that protection, because he took no means and exercised no judgment whatever.

I agree with many of the arguments very ably put by Mr. Myburgh and Mr. Kennedy. I should not, perhaps, rely very much on the five inches per hour, because the damage did not arise from that, but it was an index of things to look at and consider. If she had made no water, or even three inches of water originally, and after such a shock as this made five, it is an element to be taken into consideration that she had received a strain. If the captain had known that, and looked at the waterways, he would have seen it. Did this damage arise from the waterways? Mr. Dent clearly establishes that it did (and there is no evidence to the contrary), because he says the damage was through the constant trickling of water down the ship's side, so that the timbers had become sodden with the water; that is not due to the water rushing through a ventilator hole or sweeping the deck-house down; it is due to the constant trickling day after day, for eleven days, of water going through the seams which a little caulking might unquestionably have stopped. I think, therefore, it is impossible to say that the judgment was wrong. We have the advantage of the learned assessors here, who concur fully with the judgment of the assessors below.

Judgment affirmed, and a reference to the registrar and merchants ordered to assess the amount of the damage.

Solicitors for the appellants, *Thomas Cooper and Co.*

Solicitors for the respondents, *Pritchard and Sons.*

Thursday, June 12, 1884.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE PACIFIC. (*a*)

Collision—Regulations for Preventing Collisions 1880, *art.* 11—*Infringement—Lights—Fishing smack—Overtaking ship.*

The bright white light carried by a trawling fishing smack when attached to her nets in pursuance of the provisions of art. 9 *of the Regulations for Preventing Collisions* 1863, *although visible astern, is not a white light shown from the stern to an overtaking ship within the meaning of art.* 11 *of the Regulations for Preventing Collisions* 1880.

Where it is the duty of a vessel to carry or show lights, and those lights are not carried where they are visible, or are not shown, the court will not be extremely nice in finding another vessel to blame because those on board her fail to see the first-mentioned vessel within a few yards of the distance when such vessel ought first to have been seen.

THIS was a damage action *in rem*, instituted by the owners of the fishing smack *Speculator* against the owners of the steamship *Pacific*, to recover damages for the loss of the smack, occasioned by a collision between the two vessels on the 24th March 1884 in the North Sea. The defendants counter-claimed.

The facts alleged on behalf of the plaintiffs were as follows:—About 3 a.m. on the 24th March 1884 the fishing smack *Speculator*, manned by a crew of five hands all told, was trawling on the Dogger Bank about 170 miles E.N.E. of the Spurn. The weather was fine and clear, with a light wind from about north, and the *Speculator* was on the port tack with all sail set except the mizen topsail, her mainsheet being slacked out. Her trawling gear was on the ground, and she was heading about E. by N. and making about one knot an hour and some leeway. A white light was exhibited from the crosstrees on her mainmast; such light was visible all round the horizon, and a good look-out was being kept. Under these circumstances the masthead light of the *Pacific* was seen from three to four miles distant, bearing about a point on the starboard quarter. Shortly after the red light came into view, and, although loudly hailed by those on board the *Speculator*, the *Pacific* came on with great speed and struck with her stem and port bow the starboard quarter of the *Speculator*, doing her so much damage that she shortly sank.

The facts alleged on behalf of the defendants were as follows:—The screw steamship *Pacific*, of 466 tons net, was shortly before 3.10 a.m. on the 24th March 1884 in the North Sea, on a voyage

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

from Hull to Dantzic. The weather was fine, but dark and cloudy towards the horizon, and there was a fresh breeze from about north. The *Pacific* was proceeding under steam with her foretopsail and forestaysail set, heading E. by N. ¾ N., and making between eight and nine knots an hour. Her regulation lights were duly exhibited and burning brightly, and a good look-out was being kept on board of her. In these circumstances those on board the *Pacific* observed at the distance of about a ship's length from the *Pacific* and right ahead (if anything a little on the starboard bow) the boom of the smack *Speculator* under sail. No light on board the *Speculator*, until after the collision, ever became visible to those on board the *Pacific*. The engines of the *Pacific* were immediately stopped and her helm was ordered hard-a-starboard, but a collision between the two vessels took place almost immediately afterwards. The defendants (*inter alia*) charged the plaintiffs with breach of art. 11 of the Regulations for Preventing Collisions at Sea, in not exhibiting a white or flare-up light from the smack's stern.

Art. 11 of the Regulations for Preventing Collisions 1880 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.

Art. 9 of the Regulations for Preventing Collisions at Sea 1863, continued in force by Order in Council is as follows:

Fishing vessels and open boats, when at anchor or attached to their nets and stationary, shall exhibit a bright white light.

The evidence on behalf of the plaintiffs proved that the white light was carried in the weather crosstrees, that that was the usual place to carry it, and that it was visible astern. The witnesses on behalf of the defendants admitted that while it was possible, had their attention been directed to the smack, to have seen her at a distance of two ship's lengths, they did not see her until within the distance of one ship's length. They also stated that, having regard to the relative position of the two vessels, it was impossible for them to have seen the white light of the smack.

Dr. *Phillimore* (with him *Bucknill*) for the plaintiffs.—Assuming the smack's light not to have been visible all round the horizon, it was nevertheless carried in the place where it is the practice for fishing smacks to carry their light. Those on board the steamer, seeing that they were navigating across a fishing ground, should have taken extra precautions. It is, however, admitted that the steamer was making from eight to nine knots, and it is submitted that, under the circumstances, this was an excessive rate of speed. Assuming that the smack was bound by art. 11, we contend that there has been a compliance with it. The rule requires a white light or a flare-up light to be shown from the stern. Having regard to the fact that the smack's light was a white light on the crosstrees, and therefore visible astern, the duty to show a white light from the stern was complied with. [BUTT, J.—Surely the obvious intention of the Legislature in using the words "from her stern" is that the light is to be abaft everything that might possibly interfere with its being visible to an overtaking vessel. That is what I think the Legislature meant by the rule.] Assuming that to be so, the effect in the present case is the same. Whether the light had been exhibited from the stern or was hung on the crosstrees, it was yet visible to the overtaking ship, and therefore the breach of the rule cannot be said to have by any possibility contributed to the collision. According to *The Reiher* (4 Asp. Mar. Law Cas. 479; 45 L. T. Rep. N. S. 767) a vessel is not bound to show a white light or flare-up light to an overtaking vessel, unless there is ground for the apprehension of danger. Under the circumstances of this case, there was no ground for the apprehension of danger. The defendants have admitted that it was possible for them to have seen the smack at a distance of two ship's lengths, while they say that as a fact they did not see her until within a ship's length off. If so, they should be held to blame for having a bad look-out.

Hall, Q.C. (with him *Kennedy*) for the defendants.—It would be impossible for vessels coming from the southward in certain directions to see the smack's white light, which would necessarily be shut out by the mast and rigging. It is obvious that the plaintiffs have infringed art. 11 of the Regulations. The white light there alluded to must be shown at the stern, so that there may be nothing abaft it which may intercept its rays, and further to indicate to an overtaking vessel the exact position of the stern of the overtaken ship, and thus enable the overtaking ship to manœuvre accordingly. The fact that those on board the steamer did not see the smack herself quite so soon as was physically possible is no proof of negligence. As to the speed of the steamer, there is no rule of navigation which says that in the absence of fog a steamer shall not go full speed, provided she is carefully navigated.

Dr. *Phillimore* in reply.—A steamer is not justified in running at full speed on a dark night across a fishing ground:

The City of Brooklyn, 1 P. Div. 276; 3 Asp. Mar. Law Cas. 230; 34 L. T. Rep. N. S. 932.

BUTT, J.—This is a case where, on a fine night but perhaps rather dark and cloudy towards the horizon, the smack *Speculator* was run down and sunk by the steamship *Pacific* in the North Sea, somewhere in the neighbourhood of the Dogger Bank. The substantial questions in the case relate to the lights carried or shown by the smack. For reasons to which I have adverted in the course of the evidence and during counsel's speeches, it is not necessary to go into the questions raised under the Orders in Council, which deal with art. 9 of the old and art. 10 of the new Regulations for Preventing Collisions (*a*). It is clear from the evidence that the smack's light was so placed that it did not show all round the horizon. What exact number of points was obscured it is not easy to say, but that it did not show all round is clear. But I do not say that the smack is necessarily to blame for that. There is a difficulty in placing these lights, and it has yet to be decided whether it is possible to have a light which will show all round the horizon. However, in that state of things, it is certainly more important that the other regulations as to lights should be strictly observed. Now, it seems

(*a*) The question as to what lights are to be carried by a trawler when attached to her nets and stationary has been subsequently dealt with by the Court of Appeal in the case of *The Dunelm*, *post*.—ED.

clear to myself and the Elder Brethren that the regulation which requires a light to be shown from the stern to an overtaking vessel was infringed. Even apart from the regulations, one would have thought that, under the circumstances of this case, it would only have been an ordinary precaution to have shown a light from the smack's stern. Some suggestion has been made on behalf of the plaintiffs that, assuming the white globular light fixed on the crosstrees was not hidden by the sails or spars of the smack, but was visible astern, there has been a substantial compliance with the regulation. I, however, do not think that contention can successfully be maintained. I think the view of the Legislature in laying down this regulation was something very different from a light carried in the forepart of the vessel, even assuming it to be visible astern.

It has then been said that the steamer is also to blame. As to those on the steamer not seeing the smack's light, I think that it was so obscured by the smack's sails as not to be visible to them. We are satisfied that there was a good look-out on the steamer. The light of another steamer had just previously been seen, and we think it impossible that the smack's light, which is admitted by those on board the steamer to have been a good light, should not have been seen had it been visible. There has been some discussion as to the way in which this light was carried. However, taking the view I do, it is not necessary to decide that. Wherever it was, I think that it was obscured from those on the steamer until the smack had been turned round by the force of the blow. Then arises a further question. Assuming that the smack's light was obscured, ought not those on the steamer to have seen the smack's sails at an earlier period and perhaps in time to have avoided the collision? I have considered that matter, and I must say that where it is the duty of a vessel to carry or shew lights, and those lights are not carried where they are visible or are not shown, I do not think the court ought to be extremely nice in finding another vessel to blame because she has failed to see her within a few yards of the distance when she ought first to have been seen. It is then said that the steamer in crossing a fishing ground at full speed was going at an improper rate. I, however, do not think that her speed under the circumstances was such a rate of speed as to constitute negligent navigation. On the whole, therefore, I come to the conclusion that the smack must be pronounced alone to blame for this collision. *Judgment for the defendants.*

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

Solicitors for the defendants, *Stokes, Saunders*, and *Stokes*.

Tuesday, June 10, 1884.

(Before BUTT, J.)

THE BOWESFIELD. (*a*)

Collision—Loss of life—Action in rem—Lord Campbell's Act (9 *&* 10 *Vict. c.* 93)*—Amendment of writ—Practice—Order XVI., r.* 11.

Plaintiffs commenced an action in rem under Lord Campbell's Act on the 4th Jan. 1884 *in respect of loss of life by collision at sea on the* 10*th Jan.* 1888. *After the* 10*th Jan.* 1884, *it having been decided in the interim by the Court of Appeal that the Admiralty Court had no jurisdiction in such actions, the plaintiffs applied to add as defendants the owners of the wrongdoing ship personally.*

Application refused upon the ground that, under the provisions of Order XVI., r. 11, *proceedings against the parties proposed to be added would only be deemed to have commenced from the date of the service upon them of the writ of summons, and hence the action would not have been commenced against them within the time provided by Lord Campbell's Act, and the court being of opinion that it had no power to add parties as defendants in personam in an action in rem, thought it ought not to make the order merely because the objection as to time was an objection which ought strictly to be taken at a later stage.*

THIS was a motion by the plaintiffs in an action *in rem* under Lord Campbell's Act to amend their writ of summons by adding the names of the registered owners of the steamship *Bowesfield* as defendants in the action.

The collision, out of which the action arose, occurred between the schooner *Laura* and the British steamship *Bowesfield*, on the 10th Jan. 1883, in the Straits of Dover. By reason of the collision Carl Bjorn Pedersen and Axel Pedersen, two of the crew of the *Laura*, were alleged to have been drowned.

On the 4th Jan. 1884 the legal personal representatives of Carl Bjorn Pedersen and Axel Pederson brought an action *in rem* under Lord Campbell's Act against the owners of the *Bowesfield* to recover damages sustained by the deaths of the said Carl Bjorn Pedersen and Axel Pedersen.

The *Bowesfield* was never arrested, in consequence of her owners on the 17th Jan. 1884 undertaking to enter an appearance in the action.

Owing to the decision of the Court of Appeal in *The Vera Cruz* (51 L. T. Rep. N. S. 104; 9 P. Div. 96), that the Admiralty Division has no jurisdiction to entertain an action *in rem* under Lord Campbell's Act, the plaintiffs took out a summons on the 14th May 1883 before the registrar to amend the writ of summons by adding the names of the registered owners of the *Bowesfield* as defendants. On this summons coming on for hearing the registrar refused to make the order and condemned the plaintiffs in the costs of the summons. Thereupon the plaintiffs took out a similar summons before the judge in chambers, who upon it coming before him referred it into court.

Lord Campbell's Act (9 & 10 Vict. c. 93), s. 3, is as follows:

> Provided always and be it enacted, that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

T. T. Bucknill, on behalf of the plaintiffs, in support of the motion.—This application is made in consequence of the decision of the Court of Appeal in *The Vera Cruz* (*ubi sup.*), where it was held that no action *in rem* would lie under Lord Campbell's Act. The plaintiffs, therefore, wish to add the owners of the *Bowesfield* under the provi-

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

sions of Order XVI., r. 11. (*a*). [BUTT, J.—Can you say that you have brought an action against them within the twelve months required by Lord Campbell's Act?] I must say that or fail. [BUTT, J.—Then do you say that an action against the ship is an action against the parties owning the ship?] According to the form of the writ it is addressed to the "owners and parties interested in the ship or vessel A. B." It is to be noticed that in this particular case the ship was never arrested and the owners undertook to put in an appearance. [BUTT, J.—You want to turn an action *in rem* into an action *in personam*. I do not think that ever has been done.] In an action of possession the court has directed that the managing owner should appear as defendant. [BUTT, J.—Can you refer me to any case in which the court has engrafted parties on to an action *in rem*?] I know of no authority which says it shall not be done, and in a recent case, *The Hollandia* (not reported), Sir James Hannen joined the pilot. It may be that prior to the Judicature Act this could not be done, but I submit that your Lordship now has the power under Order XVI., r. 11., the important words of which are, "in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause of matter." [BUTT, J.—I can add a pilot under this order upon the ground that you cannot do effective justice without it. Dr. *Phillimore*, as *amicus curiæ*, referred to the case of *The Hope* (1 W. Rob. 154), where Dr. Lushington had expressed an opinion that it was not competent for the court to engraft upon a proceeding *in rem* a personal action against the master.] In two cases subsequent to the Judicature Act owners have been added personally to an action *in rem*:

The Native Pearl, 3 Asp. Mar. Law Cas. 515; 37 L. T. Rep. N. S. 542;

The Annandale, 3 Asp. Mar. Law Cas. 489; 2 P. Div. 179; 37 L. T. Rep. N. S. 364.

According to the note at p. 23 of Coote's Admiralty Practice, 2nd edit., the same thing could have been done prior to the Judicature Act. (*b*) [BUTT, J.—That I doubt. Your difficulty here seems to me that, having got an action which is useless, you are asking me to turn it from an action *in rem* into an action *in personam*. I do not think that is contemplated by the rule. What you are seeking to do is to deprive the defendants of the benefit of the provision in Lord Campbell's Act which says the action shall be brought within twelve months.]

J. P. Aspinall for the defendants *contra*.—*The Native Pearl* (*ubi sup.*) is hardly a binding authority in this case, because the action there was an action *in rem* under the Admiralty Court Act not to enforce a maritime lien, but merely a right against owners commencing from the date of action. In the present case the action is an action *in rem* irrespective of statute. Moreover, that action was a default proceeding, and hence the addition of the defendant was not argued. Even assuming the present application was acceded to, the plaintiffs would be out of time because by the provisions of Order XVI. r. 11, the proceedings as against the party added are to be deemed to have begun only on the service of the writ or notice.

Bucknill in reply.—This is not the proper time to take this last objection, though it may well be a question hereafter. [BUTT, J.—That is very true, but you must remember that before my attention was called to those words I was against you, and although I am anxious to prevent a great injustice being done by reason of this lapse of time, I can now see no reason for straining my first impression and acceding to your application.] Inasmuch as the ship was never arrested, the parties have really appeared personally. [BUTT, J.—No, they have not. They only appear to protect their interest in the *res*. They are not personally defendants.]

BUTT, J.—I have very grave doubts indeed whether this is a matter over which I have power to act in the way I am now asked. However, I should have been strongly disposed to have gone counter to the inclination in my own mind had I thought that it would prevent the objection as to time being urged and availing the defendants in their contention. But it seems to me that it would avail, and I therefore must act upon what was my impression at the outset and refuse to make the order.

Aspinall asked for costs.

BUTT, J.—Had I made the order it must have been upon payment of costs by the defendants, as the necessity for doing so was caused by their mistake. They must, therefore, pay the costs.

Motion refused.

Solicitors for the plaintiffs, *Ingledew, Ince*, and *Colt*.

Solicitors for the defendants, *Fielder* and *Sumner*.

(*a*) Order XVI., r. 11, is as follows: "No cause or matter shall be defeated by reason of the mis-joinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff, under any disability, without his own consent in writing thereto. Every party whose name is so added as defendant shall be served with a writ of summons or notice in manner hereinafter mentioned, or in such manner as may be prescribed by any special order, and the proceedings as against such party shall be deemed to have begun only on the service of such writ or notice."—ED.

(*b*) The note referred to is as follows: "It would seem that, at one period of the practice of the Admiralty, a plaintiff might take proceedings *in rem* and *in personam* at the same time and in the same action. The *Formulare Instrumentorum*, a collection of processes in the Admiralty Court, printed under the direction of Sir James Marriott in 1802, gives the form of an action for seamen's wages against a ship and a master jointly."—ED.

HOUSE OF LORDS.

Feb. 25, 26, *and March* 17, 1884.

(Before the LORD CHANCELLOR (Selborne), LORDS BLACKBURN and WATSON.)

BIRRELL *v.* DRYER. (*a*)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Marine insurance — Time policy — Warranty — Ambiguity—Maxim, Fortius contra proferentem —Judicial notice.

Whether the underwriters or the owners are to be considered as the proferentes in regard to a condition in a policy of insurance, depends upon the character and substance of the particular condition.

The respondents, shipowners, claimed against the appellants, the underwriters of a time policy of insurance, as for a total loss, and the appellants resisted the claim on the ground of a breach of a warranty in the policy. The warranty was "No St. Lawrence" between certain dates, and it was admitted that the vessel had navigated the gulf of St. Lawrence within the prohibited time, but the owners contended that the warranty applied only to the river *St. Lawrence. It was proved that the navigation of the gulf was dangerous at that season, but less so than that of the river.*

Held (reversing the judgment of the court below), that, in the absence of any evidence to that effect, the words of the warranty disclosed no ambiguity or uncertainty sufficient to prevent the application of the ordinary rules of construction as to negative words, and that both the gulf and the river were prohibited.

A court should take judicial notice of the geographical positions of, and general names applied to a district as shown on the Admiralty chart.

THIS was an appeal from a judgment of the majority of the Second Division of the Court of Session in Scotland, consisting of the Lord Justice Clerk (Lord Moncrieff), Lords Young and Rutherfurd Clark (Lord Craighill dissenting). which had reversed a judgment of the Lord Ordinary (McLaren). The case is reported in 10 Court Sess. Cas. 4th series, 585; and 20 Sc. L. Rep. 385.

The action was brought by the respondents, who were shipowners, against the appellants, who were underwriters of a policy of insurance, under circumstances which appear in the head-note above and in the judgments of their Lordships, where also the arguments are sufficiently referred to.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *Cohen*, Q.C., and *Hollams* appeared for the appellants.

The *Lord Advocate* (Balfour, Q.C.) and *Barnes* for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 17.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Selborne).—My Lords: The question on this appeal is whether the words "warranted no St. Lawrence between the 1st Oct. and the 1st April" in a time policy on the respondents' ship *L. de V. Chipman* effected with underwriters of Glasgow on the 8th June, 1878, for the twelve months from 29th May 1878 to 28th May 1879, include the Gulf of St. Lawrence or are confined to the river of that name? Many witnesses were examined on both sides to show in what sense they understood these words, and thought that others ought to understand them, but none of those witnesses proved that they bore either the one sense or the other, according to any local or general usage; nor were they able to refer to any instances in which the question had practically arisen, and had been practically determined. Conflicting opinions of individuals, as to the proper interpretation of words in a written contract, would be entitled to no weight, even if it were clear that they were admissible. Your Lordships have, therefore, to consider whether the ordinary rules and principals of construction do, or do not, enable you to ascertain the subject to which these words apply, having regard to those extrinsic facts which are either within your judicial cognisance, or sufficiently established by the evidence. The facts of which I think your Lordships are entitled to take judicial notice, independently of evidence, are these: The great river which discharges the waters of the North American lakes, and the gulf into which it flows, both bear the name of St. Lawrence. There is a Cape St. Lawrence at the main southern entrance into the gulf. The river below Quebec expands into a broad estuary, passing, on each side of the island of Anticosti, into the gulf. The river and the gulf are thus naturally and immediately connected with each other, the access to and the outlet from the river being through the gulf, which is a large water-space, landlocked between the west coast of Newfoundland and the southern, eastern, and northern shores of Canada, New Brunswick, and Nova Scotia, having within it the considerable islands of Anticosti, Prince Edward's Island, and Cape Breton, and connected with the Atlantic Ocean by several channels, of which all but one are narrow. If the words "St. Lawrence" were preceded by the definite article, a noun substantive in the singular number must be understood, which, I think, could only be the "river"; and it would not, in my opinion, be consistent either with the popular or with the geographical use of the word "estuary," which means the tidal part of a river, to regard the whole waters of the gulf as forming part of the estuary, properly so called, of the river St. Lawrence. Here, however, the words are not "the St. Lawrence," they are negative, "no St. Lawrence."

The other material facts, established by the evidence, are these. The navigation of the river St. Lawrence is open, and generally safe, from about the beginning of April till October, after which it becomes dangerous, chiefly from its liability to be impeded by frost, which often sets in suddenly and rapidly. After the middle of November vessels cannot remain there, except at the risk of being frozen in for the winter; and from the beginning of December till about April the navigation is, in ordinary seasons, entirely closed. At the end of March or the beginning of April the ice breaks up and descends into the gulf. The navigation of the gulf is never absolutely closed, but the harbours and narrow waters round its shores, on the south side as well as elsewhere, are often blocked up, or much impeded, in the winter by ice. Ships with grain and other cargo continue to sail from the Bay of

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Chaleur, from Miramichi, and from Prince Edward's Island, for some time after the river is closed, and sealing vessels visit the gulf during the winter. "As a general rule," according to the book called "the St. Lawrence Pilot," quoted by one of the appellants' witnesses, "the navigation is not considered safe, "even in the southern part of the gulf, after the first week in December or before the 15th of April." "From about January," according to the evidence of one of the respondents' witnesses, "the gulf is practically closed," by which I understand closed to vessels of any considerable burthen engaged in the ordinary trades of those ports. During this winter season the gulf is dangerous, (though most of the witnesses consider its dangers to be less than those of the river), chiefly from fogs and from snowstorms, which are very dense and frequent. These dangers are enhanced to ships engaged in the usual trade of that region by the nature of their cargoes—timber, and more especially grain; and though the same kind of weather is also met with in the same season outside, upon the banks of Newfoundland, the danger in the gulf is greater because there is less sea-room there. Besides this the Anticosti lights are all put out in the middle of December, and, as the winter advances, the Belle Isle light, and all others of any consequence in the gulf, except some small local lights and that of St. Paul's, twelve or thirteen miles from Cape North, are also extinguished. As to the risks of this navigation from an insurer's point of view, there is a general consent among the witnesses on both sides. [His Lordship here quoted the evidence of several witnesses to the effect that the navigation both of the gulf and river St. Lawrence was especially dangerous during the winter months, and that they were much shunned by underwriters during that period.] No evidence was given to show that any such insurance as that now in question could have been effected on similar terms (10 guineas per cent. premium) by a policy so expressed as unequivocally to leave the gulf open to the vessel insured during the prohibited months; and it is significant that two of the respondents' witnesses, who had been in the habit of insuring by policies in the form now in question, which they say they interpret as prohibiting the river navigation only, have themselves, since the meaning of the warranty was brought into controversy by the present action, been obliged to have their policies made out in an altered form, expressly excluding the gulf. Reading this contract of insurance in the light of the relevant facts, it appears to me that there are two subjects, distinguishable from but closely connected with each other, to both of which the descriptive words "St. Lawrence" may apply, and that there is nothing to confine them to the one rather than to the other of those subjects. The office of the negative form of expression "no St. Lawrence" is not to define, but is to prohibit or exclude. It occurs in a contract for the purposes and objects of which it is reasonable and probable that both the gulf and the river should have been meant to be excluded. The reasons for such exclusion during the prohibited months are applicable to both, though in different degrees at different times during that period. I agree, under these circumstances, with the opinion and conclusion of the Lord Ordinary. I do not think that the evidence discloses any ambiguity or uncertainty sufficient to prevent the application to this case of the ordinary rules and principles of construction; and, according to those rules and principles, the whole St. Lawrence navigation, both of gulf and river, is, in my judgment, within the fair and natural meaning of these negative words, and is therefore prohibited during the months in question. There does not appear to me to be any necessity for resorting to presumptions in favour of or against either party, whether founded on the rule *Fortius contra proferentem*, or on the onus of proving an exception from the general affirmative terms of this contract. I therefore move your Lordships to reverse the interlocutor appealed from, and to restore that of the Lord Ordinary with costs.

Lord BLACKBURN.—My Lords: I also think that the judgment of the Lord Ordinary was right. The contract is in a time policy for a year, in which is indorsed as part of the contract "warranted no St. Lawrence between the 1st Oct. and the 1st April." No one can, I think, doubt that the document would, like every policy of marine insurance, be very difficult to construe if it were now for the first time brought before a court, but there is no dispute as to the meaning and effect of the contract. The question, as the Lord Ordinary, I think very accurately, says, is not one of degree but of identification. If the ship was during the prohibited time within the district described by the words "St. Lawrence," as here used, there is a defence. It is now admitted that she was within the Gulf of St. Lawrence, and was not within the river of St. Lawrence, and one question is whether "no St. Lawrence" means neither in the gulf nor the river, or means only not in the river. In *Uhde* v. *Walter* (3 Camp. 16), where the ship was insured from London to "any port in the Baltic," and was lost when proceeding to Revel, in the Gulf of Finland, Lord Ellenborough, C.J. said: "I think it is clearly competent to the plaintiff to prove that the 'Baltic' is *nomen generale*, comprehending in common understanding the gulfs and inlets which communicate with the sea, laid down as 'the Baltic' in geographical charts. If the Gulf of Finland is to be considered as the Baltic the ship was sailing on the voyage insured at the time of the capture, and there can be no objection to admit evidence as to the understood limits of any particular sea." And, independent of the high authority of Lord Ellenborough, I think that in applying a local description to the particular spot, some evidence must be admissible. But the evidence received here does not go further than to show that several persons, having no better means of judging than the court, have formed an opinion one way, and several others have formed the opposite opinion, and it leaves the case as it was before.

Reliance was placed by some of the judges below on the maxim *Fortius contra proferentem*. I do not think that the description of the district excluded can be considered as the words of one party more than of the other. The shipowner, knowing where he is likely to employ his ship, and that he does not intend to use her in some district, generally puts on the ship a description of that district in order to induce the underwriters to agree to a lower premium. I am by no means prepared to say that in some cases, where the description of the excepted district is special, it may not be right to say that these are the words of the assured. But

where the description is, like this, general, I think that the assured has a right to suppose that the underwriters understand that description as they ought to understand it. It is alike for the interest of the assured and the underwriters that the description should be definite, and that is alluded to in the warranty "no British America between the 1st Oct. and the 1st April." No one could imagine that there was a material difference in the risk between a voyage from the most northern port in the United States and one from the most southern port of British North America, or between a voyage commenced on the last day which is not prohibited and one commenced on the first day which is prohibited; but a fixed limit is agreed on to prevent disputes. I think that the court should take judicial notice of the geographical position and the general names applied to such districts as this—in short, of all that we see in the Admiralty chart of this part of the sea. I do not know whether the first discoverers of America called the Gulf that of St. Lawrence, and then gave the same name to the river, or *vice versâ*, nor do I think it material. The name has for many years been applied to both. I think that, applying the name as we find it used in charts and by geographers to a well-defined district, it includes both the river and the gulf.

Lord WATSON,—My Lords: The appellants in their pleadings allege as a matter of fact that, by the general custom of merchants, the words "warranted no St. Lawrence" in a policy of marine insurance include both the gulf and the river of that name. The respondents, on the other hand, aver that, according to mercantile custom, these words refer exclusively to the river St. Lawrence, and also that, assuming the truth of the appellant's allegations, the *L. de V. Chipman* was not navigated within the limits of the gulf. In the court below the parties were allowed to lead proof of their respective averments; but in the arguments addressed to the House, it was admitted on both sides that the appellants and respondents have equally failed to prove the statements which they made on record. It must, therefore, be taken as an established fact that there was s breach of warranty through the vessel being navigated within the limits of the Gulf of St. Lawrence during the voyage in the course of which she was lost, if it be held that the warranty applies to the gulf. In that case it follows that the respondents cannot recover under the policy either the average loss accruing during the deviation, or for the total loss which subsequently occurred. In the absence of evidence sufficient to show that a technical meaning has been attached to the words "no St. Lawrence," or, it is accurate to say, in consequence of its being established by the evidence that the words have no technical meaning, it becomes necessary for the court to construe them; and, in construing them, I apprehend that it is perfectly legitimate to take into account such extrinsic facts as the parties themselves either had, or must be held to have had, in view when they entered into the contract of insurance. The evidence of both parties was properly directed to the statements of fact upon which they relied in their record, to which the proof allowed was necessarily limited, and the result is that upon various matters, which it might have been of importance to investigate, we have no information. But there are certain facts established by the respondents' as well as the appellants' evidence, which appear to me to be very useful in considering what significance must be attached to the expression "no St. Lawrence." These facts are (1) that there is a gulf, well defined by the peculiar contour of its shores, into which a great navigable river debouches, and that both gulf and river bear the same name, St. Lawrence; (2) that, although there are ports within the gulf to which there is a separate shipping trade, yet, for many trading purposes, the gulf and the river are parts of the same navigation; and (3) that during several months of the year the navigation is exceptionally dangerous.

Two at least of the three learned judges who formed the majority of the Second Division have held that "no St. Lawrence" must be applied to the river only, on the ground that the expression is ambiguous, and that the ambiguity must be solved adversely to the appellants, because "the underwriters are the *proferentes* with regard to a policy of insurance." That the underwriters may be rightly held to be the *proferentes* with regard to many conditions in a policy I do not doubt; whether they ought to be so held depends, in each case, upon the character and substance of the condition. In the present case there are many considerations which lead to the inference that the clause in question is not one constructed and inserted by the appellants alone, and for their own protection merely. It was, in point of fact, inserted in the contract by the agent of the respondents; and it is in form a warranty by them that their vessel will not be navigated in certain waters—a matter which it was entirely within their power to regulate. These considerations point rather to the respondents themselves being the *proferentes*; but I think the substance of the warranty must be looked to, and that in substance its authorship is attributable to both parties alike. The main object of the clause is to define the limits within which the vessel is to be kept while she is navigated under the policy, and that appears to me to be as much the concern of the shipowner as of the underwriters. To define the limits within which the vessel is to be navigated for the purpose of a time policy is, in principle, precisely the same thing as to describe the voyage for which a vessel is insured under an ordinary policy. In both cases it is a definition of the subject-matter of the insurance, a term of the contract, the settlement of which must, in my judgment, be regarded, in a case like the present, as the deliberate act of both parties. Although the rule of construction *contra proferentem* may not apply, I think that it was rightly argued for the respondents that, seeing the clause in question occurs in the shape of an exception from a leading term of the policy which gives the vessel leave to navigate in any waters, it can only receive effect in so far as it is plain and unambiguous. But I am not satisfied that there is any ambiguity, such as will avail the respondents, to be found in the clause when it is read as a whole. The ambiguity, according to the argument of the respondents, consists in this—that the words may denote either the river, or both gulf and river, and according to the view taken by Lord Young, consists in their being applicable either to the river, or to the gulf, or to both. It is not matter of dispute that the name "St. Lawrence" is applicable to the gulf and also to the river

and that, as suggested by Lord Young, it is equally correct to designate the gulf and river as the gulf and river of St. Lawrence; and if one could conceive a case of the words "St. Lawrence" standing by themselves in a policy, without any qualifying context, they certainly would be ambiguous, if not unintelligible. But in the present case any ambiguity which might otherwise have arisen is expelled by the word "no." It is a universal negative, and, in my opinion, excludes all navigable waters, salt or fresh, bearing the name of "St. Lawrence," which can reasonably be held to have been within the contemplation of the parties to the policy. If the river had been the only navigable water in North America known as "St. Lawrence," and there had been elsewhere a gulf of that name, I might have hesitated to hold that the latter was within their contemplation; but the gulf and river of St. Lawrence are so intimately connected, and the perils attendant upon their winter navigation so much akin, that I have come to the conclusion that the warranty must be held to exclude both. Being of the same opinion with the Lord Ordinary and Lord Craighill, I agree with your Lordships that the interlocutor of the Second Division ought to be reversed, and that of the Lord Ordinary restored.

Interlocutor appealed from reversed, and appeal allowed with costs.

Solicitors for the appellants, *Waltons, Bubb,* and *Walton,* for *J.* and *J. Ross,* Edinburgh.

Solicitors for the respondents, *T. Cooper* and *Co.,* for *Archibald* and *Cunningham,* Edinburgh.

Supreme Court of Judicature.

COURT OF APPEAL.

April 22, 23, *and* 28, 1884.

(Before Brett, M.R., Bowen and Fry, L.JJ.)

The Vera Cruz. (*a*)

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

Collision—Lord Campbell's Act (9 *&* 10 *Vict. c.* 93) *Action in rem—Foreign ship—Jurisdiction—Admiralty Court Act* (24 *Vict. c.* 10), *s.* 7—*Limitation of liability—Appeal—Practice.*

The Admiralty Division of the High Court of Justice has no jurisdiction to entertain an action in rem under Lord Campbell's Act, and hence the personal representatives of a deceased person killed by the negligence of those on board a foreign ship, in a collision between that ship and a British ship on waters within Her Majesty's dominions cannot sustain an action in rem against the owners of the foreign ship to recover damages for the loss of the deceased; but, semble (per Brett, M.R.), that, if in action for limitation of liability some of the claimants are the persons mentioned in Lord Campbell's Act, the Admiralty Division may entertain the claim.

Although, in consequence of the Court of Appeal being equally divided in opinion, the decision of the court below stands, yet the Court of Appeal is not bound thereby on a subsequent occasion, though, semble (per Brett M.R.), it is otherwise in the case of the House of Lords,

This was an action *in rem* brought under Lord Campbell's Act by Mary Seward, the widow and administratrix of William Seward deceased, late master of the British schooner *Agnes,* against the owner of the Spanish steamship *Vera Cruz,* to recover compensation for the pecuniary loss sustained by the plaintiff in consequence of William Seward's death, which was occasioned by a collision between the *Agnes* and the *Vera Cruz,* on waters within Her Majesty's dominions.

The collision took place in the Crosby Channel, at the entrance to the Mersey, between the Crosby and Formby lightships, on the 12th Aug. 1882.

An action *in rem* had previously been brought against the *Vera Cruz* by the owners of the *Agnes,* to recover damages for the loss of the *Agnes.* In that action the court had found both ships to blame.

The defendant in the present action appeared under protest (*a*), and the following petition on protest against the jurisdiction of the court was filed on his behalf:

1. The plaintiff is a British subject and is resident at or near Ulverstone in the county of Lancaster.

2. The defendant is a subject of His Majesty the King of Spain and is resident within that kingdom.

3. The defendant is the sole owner of the steamship or vessel *Vera Cruz,* which is a Spanish vessel belonging to the port of Bilboa, in Spain, and which is not registered in the United Kingdom of Great Britain.

4. On or about the 12th Aug. 1882, the *Vera Cruz* was in the Crosby Channel between the Crosby and Formby lightships, on a voyage from Liverpool to ports in Spain and elsewhere, and whilst in the prosecution of the said voyage, and when at the place aforesaid, the *Vera Cruz* came into collision with the British vessel, the schooner *Agnes,* and by reason of the said collision the *Agnes* was sunk and her master and some of her crew and passengers were drowned.

5. The *Vera Cruz* was in the port of Liverpool in the month of July 1883.

6. On or about the 13th July 1883, the *Vera Cruz* was arrested in a suit *in rem* instituted in the Admiralty Division of this honourable court by the owners of the schooner *Agnes* to recover damages sustained by the owners of the *Agnes* by reason of the aforesaid collision. The present action *in rem* was commenced by the plaintiff on the 23rd Nov. 1882, and the indorsement on the said writ is in the words and figures following: "The plain-

(*a*) Reported by J. P. Aspinall, and F. W. Raikes Esqrs., Barristers-at-Law.

(*a*) It would appear from this case that the Admiralty Court procedure of appearance under protest is not abolished by the Rules of the Supreme Court 1883. By these rules it is enacted that "The orders and rules mentioned in Appendix O. hereto are hereby annulled, and the following orders and rules shall stand in lieu thereof." In Appendix O. are contained the rules, orders, and regulations for the High Court of Admiralty 1859 and 1871, by which it was directed (*inter alia*) that "If the proctor intends to object to the jurisdiction of the court, the appearance may be entered under protest." The result of this would at first sight appear to be that this mode of procedure was abolished were it not for Order LXXII., r. 2, which states that, "Where no other provision is made by the Acts or these Rules, the present procedure and practice remain in force;" and on reference to the rules it will be found that no provision for appearance under protest is made. However, by Order XII., r. 30, a defendant is entitled to enter a "conditional" appearance, and then move to set aside the service of the writ upon him, a procedure similar in principle to appearance under protest. On this subject see the cases of *The Pieve Superiore* (vol. 2, p. 319; L. Rep. 5 P. C. 482; *The Vivar* (vol. 3, p. 308; L. Rep. 2 P. Div. 29), *The City of Mecca* (vol. 4, p. 412; L. Rep. 6 P. Div. 106), and *The Leon XIII.* (vol. 5, p. 73 L. Rep. 8 P. Div. 121).

tiff as administratrix, with the will annexed of her late husband William Seward, deceased, late master of the vessel *Agnes*, claims £1000 against the owners of the ship or vessel *Vera Cruz* and her freight for damages for the loss of the said William Seward's life, occasioned by a collision which took place at the mouth of the Mersey in the month of Aug. 1882, and the sum of £3 3s. for costs. If the amount claimed is paid to the plaintiff or her solicitor or agents within four days from the service hereof, further proceedings will be stayed."

7. Bail was given in the said first-mentioned action and the *Vera Cruz* was thereupon released and sailed from England on or about the 17th July, 1883.

8. This honourable court has no jurisdiction to entertain the said cause of damages for loss of life, and by reason thereof the service of the said writ on the *Vera Cruz* is in the circumstances stated in this petition irregular and void.

The defendants therefore pray this honourable court to pronounce against the jurisdiction of this honourable court and to dismiss this suit with damages and costs.

The allegations in the protest, with the exception of paragraph 8, were admitted by the plaintiffs.

On the petition coming on for hearing, Butt, J., being bound by the decision in *The Franconia* (3 Asp. Mar. Law Cas. 435; 36 L. T. Rep. N. S. 640; 2 P. Div. 163), dismissed it without expressing any opinion on the subject. In *The Franconia* (*ubi sup.*), in consequence of the Court of Appeal being equally divided, the decision of Sir R. Phillimore, that the Admiralty Division had jurisdiction to entertain an action *in rem* under Lord Campbell's Act, stood.

The defendant was now appealing from Butt, J.'s decision. The following Acts of Parliament were referred to in the course of the argument:

The preamble and sect. 2 of Lord Campbell's Act:

Whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

2. And be it enacted that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the beforementioned parties in such shares as the jury by their verdict shall find and direct.

Sect. 7 of the Admiralty Court Act 1861:

The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

Dr. *Phillimore* and *Bucknill* for the appellant, the owner of the *Vera Cruz*.—It is submitted that the decision of Sir Robert Phillimore in *The Franconia* (3 Asp. Mar. Law Cas. 435; 36 L. T. Rep. N. S. 640; 2 P. Div. 163) is wrong, and should be reversed. The fact that, owing to an equal division of opinion among the judges of this court, that decision stood, does not now preclude this court from reversing it. The words "damage done" in the Admiralty Court Act 1861, s. 7, do not cover a claim under Lord Campbell's Act. Notwithstanding the decisions in

The Sylph, 3 Mar. Law Cas. O. S. 37; 17 L. T. Rep. N. S. 519; L. Rep. 2 Ad. & Ecc. 24;
The Explorer, 3 Mar. Law Cas. O. S. 507; 23 L. T. Rep. N. S. 405; L. Rep. 3 Ad. & Ecc. 289;
The Beta, 20 L. T. Rep. N. S. 988; 2 P. C. N. S. 447;
The Guldfaxe, 3 Mar. Law. Cas. O. S. 201; 19 L. T. Rep. N. S. 748; L. Rep. 2 Ad. & Ecc. 325;

it is to be noticed that none of them are binding on this court, and moreover the Queen's Bench has decided otherwise:

Smith v. *Brown*, 1 Asp. Mar. Law Cas. 56; 24 L. T Rep. N. S. 808; L. Rep. 6 Q. B. 729;
James v. *London and South-Western Railway Company*, 1 Asp. Mar. Law Cas. 428; 27 L. T. Rep. N. S. 382; L. Rep. 7 Ex. 187, 287;
Simpson v. *Blues*, 1 Asp. Mar. Law Cas. 326; 26 L. T. Rep. N. S. 697; L. Rep. 7 C. P. 290.

It is true that, by reason of the Merchant Shipping Acts allowing limitation of liability in cases of loss of life, claims under Lord Campbell's Act may be entertained by the Chancery and Admiralty Divisions, but that would only be so in cases where the owners of the wrongdoing ship had admitted their liability:

The London and South-Western Railway Company v. *James*, L. Rep. 8 Ch. App. 241; 1 Asp. Mar. Law Cas. 526; 38 L. T. Rep. N. S. 48:
Glaholm v. *Barker*, L. Rep. 1 Ch. App. Cas. 223 14 L. T. Rep. N. S. 880; 2 Mar. Law Cas. O. S. 298, 380.

An English statute ought not, in the absence of express words, to be construed so as to impose liabilities upon foreigners for acts committed outside the territorial jurisdiction of England. The mode of assessing damages under Lord Campbell's Act is opposed to the contention that the Legislature intended that claims under that Act might be enforced by a proceeding *in rem*.

French for the respondent. — The words "damage done" cover personal injury and loss of life. If so, there has been damage done to the widow of the deceased, inasmuch as she, by her husband's death, has suffered pecuniary loss:

The Beta (*ubi sup.*);
The Ruckers, 4 C. Rob. 73.

Foreign shipowners can limit their liability for loss of life, and claims under Lord Campbell's Act are entertained in the registry of the Admiralty Division for the purpose of determining what amount the several claimants in respect of damage to ship, life, and effects are respectively to get. If the court has no jurisdiction to entertain these claims, it will be impossible to apply limitation of liability. Again, assume the case of a ship the shares in which belong to what is known as a single ship company; assume she has occasioned loss of life by improper navigation; and assume that subsequently the company goes into liquidation and is wound-up. In order that the Chancery Division may rateably distribute the proceeds of the sale of the ship, it will be necessary that claims under Lord Campbell's Act arising from the "damage done" by the ship should be entertained. If, then, the Admiralty and Chancery Divisions have this indirect jurisdiction, why should the Admiralty Court Act

1861 be so construed as to exclude the direct jurisdiction? The advantages of construing the Act so as to bring the present claim within it are obvious. The proceeding *in rem* gives an easy and effective remedy. A proceeding *in personam*, where the wrongdoing ship belongs to a foreigner, is in many cases practically useless. It is, moreover, submitted that this court is bound by its decision in *The Franconia* (*ubi sup.*). The effect of that decision was to confirm the decision of Sir Robert Phillimore. In the House of Lords, were a decision of this court to stand by reason of an equal division amongst their Lordships, the House of Lords would be bound by that decision on subsequent occasions. If so, the effect of an equal division among the judges of this court has the same result.

Dr. *Phillimore* in reply.—There may be reasons why an equal division in the House of Lords should bind it on subsequent occasions, on the ground that it is the final and ultimate tribunal of all. In the present case the effect of the decision in *The Franconia* (*ubi sup.*) was not to confirm Sir Robert Phillimore's decision, but merely to leave it standing, as if there had been no appeal:

Bright v. *Hutton*, 3 H. of L. Cas. 341;
Ridsdale v. *Clifton*, 2 P. Div. 276; 34 L. T. Rep. N. S. 515;
Thompson v. *Ward*, L. Rep. 6 C. P. 327;
Beamish v. *Beamish*, 9 H. of L. Cas. 274.

Cur. adv. vult.

April 28.—Brett, M. R.—In this case an action has been brought in the Admiralty Division against the owners of the Spanish steamship *Vera Cruz* to recover damages under what is called Lord Campbell's Act; that is, to recover damages on behalf of the relatives of the master of a British ship, who had been killed in a collision between his ship and the *Vera Cruz*. The collision happened, I think, within the realm of England; it happened within the three-mile limit. So far, therefore, it is within the municipal jurisdiction of England. But the owner of the *Vera Cruz* is a foreigner resident abroad, and the manner in which he was brought before the Admiralty Court was by seizing his ship while she was in England; that is to say, by the process *in rem*, by means of the seizure of the ship. He himself was not in England, so far as I understand, after the accident, and he never was served personally with a writ, and there was nobody on his behalf who could be served personally, and he never even had notice of this suit. Upon that a protest is entered against the jurisdiction of the court, and Butt, J., without expressing any opinion of his own, felt himself bound by previous decisions of the Court of Admiralty, and overruled the protest, whereupon there is an appeal to this court. Now, here the first point taken was whether this court was bound by a previous decision in the case of *The Franconia* (*ubi sup.*), where, upon an appeal on a similar point, this court was equally divided, the result being that the judgment of the Court of Admiralty, in favour of the jurisdiction, stood. It was now argued that in this Court, there having been a case before in which the result of the judgment of this court was that the jurisdiction *in rem* must be in these cases allowed, this court was therefore bound by that decision. That raises the question whether in any court below the House of Lords the court is bound by a decision, either of its own, or of any other court, where that decision is given by an equal division of the judge who heard the case. As far as my experience goes, when there were three great courts in Westminster Hall, each of them, by way of comity, considered itself bound by a former decision of either of the three courts, being all courts of co-ordinate jurisdiction. But there is no law, either at common law or by statute, which says that a court is bound by the decision of another court. It was traditional comity among the judges in order to enforce uniform decision. Hence, if a court of co-ordinate jurisdiction had come to a determination, the other courts followed it. But that was only comity among the judges. So in the same way there is no law, either at common law or by statute, by which a court is bound by a former judgment of its own. But when a court is equally divided the comity does not exist. Which of the two sides is the one which the court is bound to obey as the predominating authority? Suppose there are four judges, and they are equally divided in opinion, all of those four judges are of equal authority. There is nothing under those circumstances, as it seems to me, upon which comity can be founded. I am perfectly certain myself that, if the reports be examined, it will be found that it was invariable where either a court of co-ordinate jurisdiction or the same court had given a former decision only by equal division of its members, then the court which came afterwards had to elect and choose which of the two equal divisions they agreed with, and that it did not consider itself bound by the former decision. With regard to the House of Lords, it probably is, and I believe is, different, but that is because it is the last and ultimate court. I am not certain that it is conclusive there, but I am inclined to think that it is. The reason for that is that, where a decision has been given by the highest tribunal of all, people must take that to be the law, and it is not to be questioned afterwards, otherwise there would be vacillation in the law. Therefore, I am clear in my own mind that we are not bound by the decision that was formerly given by this court, of which I myself was one of the four judges. I was therefore glad that two of my brother judges here were not members of that court, so that their minds might be brought, unbiassed by any former opinion, to the important question which is raised in this case. I may say for myself that, had I been now persuaded, I would, without a moment's hesitation, have altered my previous view.

Now, the case depends upon this: unless jurisdiction is given by the 7th section of the Admiralty Court Act 1861, there is no jurisdiction. It is important to remember that this is not a case in which the shipowner has been personally served in England so that an action in the Queen's Bench Division might be entertained against him, and that an action has been brought in the Admiralty Division. It would then be an action over which the High Court would have jurisdiction, and the judge of the Admiralty Court, being a judge of the High Court, if other things were in conformity and other conditions were fulfilled, might try the action. It would only then be a question of removing the action from the Admiralty Division to the Queen's Bench

Division. That would not be a question of jurisdiction. But here, unless the claim is within the 7th section of the Admiralty Court Act 1861, there is no jurisdiction. The answer to this question depends, it seems to me, upon this proposition: Does that section apply to the grievance for which a remedy is given in Lord Campbell's Act? The answer to that question depends upon the construction of both those Acts of Parliament. I will first of all take the Admiralty Court Act, the words of which are "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." That Act of Parliament was passed in 1861. In 1860 the case of *The Bilbao* (Lush. 149; 1 Mar. Law Cas. O. S. 5; 3 L. T. Rep. N. S. 338) came before Dr. Lushington. There damage had been done by a foreign ship to a barge either in the Thames or the Medway, and the question was whether the then existing Admiralty statutes gave the Admiralty Court jurisdiction in such a case. Dr. Lushington there pointed out that the then existing Admiralty Act did not give him jurisdiction, because it only gave jurisdiction in the case of damage done to a ship, and not damage done by a ship. In 1861 the present Act of Parliament is passed, in which the words are "any claim for damage done by any ship." In 1862 the case of *The Malvina* (Lush. 493; 1 Mar. Law Cas. O. S. 218; 6 L. T. Rep. N. S. 369), in which there had been damage done by a ship, came before Dr. Lushington. That learned judge there said that it seemed to him that the 7th section of the Admiralty Court Act of 1861 was passed for the purpose of meeting this case, the other statute applying only to damage done to a ship. Now what is the meaning of this 7th section, taking into account the former statute. The words are, "shall have jurisdiction over any claim for damage done by any ship." Is the effect of that to give a jurisdiction in respect of any claim in the nature of an action on the case? It seems to me that the claim is for damage where the ship is the acting instrument of the damage. If you read the section in that way it comes to this: "Shall have jurisdiction over any cause of action, which cause of action is damage done physically by a ship." If that be so, the claim is for damages arising out of a cause of action, which cause of action is a physical injury done to something by the ship. I am not prepared to say that it is confined to damage done to property. I am not prepared to say that, if by mismanagement of a ship her bowsprit or some other part o her were to strike a man on his person and injure him, that would not be damage done by a ship within the meaning of this section. It clearly does not apply to damage done to a man in a ship, but to damage done by a ship, where, as I say, the ship itself is the physical instrument by which the injury is done, and where the cause of action is the physical injury. As I said before, I do not confine the section to property, but to a case where the ship is the instrument by which the damage or injury is caused. If that be the true meaning of the section, what is the cause of action which is given by Lord Campbell's Act? Is it such a cause of action? It seems to me it is not. Lord Campbell's Act was passed to meet cases where a person received what is called a personal injury, that is, injury not to his estate, but to himself as a person, in order to obviate the hardships arising from the doctrine of law that the cause of action died with the person. That was the law prior to Lord Campbell's Act, and Lord Campbell's Act has not altered that maxim or its application. A personal cause of action dies just as much now as it did before. If it be slander, the action dies. If it be personal injury such as breaking a man's arm or leg, or otherwise injuring him, it dies with him. The executor cannot bring an action as executor for the injury to the estate of the deceased. The man has been killed, and there is no right of action. His executor cannot bring an action for the benefit either of his estate or for the benefit of his devisees. What Lord Campbell's Act does is to give a right of action to an executor or administrator, not as representing the deceased, but as representing other people who before had no right of action. But to give such a right of action there must be something more than the killing of the man, and the executor or administrator is a mere instrument to maintain the action on behalf of other people who have sustained pecuniary damage by the killing of the deceased. The executor acts for these people, and not for the deceased. Now what is it gives this cause of action? The death of the deceased caused by the negligence of the defendant is part of the cause of action; but by itself it is not the cause of action. It is necessary that there should be, owing to the death of the deceased, an injury done to those persons on whose behalf the action is brought, which injury has been held to be on the construction of the Act a pecuniary injury. Therefore the cause of action is not the death of the deceased caused by the negligence of the defendant, but, although that is a necessary part of the cause of action, the real cause of action under Lord Campbell's Act is the pecuniary loss to the persons defined by the Act. The cause of action therefore is not a cause of action for anything done by the ship; that is to say, the thing done by the ship is not the cause of action, and something else is. The thing done by the ship is only an ingredient in the cause of action. If so, the Admiralty Court Act does not apply to this case, and therefore does not give jurisdiction to the Admiralty Court to try directly such an action. I wish to be particular in what I am saying now—to try directly such an action.

But I am not prepared to say that in no case can the Admiralty Court inquire into the amount of damage caused by the death of the deceased through the negligent management of a ship. The Court of Chancery had, and has, jurisdiction to limit the amount of liability of a shipowner to a certain sum per ton of his ship, and if there are several claimants upon the ship to distribute the regulated amount amongst them. But in that case the jurisdiction is given when the liability as to negligence is admitted. That jurisdiction has also passed to the Admiralty Court. In such a suit to distribute the regulated amount per ton amongst several claimants, if any of the claimants is the family of the deceased person, as mentioned in Lord Campbell's Act, it being necessary to distribute amongst all claimants, it may be, and I am inclined to think it is, that the Admiralty Court or the Court of Chancery, in order to fulfil that which is within their jurisdiction, must entertain claims which, but for that

are not within their direct jurisdiction. If a person had a claim against a shipowner at common law—even under Lord Campbell's Act—which claim might be maintained in any of the other divisions, when it comes indirectly before the Court of Admiralty as a necessary part of its jurisdiction, then the Court of Admiralty must, in order to fulfil that which is within its jurisdiction, entertain a claim which could not be directly but which is thus indirectly brought within its jurisdiction. I cannot lay my hand upon the case at the moment, but I remember having to argue this point before Dr. Lushington. It was not with regard to Lord Campbell's Act, but with regard to a bill of lading or charter-party under circumstances where the Admiralty Court had no direct jurisdiction, and the question came indirectly before the court in a case in which it had jurisdiction. I succeeded there in persuading Dr. Lushington of the truth of the proposition which I am now endeavouring to enunciate, viz., that though the court has not direct jurisdiction, yet, if a matter is brought before it indirectly as a necessary part of its jurisdiction, it must, in order to fulfil the jurisdiction which it has, entertain that which otherwise it would not have the jurisdiction to entertain. In that way a claim under Lord Campbell's Act for personal injury done by a ship would, in my opinion, come before the Admiralty Court in a suit where that suit was brought for the purpose of limiting the liability of the shipowner according to the tonnage of his ship, and where it was necessary for the Admiralty Court, in order to apportion the regulated amount amongst the claimants, to know the particular claim of the parties who were claiming under Lord Campbell's Act. For these reasons I maintain my former opinion, in which Lord Bramwell concurred with me, that the Admiralty Court has not, when a claim under Lord Campbell's Act is brought directly before it, any jurisdiction under the Admiralty Court Act 1861, and if it has no jurisdiction under that Act then it has no jurisdiction at all. I am of opinion, therefore, that the decision of Butt, J., which, as I have before said, is no decision of his must be overruled and this appeal allowed.

Bowen, L.J.—I also think, for the reason given by the Master of the Rolls, that this is a case which is still open to our consideration, notwithstanding the decision in *The Franconia* (*ubi sup.*). Now passing to the main point, I feel satisfied that the Act of 1861 did not give the necessary jurisdiction to the Admiralty Court to enable it to entertain this claim for personal injuries under Lord Campbell's Act, and I therefore agree with the views expressed by Lord Bramwell and the Master of the Rolls in *The Franconia* (*ubi sup.*). Shortly the question is, whether this is a claim for "damage done by a ship." Looking to the history of the legislation on this point, it shows that it is not, and apart from that consideration the obvious meaning of the section is such as to lead me to the same conclusion. The Act gives a right to compensation for "damage done by any ship." That then, and that only, is the cause of action. Now, what does "damage done by any ship" mean? It means damage done by a ship as the noxious instrument, or more correctly speaking, by those in charge of her. But the plaintiff is in this dilemma, that the claim here must be either for the killing of the deceased, or the injury done thereby to his family. But the killing of the deceased *per se* gives the plaintiff no right of action at all, either at law or under Lord Campbell's Act. If then, to escape this horn of the dilemma, the respondent says her claim is for the injury done to the interests of the dead man's family, the claim is not for something done by the ship, but it arises partly from the death which the ship causes, and partly from a combination of circumstances pecuniary and otherwise with which the ship has nothing to do. The injury done to the family cannot therefore be said to be done by the ship.

Fry, L.J.—I concur with the views expressed by the Master of the Rolls and Bowen, L.J. I think that, notwithstanding the case of *The Franconia*, the question raised in this case is still open to us. Bearing in mind the observations of Lord Truro in *Bright* v. *Hutton* (*ubi sup.*), and of Lord Cairns in *Ridsdale* v. *Clifton* (*ubi sup.*), there can be no doubt but that we are at liberty to consider this case, but that we are not bound by *The Franconia*, which only bound the persons who were parties to that action. Now on the point as to jurisdiction, the words in the Admiralty Court Act 1861 are "damages done by any ship." Do those words include injury to the person? I have come to the conclusion that they do, and I concur with James and Baggallay, L.JJ. as to the meaning of the word damages. Secondly, assuming injury to the person is within the meaning of the section, is it sufficiently wide to embrace an action under Lord Campbell's Act? I think not. Take for instance damage done to a barge in the Thames by the bowsprit of a ship, and a person killed by the same thing. In the first case, the injury which is the cause of action is directly caused by the ship. In the second the cause of action is pecuniary injury to the relatives of the deceased, which injury results from the damage done to the deceased by the ship. And it must be admitted even by the plaintiff that this is not an action for "damage done" by the ship, but for pecuniary loss arising out of such damage. In this view I am confirmed by observing the convenience of such a construction, which not only avoids the difficulty as to a trial by jury, but further the conflict between the common law and Admiralty Court rule as to negligence.

Appeal allowed.

Solicitors for plaintiff, *Jackson* and *Evans*.

Solicitors for defendant, *Gregory, Rowcliffes*, and *Co.*

Tuesday, April 29, 1884.

(Before Brett, M.R., Bowen and Fry, L.JJ.)

The Winston.

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Collision—Compulsory pilotage—Passing through the limits of a pilotage district—Exemption—Merchant Shipping Act Amendment Act 1862 (25 & 26 *Vict. c.* 63), *s.* 41.

Where a steamship puts into a port within a pilotage district for the purpose of coaling whilst bound on a voyage between two places outside

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

such district, although she is only passing through such district, she is not exempt from compulsory pilotage under the provisions of sect. 41 *of the Merchant Shipping Act* 1862, *as that section provides that the exemptions shall not extend to ships loading and discharging therein, and such loading and discharging is not confined to cargo but extends to coaling.*

This was an appeal from the judgment of Sir James Hannen in a damage action *in rem* against the steamship *Winston* for damages arising out of a collision between that vessel and the steamship *Warwick Castle* in Dartmouth Harbour, by which he had found that the *Winston* was exempted from blame on account of her being compulsorily in charge of a pilot.

The facts of the case are fully set out in the report of the case in the court below (49 L. T. Rep. N. S. 403; 5 Asp. Mar. Law Cas. 143).

The question at issue which had been decided against the plaintiffs in the court below, and from which the plaintiffs now appealed, was whether a vessel which in passing through a district where pilotage is compulsory, stops within that district for the purpose of coaling only, and not for taking in cargo, is by the provisions of the Merchant Shipping Act 1862, s. 41, compelled to take a pilot; that is, whether the words "loading and discharging" in that section are, or are not, to be construed as relating strictly to cargo.

The section of the Act is as follows:

41. The masters and owners of ships passing through the limits of any pilotage district in the United Kingdom on their voyage between two places, both situate out of such districts, shall be exempted from any obligation to employ a pilot within such district: Provided that the exemption contained in this section shall not apply to ships loading or discharging at any place situate within such district, or at any place situate above such district on the same river or its tributaries.

Cohen, Q.C., *Bruce*, Q.C., and *J. P. Aspinall* for the appellants.—The 41st section of the Merchant Shipping Act 1862 would certainly not apply if the vessel had put in for the purpose of getting a new sail or a new anchor, and it ought not to apply to a loading of coals. The following cases were also cited:

Clyde Navigation Commissioners v. *Barclay*, L. Rep. 1 App. Cas. 790; 3 Asp. Mar. Law Cas. 390; 56 L. T. Rep. N. S. 379;

The General Steam Navigation Company v. *British and Colonial Steam Navigation Company*, L. Rep. 3 Ex. 330; 3 Mar. Law Cas. O. S. 168, 237; 19 L. T. Rep. N. S. 357; 20 Ib. 581; 37 L. J. 194, Ex.; 38 Ib. 97;

The Lion, L. Rep. 2 P. C. 525; 3 Mar. Law Cas. O. S. 133, 266; 18 L. T. Rep. N. S. 803; 37 L. J. 39, Adm.

W. G. F. Phillimore and *Raikes*, for the respondents, were not called upon.

Brett, M.R.—The sole question here is, what is the meaning of 25 & 26 Vict. c. 63, s. 41, as applied to this case. Now, it certainly applies to a place within a pilotage district, which was not the original port of loading or the original port of discharging the ship. It deals with the case of some intermediate part of the voyage. What is the difficulty here? It has been thought extremely hard that, because a ship passed through a portion of the district without any intention of stopping there at all (because the words of the original Act of Parliament speak of being bound to make a signal for and to take a pilot whilst within the district), a pilot should go on board, not for the purpose of amusing himself, but for the purpose of getting pilotage fees, and therefore to remedy this the present Act superseded the 379th section of the Act of 1854, where it was made a part of the exemption that if the ship was passing through she was exempt, but if she anchored she would not be exempt. Now I have no doubt that some ingenious person immediately argued thus upon some given case: that if a ship dropped her anchor for the purpose of turning her round, not for the purpose of doing anything in the place, but merely because the wind was adverse or too light, and she got under a headland, that nevertheless she was bound to have a pilot; and some ingenious person arguing thus thought it was intended to impose the liability by way of proviso on the exemption, so that, although the ship is in the district in an intermediate part of her voyage, and in that sense is passing through, that nevertheless if she does something, although she is passing through in one sense, she must take a pilot. Then it was found that these words, "whilst at anchor," would not do, and so they were obliged to look for something else, and they have looked for something else which is substantial. It would not do to say "using a port," that might be misunderstood, because they have said that where a ship (though in one sense she is passing through) goes into a port for a definite purpose, such as loading or discharging, then she must have a pilot.

If they had meant to say loading or discharging mercantile cargo, nothing would have been so easy as for them to have said so. If it only applies to cargo on board a ship for freight purposes, it would not apply to a yacht or to a mere passenger ship. Why should it not? It merely means that this is the test of her not being merely passing through; it is not a mere momentary stoppage, it is not a mere stoppage which they cannot help by stress of weather, it is one in which she must obviously and necessarily bring herself to an anchor. It is going in for a definite purpose to load or unload. There is nothing in the language of the section which confines it to loading or discharging mercantile cargo. Why should there be, the reason of the thing being to the contrary, the words not being put in to limit, the reason of the thing not being limitation? Therefore it seems to me you must give a plain meaning to the words. If a ship is loading or discharging, whichever it may be, and goes into the district, she is bound to have a pilot on board. That is the meaning of the statute. A case has been suggested where the ship has been brought up and substantially brought up for a long period in the port, and yet did not take a compulsory pilot. It is unnecessary to give my opinion upon this, and I shall reserve my opinion till such a case comes before me.

Fry, L.J.—I am authorised by Lord Justice Bowen to say that he concurs with the opinion of the Master of the Rolls. It seems to me that the natural construction of the word "loading" applies to the present case, and that it was exactly this kind of loading which was in the contemplation of the Legislature in making this 41st section

of the Act of 1862, and I have therefore no hesitation in saying that I am of opinion that in this case pilotage was compulsory.

Appeal dismissed.

Solicitors for the appellants, *Parker, Garrett,* and *Parker.*

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

Wednesday, June 18, 1884.

(Before Brett, M.R., Bowen and Fry, L.JJ., assisted by Nautical Assessors.)

The Beta; The Peter Graham. (a)

ON APPEAL FROM BUTT, J.

Collision—Regulations for Preventing Collisions at Sea, Art. XIII. 1880—*Moderate speed—Dense fog—Bristol Channel—Salvage—Merchant Shipping Act* 1873 (36 *&* 37 *Vict. c.* 85), *s.* 16.

Moderate speed for a sailing ship, within the meaning of Art. XIII. of the Regulations for Preventing Collisions 1880 *in a dense fog in the Bristol Channel, is the slowest speed that she can go so as to be under command, and, if she carries more sail than is necessary for this purpose, she will be guilty of a breach of the article.*

Moderate speed, within the meaning of art. 13 *of the Regulations, varies according to the density of the fog; the thicker the fog, the slower ought to be the speed.*

Per Butt, J.: Where two ships having been in collision, one of them renders assistance to the other by towing her, being bound by sect. 16 *of the Merchant Shipping Act* 1873 *to stand by and render assistance, quære, whether she is entitled to salvage remuneration, even though she is not to blame for the collision.*

This was a consolidated damage action *in rem,* instituted by the owners of the steamship *Peter Graham* against the owners of the schooner *Beta,* to recover damages arising out of a collision between the two vessels on the 26th Aug. 1883 in the Bristol Channel.

The defendants counter-claimed.

The facts alleged on behalf of the plaintiffs were as follows: Shortly before midnight on the 26th Aug. 1883 the steamship *Peter Graham,* of 516 tons register, was in the Bristol Channel, about fifteen miles N. by E. of the Longships, on a voyage from Swansea to Valencia with a cargo of patent fuel. The wind was very light from the W.S.W., there was a thick fog, and the tide was ebb. The *Peter Graham* had been turned round on a N.E. by E. course to stem the tide, and was proceeding at dead slow, making about two knots an hour. Her regulation lights were duly exhibited and burning brightly, and her steam-whistle was being duly sounded and a good look-out kept on board of her. Under these circumstances those on board the *Peter Graham* saw the boom of the schooner *Beta* about two points on the starboard bow and about 100 yards off, and, although the engines of the *Peter Graham* were reversed full speed and her helm put hard-a-port, the two vessels came into collision, the jibboom of the *Beta* striking the starboard bow of the *Peter Graham.* Both vessels sustained considerable injury. The *Peter Graham* stood by the *Beta* till daylight, and at 5.30 a.m. on the 27th took her in tow, and towed her to the Mumbles Roads off Swansea, where she cast anchor in a place of safety about 6 p.m. on the same day. The plaintiffs charged the defendants with breach of articles 12, 13, and 22 of the Regulations for Preventing Collisions at Sea 1830, and claimed judgment for the damages occasioned by the collision, together with such an amount of salvage as to the court should seem just.

The facts alleged on behalf of the defendants were as follows: Shortly before 11.50 p.m. on the 26th Aug. 1883 the schooner *Beta,* of 97 tons, was in the Bristol Channel, about twenty miles W.N.W. from Trevose Lighthouse, on a voyage from Cardiff to Devonport, with cargo of coals. The *Beta,* under all plain sail, was making about two knots, and heading about N.W. by W., close-hauled on the port tack. The wind was light from the W.S.W., the weather foggy, and the tide flood of about the force of one knot. The *Beta* had her regulation side lights exhibited and burning brightly, and her foghorn was being sounded in accordance with the regulations, and a good look-out was being kept on board of her. Under these circumstances those on the *Beta* saw the masthead light of the *Peter Graham* about three points on the port bow, and distant about 400 yards, and although the steamship was hailed to starboard, and the *Beta* was brought up into the wind, the *Peter Graham* came on, and struck with her stem and starboard side the *Beta* on her bowsprit and cutwater, doing her great damage. The defendants charged the plaintiffs with breach of articles 12, 13, 17, and 18 of the Regulations for Preventing Collisions at Sea 1880.

On behalf of the plaintiffs evidence was called to prove that the foghorn of the *Beta* was not heard by those on board the steamer. According to the undisputed evidence of a surveyor, called on behalf of the plaintiffs, the topgallant forecastle plate on the starboard bow of the *Peter Graham* was smashed in about seven feet, and one plate further aft bulged and bent, second plate down smashed in, and also two shear stroke plates smashed in about thirteen feet from the stem, &c.

On the 5th Dec. 1883 the action came on for hearing before Butt, J. assisted by Trinity Masters.

C. Hall, Q.C. (with him *Bucknill*) for the plaintiffs.

Myburgh, Q.C. (with him *Aspinall*) for the defendants.

At the conclusion of the arguments, the learned Judge found the schooner alone to blame. In his judgment having found that the *Beta's* foghorn was blown by bellows, he proceeded as follows:—Whether it was blown quite as often as it ought to have been, and whether it was sounded within two minutes of the time of the collision, I confess to having some doubt. So much for the foghorn. But now each vessel says the other was going too fast. I am dealing with the question of negligence on the part of the *Beta,* and I propose first to consider the question, was the *Beta* going too fast? Now, I state at once, because I think it is the fair way on these occasions, that there is a difference of opinion between my assessors as to the speed of the *Beta.* One of the two gentlemen thinks that she

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

was going under an undue press of sail and was making more headway through the water than she ought to have been doing on this night with the weather as it was. She was under all plain sail, including two square topsails, and it is thought by one of my assessors that that, coupled with the fact of the very severe blow she delivered to the steamer and the damage she did, shows that she had more way on her than she admits and more way than she ought to have had under the circumstances. Under these circumstances it falls to my lot to decide the question. I do not deny that I have had hesitation about it, but I lean to the conclusion that she was going too fast, and so I decide. I am mainly governed in so doing by this. We have before us a survey of the steamer, and we get from it the nature and the violence of the blow that was delivered. The report says on the starboard bow the topgallant forecastle plate smashed in about seven feet from the stem, one plate further off bulged and bent, the second plate down smashed and also the two shear stroke plates smashed in about thirteen feet from the stem, three frames broken and two twisted and bent, one forecastle deck beam broken and six forecastle deck planks, and two broad deck planks broken, lining and bunk fittings, &c. Then there is other damage mentioned, and there was evidence of the bowsprit of the *Beta* having gone through the deck of the steamer. This leads me to the conclusion that the *Beta* was going faster, and not inconsiderably faster, than she says, and that being so, I think she was carrying too great a press of sail having regard to the weather. I think that was negligence on her part, and that she is liable for it. [The learned Judge then dealt with the speed of the *Peter Graham*, and found it to have been as slow as was consistent with good steerage-way.] Now comes the only remaining point. The foghorn of the *Beta* was not heard, according to the evidence, by those on board the *Peter Graham*, and here arises a point which I have often considered, and about which I have always felt a difficulty. Ought we to find negligence against the steamer because she did not hear the foghorn before the collision? In order so to find we must be satisfied that there was not a longer interval between the blasts than two minutes—a matter upon which I have already expressed some doubt. What occurs to me is this: Here were persons on the alert on board the *Peter Graham*. The question of hearing is not like that of eyesight. People's eyes may be closed or turned away from the direction in which an object comes into view, and they may fail to see it, but their ears are not stopped, and even if they are attending to something else, a foghorn in thick weather is a thing that at once arouses their attention. It seems to me very difficult to say that merely because these people, who were on the look-out and on the alert, did not hear the schooner's foghorn, they are to blame, having regard to the fact that the foghorn, if sounded, was certainly to leeward of the steamer, and that the sound would rather be carried away from the steamer by the wind than towards her. Considering too the careful way in which this steamer was being navigated and the whole circumstances of this case, I do not think that the fact of her not hearing the schooner's foghorn is evidence of negligence for which she ought to be held to blame. In the result I must pronounce that the only blame in this case attaches to the *Beta*. Now comes the question, is the steamer entitled to salvage? I know it has been held in some cases that where a collision is brought about by the wrongful act of one of two ships the innocent ship is entitled to salvage. No doubt the steamer took the *Beta* in tow. What I have to consider is, must I administering the law I have to consider is, must I administering the law imply a contract to pay for salvage services? I will not do anything of the sort, and I do not mean to give any salvage in this case. If I am wrong I must be set right elsewhere, but I do not forget that there is an Act of Parliament which renders it a positive duty upon one of two ships which has been in collision to stand by and render such assistance as may be practicable to the other ship, and that is equally her duty whether the other ship is to blame or not. I refer to the 16th section of the Merchant Shipping Act 1873. I believe in acting as the steamer did after this collision she acted most properly, and I do not believe that it ever occurred either to the captain or crew of the *Beta* or to the captain or crew of the *Peter Graham* that when they towed this little schooner they were doing it on the terms of being paid salvage. In my view of the Act of Parliament, if the steamer had not chosen to tow the schooner she would have had to stay by her a very long time, because she would not have dared to have left her. Therefore I do not think that this is a case in which any salvage ought to be awarded. I do not know why I was not addressed on this point. I have not had the advantage of any observations on either side upon it, or of having my attention called to the authorities, but I suppose the real truth of the matter is that there is a sort of feeling which I should expect on the part of the owners or legal advisers of the steamer that this is not a case in which they would care to claim salvage, even although technically they might be entitled to it.

From this decision the owners of the *Beta* now appealed, and contended that the steamer was alone to blame for the collision.

Art. 13 of the Regulations for Preventing Collisions at Sea 1880, upon which the decision turned is as follows:

> Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow, go at a moderate speed.

Myburgh, Q.C. and *J. P. Aspinall*, on behalf of the owners of the *Beta*, in support of the appeal.—It was the duty of the *Beta*, under art. 13 of the Regulations for Preventing Collisions, to go at a moderate rate of speed. This she did. Though it is true that she was carrying all plain sail it is to be remembered that the wind was light, and that it is necessary for a sailing vessel to have some little way on so as to be well under command. Under these circumstances her speed could not be called immoderate:

> *The Elysia* 4 Asp. Mar. Law Cas. 540; 46 L. T. Rep. N. S. 840.

The fact that there is strong affirmative evidence that the foghorn was blown on the schooner, and the fact that no foghorn was heard by those on the steamer, is very suggestive of a want of due diligence on the part of those on the steamer.

Hall, Q.C. and *Bucknill*, for the respondents, were not called upon.

Brett, M.R.—It seems to me that the greater part of this case depends upon what is the law with regard to these two ships. It is undoubted to my mind that by the true construction of art. 13, the steamer was bound to go as slowly as she could in such a dense fog as this was, because it is to be taken that the fog was absolutely dense, so that it was impossible to see anything until it was close upon one. Under these circumstances it seems to me that the steamer was bound to go dead slow; that is, as slow as she possibly could in order to keep herself under command. She ought to have done that, and she did it. She therefore has obeyed the rule.

We now come to the sailing vessel. The rule says she is to go at a moderate speed. What is the meaning of that? Moderate speed, to my mind, must depend upon the density of the fog, because that which would be moderate speed in a light fog would not be moderate in an absolutely dense and thick fog in which one could not see at all. That which would be moderate speed in a fog through which daylight was coming would not be moderate in a fog which was absolutely thick and dark. If we take this fog to be a dense fog, this sailing vessel comes under the same conditions as the steamer, namely, that she must not go through the water faster than is necessary for her being kept under command. This schooner had all plain sail set. Under certain circumstances it might be necessary to have all plain sail set to keep her under command. The question is whether it was necessary in this case. I have put that question to the gentlemen who advise us, and they tell us that this vessel might have been under command to perform the necessary operations with less sail. I do not ask them anything else. What is the necessary inference to draw from their answer? The inference I draw is, that this schooner was going through the water faster than was necessary to keep her under command. If so, she was going at more than a moderate speed, and at a greater speed than was necessary under the circumstances. If so she was wrong. It therefore seems to me that, not being able to overrule the learned judge upon any other point, we cannot overrule him on this, and the appeal must accordingly be dismissed.

Bowen, L.J.—I am of the same opinion. Art. 13 says that "every ship, whether a sailing ship or steamship, shall in a fog, mist, or falling snow, go at a moderate speed." What does the term moderate mean? It is a term of relation, and it must be used in relation to something. Now in this case the collision occurred in the Bristol Channel in a dense fog. Under these circumstances the sailing ship ought not to go at a greater rate of speed than is necessary to enable her to be under command. That being the law, the gentlemen who assist us say that, having regard to the wind, the sails carried by the schooner, and the character of the blow, they are of opinion that the *Beta* was carrying more sail than was necessary to keep her under command. The result is, that the schooner has infringed the rule, and must therefore be held to blame for this collision.

Fry, L.J.—I am of the same opinion. There are two questions which arise in this case. The first is with regard to the speed of the schooner. On this point the conclusion of the learned judge below appears to be well founded, having regard to the fact that this collision occurred in a dense fog in the Bristol Channel. It was also said that the persons on board the steamer must be taken to have heard the foghorn of the schooner. The learned judge below has, however, found otherwise, and I think it is impossible for us to disturb that finding. The conclusion, therefore, is that the schooner is alone to blame.

Solicitors for the appellants, *Clarkson, Greenwell,* and *Wyles.*

Solicitors for the respondents, *W. A. Crump* and *Son.*

Thursday, June 19, 1884.

(Before Brett, M.R., Bowen and Fry, L.JJ., assisted by Nautical Assessors.)

The John McIntyre. (*a*)

ON APPEAL FROM BUTT, J.

Collision—Regulations for Preventing Collisions at Sea 1880, *arts.* 13, 18—*Dense fog—Steamships—Steam whistle.*

Where those on a steamship in a dense fog hear the whistle or foghorn of another vessel more than once on either bow and in the vicinity from such a direction as to indicate that the other vessel is nearing them, it is their duty, under art. 18 *of the Regulations for Preventing Collisions at Sea, to at once stop and reverse her engines, so as to bring their vessel to a standstill in the water.*

This was an appeal by the defendants in a damage action *in rem* from a judgment of Butt, J., by which he, on the 19th Dec. 1883, had found the steamships *John McIntyre* and *Monica* both to blame for a collision in the North Sea on the 14th Sept. 1883.

The facts alleged on behalf of the plaintiffs were as follows:—

Shortly after 3.30 a.m. on the 14th Sept. 1883 the steamship *Monica*, of 853 tons net, was in the North Sea, off Seaham, on a voyage from Newcastle to Hamburg. The wind was light from the east and there was a dense fog. The *Monica* was heading about S.E. by E., and was making about three knots an hour. Her regulation lights were duly exhibited and a good look-out was being kept on board her, and her whistle was sounded regularly. In these circumstances the whistle of a steamer was heard on the starboard bow and replied to. After three or four blasts had been heard and replied to the helm was put to starboard. Immediately afterwards the masthead and red lights of the *John McIntyre* were seen broad on the starboard bow, and although the helm was hard-a-starboarded and the engines reversed full speed astern, the stem and port bow of the *John McIntyre* struck the starboard side of the *Monica* about midships.

The facts alleged on behalf of the defendants were as follows:—

About 3.40 a.m. on the 14th Sept. 1883 the steamship *John McIntyre*, of 659 tons registered, was in the North Sea, off the coast of Durham, on a voyage from London to the Tyne. The wind was light from the N.N.E., and there was a thick fog. The *John McIntyre* was heading about N.N.W., and making about two knots an hour. Her regulation

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

lights were duly exhibited, a good look-out was being kept on board of her, and her whistle was sounded from time to time. Under these circumstances the whistle of the *Monica* was heard about four points on the port bow, and then heard twice again, when it appeared to those on the *John McIntyre* that the *Monica* was approaching on the port bow so as to involve risk of collision, and although the engines of the *John McIntyre* were reversed, and immediately afterwards reversed full speed astern, the starboard side of the *Monica* struck the stem and bows of the *John McIntyre*.

Dec. 19, 1883.—The action came on for trial before Butt, J., assisted by Trinity Masters.

Myburgh, Q.C. (with him *Phillimore*) for the plaintiffs, the owners of the *Monica*.

Webster, Q.C. (with him *Steavenson*) for the defendants.

After hearing the evidence and the arguments on both sides the learned Judge found both ships to blame for breach of article 18 of the Regulations for Preventing Collisions at Sea. With regard to the navigation of the *John McIntyre* his Lordship dealt as follows:—Now as to the evidence of the *John McIntyre*, I cannot accept her captain's evidence us to speed. I utterly disbelieve, and the Elder Brethren agree with me, that she was still in the water, or anything like still in the water, at the moment that the blow was delivered. We think that, when she delivered the blow and sank the *Monica*, she herself was going at a considerable rate of speed. I think the nature of the blow shows it to be so. One has only to hear what admittedly happened to the *Monica*, only to look at the photograph of the *John McIntyre*, and the evidence of the surveyor who surveyed her, to be quite satisfied that she was going very much faster than the defendants allege. Now her captain says: "We heard her (that is the *Monica's*) whistle five minutes before the collision. I gave an order to stop and reverse one minute before the collision. We kept our engines going ahead for four minutes after we heard her whistle, and before we gave any order to stop our engines." It must have been apparent long before the lapse of those four minutes, they having heard the whistle several times, that there was danger. The engines of that vessel ought to have been stopped long before they were, and if necessary also reversed. In conclusion I have no hesitation in pronouncing both these vessels to blame.

From this decision the defendants appealed, and on June 19, 1884, the appeal came on for hearing. It was admitted that the *Monica* was to blame.

Article 18 of the Regulations for Preventing Collisions at Sea 1880 is as follows:

> Every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary.

The *Solicitor-General* (Sir F. Herschell, Q.C.) and *Webster*, Q.C. (with them *Steavenson*) for the appellants.—The learned judge below was wrong in finding the *John McIntyre* to blame for not stopping and reversing sooner. With the first whistle four points on the port bow it did not become necessary to stop and reverse until the third whistle had been heard. To hold otherwise would be to lay it down that a steamer in a dense fog the moment she hears a whistle is to at once stop and reverse, a manœuvre which might in many cases bring about the collision instead of avoiding it.

Myburgh, Q.C. and Dr. *Phillimore*, for the respondents, were not called upon.

Brett, M.R.—The question in this case is as to the application of article 12 of the Regulations for Preventing Collisions at Sea 1880 to the *John McIntyre*. The case of the other ship is hopeless, her navigation being most improper and reckless. We have to apply article 18 to the *John McIntyre*, a vessel navigating in a dense fog. The *John McIntyre* was a steamer approaching another vessel in a dense fog. If, then, the circumstances were such that the officer in charge of the *John McIntyre* ought to have come to the conclusion that, in order to avoid danger or risk of collision, he was bound to stop and reverse his engines sooner than he did, why then he broke the rule. The next question is, were the circumstances such that he ought to have concluded that if he did not stop and reverse his engines there would be risk of collision? because, if he ought to have concluded that, then according to the rule it was necessary that he should not merely slacken his speed, but also stop and reverse his engines. The circumstances of this case seem to me to be, that these vessels were approaching in a thick fog, and that under the circumstances it was the duty of the *Monica* to keep out of the way of the *John McIntyre*. Nevertheless, it was palpable to the officer in charge of the *John McIntyre* that she was approaching another vessel in a fog. It was the whistle of the other vessel which told him not exactly where she was, but about where she was, and that she was in a position in which he could not consider her to be an absolutely safe vessel with regard to him; *i.e.*, he could not consider that he had passed her or that she had passed him either ahead or astern, while he was not at once bound the moment he heard a whistle, wherever it might be, to stop and reverse his engines; but having heard the first whistle, which was about four points on his port bow, he hears another and another whistle, and I cannot help thinking that the evidence shows that it was something like three or four whistles that he heard. The sound of these whistles obviously did not, because they could not, appear to him to be going further astern of him or broader on his beam. What is the inference to be drawn from that? Why, that each of those whistles as they came ought to have told him that the vessel was coming nearer to his bow. He could not see the other ship. What is the conclusion to which he ought to have come? Ought he to have come to this conclusion—that, taking the fog and taking it that he himself was not going dead slow through the water (for I think the learned judge found, and found rightly, that he could not have been going at what is called dead slow), taking into account the pace at which he himself was going, which I think will be shown was faster than he puts it at, ought he not then to have concluded that unless he stopped and reversed his engines there would be, not collision, but risk of collision? If a steamer in a thick fog—so thick that she can hardly see before her—hears another vessel in her neighbourhood on either bow, not being able to see her, and she herself not going at her slowest pace, the question is,

whether under those circumstances the officer in charge of the steamer ought not to conclude that it is necessary, in order to avoid risk of collision, that he should stop and reverse. I do not hesitate to lay down the rule, not strictly as a matter of law, but as a matter of conduct, that the moment such circumstances as these happen it is necessary, under the article, to stop and reverse. I am not saying that every time those on board a steamer hear a whistle or a foghorn on their bow they are at once to stop and reverse, but if they hear a whistle or foghorn on either bow getting nearer to their bow, or being in anything like near neighbourhood on either bow, I do not hesitate to lay down the rule that, if the fog is so dense that they can see nothing, then the necessity has arisen for them to stop and reverse. We do not say that she must have stern way on her, but we say she must stop and reverse her engines, so as, if necessary, to bring herself to a dead standstill in the water.

How are we to conclude anything as to the rate at which the *John McIntyre* was going? I will assume that the *Monica* was crossing the *John McIntyre* at a very considerable speed, and that she was under a starboard helm. But then it is clearly proved, in my opinion, that the *John McIntyre* was made by something or other to enter into the side of the *Monica*, a distance of from 7 feet to 12 feet. The next thing one has to do is to look at the injury done to the *John McIntyre*. Now, we have the evidence of the surveyor that she was injured on one bow from the stem downwards some 11 feet, and on the other bow some 7 feet. We have asked the gentlemen who assist us, having regard to the evidence of the surveyor, of the photograph produced in court, and the angle of the blow, what is their opinion as to the speed of the *John McIntyre*, and they tell us that they think she was going at a considerable rate of speed at the moment of collision. I have already said that, in my judgment, the circumstances were such as made it her duty to stop and reverse, and that it was necessary for her to stop and reverse in order to avoid risk of collision if she was going at any considerable speed. If she was going at considerable speed at the moment of collision, it is obvious that she was going at considerable speed before the moment of collision. If she was doing that, it seems to me that we must decide that she ought to have stopped and reversed before she heard the last whistle, which was almost immediately before the collision. However difficult it may be for persons in command of steamers to do what the law directs, in my opinion we must hold strictly that in a dense fog the moment another vessel is found on the bow or in near vicinity on either bow, and she herself is going at any speed, it has then become necessary, under the 18th rule, not merely to slacken speed, but instantly to stop and reverse. That is a rule of conduct which seems to me to be the result of the statutory regulations, and that has been broken by the officer in command of the *John McIntyre*. Therefore the judgment of the learned judge was correct, and this appeal must be dismissed.

Bowen, L.J.—I am of the same opinion. I think, as I have said before, that where two ships are approaching so as to involve risk of collision they are bound to slacken speed, and if that is not sufficient they are bound to stop and reverse if it is necessary to avoid risk of collision. Although it may not be possible to say as an absolute matter of law that a vessel in a fog ought to stop the moment she hears the whistle of another vessel in her neighbourhood, yet, as the Master of the Rolls has already pointed out, it seems to me that in this case the officer in charge of the *John McIntyre* could not have concluded that it was safe to have gone on, and therefore it was necessary to stop and reverse. This the *John McIntyre* did not do until a later period and she must therefore be held to blame. With regard to the other points urged before us, I entirely concur with the Master of the Rolls, and therefore think the appeal must fail.

Fry, L.J.—I am of the same opinion. In this case two questions have been raised. With regard to the speed of the *John McIntyre*, the learned judge below has found as a fact that she was going at a greater rate of speed than the witnesses on her behalf have stated. In the first place I, not having seen the witnesses, should in the absence of strong reasons, be unwilling to come to an adverse conclusion. Moreover, those gentlemen who assist us are of the same opinion as the learned judge below. Therefore I think that it must be taken that that finding was correct and cannot be impeached. Now, assuming that speed to be greater than was allowed by the appellants, was it not necessary for the *John McIntyre* to have stopped and reversed her engines at an earlier time than she did? I think it was, and that under the circumstances it was the duty of the *John McIntyre* to have earlier taken steps to come to as near a standstill as possible. That being so, I think the *John McIntyre* must be held to blame.

Appeal dismissed.

Solicitors for the appellants, *Gellatly, Son,* and *Warton.*

Solicitors for the respondents, *Botterell* and *Roche.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Friday, May 23, 1884.

(Before Stephen and Mathew, JJ.)

Vallance *v.* Falle. (*a*)

Merchant Shipping Acts—Seaman's remedy against master — Refusal of certificate — Discharge — Penalty—17 & 18 *Vict. c.* 104, *ss.* 27 *and* 524.

By the Merchant Shipping Act 1852, *s.* 172, *upon the discharge of any seaman the master shall sign and give him a certificate, and if any master fails to sign and give to any such seaman such certificate of discharge he shall for each such offence incur a penalty of* 10*l., and by sect.* 524 *the whole or any part of the penalty may be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed.*

In an action for damages caused by the refusal of the defendant, a master, to give the plaintiff, a seaman, discharged from his ship engaged in the

(*a*) Reported by M. W. McKellar, Esq., Barrister-at-Law.

coasting trade, a certificate, the County Court judge nonsuited the plaintiff.

Held, that the remedy by penalty was exclusive under the provisions of the Act, and that the County Court judge was right.

THIS was an action tried in the County Court of Dorset, in which the plaintiff, a seaman, sought to recover damages against the defendant, the master of a ship called the *Brighton*, trading between Weymouth and the Channel Islands, for improperly withholding and detaining from the plaintiff a certificate of discharge to which the plaintiff was entitled on the termination of his service on board the said ship, whereby the plaintiff was unable to obtain employment in other ships.

The County Court judge nonsuited the plaintiff on the ground that his only remedy was by summons before a court of summary jurisdiction under the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104).

By sect. 17 of that Act:

In the case of all British foreign-going ships, in whatever part of Her Majesty's dominions the same are registered, all seamen discharged in the United Kingdom shall be discharged and receive their wages in the presence of a shipping master duly appointed under this Act, except in cases where some competent court otherwise directs, and any master or owner of any such ship who discharges any seaman belonging thereto or except as aforesaid pays within the United Kingdom in any other manner shall incur a penalty not exceeding 10*l.*, and in the case of home-trade ships seamen may, if the owner or master so desires, be discharged and receive their wages in like manner.

By sect. 171:

Every master shall, not less than twenty-four hours before paying off or discharging any seaman, deliver to him, or, if he is to be discharged before a shipping master, to such shipping master, a full and true account in a form sanctioned by the Board of Trade of his wages and of all deductions to be made therefrom on any account whatever, and in default shall for each offence incur a penalty not exceeding 5*l.*; and no deduction from the wages of any seaman (except in respect of any matter happening after such delivery) shall be allowed unless it is included in the account so delivered, and the master shall during the voyage enter the various matters in respect of which such deductions are made, with the amounts of the respective deductions as they occur, in a book to be kept for that purpose, and shall, if required, produce such book at the time of the payment of wages, and also upon the hearing before any competent authority of any complaint or question relating to such payment.

By sect. 172:

Upon the discharge of any seaman, or upon payment of his wages, the master shall sign and give him a certificate of his discharge in a form sanctioned by the Board of Trade, specifying the period of his service and the time and place of his discharge; and if any master fails to sign and give any such seaman such certificate of discharge he shall for each such offence incur a penalty not exceeding 10*l.*; and the master shall also upon the discharge of every certificated mate, whose certificate of competency or service has been delivered to and retained by him, return such certificate, and shall in default incur a penalty not exceeding 20*l.*

By sect. 173:

Every shipping master shall hear and decide any question whatever between a master or owner and any of his crew which both parties agree in writing to submit to him, and every award so made by him shall be binding on both parties, and shall in any legal proceeding which may be taken in the matter before any court of justice be deemed to be conclusive as to the rights of the parties, and no such submission or award shall require a stamp, and any document purporting to be such submission or award shall be *primâ facie* evidence thereof.

By sect. 174:

In any proceeding relating to the wages, claims, or discharge of any seaman carried on before any shipping master, under the provisions of this Act, such shipping master may call upon the owner or his agent, or upon the master, or any mate, or other member of the crew to produce any log book, papers, or other documents in their respective possession or power, relating to any matter in question in such proceeding, and may call before him and examine any of such persons being then at or near the place or any such matter, and every owner, master, mate, or other member of the crew who, when called upon by the shipping master, does not produce any such paper or document as aforesaid if in his possession or power, or does not appear and give evidence, shall, unless he shows some reasonable excuse for such default, for such offence incur a penalty not exceeding 5*l.*

By sect. 175:

The following rules shall be observed with respect to the settlement of wages (that is to say)—

(1.) Upon the completion before a shipping master of any discharge and settlement, the master or owner and each seaman shall respectively, in the presence of the shipping master, sign in a form sanctioned by the Board of Trade a mutual release of all claims in respect of the past voyage or engagement, and the shipping master shall also sign and attest it, and shall retain and transmit it as herein directed.

(2.) Such release so signed and attested shall operate as a mutual discharge and settlement of all demands between the parties thereto in respect of the past voyage or engagement.

(3.) A copy of such release, certified under the hand of such shipping master to be a true copy, shall be given by him to any party thereto requiring the same, and any such copy shall be receivable in evidence upon any future question touching such claims as aforesaid, and shall have all the effect of the original of which it purports to be a copy.

(4.) In cases in which discharge and settlement before a shipping master are hereby required, no payment, receipt, settlement, or discharge otherwise made shall operate or be admitted as evidence of the release or satisfaction of any claim.

(5.) Upon any payment being made by a master before a shipping master, the shipping master shall, if required, sign and give to such master a statement of the whole amount so paid, and such statement shall, as between the master and his employer, be received as evidence that he has made the payments therein mentioned.

By sect. 176:

Upon every discharge effected before a shipping master the master shall make and sign in a form sanctioned by the Board of Trade a report of the conduct, character, and qualifications of the persons discharged, or may state in a column to be left for that purpose in the said form that he declines to give any opinion upon such particulars or upon any of them, and the shipping master shall transmit the same to the Registrar-General of Seamen, or to such other persons as the Board of Trade directs, to be recorded, and shall, if desired so to do by any seaman, give to him or indorse on his certificate of discharge a copy of so much of such report as concerns him, and every person who makes, assists in making, or procures to be made, any false certificate or report of the service, qualifications, conduct, or character of any seaman, knowing the same to be false, or who forges, assists in forging, or procures to be forged, or fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered, any such certificate or report, or who fraudulently makes use of any such certificate or report which is forged or altered, or does not belong to him, shall for each such offence be deemed guilty of a misdemeanour.

By sect. 524:

Any court, justice, or magistrate imposing any penalty under this Act for which no specific application is herein provided, may, if it or he thinks fit, direct the whole or any part thereof to be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed, or to be applied in or towards payment of the expenses of the proceedings.

Francis Turner argued for the plaintiff.—By the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 31, any officer of the Board of Trade may take the legal proceedings under the Merchant Shipping Act, and if that were done here the plaintiff could get no compensation. In many cases it has been held that an action will lie for breach of a statutory duty notwithstanding a provision for a penalty.

Tindal Atkinson for the defendant.—It depends upon the construction of each statute whether the penalty imposed is the only remedy for a breach of statutory duty. Here it could not have been contemplated to make an action lie for this omission. Compensation is provided by sect. 524.

The following cases were cited and discussed:

Beckford v. *Hood*, 7 Term Reps. 620;
Hurrell v. *Ellis*, 15 L. J. 18, C. P.;
Stevens v. *Jeacocke*, 11 Q. B. 731;
Rogers v. *McNamara*, 23 L. J. 1, C. P.;
Couch v. *Steel*, 3 E. & B. 402; 23 L. J. 121, Q. B.;
Wright v. *London General Omnibus Company*, 36 L. T. Rep. N. S. 590; 2 Q. B. 271;
Atkinson v. *Newcastle Waterworks Company*, 36 L. T. Rep. N. S. 761; 2 Ex. Div. 441.

STEPHEN, J.—I am of opinion that the judgment of the County Court judge must be affirmed. The case has been well argued on both sides, and I believe every authority has been cited. I do not intend to follow the distinctions which have been drawn between the various decisions; but the general rule to be deduced from them seems to be that every particular enactment providing a summary remedy of this kind must be considered with respect to its own provisions and object in order to discover whether the Legislature intended to confer a general right, which might be the subject of an action, with a collateral remedy by summons at petty sessions, or whether the duty imposed was sanctioned only by the particular penalty, and therefore enforceable by no other than the summary remedy. We must therefore consider the provisions of this statute. The 170th section deals with foreign-going ships, and it appears to give a certificate in such cases more value than in coasting ships of the class in this case. The form authorised by the Board of Trade for foreign-going ships includes an entry as to character; but no effect of that kind is given by the form of certificate for coasters under sect. 172, nor does any special value appear to attach to such certificate. This 172nd section makes it the duty of the master, upon the discharge of any seaman, to sign and give him a certificate of his discharge in a form sanctioned by the Board of Trade, specifying the period of his service, and the time and place of his discharge, and the section goes on to provide that if any master fails to sign and give to any such seaman such certificate of discharge he shall for each such offence incur a penalty of 10*l.* There is a provision later on in the Act (sect. 524) that any court, justice, or magistrate, imposing a penalty for which no specific application is given, may direct the whole or any part thereof to be applied in compensating any person for any wrong or damage which he may have sustained by the act or default in respect of which such penalty is imposed. It appears therefore that this is an offence, created by the statute, for which a specific remedy is provided for any damage which may be the consequence of it. As to the cases cited, I have already said that I think every statutory remedy of this kind must depend upon itself, and can have but little authority with regard to others; it will be sufficient, therefore, if I allude only to one or two of those upon which counsel for the plaintiff relied. For instance, in *Beckford* v. *Hood* the question decided was whether a small and inadequate penalty given to an informer precluded an aggrieved author from obtaining damages in an action for breach of copyright. Lord Kenyon there said: "I cannot think the Legislature would act so inconsistently as to confer a right, and leave the party whose property was invaded without redress" (p. 627). That consideration can have no weight in the case before us, because sect. 524 gives to the seaman aggrieved a right to apply to the court of summary jurisdiction for as much of the 10*l.* penalty as may be considered adequate to the circumstances, and I cannot think that any damage he could suffer would be likely to exceed that amount. On the other hand, in *Atkinson* v. *Newcastle Waterworks Company* it was obvious that the defendants could never have been intended, by an obligation to supply water for fire engines, to be made insurers for the whole of a large town, when a specific penalty was imposed for failure to fulfil the obligation. That case is far stronger than this, and, to my mind, is no more an authority than the other; but the conclusion there arrived at seems to me more appropriate to this case than that of the copyright, and I think, having regard to the nature of the certificate, the injury likely to result from its omission, and all the provisions in relation thereto, that the remedy, and only remedy, for the wrong of which the plaintiff complains, is by summons before petty sessions. The County Court judge therefore was right in nonsuiting the plaintiff in this action.

MATHEW, J.—I am of the same opinion, and I must say I feel no doubt about it. With regard to a statutory remedy of this description, it was observed by Willes, J. in *Wolverhampton New Waterworks Company* v. *Hawkesford* (28 L. J. C. P., at p. 246): "There are three classes of cases in which a liability may be established by statute. There is that class where there is a liability existing at common law, and which is only re-enacted by the statute with a special form of remedy; there, unless the statute contains words necessarily excluding the common law remedy, the plaintiff has his election of proceeding either under the statute or at common law. Then there is a second class which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it. Now it appears to me that the present case falls within such third class;" and I would interpose in this quotation to express the same view with respect to the seaman's certificate here; "and as with respect to that class it has been always held that the party must adopt the form of remedy given by the statute, so I think the company are bound here to follow the form given by this statute which creates the right." This certificate is not one of character, and the

10*l.* penalty is ample compensation for any wrong done to a seaman by withholding it. Upon the true construction of the provisions of this Act, I think the proceeding for a penalty is the exclusive remedy for any damage of which the plaintiff can complain in this action, and therefore the action was misconceived.

Judgment for defendant.

Solicitors for plaintiff, *Coode, Kingdon,* and *Cotton,* for *J. H. Jolliffe.*

Solicitors for defendant, *Wainwright* and *Baillie.*

Monday, Dec. 10, 1883.

(Before DAY and SMITH, JJ.)

REG. *v.* THE JUDGE OF THE CITY OF LONDON COURT. (*a*)

County Courts—Admiralty jurisdiction of—"Carriage of goods in any ship"—Passenger's luggage on board—Action by passenger against shipowner for loss of—Jurisdiction of County Court to try action—County Courts Admiralty Jurisdiction Acts 1868 *and* 1869—31 *&* 32 *Vict. c.* 71, *s.* 3, *sub-sect.* 8—32 *&* 33 *Vict. c.* 51, *s.* 2.

The personal luggage of a passenger on board ship, which is carried with him as a privilege incidental to the contract to convey the passenger himself, is not "goods" within sect. 2 *of the County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 *&* 33 *Vict. c.* 51), *by which County Courts, having Admiralty jurisdiction, are empowered to try claims "arising out of any agreement made in relation to the carriage of goods in any ship;" and there is therefore no jurisdiction in a County Court under that Act to try any action by a passenger against a shipowner for the loss of such luggage.*

THIS was a rule, calling upon the learned judge of the City of London Court and the defendant in an action brought by the plaintiff in that court, to show cause why the judge should not proceed to hear and determine the said action. The facts of the case were as follows:—

The plaintiff was a passenger on board a ship belonging to the defendant on a voyage from Hamburg to London, and his personal luggage, which on his embarkation on board had been stowed away in the ship's hold, had been lost in the course of the voyage. He sued the defendant, the shipowner, in the City of London Court, to recover its value in damages, his action being brought under the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), s. 2. The learned judge of the court was of opinion that under that Act he had no jurisdiction to try the action, inasmuch as, in his opinion, the term "goods" in that Act applied not to a passenger's personal luggage, but only to "goods" carried on board a ship as merchandise or for profit; and he accordingly declined to hear the action, which he dismissed with costs, whereupon the rule above mentioned was obtained on behalf of the plaintiff.

The County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c, 71), by sect. 2, enables Her Majesty, on the representation of the Lord Chancellor, by an Order in Council, to appoint certain County Courts to have Admiralty jurisdiction as therein specified and enacted, with a proviso that no judge of a County Court, except the judge of the London Court, shall have jurisdiction in the city of London.

Sect. 3:

Any County Court having Admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating 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):

(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.*

By 32 & 33 Vict. c. 51 (the County Courts Admiralty Jurisdiction Amendment Act 1869), s. 2:

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.*

G. Barnes, for the defendant, the shipowner, now showed cause against the rule.—The ruling of the learned judge of the City of London Court, that the term "goods" in the amended County Courts Admiralty Jurisdiction Act of 1869 applied only to "goods" carried as "merchandise or for profit," and in no way related or could be extended to such articles as the ordinary luggage of a passenger on board the ship, was right. The authorities in the way of text-books clearly support that view; for instance, in Marshall on Marine Insurance, 4th ed., part 1, chap. 7, p. 257, it is said that "a policy on goods means only such goods *merely* as are merchantable, *i.e.*, cargo put on board for the purposes of commerce;" and to the same effect is Lowndes on Marine Insurance, par. 91, p. 48. Even assuming a contract to carry a passenger and his luggage, that would not be a contract to carry his luggage as "goods." There is no precise authority upon this Act; but the above text-books and the following cases throw a light upon the meaning of the term "goods" in such a case as this, where an Admiralty jurisdiction is conferred:

Brown v. *Stapylton,* 4 Bing. 119; 5 L. J. 121, C. P.; and the judgment of Best, C. J.;
Hill v. *Patten,* 8 East. 373, per Lord Ellenborough, C.J.;
1 Park on Insurance, 7th ed., p. 26 (citing *Ross* v. *Thwaites*);
Cohen v. *The South-Eastern Railway Company* (in the Court of Appeal), 35 L. T. Rep. N. S. 213; 2 Ex. Div. 253; 46 L. J. 417, Q. B. and Ex.;
Cahill v. *London and North-Western Railway Company,* 4 L. T. Rep. N. S. 246; 10 C. B. N. S. 154; 30 L. J. 289, C.P.

It is clear that "goods" in the section means something very different from ordinary "luggage," which is not the subject of general average or salvage.

E. Pollock, for the plaintiff, *contrà,* in support of the rule.—A reference to the prior Act of 1868 (31 & 32 Vict. c. 71) will throw some light on the meaning of the word "goods" in the subsequent Act of 1869 (32 & 33 Vict. c. 51). By the former Act of 1868, s. 3, Admiralty jurisdiction is given to the County Courts in claims for damages to "cargo," but in the subsequent amending Act of 1868 the term "goods" is used in contradistinc-

(*a* Reported by HENRY LEIGH, Esqr., Barrister-at-Law.

tion to to the word "cargo," and it is submitted that the Legislature, by so changing the word and substituting "goods" for "cargo," clearly meant something different; and, so far from the word "goods" in the later Act meaning the same thing as "cargo" in the earlier Act, as the learned County Court judge held was the case, I contend, on the other hand, that the very reverse is the true and proper construction of sect. 2 of the Act of 1869, and that "luggage," such as that in the present case, was meant by the Legislature to be included in the term "goods." He cited

Cohen v *The South-Eastern Railway Company* (*ubi sup.*);
The Corgo ex Argos, 1 Asp. Mar. Law. Cas. 360, 519; 27 L.T. Rep. N.S. 64; 28 Ib. 77, 745; L. Rep. 4 Adm. & Ecc. 9; Ib. 5 P. C. 134; 41 L.J. 89, Adm.; 42 Ib. 1 and 49, Adm.;
The Alina (*Brown* v. *The Alina*), 4 Asp. Mar. Law Cas. 257; 42 L. T. Rep. N. S. 517; 5 Ex. Div. 227.

"Goods," under the Railways and Canal Traffic Act 1854, includes passengers' luggage, and, unless there is manifest absurdity in so doing, the court will so hold in the present case, and make the rule absolute.

Day, J.—I am of opinion that the decision of the learned judge of the City of London Court is quite right. The cases which have been cited by Mr Pollock, though very ingeniously put before us by him, do not, I think, help us much in coming to a decision in this case, in which, I think, the Act of Parliament (32 & 33 Vict. c. 51, s. 2, sub-sect. 1) on which the question turns must be construed by itself. For myself, I have little doubt as to the way in which we ought to construe it. The first part of sub-sect. 1, by which jurisdiction is given to the County Court "as to any claim arising out of any agreement made in relation to the use or hire of any ship," refers clearly, as it seems to me, to claims arising out of or under charter-parties. Then comes the next paragraph of the sub-section, "or in relation to the carriage of any goods in any ship," which refers, I think, as clearly to questions and claims on bills of lading. But it is urged by the plaintiff's counsel, and we are asked by him to say, that the words "in relation to the carriage of any goods in any ship" relate to a claim like the present respecting the claim of the plaintiff for the loss of his personal luggage, and that the agreement to carry a passenger and his luggage is, so far as the luggage is concerned, a contract to carry "goods." That, in my opinion, is not so. The contract or agreement here was not made for or with reference to the carriage of "goods" or luggage, but for the carriage of the plaintiff himself as a passenger, and it is only incidental to that contract that the passenger's luggage (his ordinary personal luggage) is carried with him. Such luggage is not and cannot be deemed to be "goods" in the sense or within the meaning of that word in the above sub-section. The ruling of the County Court judge being quite right, this rule must be discharged.

Smith, J.—I am entirely of the same opinion, and cannot at all agree with the view taken of the section in question by Mr. Pollock. The two statutes that have been referred to deal, so far as concerns the present case, with three matters. The first of them, the Act of 1868 (31 & 32 Vict. c. 71), by sect. 2, sub-sect. 3, relates to claims made for damage to "cargo." In the subsequent Act of 1869 (32 & 33 Vict. c. 51), by sect. 2, sub-sect. 1, two claims are dealt with, namely, first a "claim arising out of any agreement made in relation to the use or hire of any ship," which, as my brother Day has already said, relates to questions upon charter-parties; and secondly, to a claim "in relation to the carriage of goods in any ship," which I also agree with my brother Day in thinking relates to bills of lading. Now, Mr. Pollock has argued that the "claim in relation to the carriage of goods" mentioned in the section must mean or include the plaintiff's luggage, and that the agreement to carry the passenger is an agreement to carry his luggage, which is included in the term "goods." Now, no doubt in the sense that a contract to carry a passenger gives that passenger the incidental right or privilege to carry or take his personal luggage with him, the contract is a contract to carry the luggage, but in no sense is it a contract to carry "goods" within the meaning of the sub-section by which a passenger's luggage was never intended or contemplated. The Act was dealing with "merchandise" in the ordinary and well-known sense of the term.

Rule discharged.

Solicitor for the plaintiff, *R. Greening.*
Solicitors for the defendant, *Stokes, Saunders,* and *Stokes.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, April 29, 1884.

(Before Butt, J.)

The Pontida (*a*)

Bottomry—Cargo owners—Necessity — Master—Agent.

The authority of a master to raise money on bottomry on ship, freight, and cargo is limited as against the cargo owners to such an amount as is necessary to enable the ship to complete her voyage with safety, and even where the money is advanced and the bond given to a person who is not the ship's agent or in any way connected with the ship, he cannot recover as against the cargo owner anything in respect of items other than those which are absolutely necessary.

Upon a reference to the registrar and merchants, in an action on a bottomry bond, the registrar and merchants have a discretionary power to reduce the amounts claimed and expended for any specific item which they shall deem unnecessary or exorbitant, and also the amounts charged for commissions and premium, whether the bond be given to the ship's agent or to a person unconnected with the ship. (*b*)

This was an action *in rem* brought by the Comptoir d'Escompte de Paris to enforce payment upon a bottomry bond, they being the holders thereof, against the Italian barque *Pontida*, her cargo and freight:

The facts as set out in the statement of claim were (so far as they are material) as follows:

(*a*) Reported by J. P. Aspinall and F. W. Baikes, Esqrs., Barristers-at-Law.

(*b*) This decision has since been affirmed, on appeal, see *post*.—Ed.

1. On the 2nd April 1883 the Italian barque *Pontida* was at Ponta del Garda, in the island of San Michael, in distress, laden with a cargo of wheat shipped under bills of lading, making the same deliverable to shipper's order, and bound on a voyage from Philadelphia to Queenstown, Plymouth, and Falmouth, for orders for a port of discharge, and her master Marco Antonio Faradine being without funds or credit, was compelled to borrow on bottomry of the said ship, her cargo and freight, from Bensande and Co., of Ponta del Garda aforesaid, the sum of 91,375·71 francs for the necessary disbursements and expenses of the said ship and cargo, to enable her to proceed on her voyage.

2. On the 2nd April 1883 a bottomry bond for the said sum of 91,375·76 francs was duly executed between the said master and the said Bensande and Co.

3. By the said bottomry bond, after reciting that the said master and Mr Henrique Bensande, in the capacity of managing partner of the firm of Bensande and Co. personally before the consular agent for the kingdom of Italy, at Ponta del Garda aforesaid, for the purpose of executing the said bond, that the said master was the legal representative of the owners of the *Pontida*, and duly authorised on their behalf, and likewise the legal representative of the owners of cargo on board, to whom he had communicated the necessity in which he was placed of executing the said bond, not having done so to the consignees through ignorance of who they were, and that in consequence of average suffered by the Italian barque *Pontida* during her said voyage the said vessel was forced to put into the said port . . . that thereby a necessity had arisen for contracting a loan in the sum of 91,375·76 francs to meet the expenses incurred so as to be able to continue in safety the said voyage which bond had been legally authorised by the said Royal Consular Agency of Italy in the said place, and which in presence thereof had been on the 14th Dec. then last adjudicated to the said firm . . . that the said Henrique Bensande declared to the said consular agent his wish to advance on bottomry . . . the aforesaid sum . . . at a premium of 20 per cent. if discharged in the United Kingdom . . . that the said M. A. Faradine declared that he had already received from the said firm the said sum. . . . And that it was covenanted between the contracting parties that the *Pontida* should be hypothecated together with her freight and the whole of her cargo of wheat.

4. The said bottomry bond was subsequently indorsed to the plaintiffs, who are the legal owners thereof.

5. The *Pontida* proceeded on her voyage on the 28th April 1883, and safely arrived with her said cargo on board at Avonmouth, Bristol, her port of discharge within the meaning of the said bond.

The 6th paragraph recited that the bond had been executed according to all the formalities required by Italian law; that the said sum of 91,375·76 francs, together with bottomry premium at 20 per cent., amountd to 109,655·91 francs, and was then still due to the plaintiffs and unpaid.

On the 19th June 1883 judgment in the action was pronounced for the validity of the bond against the *Pontida* and her freight, and subsequently the owners of cargo admitted the validity of the bond as regards the cargo, subject to a reference to the registrar and merchants. The amount claimed at the agreed rate of exchange was 4386*l.* 0*s.* 8*d.*

The usual order for reference to the registrar and merchants was made.

On the 12th July 1883 the question came on for hearing at the reference before the registrar and merchants, and from the evidence then given and the documents put in the following additional facts were proved:

From the log of the *Pontida* it appeared that whilst on a voyage from Philadelphia she had met with very severe and tempestuous weather and made a great deal of water, and that all hands had forcibly called on the master to put into the nearest port, and that in consequence she had put into the island of San Michael. Upon her arrival a survey was held by the direction of the Italian consul and by surveyors appointed by him, and it was found that the cargo was in a good condition, but the surveyors advised that the vessel should be lightened up to the copper line in order that they might be better able to examine the true state of the cargo and caulking; they also found that the putting into port was indispensable through the vessel having sprung a leak.

The mate, who was a co-owner of the vessel, then authorised the captain to have the repairs executed which the surveyors had reported to be necessary.

The captain having no funds at his disposal, it became necessary for him to raise the money for such repairs by giving a bottomry bond. He thereupon wrote to the shippers in New York informing them of the circumstances, and an advertisement was inserted in the local paper giving notice that the captain would receive tenders for the money required on bottomry (about 600*l.*). Two tenders were received, and that of Messrs. Bensande and Co. being the more advantageous for the interests of those concerned, was accepted by the master with the sanction of the consul.

A second survey was then held by the same surveyors, the vessel having been lightened as recommended by them, and they found that the oakum had been washed out of the seams and much metal had been ripped away; a diver was also sent down to examine the ship's bottom, and he found that a quantity of metal had been ripped off all along the bottom of the vessel, in consequence of which the surveyors advised that the whole of the cargo should be discharged to enable them to see the bottom of the vessel, and order what should be done. The remainder of the cargo was then discharged, and the surveyors examined the vessel and gave an estimate of the repairs which they considered necessary. The repairs and other expenses being greater than at first contemplated, it became necessary to increase the sum required on the bottomry bond; which was accordingly done. On the completion of the repairs the surveyors examined the vessel, and finding that the necessary repairs had been properly done, pronounced her to be in a fit condition to reload her cargo and prosecute her voyage. The vessel was then reloaded and proceeded on her voyage. Before leaving San Michael, the captain wrote again to the shippers in New York, informing them that the whole of the repairs would amount to 2500*l.*

The surveyors estimate for repairs was as follows:

	Reis.
To caulking from metal line up, and deck, &c.	1,600,000
To port holes covering boards	100,000
Rigging backstays to foretopsail	540,000
Two yards, &c., topsails	190,000
To relining the hold, &c.	150,000
To new bolts and nails to knees and caulking, &c.	2,177,000
To metal, bolts, felt, nails	5,490,000
To repairing rudder	50,000
To scraping and painting	200,000
	10,497,000

Equal to £2099 8*s.*

The amounts claimed in respect of the work done, as recommended by the surveyors were as follows:

	Reis.
Ship chandler's account for rope, nails, &c. ...	80,780
Ditto	452,100
Labour in dry dock—recaulking and remetalling, &c.	5,994,800
Metal, felt, and nails	3,911,280
Blacksmith's account for bolts, tools, &c, ...	509,135
	10,948,095
Less charge in account for provisions ...	22,330
	10,925,765

Equal to £2185 3*s*.

It was proved at the reference that the weight of metal required had been carefully ascertained, and the quantity used had been duly weighed and no more used than required.

The other items claimed (so far as material) were 5 per cent. commission, being the ship's agent's charge upon disbursements, and amounting to 814,520 reis; 2½ per cent commission on 46,809,280 reis, being the value of the cargo discharged, as per manifest less the damaged cargo; and the bottomry premium of 20 per cent. on the total amount advanced.

The commissions were claimed as being the usual and ordinary commissions charged at San Michael under the like circumstances and it was shown that the master had sought to have them reduced but without success.

The premium claimed was that named in the tender and was the lowest offered.

On the 21st July 1883 the assistant registrar made his report and found the sum of 3685*l*. 3*s*. 4*d*. to be due to the plaintiffs upon the bottomry bond, the sum disallowed being 700*l*. 17*s*. 4*d*. Reductions had been made in three items, namely: (1) the amount of the bill for new metal, felt, and nails; (2) the commissions of 5 per cent. and 2½ per cent. by the ship's agent at San Michael; (3) the bottomry premium.

The amounts disallowed appeared in the schedule to the report, as follows:

	Claimed. Reis.	Allowed. Reis.
Metal and felt, &c.	3,911,280	3,000,000
Commission at 5 per cent. ...	814,520	500,000
2½ per cent. on 46,809,280 value of cargo as per manifest deducting value of damaged wheat sold	1,170,230	500,000
	5,896,030	4,000,000
Equal, at agreed exchange of 200 reis per franc, to	29,480·15	20,000
Bottomry premium at 20 per cent.	18,275·15	10,236·58
France ...	47,755·30	30,236·58

The total amount claimed without premium was 91,375fr. 76c. The total amount allowed was 81,375fr. 66c. The premium was therefore reduced to 12½ per cent.

The reasons upon which the assistant registrar had acted in giving his decision not appearing in his report, an application was made for them, and they were obtained. They were as follows:

(1) Bill for metal.—Taking the cost of copper metal in England at 3*l*. per cwt. and allowing an ample amount for cost of conveyance to San Michael, it was considered that the price of 7*l*. per cwt. was exorbitant. I am also advised that more metal was used than was probably necessary to repair the vessel. On these grounds 911,280 reis was disallowed, rather less than one quarter of the amount charged.

(2) The commission of 5 per cent. on the amount expended, and 2½ per cent. in addition on the value of the cargo charged by the ship's agent at San Michael was considered excessive. The amount allowed 500,000 reis on the ship, and the like amount on the cargo, in all about 200*l*., was considered an ample *quantum meruit* for his services.

(3) The premium of 20 per cent. was considered exorbitant for a voyage of less than three weeks, with a ship that had just been thoroughly repaired and remetalled. In these circumstances 12½ per cent. which was allowed was considered to be a high rate of premium.

And he further added that, before making the reduction for the latter item, one of the merchants who had assisted him in the reference had ascertained by inquiring that the amount of the loan might have been insured for so short a voyage for a small percentage.

On the 19th Nov. 1883 the plaintiffs filed a petition in objection to the assistant registrar's report on the grounds (1) that they were entitled by Italian law to the full amount of principal and premium, and (2) that if the question were governed by English law they were also entitled to the principal and premium, and that nothing had been proved by the defendants upon the reference to justify the reduction. To this the defendants filed an answer, and to the answer the plaintiffs filed a conclusion.

April 1 *and* 8.—The case came on for hearing upon the petition, in objection to the report of the assistant registrar.

Phillimore and *Aspinall* for the plaintiffs.—The reductions which the registrar has made in the amounts claimed by the plaintiffs are not warranted either by the facts which were proved at the reference, or the reasons which the registrar has himself given for so reducing them, or upon the authorities which exist on these points. First of all, taking those cases which are against the plaintiff, they are divisible into two classes, namely, those which affect the cost of repairs, and those which affect the commissions and premium. As to the first, there are no cases which lay down the principle that, when the sum advanced on bottomry has been advanced by a person other than the ship's agent, he is bound to see to the application of it, or that the amount expended in repairs can be reduced on the ground of being unnecessary or exorbitant except in the case of fraud. As to the second point, the two strongest cases are

The Cognac, 2 Hagg. 377;
The Glenmanna, Lush. 115,

in both of which the advance was made by a person not the ship's agent. In the former the bottomry premium having been reduced from 20 to 12½ per cent. was restored by the court, but the reduction in the commissions was affirmed. In the latter the commissions claimed upon the goods landed, and on the advances, were disallowed. In neither case, however, was there a foreign consul acting on behalf of the ship of his nation. In the former case the learned judge held "that the court has not authority to reduce the premium on a bottomry bond, unless specifically affected with fraud or collusion, which must be shown in a clear and distinct manner" (p. 386). But both of these cases, so far as they effect commission, are inconsistent with *The Prince of Saxe Coburg* (3 Moo. P. C. 1; 3 Hagg. 387), which lays down that, if the foreign merchant after due inquiry shall have reasonable ground for concluding

that the repairs are necessary and that the money cannot be raised on personal credit, then his security on ship and cargo shall not be impeached, because it might happen notwithstanding such inquiry that such repairs were not necessary or the money might have been obtained on personal credit. It must follow that, if commissions are payable at all, it cannot be the duty of the lender to inquire into the amount of those commissions or the mode of their application; it is not for him to judge whether the full amount was necessary; and this applies with double force in a case where it appears that the commissions charged are usual at the place where the bond is given. Passing to the cases in favour of the plaintiffs' claims, it has been distinctly laid down that there is no obligation on the part of the lender (not being the ship's agent) to see to the application of the money, or to calculate the expediency of the repairs, if he is sufficiently well assured that the money has been fairly borrowed and that there is nothing in the transaction that is fraudulent:

The Jane, 1 Dods. 464, 465;
The Vibilia, 1 W. Rob. 1, 10;
The Orelia, 3 Hagg. 75, 84;
The Royal Stewart, 2 Spinks, 260.

As to the reduction of premium, in the case of *The Cognac* (*ubi sup.*) the premium of 20 per cent. was reduced by the registrar to 12½, but restored by the court. And in another case a reduction from 14 to 10 per cent. was also restored:

The Zodiac, 1 Hagg, 320.

Except in the case of a loan by a ship's agent the owner of cargo should be held estopped from disputing his liability to pay particular items when once a necessity for the loan has been shown; he, by putting his cargo on board the ship impliedly authorises the master to act as the agent on an emergency arising; in other words, he holds the master out as his agent in case of necessity, and once given that necessity, the acts of the master in supplying the needs of ship and cargo ought not to be open to question by the principal as against a third person. The whole transaction was formally carried out before the Italian consular agent, and competent surveyors were duly appointed by him, who examined the vessels and made reports both before and after the repairs had been executed, and certified that the quantity of the metal paid for had been used for the necessary repairs. Under such circumstances the item for metalling ought not to be impeached but should be allowed:

Messina v. *Petrocochino*, L. Rep. 4 P. C. 144; 1 Asp. Mar. Law Cas. 298.

Bigham, Q.C. and *Barnes* for the defendants.—The amount which the defendants are compelled to pay upon the bond is limited to what are considered as necessaries in the strict sense of the term; and further, the cost of such necessaries must not be exorbitant, but reasonable under the circumstances, and it has always been the practice of the registrar and merchants to go into figures under these heads:

The Rhoderick Dhu, Swabey, 177;
The Albion, 1 Hagg. 333;
The Zodiac, Ib. 321;
The Tartar, Ib. 1;
The Nelson, Ib. 169;
The Calypso, 3 Hagg. 162;
The Lord Cochrane, 2 W. Rob. 320;
The Huntley, Lush. 24;
The Ysabel, 1 Dods. 273.

Phillimore in reply.

Cur. adv. vult.

April 29.—BUTT, J.—This is an action brought by the plaintiffs the Comptoir d'Escompte de Paris, as holders of a bottomry bond given at San Michael, on the Italian ship *Pontida*, her freight, and the cargo of wheat laden on board. The shipowners admitted their liability, but an appearance was entered on behalf of the owners of the cargo, who dispute the amount, although they do not contest the validity of the bond. The matter having been referred to the registrar and merchants, the plaintiffs' claim of 4386*l.* 0*s.* 8*d.* was by them reduced to 3685*l.* 3*s.* 4*d.* with interest. The reductions of which the plaintiffs complain relate to charges for metal, commissions, and bottomry premiums. With reference to the item for metalling the ship, the plaintiffs contend: (1) That it being admitted that some metal was necessary, and the lender on bottomry not being the ship's agent but a banker who came forward in answer to advertisements, it was not competent for the registrar to go into the question of the reasonableness of the quality or price of the metal; (2) That the bond having been entered into with the sanction and approval of the Italian consul at San Michael, is by Italian law binding on all parties. As to this latter contention it is sufficient to say that there is no evidence of the Italian law being such as is alleged.

With respect to the quantity of metal used and the price charged, the question in this as in all such cases must be, was the expenditure necessary for the completion of the voyage? The master is, and can only be, agent of the owners of cargo so as to bind them, *ex necessitate*; and it is no more within his competency to fix them with liability for an excessive quantity or an excessive price of material, than for material none of which was necessary for the voyage. The question of excess must always be a question for the registrar and merchants. The same considerations apply to the commissions and maritime premiums, both of which appear to me exorbitant. It is scarcely necessary to cite an authority for what I consider the settled law and practice of this court to refer questions of excessive charges, whether for repairs, commissions, or premiums to the registrar and merchants, but the observations of Dr. Lushington in *The Lord Cochrane* (2 W. Rob. 320, 336), and of Lord Stowell in *The Gratitudine* (3 C. Rob. 240), may be referred to. It was further contended, more especially I think with reference to the commissions, that the ship might have been detained at San Michael had payment been refused; but, as pointed out by Lord Stowell in the case of *The Augusta* (1 Dods. 288), that alone will not suffice. With regard to the facts it does not appear to me that the registrar and merchants were precluded by the evidence adduced from exercising their discretion in the matter, or that they have erred in its exercise. I must therefore, overrule the objections and confirm the registrar's report, with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Lowless* and *Co.*

Solicitors for the defendants, *Ingledew* and *Ince*, for *Henry Brittan* and *Co.*, Bristol.

Thursday, June 12, 1884.

(Before BUTT. J.

GOWAN *v.* SPROTT. (*a*)

Co-ownership action—Order for an account—District registrar—Report—Order III., r. 8—*Order XV., r.* 1—*Order LVI., r.* 11.

Where an action is instituted in an Admiralty District Registry by part owners of a ship against the managing owner thereof for an account, and the writ claims an account under Order III., r. 8, *and an order for the filing of the accounts is made under Order XV., r.* 1, *and the account is proceeded with pursuant to order, and the district registrar reports thereon, such report is to be treated as the usual report in an Admiralty Court action, and if the defendant seeks to take objection thereto, he must do so according to the provisions of Order LVI., r.* 11, *otherwise the plaintiff will be entitled to judgment thereon.*

Where a district registrar has made an order in an action in the Admiralty Division for an account between the part owners of a ship that the accounts be filed, and that they be proceeded with, it is too late to take objection to his making such order after he has reported, there having been no appeal against such order.

The court will not extend the time for objecting to the registrar's report in a co-ownership action without special grounds being shown by the party seeking to object.

THIS was a motion by the plaintiffs to confirm a report made by the Liverpool Admiralty District Registrar in an action *in personam*, in which the plaintiffs, as part owners of the vessel *Edderside*, of which the defendant was the managing owner, claimed to have an account taken of the earnings and disbursements of the last completed voyage of the said vessel.

The action was instituted on the 19th Jan. 1884 in the Liverpool Admiralty District Registry, and on the 8th Feb. the plaintiffs, having taken out a summons under Order XV., r. 1, for an account, the Liverpool District Registrar made the following order:

Upon the application of the plaintiffs, and on hearing the solicitors on both sides, it is ordered that the defendant, as the managing owner of the ship or vessel *Edderside*, do, within fourteen days from the date hereof, file an account of the earnings and disbursements of the last completed voyage of the said ship or vessel from Liverpool to Australia, Hongkong, Manilla, and home to Liverpool.

In pursuance of this order the defendant on the 22nd Feb, filed an account, and on the 14th March the district registrar made a further order in the terms following:

Upon hearing the solicitors on both sides, and considering the account filed by the defendant on the 22nd day of February last, and the examination of the defendant taken *viva voce* this day, it is ordered that the defendant do file a further and better account showing the items at credit of the owners of the ship or vessel *Edderside* at the commencement of the voyage, an interest statement and an amended statement of freight on her homeward voyage, and that such account be filed within one week from the date hereof, and be proceeded with on the 22nd instant, at eleven o'clock.

On the 20th March the defendant obtained an order extending the time to file the further account until the 24th March, and the 27th March was appointed to proceed with the taking of the accounts. The defendant did not file his further account within the extended time, and on the 27th March his solicitor attended before the district registrar and contended that the registrar had no authority to make the order of the 20th March, and that his jurisdiction ended when the first account was filed.

The matter was then adjourned to the judge in chambers for directions, whereupon Butt, J. on the 1st April deferred making any order until the order of the 20th March had been drawn up and served on the defendant; but, before any further application was made, the defendant on the 24th April filed a further or amended account.

The registrar thereupon proceeded to take the account, and found that there was a balance due from the defendant to the plaintiffs. The following is an extract from the registrar's report, which was given on the 7th May 1884:

We consider it to be our duty to report to your Lordships that the defendant did not in our opinion keep proper books of account as ship's husband, and that had he done so he could have more readily made up and rendered a proper statement of accounts to his co-owners at the termination of the voyage. We also must advert to the fact that several of the accounts for the outward voyage were not paid for until a long period after they were due instead of being paid at the time, and the usual discount obtained, and it is partly because we are unable to point out the specific loss sustained by the owners in consequence of this that we consider that the defendant should be charged with interest at 5 per cent. on the money in his hands and credited with interest on his payments from the date on which they were made.

June 10.—The plaintiffs now moved for judgment.

J. P. Aspinall, for the plaintiffs, after stating the facts, was stopped.

Bucknill, for the defendants, *contra*.—This is an action under Order III., r. 8, and Order XV., r. 1. [BUTT, J.—Do those orders apply to the Admiralty Division?] It is submitted that they do. According to Order XV., r. 1 (*a*), "an order for the proper accounts, with all necessary inquiries and directions now usual in the Chancery Division in similar cases" is to be forthwith made. According to the registrar's first order, by which he is bound, it is ordered that the defendant do file an account of the earnings and disbursements of the *Edderside*. No mention is made of an account being taken, and in the absence of any such order it is submitted that the registrar had no jurisdiction to take the account, and therefore this report is valueless. It has been decided in the

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

(*a*) Order XV., r. 1, is as follows: "Where a writ of summons has been indorsed for an account under Order III., r. 8, or where the indorsement on a writ of summons involves taking an account, if the defendant either fails to appear, or does not after appearance, by affidavit or otherwise, satisfy the court or a judge that there is some preliminary question to be tried, an order for the proper accounts, with all necessary inquiries and directions now usual in the Chancery Division in similar cases, shall forthwith be made." In the case of *York* v. *Stowers* (W. N. 1884, p. 174), which came before Field, J. in chambers shortly after the Rules of the Supreme Court 1883 came into operation, objection was raised to an account being taken in the Queen's Bench Division under this rule, and application was made that the action should be transferred to the Chancery Division. Field, J., however, decided that the rule was meant to apply to the Queen's Bench Division. The result of the present case is, that the rule is applicable to the Probate, Divorce, and Admiralty Division, thus making it applicable to all three branches of the High Court.—ED.

Chancery Division that a district registrar has power to make an order for an account under Order XV., r. 1, and if the order so directs, but not otherwise, he can then proceed to take the account:

Re Bowen, 20 Ch. Div. 538; 47 L. T. Rep. N. S. 114.

That case is directly in point. It is true that by the second order it is directed that a further account be filed and be proceeded with. But, inasmuch as the registrar in the commencement took upon himself jurisdiction without a proper order, he cannot remedy that defect by this subsequent order. Moreover, the words "be proceeded with" are not sufficient to constitute an order to take the accounts.

BUTT, J.—The case referred to is in the Chancery Division, where it is possible to conceive many instances in which the mere filing of an account is all that is requisite. There are many cases in which the mere delivery of documents into the custody of the chief clerk is alone necessary. But, according to the practice of this court, where accounts are ordered to be filed, it means that the registrar is to go on and take an account. There has been no appeal against this order, and in the absence of such it is to be assumed to be right.

Bucknill.—As your Lordship is against me on the point of law, I would submit that the case should be adjourned in order that objection may be taken to the amount allowed to the plaintiffs. [BUTT, J.—Has not the time expired within which you should have taken such objection?] It is submitted not, because this is a reference under Order XV. and not under Order LVI., by which the time for objecting is limited to six days. It is to be remembered that this is not the ordinary form of Admiralty reference to which the provisions of Order LVI. are applicable, but that it is an action for an account under Order III., r. 8, and Order XV., r. 1. According to Order XV., r. 1, it is an order "with all necessary inquiries and directions now usual in the Chancery Division in similar cases;" and therefore the Chancery practice applies, and not the Admiralty.

J. P. Aspinall.—The action was instituted under the Admiralty Court Act, but we availed ourselves of the provisions of Order XV.

BUTT, J.—It is an action for an account under the Admiralty Court Act, and as the six days within which objection should have been taken have expired, I cannot accede to this application.

Bucknill.—Assuming the time has expired, the court has jurisdiction to extend it, and on the merits of the case this should be done.

BUTT, J.—The defendant has throughout persisted in taking a highly technical objection, in consequence of which he has not taken objection to this report within the proper time. He has, therefore, brought about the difficulty in which he is now placed, and, in the absence of special grounds, I see no reason for extending the time.

The report was accordingly confirmed, with costs.

Solicitors for the plaintiffs, *Hill, Dickinson, Lightbound*, and *Dickinson*.

Solicitors for the defendant, *Banks* and *Kendall*.

Tuesday, June 17, 1884.

(Before BUTT, J.)

THE MAMMOTH. (*a*)

Practice—Collision—Costs—Printed evidence for use of counsel in court—R. S. C., Order LXVI., r. 7, and Appendix N.—Counsel.

In consequence of the negligent navigation of the M. the steamship P. M. came into collision with the M. and with the D. In a damage action, instituted by the owners of the P. M. against the M., the plaintiffs were successful. In a damage action, instituted by the owners of the D. against the M. to recover damages arising out of the collision between the D. and the P. M., the plaintiffs were successful.

In this latter action by agreement between the parties the evidence of the first action, which had been printed in the form of a record for the purposes of appeal, was admitted, and was supplied to the plaintiffs by the owners of the P. M., the defendants refusing to provide them with it.

The registrar, on taxation, allowed the plaintiffs, the owners of the D., the amount paid by them to the owners of the P. M. for the printed evidence, and 3d. per folio for this printed evidence provided for the use of counsel in court in accordance with the terms of Appendix N. of the Rules of the Supreme Court 1883. *On objection to the registrar's taxation the Court refused to disallow the 3d. per folio.*

In a collision action where the trial promised to be protracted, and the damage done exceeded 2000*l., the Court refused to interfere with the registrar's discretion in allowing the costs of three counsel.*

THIS was a summons by the defendants in a damage action calling on the plaintiffs to show cause why the registrar should not review his taxation of the plaintiffs' costs by disallowing certain items therein allowed.

The action was instituted by the owners of the vessel *Dunscore* against the East and West India Dock Company, the owners of the derrick *Mammoth*, to recover damages arising out of a collision between the steamship *Persian Monarch* and the *Dunscore* on the 5th Jan. 1883, in the river Thames, alleged to have been brought about by the wrongful manœuvres of the *Mammoth*.

Immediately prior to this collision the *Persian Monarch* and the *Mammoth* had been in collision, in respect of which the owners of the *Persian Monarch* had instituted an action against the owners of the *Mammoth*, and in Feb. 1883 the *Mammoth* was found solely to blame for the collision. Thereupon the present action was instituted, and it was agreed that the evidence taken in the previous action should be admitted in this action. Accordingly, application was made by the plaintiffs to the defendants for the record in the previous action, which record had been printed for the purposes of appeal in such action. This the defendants refused to supply, whereupon the owners of the *Dunscore* obtained it from the owners of the *Persian Monarch*, the plaintiffs in the previous action.

The owners of the *Dunscore* having proved successful in their action against the *Mammoth*, proceeded to tax their costs, and among other

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs. Barristers-at-Law.

items allowed by the registrar were the charge for the prints of the records together with 3*d.* per folio on the copies supplied to counsel and the fee of a third counsel. The 3*d.* per folio was allowed under the provisions of Appendix N. of the Rules of the Supreme Court, which provides that

> The solicitor for a party entitled to take printed copies shall be allowed, for such number of copies as he shall necessarily or properly take, the amount he shall pay therefor. In addition to the allowances for printing and taking printed copies, there shall be allowed for such printed copies as may be necessary or proper for the following, but for no other purposes (*videlicet*): Of any pleading, special case, petition of right, or evidence for the use of counsel in court, and in country agent causes when proper to be sent as a close copy for the use of the country solicitor, at per folio ..... 3*d.*

To these items the defendants now took objection on the grounds: (1) that there is no rule or scale under the Judicature Act which empowers a taxing officer to allow for prints of a document at 3*d.* or any other rate per folio which had been printed for and used in another action; (2) that no work or labour was bestowed by the plaintiffs' solicitors on the record to entitle them to such an allowance; (3) that the whole expense of printing such record has already fallen on the defendants in the action brought by the owners of the *Persian Monarch*, and they have also actually paid for prints of such record furnished by the plaintiffs' solicitors to counsel in that action; (4) that under the existing rules only a party to the action in which a document has been printed is entitled to take prints or to charge for prints for the use of counsel; (5) that the employment of a third counsel was wholly unnecessary, and, under the circumstances of the case, unwarranted, and ought not to be allowed on the ground that the evidence of ten of the witnesses was admitted on their evidence taken long before the hearing, and only four witnesses were actually examined at the trial.

With regard to these items, the registrar's notes were as follows:

> It appears to me that the defendants' solicitors ought themselves to have supplied the copies, and that on their refusal the plaintiffs' solicitors were clearly entitled to obtain them from the plaintiffs' solicitors in the other action, and to recover the amount paid for them from the defendants. I think, on further consideration, that they are also entitled to the scale allowance of 3*d.* a folio on the copies supplied to counsel, the whole record having ultimately been admitted by the defendants, besides having been previously admitted for the purpose of cross-examination. It is true that no labour was bestowed by the plaintiffs' solicitors on the record in question, but that is an objection which would apply to the scale allowance in any case where the solicitor claiming is not the solicitor who has printed the record. It is also true that the defendants have already incurred a similar charge for the same printing in the former action, but if they have to pay the charge again it results from their having raised again the same issues which were decided in that action. I have felt some doubt as to the allowance of a third counsel, but, considering that the case promised to be a hard-fought one, that the trial of the action by the *Persian Monarch* had occupied the court four days, that the defendants had appealed, that the issues in that action were in effect to be tried again in this, and that the defendants agreed to pay a sum of 2700*l.* in settlement of the claim in this action, a sum much exceeding the amount recovered in the action by the *Persian Monarch*, it appears to me that the plaintiffs were justified in retaining three counsel, as was also done by the defendants.

The summons came on before the judg in chambers, but was adjourned into court.

Bucknill in support of the application on behalf of the defendants.—On reference to Appendix N. it will be seen that the person entitled to the 3*d.* per folio is "the solicitor for a party entitled to take printed copies." That is, the solicitor in the action in which the matter is printed. Here it is the solicitor in an action other than that in which the evidence is printed who is seeking to charge the defendants with this 3*d.* per folio. The idea in allowing the 3*d.* per folio was to remunerate the solicitor over and above the price actually paid for the printing, and was by way of compensation for his work and labour in correcting proof, and generally in drawing up the record. In this case the record having been printed in the previous action, the solicitor to the present plaintiffs has been at no trouble, and therefore is entitled to no compensation. There was nothing in the circumstances of the case to warrant the allowance of three counsel. There were only four witnesses examined at the trial, and the issues raised were of no unusual character.

Kennedy, for the plaintiffs, *contra*.—There is nothing in the Rules of the Supreme Court expressly limiting the allowance of 3*d.* per folio to the solicitor at whose instigation the evidence is actually printed. It is the profit allowed to a solicitor in respect of printed evidence for use of counsel, and should be allowed irrespective of the question whether or not the evidence has been printed by the order of the solicitor claiming the allowance. The circumstances are sufficiently special to justify the registrar in allowing three counsel. The case lasted some time, and the amount at stake was large.

BUTT, J.—I can see no reason to interfere with this taxation of costs. The first items which I have to deal with are those charges for the prints of the record over and above the sum actually paid for them to the solicitors of the plaintiffs in the action between the *Persian Monarch* and the *Mammoth*. Have any sufficient reasons been shown why I should disallow these charges? It is admitted by the defendants that, if these records had been printed by a party to the action, the plaintiffs would have been entitled to charge at the fixed rate of 3*d.* per folio under Order LXVI., r. 7, But then it is argued that this rule does not apply when the record is printed by parties other than those to the action in which the record is printed. However, I think that when parties enter into an agreement not to call evidence in the ordinary way, but to admit prints of evidence prepared for appeal in another action, that then this is similar to an agreement that the parties should be in the same position as if it had been necessary to have the same evidence printed under an order. I therefore do not think that the objection to these items is made out. With regard to the costs of a third counsel, I am quite aware of the new rules relating to that subject, but it has not been argued that I am absolutely bound by them. I am of opinion that where damage has been done to the amount of 2000. it is not unreasonable to have three counsel. I therefore think, on the whole, that nothing has been shown me to cause me to overrule the taxing master's discretion in this matter, and I therefore direct these objections to be dismissed with costs.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

Solicitors for the defendants, *Freshfields* and *Williams.*

Tuesday, Aug. 4, 1884.

(Before Sir JAMES HANNEN and BUTT, J.)

THE BELFORT. (*a*)

Charter-party—Demurrage—Stamp Act 1870 (33 & 34 *Vict. c.* 97), *ss.* 15, 67, *and* 68.

A charter-party wholly executed by both parties thereto abroad, is duly stamped so as to be admissible in evidence if it has been stamped within two months after it has been first received in the United Kingdom as provided by sect. 15 *of the stamp Act* 1870, *and it is not necessary that such a charter-party should be stamped under sect.* 68 *of the same Act.*

Semble, that such a charter-party must be stamped with an impressed stamp, and not with an adhesive stamp.

THIS was an application for a new trial by the plaintiffs in an action instituted in the County Court to recover demurrage amounting to 57*l.* 10*s.* in respect of four voyages of the steamship *Belfort* belonging to the plaintiffs.

The charter-party under which the defendants' goods had been carried was dated Nov. 30, 1883, and had been entered into and signed by or on behalf of all the parties at La Rochelle in France. On the 13th March 1884 the original charter-party was received unstamped in England by the plaintiffs' agents for the purposes of the action, and was sent by them to the Inland Revenue Office on or about March 17, in order that it might be stamped. On the 2nd April the charter-party was returned from the Inland Revenue Office unstamped with a memorandum in the following words:

> If this charter-party was executed and intended to be dated as at Cardiff it cannot now be stamped under any circumstances. But if signed and intended to be dated as at La Rochelle, an adhesive stamp of 6*d.* must be affixed and cancelled within ten days after its receipt in the United Kingdom, and before being signed by any party within the United Kingdom. But the impressed stamp is not applicable in such a case.

On the 2nd April the plaintiffs' agents in England placed a 6*d.* adhesive stamp on the charter-party and cancelled such stamp. During the hearing of the plaintiffs' case it was proposed to put in the charter-party, but objection was taken by the defendants to the admission of that document on the ground that it had not been stamped in compliance with the provisions of sects. 67 and 68 of the Stamp Act 1870. On this question the County Court judge decided that the charter-party should have been stamped under the provisions of sect. 68, and gave judgment for the defendants.

On the 8th April the plaintiffs wrote, inclosing the charter-party, to the Inland Revenue Commissioners for their opinion as to whether or not the document could be stamped. The charter-party was subsequently returned with an adjudication stamp affixed thereto, and dated April 10, the commissioners being of opinion that the case came within sect. 15 of the Stamp Act 1870 and not within sect. 68 as decided by the County Court judge. (*a*)

Thereupon application was made to the said County Court judge for a new trial, but such application was refused. An application was then made to the Admiralty Division of the High Court, under sect. 27 of the County Courts Admiralty Jurisdiction Act 1868, for leave to appeal, and such application was granted. (*b*)

Barnes, on behalf of the plaintiffs, in support of the appeal.—This charter-party, which is executed by both parties on Nov. 30, 1883 out of the United Kingdom, is not received in the United Kingdom until March 13. Within two months of that date it has been stamped, and if the provisions of sect. 15 of the Stamp Act 1870 apply there has been a compliance with those provisions. That section enacts that, in the absence of express provision to the contrary, any unstamped instrument executed at any place out of the United Kingdom may be stamped within two months after its receipt in the United Kingdom. No express provision to the contrary exists. It is true that sects. 66, 67, and 68 expressly deal with charter-parties, but only under circumstances different from the present case. In this case the charter-party was executed wholly abroad. Sect. 68 could not have been meant to apply to such a charter-party as the present, because it fixes the utmost limit of time within which it must be stamped as one month, and yet there must be many places out of the United Kingdom whence it would be impossible for a charter-party to reach the United Kingdom within the prescribed month. Sect. 67 cannot apply to the present case, because it deals with charter-parties partly executed abroad, and then sent over to England to be finally executed. Sect. 66 is clearly meant to apply to charter-parties made in this country. There is therefore no "express provision to the contrary," and hence sect. 15 is applicable.

Dr. *Phillimore* and *Bucknill*, for the defendants, *contra.*—Sect. 68, which deals exclusively with charter-parties, contains express provision contrary to the enactment contained in sect. 15. According to sect. 68 a charter-party can only be stamped within one month after its execution,

(*a*) Reported by J. P. ASPINALL, and F. W. RAIKES, Esqrs., Barristers-at-Law.

(*a*) On reference to the charter-party we find that the adjudication stamp placed thereon by the inland Revenue Commissioners consisted of a sixpenny impressed stamp, with the words "adjudged duly stamped" printed underneath. Having regard to the fact that sect. 23 provides that, "Except where express provision is made to the contrary, all duties are to be denoted by impressed stamps only," and that no express provision is made to the contrary by sect. 15, under which the court has held that the present charter falls, it is to be presumed that such a charter-party as the present must be stamped with an impressed stamp, and not with an adhesive stamp.—ED.

(*b*) Sect. 27 of the County Courts Admiralty Jurisdiction Act (31 & 32 Vict. c. 71) 1868 provides as follows: "No appeal shall be allowed unless the instrument of appeal is lodged in the registry of the High Court of Admiralty within ten days from the date of the decree or order appealed from, but the judge of the High Court of Admiralty may, on sufficient cause being shown to his satisfaction for such omission, allow an appeal to be prosecuted, notwithstanding that the instrument of appeal has not been lodged within that time." In the case of *The Humber* (*ante*, p. 181) Sir James Hannen and Butt, J., sitting as a divisional court, decided that this section is not altered or curtailed by sect. 6 of the County Courts Act 1875, which merely provides an alternative mode of appeal.—ED.

and in this case that month has elapsed. [Sir JAMES HANNEN.—If it is physically impossible that in consequence of the locality where the charter is entered into it should be stamped within the month, what then?] Parties who contemplate entering into charter-parties should have adhesive stamps with them to meet such a contingency.

Sir JAMES HANNEN.—I am of opinion that this document was properly stamped when it was produced on the second occasion before the County Court judge. Sect. 15 of the Stamp Act is general and provides that "(1.) Except where express provision to the contrary is made by this or any other Act, any unstamped or insufficiently stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty where the unpaid duty exceeds ten pounds of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when such interest is equal in amount to the unpaid duty. And the payment of any penalty or penalties is to be denoted on the instrument by a particular stamp. (2.) Provided as follows: (*a*) Any unstamped or insufficiently stamped instrument, which has been first executed at any place out of the United Kingdom, may be stamped at any time within two months after it has been first received within the United Kingdom on payment of the unpaid duty only. (*b*) The commissioners may, if they think fit, at any time within twelve months after the first execution of any instrument, remit the penalty or penalties, or any part thereof."

Now this was a document first executed out of the United Kingdom, and it has been stamped with an impressed stamp within two months after it had been received in the United Kingdom. It lies therefore upon the party who is impeaching the legality of the stamping to show that there is "express provision to the contrary." The express provision to the contrary relied upon is to be found in the sections specially relating to charter-parties. Sect. 66 is: "The duty upon an instrument chargeable with duty as a charter-party may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is last executed, or by whose execution it is completed as a binding contract." I am of opinion that that section does not refer to charter-parties executed abroad. It is there dealing with charter-parties executed in this country. When we come to sect. 67, I find that the marginal note, which is "as to charter-parties executed abroad," is strongly confirmatory of the contention that sect. 66 does not apply to charter-parties made abroad. This 67th section enacts that, "Where any document chargeable with duty as a charter-party, and not being duly stamped, is first executed out of the United Kingdom, any party thereto may, within ten days after it has first been received within the United Kingdom, and before it has been executed by any person in the United Kingdom, affix thereto an adhesive stamp denoting the duty chargeable thereon, and at the same time cancel such adhesive stamp, and the instrument with an adhesive stamp thereon so affixed and cancelled shall be deemed duly stamped." That contemplates the case of a charter-party first being executed abroad and then being executed in the United Kingdom. That section therefore does not apply to this particular case, because the charter-party here has been executed by both parties out of the United Kingdom. Sect. 68 enacts that, "An executed instrument chargeable with duty as a charter-party and not being duly stamped, may be stamped with an impressed stamp upon the following terms: that is to say, (1.) Within seven days after the first execution thereof, on payment of the duty and a penalty of four shillings and sixpence; (2.) After seven days, but within one month after the first execution thereof, on payment of the duty and a penalty of ten pounds, and shall not in any other case be stamped with impressed stamp." I am of opinion that that section does not relate to a document wholly executed out of this country. It seems to me that it was never intended that in the case of charter-parties executed abroad the parties should have adhesive stamps with them. It appears to me, therefore, that Dr. Phillimore has failed to show that there is any express provision to the contrary, and if so the case comes within sect. 15, and the stamping has been done within the time prescribed by that section. I will only add that in my view the course taken has been most productive of waste of time in rendering it necessary that the whole case should be tried a second time. The proper course would have been to have ordered an adjournment in order that this point might be settled. The result, therefore, is that this appeal must be allowed and a new trial ordered.

BUTT, J.—I am of the same opinion. I think that this document was properly stamped under sect. 15. and that the case comes within the provisions of the sub-sections of that section. It is provided under sub-sect. 1, that with regard to instruments executed abroad they may be stamped within two months after they have been received within the United Kingdom, and by sub-sect. 2 power is given to the commissioners to remit the penalty if they think fit. Now, unless this case is taken out of sect. 15 by some express provision to the contrary, it seems clear that the commissioners have power to do that which they have done. For the express provision to the contrary we are referred to sects. 67 and 68. I do not, however, think that those sections apply to this case, in which the instrument is wholly executed out of the United Kingdom. For instance, sect. 67 applies to a charter-party first executed out of the United Kingdom, because it speaks of something being done within ten days after it has been received in the United Kingdom. Therefore I think that there is nothing to take this case out of the operation of sect. 14 and that this appeal should be allowed.

The Court ordered each party to bear their own costs in the court below, the defendants to pay the costs of the appeal.

Solicitors for the plaintiffs, *Ingledew, Ince*, and *Colt*.

Solicitors for the defendants, *Stokes, Saunders*, and *Stokes*.

Oct. 28 *and Nov.* 4, 1884.

(Before BUTT, J.)

THE WILLIAM SYMINGTON. (*a*)

Salvage—Practice—Tender—Costs.

Where in a salvage action defendants with their statement of defence tender and pay into court a sum of money in satisfaction of the plaintiffs' claim, and plead such payment into court, and the sum paid in is held to be sufficient, the court will order the defendants to pay the plaintiffs' costs up to the date of the delivery of the statement of defence, unless the circumstances of the case render it just and expedient to order otherwise. (*b*) *In a salvage action it is not necessary that a tender should be accompanied with an offer to pay the plaintiffs' costs up to the date of tender.*

THIS was a motion by the defendants in a salvage action, subsequent to judgment therein, to vary the decree by striking out so much as gave to the plaintiffs the costs incurred by them up to the time of tender, and by condemning the plaintiffs in the entire costs of the action.

The action was instituted by the crew and owners of the steamship *Xantho* against the steamship *William Symington*, to recover salvage for services rendered to the *William Symington*, off the coast of Spain, on May 23, 1884.

The plaintiffs claimed 800*l*. The defendants in their defence alleged a tender and payment into court of 200*l*. which was refused by the plaintiffs in their reply. The defence was dated July 12, and the money was paid into court on July 14.

The action came on for trial on the 24th July, before Butt, J., who upheld the tender of 200*l*. with costs. On counsel for the plaintiffs applying for costs up to the time of tender, Butt, J. said: "I have always had a doubt about the practice of this court. I know the rule in the common law courts was, that if a man declined to accept a tender he went on at his own risk, and he paid the whole costs if he failed. I do not know whether that is the rule here. They will follow the usual course in the registry. I will not decide the matter now. If there is an appeal from the registrar we will have the matter decided."

Upon this the following decree was drawn up in the registry:

The judge having heard counsel on both sides pronounced the tender of 200*l*. heretofore made in this action to be sufficient, dismissed the defendants and their bail from this action and all further observance of justice therein on payment of the costs incurred by the plaintiffs up to the time of the said tender being made, and condemned the plaintiffs in the costs incurred subsequently to the said tender.

The plaintiffs thereupon lodged their costs in the registry for taxation, but on the defendants alleging that they proposed raising the question as to whether the plaintiffs were entitled to any costs the registrar postponed taxation.

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

(*b*) The learned Judge in his judgment directs the defendants to pay the plaintiffs' costs up to the date of delivery of the statement of defence. We assume that he took this date as being identical with the date of tender. Were the tender made prior to statement of claim, it is presumed that the plaintiff would only get his costs up to the date of the tender.—ED.

The motion now came on before the judge in court.

J. P. Aspinall, for the defendants, in support of the motion.—While the practice of late years in the Admiralty Court has been under similar circumstances to give the plaintiffs the costs incurred up to the tender, it is nevertheless opposed to the practice at common law. [BUTT, J.—We must remember to distinguish between what is called tender in the Admiralty Court and what is known as tender in the common law courts. In the Admiralty Court what is called tender is simply payment into court; whereas, at common law it is an offer of so much in satisfaction of the plaintiff's claim before action brought.] The practice at common law has been to give the defendant the entire costs of the action where the payment into court has been found sufficient. [BUTT, J.—That I think is so, but the practice in the Admiralty Court has been different, and the question is, whether it is a right practice.] It is only since 1869 that the present practice of the Admiralty Court has been unvaried. [BUTT, J.—At the common law I remember there used to be two pleas, viz., tender and payment into court. We must therefore distinguish between the two, inasmuch as in the Admiralty Court payment into court is called a tender.] The question of payment into court has recently been considered by the Court of Appeal, who have decided that the alternative plea of money paid into court as sufficient to satisfy the plaintiff's claim, when held to be sufficient, goes to the whole cause of action, and that judgment should be entered for the defendant, and that the defendant should get all the costs of the action:

Wheeler v. *The United Telephone Company*, 50 L. T. Rep. N. S. 749; 13 Q. B. Div. 597.

The desirability of having one uniform practice in all the courts should be considered, and, inasmuch as costs are in the discretion of the judge, there is no reason why the old practice of the Admiralty Court should not be set aside. [BUTT, J.—That being so, it is a question of which is the more reasonable.] It would seem the more reasonable course because in a salvage action what generally happens is that either the plaintiffs hastily institute their action without giving the defendants time to make a tender before action brought, or else a tender is made, and refused as insufficient, and then action commenced. In either case the action of the plaintiff is productive of unnecessary litigation if the tender is upheld, and hence the defendants should be made to pay all the costs.

Myburgh, Q.C., for the plaintiffs, *contra*.—In the absence of strong reasons, the old practice should be followed. [BUTT, J.—I have always had great doubts on this point, and I have been inclined to think that the prevailing practice is a bad one.] Having regard to the eminent judges who laid down the practice, it is to be assumed that it is a reasonable one. [BUTT, J.—But there is no want of analogy between payment into court at common law and tender in the Admiralty Court, and yet the practice at common law has also been settled by equally eminent judges.] The peculiar circumstances of salvage make the practice a just and reasonable one. The tender is not made until after the plaintiffs have instituted their action, a thing which all salvors are entitled to do.

[BUTT, J.—But if you refuse a tender after action brought, you would refuse the same tender prior to action brought, and therefore you are really the creator of unnecessary litigation.] It is not the universal practice at common law to give the defendant all the costs of the action when the tender is upheld:

Buckton v. *Higgs*, 45 L. T. Rep. N. S. 755; 4 Ex Div. 174;
Greaves v. *Fleming*, 4 Q. B. Div. 226;
Gretton v. *Mees*, 38 L. T. Rep. N. S. 506; 7 Ch. Div. 839.

The practice in the Admiralty Court has been to tender a sum of money with costs:

The Hickman, L. Rep. 3 A. & E. 15; 3 Mar. Law Cas. O. S. 298; 21 L. T. Rep. N. S. 472;
The Thracian, L. Rep. 3 A. & E. 504; 1 Asp. Mar. Law Cas. 207; 25 L. T. Rep. N. S. 889.

[BUTT. J.—I do not understand the meaning of a tender with costs. A tender is an offered payment of a sum of money in satisfaction of the plaintiff's claim, and if accepted the person accepting gets his costs as a matter of course.] The Court of Appeal in the case of *The Hector* (5 Asp. Mar. Law Cas. 101; 48 L. T. Rep. N. S. 890; 8 P. Div. 218) upheld the old practice of the Admiralty Court as to costs where both ships are held to blame for a collision, although it is opposed to the common law practice, and in many cases works considerable injustice to successful appellants.

J. P. Aspinall, in reply, cited

Langridge v. *Campbell*, 2 Ex. Div. 281; 36 L. T. Rep. N. S. 64.

Cur. adv. vult.

Nov. 4.—BUTT, J.—This is a suit for salvage services rendered by the plaintiffs to the steamship *William Symington* on the 24th May last. The action was instituted on the 18th June. The defendants, in their statement of defence, which was delivered on the 12th July, denied that the services rendered by the plaintiffs were salvage services, and as an alternative defence they paid into court the sum of 200*l.*, which sum the plaintiffs, by their reply, alleged to be insufficient. The cause was heard on the 24th July, when the court pronounced the sum paid in to be sufficient. A question as to payment of costs has arisen. There is no doubt as to the liability of the plaintiffs to pay the defendants' costs subsequently to the delivery of the statement of defence; but the plaintiffs claim to be entitled by the practice of the court to be paid their costs up to that date. No doubt the general practice of the Court of Admiralty was to give the plaintiffs their costs up to the time of payment into court, or of tender, as such payment into court was called. On the other hand, the invariable practice of the courts of common law was to give the defendants the whole costs of the cause where the only issue was the sufficiency of the amount paid into court, and where he succeeded on that issue.

Since the passing of the Judicature Acts these costs, instead of necessarily following the event, are by Order LV., r. 1, in the discretion of the court or judge. I think it desirable that the practice of this division, with respect to costs, should, in the generality of actions, be made to conform, as nearly as may be, to that of the Queen's Bench Division; and had there been no considerations specially applicable to salvage suits, I should have been disposed to have condemned the plaintiffs in the whole costs. But there are circumstances which render it peculiarly difficult, if not impossible, for plaintiffs in salvage actions to form an estimate of the amount to which they are entitled for the services they have rendered. In the first place, the amount of their remuneration depends to some extent on the value of the salved property, and of this salvors are seldom aware until after proceedings in the suit have gone some length. Again, from motives of public policy, and from the nature of the services rendered, their title to remuneration is not a mere *quantum meruit*. Having regard to the weight my predecessors have attached to these considerations, and to the decision of the court in the case of *Buckton* v. *Higgs* (*ubi sup.*), where, as in this case the defendant had pleaded payment into court as an alternative defence, I shall exercise the discretion vested in me by ordering the defendants to pay the plaintiffs' costs up to the time of delivery of the statement of defence. This, however, is a rule from which I should not hesitate to depart in any case in which I thought salvors had acted unreasonably in refusing an offer made before suit. I wish to add that much confusion has arisen both in the Court of Admiralty and in this division from a notion that no payment into court is sufficient unless it be accompanied by an offer to pay the plaintiffs' costs up to that time. In my opinion such an offer is not only unnecessary, but erroneous, and is one which should not be made.

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *Fielder* and *Sumner*.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, March 25, 1884.

(Before BRETT, M.R., BAGGALLAY and LINDLEY, L.JJ.)

STOCK *v.* INGLIS. (*a*)

Marine insurance—Insurable interest—No specific appropriation of goods to contract—Property not passed to the assured—"Free on board."

Where goods are shipped f.o.b., even though mixed with other goods of the same sort and not specifically appropriated to the buyer, if it appear that it was the intention of the parties, in the ordinary course of business, that the goods should be at the risk of the buyer, the buyer has an insurable interest in them.

D. and Co., sugar merchants of London, agreed in writing to sell to the plaintiff, a merchant at Bristol, 200 *tons of sugar of a certain quality as regards saccharine matter, at the price of* 21*s.* 9*d. per cwt. f.o.b. Hamburg. The sugar was to be shipped from Hamburg to Bristol, and payment was to be made by cash in London in exchange for bills of lading. D. and Co.'s agents at Hamburg, in performance of this contract and also of another Bristol contract for another* 200 *tons of sugar, shipped thence per the steamship* City of Dublin 400 *tons of sugar, and consigned the same to Bristol. D. and Co.'s usual course of*

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

business was, as the plaintiff knew, not to apportion particular bags of sugar to particular buyers at the time of shipment, but to apportion the various bags and the bills of lading representing them between their various buyers at a particular port, after the sugar had been shipped and after D. and Co. had received the bills of lading. This was done in order that D. and Co. might with comparative accuracy make up to each buyer the amount of saccharine matter contracted for by him. The City of Dublin *was lost on the voyage from Hamburg to Bristol, before any appropriation of sugar had been made by D. and Co., but D. and Co. afterwards appropriated* 200 *tons to the plaintiff and sent him an invoice and the plaintiff thereupon paid for the sugar so appropriated to him. The plaintiff had a floating policy on goods, and on hearing of the loss declared thereunder in respect of these* 200 *tons of sugar in the* City of Dublin.

Held, in an action on such policy, that the plaintiff had an insurable interest in such sugar, because, although the property had not passed to him, the words f.o.b. in the contract made between the parties, having regard to their knowledge of the course of business, showed it to be their intention that the 200 *tons bought by the plaintiff should be at his risk, and that he should be liable to pay for it whether it arrived or not.*

Judgment of Field, J. (47 *L. T. Rep. N. S.* 416) *reversed.*

THIS was an appeal from a judgment of Field, J., on further consideration (reported 4 Asp. Mar. Law Cas. 596; 47 L. T. Rep. N. S. 416).

The plaintiff was a Bristol merchant and sought to recover from the defendant, an underwriter at Lloyd's, under a "floating" marine policy on goods in respect of a loss of 3900 bags of sugar shipped on board the *City of Dublin* from Hamburg to Bristol.

The facts, which are very fully set out in the judgment of Field, J., were as follows:—

The sugars which were lost had been shipped at Hamburg for Messrs. Drake and Co., London merchants, by their forwarding agents there, in intended performance of two written contracts for sale entered into by Drake and Co. with two Bristol buyers in Jan. 1881. 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 degrees 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 identical 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 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 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 the plaintiff, and although plaintiff knew that he had 400 tons coming from Hamburg, *i.e.*, 200 to be shipped by Drakes, and 200 to be shipped by someone 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. The ultimate destination of the whole 400 tons was thus Bristol, deliverable by Drake and Co., f.o.b. at Hamburg during the month of January. The ordinary course of business, and 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 departure at the end of the last half of January. The plaintiff, 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 Harmann and Thielnehmer, their Hamburg forwarding agents, that they had sold 400 tons for Bristol, and gave them the necessary directions 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. The whole of the sugar which Drake and Co. had appropriated to satisfy the two contracts together had not arrived, however, at Hamburg at the time of the departure of the steamer, and in consequence Hermann and Thielnehmer 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 no appropriation was 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 undistinguishable mass, and all were consigned simply "order Bristol." This was in accordance with the usual course of business of Drake and Co., which was not to fulfil contracts of this kind by appropriating the sugar to each buyer at the time of shipment, but to ship enough to satisfy all the contracts they might have for sugar, which were deliverable at any particular port, and after the shipment to apportion the sugar shipped between the buyers at that port according to each contract. The apportionment was made so that no part of the sugar to be supplied under any contract should exceed 92 degrees net saccharine matter, and that the average should not be more than 90, for all net above, though paid for by Drake and Co. in Germany, would, under the terms of the contract, go for nothing in England, and so be a loss to them. It was therefore the usual course of business for Drake and Co. not to

make the apportionment until they had got the bills of lading, when by comparing them with the certificates of the analyses of the sugar made in Germany, and which were duly forwarded to them in London, and had references to the marks and number of the bags in which the sugar was packed, they could ascertain the net saccharine contents of each lot of bags, and could allot the bags to their different buyers at the port for which they were shipped, so as to correspond in respect of the specific quantity of net sugar with the degree contracted for. Messrs. Drake and Co.'s transactions of this character were very extensive, as well with the plaintiff as others, and the general course of business between them and their buyers had been for the buyer to bear the cost of the insurance against sea risks from the time of delivery, and the Court of Appeal drew the inference that, as a matter of fact, both the plaintiff and Beloe and Co. knew that it was the course of business of Drake and Co. to apportion and appropriate the sugar to the contracts with their different buyers in the way above described after and not at the time of shipment. The *City of Dublin*, with the 3900 bags on board, left Hamburg on the 2nd Feb. 1881, and was lost with her cargo on the morning of the 4th. On the 4th Feb. Drake and Co., who had then got the bills of lading, apportioned the 3900 bags between Beloe and the plaintiff, and they made out invoices to each accordingly, that to Beloe and Co. showing an average percentage on the whole of 89·5875, and that to the plaintiff of 89·35, both averages therefore being kept under 90. News of the loss arrived before these invoices were posted, and the plaintiff anticipating that he might have the 200 tons on board coming to him under his contract, although without any specific advice of the shipment, declared on the *City of Dublin* under the policy sued on for any loss in respect of those 200 tons. In the letter to the plaintiff of the 4th Feb., in which Drake and Co. 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 plaintiff and Beloe and Co. subsequently respectively paid the contract price, and obtained the bills of lading for the sugars specified in their respective invoices, and Beloe and Co. afterwards sent an invoice of the 200 tons of sugar sold by them to the plaintiff, who thereupon paid the price of these and received the bills of lading in respect thereof. The plaintiff then declared under the floating policy in respect of this last-mentioned sugar. In consequence of the loss of the ship and cargo, the plaintiff, who had made two sub-contracts with the Bristol Sugar Refining Company for the sale to them of the sugar he had contracted to buy of Drake and Co. and Beloe and Co. at an advanced price, 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."

Field, J., before whom the action was tried, was of opinion, on further consideration, that the plaintiff had neither property nor insurable interest in the sugar, and that, as he was not entitled to recover for a loss of profit under a policy like this on goods, the defendant was entitled to judgment, and he gave judgment for the defendant accordingly.

The plaintiff appealed.

Charles Russell, Q.C. and *Reid*, Q.C. (*Danckwerts* with them) for the plaintiff.—The plaintiff had an insurable interest in the sugar, because as soon as it was shipped f.o.b. at Hamburg it was at his risk, even though no property in it had passed to him prior to the apportionment. The plaintiff here contracted to pay for the sugar, whether it arrived or not, and he expressly took all the risks of the voyage. They cited the following cases:

Lucena v. *Craufurd*, 2 B. & P. (N. R.) 269;
Joyce v. *Swann*, 17 C. B. N. S. 84;
Wilson v. *Jones*, 2 Mar. Law Cas. 452; 14 L. T. Rep. N. S. 65; L. Rep. 1 Ex. 193;
Barclay v. *Cousins*, 2 East, 544;
Anderson v. *Morice*, 3 Asp. Mar. Law Cas. 31, 290; 33 L. T. Rep. N. S. 355; 35 L. T. Rep. N. S. 506; 1 App. Cas 713;
Appleby v. *Myers*, 16 L. T. Rep. N. S. 669; L. Rep. 2 C. P. 651;
Castle v. *Playford*, 1 Asp. Mar. Law Cas. 255; 26 L. T. Rep. N. S. 315; L. Rep. 7 Ex. 98;
Jackson v. *Anderson*, 4 Taunt. 34;
Hill v. *Secretan*, 1 B. & P. 315.

Cohen, Q.C. and *Barnes* for the defendant.—The plaintiff had no property, nor any insurable interest in the sugar. The price was not ascertainable until the sugar had been appropriated, and therefore at the time of the loss there was no liability to pay the price; the case therefore of *Anderson* v. *Morice* (*ubi sup.*) is an authority in favour of the defendant. They cited

Seagrave v. *Union Marine Insurance Company*, 2 Mar. Law Cas. O. S. 331; 14 L. T. Rep. N. S. 479; L. Rep. 1 C. P. 305;
Ebsworth v. *Alliance Marine Insurance Company*, 2 Asp. Mar. Law Cas. 125; 29 L. T. Rep. N.S. 479; L. Rep. 8 C. P. 596.
Stockdale v. *Dunlop*, 6 M. & W. 224;
Brown v. *Hare*, 4 H. & N. 822.

Reid, Q.C., in reply, referred to the judgment of Lord Brougham in

Cowasjee v. *Thompson*, 5 Moo. P. C. 165, at p. 173.

Brett, M.R.—I think that no one can deny that this is a case of extreme difficulty and of great nicety. In my opinion it is the duty of a court to lean in favour of an insurable interest if possible, because when an underwriter who has received his premium takes the objection that the assured had no insurable interest, he takes an objection which is technical, and which has no real merit in most instances, and for that reason I have always felt it my duty to lean in favour of an insurable interest if possible. Of course we must not assume facts which do not exist, and we must not stretch the law beyond its proper limits; but we must, I think, approach the consideration of the question with a mind to find in favour of an insurable interest, if the law and the facts will allow it.

In this case it seems to me to have been proved that there was in Bristol a course of business—I do not think it amounted to a custom of trade—in this sugar trade, and that this course of business consisted in this: Where sugar was shipped at Hamburg for Bristol by a particular

shipper in sufficient quantities to fulfil all the orders that he had from Bristol, and where the price of the sugar depended upon the amount of saccharine matter in the sugar, it was impossible to be very exact in allocating to each contract the exact amount of saccharine matter to which it was entitled. In consequence of this difficulty the course of business was for the shipper to take bills of lading of small quantities of the sugar, so that, when he saw the analyses of the quantities of the sugar, he could, by distributing the bills of lading according to those analyses, allocate to each contract out of the sugar shipped the exact amount of saccharine matter to which that contract was entitled. Now it seems to me that, whether as a fact that allocation could or could not have been done before shipment, it never was done before shipment, but was always done in England. That is the inference which I draw from the evidence. Then the plaintiff is a dealer in this sugar business; he is a buyer certainly, but he has made many contracts of this kind with persons who sold this kind of sugar. That being the course of business by the seller, the sugar to which the buyer would be entitled depended upon the distribution of the bills of lading according to the analyses, and the exact price which the buyer would have to pay depended also upon that distribution. I cannot then believe that a buyer who had dealt in this sugar trade did not know of this course of business, and I draw the inference that he did know of it. If so, then the course of business was known to the plaintiff and Messrs. Drake and Co. at the time the contract of sale was made, and I think to Beloe also and to all persons trading in sugar between Hamburg and Bristol. Now the contract is made in writing for the purchase and sale of a quantity of sugar on the terms "free on board" by persons who knew the course of business which I have described, and the question is, what is the true construction of that contract having regard to the knowledge of the parties with respect to the course of business in such cases? Now it is not denied that, if the goods shipped are specific goods, the words "free on board" mean more than that the goods are to be delivered on board the vessel at the shipper's expense. If the goods are specific goods the words "free on board" mean that the goods are to be delivered on board at the expense of the shipper on account of the buyer, and in such a case the goods would be at the risk of the buyer from the time when they were shipped, whether they were lost or not on the voyage.

If that is the meaning of the words "free on board" in a contract for the purchase and sale of specific goods, even though payment is not to be made on delivery of the goods on board, but at some other time, and even though the purchaser cannot obtain delivery until he has paid cash or accepted bills against the bills of lading, then the question arises whether there can be a contract made on the terms "free on board," which can be fulfilled without the delivery on board of any specific goods at the time of shipment. That question may be tested thus: Can you make such a contract with regard to part of a bulk cargo? Is there any mercantile or legal reason why a person should not agree to sell another person so much out of a bulk cargo, or *ex* such and such a ship, upon the terms that if lost the loss shall fall on the purchaser and not upon the seller? I see no reason against this, and if such a contract can be made, then it is made when you put the words "free on board" in a contract to buy and sell a certain quantity of a bulk cargo *ex* such and such a ship. In such a contract some meaning must be given to the words "free on board," and what meaning can be given to them with regard to the unseparated part of the cargo except the meaning which would be given to them if the contract was dealing with specific goods? What is there contrary to business or law in those words "free on board" meaning in such a contract "I sell you twenty tons out of fifty, I paying the cost of shipment, and you bearing the risk of whether they are lost or not?" I think it is not a bit more inconsistent with business and law, that parties should make such a contract with regard to part of a cargo, than that they should do so with regard to a whole cargo, or with regard to specific parts of a cargo, and therefore the only remaining question is whether this is such a contract. Now, taking the surrounding circumstances into consideration, the circumstances of the course of business known to both buyer and seller, I think that both these contracts of Messrs. Drake and Co. with Beloe and with the plaintiff were that the buyer should pay for the sugar that might be allocated to him, and that he should be bound to accept such sugar, and further that the seller should not run the risk of arrival, but that the buyer should be bound to pay the price against the allocation of bills of lading whether the sugar arrived or not. Therefore, if that is so, when Beloe sold to the plaintiff he sold in truth that contract, and the plaintiff became liable to Beloe to pay for the sugar whether it arrived or not, and he was already liable to Drake and Co. upon the same terms, and therefore upon the non-arrival of the sugar he would suffer a money loss. It is not only that he would not only make a profit, but he would suffer a money loss, and therefore the question that was raised about *Anderson* v. *Morice* (*ubi sup.*) does not arise. Directly one arrives at the true meaning of the contract the case falls within known principles of insurance law, and I cannot doubt that here the plaintiff had an insurable interest. Therefore I think our judgment ought to be in favour of the plaintiff.

Baggallay, L.J.—I am of the same opinion, and I shall express my reasons for agreeing with the Master of the Rolls very concisely. I am of opinion that the appellant is entitled to succeed, upon the ground that at the time of the loss the goods were at his risk. The argument in support of that view has been based on two reasons: one, the fact that the goods were to be "free on board;" the other, the course of business in this particular trade. It has not been denied that where the goods are specific goods the words "free on board" place them at the risk of the buyer from the time of shipment; but it has been suggested that it is different when the goods are not specific, but are, as in the present case, a certain proportion of goods out of a larger bulk. What authority is there for this suggested difference? No authority has been cited to show that there is a difference; what reason, then, in law is there for such a difference? I think it very difficult to suggest any, and if called on to express an opinion I should assent to the argument of Mr Reid. But I prefer to rest my decision upon

the general course of business in regard to transactions of this kind. I think it is impossible to come to any other conclusion than that the distribution of the bills of lading, with reference to the analyses of the different sugars which were the subjects of the different contracts, was the ordinary course of business in transactions of this character, and that both parties knew it to be so. Consequently, the goods were at the risk of the purchaser at the time of the loss, and he had an insurable interest for which he is entitled to claim.

LINDLEY, L.J.—In this case the action is brought upon a policy of insurance effected upon goods, and the only question for us to consider is whether the plaintiff had an insurable interest in those goods at the time when the policy was effected. Now, the plaintiff's interest in those goods arises out of a contract, and the first question is, what is the meaning of that contract? The contract is for 200 tons of sugar, free on board at Hamburg, the price to be paid in London against bills of lading, and the sugar to answer a certain description as regards saccharine matter. First, let us examine that contract by itself without reference to any particular course of trade. No particular sugar is specified, and it seems to me that such a contract might be performed in two different ways. Two hundred tons of sugar, answering the description, might be shipped free on board at Hamburg, and appropriated to the contract at the time of shipment and then the property would pass to the buyer at the time of shipment, and the goods would then be at his risk. That is one way, and perhaps the ordinary way of performing such a contract. But there is another way of performing the contract, and here it is that a difficulty arises. Messrs. Drake and Co., the sellers of the sugar, conducted their business in a particular way, and the plaintiff, who was a merchant at Bristol, and had had dealings of this sort with Messrs. Drake and Co., knew of their course of business. That course of business was not to appropriate a certain quantity of sugar to a particular buyer at the time of shipment, but to ship enough sugar to satisfy all the contracts for sugar deliverable at a particular port, and then after shipment to apportion out of that bulk the quantities deliverable to the buyers at that port. It is plain that this was the course of business, and that the plaintiffs knew of it to this extent at all events, that having had dealings with Messrs. Drake and Co. for some years he had been in the habit of insuring the sugar he bought from them directly it was shipped. What is left obscure is whether the plaintiff knew exactly how the appropriation was effected. If we once come to the conclusion that the plaintiff was fully aware of Messrs Drake and Co.'s course of business, then all difficulty vanishes. My difficulty is one of fact, but on the whole I come to the conclusion that the plaintiff knew that Messrs. Drake and Co.'s course of business was not to appropriate quantities of sugar to a particular buyer at the time of shipment, but to ship enough sugar to fulfil their Bristol contracts, and then to appropriate particular bags to particular buyers after shipment. Now, what is the meaning of this contract, having regard to these circumstances? It must mean that out of the quantity of sugar shipped to satisfy the Bristol contracts, the quantity shipped to answer each contract shall be at the risk of the buyer. There is nothing so far as I can see, in point of law, to exclude the existence of such a contract as that. But it is said that you cannot have a contract by which the goods are to be at the risk of the buyer, unless they were appropriated to him at the time of shipment. I think that is too wide a proposition. I see no reason why a person should not agree to buy and pay for a certain portion of a bulk cargo on the terms that such portion should be at his risk during the voyage, even though no portion be appropriated to him until the ship is unloaded. I agree with Field, J. that there was no appropriation of goods in this case so as to pass the property to the plaintiff, but I think it is plain that the intention was that the 200 tons of the cargo should be at the plaintiff's risk. Then the whole difficulty vanishes, because, if that be so, the plaintiff clearly had an insurable interest. I therefore think that the judgment of Field, J., which proceeded on the ground that the plaintiff had no property in the goods, cannot be supported, and that this appeal must be allowed.

Judgment reversed.

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

Solicitors for the defendant, *Bubb, Waltons,* and *Bubb.*

Nov. 26 *and* 27, 1883, *and April* 9, 1884.

(Before BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.)

BURDICK *v.* SEWELL AND ANOTHER. (*a*)

Bill of lading—Indorsement of, by way of security for money advanced—Liability of indorsee for freight—Passing of property in goods—Bills of Lading Act (18 *&* 19 *Vict. c.* 111), *s.* 1.

The mere indorsement and delivery of a bill of lading by a shipper of goods by way of security for money advanced to him by the indorsee passes the property in the goods to the indorsee so as to make him directly liable to the shipowner for freight under 18 *&* 19 *Vict.* 111, *s.* 1. (*b*)

So held by Brett, M.R. and Baggallay, L.J., Bowen, L.J. dissenting.

Judgment of Field, J. (48 *L. T. Rep. N. S.* 705) *reversed.*

THIS was an appeal by the plaintiff from the judgment of Field, J. upon further consideration, in favour of the defendants (reported 5 Asp. Mar. Law Cas. 76; 48 L. T. Rep. N. S. 705).

The action was brought by the plaintiff, as owner of the steamship *Zoe*, to recover the sum of 174*l.* 8*s.* 9*d.* in respect of freight for the carriage of goods from London to Poti in Russia.

The defendants were bankers at Manchester, to whom the shipper had delivered the bill of lading for the goods indorsed in blank as security for advances made by them to enable the shipper to pay for the goods which he had caused to be manufactured in this country.

The facts fully appear in the report of the proceedings before Field, J., and are also stated in the judgments hereinafter set forth.

Nov. 26 *and* 27, 1883.—*C. Hall,* Q.C. and *Edwyn Jones* for the plaintiff.

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

(*b*) This decision has since been reversed by the House of Lords. See *post.*—ED.

Sir *F. Herschell* (S. G.) and *Danckwerts* for the defendants.

The following authorities were cited in the course of the arguments:

Story on Bailments, sect. 287;
Donald v. *Suckling*, 14 L.T. Rep. N.S. 772; L. Rep. 1 Q. B. 585;
Barber v. *Meyerstein* 3 Mar. Law Cas. O. S. 449; 22 L. T. Rep. N.S. 808; L. Rep. 4 E. & I. App. 317;
Glyn, Mills, and Co. v. *The East and West India Dock Company*, 4 Asp. Mar. Law Cas. 345, 580; 43 L. T. Rep. N. S. 584; 47 L. T. Rep. N.S. 309; 6 Q. B. Div. 480; 7 App. Cas. 606;
The Freedom, 20 L. T. Rep. N. S. 229; L. Rep. 3 P. C. 594; 1 Asp. Mar. Law Cas. 28;
Lickbarrow v. *Mason*, 1 Sm. L. C. 7th edit. 756;
Hibbert v. *Carter*, 1 T. R. 745;
Short v. *Simpson*, 13 L. T. Rep. N.S. 674; L. Rep. 1 C. P. 248;
Newson v. *Thornton*, 6 East. 17;
Turner v. *Trustees of the Liverpool Docks*, 6 Ex. 543; 20 L. J. 393, Ex., Ex. Ch.;
Jenkyns v. *Brown*, 14 Q. B. 496;
Harris v. *Birch*, 9 M. & W. 591;
Re Attenborough, 11 Ex. 461;
Johnson v. *Stear*, 9, L. T. Rep. N.S. 538; 15 C. B. N.S. 330;
Franklin v. *Neate*, 13 M. & W. 481;
Kemp v. *Falk*, 5 Asp. Mar. Law Cas. 1; 47 L. T. Rep. N.S. 454; 7 App. Cas. 573;
Pease v. *Gloahec*, 2 Mar. Law Cas. O.S. 394; 15 L. T. Rep. N. S. 6; L. Rep. 1 P. C. 219;
Blackburn on Sale, p. 297.

Cur. adv. vult.

April, 9, 1884.—The following judgments were delivered:

BRETT, M.R.—In this case the material facts seem to be, that the goods in respect of which freight is demanded in the action were shipped on board the plaintiff's ship *Zoe*, by one Nercessiantz, to be carried to Poti, in Russia; that Nercessiantz applied to the defendants (who were bankers in Manchester) for, and obtained from them, a loan or advance, and, as a security for the advance, indorsed to the defendants the bill of lading of the goods; that circumstances arose under which the goods were landed and warehoused in Poti, with a stoppage for freight; but the goods were sold under Russian law for duties and charges, and were sold for an amount which left nothing applicable to answer the claim for freight. Thereupon the plaintiff demanded the freight from the defendants. The case was tried before Field, J. without a jury; and he held, as a matter of law, that he was entitled to inquire whether, and he found as a fact, that the intention of Nercessiantz and the defendants was that the transaction was to be only a pledge; that is, that the intention was not to pass and take respectively the whole legal property, subject to an equity as to redeeming it, or as to a balance, if any, after a sale, but to pass and take respectively only a pledge. The learned judge then held, as the result of that intention, that the legal property in the goods did not pass to the defendants, that the Bills of Lading Act did not apply, that there was no contract between the plaintiff and the defendants, and that the plaintiff could not maintain his action for freight against the defendants. Against this judgment the plaintiff appeals. The ultimate question of course is whether under the circumstances the property in the goods passed by the indorsement of the bill of lading to such an extent as to bring the case within the Bills of Lading Act (18 & 19 Vict. c. 111). That depends very nearly, if not quite, upon the question stated by Field, J. "The question in the present case," he says, "resolves itself into, whether the security was intended to operate, or by implication of law arising upon the undisputed facts did operate, in the same way as an assignment by bill of sale, or as a mere pledge?" I should rather put the question thus: Does or does not the indorsement of a bill of lading as a security for an advance, as distinguished from an indorsement of it upon a sale of it or the goods named in it for a price, by necessary implication operate in the same way as an assignment of goods by bill of sale, that is, so as to pass the whole legal property in the goods to the assignee, leaving to the assignor an equity in the proceeds beyond the advance secured and expenses; or may evidence be given of other accompanying facts, from which it may be inferred that the intention of the parties was, and therefore the legal result is, that there was only a pledge of the bill of lading, or of the goods named in it? That question put more tersely is: Does the indorsement of a bill of lading as a security for an advance, by a necessary implication which cannot be disproved, pass the legal property in the goods named in the bill of lading to the indorsee with an equity to the indorser, the borrower, to redeem the bill of lading by payment, or to receive the balance, if any, on a sale?

First, let us consider the consequences of the opposite views; let the transaction be treated as a pawn or pledge of the bill of lading, or of the goods. If of the bill of lading, then there is no common law power in the pledgee to use the bill of lading at all; there is no power to sell it before the time when according to the contract of pledge the article pledged is forfeited, and until a late statute an unauthorised sale of it before that time would have passed no right to the vendee; if of the goods, there is no valid pledge unless the delivery of the bill of lading is treated as a delivery of the possession of the goods to the pledgee. But a delivery of a bill of lading is not a delivery of the possession of the goods to the pledgee, though, when speaking of its effect to pass property, it has often been said to have the same effect as a delivery of possession of the goods; it gives to the indorsee a right to possession on arrival of the ship on payment on freight. It is because it does not give to the indorsee the possession, but that the possession is in the captain of the ship, that the original vendor may under given circumstances stop *in transitu* the goods in which he has no longer any property, and that the captain has a lien on the goods for his freight, charges, &c. And if the indorsement of the bill of lading is only a pledge of the goods, yet where the pledgee is not otherwise a factor, the mere pledge, before the time of forfeiture given by the contract of pledge, would not by any Factors Act, or any other statute until a recent one, or by common law, have enabled the holder of the bill of lading to sell the goods, or (if he assumed to sell them) to pass any right by such sale. It follows that any merchant, banker, or other asked to advance on the security of a bill of lading must have inquired not only whether it was indorsed for value, but as to what were the terms on which the value was given and the indorsement made. And as to insurance, if the legal property does not pass, inasmuch as certainly

in equity the whole interest does not pass, the indorsee for value of the bill of lading cannot insure in his own name for more than his real interest. Whereas, if the indorsement for value was treated as a mortgage, the terms of the equity relating to it were settled between the parties by a contemporaneous writing, and for the breach of those terms there was always between the parties a remedy in equity, and the free dealing with the bill of lading in the general mercantile business of the country was not hampered. He who held the bill of lading with an interest in it could realise his interest by a legal sale, could protect all interests under it by an easy insurance. The purchaser of the bill of lading could buy with safety, and therefore could give a better price. The one view tended, as pointed out by Buller, J., in *Lickbarrow* v. *Mason* (*ubi sup.*), to inconvenience, the other to facility in mercantile business. He points this out, as it seems to me, as a reason upon which the custom of merchants, on which his judgment was founded, came to be in existence. If the general understanding of merchants had not been, in accordance with the verdict of the jury in *Lickbarrow* v. *Mason*, accepted in its largest sense, there would, one would think, have been cases in the books raising the question; but no such thing is known in any book. The only mode of accounting for this is to say that merchants have treated the indorsement of a bill of lading for value as equivalent to a bill of sale. It has been suggested that a decision in favour of the plaintiff in this case will not hamper trade, because it will make, by reason of the Bills of Lading Act, a merchant who takes a bill of lading only as security for an advance, so as to be in reality only partly interested in the bill of lading, liable for unknown claims under it by the shipowner who granted it. As to the liability to pay freight, it can only be important in such an isolated instance as the present, because the security for the advance can rarely be available until the lien for freight is satisfied. The amount of the advance is always calculated according to the value of the goods less freight, and so in respect of any other claim subject to a shipowner's lien. If the bill of lading, by reference to a charter-party, incorporates other and unusual liabilities, the merchant asked to advance will examine the charter-party, and only advance to a more limited amount. A loaded bill of lading is of little value. A decision in favour of the defendant would retain in the suggested case of a mere pledge the difficulty which the Bills of Lading Act was passed to obviate, namely, that the pledgee will have rights in the property but no rights in the contract. If he desires by the contract to protect the goods and his interest in the goods, which is the first interest invaded by a breach of the contract of carriage, he must revert to the old inconvenience of being obliged to use the pledgor's name. Mercantile convenience seems to me to lean strongly in favour of a decision for the plaintiff in this case.

The case, however, must after all depend upon authority; it must depend upon the sense in which it is now considered that the finding of the custom of merchants by the jury in *Lickbarrow* v. *Mason* (*ubi sup.*) has been adopted by the courts so as to be taken to be the law merchant without further proof. In order to determine this, it may be well to examine some of the cases which were decided before and which were cited in the case of *Lickbarrow* v. *Mason*, as well as that case and the cases after it. The question is, does the *bona fide* indorsement of a bill of lading as security for an advance, as distinguished from an indorsement upon a sale for a price, pass the whole legal property in the goods named in the bill of lading to the indorsee, leaving only equities to the indorser? The third case put by Holt, C.J. in *Evans* v. *Martlett* (1 Ld. Raym. 271), cited in *Lickbarrow* v. *Mason*, is "a bill of lading to A., and the invoice only (that is the invoice alone) shows that they are upon account of B.; A. ought always to bring the action, for the property is in him, and B. has only an equity." This does not state in terms whether the bill of lading is originally made to A., or is indorsed to A. The terms are large enough to include an indorsement to A. for value, and then B.'s interest is stated to be only one in equity. The action mentioned is obviously an action of trover. In *Hibbert* v. *Carter* (*ubi sup.*) the plaintiffs were merchants in London, agents and general consignees of one Robert Kerr, who was the owner of goods, and shipped them from Jamaica. The plaintiffs having received advice that the goods were shipped, insured them, but before they had effected the insurance Kerr had indorsed the bill of lading to one Dellprat, in Jamaica, for an arrear due on a mortgage. Buller, J. was of opinion that Kerr had no insurable interest, because the indorsement of the bill of lading had passed the whole property to Dellprat, yet Kerr had not sold the goods. The court was of the same opinion as to the legal property, but held that nevertheless Kerr might have an insurable interest. In what respect? Obviously in respect of his equitable interests, his right to redeem, and to a surplus, if any, on a sale. In *Wright* v. *Campbell* (4 Burr. 2046) the action was in trover by the assignees in bankruptcy of one Richard Scott. Lewis Fontaine shipped the goods and took bills of lading and indorsed one copy to Richard Swanwick in Liverpool, in order that Swanwick might sell the goods for him as factor. Swanwick indorsed this copy to Scott to secure him on his becoming bail for Swanwick, and also as security for a debt due from Swanwick to Scott. Scott demanded the goods on the arrival of the ship, but was refused. The goods were delivered to and sold by the defendants. The action was in trover by the assignees of Scott. There was no sale for a price by Swanwick to Scott. Swanwick being a factor could not pledge to Scott, but as factor he had a right to pass the property to Scott. The decision is that, if the transaction was *bona fide*, the indorsement to Scott for value passed the property to Scott. It did so although the value given was not the price for a sale, and Lord Mansfield is reported by Buller, J. to have approved of the case in Lord Raymond, *Evans* v. *Martlett*, upon an interpretation of it in its widest sense. It was after these views, thus expressed, that arose the case of *Lickbarrow* v. *Mason* (*ubi sup.*), upon the interpretation of the decision in which the present question depends. In that case the facts were, that Turing and Son sold goods to Freeman on credit, and shipped them to Freeman and sent him bills of lading. Freeman indorsed the bills of lading to the plaintiffs as security for an advance, and became insolvent before the arrival of the goods.

Turing stopped the goods *in transitu* by indorsing a copy bill of lading to the defendants to enable them to do so on his behalf. The defendants sold the goods for Turing. Action of trover by the plaintiffs against the defendants. The defendants demurred to the evidence, or, in other words, asserted that there was no evidence on which it could legally be held that the plaintiffs were entitled to succeed. It was argued for the plaintiffs that, as between the consignor and the consignee, the bill of lading is a mere authority by the consignor to the captain to deliver the goods to the consignee, and to the consignee to receive them, and that the consignee cannot transfer a greater right than he has, that is, a right to receive the goods if the authority given to the captain is not countermanded. It was argued for the defendants that the *bonâ fide* indorsement for a valuable consideration, of a bill of lading to a third person is an absolute transfer of the whole property. It was not suggested on either side that there was a question of intention to be determined by a jury on an inference of fact. It is clear that everyone assumed that the bill of lading was indorsed in order to secure to the plaintiffs the amount of their advance, leaving the surplus if any, for Turing. No one suggested that there was, independently of the indorsement of the bill of lading, a contract of sale of the goods for a price as between Turing and the plaintiffs. Under these circumstances Buller, J. says, "I make the question even more general than it was made at the bar, namely, whether a bill of lading is by law a transfer of the property:" (Smith's Leading Cases, 6th edit. vol. i, p. 710.) He does not say, "whether a bill of lading given under the circumstances of this case is a transfer of the property," but "whether a bill of lading is by law a transfer of the property." It is obvious that he was speaking of a bill of lading indorsed for value. He cites *Wright* v. *Campbell* (1 Sm. L. C. 6th Ed,), and then says, that "Lord Mansfield in that case said, that since the case in Lord Raymond it had always been held that the delivery of a bill of lading transferred the property at law." "If so," says Buller, J., "every exception to that rule arises from equitable considerations which have been adopted by courts of law." "Thus," he says, "stand the authorities on the point of legal property; and from hence it appears that for upwards of 100 years past it has been the universal doctrine of Westminster Hall that by a bill of lading, and by the assignment of it, the legal property does pass. And, as I conceive, there is no judgment, not even a dictum, if properly understood, which impeaches this long string of cases." It has been observed that these statements of the law are not literally correct, because they do not exclude an indorsement to a mere agent. But Buller, J. had already in the same judgment, referring to a case before Lord King, disposed of an indorsement to "a pure factor having no demand of his own." I agree, he had said, that he would have no property, because in such a case the factor is only a servant or agent; "he is merely a servant or agent." But then, he said, "it remains to be proved that a man who is in advance, or under acceptances on account of goods, is simply and merely a servant or agent; for which no authority has been or can be produced. It is with regard to the case of "a man who is in advance on account of goods" that his whole judgment is dealing. The whole case of *Lickbarrow* v. *Mason* deals with such a person. It is to me impossible to suppose, it seems to me perverse to assume, that the question finally left to the jury was not a question put and understood to be put with regard to such a man. The dispute was between such a man and the plaintiffs. It was with regard to that dispute that the jury found "that by the custom of merchants, bills of lading for the delivery of goods to the order of the shipper or his assigns, are after the shipment, and before the voyage is performed, negotiable and transferable by the shipper's indorsement, or transmitting of the same to any other person; and that by such indorsement and delivery, or transmission, the property in such goods is transferred to such other person." If the contention made now on behalf of the defendants is true, that answer ought not to have been accepted. It made the custom too large. It ought to have contained the limitation "if so intended." If the present contention be true, a question was not asked which ought to have been asked, namely, did the parties intend the transaction to be a pledge on a mortgage? I cannot bring my mind to believe that everybody concerned in that long discussion omitted to consider the proper limitations of the general principle which everybody was trying to discover, and which Buller, J. expressed. It was then in a case where the bill of lading was indorsed to secure an advance that, after long and exhaustive discussion and two trials, the House of Lords held, without anyone even referring to the idea that in any such case an inquiry must be made as to what was the intention of the parties, that by the general custom of merchants the *bonâ fide* indorsement of a bill of lading for an advance passes the legal property in the goods to the indorsee, leaving the ultimate account between the parties to be settled as an equity. Such a decision I cannot depart from. I can be no party to explaining it away. I accept it as I firmly believe it was intended. To do otherwise restores the judgment of Lord Loughborough. The judgment in *Lickbarrow* v. *Mason* governs the present case. According to it the whole legal property in the goods represented by the bill of lading passed by the indorsement of the bill of lading to the defendants. If so it cannot be doubted that, by virtue of the Bills of Lading Act, the liability under the contract contained in the bill of lading passed also to and against the defendants, and that the plaintiff was and is entitled to recover the freight in dispute. I cannot agree with the judgment of Field, J., and in my opinion it should be reversed.

BAGGALLAY, L.J.—The plaintiff in this action is the owner of the ship *Zoe*, on which certain cases of machinery were shipped and carried to Poti, a Russian port in the Black Sea. The defendants are bankers at Manchester; and, whilst the ship was at sea, they made an advance to the shipper of the goods, who delivered over to them the bill of lading duly indorsed as a security for the loan. No memorandum of charge or other formal document indicative of the intention of the parties was executed, but it was represented by the shipper to the defendants that he was about to proceed to Poti to superintend the delivery of the machinery, that the amount advanced would be repaid before he left England and that he would

call again and make definite arrangements for that purpose. He failed, however, to carry out the representations so made by him. The ship arrived at Poti in due course, and the goods not having been cleared within the time limited for that purpose, were sold in accordance with Russian law, but did not realise more than was required to satisfy the demands of the Russian Custom House. The plaintiff thereupon, treating the property in the goods as having passed to the defendants by virtue of the delivery to them of the indorsed bill of lading, and relying upon the provisions of the Bills of Lading Act, demanded from the defendants payment of the freight and incidental charges, and, upon the refusal of the defendants to make such payments, commenced the present action. The action was tried before Field, J. without a jury, and that learned judge held that no sufficient property in the goods passed to the defendants by the delivery to them of the indorsed bill of lading, to render them liable to the plaintiff, and he gave judgment for the defendants. From that judgment the present appeal has been brought.

The first question for consideration is, what was the effect of the delivery to the defendants of the indorsed bill of lading? With all respect for the contrary opinion expressed by Field, J., and which is, I believe, concurred in by my colleague, Bowen, L.J., I am of opinion that, for reasons which I will very concisely state, the legal property in the goods passed to the defendants by the delivery to them of the indorsed bill of lading. I do not propose to examine or discuss the numerous authorities which have been cited in the course of the arguments upon this appeal. The more important of them have been amply examined by the Master of the Rolls in the judgment which he has just delivered, and had previously been fully examined by him in the case of *Glyn* v. *East and West India Dock Company* (*ubi sup.*). I shall content myself with referring to that portion of his judgment in the case just mentioned which had reference to the effect of the delivery of an indorsed bill of lading. In that judgment the Master of the Rolls distinguished between the legal effect of the transaction in transferring the legal property in the goods, and the equitable rights that might be reversed to the borrower by express agreement between the parties, or might be implied in his favour from the general circumstances of the case; and after referring to a suggestion that had been made in argument that the indorsement of the bill of lading, when accompanied by such a letter of charge as had been given in that case, might not have the same fullness of effect in passing the property as if there were no letter of charge, he proceeded as follows: "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 the whole world, except some one 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 is still an equity though recognised by the common law courts." This is, in my opinion, a clear and correct exposition of the true effect of the delivery of an indorsed bill of lading as a security for a loan; the legal property in the goods named in the bill of lading passes to the lender, but subject to the equitable rights of the borrower, the nature and extent of which must be gathered from the circumstances of the transaction. It may be, and probably is the case, that certain equitable rights and liabilities were created between the borrower and lender in the present case by the representations made by the former at the time of the loan, and other circumstances of the transactions, but the existence of such equitable rights and liabilities cannot, in my opinion, affect the legal effect of the delivery of the indorsed bill of lading. If it be the true effect of the delivery of the indorsed bill of lading to the defendants that the legal property in the goods passed to them, it can hardly be disputed that they became liable under the provisions of the Bills of Lading Act to pay the amount of freight claimed from them in the present action.

BOWEN, L.J.—I regret very much to find myself at variance with the other members of the court. In this case there are two questions; The first, whether any and what property in the cargo passed to the defendants upon the indorsement and delivery of the bill of lading; the second whether the passing of any such property as passed was a passing of "the" property within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), so as to render the defendants liable to freight at the cost of the shipowner. What property, if any, in a cargo afloat passes upon delivery of an indorsed bill of lading, appears to me to be a question of fact in each case that depends, so far as the right between themselves of the immediate parties are concerned, on the express or implied agreement between them. The owner of merchandise may do whatever he pleases with his goods; he may sell them, or mortgage them, or pledge them. It is a pure question of bargain whether he delivers them upon terms which part with the entire beneficial interest in them, or which part with the entire legal interest reserving an equitable right to himself, or which part with a special property only in them, reserving to himself the general and absolute property at law. The freedom of disposition, which owners of property possess when their property is on shore, belongs to them equally when it is afloat. They can if they please, sell the bill of lading, or transfer it upon terms which amount either to a mortgage or to a pledge. For a bill of lading is a symbol of the goods themselves. The cargo being at sea, no actual delivery of it is possible before the ship arrives. During this period of flotation and transit the bill of lading becomes and remains the token or symbol of the goods, and the delivery and indorsement of the bill of lading is equivalent, so far as the passing of the property is concerned, to a symbolical delivery of the goods. Upon principle and reason, therefore, apart from authority, one would suppose that it is to the agreement between the original parties that we ought to look if we wish to discover the effect as between themselves of a delivery of the indorsed bill of lading, just

as it is to the agreement between them that we should look to determine the legal consequences that follow on the corporate delivery of the goods. We should expect, in some cases, to find that the entire property had passed; in others, that there had been some different arrangement. Nobody denies that in many instances the transfer of the indorsed bill of lading passes the complete property, nor, indeed, that it is *primâ facie* evidence of its passing. But this does not prove that when the bargain is different the same effect follows, any more than because the property in a watch often passes on delivery, it follows that a watch cannot be pledged or mortgaged,

It has been argued before us that there is an implication of law derived from the custom of merchants, that by indorsement and transfer of a bill of lading for an advance the absolute property in the cargo vests in the indorsee. In support of this contention reference has been made to the language of the present Master of the Rolls in the case of *Glyn, Mills, and Co.* v. *East and West India Dock Company* (*ubi sup.*). The language of Lord Bramwell in the same case is, on the other hand, in favour of a different view. Lord Blackburn, in the House of Lords, abstained from expressing an opinion as to which was the true nature of the transaction in that particular instance; but even if the transaction in Glyn, Mills, and Co.'s case had been held to amount to a mortgage, it would not follow that a different transaction did not amount to a pledge only, and the decision would not, as it seems to me, have militated against the principles I have above explained. It was further contended by the appellant that the well-known judgment of Buller, J., in the House of Lords, in the case of *Lickbarrow* v. *Mason* (*ubi sup.*), lays it down as law that by the indorsement and delivery of a bill of lading the complete property of goods at sea passes, and that on the second trial of the case a Guildhall jury found that there was a custom of merchants to that effect. Both judgment and verdict must, as it seems to me, be read with reference to the facts of the case itself. Freeman, the consignee of the cargo, had sent to the plaintiffs two bills of lading, together with the invoice of the goods, in order that the goods might be taken possession of and sold by them on Freeman's account, and the plaintiffs had accepted and paid bills of exchange to the value of 520*l.* drawn upon them by Freeman against the goods. "The truth of the case," says Buller, J., "was that Freeman transferred the legal property of the goods to the plaintiffs, who were to sell them to pay themselves the 520*l.* advanced in bills out of the produce, and to be accountable to Freeman for the remainder, if any." It was with reference to this transaction—a transaction of which the very essence was that the property in the goods was intended to pass, if the indorsement of the bill of lading can properly be given this effect—that Buller, J. discusses the question whether the property of goods at sea passes by the indorsement of the bill of lading. What is the proposition of law that he lays down as clear? "That every authority which can be adduced from the earliest period of time down to the present hour, agree that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the consignee." In other words, property passes by an indorsed bill of lading when it would pass by the delivery of the goods themselves. And it was with reference to the same transaction that the special verdict was found as to the custom. The question of the effect of an agreement between the parties when no property, or only a qualified property, was intended to pass with the bill of lading did not arise, nor was it submitted to the jury. Can it be inferred from a verdict so found that the jury intended to establish a custom by which, on delivery and on indorsement of a bill of lading as between the immediate parties, and apart from the rights of third persons, the property in one man's goods passes to another against the will of both, unless there be some written agreement to control the effect of the indorsement? If the borrower in the present instance had verbally agreed with the bank that the absolute property in the goods was not to pass, but a qualified property only, can it be said that any custom of merchants overrides such oral agreement? And if such is not the law, it necessarily would seem to follow that such a restrictive agreement can be implied from the nature of the transaction itself, as well as from express words. Read in their widest sense, the words of the special verdict in *Lickbarrow* v. *Mason* admittedly overstate the law, for the delivery to a servant or agent of a bill of lading with the intention that he shall receive the cargo and hold it for his principal obviously passes no property. Some qualification must be read into the terms of the special verdict, and the proper qualification seems to me to be what I have said. It is not easy to see upon what principle there can be any marginal virtue in the symbolical delivery (through the indorsed bill of lading) of goods afloat, beyond what there would be in the delivery of goods ashore, when the question arises between the immediate parties to the agreement.

Shortly after the special verdict on the second trial of *Lickbarrow* v. *Mason* its meaning was discussed in the Exchequer Chamber in the case of *Haille* v. *Smith* (1 B. & P. 561). Eyre, C.J., in delivering the judgment of the court, intimates that the indorsement of a bill of lading does not itself change the property as a bargain and sale would, but is evidence only of a change, and, as between the original parties, derives its sole virtue and efficacy from the agreement between the parties. This is substantially the same law as that expressed by Buller, J. in *Hibbert* v. *Carter* (*ubi sup.*), and it is not immaterial, as Field, J. has pointed out, to notice that *Hibbert* v. *Carter* is a case cited with approval by Buller, J. himself in his subsequent judgment in *Lickbarrow* v. *Mason*. The mere fact that in many cases before and after *Lickbarrow* v. *Mason* the transfer of a bill of lading is spoken of as passing the property, that in others it is spoken of as creating a pledge, as in *Meyerstein* v. *Barber* (*ubi sup.*), and that in others it is spoken of as a mortgage, affords to my mind, therefore, no difficulty. A man may sell, or he may mortgage, or he may pledge a bill of lading by indorsing and delivering it. The question in each case, when the original parties only are concerned, is what was the bargain on the subject? In the present instance accordingly we have to draw the inference as to the effect of the indorsement and delivery from the narrative of the particular transaction. The cargo shipped in England was to be delivered at Poti in the

Black Sea. The owner borrowed an advance from the defendants, and as security deposited the bill of lading, saying that he was shortly going out to Poti to superintend the receipt and delivery of the cargo, and that the amount advanced would be repaid before he left England, and that he would call again and make arrangements about it. What have we here except the simplest form of pledge, the deposit of goods as security for a debt, by which the right to the property vests in the pledgee so far as is necessary to secure the debt, the general property remaining in the pledgor? Delivery of possession is no doubt an essential element in any pledge, but it is very old law that constructive or symbolical delivery of possession is sufficient when actual possession cannot be given. "Goods at sea," says Story on Bailments, "may be passed in pledge by a transfer of the muniments of title, as by a transfer of a bill of lading, or by a written assignment thereof. So goods in a warehouse may be pledged by symbolical delivery of the key, and a bill of lading is only a key of the floating warehouse where the goods are lying." The counsel for the appellant argued that if a pledge only was intended, no indorsement of the bill of lading was needed. This surely is a misapprehension. The pledgee of goods is entitled to sell them upon default, and without the indorsement of the bill of lading the common law powers of the pledgee would be incomplete. It seems to me that the language of Lord Bramwell in *Glyn, Mills, and Co's* case, cited at length by Field, J. in the court below, applies *mutatis mutandis* to this case. I feel great diffidence in dissenting from the view of so considerable an authority on the mercantile law as that of the present Master of the Rolls and Baggallay, L.J.; but, except for their contrary opinion, I should have myself thought that there had been in the present case, as between the original parties, a pledge and nothing more.

It remains to be considered whether the pledge of an indorsed bill of lading is such a passing of "the property" as is contemplated by the Bills of Lading Act (18 & 19 Vict. c. 111). I may pause for a moment to observe that it was clearly the opinion of those who framed that statute that the property in goods *need* not pass by the indorsement of the bill of lading, and that the framing of the preamble and section of that Act shows that the language of the special verdict in *Lickbarrow* v. *Mason* is not to be read without some qualification. But passing from this, I think the wording of the Act shows that the provision which we have to construe does not apply to the case of a pledge. [See *Fox* v. *Mott* (30 L. J. 259, Ex.), per Martin, B., as explained in *The Freedom* (*ubi sup.*).] "A" property passes no doubt by a pledge, but not "the" property, which still remains in the pledgor. Was it intended that a banker who only acquired such a limited and special legal interest in a bill of lading as was necessary to secure his advance should be sued for freight? The present is the first case, as far as I know, in which it has ever been suggested that he could. And I cannot help thinking that the many bills of lading pledged daily in the city of London for advances are not taken by bankers under any such idea. I believe that the true view of the law as to this matter also is that expressed by Lord Bramwell in the case of *Glyn, Mills and Co.*, viz., that a mere pledgee cannot be sued for freight under the Act. He has not got "the" property; he has "a" property only. For these reasons, I agree with the judgment of Field, J., whose careful and elaborate reasonings leave nothing really to be added, and to which I should have added nothing had it not been that I am unfortunately dissentient from the opinion of the Master of the Rolls and Baggallay, L.J. In my opinion, this appeal should be dismissed with costs (*a*).

Appeal allowed.

Solicitors for the plaintiff, *Lowless* and *Co.*
Solicitors for the defendants, *Hare* and *Co.*

July 24 and 25, 1884.

(Before Brett, M.R, Bowen and Fry, L.JJ., assisted by Nautical Assessors.)

The Dunelm. (*b*)

ON APPEAL FROM BUTT, J.

Collision — Lights — Steam trawler — Look-out — Regulations for Preventing Collisions at Sea 1863, *art.* 9—*Regulations for Preventing Collisions at Sea* 1880, *art.* 10.

A steam trawler with her nets down and attached thereto is "stationary" within the meaning of art. 9 of the Regulations for Preventing Collisions at Sea 1863, *although she has way on her through the water, provided such way is not more than is necessary to keep her under command, and in such circumstances she is bound only to carry the white light required by that article; but, if she exceeds that speed, she is bound by art.* 3 *of the Regulations for Preventing Collisions at Sea to carry the lights of a steamship under way.*

A steam trawler, whilst fishing, was only carrying a white light when she ought to have been carrying the lights of a steamship under way. A steamship having a bad look-out, but with an officer on deck and in charge, was approaching the trawler, but did not see her until within a distance of from a quarter to half a mile, and then did not alter her course until too late to avoid a collision.

Held, that, as the officer in charge might have acted sooner if he had seen a side light, and that, as it was not proved that the absence of the side lights could not by any possibility have contributed to the collision, the steam trawler was to blame for a breach of the regulations.

The judgment of the court below having been confirmed, but for reasons other than those given by the judge below, and the Court of Appeal differing from those reasons, ordered each party to pay his own costs.

This was an appeal from a judgment of Butt, J. in a damage action *in rem* to recover compensation for damage sustained by the paddle-wheel steam trawler *Achievement*, of thirty-six tons net, in a collision between that vessel and the screw

(*a*) The following American decisions, although not directly in point, contain some valuable remarks as to the effect of an indorsement of a bill of lading: *De Wolf* v. *Gardner*, 12 Cush. 19; *Emery's Son* v. *Irving National Bank*, 25 Ohio St. 360; *Hathaway* v. *Haines*, 124 Mas. 311.—Ed.

(*b*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

steamship *Dunelm*, of 826 tons gross, at about 11.30 p.m. on March 25, 1884, in the North Sea, about seven miles east of Seaham Harbour. The defendants counter-claimed.

At the time of collision the wind was easterly, a light breeze, the weather fine and clear, and the tide about half flood of the force of two knots.

The *Achievement*, which was on a fishing voyage, had her trawling gear on the ground, and according to her evidence was dragging it with the tide over the ground at about four and a half knots an hour. She was exhibiting a white light in a globular lamp at her masthead, and was heading about south.

The *Dunelm*, which was on a voyage from Rochester to Sunderland, was heading N.W. by N. ½ N., and making about eight knots, when those on board her observed the white light of the *Achievement* about half a point on the starboard bow, and from about a quarter to half a mile distant. The white light was watched, and after a short time was made out to be crossing the bows of the *Dunelm* from starboard to port, and the helm of the *Dunelm* was put hard-a-port, but although the engines were immediately afterwards stopped and reversed, the vessels came into collision, the port side of the *Achievement* striking the stem of the *Dunelm*.

According to the evidence of two of the crew of the *Dunelm*, called on behalf of the plaintiffs, there was no look-out on board the *Dunelm*. It however appeared that the officer in charge of the *Dunelm* was on the bridge. During the course of the hearing it was admitted that the *Dunelm* was to blame.

The Regulations for Preventing Collisions at Sea and the Order in Council upon which the argument turned are as follows:

Regulations for Preventing Collisions at Sea 1863, art. 9:

Fishing vessels and open boats when at anchor, or attached to their nets and stationery, shall exhibit a bright white light.

Regulations for Preventing Collisions at Sea 1880, art. 10, deals with the lights to be carried by open fishing boats, and other open boats, and by fishing vessels, and is divided into paragraphs *a*, *b*, *c*, *d*, *e*, *f*, and *g*.

(*d*) A trawler at work shall carry on one of her masts two lights in a vertical line over the other, not less than three feet apart, the upper light red, and the lower green, and shall also either carry the side lights required for other vessels, or if the side lights cannot be carried, have ready at hand the coloured lights as provided in article 7, or a lantern with a red and green glass as described in paragraph (*a*) of this article.

Order in Council dated March 24, 1880:

Whereas by the Merchant Shipping Act Amendment Act 1862 . . . Now, therefore, Her Majesty by virtue of the powers vested in her by the said recited Act, and by and with the advice of her Privy Council, is pleased to direct that the operation of the said recited article, numbered 10 of the new regulations (the regulations of 1880) contained in the first schedule of the said Order in Council of the 14th day of August 1879, shall be suspended until the 1st day of September 1881, and that in lieu thereof and in substitution therefor, the said recited article numbered 9 of the regulations appended to the said Order in Council of the 9th day of January 1863 shall continue and remain in force until the 1st day of September 1881.

By a succession of Orders in Council art. 9 of the Regulations for Preventing Collisions at Sea 1863 had been continued in force, and was in force at the time of the collision.

July 2.—The action came on for hearing before Butt, J., assisted by Trinity Masters.

Dr. *Phillimore* (with him *Bucknill*) for the plaintiffs, the owners of the *Achievement*.—The one white light carried by the trawler was in accordance with the Regulations for Preventing Collisions at Sea. By Order in Council, the lights prescribed by art. 10 of the regulations of 1880 were suspended, and in their place was substituted the one white light required by art. 9 of the regulations of 1863. Even assuming the trawler not to have been stationary in fact, she was stationary within the meaning of the word as used in the article, and she has therefore complied with the regulations:

The Edith, L. Rep. Ir. 10 Eq. 345;
The Robert and Ann v. *The Lloyds*, Holt's Rule of the Road, p. 57;
The Englishman, 3 Asp. Mar Law Cas. 506; 37 L. T. Rep. N. S. 412; 3 P. Div. 18.

Assuming there to have been a breach of the regulations by the *Achievement*, and assuming it to have been her duty to carry side lights, it cannot be said that this breach could by any possibility have contributed to the collision. It has been proved that not only was there a bad look-out on the *Dunelm*, but that there was no look-out. If so, the question of lights on the trawler becomes immaterial, and their absence or presence could in no way conduce to the collision:

The Fanny M. Carvill, 2 Asp. Mar. Law Cas. 478, 566; 32 L. T. Rep. N. S. 129, 646; L. Rep. 4 A & E. 417;
The Englishman (*ubi sup.*).

Hall, Q.C. and *W. R. Kennedy* for the defendants.—The Order in Council of the 24th March 1880 suspends art. 10 of the regulations of 1880, but only substitutes art. 9 of the regulations of 1863 in cases covered by the terms of that article. Thus art. 9 provides that fishing vessels when attached to their nets and stationary shall carry the one bright light. But the *Achievement* was not stationary. She admittedly was making some two and a half knots through the water, and should therefore have exhibited side lights. She, therefore, has infringed the regulations, and in such a way that may possibly have conduced to the collision. For, assuming there to have been a bad look-out on the steamer, yet there was an officer on the bridge, and had the side lights been exhibited, it is impossible to say that he might not have seen them.

Butt, J.—This is a case in which a point of some nicety has arisen on the interpretation of one or more of the Regulations for Preventing Collisions at Sea. I have come to the conclusion, acting on the advice of the Elder Brethren of the Trinity House, that both these vessels must be held to blame. That the steamer is to blame there can be no doubt, and indeed Mr Hall has conceded it to be so. I would therefore only advert to the fact that, though the steam trawler had a good white light exhibited, which ought to have been visible at two or three miles, it was never seen by those on board the steamer until, according to their own statement, they were within a distance of from a quarter to half a mile, and that even then they do nothing, although they are in doubt as to the meaning of the white light, whereas I think

they ought certainly to have stopped and reversed their engines. Had they done so they never would have sunk this vessel, the *Achievement*. That settles the matter as to the steamer.

Now with regard to the steam trawler, the question as to the application of the Regulations for Preventing Collisions at Sea arises. She was carrying a good globular light at the masthead, according to the evidence some 30 feet above the deck. She was heading about south, with her trawl down, and was making, by her own admission, about two and a half knots through the water, and about four and a half over the ground. I am advised by the Trinity Masters that trawlers prefer to go at even a greater rate of speed over the ground, and that as a fact they must have some good headway on them. However, taking the speed to have been two and a half knots through the water, what follows? In the year 1880 the Regulations for Preventing Collisions at Sea, which with some exceptions are now in force, were promulgated, and had art. 10 of those regulations not been suspended by Order in Council, there would have been no difficulty in determining this case, had it ever arisen, which I very much doubt if that article had remained in force. Now art. 10, sub-sect. (*d*) of the Regulations provided that "A trawler at work shall carry on one of her masts two lights in a vertical line one over the other not less than three feet apart, the upper light red and the lower green, and shall also either carry the side lights required for other vessels, or if the side lights cannot be carried, have ready at hand the coloured lights, as provided in art. 7, or a lantern with a red and green glass, as described in paragraph (*a*) of this article." By a series of Orders in Council that article has been suspended, and remains so suspended up to the present time. The first of these Orders in Council, dated the 24th March 1880, I will advert to immediately. It is agreed by the counsel on both sides that there are subsequent Orders in Council in the same terms as the first, and therefore I will confine myself to dealing with the first. By it the operation of art. 10 of the present Regulations for Preventing Collisions was suspended, and in lieu thereof, and in substitution therefor, the 9th article of the Regulations for Preventing Collisions at Sea 1863 was to continue and remain in force for a certain period. Now, then, what is the effect of that Order in Council? Dr. Phillimore, on behalf of the plaintiffs, the owners of the steam trawler, has contended that it substituted for the lights provided by sub-section (*d*) of art. 10 of the new regulations the one bright light mentioned in art. 9 of the old regulations, which bright light was undoubtedly carrried by the *Achievement*. Certainly, that is an argument which is deserving of very serious consideration, and to which I have given all the weight I think I ought to give, though I have not allowed that argument to prevail with me. The conclusion to which I have come is, that the Order in Council does not substitute the one bright light mentioned in art. 9 of the old regulations for the lights prescribed by sub-sect. (*d*), art. 10, of the new regulations. The view I take of the matter is this: I think the proper view of the Order in Council is, that art. 9 of the old regulations is, by the Order in Council, substituted for art. 10 of the new regulations in so far, and in so far only, as art. 9 applies to any particular case, and that where art. 9 cannot be applied, art. 10 is suspended, and nothing is substituted for it. If that is the right view of the matter, then I think that in this case art. 3 of the new regulations comes into operation. Is this trawler to blame for not carrying side lights? I think it is impossible to say that she was stationary. She was not stationary as a matter of fact, and in my opinion not stationary within the meaning of the word as used in the regulations. She had four and a half knots on her over the ground, and, what is more important, two and a half knots through the water. The Elder Brethren, whose opinion I have taken on this point, think she cannot be considered as stationary. But further, when one looks at the second paragraph of art. 9 of the old regulations, it appears to me to apply, and to have been intended to apply, only to vessels which are practically stationary. The light required is the light prescribed for vessels at anchor, and I think the article is only applicable to vessels at anchor, or, at the utmost, to vessels drifting without way through the water. If that be the right construction, what follows? It follows that the *Achievement* was not carrying the proper lights. Whether that conduced to the collision is a matter which I have not to determine. The question is, might not the absence of the side lights have contributed to the collision? Now, what are the facts? I have already said that there was a bad look-out on board the steamer. There was, however, an officer on the bridge, but he also was keeping a bad look-out, because he did not see the *Achievement's* light until a distance of from a quarter to half a mile. If the trawler had been carrying the side lights, which I have held she ought to have carried, that officer would, in all probability, having regard to the relative position of these two vessels, have seen the red light as soon as he saw the white light. Seeing a red light in such a position, ordinarily an officer would at once give the order to port, which, in this case, is not done till later. He does not then do that, but waits until he can make out the meaning of the single white light. It is therefore probable that, had he seen a red light, he would have ported earlier and in sufficient time to have avoided a collision. In conclusion, it appears to me that, having regard to all the circumstances of this case, not only is it possible, but probable, that this collision might have been avoided if a red light had been visible, and I therefore hold both these vessels to blame.

From this judgment the plaintiffs appealed.

Dr. *Phillimore* (with him *Bucknill*), for the plaintiffs, in support of the appeal.—Under the circumstances of this case the *Achievement* was bound by the provisions of art. 9 of the Regulations for Preventing Collisions at Sea 1863. She acted in accordance with that article by exhibiting a white light, and therefore should not be held to blame for this collision. If, however, art. 9 does not cover the case of a trawler, then she is bound by the common law only to exhibit such a light as shall warn other vessels in sufficient time of her presence. If so, the white light carried would answer that purpose. It is, however, submitted that art. 9 does cover trawlers,

because it is unreasonable to suppose that the Legislature, when specifically enacting with regard to fishing vessels, should have so enacted as to exclude trawling, one of the principal modes of fishing, from the operation of the article. It is submitted that art. 9 is to be construed by reference to art. 10 of the Regulations for Preventing Collisions at Sea 1880:

Attorney-General v. *Lamplough*, 38 L. T. Rep. N. S. 87; L. Rep. 3 Ex. Div. 227.

Art. 10 (in terms deals with "a trawler at work," when therefore art. 9 was substituted for art. 10, it is to be assumed that art. 9 was meant to cover the case of a trawler at work. According to art. 9 fishing vessels when "attached to their nets and stationary" are to carry a bright light. Inasmuch as a trawler cannot work without some way on her, the word "stationary" should be construed to mean stationary so far as is consistent with carrying on the work of trawling. It is a matter of common knowledge that trawlers, when fishing, go with the tide. It is therefore necessary that trawlers should have way over the ground. It is also obvious that trawlers, incumbered with their nets, must be under some command, and in order to be so it is necessary that they should have some way through the water, in order to give themselves steerage way and otherwise to enable them to manœuvre. Having regard to the fact that this must have been within the knowledge of those who framed this article, it is to be presumed that in using the word "stationary" they could not have meant a total absence of motion, the effect of which would be to prevent trawl fishing altogether. According to Dr. Lushington and the Irish Court of Appeal the word is to be defined as meaning such way through the water as will give the trawler steerage way:

The Robert and Ann v. *The Lloyds*, Holt's Rule of the Road, p. 57 (*a*);
The Edith, L. Rep. Ir. 10 Eq. 345.

If so, it is submitted that two knots does not exceed this limit. It is also submitted that the fishing vessels referred to in art. 9 belong to three distinct categories, viz., vessels at anchor, vessels attached to their nets, and vessels stationary. If so, the *Achievement* being undoubtedly attached to her nets, it becomes unnecessary to consider whether she was also stationary, and there has therefore been a proper compliance with the article. Even assuming there to have been a breach of the regulations, it could not possibly have conduced to the collision, seeing that it has been proved that there was a bad look-out on board the steamer.

Hall, Q.C. and *W. R. Kennedy*, for the respondents, *contra*.—Having regard to the fact that art. 9 prescribes a white light for vessels attached to their nets and stationary, and that vessels at anchor are directed to carry a white light, it is to be assumed that vessels when "stationary" are meant to be in much the same position as vessels at anchor. A vessel when attached to her nets and stationary would both be incumbered with her nets, and also out of command, hence she is to carry that light which will indicate to other vessels that she is to be looked upon as equivalent to a vessel at anchor, and incapable of manœuvring to keep out of their way. It is therefore submitted that stationary means, if not absence of motion over the ground, nothing more than motion with the tide. To give it any wider definition, is to do violence to its meaning. Even assuming it to cover some slight way through the water, the two knots in the present case are excessive. The argument that art. 9 covers three distinct conditions of fishing vessels is negatived by the language of the article, the first conjunction being "or," and the second "and," which shows that the words "attached to their nets and stationary" are to be read together. With regard to the breach of the regulations not possibly conducing to the collision, it is submitted that it is not sufficient to prove merely that there was a bad look-out.

Brett, M.R.—In this case there was a collision between the steamer *Dunelm* and the steam trawler *Achievement*, and it is exceedingly clear, and is not otherwise contested, that the steamer was in the wrong. The only question is, whether the *Achievement* was also to blame. At the time of the collision this steam trawler was in the act of fishing with her trawl net, and had her trawl net down, and being in that position she had a globular white light on her mast, and she had not any red or green side lights. The first question is, whether, being in that state as to her lights, she committed a breach of any rule that was imperative upon her. Another question is, under what rule, if any, would she be? This collision

(*a*) This was a case tried by Dr. Lushington in which it was necessary for the court to consider the meaning of the word "stationary" as used in art. 9 of the Regulations for Preventing Collisions at Sea 1863, although ultimately the decision was based on other grounds. The observations of the learned judge on this subject are contained in his address to the Elder Brethren and are as follows: These are the pressing words, 'attached to their nets and stationary shall exhibit a bright white light.' The argument of Her Majesty's Advocate upon this is somewhat to this effect: 'This is not a case where you ought to have carried a white light at all, but it is a case in which you ought to have carried coloured lights; and if it is a case in which you ought to have carried coloured lights, you did not do it, and are therefore to blame.' But I should wish to bring to your very particular consideration the meaning of these words, 'attached to their nets and stationary.' Do you consider, in ordinary circumstances, a fishing vessel, having the trawl attached to it, generally speaking is in a state of locomotion or stationary? And if you should be of opinion that when a vessel is simply dredging, or scarcely in motion, or only that degree of motion which is indispensably necessary to fishing, are you of opinion that the circumstances of this case are different? I should observe to you that the circumstances of this case require consideration, and they were very properly brought to your attention by Her Majesty's Advocate, for he said, and truly said, that in the petition it was stated that the smack was dragging her trawl gear and going through the water at the rate of about one knot per hour, under mainsail, foresail and jib, and that she had at that time the tide running in the direction mentioned. A very important question is, first, whether you are of opinion that she was stationary within the meaning of this section; and secondly, if you should be of opinion that the objection raised by Her Majesty's Advocate is well founded, then whether it was the occasion of the collision or not." It is to be noticed that one of the two questions left by Dr. Lushington to the Trinity Masters is whether in their opinion the smack was stationary within the meaning of this section. The result of this would appear to be that he left to the Trinity Masters what was really a question of law for the court. It would be for the court to interpret the meaning of "stationary," and then to ask the Trinity Masters, as the Court of Appeal in the above case have done, was the trawler exceeding or not the speed sanctioned by the court's definition of stationary.—Ed

took place after the Order in Council promulgating the regulations of 1880, in which regulations when originally published, there was an art. 10 which dealt with trawlers. But by a subsequent Order in Council this art. 10 was suspended, and art. 9 of the regulations of 1863 was substituted in lieu of art. 10. Hence Dr. Phillimore argued that we ought to construe art. 9 by what was in art. 10. That is contrary, to my mind to the proper rules of construction. We have to construe art. 9 as if we had to construe it the day after it was enacted. What I mean is this, that we are to take out of the regulations art. 10, and read into it, as if it were there, the old art. 9. Therefore, the code of regulations under which this vessel was at the time of the collision, was the Order in Council promulgating the regulations of 1880, as if that Order in Council had been published with all the articles in it except art. 10, art. 9 being in its place. That being so, was this steam trawler within art. 9? I mean, is she the sort of vessel that could be within art. 9? There is also the question whether, under the circumstances, she ought to have acted under art. 9 or under art. 3, which latter article would be applicable to her as a steamer under way. Prior to the Order in Council substituting art. 9 for art. 10 fishing of different kinds was well known. There was fishing with drift nets, fishing without nets at all, and fishing with trawls. The vessels with drift nets, trawl nets, &c., were all vessels attached to their nets. Now we must assume that those who had to legislate on this matter, knew the way in which the fishing trade was carried on. They knew, therefore, that these vessels fished with their nets attached to them, and so when they use the words "attached to their nets" it seems to me obvious that they meant to include vessels attached to trawling nets just as much as to any other nets. They make no distinction between the nets. Therefore I think it perfectly clear that trawlers, which at the date of the Order in Council were principally sailing vessels, were meant to come within the rule.

But it is not under all circumstances that a fishing vessel is allowed to carry the light prescribed by that rule. A fishing vessel can only carry the white light when at anchor or attached to her nets and stationary. If she is not under those particular circumstances, she is an ordinary seagoing vessel, and, if under way, she must carry the red and green side lights; and, if at anchor, the prescribed white light. With regard to a steamer, which was the case here, there is nothing in art. 9 to exclude her if she is a fishing vessel and is attached to her nets and stationary. If she was within that category, then she must show the white light required by that article. Therefore the matter is reduced to this: Was this steam trawler, at the time when the collision took place, a vessel within the limits of art. 9, so that it was her duty to show a white light, or was she outside that article? If she was not within the article, it follows, as a matter of course, that she was a steamer under way, and ought to have carried the red and green and masthead lights. Therefore, in this particular case, the question is, whether the trawler was a steamer under way, or whether she was a fishing vessel attached to her nets and stationary. That leads me to the construction of art. 9. It certainly is a difficult one to construe. My view of an Act of Parliament —and these regulations are equivalent to an Act of Parliament—which is applicable to a large trade or business is, that it is to be construed, if possible, not according to the strictest and nicest rules of interpretation, but that it is to be construed in a reasonable way with regard to the trade or business with which the Act is dealing. It seems to me impossible to suppose, and it would be wrong to assert, that those who have to legislate with regard to a large trade or business, should be supposed to have so legislated as to prevent that trade or business from being carried on, unless one is forced to come to such a conclusion by the language used; and then that could only be by the most extraordinary inadvertence of those who legislate. With regard to this article, it is first of all enacted as to fishing vessels at anchor—that is, when they are not fishing—that they are to carry a white light. Then there is an enactment as to fishing vessels "attached to their nets and stationary," so that "stationary" is not equivalent to being at anchor. For a vessel to be "at anchor," it is not necessary that there should be an anchor down. For instance, a vessel made fast to moorings has no anchor down, and yet nobody would say that she was not at anchor. So again with fishing boats which are brought up by dropping overboard an exceedingly heavy piece of stone. They are "at anchor," though not attached to an anchor. Therefore the difference between being at anchor and attached to their nets and stationary means that they are not exactly in the same state. To my mind the words "attached to their nets and stationary" are meant to be applicable at a time when the vessels are fishing; because, as every one knows, vessels when fishing are attached to their nets. They are not then under way; that is, they do not enjoy the same liberty of movement as they would when under way. They are then much more like a vessel at anchor than like a vessel under way. They have not the same command over themselves. Should it become necessary for them to go forward they could not easily do so on account of the weight of their nets, especially so in the case of trawlers. Assuming them to be steamers, if they backed, they would back into their own nets, and their screw or paddles would become hopelessly entangled in them. Therefore they are in an extremely helpless state. So if a sailing vessel wore round to avoid some obstruction she would be into her own nets. If she tacked considerably she would also do damage. Therefore these vessels when attached to their nets are much more like vessels at anchor than they are like vessels under way, and it was for that reason, no doubt, that provisions were enacted with regard to them whilst they were fishing, which would distinguish them from vessels under way. Again, with regard to vessels approaching them, if they, while thus crippled, were to carry the same lights that a vessel does when she is under way and in full command of herself, they would mislead other vessels, which would suppose that the fishing vessel was under way and would act accordingly. If another vessel wanted to go astern of a fishing vessel she would have a right to steer on the assumption that the fishing vessel was going forward. But the fishing vessel would be practically stationary, and hence the other vessel would go a great deal too close to

her and would probably cut her nets. There are positions in which a fishing vessel, if she is within the rule for vessels under way, would be bound to give way to other vessels, although in her crippled state she could not do what the rule stated ought to be done. That to my mind shows that this article was meant to apply to fishing vessels when fishing. What then is the meaning of the word "stationary?" It has been argued that it must mean mathematically stationary. It seems to me that that cannot be so in a tideway unless the vessel is anchored. A vessel must go with the tide unless she is so managed that with her head turned to tide she exactly counteracts the tide—a thing almost impossible to do for five consecutive minutes. Therefore that cannot be the meaning. Then it was suggested that it means that the vessel must not have any way through the water. But it is told us by our assessors that the mode of fishing in the case of drift nets and trawlers is for the vessels to go with the tide and not against it. If that be true, and the vessel has no way through the water, she cannot steer at all. There may be no harm in a vessel not having command of herself in a perfectly calm sea, but assume there is some sea on, and vessels do fish in what is not exactly a calm sea, she would, under those circumstances, be in manifest danger. How is a vessel then to fish? She cannot be aimlessly wandering about from one side to the other, into her nets and then out of them, and all the time with no command over herself. It makes the thing impracticable. If it was meant that she was to have no way through the water, the Legislature might just as well have said at once that she must not fish at all. What, then, is the use of the white light if by the hypothesis the vessel cannot fish at all? Therefore it seems to me clear that the word "stationary" cannot mean mathematically stationary, that is, going by the land and not by the tide; neither can it mean that the vessel is to have no way on her through the water. I agree that it is a strong word, and the Legislature must have meant to hold the case very strongly indeed. If a vessel is more in the condition of being a vessel under way than at anchor, then she would mislead other vessels if she showed a light which is intended to show that she is a vessel at anchor. The result, therefore, is, that we must so construe this word "stationary" as to mean that the vessel is not in fact stationary, though at the same time I think that we are bound to give the fullest effect to so strong a word as "stationary." It must mean that the vessel is to have some way through the water. How far can one go so as to make trawling practicable in allowing the vessel to have way through the water, and yet at the same time give the fullest possible effect to the word "stationary?" Upon the best consideration that we can give to it, I think what we must say is this, that she must not be going faster than is necessary to keep herself under command while attached to her nets. It will follow from that, that it will not be sufficient for fishermen to say, "We were only going so fast as to enable us to fish with the best advantage and effect," because it may be that a fishing vessel may desire to go faster than I have fixed as the limit, for the purpose of coming to the fish faster and so catching more fish in a given time. Trawl fishing is usually slow because the net is on the ground, and if the vessel goes too fast the net would get torn. But suppose the weather to be such that a vessel cannot fish without going faster than is necessary to keep her under command. It is very possible that there may be weather which is so strong that if vessels fish they must go faster than is necessary to keep them under way. That would be more so in the case of a sailing vessel than in the case of a steamer; but if it is so, they must, according to what I have laid down, neither fish at all, or if they do, they must in the case of a sailing vessel show the red and green lights, and in the case of a steamer show the red, green, and masthead lights. Whether in any particular case a vessel is going faster than is necessary to keep herself under command is a matter of evidence and almost invariably a question for the assessors, although it is perfectly clear that if a trawler was going nine knots through the water we would not want the assessors to tell us that that was excessive.

The evidence in this case I take to be, that the trawler with her trawl on the ground was going at two knots an hour through the water, which with the two-knot tide would give her four knots over the ground. The test, to my mind, is not the speed over the ground, but through the water, and in this case the trawler's speed through the water was two knots. We have therefore asked our assessors this question: "Was the *Achievement*, assuming she was going two knots an hour through the water, going faster than was necessary to enable her to keep herself under command whilst attached to her nets?" They say that she was. She therefore was not within art. 9, and was within art. 3. Instead, therefore, of having only a white light, she ought under the circumstances to have carried the red, green, and masthead lights. Hence she is to blame, unless another proposition which was put forward can be maintained, which was, that although she had infringed the regulations, yet, under the circumstances, it was not possible that the infringement could have conduced to the accident. It is sufficient for me to say that in this case it is impossible to accept such an argument, because the officer in command of the steamer, only seeing the trawler's white light, would be induced to act differently from what he would have done had the trawler carried the lights which would have shown that she was a steamer under way, and if the absence of those lights might have induced the officer to act differently, then the infringement of the regulations cannot be excused. This is not like the case to which the proposition was referred when it was enunciated, namely, that where one vessel was on the starboard side of the other, and that other vessel has got a green light but not a red light, it is useless to charge her with a breach of the rules for not exhibiting a red light, because, if she had had twenty lights on the port side, no one on the approaching vessel could have seen them, and therefore its absence could make no difference. But this is not anything like that case. The strict interpretation that we have had to put upon this rule will make it very difficult for trawlers, at any given moment, to know what they are to do, because, if they are within art. 9, they do wrong to carry the red and green lights, and if they are outside art. 9, then they do wrong in carrying the white light only. Therefore persons in charge of trawlers will have to do

what sailors often have to do, they will have to solve a most difficult problem, and be always asking themselves: "Am I going faster than I ought with only a white light? If so, I must put up my red and green lights. If I am not, I must put up the single white light and immediately take down the side lights." That is the difficulty, but it is one which we cannot help. We have tried to define as fairly as possible the meaning of this Act of Parliament. A larger definition, to my mind, would have been on the whole more desirable, but I do not see any way to construe the word "stationary" in any larger sense than we have done. Therefore I think that, while not agreeing with the reasons of the judgment of the court below, we must come to the same conclusion and dismiss this appeal. How the costs of this appeal are to be borne will have to be considered. The question arises, whether the case comes within the rule that, where both parties are to blame, each party pays his own costs; or whether, the appeal being dismissed, the appellants should pay the costs.

Bowen, L.J.—I am of the same opinion. I agree entirely with the reasons given by the Master of the Rolls for his exposition of the regulations, and I only add a few words because this is, to my mind, a most important matter. In the first place, I should wish most emphatically to call the attention of the Board of Trade to the necessity of dealing in some efficient way with trawl fishing. For myself, I have neither the necessary experience nor the desire to formulate an opinion as to whether or not the white bright light should be legalised for trawlers under all circumstances. If it is that a conflict of opinion rages upon the subject, I do not wish to express any opinion other than this, that some clear and definite line ought to be taken with regard to trawlers, because at the moment the existing legislation is nothing better than a trap for trawlers. I agree with the Master of the Rolls in saying that we should have been glad to have laid down some express guidance for trawlers if we could have done so without doing violence to the meaning of the word "stationary," so that those in charge of trawlers might know what lights to carry, without having to exercise a difficult judgment at each particular moment as to the exact pace at which they are moving through the water. I therefore trust that the Board of Trade will not leave trawlers any longer in their present position. (*a*)

As regards the construction we are putting upon art. 9, it seems to me to come to this: Steam and sailing trawlers, within art. 9, are only intended to carry a white light if they come within the rather difficult definition of either being at anchor or attached to their nets and stationary. What is the meaning of "attached to their nets and stationary?" The nets must be supposed to be out, or else the vessels would not be attached to their nets. The words "and stationary" must therefore mean something additional. I agree with the Master of the Rolls, when he says that we must construe the article from a business point of view, just as one would construe an Act of Parliament with reference to a matter of science, art, or law. It is the subject-matter which gives the colour to the words used in an Act of Parliament. The first thing to be observed of this article is that the fishing vessels which are dealt with are fishing vessels at anchor; that is to say, vessels which are attached to the land, and do not move with the water. Then there is the other class of vessels which are dealt with, which are vessels moving with the water. They are vessels which rest upon the water as distinct from resting on the land. I do not think the word "stationary" is exactly antithetical to "under way," but thin it means substantially keeping the same spot or station, and only moving about so much as is consistent with fishing. This leads me directly to the test given by the Master of the Rolls. The vessel must have a certain motion with the tide if she is going with the tide, and moreover she must have a certain motion through the water for the purpose of keeping herself under command, and for the necessary purpose of managing her nets. But that is all. If she is doing more than that she is locomotive, and not stationary. No doubt it is a difficult question of fact to say whether a vessel is really stationary according to this popular and seafaring term, but I think it cannot be doubted that a vessel travelling two knots through the water is not stationary. In conclusion, I cannot help thinking that the exposition of the law by the Master of the Rolls is the same exposition, though couched in different language, as that of the Court of Appeal of Ireland in the case of *The Edith* (*ubi sup.*), and that it is not at all inconsistent with what has been laid down by Dr. Lushington in the case of *The Robert and Ann* v. *The Lloyds* (*ubi sup.*).

Fry, L.J.—I concur in the judgments pronounced by my learned brethren. The question turns upon the meaning to be given to a few words in art. 9 of the old Regulations for Preventing Collisions. The words are "fishing vessels and other boats, when at anchor, or attached to their nets and stationary, shall exhibit a bright white light." What is the mean-

(*a*) We find on reference to the recent Regulations of 1884, issued subsequently to this decision, that no special provision is made for trawlers of over twenty tons when engaged in fishing. The result is, that they are bound by art 10 (*a*) to carry the ordinary lights of a vessel under way. Art. 10 (*a*) directs that "All fishing vessels and fishing boats of twenty tons net registered tonnage, or upwards, when under way and when not required by the following regulations in this article to carry and show the lights therein named, shall carry and show the same lights as other vessels under way." Inasmuch as a trawler is and must be under way when engaged in fishing, and as none of the subsequent regulations in art. 10 provide for trawlers, the result is that trawlers will be bound to exhibit the lights of a vessel under way. Hence all the duties of a vessel under way will be thrown upon trawlers under circumstances which will render it almost impossible for them to efficiently discharge those duties. The disastrous results of casting this heavy burden upon trawlers when incumbered by their nets cannot be more forcibly described than in the above language of Brett, M.R. The only possible advantage of this new state of things over the old is, that the duties of persons in command of trawlers, however difficult it may be to perform them, is clear and obvious, whereas under art. 9 of the Regulations of 1863, as above interpreted by the Court of Appeal, it would be in all cases necessary for them to exercise a difficult judgment at each particular moment as to the exact speed at which their vessel was moving through the water, before they could know what lights they were bound to exhibit.—Ed.

ing of the word "stationary?" Dr. Phillimore asks us to read "and," which precedes the word "stationary," as "or," so as to hold that the article applied either to fishing boats at anchor, or attached to their nets or stationary. But it is obvious that such a construction would do violence to the language of the article, and would be inconsistent with its intention. It appears to me that two conditions must be satisfied by the meaning to be given to the word "stationary." In the first place, it must describe a common condition of fishing vessels. We cannot suppose that Her Majesty in Council was legislating with regard to an extraordinary and uncommon condition of fishing vessels, and requiring an extraordinary condition of lights. In the next place it must express some condition, some state of fishing vessels incidental to them when their nets are down, and therefore we must find some condition, some common state of fishing vessels when they are attached to their nets and stationery. That appears to me to be the principle upon which the word should be construed, and one which our construction satisfies. No doubt the most rigorous meaning of the word "stationary" is a negation of any motion of the vessel with regard to the ground; but there is a condition, a common and well-known condition of fishing vessels, in which they are attached to their nets, and making some way over the ground. With regard to the other parts of the case I entirely agree with my learned brethren, and I do not consider that it is necessary for me to add any more.

Brett, M.R.—As to the costs of this appeal, we think that, the reasons for the judgment below being in our view incorrect, we ought, under the circumstances, to order each party to bear their own costs. (*a*)

Appeal dismissed.

(*a*) The rule as to costs where both vessels are held to blame was somewhat recently settled in the case of *The Hector* (vol. 5, p. 101; 8 P. Div. 218), where the Court of Appeal, following the old practice of the Privy Council, decided that where both ships are held to blame for a collision each party bears his own costs, both in the court below and in the Court of Appeal. This rule applies even where the defendant's ship is held exempt from liability on the ground of compulsory pilotage and the defendant has not counter-claimed. For instance, in *The Rigsborg Minde* (vol. 5, p. 123; 8 P. Div. 132), on appeal from a judgment of Sir Robert Phillimore finding the defendants' vessel alone to blame, the Court of Appeal held both vessels to blame, but found that the defendants were under no liability, as the wrongful manœuvre of their ship was caused by the fault of the pilot who was in charge of their ship by compulsion of law. Yet notwithstanding the fact that the defendants had not counter-claimed and were therefore entirely successful appellants, and notwithstanding that the decision of both ships being to blame was due to the fault of a person who was not their servant, they were made to bear their own costs in both courts. This result of the rule would hardly appear to be equitable, and we cannot help agreeing with Cotton, L.J. in his doubts as to whether the rule is settled on reason or sound principles. According to that learned judge, "whoever appeals ought to get the costs of a successful appeal, and to pay the costs of an unsuccessful one." Costs are now in the discretion of the judge, and it would seem more consonant with justice to disregard a rule, even though it be old, if its application works injustice. The only exception to this otherwise general rule is where the appeal is brought by either party from a decision holding both ships to blame, and that decision is confirmed on appeal: (cf. *The Hector*, *ubi sup.*) In such a case the appellant having wrongly occasioned the costs of the appeal would generally be made to bear all the costs.

Solicitors for the plaintiffs, *Ingledew. Ince*, and *Co.*

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

Feb. 28 *and July* 30, 1884.

(Before Brett, M.R., Baggallay and Lindley, L.JJ., assisted by Trinity Masters.)

The City of Chester. (*a*)

ON APPEAL FROM BUTT, J.

Salvage—Damage to salving ship—Demurrage—Evidence—Separate award for injuries sustained—Registrar and merchants.

In a salvage action evidence of the specific injuries sustained by the salving ship and the cost of repairs thereof, and of demurrage during repairs, was tendered in the Court of Admiralty, and rejected.

Held, in the Court of Appeal (Baggallay and Lindley,, L.JJ.,), that the judge is bound to receive such evidence, and to include the loss shown in his award, except in cases where such evidence is immaterial by reason of the property saved being too small in value to satisfy such loss, or by reason of the services being so trifling as to render it unjust that the loss sustained by the salvors should be borne by the owners of the salved property, or where from other circumstances it is obvious that the court cannot give an amount sufficient to cover the loss; but, per Brett, M.R., that the admission of such evidence is entirely in the discretion of the judge, subject to his award being reviewed by the Court of Appeal in the event of its being shown that the rejection of the evidence improperly affected the amount of the award. (b)

This was an appeal by the plaintiffs in a salvage action from a judgment of Butt, J. delivered on the 1st May 1883, by which he awarded 4500*l.*, to the owners of the *Missouri*, the salving vessel, 500*l.* to the master, and 1500*l.* to the crew, making in all a total of 6500*l.*

The facts of the salvage service were as follows:—

The steamship *City of Chester*, belonging to the Inman line, and of 2713 tons nett, while on a voyage from New York, with 111 passengers on board, was sighted in the Atlantic Ocean, flying signals of distress, on the 10th March 1883, by those on board the steamship *Missouri*. The *Missouri* was a steamship of 5146 tons gross, bound from Boston to Liverpool, with a general cargo and five passengers. On the *Missouri* coming up with the *City of Chester* it appeared that her crank shaft had broken down four days

occasioned by his appeal. In the present case, however, the Court of Appeal has disregarded the exception and enforced the general rule, apparently on the ground that the appeal, although dismissed, was brought from a decision which, though right in fact, was wrong in law. —Ed.

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

(*b*) In an American salvage case, *The Colon* (18 Blatchf. C. Ct. 277), we find that evidence was given of the specific injuries and losses suffered respectively by the owners of the salving ship and by the owners of the cargo laden on board the salving ship, and that the court made specific awards in respect of such losses in addition to a sum awarded as salvage proper.—Ed.

previously, and that she was in need of assistance. The *Missouri* thereupon took the *City of Chester* in tow, and on the 12th March towed her into Halifax harbour, a distance of 229 miles. During the towage there was a heavy sea running, and the *Missouri's* bitts were carried away, her crank shaft was injured, and she was considerably strained. At the time the *City of Chester* was taken in tow, she was in the track of steamers, and had signalled to several for assistance, one of which, the *Suevia*, had towed her for twenty-four miles, on the 6th and 7th March, and had then left her on the ground that her coals were running short.

On the 14th March the *Missouri* left Halifax, and arrived at Liverpool on the 27th.

The value of the *Missouri* was 83,000*l.*; of her cargo and freight, 104,047*l.*; of the *City of Chester*, 9,000*l.*; and of her cargo and freight, 89,535*l.*

The plaintiffs in their statement of claim claimed such an amount of salvage as to the court should seem just, and if necessary a reference to the registrar, assisted by merchants, to determine the amount of damage sustained by the *Missouri* while rendering the service, it having been therein previously alleged that the *Missouri* had sustained damage, and that in consequence thereof she had to be repaired at Liverpool.

The allegations in the statement of claim with reference to the damage sustained by the *Missouri* were as follows:—

> She had a list of several degrees during the voyage. Her hull and engines were considerably strained and her hawsers damaged. She also sustained damage when the starboard bitts were torn away, and to her jigger mast. The *Missouri* arrived in Liverpool on the 27th March 1884. She was then docked and surveyed, and it was found as the fact was that the straining to her hull and engines during the towage had been so great that it was necessary to put her into graving dock, to take out her after crank shaft, and to give her a thorough overhaul and repair. The repairs are now in progress, and according to the best estimation that can be made will cost from 2000*l.* to 2500*l.*, and will detain the vessel, whose ordinary demurrage rate is 128*l.* 13*s.* per day, thirty days, and the total cost for damage and demurrage will be from 5900*l.* to 6400*l.*
>
> A number of passengers were engaged to proceed by the *Missouri* on her next voyage to Boston, but in consequence of the detention of the *Missouri* it became necessary to engage passages for them in other vessels at an expense to the owners of the *Missouri* of 107*l.* 5*s.* 3*d.*

The action came on for hearing before Butt, J., assisted by Trinity Masters, on the 30th April 1883.

During the course of the plaintiffs' case evidence was given of the fact that the *Missouri* had been generally strained, that her crank shaft had been injured and that her engines had been loosened. Evidence was then tendered by them of the specific particulars of the injuries sustained by the *Missouri*, and of the fact that the cost of the repairs rendered necessary by the salvage services amounted to between 2000*l.* and 2500*l.*, and that in consequence of such repairs the *Missouri* was detained thirty days, which, taking the demurrage rate to be 128*l.* 13*s.* a day, occasioned a loss of about 3900*l.*, making a total actual loss of over 6000*l.*

The learned judge refused to receive this evidence, or to direct a reference to the registrar and merchants to ascertain the amount of loss sustained both by reason of the injuries done to the *Missouri* and by reason of her detention for repairs. The reasons for his decision appear in the judgment of Baggallay, L.J. In the conclusion, the learned judge awarded the sum of 6500*l.*, of which he apportioned 4500*l.* to the owners of the *Missouri* and the remainder to her master and crew, without making any specific apportionment in respect of the injuries sustained by the salving ship.

From this decision the plaintiffs now appealed.

Russell, Q.C. and Dr. *Phillimore* for the appellants, the plaintiffs.—The award of the court below should be varied for two reasons: because the sum awarded is inadequate, and because the learned judge improperly refused to admit evidence to prove the damage sustained by the salvors' ship while rendering the services and the consequential loss by demurrage. Salvage should be a full and adequate reward for services voluntarily rendered and successfully performed. How can that be given unless the court will allow itself to be informed what the services actually cost the salvors? If a sum is given insufficient to recoup the salvors for the expenses sustained by them in rendering the services, as is the case here, there is no salvage reward at all. The salvors should be put in the same position as they were before the services, and should receive a reward in addition. If the present award is allowed to stand, the salvors are actually out of pocket. A reward necessarily means something over and above the outlay expended. To hold otherwise would cause shipowners to instruct their captains not to salve. This question has already been decided in favour of the appellants' contention by the Privy Council, and by Sir James Hannen in the Admiralty Division:

> *The De Bay*, 5 Asp. Mar. Law Cas. 156; 49 L. T. Rep. N. S. 414; L. Rep. 8 App. Cas. 559;
> *The Sunniside*, 5 Asp. Mar. Law Cas. 140; 49 L. T. Rep. N. S. 401; 8 P. Div. 137.

It has been the practice of the Admiralty Court since 1829 to refer the assessment of the actual damage sustained by the salvors to the registrar, and to add the amount so found to the award:

> *The Oscar*, 2 Hagg, 257;
> *The Salacia*, 2 Hagg. 262;
> *The Jane*, 2 Hagg. 344;
> *The Saratoga*, Lush. 318;
> *The Albert*, 33 L. J. 191, Ad.;
> *The Mudhopper*, No. 4, 4 Asp. Mar. Law Cas. 103; 40 L. T. Rep. N. S. 462;
> *The Silesia*, 4 Asp. Mar. Law Cas. 338; 43 L. T. Rep. N. S. 319; 5 P. Div. 177;
> *The Crown*, Pritchard's Admiralty Digest, p. 842;
> *The Demetrius*, Ib. p. 847;
> *The Bentinck*, Ib. 858;
> *The Leda*, Ib. 863;
> *The Gladiator*, Ib. p. 827.

The present Rules of the Supreme Court do require particulars of damage to be set out in the statement of claim. Evidence of them therefore must be admissible.

Webster, Q.C. and *Myburgh*, Q.C. (with them *Bucknill*) for the respondents).—Salvage operations are undertaken for better or for worse. To compensate salvors for the risk of being unsuccessfu and perhaps sustaining damage to their own ship, the court gives very large awards where the salvage is successful. In view of these large awards, the salvor takes the chance of injuring his own property. Cases certainly exist where

small current expenses such as the cost of broken hawsers, coal, &c., have been referred to the registrar and merchants. But they are direct injuries arising from the services during the towage. [Brett, M.R.—What do you say if an injury to the shaft is discovered during the towage?) Evidence might be given of the injury, but not of the cost of repairs. The case of *The Martha* (3 Hagg. 434) is opposed to the contention that the damages sustained should be first paid for, and then a reward added to that. The salved are not insurers, and there is no case which lays down this principle of indemnity contended for. As to the authority of *The De Bar* (*ubi sup.*) it is not binding upon this court, and it is submitted that the principle of that decision is incorrect. The following authorities support the respondents' contention:

The Enchantress, Lush. 93.
The Ellora, Lush. 550;
The Star of India, 4 Asp. Mar. Law Cas. 261; 35 L. T. Rep. N. S. 407; 1 P. Div. 466.

Dr. *Phillimore* in reply.

Cur. adv. vult.

July 30.—Brett, M.R.—At the hearing of this case before Butt, J. the salvors, after giving general evidence that the *Missouri* was strained and her crank shaft injured, claimed, as of right, to give in evidence, either before the judge or the registrar and merchants, before the decree, the specific particulars of the injuries to the ship and machinery, and the specific particulars of the items of the cost of repairing such injuries, and of the estimated time necessary for repairing the same and of the consequent loss to the owners in the nature of demurrage. Butt, J. declined to admit evidence of such particulars either before himself or before the registrar and merchants as required. He further declined, though required to do so, to award any specific sum in respect of the injuries to the salvors' ship, or to her machinery, but awarded generally to the owners of the *Missouri*, as distinct from the more direct salvors, the sum of 4500*l*. The owners of the *Missouri* appealed, insisting upon their right, *ex debito justitiæ*, to give, either before the court or the registrar and merchants before the decree, the evidence which they proffered at the trial; they insisted that there had been a mis-trial on the ground of improper rejection of evidence; they insisted that the judge is bound, on being so required, in every salvage case to admit such evidence, or at all events that he was bound to receive such evidence in the present case. Upon an appeal brought on such grounds the question is not whether the judge ought or ought not in estimating salvage award to take into account and therefore to receive, evidence of the fact that in and by rendering the salvage service the property of the salvors has been injured, but whether in such a case as the present the judge is bound before making his decree to hear evidence, either personally or through the registrar and merchants, of all the specific particulars of such injury, and of all the specific particulars of the loss to the salvors occasioned thereby. It was argued that the judge is bound to receive such evidence in every case, and therefore, of course, in this, or if not in every case, he was in the present case, because the value of the property saved was amply sufficient to allow an amount of reward which would cover the losses suffered by the salvors in rendering the salvage service. In such case it was said the judge is bound to grant an amount of reward which would cover such losses, and therefore bound to ascertain exactly what those losses are. Or it was said he was bound to ascertain such losses in order to consider judicially whether he would or would not grant an amount of reward sufficient to recover them. As to all these contentions the answer depends upon a preliminary question, namely, whether in every case, or in the particular case suggested, the judge is bound to award a sum sufficient to indemnify the salvor. For if he is not, and if from other circumstances in the case he is rightly of opinion that he ought not, the proposition that he must hear the evidence, which upon the hypothesis has become clearly immaterial, is absurd. And an absurd proposition is not a principle of law. Now as to the first, that is to say, the absolute proposition, it is clearly not true. Suppose the loss to the salvors by reason of injury to their property, the result of using it in the salvage service, is equal to or greater than the value of the property saved, the award obviously cannot cover such loss, otherwise the supposed salvage would be a saving of nothing. Then the particulars of such loss are immaterial. Suppose it is at the commencement of, or becomes apparent in the course of the hearing, that the loss of the salvors is greater than half the value of the property saved, it is immediately obvious that the amount to be awarded cannot cover the loss of the salvors, because even in the case of derelicts the Court of Admiralty has hardly ever, under any circumstances, and in no known case of non-derelict has ever awarded, as for salvage reward, more than half of the value of the property saved. In such case again, therefore, the suggested evidence is obviously immaterial. It is immaterial even for the purpose of obliging the judge to consider whether he will or will not grant an amount of reward sufficient to cover the loss, because by the hypothesis circumstances have made it clear that he cannot.

Then let us consider the more limited proposition. Suppose the danger to the thing saved to have been small, though sufficient to raise a salvage claim, is it true to say that in such a case, if by accident, without fault or negligence, the property of the salvor is greatly injured, the whole consequence of such accident is, according to the large equity of Admiralty law, to fall upon him whose property is saved? Is the mere fact that the property saved is sufficient in value to allow the claim for injury to the salvor to be met, conclusive to oblige the judge, without regard to the other circumstances of the case, to allow the claim? To say that it is would be contrary to the whole principle of salvage reward, and the whole long-continued course of its administration. The danger of an injury to his property so large as to make it wrong on the equities of the case to place the whole consequences of such injury on the owner of the property saved, is one of the risks, and by no means the only risk, which is run by all salvors. The judge is bound to consider, not only the circumstances of loss having been incurred by the salvor, but, in conjunction with it, all the other circumstances which enter into the problem of what in the

particular case is a reasonable, and between the parties an equitable, amount of salvage reward. There is no jurisdiction known which is so much at large as the jurisdiction given to award salvage. There is no jurisdiction known in which so many circumstances, including many beyond the circumstances of the particular case, are to be considered for the purpose of deciding the amount of salvage reward. All these circumstances have been repeatedly enunciated by Lord Stowell, Dr. Lushington, and others. It is useless to repeat them. It follows that there is no jurisdiction known the administration of which is more within the discretion of the judge who has to administer it. The moment the judge is of opinion, and is not unjustified in being of opinion, that he cannot give, as a part of the amount to be awarded, the specific loss incurred by the salvor, it becomes impossible to say that he is bound at whatever expense to the suitors, or at waste of his own time, to listen to evidence of the particulars of such loss. It follows that in no case can it be predicated that the judge is bound, from the mere fact that it is proffered to him, to admit and entertain and consider such evidence. It may be that in some particular case it can be shown that for want of the knowledge to be obtained from such evidence the judge has not justly determined the amount of salvage which he has awarded. But in such a case an appeal succeeds, not on the ground of the rejection of the evidence, but on the ground of the inadequacy of the amount awarded. The Court of Appeal cannot come to the conclusion that the evidence has been improperly rejected until, from the other circumstances of the case, it has concluded that the only reasonable exercise of discretion was to allow the exact amount of the salvor's loss, or that the discretion cannot, even on the appeal, be fairly exercised without the knowledge of the exact amount. It cannot come to this conclusion until it is clearly of opinion that the amount awarded is in the particular case unreasonably too small, or that it cannot tell whether it was or was not unreasonably small. In truth, a clear conclusion that the amount awarded is unreasonably too small or too large, or that there was not means of determining whether it was unreasonably too large or too small, is the only ground on which an appeal in the case of a salvage award can be successful. The contention, therefore, of the salvors in this case, that the judge was bound *ex debito justitiæ* to receive at the time and in the manner proffered the evidence proffered to him on the mere ground that it was proffered, fails. In no case has it ever been held that the judge is bound to receive such evidence. It must have been offered and rejected many times. It does not appear to have been received in more than a few cases in the books. The absence of any decision to show that it must be received is fatal to the appellants' contention. I have inquired from the most experienced officers of the Court of Admiralty, and find that no one of them has ever known or heard of any case in which, in a salvage action, such an inquiry was ever referred to the registrar and merchants before the decree, or otherwise than as a means of working out a decree which has already adjudged that a part of the salvage reward shall be the actual cost of the repairs and their consequences. The cases of *The Sunniside* (*ubi sup.*) and *The De Bay* (*ubi sup.*) are not in point. In both cases the evidence was received. In *The Sunniside* (*ubi sup.*) counsel for a salvor asked questions as to the loss of profits occasioned to the trawler by engaging in the services, and also as to the costs of repairing damages occasioned to the vessel by rendering the services in question. This was objected to as inadmissible, but it was admitted. In his judgment Sir James Hannen says: "I was asked to reject that evidence, but this I did not consider myself at liberty to do, because it appears to me it was admissible as an element to be considered in awarding the remuneration to be paid to a vessel which had rendered salvage services. I remain of the opinion which I expressed yesterday, after considering it further, that it is not to be taken in ordinary cases as a fixed figure always to be allowed as in the nature of damages, and then to be added to the amount awarded for the actual salvage service. As a rule it appears to me that the amount for loss of trade, and so on, cannot be taken as an actual figure in calculating what the salvage reward is to be. The same remarks apply, though not with the same force, to the question of damage done, but there is a reason in this case why a distinction should be drawn, and I propose to do it for the purpose of this case only." In *The De Bay* (*ubi sup.*) it was contended that some of the items ought not to be taken into consideration at all, as for instance, the loss on charter, and it was further contended that in no case ought the items of loss or damage to the salving vessel to be allowed "as moneys numbered," but that they should only be generally taken into account when estimating the amount to be awarded for salvage remuneration." Their Lordships, it is stated at page 563 of 8 App. Cas., "are of opinion that it is always justifiable and sometimes important, when it can be done, to ascertain what damages and losses the salving vessel has sustained in rendering the salvage services;" and later they add: "If there is a sufficient fund, and the losses sustained by the salvor are ascertained, it would be unreasonable to reject the assistance to be derived from that knowledge when fixing the amount of salvage reward, and their Lordships are unable to appreciate the argument that that which is known may be taken into account generally, but not specifically." This is only a decision that the judge may receive the evidence and may award specific sums. It is no decision that he must do either. That the judge might in this case, and that a judge may in any case, receive such evidence is a proposition which is incontestable. Whether, having received such evidence, the judge has rightly acted upon it is a matter of appeal. But that is an appeal as to the amount awarded. That he may act upon it by directing, as a part of his award, that the specific ascertained amount of the loss be paid to or be realised by the salvor is undoubted, if the other circumstances do not render it unjust that such amounts should be paid or realised. Such a specific direction has been given in many cases. It may, however, not be unworthy of observation that in all such cases the value of the property of the salvors has been small. But it follows from the considerations brought forward in this judgment that the judge is never bound to decree in terms, as a part

of his award, that such specific ascertained amount shall be paid or realised. The judge is always entitled to award a general sum. It follows that he is not bound to receive evidence of a specific ascertained amount.

It remains to be considered whether, in the present case, we are of opinion that the judge could not make a reasonably just award without hearing and considering the proferred evidence. I cannot so adjudge. But after consulting the learned judge of the Admiralty Court, and considering the large value of the property saved and the undoubted fact that a large injury was suffered by the appellants, I have, with the assent and concurrence of the learned judge of the Admiralty Court, undertaken to reconsider his decree. In the result, we have come to the conclusion to vary his decree as follows: We decree to the owners of the *Missouri* 1000*l.* and the cost of the repairs rendered necessary by the straining and other injuries to the *Missouri* caused by the salvage services, and the real cost, if any, to the owners of the *Missouri* of any crew kept and paid by them for the service of the ship while she was under repair. Such costs must be ascertained by the registrar and merchants. We leave it to the appellants either to accept that decree or to keep the one which they already have. If they accept our proposed decree they take it subject to this risk, that the costs of this appeal will follow the result of the inquiry before the registrar and merchants. If, however, they should prefer to allow Butt, J.'s award to stand, they may keep it, each side paying their own costs of the appeal.

Baggallay, L.J.—This is a salvage action, and the question involved in the appeal is by what rules, if any, a judge should be guided in such an action in receiving or rejecting evidence, tendered on behalf of the salvors, as to the amount of cost incurred by them in repairing injuries occasioned to their ship by rendering the salvage services, and of the loss arising from the detention of their ship whilst such repairs were being executed. On the part of the appellants, who are the plaintiffs in the action, it has been contended that they were entitled *ex debito justitiæ* either to have such evidence received and dealt with by the judge himself, or to have the matter referred to the registrar and merchants; whilst it has been urged, on behalf of the respondents, that it was at the absolute discretion of the judge to receive or reject such evidence, and that the exercise of such discretion could not, consistently with the recognised practice in salvage cases, be reviewed. In my opinion, each side in so contending put their case too high. As a second point, it was urged on behalf of the appellants, that, under the circumstances of the present case, certain evidence which was tendered and rejected by the learned judge ought to have been admitted. In order that I may make my views clear, as to the alternative contention of the appellants, I must refer, and I shall do so very concisely, to the circumstances under which this appeal has been brought. [The learned Judge then stated the facts as already set out, and continued:] It is not in dispute that at the time when the *Missouri* took the *City of Chester* in tow, and throughout the towage to Halifax, the weather was bad, that the towage was very heavy, and that after the salvage service it was found that the *Missouri* was strained, and her crank shaft fractured. In reference to the fracture, the learned judge, in the course of his judgment, after stating that it might be a very nice question whether the crank shaft was thoroughly sound before the towage services were rendered, expressed himself as follows: "Upon the whole, I think there is very strong reason to believe that the vessel strained considerably during the towage services and because she had the other very heavy vessel in tow in a heavy sea way;" and again, "I do not think one can shut one's eyes to the fact that there was a very heavy strain brought upon the vessel, and if it is not proved to demonstration that the injuries were done in consequence of the strain, there is very strong reason to believe that they well might have been." It will be noted that the amount of the loss alleged by the plaintiffs to have been sustained by the owners of the *Missouri* considerably exceeds the amount awarded to them, and that, according to the view taken and acted upon by Butt, J., the *Missouri* may have rendered the salvage services, not only without any remuneration to her owners, but at a very heavy loss to them; it may be that her owners may have formed an exaggerated estimate of the amount of loss which they have sustained, but they have been deprived of the opportunity of showing that the loss sustained by them is as great as they allege. Now, one cannot help feeling that such a result, in this and other cases, would have a strong tendency to discourage the rendering of salvage services, especially under circumstances similar to those which we are now considering; when from the very first it was evident that the towing of the *City of Chester* to Halifax must be one of a heavy character and involving considerable risk to the salving ship. These views were thoroughly present to the mind of Butt, J., who, in the course of his judgment, alluded to the increasing indisposition to render assistance to vessels in distress, and to the necessity of making liberal awards when such services were rendered—an observation supported in its application to the present case by the fact that another steamer, the *Suevia*, had towed the *City of Chester* for twenty-four hours on the 6th and 7th March, and had then abandoned her on the alleged ground that her own coals were running short.

I pass on to consider the reasons assigned by the learned judge for the rejection of the tendered evidence. The question was not dealt with in the course of his judgment, beyond a statement that he was not going to award any amount for the repairs of the crank shaft or for the repairs of the ship; but in the course of the trial, when the rejected evidence as to the detention of the ship for the purpose of her being repaired was tendered, he expressed himself as follows: "I do not think it has anything to do with the question save as evidence of the risk run. If you have so much damage done that it costs you 20,000*l.*, I could not have increased my award. It is all evidence of the risk you have run; you run that risk for better or worse. If you do it without injury at all, you earn so much more; if not you earn so much less." The counsel for the plaintiffs thereupon submitted that it was the duty of the court to see, if possible, that the salvors were not out of pocket; to which the

learned judge replied: "I do not agree with that at all, I differ entirely with you there. I think that it may very well be that a vessel rendering salvage services would get such an injury that the owners would be out of pocket." And when, upon the rejection of the tendered evidence, the counsel for the plaintiffs pressed for a reference to the registrar and merchants, the judge observed: "Salvage remuneration is the sort of compensation, or sort of price to pay, for the services rendered, and one of the elements in arriving at that is the risk run by the salvors and their property. Now, in order to appreciate the risk to property, it is very often material to see what did happen, and if you show a collision between two vessels, or if you show straining and damage to the crank shaft of the salving vessel, all that is evidence of the risk, and all that may very properly be taken into account in the award; but what I hold is this, that, taking the risk upon yourself, and having a greater or less amount awarded you in consequence of that risk, you are not entitled, if the risk had gone against you, to say: Now then we claim not only our award, but we claim the whole price of repairing the injury done and the demurrage during the delay for such repairs. I do not think you are entitled to that, and if you are not I do not see how any of this is material, beyond the fact that your crank shaft was broken and the body of your engine was loosened, and matters of that sort." I have thought it right to set out at some length the grounds, as stated by himself, upon which Butt, J. declined to entertain the question of the amount of damage sustained by the *Missouri*, either by the reception of evidence adduced before himself, or by a reference to the registrar and merchants. I readily assent to the proposition enunciated by him, that, in determining the amount of salvage to be awarded in any particular case, one of the matters to be taken into consideration is the amount of risk run by the salving ship in rendering the salvage service, and that in estimating the amount of risk so run, evidence of any injury actually sustained by the salving ship is admissible; but I am unable to adopt the view, apparently held by him, that the amount of salvage award should in no respect depend upon the amount of loss occasioned to the owners of the salving ship by reason of the injury sustained by their ship in rendering the service. Butt, J. put a strong case, but it illustrated his views upon the subject, when he said, "If you have so much damage done that it will cost you 20,000*l*. I cannot increase the award;" and it was evidently present to his mind that the principle upon which he was acting in the present case would, as I have already pointed out, probably leave the owners of the *Missouri* not only unrewarded for their salvage services, but heavy losers through having rendered them. If I rightly appreciate the language used by the learned judge, he considered himself bound, by rules recognised by his predecessors in the Court of Admiralty, to reject the tendered evidence; but he nevertheless at the time when he rejected it expressed himself to the effect that the question involved was of great importance, and one which in his time had never been satisfactorily argued, and that though objections had been from time to time taken and rulings made, it had always been without argument. Though the admission of the rejected evidence or a reference to the registrar and merchants was strongly pressed by the counsel for the plaintiffs, and as strongly opposed on behalf of the defendants, it does not appear that there was any argument upon the question before Butt, J. It has, however, been very ably discussed before us.

In the course of the arguments, numerous cases were cited by the counsel for the plaintiffs, in which the Court of Admiralty has decreed payment to the owners of salving ships for the losses sustained by them in consequence of injuries to their ships whilst rendering the salvage services. In some of such cases the court itself received evidence as to the amount of such losses, and in others it referred it to the registrar and merchants to ascertain and report to the court. Amongst others, our attention was directed to *The Oscar* (*ubi sup.*), *The Salacia* (*ubi sup.*), and *The Jane* (*ubi sup.*), all decided by Sir Christopher Robinson, *The Saratoga* (*ubi sup.*), and *The Mudhopper* (*ubi sup.*). I deem it unnecessary to refer to these cases in detail, as since the decision of Butt, J. on the 1st May 1883, in the case now under consideration, two other judgments have been delivered: the one by Sir James Hannen on the 21st of the same month, in the case of *The Sunniside* (*ubi sup.*); and the other by the same learned judge in the Privy Council on the 30th June following, in the case of *The De Bay* (*ubi sup.*), in which similar questions arose to those with which we now have to deal, The material facts in the case of *The Sunniside* (*ubi sup.*) were as follows: On the 7th Nov. 1882 the steamer *Sunniside* broke down, when she was about twelve miles east of Scarborough, bound for Shields. Salvage services were rendered by several vessels, and amongst others by a steam trawler named the *Monarch*. In the action, which was a salvage action, evidence was tendered by the counsel for the *Monarch* as to the cost of repairing damages occasioned to her whilst rendering the salvage services, and of the loss of profits whilst so engaged, and this evidence was received by Sir James Hannen, though urged by the counsel for the *Sunniside* to reject it; and in the result Sir James Hannen awarded to the *Monarch* 200*l*. in respect of salvage pure and proper, and 100*l*. beyond that sum for loss of profits and repairs. As before mentioned, this award was made on the 21st May 1883, three weeks after the judgment of Butt, J. in the present case. In the course of his judgment Sir James Hannen, after describing the extent to which he considered that the several vessels had rendered services, and stating that in his opinion the *Monarch* was the vessel which performed the real salvage service, expressed himself as follows: "A question arose at the hearing yesterday as to the admissibility and effect of evidence of what a salving vessel might have earned if she had not been occupied in rendering the salvage service. I was asked to reject that evidence, but this I did not consider myself at liberty to do, because it appears to me that it is admissible as an element to be considered in awarding the remuneration to be paid to a vessel which has rendered salvage services. I remain of the opinion which I expressed yesterday, after considering it further, that it is not to be taken in ordinary cases as a fixed figure always to be allowed as in the nature

of damages, and then to be added to the amount awarded for the actual salvage service. I think the loss of earnings and the actual services must be considered under ordinary circumstances together. It is to be remembered that the reason why so high a rate of remuneration is given for salvage service is because of the sacrifices which the salving vessel makes, but to give as it were damages for the sacrifices made, and also a high rate of salvage remuneration, would be to give that remuneration twice over. As a rule, therefore, it appears to me that the amount for loss of trade, and so on, cannot be taken as an actual figure in calculating what the salvage reward is to be. The same remarks apply, though not with the same force, to the question of damage done. But there is a reason in this case why a distinction should be drawn, and I propose to do it for the purposes of this case only;" and he then proceeded to state why, in the case before him, he thought it right to assess the amount of salvage pure and simple apart from the amount which he awarded for cost of repairs and loss of profits. The decision in the case of *The Sunniside* (*ubi sup.*) appears to me to affirm the following propositions: 1. In a salvage action evidence is admissible of the cost of repairing damage done to the salving vessel in consequence of rendering salvage service, and of the loss of earnings occasioned by any injury in such service. 2. Such cost and loss are elements for consideration in estimating the amount of the salvage reward. 3. Under ordinary circumstances the amounts of such costs and loss ought not to be taken as "fixed figures" or "moneys numbered" to be allowed in the nature of damage, added to the amount of the reward for actual salvage service, but should be taken into consideration in arriving at the amount to be so awarded. 4. Under special circumstances, of which the case of *The Sunniside* was itself an illustration, the amounts, when ascertained, of cost incurred for repairs, and of loss of earnings, may properly be taken as "fixed figures," and added to the award for actual salvage service. With respect to the first of these propositions it is to be observed that it goes no further than to affirm that the evidence therein mentioned is admissible, but it must be borne in mind that the only question raised was whether it was admissible. I pass on to consider the case of *The De Bay* (*ubi sup.*), the material facts of which were as follows: In the month of Sept. 1881 the *Mary Louisa*, a steamship of 1287 registered tonnage, in ballast, and bound from Marseilles to a port in Sicily, fell in with the *De Bay*, a screw steamer of 1805 tons register, bound to Rangoon, with a general cargo: the *De Bay* was making signals of distress, having lost her propeller; the *Mary Louisa* towed the *De Bay* to Malta; the services, which lasted about sixty-two hours, were rendered under circumstances of great difficulty and some danger, and it was alleged by the owners of the *Mary Louisa* that their ship sustained considerable damage consequent on the services so rendered. A suit for salvage was brought by the *Mary Louisa* against the *De Bay* in the Vice-Admiralty Court of Malta, the value of the *De Bay*, her cargo and freight, being agreed at 67,000*l.*, and the judge awarded the sum of 3535*l.* for loss and damages, and 5000*l.* for salvage services, making together 8535*l.* From that judgment the owners of the *De Bay* appealed to the Privy Council, and in support of their appeal contended that, in no case, ought the items of loss or damage to the salving vessel to be allowed as "moneys numbered," but that they only should be taken into account generally when estimating the amount to be awarded for salvage remuneration. They also contended that some of the items of loss or damage ought not to have been taken into consideration at all. The judgment delivered by Sir James Hannen contained passages in the following terms: "Their Lordships are of opinion that it is always justifiable, and sometimes important when it can be done, to ascertain what damages and losses the salving vessel has sustained in rendering the salvage services. It is frequently difficult and expensive, sometimes impossible, to ascertain with exactness the amount of such loss, and in such cases the amount of salvage must be assessed in a general manner upon so liberal a scale as to cover the losses and afford an adequate reward for the services rendered. In the assessment of salvage regard must always be had to the question whether the property saved is of sufficient value to supply a fund for the due reward of the salvors, without depriving the owner of that benefit which it is the object of the salvage service to secure him. If, as in the present case, the fund is ample, it is but just that the losses voluntarily incurred by the salvors should be transferred to the owner of the property saved, for whose advantage the sacrifice has been made, and in addition to this the salvor should receive a compensation for his exertion and for the risk he runs of not receiving any compensation in the event of his services proving ineffectual: for if no more than a *restitutio in integrum* were awarded there would be no inducement to shipowners to allow their vessels to engage in salvage services." And again, "their Lordships are therefore of opinion that the learned judge below has not adopted an erroneous principle in first estimating the amount of loss sustained by the *Mary Louisa*, and then adding to it an amount for salvage services." Their Lordships, however, having examined into the evidence, did not accept all the items of loss which had been taken into consideration by the judge of the Vice-Admiralty Court, and they further considered, for the reasons expressed in the judgment, that he had awarded too large a sum for salvage remuneration, and they accordingly held that an aggregate of 6000*l.* was sufficient. The case of *The De Bay* has, in my opinion, established the following proposition: that the cost of repairing injuries occasioned by rendering salvage service, and the loss of earnings arising from the detention of the ship whilst such repairs are being executed, ought to be ascertained with precision when possible. In some cases which will readily suggest themselves, the actual cost of repairs and loss of earnings may be immaterial, as for instance if they clearly exceed the recognised limits of salvage award. In such a case it would be a waste of time and money to enter into such evidence. In other cases it may be extremely difficult, if not impossible, to ascertain with exactness the amount of such cost and loss, and in such cases estimates must be adopted in making the general award. During the arguments in the Privy Council, in the case of *The De Bay*, it was urged, as it has been urged before us, that by allowing the cost of repairs and loss of earnings, and then a further

sum for salvage, the salvors would receive payment of their losses twice over; but, as was pointed out in the judgment delivered by Sir James Hannen, such a result could only be brought about by the court, after giving the amount of the alleged losses specially, taking them again into consideration when awarding the remuneration, an error into which it could not be presumed that any judge would fall.

The cases of *The Martha* (3 Hagg. 434), *The Enchantress* (Lush. 93), *The Ellora* (Lush. 550), and *The Star of India* (1 P. Div. 466; 3 Asp. Mar. Law Cas. 261), were cited on behalf of the respondents, but they do not appear to me to displace the authority of the older cases cited on behalf of the appellants, and which were referred to, approved, and acted upon in the cases of *The Sunniside* and *The De Bay*. I fully recognise the very large discretion which is vested in the judge when dealing with salvage cases; but it is, in my opinion, a discretion, the exercise of which may be reviewed, and however unwilling a Court of Appeal may be to interfere with a decision at which the judge in the exercise of his discretion has arrived, it is its plain duty to do so when in its opinion the discretion has been exercised in a manner which has failed to do complete justice between the litigant parties. The alterations which are occasionally made in the amount of salvage awards illustrate the general principle to which I am adverting, and a rejection of evidence which ought to have been received would appear to be a stronger case for its application. Under these circumstances I cannot assent to the argument of Mr. Webster that the principles enunciated in the judgment in the case of *The De Bay* are unsound; on the contrary, it appears to me not only that they are sound, having regard to past authority, but that they are consistent both with justice and policy, when we bear in mind the purposes for which the jurisdiction of our courts is exercised in salvage cases. For these reasons, and bearing in mind that the property salved in the present case was of sufficient value to supply a fund for the due reward of the salvors, I think that the learned judge by whom this action was tried ought either to have received the evidence which was rejected before making his award for the salvage service proper, or to have referred it to the registrar and merchants to estimate the additional allowance for costs of repairs and loss arising from detention.

Lindley, L.J.—This is an appeal by the owners of the steamship *Missouri* against a decision of Butt, J. awarding a sum of 6500*l.* for salvage services rendered by the *Missouri* to the steamship *City of Chester*. The value of the salved property was 179,000*l.*, and there were 111 passengers on board the *City of Chester*. The value of the salving property was 189,000*l.*, and the court apportioned the 6500*l.* awarded as follows: 4500*l.* to the owners of the *Missouri*, and 2000*l.* to the master and crew. The sum of 4500*l.* awarded to the owners of the salving ship is a very large sum, but, large as it is, her owners complain that it is not enough to cover the loss they have actually sustained by reason of the services their ship rendered to the *City of Chester*. They allege that the *Missouri* broke her crank shaft, and suffered further injury, and that the cost of repairs alone amounted to between 2000*l.* and 2500*l.* They further allege that it took thirty days to make good these repairs, and, taking the demurrage rate of the *Missouri* to be 128*l.* 13*s.* a day, they estimate their loss occasioned by her detention for repairs at 3900*l.*, making their whole actual loss from 5900*l.* to 6400*l.* By the statement of claim the plaintiffs demanded, if necessary, a reference to the registrar and merchants to ascertain the amount of damage suffered by the *Missouri* in rendering the salvage service. At the trial the plaintiffs tendered evidence in support of their above-mentioned claims, but the learned judge refused to receive it, and he refused to direct a reference to the registrar and merchants to ascertain the amount of loss actually sustained by reason of the injuries done to the *Missouri*, and of her detention for repair. The view taken by the learned judge is expressed at p. 45 of the record.

The substantial question raised by the appeal is whether the learned judge ought to have received evidence of the above-mentioned losses, and whether he ought, considering the nature of the salvage services and the great value of the property saved, to have awarded to the owners of the salving ship such a sum as would at least cover their losses out of pocket. I think he ought, and my reasons for so thinking are as follows: Salvage is the compensation made to those by whose assistance a ship or its cargo has been saved from impending peril or recovered from actual loss. The claim to compensation for salvage services is enforceable by action in the Court of Admiralty. The persons in whose favour the claim will be recognised, and the circumstances under which compensation to them will be awarded, have been the subject of judicial decision, and the leading principles applicable to these matters may be taken as settled. If the claimants come within the recognised class of salvors, and the circumstances under which compensation is habitually awarded are proved, their claim is allowed. In such cases the claim is made and allowed, not as a matter of favour which can be granted or refused at the arbitrary discretion of the court, but as a matter of right. The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 458, clearly recognises this right. (*a*) It is true the Act in sect. 458 is confined to salvage in the United Kingdom, but by the law of this country the nature of the right does not depend upon whether the salvage services were rendered on the high seas or on British territorial waters. The lien which salvors have is only con-

(*a*) Sect. 458 is as follows: "In the following cases (that is to say), 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 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."—Ed.

sistent with the existence of a right to be remunerated for their services, and this lien exists wherever the services may have been rendered. But although the salvors have a right to compensation for salvage services, the amount to which they are entitled is not fixed more definitely than by saying it ought to be reasonable. What is reasonable in any case must depend upon all the circumstances of that case, and different minds will naturally sometimes differ in their views of what is reasonable. But here again some circumstances are always material for consideration, and these have been ascertained by experience, and the court has for its guidance a long course of judicial decision to assist it in coming to a proper conclusion in each particular case. The first matter for consideration is the nature of the service rendered, the danger from which the one ship has been saved and the danger to which the other ship has been exposed. Under this head have to be considered the skill and courage of the salvors, and the risk of life and death as well to the saved as to their rescuers. A salvage service which hardly exceeds ordinary towage is naturally remunerated on a very different scale from an heroic rescue from imminent destruction. The next matter for consideration is the value of the property saved. The primary object of saving a ship and her cargo from loss is to preserve them for their owners, and this object would be defeated if the remuneration awarded to the salvors were so large as to deprive the owners of the saved ship and cargo of all benefit from their preservation. This consideration at once limits the amount of the salvors' remuneration; for however meritorious their services, salvors are never awarded such a sum as to make those services useless to those who have to pay for them. The value of the ship and cargo saved, is therefore always one element, and a very important element, in considering the amount to be awarded to salvors. There is not, however, any definite rule either as to the proportion of value to be given to the salvors or as to the proportion to be left for the owners of the property saved: see *The Salacia* (*ubi sup.*). And it is obvious that whilst a small percentage on a very large value might be proper in one case, the same percentage might be a very inadequate remuneration in another case. The risk of getting little by reason of the comparatively small value of the property saved is one of those risks which salvors always run. Another circumstance which has to be taken into consideration is the risk salvors always run of getting nothing at all by reason of the failure of their efforts to save. However strenuous those efforts, however heroic, still, if unsuccessful, they go unrewarded. They have not in the result benefited the owners of the ship or cargo, and there is nothing preserved out of which remuneration can be paid. Another circumstance to be considered is the importance of so remunerating salvors as to make it worth their while to succour ships in distress. This consideration renders it necessary to be liberal not only to captains and crews who perform the salvage services, but also to the owners of vessels engaged in those services where such vessels have been injured or exposed to danger. The salving vessel is often herself exposed to imminent peril. The risk of loss or damage to her is often very great, and the damage actually done to her, and the loss actually sustained by her owner from delay in her voyage and otherwise may be, and often is, very considerable. Hence one element in determining the amount to be awarded for salvage services is the value of the salving ship and cargo which have been exposed to risk, and the nature and extent of the risk are other elements for consideration. Where the salving vessel is, as in the present case, a large and valuable steamer, exposed to great risk, the claims of her owner deserve very favourable attention: see per Dr. Lushington in *The Spirit of the Age* (Swa. 286). Unless, where the salving vessel is a valuable steamer, the remuneration awarded to her owner is sufficient to cover this risk, owners of such vessels will naturally discourage their employment in salvage services; a result which would be very disastrous, and which the court should do what it can to prevent. In order to avoid such a consequence as this it is necessary that the amount of compensation awarded to the owner of the salving ship shall, wherever practicable, be sufficiently large to cover the risk of damage and loss which he ran where fortunately none has been sustained. And where damage and loss have been in fact sustained, and its amount can be ascertained, it is necessary that the sum awarded shall, when possible, be large enough to cover such an amount. This amount, however, ought not to be the measure of the remuneration, for the damage actually sustained may be very small, and there may have been serious risk of sustaining much greater damage. Besides which there is always the risk of earning nothing by reason of the loss of the succoured vessel. The amount of loss actually sustained by the owner of the salving ship can therefore seldom, if ever, be the maximum limit of the remuneration to be awarded to him. Neither can such loss be always the minimum limit. It never can be so where the value of the ship and cargo saved is too small to admit of payment in full of the loss in question. And even where the value is sufficient, the salvage service may be so trifling as to render it unreasonable to throw the loss sustained by the salvors on the owners of the property saved. But where the salvage services have been dangerous to the salvors, and have occasioned them serious pecuniary loss, and have been highly valuable to the owners of the property saved, and where the value of the ship and cargo saved is ample not only to defray the loss sustained by the salvors in addition to a proper sum for the services of the master and crew of the salving ship, but also to leave a substantial surplus for the owner of the property saved, in such a case the sum to be awarded to the owner of the salving ship ought to be enough to cover her actual loss and whatever additional risk he ran. Of course care must be taken not to fall into the error of remunerating him twice over for the same risk. He must not be remunerated for the risk he ran of suffering the loss, the amount of which is ascertained and taken into consideration as the loss sustained. Another very important reason for ascertaining the amount of pecuniary loss sustained by the owner of the salving vessel is to enable the court to make a proper apportionment of the total sum awarded for salvage services, for it is obvious that no part of that sum which is given to cover the

risk run by the shipowner or damage to the ship ought to go to the master or crew.

Having thus examined the principles applicable to this subject, it is necessary to turn to the authorities and see how they stand. In *The Oscar* (*ubi sup.*) the value of the salved ship and cargo was 2400*l.*; the sum of 220*l.* was awarded for salvage and apportioned between five sailing smacks; but in addition to this sum Sir Christopher Robinson directed a reference to the registrar and merchants to ascertain the amount of loss and damage actually sustained by the different salvors. Again, in *The Salacia* (*ubi sup.*) the same learned judge awarded 1500*l.* for salvage services, and in addition 600*l.* to the owners of the salving ship for injuries sustained by her, and a further sum of 1000*l.* to them for the loss of a sealing voyage. This last sum was assessed by the registrar and merchants to whom the assessment of this loss was referred. The learned judge remarked upon the report of the registrar and merchants that, "it relieves the court from the task of forming conjectural estimates of such consequences as are attributed to the engagement of the vessel in this salvage service." In all judicial investigations it is desirable to substitute accuracy for conjecture when the expense of so doing is not too great. In *The Jane* (*ubi sup.*) the same learned judge awarded 1200*l.* in all. Of this sum 500*l.* was awarded to the master and crew of the salving ship, and 700*l.* was given to her owners for demurrage, repairs, risks, and expenses. The value of the ship and cargo salved was 7000*l.* The owners of the salving ship claimed 350*l.* for demurrage, repairs, and expenses, and there being no dispute as to these figures, no reference to ascertain them was necessary, and they were accordingly adopted by the court. In *The Saratoga* (*ubi sup.*) the value of the ship and cargo salved was 52,002*l.* The salving vessel was a steamer and was crushed against the landing stage at Liverpool and was damaged. Dr. Lushington estimated the damage at 150*l.*, the loss of employment when under repair at 250*l.*, making together 400*l.*, and he awarded 600*l.* in all. There seems to have been no discussion in this case as to the admissibility or non-admissibility of evidence as to the cost of repairing the damage sustained or as to the loss of employment, but it is plain from the judgment that Dr. Lushington fixed the salvage awarded at an amount sufficient to cover these losses as well as ordinary salvage services. In *The Albert* (*ubi sup.*) Dr. Lushington, in awarding 400*l.* to a cutter which was damaged in saving a ship and cargo worth 1672*l.*, expressly said the 400*l.* included the damage to the cutter. This remark again shows that the salvage awarded ought at all events to cover the amount of damage sustained by the salving ship when the property salved is of sufficient value to enable this to be done. This case is reported with two others, *The Otto Herman* and *The Ella Constance*, and in the head-note it is stated, "in all cases the value of the salving vessel is regarded, and to whatever remuneration is given, must be added a sum to meet any damage she sustains." But I cannot find anything in the judgment in those cases which warrants so wide a proposition. It is evidently inaccurate where the damage done to the salving ship is very great compared with the value of the ship and cargo salved. In *The Mudhopper* (*ubi sup.*) Sir Robert Phillimore expressly decided after argument that the owner of the salving ship was entitled to be compensated for the damage to the ship and for her detention during repair, in addition to what was awarded for salvage services. In this case the principle being decided, the figures were agreed. In *The Sunniside* (*ubi sup.*) evidence was tendered of what the salving vessel, the *Monarch*, might have earned if she had not been occupied in rendering the salvage service, and also of the cost of repairing the damage done to her. This evidence was objected to on the ground that no fixed sum could be awarded for these matters in addition to the sum given as a salvage reward which covered these items. Sir James Hannen admitted the evidence as an element to be considered in awarding the remuneration to be paid to a vessel which has rendered salvage services, and he awarded the *Monarch* 200*l.* for salvage services pure and proper, and 100*l.* beyond that for loss of profit and repairs. The last and most important case in which this question has been discussed was the case of *The De Bay* (*ubi sup*), decided by the Privy Council. In that case the judge of the Vice-Admiralty Court of Malta had awarded a salving ship 5000*l.* for salvage services and 3500*l.* for demurrage and damages, *i.e.* 8500*l.* in all. An appeal was brought on the ground that this sum was excessive, and the Privy Council reduced the amount to 6000*l.* The court thought that some of the items of loss were not satisfactorily proved, but the court nevertheless would not disturb the judgment on these items, but the Judicial Committee, allowing them to stand, reduced the 5000*l.* on the ground that the court below having allowed all damages and losses in full had been too liberal in adding so large a sum as 5000*l.* to them. In this case the Privy Council expressly decided that the court below had done right in admitting evidence of the loss sustained by the salving vessel and in ascertaining the amount of such loss, and in fixing the sum awarded high enough to cover such loss and a proper remuneration for the salvage services. It is true that the decisions of the Privy Council are theoretically not binding on this court, but in cases of mercantile or Admiralty law where the same principles are professedly followed in the colonies and in this country, it is, to say the least, highly undesirable that there should be any conflict between the decisions of the Judicial Committee and those of the High Court or Courts of Appeal in this country. Even if therefore I doubted the correctness of the decision in the case of *The De Bay* (*ubi sup.*), I should be disposed to follow it rather than depart from it, and so introduce a diversity of practice where there ought to be no difference in principle. But in fact the cases already referred to seem to me fully to warrant the decision in the case of *The De Bay*, and I do not regard it as introducing any new practice or principle. It must, however, always be borne in mind that the court was there dealing with a case in which the value of the property saved was very large compared with the whole sum awarded to the salvors, and that there was no circumstance to prevent the court from awarding enough to cover the whole loss sustained by them. The conclusion to be drawn from these authorities is, that where the property saved is ample in the sense

already explained, and where there is no circumstance which the court can see at once would prevent it from giving an amount of salvage sufficient to cover the loss sustained by the salvors, evidence has been received, and ought to be received, to show the amount of loss actually sustained by the owner of the salving ship by reason of the salvage services, with a view to fix his remuneration at a sum that will cover such loss, and remunerate him for such further risk as he ought to be compensated for. This view is corroborated by the form of statement of claim given in Appendix C, s. 3, No. 6, to the Rules of the Supreme Court 1883. In that form will be found amongst the particulars of a salvor's claim, "Damage done to the salving ship, so much." These forms were settled by persons of great experience; and although of course they are only illustrative and not conclusive on any question of principle, the form in question indicates that, where a salving ship has been injured, the cost of repairing her ought to be stated. If it ought to be stated, evidence in support of the statement ought not to be rejected except in cases where it is useless to admit it. If it be said that the amount of salvage to be awarded is discretionary with the judge, the answer is that his discretion is a judicial discretion and not an arbitrary discretion, and that a judge who excludes evidence on a matter which he ought to consider does not place himself in the position in which he ought to be before his discretion can be exercised. I do not, however, wish to be understood as going further than the court did in the case of *The De Bay* (*ubi sup.*). When the judge has ascertained the amount of loss sustained by the salvors, it still remains for him to decide what amount of salvage is reasonable, regard being had to all the circumstances of the case—the amount of loss sustained by the salvors being only one of them. But unless, owing to the comparatively small value of the property saved, the trifling nature of the salvage services, or some other circumstances, the judge can foresee that it will be useless to inquire into the loss sustained by the salvors, he ought, in my opinion, to receive evidence of such loss.

In the present case the value of the salved property was ample not only to defray any amount of remuneration which could be reasonably awarded to the salvors, but also to leave a very large surplus to the owners of the property saved. The salvage service was important, and there was no circumstance to justify the court in coming to the conclusion that the evidence, if taken, would not affect the amount of salvage to be awarded. The learned judge who tried the action awarded to the owners of the salving ship 4500*l.*, which is a large sum; but, as already stated, he refused to allow evidence to be given either before himself or the registrar of the loss sustained by those owners by reason of the damage done to their vessel, and by reason of the delay in her voyage. The learned judge, however, had not the assistance of the decision of the Privy Council in the case of *The De Bay* (*ubi sup.*), for that case was not decided till June 1883, two months after the present case was heard by him. Had that decision been reported, the learned judge would no doubt have followed it. For the reasons above stated I am of opinion that the learned judge ought, under the circumstances, either to have admitted the evidence which he rejected, and then to have decided what would be a proper sum to award the salvors, or to have fixed the remuneration for mere salvage, and to have referred the amount of loss to the registrar and merchants, and have added that amount to the former sum. Had he adopted either of these courses, and ascertained as a fact that the salvors' losses out of pocket amounted to between 5000*l.* and 6000*l.* which is what they allege, I cannot think that he would have considered 4500*l.* sufficient for their remuneration. Whether the judge of the Admiralty Division of the High Court in this or any other salvage action will himself ascertain the amount of loss, or refer it to the registrar and merchants, is entirely a matter for his discretion. But I cannot think it discretionary with him to admit or reject evidence of such loss where, as in this case, there is nothing to justify the rejection of the evidence as useless, and where there can be no difference of opinion as to the ample value of the property saved to admit of the application of the course followed in the case of *The De Bay* (*ubi sup.*). The appeal ought not, in my opinion, to be dismissed, but the order of the court below ought to be varied so far as it relates to the sum of 4500*l.* awarded to the appellants. Unless, therefore, the appellants prefer to take the sum of 4500*l.* awarded them, they are entitled to an inquiry in the terms stated by the Master of the Rolls, in order to ascertain the amount of loss sustained by them, and to add the amount when ascertained to the sum awarded for the use of the ship and the risk of her earning nothing, and this sum we fix at 1000*l.*

Solicitors for the appellants, *Bateson* and *Co.*

Solicitors for the respondents, *Hill, Dickenson, Lightbound*, and *Dickenson.*

June 17 *and* 18, 1884.

(Before Brett, M.R., Bowen and Fry, L.JJ., assisted by Nautical Assessors.)

The Beryl. (*a*)

ON APPEAL FROM BUTT, J.

Collision—Risk of collision—Crossing steamships—Course—Province of Trinity Masters—Regulations for Preventing Collisions at Sea 1880, *arts.* 18, 22.

The object of the Regulations for Preventing Collisions at Sea is not merely to prevent actual collision, but also risk of collision, and therefore the regulations should be applied, not only when there is actual risk of collision, but also where the circumstances are such that it is probable that risk of collision may be involved. (*b*)

The duty of a vessel to "keep her course" under art. 22 *of the Regulations for Preventing Collisions at Sea is complied with if she keeps*

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

(*b*) On reference to the American decisions we find it was decided in *The Dexter* (23 Wall, 69) that the regulations are obligatory from the time when necessity for precaution begins. In another American case, *The Milwaukee* (1 Brown Adm. 313), it was laid down that risk of collision begins the moment the two vessels have approached so near that a collision might be brought about by any departure from the rules of navigation.—Ed.

her heading, whilst checking her speed, because art. 22 *covers direction only, and not speed.*

Under art. 18 *of the Regulations for Preventing Collisions at Sea, a steamship approaching another vessel so as to involve risk of collision, is always bound to slacken her speed, but her duty to stop and reverse her engines is governed by the words "if necessary."*

Per Brett, M.R.: The duty to execute the manœuvres prescribed by the Regulations for Preventing Collisions at Sea does not arise from the mere fact of risk of collision, but only if such fact ought under the circumstances to be within the knowledge of those in command of the ship.

Per Brett, M.R.: The functions of the nautical assessors being to assist the judge by their advice, and not to control his decision, where the judge differs from his assessors on questions of nautical skill he is not bound by their opinion. (a)

The steamships A. and B. were on courses crossing one another at right angles, the A. having the B. on her starboard side. When they had approached one another within a distance of from a quarter to half a mile, those on the B., seeing that those on the A. were taking no steps to keep out of their way, whistled and eased the engines. When within 300 *yards of one another, those on the B., seeing that those on the A. were still taking no steps to keep out of their way, stopped and reversed their engines full speed astern, but the vessels came into collision. It was admitted that the A. was to blame, but contended that the B. was also to blame for not stopping and reversing sooner.*

Held, that it was the duty of the B., under art. 18 *of the Regulations for Preventing Collisions at Sea, to stop and reverse her engines, if necessary, to avoid risk of collision; that she had failed to do so in due time; and that she therefore was also to blame for the collision.*

This was an appeal by the plaintiffs in a damage action from a judgment of Butt, J., by which he had found the steamship *Abeona* alone to blame for a collision between that vessel and the steamship *Beryl*.

The collision occurred in the North Sea, at about 11.30 p.m. on the 10th Sept. 1883. The steamships were on courses crossing one another at about right angles, the *Abeona* having the *Beryl* on her starboard side. As they approached, those on the *Beryl*, seeing that the *Abeona* was taking no steps to keep out of the way, slackened her speed and blew their whistle at a distance of from a quarter to half a mile off. The *Beryl* continued at this slackened speed until within a distance of 300 yards, when the *Abeona* still taking no steps to keep out of the way, the engines of the *Beryl* were stopped and reversed full speed astern; but, notwithstanding this manœuvre, the vessels came into collision, the *Beryl* with her stem and port bow striking the starboard bow of the *Abeona*.

The further facts of the case appear in the report of the proceedings in the court below: (5 Asp. Mar. Law Cas. 193; 49 L. T. Rep. N. S. 748; 9 P. Div. 4.)

The appellants admitted that the *Abeona* was to blame, but contended that the *Beryl* was also to blame.

Hall, Q.C. and Dr. *Phillimore*, for the owners of the *Abeona*, in support of the appeal.—The *Beryl* has infringed the 18th article of the regulations in not stopping and reversing her engines until at a distance of 300 yards from the *Abeona*. The article directs that a steamship, if approaching another ship so as to involve risk of collision, shall stop and reverse her engines if necessary. Here, however, the *Beryl* kept on after risk of collision had been involved, and after it had become necessary, within the meaning of the article, to stop and reverse. She therefore has infringed the article and should be held to blame:

The Khedive, 4 Asp. Mar. Law Cas. 360; 43 L. T. Rep. N. S 610; L. Rep. 5 App. Cas. 876.
The Benares, 5 Asp. Mar. Law Cas. 171; 48 L. T. Rep. N. S. 127; 9 P. Div. 16.

Though it is true that she was bound by art. 22 to

(a) The functions of the nautical assessors have since been discussed by the Court of Appeal, in the cases of *The Glengarry* (decided Nov. 26, 1884) and *The Viatka* (decided Nov. 27, 1884). In *The Glengarry* it was argued on appeal that the opinion of the nautical assessors in the Admiralty Court, who have seen the witnesses, is not to be reversed by the assessors in the Court of Appeal. To this argument the Court of Appeal refused to accede. The remarks of Brett, M.R. were as follows: "The judge of the Admiralty Court, assisted by assessors, has come to a certain conclusion, and this is brought by way of appeal before us, who are also assisted by nautical assessors. Now I do not say that there is an appeal from the nautical assessors in the Admiralty Court to the nautical assessors in this court. But I do say that the appeal when it comes on is a rehearing, and that we must give our own opinion on the evidence, and ask the assistance of our own assessors upon any question of nautical skill that may arise." In *The Viatka* it was argued that in cases where damage has been done by a ship breaking adrift from her moorings the opinion of the assessors as to the propriety of the moorings is binding on the court. In support of this contention reliance was placed upon the cases of *The Volcano* (2 W. Rob. 337); *The William Lindsay* (L. Rep. 5 P. C. 338; 2 Asp. Mar. Law Cas. 118), and *The Peerless* (Lush. 30). The remarks of Brett, M.R. on this point are as follows: "This case was tried in the Admiralty Court, and the Trinity Masters, upon certain questions which were asked them by the judge, came to a conclusion adverse to the defendants so far as Trinity Masters have authority to come to such a conclusion. They in this case gave adverse answers to the nautical questions put to them by Butt, J. The learned judge differed from his nautical assessors as to the answers given him on these nautical questions. Dr. Phillimore, to my surprise, has argued that the judge of the Admiralty Court was bound in law to accept the answers of his Trinity Masters upon these questions of nautical skill. The constitution of the Admiralty Court has long since been settled, and it is this: The judge is the sole judge both of law and of fact. He is the court, and he only, and the gentlemen who assist him are no part of the court. The assessors, from the very meaning of the word, are there merely to assist him. The responsibility of finding both law and fact rests solely upon the judge. If that is so, it is at once absurd to argue that he, being the person solely responsible for the finding of the facts, is bound as a matter of law to follow anyone else's opinion in relation to the facts. It would come to this, that the judge would be bound to find upon his own responsibility that a fact was so and so when he himself had a firm conviction that it was not so. The judge of the Admiralty Court ought, and always does pay the greatest possible deference to the opinion given him by the assessors upon questions of nautical skill. Unless he is forced by the most extreme conviction of his own to the conclusion that he cannot agree with them, he always follows them; but to say that, if he has that firm conviction, he is yet bound to follow them, is absurd." In the case of *The Aid* (4 Asp. Mar. Law Cas. 432) Sir Robert Phillimore laid down the law in the same way. It is to be noticed that the effect of deciding that the opinion of the nautical assessors is under any circumstances binding on the court, is nothing less than giving them the functions of a jury.—Ed.

keep her course, yet art. 18 was also applicable, it always being the duty of a steamship to stop and reverse, if necessary, to avoid risk of collision. Moreover, art. 22 is concerned with heading only, and has nothing to do with speed. If, therefore, the *Beryl* had stopped and reversed earlier, while keeping the same heading, she would have obeyed the directions contained in both articles. An officer in command of a vessel has no right to blindly act upon the assumption that another will manœuvre in accordance with the regulations, where the circumstances are such that there is considerable probability that the other vessel will neglect to do what is her duty.

Myburgh, Q.C. (with him *Kennedy*) for the respondents.—It is conceded that the *Beryl* slackened her speed at a distance of from a quarter to half a mile. That is in itself evidence of careful navigation, and was a compliance with the direction in art. 18 to slacken her speed. In consequence of the continuing neglect of the *Abeona* to keep out of the way, the slackening on the part of the *Beryl* was insufficient, and it became necessary to stop and reverse. In order that the officer in command of the *Beryl* might properly appreciate the state of the case and come to a right conclusion as to the proper manœuvre, it was necessary that some reasonably short time should elapse between the order to slacken and the order to stop and reverse. It is submitted that, with the *Beryl* making eight knots an hour, the time that she would take to run the space between the distance of from a quarter to half a mile, and the 300 yards at which she admittedly stopped and reversed, is necessarily very short, and that therefore, under the circumstances, there has been a compliance with the rule. The officer in charge of the *Beryl* had a right to assume that the *Abeona* would have done her duty, and probably do it by going under his stern. For him to have stopped and reversed before it became absolutely necessary, might have been the very means of counteracting this manœuvre, and might have brought about risk of collision. The circumstances were such that it could not have been present to the mind of the officer in charge of the *Beryl* that there would be risk of collision until the vessels were in close proximity, and even then, had the *Abeona* done her duty, it is probable that no collision would have occurred.

Brett, M.R.—I am very sorry in this case to have to come to the conclusion to which I feel bound to come. A great many things have been said during the arguments which I think have startled me that they should have been brought forward at this time. I refer to the observations made with regard to the construction of the regulations, which I, for my part, thought had been settled almost from the time the rules were drawn up. I take it that the basis of all these rules is that they are instructions to those in charge of ships as to what they ought to do, and the Legislature has not thought it enough to say, "We will give you rules which shall prevent a collision;" they have gone further and said that, for the safety of navigation, "We will give you rules which shall prevent risk of collision." It is, therefore, not enough for an officer in command of a ship to do only that which will prevent a collision. The Legislature lays down rules which shall regulate his conduct, not merely for the purpose of preventing a collision, but for the purpose of preventing even risk of collision. Therefore, the basis and foundation of all these rules are instructions to those in command of ships by which risk of collision is to be avoided. When one speaks of rules which are to regulate the conduct of men, the rules can only apply to those circumstances which must or ought to be known to the parties at the time. It is impossible to regulate the conduct of people as to unknown circumstances. When one is instructing people, it must be to instruct them as to what they ought to do under circumstances which are or ought to be before them. When one says that a man must slacken speed or stop and reverse in order to prevent risk of collision, it would be insensible to suppose that it would depend upon the mere fact of whether there was risk of collision, if the circumstances were such that he could not know there was risk of collision. It would be wicked folly to attempt to regulate a man's conduct with regard to circumstances which could not be known to him. I put some instances during the argument to show that this must be so. A vessel approaching another vessel ought to slacken her speed, if by going on there would be risk of collision. But suppose the night to be absolutely dark and the other vessel to be showing no lights, it would be absolutely wicked, under circumstances like these, where the officer could have no means of knowing that there was risk of collision, to hold his owners liable for a breach of the rule. If, however, the circumstances were such that he ought to have seen the other ship, then it is no excuse to say that in fact he did not see her. Take another case. If two vessels are approaching on courses which will cause them to meet on a high headland, so that until they are absolutely close they cannot see one another, how is one to regulate their conduct under these circumstances? It is absurd to suppose that it is possible to regulate their conduct with regard to what they cannot see and cannot know. Therefore the consideration must always be in these cases, were the circumstances such as ought to have brought it to the mind of the persons in charge that the rule was applicable? It is not whether the rule was in fact applicable, but were the circumstances such that it ought to have been present to the mind of the officer in charge that the rule was applicable. That being so, we have, in this case, to apply that consideration to two separate rules, and to apply it under separate circumstances. The first rule is this: "If two ships under steam" —not two steamships therefore, but "two ships under steam," that is, with their steam up—"are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." If the circumstances of the two ships under steam are such that those in charge of them ought to see that risk of collision is involved, then the ship which has the other on her starboard side is bound to do something to keep out of the way of the other. The object of these regulations being to avoid risk of collision, a canon for their interpretation is that they are all applicable at a time when the risk of collision is to be avoided, not that they are applicable when the risk of collision is already fixed and determined. Therefore, they are all applicable some time before the risk of collision is finally fixed and determined. Hence we have always said that the

right moment of time to be considered is the moment before the risk of collision is constituted. The words of the rule are not "If two ships under steam are crossing with a risk of collision," but "are crossing so as to involve risk of collision," that is, the moment before there was risk of collision. Here the duty of the *Abeona* was to follow whatever manœuvre she chose to select which would keep her out of the way of the other so as to avoid risk of collision. But then there is a reciprocal rule which applies to the conduct of the other ship, which is this: "Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course." It was suggested that "keeping her course" meant keeping her course at the same pace at which she was going before she was called upon to obey this rule. It is the first time I ever heard it suggested "keeping her course" means that she is to keep on at the same speed as before. It has nothing to do with the question of speed, but is concerned with the direction in which a vessel is going. Therefore, she was bound to keep her course. Now we come to another rule, the 18th, which does not in any way modify, clash with, or require to be construed at the same time as, the other rules. It is a wholly independent rule. It will apply, though certain of the other rules apply. In the case of two steamers approaching each other it applies to both of them. We have had a great deal of discussion about this rule, and it is very necessary to consider it carefully. It, in my opinion, like all the others, applies more particularly to the moment before the risk of collision is constituted and exists. It is applicable at a time when the action of both steamers is such as to involve risk of collision. At that moment of time, if what they are doing involves risk of collision, they ought both to slacken their speed. It applies to each of them. But it may be that the condition of things just before the moment when the risk of collision is to be constituted is such that the slackening will not suffice to avoid the risk of collision, and it requires another manœuvre, viz., stopping and reversing. If then it is necessary to stop and reverse, they must do so, either one or the other or both. But this, again, is an instruction as to the conduct of men, and it cannot be that they are to stop and reverse merely because it is proved afterwards that there was risk of collision; it must be if the circumstances are such that an officer of ordinary skill and care would be bound to come to the conclusion that it was necessary to stop and reverse.

That being the construction of the rules, we have to apply them to the present case. The application of these rules in the Court of Admiralty is made by a mixed tribunal. The judge has to try the case and the judgment is his and his alone. The assessors who assist the judge take no part in the judgment whatever. They are not responsible for it and have nothing to do with it. They are there for the purpose of assisting the judge by answering any questions as to nautical skill. They have nothing to do with the credibility of witnesses, unless that credibility depends upon a special knowledge of nautical affairs. They have nothing to do with the question whether the evidence proves that vessels were at one distance or another at any given time. That is not their function. All that is to be decided upon the responsibility of the judge, and upon the evidence before him, and upon his view of the evidence. But nautical questions may arise in the course of the case, and the judge is then entitled to ask the opinion of the assessors for his own guidance. They are, therefore, there to assist the judge in solving any question of nautical skill upon which he wants instruction. Therefore, before such a tribunal, the final question which has to be decided is a mixture of what is the law and what is the construction of these rules, which is a question solely for the judge. The judge is bound to give great weight to the opinion of his assessors; but at the same time, if he does not think their view right, he is not bound to follow it, but follows his own view. I think that on several occasions the opinion of Dr. Lushington differed with that of his assessors even as to questions of nautical skill, and unless the Court of Appeal thought his decision wrong, it stood. Still it would be impertinent in a judge not to consider as almost binding upon him the opinion of the nautical gentlemen who, having ten times his own skill, are called in to assist him. It must, however, be remembered that they are there to assist the judge and not to control. Now, applying these observations to the present case, it cannot be doubted that these vessels were approaching each other in a manner which made three of these regulations applicable. The 16th article was applicable. The *Abeona* was bound to get out of the way of the *Beryl*. The moment that rule applied to the *Abeona* the 22nd article applied to the *Beryl*, namely, to keep her course. If both these vessels had done what they ought to have done, risk of collision would never have been constituted. But they went on until the 18th rule became applicable. The *Abeona* seems to have done everything that was wrong. She was a great screw collier, on the north-east coast, performing her voyage with the carelessness which is not uncommon amongst colliers. She was going at full speed, not looking to the right or left, and very likely with her helm lashed, and all her people asleep. Therefore, the whole question is, it being admitted that the *Abeona* was to blame, whether the *Beryl* broke any of the rules. What she did was this, she kept her course, and, seeing the *Abeona* was not doing her duty, she whistled. This first whistle is immaterial, as it is not contended that she was bound to do anything more at that time. But, seeing the *Abeona* was still keeping on, she whistled again, and slackened her speed. At that moment, were the circumstances such as ought to have caused the officer in charge of the *Beryl* to perceive that the two vessels were so approaching as to involve risk of collision? They were at a distance of from a quarter to half a mile. At that time the officer in charge of the *Beryl* slackened his speed. Whether he was justified in only doing that seems to me to involve a question of nautical skill, and, assuming the vessels to have been half a mile apart, we have asked our assessors the following question: "At the time of the second whistle could the *Abeona*, without difficulty, have passed under the stern of the *Beryl*, or could she then otherwise, without difficulty, have avoided her?" They answer the question in the affirmative. Therefore, I think that at that time the officer in command of the *Beryl* was not put into such circumstances as ought to have made him come to the conclusion that it was necessary to stop and reverse. He

had a right to assume that the *Abeona* would not go on obstinately neglecting her duty. According to his evidence, 300 yards is the greatest distance we can give him from the *Abeona* before he acted again.

Now, the question is raised whether at any appreciable time before he did again act—assuming it to be 300 yards—the circumstances were such that he ought to have come to the conclusion that it had become necessary, in order to avoid risk of collision, to stop and reverse. In order to solve that question, which involves a matter of nautical skill, we have asked the gentlemen who assist us this question: "Was the officer of the *Beryl* justified, as a sailor, in supposing, until he was within 300 yards of the *Abeona*, that the *Abeona* would keep out of his way, and could do so without difficulty." They answer that question in the negative. Accordingly, the next inference of fact which I should draw, assuming that answer to be correct, is that he was not justified in waiting until the vessels were 300 yards apart before he stopped and reversed. He had come within the rule, the circumstances being such that he ought to have earlier come to the conclusion that it was necessary to stop and reverse. But, in order to avoid any difficulty, as to the form of the question, we have asked another question which seems to me absolutely to clench the matter: At 300 yards could the *Abeona*, by any manœuvre, have avoided risk of collision, unless the *Beryl* had, at the same time, stopped and reversed? They answer, No. It cannot be that, if what an officer is to do is to act so as to avoid risk of collision, he is to delay acting until the time when, unless he stops and reverses, it is impossible for the other vessel, by any manœuvre, to avoid risk of collision. Upon these answers, and—if it is worth while to say so—I confess I cannot myself see how they could answer otherwise, as I cannot conceive that these two vessels could approach on the courses on which they were to within 300 yards of each other without risk of collision. I absolutely and entirely agree with these findings of nautical fact, and, adding to those nautical facts the facts which are established by the evidence, I am sorry to say that I have been obliged to come to the conclusion that it had become earlier necessary, within the meaning of the rule, for the officer of the *Beryl* to stop and reverse in order to avoid, not only collision, but risk of collision. If that be so, the result is that the *Beryl* is to blame as well as the other vessel, and the usual consequences must follow. I should have been glad if Butt, J. had, in his judgment, stated what the question was which he definitely and in terms left to his Trinity Masters. Had we known what it was that was left to them it would have greatly assisted us. Therefore, with great reluctance, the conduct of the *Abeona* having been as bad as it could be, and the officer of the *Beryl* having been put into a difficult position by the wrongful act of the *Abeona*, all that can be said is that he did not do that which the Act of Parliament declares and enacts he must do, and for this pardonable, excusable, and slight fault, I feel bound to decree that his owners must pay for that breach of the Act of Parliament. We, therefore, find both vessels to blame. There will be no costs here or in the court below.

Bowen, L.J.—I am of the same opinion. I think that the judgment in this case is determined by and follows from the answers given us by our nautical assessors. The matter is governed by certain articles of the Regulations for Preventing Collisions at Sea. The articles are Nos. 16, 17, 18, and 22. Arts. 16, 17, and 22 are in the same tenor, and differ from 18. They are regulations which prescribe the course which a ship is to keep or abandon, according to circumstances. Art. 18 has to do with speed alone. The arts 16, 17, and 22 prescribe the course that each of two ships meeting so as to involve risk of collision is to take. By art. 16, "If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other." By art. 17, "If two ships, one of which is a sailing vessel, 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." As the Master of the Rolls has pointed out, these articles are intended, not merely to prevent collision, but to prevent risk of collision. In my view, art. 16 may be expanded into, "if two ships under steam are crossing in such a way that if their respective courses are continued, there will be risk of collision, &c." Art. 17 may also be expanded in the same way. What, therefore, is to be avoided is risk of collision. Art. 22 is correlative to these two other articles, and enacts that, "Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course."

It has been suggested during the argument that keeping her course means not only keeping the same heading, but also maintaining the same speed. That argument seems to me to be untenable. In my view, the article is opposed to an alteration of heading, and has nothing to do with speed. It is art. 18 which has to do with speed. In my opinion that article means that a steamship when approaching another vessel so as to involve risk of collision must, at all events, slacken her speed; but it may be necessary that she should do more, viz, stop and reverse. That, I think, is the construction to be put upon the terms "if necessary." The meaning to be put upon these words, however, does not arise in this case, on account of the answers given by the gentlemen who assist us. They have told us that in their judgment the officer in command of the *Beryl* was not justified in supposing, down to the point of 300 yards distance from the *Abeona*, that the *Abeona* would keep out of his way, and could do so without difficulty. Although I think it follows from that answer that the *Beryl* was also to blame for this collision, they have further said that at 300 yards the *Abeona* by no manœuvre could have avoided risk of collision, unless the *Beryl* had at the same time stopped and reversed. That is an answer on an issue of fact which disposes of the case. The learned judge below has not in his judgment indicated the exact questions that he put to his assessors. But, bringing to this matter the best attention that I am capable of, I am unable to see any reasons why the answers given us by the gentlemen who assist us are wrong. I think, therefore, that the judgment of the court below must be reversed.

Fry, L.J.—I am of the same opinion. The precise question which we have to determine is

this: whether it became necessary for the *Beryl* to stop and reverse at an earlier time than she did. According to the evidence, it seems to have been proved that she stopped and reversed at a distance of 300 yards from the *Abeona*. Ought she to have stopped and reversed at an earlier time than that? I observe that the rule says that the steamship is to slacken her speed or stop and reverse if necessary. Now, these two vessels were approaching so as to involve risk of collision. It was, therefore, the duty of the *Beryl* to slacken her speed. That she did. The risk of collision however continued, and the direction in art. 18 is a continuing direction, and therefore it was the duty of the officer in command of the *Beryl* to decide every moment whether it had become necessary to stop and reverse. Now, the *Beryl* slackened her speed at a distance between a quarter and half a mile off, and she continued at that speed until within 300 yards. From the answers given us by our assessors it appears to me to be plain that the *Beryl* continued at her slackened speed for a longer time than she ought to have done. It appears to me that, under the circumstances, the view taken by our assessors is well founded. It has been argued that the necessity to stop and reverse is a necessity which is to be determined by the event and not by the judgment of a seaman. It is not now necessary to decide that question, because, if it is to be judged by the event, the collision followed, and therefore it was necessary; if by the judgment of a sailor, then we have the opinion of our assessors that a sailor ought, under the circumstances, to have earlier seen the necessity of stopping and reversing. Whichever interpretation of these words is correct, it follows that in this case the *Beryl* was in fault, and must therefore be held to blame for the collision.

Appeal allowed.

Solicitors for the plaintiffs, *Ingledew* and *Ince*.
Solicitors for the defendants, *T. Cooper* and *Co.*

Saturday, June 28, 1884.

(Before Brett, M.R., Bowen and Fry, L.JJ.)

The Warkworth. (*a*)

ON APPEAL FROM BUTT, J.

Limitation of liability — Collision — Defect in machinery—"Improper navigation"—Merchant Shipping Act Amendment Act 1862 (25 *&* 26 *Vict. c.* 63), *s*, 54.

Where a ship is held liable for a collision caused by a defect in her machinery, and such defect is due, not to her master and crew, but to the negligence or default of other persons employed by the shipowner to repair the machinery on shore before the commencement of the voyage, and for the purposes of the voyage, the collision is occasioned by "improper navigation" within the meaning of sect. 54, *sub-sect.* 4, *of the Merchant Shipping Act Amendment Act* 1862, *so as to entitle the owners to limit their liability under the provisions of that Act.*

Per Brett, M.R.: All damage wrongfully done by one ship to another whilst the ship which does the damage is being navigated, and where the wrongful act of the ship which does the damage is due to the negligence of any person for whose negligence the owner is liable, is comprised within sect. 54 *of the Merchant Shipping Act Amendment Act* 1862, *unless such negligence occurs with the privity of the owner.*

Decision of Butt, J. (5 *Asp. Mar. Law Cas.* 194; 49 *L. T. Rep. N.S.* 715) *confirmed.*

This was an appeal by the defendants from a decision of Butt, J., in an action for limitation of liability under the provisions of the Merchant Shipping Act Amendment Act 1862, s. 54, sub-s. 4.

The action was brought by the owners of the steamship *Warkworth* to limit their liability in respect of a collision between the *Warkworth* and the vessel *British Enterprise*, caused by a defect in the steam steering gear of the *Warkworth*. At the damage action arising out of this collision. Sir James Hannen had found the *Warkworth* solely to blame, on the ground that the defect in the steering gear was due to the negligence of persons other than the master and crew, for whom the owner was responsible.

Under these circumstances the defendants to the limitation of liability action pleaded that the collision had not been caused by the "improper navigation" of the *Warkworth*, and therefore denied the right of the plaintiffs to limit their liability. At the trial Butt, J. had held that the collision was caused by the "improper navigation" of the *Warkworth*, and had allowed her owners to limit their liability accordingly.

The further facts of the case are fully set out in the report of the proceedings in the court below (5 Asp. Mar. Law Cas. 194; 49 L. T. Rep. N. S. 715; 9 P. Div. 20).

Webster, Q.C. and Dr. *Phillimore*, for the defendants, in support of the appeal.

Finlay, Q.C. and *Barnes*, for the respondents, were not called upon.

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

The following authorities were cited in support of the appeal:

Hayn v. *Culliford*, 4 Asp. Mar. Cas. 128; 40 L. T. Rep. N. S. 536; 4 C. P. Div. 182; 48 L. J. 372, Q. B.;
Chapman v. *Royal Netherlands Steam Navigation Company*, 4 Asp. Mar. Law Cas. 107; 40 L. T. Rep. N. S. 433; L. Rep. 4 P. Div. 157.
Good v. *London Steamship Owners' Protection Association*, L. Rep. 6 C. P. 563.

Brett, M.R.—In this case the defendants' ship, at the time of the collision, was being navigated, she was making way through the water for the purpose of going from one place to another, and by reason of a defect in her steering gear she failed to avoid another vessel which was at anchor, and by her own motion in the water struck that other vessel and damaged her. The first question which arises, under these circumstances, is, was her owner liable for that collision? He could not be liable unless the act in question was the result of the negligence of some person for whose conduct he was liable. Supposing he had bought his ship from a firm of shipbuilders, and, by reason of a latent defect in her, this accident had happened, there would have been no negligence on the part of anyone for whom he was responsible; there would have been no liability, and he would have had no need to invoke the

(*b*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs. Barristers-at-Law.

protection of this Act of Parliament. This Act is only necessary where there has been some accident caused by the negligence of persons for whom the owner is responsible. Therefore, it must be taken that this collision was the result of the negligence of someone for whose care and skill the owner was responsible. To say that this Act does not apply to negligence on shore is true, if the negligence has no result in what happens when the ship is being navigated. One must assume that the negligence if done on shore is carried on to the water and is effected on the ship when she is being navigated. The negligence in this case was the wrongful placing of a screw into a certain part of the steering gear. Therefore there was an act of negligence, and it was the act of a person for whose care and skill Sir James Hannen has held the owner responsible. Behind that finding we cannot go. If that had been all, and this defect had not been the *causa causans* of the collision, it would have been wholly immaterial; but Sir James Hannen has found it to have been the *causa causans* of the accident. It was not the *causa proxima*, which was the inability of the master to steer his ship so as to avoid this collision, and that inability was caused by the negligence of a servant of the owner.

The question, then, is whether in such circumstances the defendant is entitled to limit his liability under the Act. Though the negligence occurred before the vessel started, its effect was continuous and operative whilst the ship was on her voyage. Now, the Act says that the owner of any ship, whether British or foreign, is to be entitled to limit his liability where any loss or damage is, by reason of the improper navigation of his ship, caused to any other ship or boat, &c. I think you must read it in this way, "by reason of the improper navigation caused by anyone for whom he is responsible." Is this accident caused by the improper navigation of the ship? Surely running into another ship at anchor is not proper navigation? But then it is urged that the words "improper navigation" mean the negligence of the master or crew. There is nothing in the section so to limit it. In my view the word, improper means wrongful. If a ship is being properly navigated she does not run into other vessels. Therefore I come to this, that the proposition I am going to read is certainly included in this statute. It is that all damage wrongfully done by a ship to another ship whilst the ship which does the damage is being navigated, and where the wrongful act of the ship which does damage is due to the negligence of any person for whom the owner is liable, is comprised within the Act. Here the negligence of the person for whose act the owner was liable was the *causa causans*, and, though not the *causa proxima*, yet in my view the accident was caused by improper or wrongful navigation. I therefore think that the decision of Butt, J. was correct, and that this appeal must be dismissed.

Bowen, L.J.—I am of the same opinion. Mr Webster and Dr. Phillimore have contended that "improper navigation" in the 54th section of the Merchant Shipping Act Amendment Act 1862, is confined to acts or omissions on the part of those on board the ship who are engaged in actually navigating her. It seems to me to be plain that the Legislature, in using the word improper, meant improper navigation by the owner of the ship. In my view the owner does improperly navigate the ship in the eye of the law, and in this I am fortified by the form of words used in the old declarations, if, owing to the negligence of some one for whom he is responsible, damage is caused by his ship. It seems to me that in such a case the ship is improperly navigated within the meaning of the section, whether the damage be caused by the negligence of the master and crew or of same other person for whom the owner is responsible. I do not think it possible to limit the meaning of the words to unskilful navigation by those on board the ship, but I think it means wrongful navigation as where an owner uses his ship under conditions where it ought not to be used. For these reasons I am of opinion that the judgment of the learned judge below ought to be affirmed.

Fry, L.J.—I am of the same opinion. Dr. Phillimore has referred us to the dictionary for the meaning of the word navigation. One of the definitions given there is that navigation is the science or art of conducting a ship from place to place through the water. If that be a true definition of the word navigation, it seems to me that it involves the supplying of proper materials to enable the ship to be properly conducted from place to place and also of skilful mariners capable of so conducting the ship. Skilful mariners, if the ship be not supplied with proper materials necessary for her locomotion, cannot, in the absence of such materials, efficiently and properly conduct her from place to place; so also, all necessary and proper materials are useless without skilful mariners. In my opinion, therefore, proper navigation includes two things—the supply of all necessary parts of a ship, and of mariners with skill and knowledge of their duties. If either of these are wanting, and a collision ensues, which is occasioned by the absence of both or either of these two, then we have a case of improper navigation. The words "improper navigation" may include other cases, but they certainly include the present. In conclusion I may add that I think the following remarks of Butt, J. were well founded, and carry out my observations on this subject. They are as follows: "*Primâ facie* I do not see why the amount of relief should be limited to a case in which damage has occurred through the negligence of the master and crew, and why the Act should not apply to the negligence of persons other than the master and crew, who are employed by the shipowner to attend to the ship in preparation for the voyage, as, for example, a marine engineer employed, while the ship is in port, to overhaul the machinery." For these considerations, I therefore think this appeal must fail.

Appeal dismissed.

Solicitors for the appellants, *Gregory, Rowcliffes and Co.*

Solicitors for the respondents, *Thomas Cooper and Co.*

Nov. 25 *and* 26, 1884.

(Before Brett, M.R., Cotton and Lindley, L.JJ., assisted by Nautical Assessors.)

The Dordogne. (*a*)

ON APPEAL FROM BUTT, J.

Collision—Regulations for Preventing Collisions at Sea 1880, *arts.* 13 *and* 18—*Moderate speed—Dense fog—Steamship—Sailing ship.*

Where those in charge of a steamship in a dense fog hear a whistle and then others following it and getting nearer, even though the whistles get broader on their ship's bow, it is their duty on hearing the first whistle to reduce their speed, and as the vessels get nearer to bring their ship to as complete a standstill as is possible without putting her out of command, and when the other vessel has come close to, even though not in sight, to stop and reverse their engines.

Art. 13 *of the Regulations for Preventing Collisions at Sea, which provides that every ship shall go at a "moderate speed" in a fog, requires the speed to become more moderate as the two vessels get closer together.*

Semble, that it is the duty of those in charge of a sailing ship, when in a dense fog they hear a succession of whistles approaching closer and closer, to reduce her speed by taking off sail so as to bring her to as near a standstill as possible while retaining command over her.

This was an appeal by the defendants in a damage action from a decision of Butt, J., finding the steamships *Edith* and *Dordogne* both to blame for a collision off Ushant. The plaintiffs admitted that the *Edith* was to blame.

The collision occurred about 5.30 a.m. on Aug. 26, 1883. At the time of the collision the wind was light from the north-east, and there was a dense fog. The steamship *Edith* was of 448 tons register, and was bound on a voyage from Swansea to Clarente in France. The *Dordogne* was a screw steamship of 463 tons register, and was bound on a voyage from Bordeaux to Cardiff. The facts alleged on behalf of the plaintiff were as follows: — While the *Edith* was proceeding at half speed, her whistle being constantly sounded, and heading about S. by W., half W., the whistle of the *Dordogne* was heard on the port bow of the *Edith*. The engines of the *Edith* was thereupon put to dead slow and her helm was ported. The *Dordogne* was, however, heard to be rapidly approaching, and the helm of the *Edith* was put hard-a-port, but the *Dordogne* was immediately sighted at about a ship's length off and bearing about four or five points on the port bow, approaching at a high rate of speed. An order was given to set the *Edith's* engines full speed ahead, but before the order could be executed the *Dordogne* with her stem struck the *Edith* on the port side. The plaintiffs charged the defendants (*inter alia*) with navigating at too great a rate of speed and with failing to ease and stop and reverse their engines.

The facts alleged on behalf of the defendants were as follows:—About 5.30 a.m. on the 26th Aug. 1883 the *Dordogne* was about ten miles S. W. by S. off Ushant. There was a light air from the N. E. and a dense fog. The *Dordogne* with her engines at dead slow was heading N. half E., and was making about one knot or one and a half knots an hour. Her regulation lights were duly exhibited and burning, the whistle was being duly sounded, and a good look-out was being kept on board her. In these circumstances those on board the *Dordogne* heard the whistle of the *Edith* on the starboard bow. The engines of the *Dordogne* were stopped and her own whistle was blown; the engines of the *Dordogne* were then moved on slowly. The whistle of the *Edith* was again heard broader on the starboard bow, the engines were again stopped, and the whistle was again blown. The whistle of the *Edith* was heard a third time. It was answered by the whistle of the *Dordogne* and the engines were stopped. The *Edith* was almost directly afterwards seen and the engines were reversed full speed and the helm put hard-a-port, but the *Edith* coming on at a considerable speed and at a considerable angle to the course of the *Dordogne*, struck with her port side, near the engine-room, the starboard bow of the *Dordogne*, doing much damage to herself and the *Dordogne*.

The defendants' evidence was that at the time the *Edith* was seen their engines were stopped, and had been stopped some two or three minutes.

At the trial Butt, J. found that the *Edith* was "to blame for not having at least stopped her engines not perhaps when she heard the whistle the first, or second, or third, or fourth time, but at some time or other before the vessels got so close that they sighted each other, and the collision became inevitable." With regard to the *Dordogne* he found that she was going faster than alleged at the moment of collision, and that her engines were going ahead when the *Edith* came into sight.

Arts. 13 and 18 of the Regulations for Preventing Collisions at Sea are as follows:

13. Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow go at a moderate speed.

18. Every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary.

Cohen, Q.C. and Dr. *Phillimore* for the defendants in support of the appeal.—According to the evidence the engines of the *Dordogne* were stopped at the time the *Edith* came into sight. If so she had brought herself practically to a standstill in the water:

The Frankland and The Kestrel, 1 Asp. Mar. Law Cas. 489; 27 L. T. Rep. N. S. 633; L. Rep. 4 P. C. 529;

The Kirby Hall, 5 Asp. Mar. Law Cas. 90; 48 L. T. Rep. N. S. 797; L. Rep. 8 P. Div. 71;

It has never been laid down that a vessel on hearing a whistle, or even a succession of whistles, is to take all way off, which would have the effect of throwing herself out of command and so increase the dangers of navigation:

The Beta, 5 Asp. Mar. Law Cas. 276; L. Rep. 8 P. Div. 134; 51 L. T. Rep. N. S. 154;

The John McIntyre, 5 Asp. Mar. Law Cas. 278; L. Rep. 8 P. Div. 135; 51 L. T. Rep. N. S. 185.

According to the decision in *The Beryl* (51 L. T. Rep. N. S. 554; *ante*, p. 321; 9 P. D. 137) art. 18 is only obligatory when the circumstances are such as would lead an officer of reasonable care and skill to the conclusion that there was risk of collision. Here, although the whistles were coming closer, yet they were getting broader on the bow, and would therefore indicate a position of safety.

(*a*) Reported by J. P. Aspinall, and F. W. Raikes, Esqrs., Barristers-at-Law.

Hall, Q.C. and *Baden-Powell*, for the respondents, were not called upon.

Brett, M.R.—It seems to me that in these cases of vessels, whether steamers or sailing vessels, which find themselves in a fog, we must hold them very strictly to the regulations. As I ventured to say in *The Beryl* (*ubi sup.*), these regulations are made not only for the purpose of preventing collisions, but of preventing danger of collision, and we must take care to hold vessels in thick fogs strictly to the regulations so as to avoid danger of collision. I still am of opinion that we cannot condemn or relieve these ships by the proof of what were the actual facts. We must judge them by what an officer of care and skill ought to have judged the facts to be. That the *Edith* was solely to blame is obvious, and we need not trouble ourselves about her. The question is as to the *Dordogne*, whether she was also to blame. That question must be solved by what ought to have appeared to be the circumstances of risk of collision to an officer of reasonable care and skill in command of the *Dordogne*. Now the circumstances, in fact, were that there was so dense a fog that you could not see another ship until within a ship's length off, until, when you did see her, a collision was almost inevitable. Whilst the *Dordogne* was in this fog she was at sea, in a place where it would not be extremely probable that she would meet another vessel. This is not like the case of a vessel going up or down a river, or up or down a somewhat narrow arm of the sea like a channel. In such a case, whether an officer hears a whistle or not, he ought to contemplate the probability of meeting with other vessels, because he is in a narrow channel where vessels that are meeting would almost inevitably be in the same line as himself. Take, for instance, the Thames: before an officer hears a whistle I think he ought to have brought his vessel, in such a fog as this, as nearly as possible to a standstill, so as only just to have command over her. But in the open sea, where it is not very probable that he will meet another vessel, I think that that would be a moderate speed, which, if he was in a river and likely to meet a vessel the next minute, ought not to be his speed. But even when at sea, before he hears a whistle, he ought to reduce his way to a moderate speed, though what his speed is to be must of course differ under different circumstances.

Now when at sea an officer hears a whistle he is brought to the conclusion that there is a vessel in the neighbourhood. A good deal must of course depend upon the indication which is given by the other vessel of her presence. I cannot doubt myself but that the sound of a whistle must give some indication of where the vessel is. It is impossible to my mind to say that a whistle sounded at a mile and a half off would sound the same as a whistle sounded one hundred yards off. Personally I cannot believe that. Therefore, if a ship at sea in such a fog hears a whistle which would indicate that another vessel is a mile or a mile and a half off, she ought at once to reduce her speed to a more moderate speed, though moderate speed under these circumstances would be very different to moderate speed when the vessels came closer together. This case is not to be determined by what was done at the time the first whistle was heard. Here we have three, and perhaps more, successive whistles, all coming closer. What must be the conclusion to be derived from those whistles? We know that in fact these vessels were coming closer and closer to each other. We, however, have to judge of what ought to have been the conclusion or suspicion of the officer in charge of the *Dordogne*. What would that succession of whistles tell him? For myself I should have had no doubt, when you have a succession of whistles, each one coming closer, that each whistle would show him that the other vessel was coming nearer. It is said that the whistles showed him that she was coming in a particular direction, that is, that she was getting broader on his bow. I do not think it signifies whether the whistles get broader on the bow or not, if they show that the vessel is coming closer. If it is coming nearer and nearer in a dense fog (and every one knows that in dense fogs you cannot tell where exactly a vessel is from the sound of her whistle), and you cannot tell the direction in which it is coming, are not those such circumstances as should lead a prudent officer to suppose that if he went on as he was there would be danger? The moment the whistles show him that a vessel is really coming substantially nearer and nearer to him, he not being able to tell the direction in which she is coming, the truth of which observation is in this case shown by the ultimate fact, I have not myself any doubt that he ought to obey not only the 13th article, but also the 18th article if his vessel is a steamer. If it is only the 13th article which he ought to obey, as the other vessel comes nearer and nearer, "moderate speed" becomes more moderate and more moderate. That which is moderate speed, when the vessels are two or three miles apart, is not moderate speed when the vessels are within half a mile of each other. As the vessels get nearer and nearer he must bring his ship to as complete a standstill as is possible without putting himself out of command (*a*). If his vessel

(*a*) The Earl of Dumfries.—In this case, since decided by Butt, J. on Jan. 14, 1885, it was held that where in a dense fog a steamship has been brought to a standstill in the water, those in charge of her on hearing a whistle are entitled to get such way on her as will put her under command. The facts were, that the engines of the steamship *Boskenna Bay* were stopped on account of a dense fog; the result being that the vessel was lying dead in the water when the whistle of the steamship *Earl of Dumfries* was heard on the port bow. The helm of the *Boskenna Bay* was then put hard-a-port, and on a second whistle being heard the engines were put ahead, the helm being kept a-port. Shortly afterwards the loom of the *Earl of Dumfries* was seen and the vessels came into collision, the stem of the *Boskenna Bay* striking the starboard side of the *Earl of Dumfries*. Butt, J., after finding the *Earl of Dumfries* to blame, dealt with the *Boskenna Bay* as follows: "With regard to the *Boskenna Bay* I do not forget that she was being carefully navigated. When the fog came on she stopped her engines, and had brought herself to a standstill in the water. The question arises, what ought she to have done on hearing the whistle of the *Earl of Dumfries*? Is a vessel so circumstanced to lie like a log on the water, or ought she to set her engines ahead and so get some steerage way on her? I should be very sorry to hold that a vessel is not under those circumstances to get some way on her. But, if she does set her engines ahead she must do so with care and caution, and only give herself such way as is necessary to get herself under command. If the *Boskenna Bay* had done that and nothing more, she would be blameless. But the Elder Brethren think she did more, she not only put her engines

is a steamer she must go at least dead slow. If the other is really coming anything like near to him he ought to obey art. 18 and stop and reverse. To a sailing ship art. 18 does not apply, because she cannot stop and reverse, but she ought, if she is under full sail, to take sail off till she brings herself as nearly to a standstill as will give her command of herself.

Now what ought the officer of the *Dordogne* to have concluded? Upon that I have asked the following question of the gentlemen who assist us: "Considering the way in which these vessels were approaching each other, would each successive whistle tell the officer in charge of the *Dordogne* that the other ship was approaching nearer and nearer to him?" They agree with the view I should have come to and say "yes." If so, he ought to have brought his ship to a standstill at an early period, and when the other vessel was coming near to him he ought to have stopped and reversed. Certainly at the time the last whistle was sounded he ought immediately to have stopped and reversed, whereas, I think, the order was only given when he saw the other vessel. He therefore broke art. 18. The learned judge of the Admiralty Court relied upon another circumstance to show that the *Dordogne* was going at a very considerable pace at the time of the collision. I think it only right to state that upon this point I have asked our assessors the question: "Does the severity of the injuries suffered by the *Edith* lead to any conclusion as to the speed of the *Dordogne* at the moment of collision?" I do not know what the advice of the Trinity Masters to the judge of the Admiralty Court was, but I am bound to say that the gentlemen assisting us do not think it would lead to any conclusion as to the speed of the *Dordogne* at the moment of collision. I therefore do not rely upon the severity of the blow at all. But I rely upon the facts I have stated and the rule I have stated. I am therefore of opinion that in this case the *Dordogne* broke art. 13 by not going at a moderate speed sooner than she did; and I am further of opinion, which is quite sufficient to decide this case, that she broke art. 18 by not reversing sooner than she did. The decision of the learned judge of the Admiralty Court must therefore be supported and this appeal dismissed.

Cotton, L.J.—We have not to consider what was the conduct of the *Dordogne* when the first whistle was heard. It is clear that there was a succession of whistles, that the vessels were coming nearer and nearer, and were, in fact, getting very near one another. Now it was the duty of the *Dordogne* to stop and reverse her engines if there was risk of collision. But it is said that, inasmuch as these whistles were getting broader and broader on the bow, the officer on the *Dordogne* might reasonably conclude that there was no danger. However, in my opinion, that will not excuse the *Dordogne* for disobedience to art. 18. In a fog in which a man can see nothing he cannot form any safe opinion as to the direction of another vessel, and he should in such circumstances follow the course stated by the Master of the Rolls.

Lindley, L.J.—I take the same view and think that the *Dordogne* ought to have obeyed art. 18 sooner.

Appeal dismissed.

Solicitors for the plaintiffs, *Ingledew, Ince,* and *Colt.*

Solicitors for the defendants, *Botterell* and *Roche.*

July 25 and 28, 1884.

(Before Brett, M.R., Bowen and Fry, L.JJ.)

The Pontida. (*a*)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Bottomry bond—Authority of master—Owners of cargo—Necessity—Registrar and merchants.

The authority of a master to raise money on bottomry is limited as against the owners of cargo to such an amount as is necessary to enable the ship to complete her voyage with safety, and even where the money is advanced by a person who is not the ship's agent, and has no interest in the repairs effected on the ship, and honestly believes from inquiries made that the money is necessary, he cannot recover as against the cargo owner anything in respect of items other than those which are in fact necessary. Fry, L.J., dubitante. (*b*)

The registrar and merchants have a discretionary

(*a*) Reported by J. P. Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

(*b*) We find on reference to the American case of *The Barque Edward Albro* (10 Benedict, 668), decided in the Southern District Court of New York by Choate, J. in 1879, that the court there disallowed certain items in a bottomry bond which were not necessary for the prosecution of the voyage. It is, however, to be noticed that in that case the bond was on ship and freight only, and that the point as to the lender having made "reasonable inquiries" does not appear to have been taken. According to Choate, J.: "The test of what may be secured in a bottomry bond is not whether the expense is one for which the creditor will have a maritime lien without any express agreement, but whether it was properly and necessarily incurred by the master in pursuance of his authority as agent of the owner for the prosecution of the voyage." One item charged in the bottomry bond and allowed was the funeral expenses of a former master, who had died at the port in which the bond had been entered into. His remarks on this item are as follows: "The funeral expenses of the master should, I think, be allowed. Where a master of a ship dies in a foreign port without means to defray his funeral expenses, and the agent of the ship pays these expenses, humanity and the interests of commerce, and the relations of the parties to the vessel, justify one in treating the expense as a necessity of the ship." The analogous question as to the liability of shipowners for medical attendance to their crew in foreign ports is discussed in the American cases of *The Brig George* (1 Sumn. 151) and *Winthrop* v. *Carlton* (12 Mass. 4). According to sect. 228 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), where the master or any seaman receives any hurt or injury in the service of the ship, the expenses of medical attendance and subsistence in case of illness, and of burial in case of death, are to be defrayed by the shipowner without deduction from wages. The French code contains a similar provision: (cf. Code de Commerce, arts. 262, 263, and 264.)—Ed.

ahead, but she put her helm hard-a-port. She also set on her engines at the rate of thirty-five revolutions, and I think they were so kept for not less than four minutes. Having regard to this and other facts in the case, I think that there was an unjustifiable amount of headway put on her. I think that the navigation of the *Earl of Dumfries* was not careful, and I think that, although the *Boskenna Bay* was at the outset being carefully navigated, there was an error in giving her too much headway. The result therefore is that both vessels must be held to blame"—Ed.

power to reduced the items claimed under a bottomry bond, should they deem them unnecessary or exorbitant, and the court will not interfere with this discretion unless it be shown that the registrar and merchants have exercised it on an erroneous principle.

The Prince of Saxe-Coburg (3 *Moo. P. C.* 1) *explained.*

This was an appeal from a decision of Butt, J. in a bottomry action instituted by the Comptoir d'Escomte de Paris, as holders of a bottomry bond given at St. Michael on the Italian ship *Pontida*, her cargo and freight.

The ship *Pontida*, being at the island of St. Michael, laden with a cargo of wheat, and her master being without funds or credit, a bottomry bond was executed between the master and Messrs. Bensande and Co., bankers, who tendered in answer to advertisements. These bankers were not the ship's agents.

The bond was entered into on the 2nd April 1883, before the Italian consul, with the formalities required by Italian law, the sum borrowed on the bond being 91,375·76 francs, which, together with a bottomry premium of 20 per cent., amounted in all to 109,650·91 francs.

On the 19th June 1883 judgment was pronounced for the validity of the bond against the *Pontida* and her freight, and subsequently the owners of cargo admitted the validity of the bond as regards the cargo, subject to a reference to the registrar and merchants. The amount claimed by the bondholders at the agreed rate of exchange was 4386*l.* 0*s.* 8*d.*

The claim came before the registrar and merchants on the 12th July 1883, and included repairs effected under the recommendation of the surveyors at St. Michael, 5 per cent. commission in respect of the ship's agent's charges upon disbursements, 2½ per cent. commission on the value of the cargo discharged, and the bottomry premium of 20 per cent. on the total amount advanced.

On the 21st July 1883 the registrar made his report, and found that the sum of 3685*l.* 3*s.* 4*d.* was due to the plaintiffs upon the bottomry bond, reduction having been made in the amount of a bill for new metal, felt, and nails; in the commissions of 5 per cent. and 2½ per cent. by the ship's agent; and in the bottomry premium of 20 cent.

On the 19th Nov. 1883 the plaintiffs filed a petition in objection to the registrar's report. The case came on for hearing upon the petition on the 1st April before Butt, J., and on the 29th April the learned judge upheld the report, with costs.

From this decision the plaintiffs now appealed. The further facts of the case, and the full arguments, appear in the report of the case below (51 L. T. Rep. N. S. 268; 5 Asp. Mar. Law Cas. 284; 9 P. Div. 102).

July 25.—Dr. *Phillimore* and *J. P. Aspinall* for the appellants.—It having been proved that the lender made reasonable inquiries as to the necessity of the repairs, and that the lender was not the ship's agent, the registrar has no power to reduce the bondholder's claim. It is to be remembered that there is no imputation of fraud, and that the bond was entered into before the Italian consul with all due formalities. [Brett, M.R.—Has the duty of the lender to make inquiries anything to do with it? Is it not entirely a question of the authority of the master to bind the owners of ship and cargo?] The fact that the lender has made inquiries seems to have influenced the courts in previous decisions. [Brett, M.R.—What authority has the master to incur expenses which are not necessary?] By reason of the initial necessity of something being requisite to enable the ship to carry the cargo to its port of destination, the master is held out as the agent of the ship and the cargo owners for carrying out that purpose. If he, being so held out, incurs more expense than is afterwards decided to be necessary, it seems unreasonable that an innocent person who *bonâ fide* lends money on the faith of the agency, should be made to suffer in consequence of the wrongful acts of the agent, and that the agent's principals should escape all liability. The following authorities support the appellants' contention:

The Prince of Saxe-Coburg, 3 Moo. P. C. 1; 3 Hagg. 387;
The Jane, 1 Dod. 464, 465;
The Vibilia, 1 W. Rob. 1, 10;
The Orelia, 3 Hagg. 75, 84;
The Royal Stuart, 2 Spinks, 260;
The Cognac, 2 Hagg. 377;
The Glenmanna, Lush. 115.

The following cases were also referred to:

The Zodiac, 1 Hagg. 320;
The Lord Cochrane, 2 W. Roo. 336;
Gunn v. *Roberts*, 2 Asp. Mar. Law Cas. 250; 30 L. T. Rep. N. S. 424; L. Rep. 9 C. P. 331;
The Rhoderick Dhu, Swa. 177.

Barnes (with him *Bigham*, Q.C.), for the respondents, was not called upon.

Brett, M.R.—In this case the plaintiff brought a suit in the Admiralty Court against the owners of the *Pontida* and her cargo on a bottomry bond by which the captain at a foreign port made the ship, freight, and cargo liable to bottomry. The defence put forward by the owners of cargo is, that the circumstances with regard to three items, viz., charges for metal and felt supplied to the *Pontida*, agent's commission, and the premium on the bond, did not give the captain authority to bind the owners to a bottomry bond beyond a certain amount, and that that amount has been exceeded. Now, when a suit is brought in the Admiralty Court upon a bottomry bond, the first question is whether the Court of Admiralty will decree in favour of the bond at all? It will not decree in favour of the bond, against either the shipowner or the owner of cargo, merely from the fact that the bond is in existence. The preliminary inquiry is whether the bottomry bond, as a whole, was entered into under circumstances which gave the captain authority to bind the owners at all. The matter is one of the most extreme importance for the protection of the owners of ships and the owners of cargoes. That which is done is done as a matter of fact, entirely without their authority, and without their having the means of exercising any control whatever. These things are done in a foreign port. A long series of decisions in the Admiralty Court has shown the necessity of looking strictly into these bonds, and it has been stated over and over again that, if there were any laxity whatever exercised in the Admiralty Court as to this power of captains to bind the owner of the ship, or the owner of the cargo, by ordering large repairs in these foreign

ports, the shipowner and the owner of cargo would be practically helpless to an indefinite extent. A ship is taken into some small foreign port, which has little or no trade of its own, and if the ship came in and they could do what they liked with it, it would be like the ships that were wrecked on the coasts of England and Scotland in olden days. It would be a subject of thankfulness in every church in the place. It has been seen and known that there is little or no protection for the shipowner, or for the owner of cargo. People, one cannot say properly, but, as one knows, not unnaturally, are very likely (I am not saying this of every foreign port) to combine together to get as much out of the ship as they can in what they would say is all in the fair way of trade. They say, "Let us charge the highest prices we can; let us refit this ship from top to bottom, and the more business we do upon the ship, and the better prices we get, the more profit we will make." And therefore the court has found that, if it rested merely upon the survey of a surveyor in one of these small ports, and upon the evidence of the shipwright who has to do the work, and upon the allowances of the consul who has lived so long with the people of the place that he has got to take their view instead of considering the interests of strangers—if the court rested upon such evidence as that it would rest upon a rotten reed, and the owners of ship and cargo, who are not present, would have no protection against being practically robbed. Therefore, with regard to this preliminary question of whether the court will decree in favour of the bond at all, the court always insists upon looking strictly into the matter, and does not uphold the validity of the bond unless it is shown that the bond was entered into in good faith. Hence, when a person comes into court and says, "I have advanced money on a bottomry bond," the first question which is asked in the Admiralty Court is, "Have you done that in good faith?" Upon such a question as that the question of whether he has made any inquiry at all is very material, because, if the things supplied are proved to be absolutely necessary, there is very little more to be said; but upon the assumption that the amount of the bottomry bond is large, the very first question which presents itself as to the good faith of the lender is this: "How came you to lend such a large sum on bottomry on this ship without making any inquiry at all? That is evidence (if you have made none) of want of good faith, and if I find that the bottomry bond" —the Court of Admiralty always says—"is an extravagant bond in fact, and if I find that you, the lender on bottomry, have made no inquiries at all, I shall decree against you, as judge of fact, that you have not entered into this bottomry bond in good faith, and I will not declare for the bottomry bond at all. I set it aside absolutely and altogether." There is then no need for a reference to the registrar and merchants, for the bottomry bond is gone.

Then what is the law which authorises the captain to enter into a bottomry bond at all? I confess that, amongst the many novel arguments which I hear in this court, I have been astonished to hear of this, to me, new doctrine, that, assuming the things to be in fact unnecessary, the mere fact that the lender on bottomry has made reasonable inquiries as to whether they are necessary or not, the bond is to be upheld for its whole amount, although in fact nothing in it was necessary at all. Let us illustrate the case in this way: Suppose that all the things done to the ship, such as carpentering, &c., are as a matter of fact necessary in order that the ship may prosecute her voyage, and suppose that the price of the materials supplied and repairs effected to have been reasonable, and suppose there was an agent of the shipowner in the port whose duty it was to pay for these things on behalf of the owners; that is, to pay the prices without any bottomry commission at all. But suppose that notwithstanding that the captain has entered into a bottomry bond. That is not an imaginary case. It is in the books and has occurred: (*Gunn* v. *Roberts*, 2 Asp. Mar. Law Cas. 250; 30 L. T. Rep. N. S. 424; L. Rep. 9 C. P. 331.) In that case it was declared by the court that the bottomry bond could not be enforced; the declaration was against the bottomry bond, and it was held to be wholly void. Why? Because, although the things were necessary as a matter of carpentering to carry the ship to the end of her voyage, yet they were not necessary in the whole sense of the word, because there was an agent of the shipowner in the port who would have advanced the money on other terms than bottomry, and whose duty it was to do so. Therefore, although the bottomry lender had lent his money, he could not recover any of it as upon a bottomry bond. Now supposing, in this case of *Gunn* v. *Roberts* (*ubi sup.*), it had been asserted by the lender, "This is quite true, but I did not know there was an agent of the ship in the port. How should I know there was an agent? I went about amongst my friends and asked them, 'Do you know whether there is an agent?' and they said, "No, there is no agent that I know of.'" Supposing he had then gone to the captain and the captain had said, "No, there is not an agent." How came it that in the case referred to no allusion is made to this theory of "reasonable inquiries?" No such doctrine was even broached, and the bottomry bond was declared against upon the ground that there was no authority in the captain to enter into it under the circumstances. Now, let us take this case. Supposing a ship is in one of these foreign ports, and she requires a certain amount of sheathing or coppering, and other repairs, to take her to the end of the voyage, but the captain thinks it will be for the benefit of his owners that she should be repaired not only sufficiently to carry her to the end of the voyage, but also to re-class her, and make her as good as she was before; that is, about five times more repairs and more coppering and sheathing than would be necessary to take her to the end of the voyage. Supposing the surveyors in terms say that those are the things which are required to take her to England, or to the end of her voyage. The man lends his money on the bottomry bond on the faith of that. According to the argument here, if he does not suspect the honesty of the people, it would be said, "There are reasonable inquiries; he has reasonable grounds; there are the surveys; there is the consul's acquiescence in the surveys." There is not a case in the books in which, under such circumstances, where it has been shown that the repairs done were not merely the repairs necessary for the completion of the voyage, but

were repairs necessary to re-class the ship, the bottomry bond has been allowed to the full extent. In a case in which unnecessary repairs were done two questions would arise: First, whether the court would declare for the bond at all. On that point the court would inquire whether the lender on bottomry had made the advance *bonâ fide*. If he knew that the repairs which were done were unnecessary, and that there was an attempt to impose upon the owners (in which case the question of reasonable inquiries comes in so as to enable us to see whether he has entered into the bottomry bond *bonâ fide* or whether he has been a party in an attempt to impose upon the owners), although part of his money had been spent in necessary repairs, the whole bond is declared against. But supposing he has not, and has *bonâ fide* made the advances, then the bond would be declared for; but then it would go to the registrar and merchants to say how much of these repairs were necessary to take this ship to the end of her voyage. The bond being declared for as an honest bond, you have then to consider how much was authorised by the position of the captain, that is, how much was necessary. Therefore, when a bottomry bond is declared for as an honest bond, the lenders have to go into this, that it is a good bond for each and every item of it which is necessary, and it is a bad bond for each and every item that was beyond necessity. It is therefore for the registrar and merchants, after the bond has been declared to be a valid bond as a whole, to inquire as to each item in it, whether the captain had authority to go to the extent of the particular item. That depends upon whether the item was necessary or not, or how much of it was necessary. Each item that was necessary is allowed, and each item that was wholly unnecessary is struck out. Each item that goes beyond necessity is cut down. That is the duty of the registrar and merchants after the bond is declared for. There is, I venture to say, no trace in the books of anything ever having been referred to the registrar and merchants with regard to a bottomry bond except the questions I have now stated, which are referred to them not to enable the Admiralty Court to decree whether the bottomry bond is good or not as a whole, but after the court has declared it is good, in order to see how much of it can be allowed. If the "reasonable inquiries" were to go to the whole amount of the bond, it would be a matter to be inquired into by the court in order to see whether it would decree for the validity of the bond or not. If the reasonable inquiry would do as to any particular item it might be that, after having decreed for the bond, the question whether reasonable inquires were made as to one particular item, if it would be a matter of inquiry at all, might be for the registrar and merchants as to that point: that I will not say. It is enough for me to say that the question of reasonable inquiries has never been a test at all of what amount was to be allowed, but only whether the bond was to be allowed, or declared against.

With great deference, the language of the Privy Council in the case which has been cited, and which has raised some difficulty, it is not to my mind so accurate as the learned Lords would have used if they had been dissecting the case. In my opinion that language was meant to apply to that part of the case which I have endeavoured to explain and to enunciate, namely, whether the bond was a *bonâ fide* bond and was to be allowed at all, or not, because, as I say, even assuming that part of the expenses is for that which is absolutely necessary, yet, if the bond is an extravagant bond, and has been entered into by the lender either with gross carelessness as to the necessities of the ship, or if he has been a party to an attempt to impose upon the shipowner, there is a want of good faith which will at once put an end to the bond, and there would be nothing to go to the registrar and merchants at all. The whole principle is founded upon the fundamental doctrine that by the law of England the master of a ship, when away from his owners, and in a foreign port, has no authority to bind the shipowners to anything except in case of necessity. With regard to the cargo owner the case is still stronger, if possible, because the master is never the agent of the cargo owner. When he takes the cargo on board he does not take them on board as agent for the cargo owner. I should have thought the whole thing so simple that no one could have even argued upon it. The master takes the goods on board as agent of the shipowner, and not as agent of the cargo owner. Nothing can make him agent of the cargo owner from beginning to end, except a necessity arising during the voyage. Therefore to say that without that necessity existing he has authority to bind the cargo owner whose agent he is not because the person who lends him money has made reasonable inquiries whether the thing were necessary or not, is to cut away the whole ground upon which he can bind the cargo owner at all. To say that, although he was not the agent of the cargo owner, although necessity has not put him into the position of being agent, yet without being his agent at all he can bind him through the result of reasonable inquiries, seems to me to be a contradiction of what has always been held in this country. Therefore I myself come to the conclusion that no such doctrine as urged by Dr. Phillimore has ever been known or countenanced by the law of England, either in the Admiralty Court or elsewhere.

Having regard to a doubt which exists in the mind of my learned brother Fry, in which doubt I do not myself participate, I also think that this appeal must fail, on the ground that there is no evidence of any reasonable inquiries having been made. However, I do not base my decision upon that ground, but upon the greater ground that the master had no authority with regard to these items to bind the owners of cargo beyond what is clearly necessary. The necessity with regard to the items in dispute has been disproved at the reference. As to the decision of the registrar and merchants as to what was necessary or not, the court has never thought of interfering with that decision. The court has always said that with regard to the items found by the registrar and merchants it would only interfere with that finding upon a question of principle, and not upon a question of detail, because this the court is wholly unable to do. The registrar and merchants have found, with regard to these items that they were not necessary, and therefore I can see no reason to interfere. The question whether the commissions—that is, the mercantile commissions—which are alleged to have been paid, were necessary or not, or

whether the amcunt was that which was reasonably necessary, is for the registrar and merchants just as much as the other items. And also, with regard to the bottomry commission, that is a thing the propriety of which is known to the registrar and merchants, and the court has no means of rectifying them as to each and every one of those items. They are the ordinary points of submission to the registrar and merchants which they are wholly competent to deal with, and, as I have said, the court will never overrule them except upon a point of principle. The question brought before us has been one of principle, and that is the question which has been so strenuously argued, and that question again I say is this: Assuming that there was no necessity to the extent to which these expenses have been incurred, nevertheless has the captain authority to bind the cargo owner to their full extent, because the merchant who lent the money made "reasonable inquiries?" I say no such law is known in England as will give the captain authority upon the faith of such facts.

Bowen, L.J.—I am of the same opinion, and I agree entirely both with the law as propounded by the Master of the Rolls and with the reasoning by which he has come to that conclusion. Shortly expressed the law is this: The master, as it seems to me, is only the agent to bind the cargo owner in the hour of necessity. He derives all his authority from the necessity, and his authority must be measured by that. That is the great principle which seems to me to have run through the commercial law of this country, and to that I find really no exception. But, if this appeal were allowed, that principle would be destroyed, because the measure of the authority of the master to bind the cargo owner would not be the necessity of the hour, but what the person lending thinks about the necessity. That is a totally new principle, I believe, not only one not hitherto recognised by the common law, but one which would be most dangerous to business. It is essential that we should keep to the lines, I think, of the common law with regard to the authority of the master, or else the shipowners of this great country would be at the mercy of many a small island and many a small court. The authorities of the common law (I will not go back to them) all bear in that direction.

We have been pressed with two or three passages from the judgments in the Privy Council and of Dr. Lushington, in which it is suggested that possibly the lender of money to the captain of a ship may be entitled to recover against the principal of the master, if there is an apparent necessity without the real necessity, providing he has made what is called reasonable inquiry. I fail myself to see how, upon principle, what the lender of the money may reasonably think can possibly extend the master's authority, which is, as I said before, derived from the necessity of the case. But then there is the language in the judgment in the case of *The Prince of Saxe-Coburg* (*ubi sup.*). It appears to me that the language there used, when read by the light of the explanation which the Master of the Rolls has given, really ceases to be effective for the purpose of the appellants' argument. Whether it is so or not, that language, great as is the authority of the lips from which it came, is inconsistent with the doctrine which I consider is applicable to this case, and I cannot follow it. It seems to me to be language which is contrary to the common law. I wish also to say that, even if the law were as has been propounded by Dr. Phillimore and Mr. Aspinall, viz., that reasonable inquiries would warrant the lender in lending money which was really not wanted for the purpose of the ship continuing her voyage, yet in this case there seems to me to be no evidence of any such inquiry as would justify any honest man in dealing with the credit of others. There seems to me to be an absence of all reasonable inquiry on the part of the lender.

Fry, L.J.—I concur in the conclusion to which my brethren have come in this case, although I have not been able to do so with such freedom from doubt as they have. The doubt in my mind is, whether a tradesman supplying goods to the ship was not a tradesman supplying goods on behalf of the ship, but an independent merchant making a loan. My doubt is due to the two authorities, *The Prince of Saxe-Coburg* and *The Royal Stuart* both of them judgments of great authority. The rule, as Dr. Lushington lays it down, does seem to me to be more elastic than the rule laid down by the Master of the Rolls and Bowen, L.J., and but for the observations he made in those cases I should be free to agree with the law as now laid down by my learned brothers. The passages to which I refer have created a doubt in my mind as to whether, when the lender is a person who has nothing to do with the supplies made to the ship, and *bonâ fide* makes advances for the purposes of the ship after due inquiry, and believing as the result of his inquiries that the money is to be expended in necessaries, whether in such a case as that the bottomry bond is not good for the whole amount.

In the present case it is, however, not necessary to decide that point, because, in my judgment, the appellants have not shown that reasonable inquiries were made, nor that the advance was made upon the faith of reasonable inquiries. In the first place, it appears to me that the lender ought to have satisfied himself that the repairs bound to be done were not more than were necessary for the completion of the voyage. I have been unable to find in the documents or in the evidence anything that shows the least inquiry on the part of the lender. In the next place it appears to me that the lender being as he is described, a merchant in that port, was primarily bound to make some inquiries as to the prices charged for the repairs to the ship. The result I arrive at is this; having regard to the report, if he had made reasonable inquiry he would have found that the copper sheathing was charged at an exorbitant price. Therefore I say, if the doubt which I venture to express is a doubt, it is quite plain that the appellants have not brought themselves within that doubt, and therefore I entirely concur with the decision of the Master of the Rolls and the Lord Justice.

Appeal dismissed.

Solicitors for the appellants, *Lowless* and *Co.*

Solicitors for the respondents, *Ingledew*, *Ince*, and *Colt.*

Monday, Jan. 12, 1885.

Before Brett, M.R., Cotton and Lindley, L.JJ.)

The Beeswing. (*a*)

ON APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Practice—Appeal—Cross-appeal—R. S. C., Order LVIII., r. 6.

Where an appellant withdraws his appeal after the respondent has given notice of motion by way of cross-appeal under Order LVIII., r. 6, should the respondent determine to continue with his cross-appeal, his cross-notice will be treated as a substantive notice of appeal, in which case the original appellant may give a cross-notice of appeal that he intends to bring forward the subject-matter of his original appeal.

This was an application to the Court of Appeal by the defendants in an action to recover master's wages and disbursements.

The action was heard by Butt, J., who, on Aug. 12, 1884, gave judgment in favour of the plaintiff, but not for the full amount of his claim.

The plaintiff, being dissatisfied with part of the judgment, gave notice of appeal on Aug. 30 that the judgment of Butt, J. might be varied.

On Nov. 18 the defendants served a notice by way of cross-appeal under Order LVIII., r. 6. (*b*)

Shortly afterwards the plaintiff determined to withdraw his appeal, and on Nov. 27 notice was given to the defendants' solicitors that the plaintiff abandoned and withdrew his appeal.

Under these circumstances the defendants (the respondents) served the plaintiffs with the following notice of motion:

Take notice that the Court of Appeal, sitting at the Royal Courts of Justice, will be moved on Monday the 12th day of January 1885, at 10.30 a.m., by counsel, on behalf of the defendants, that the notice of contention given by the defendants pursuant to rule 6 of Order LVIII. of the Rules of the Supreme Court 1883, on the 18th day of November 1884, may take the place in the list of appeals of the appeal of the plaintiff, notice of which was given on the 30th day of August 1884, and which stood No. 97 in the printed list of appeals for the last Michaelmas sittings, such last-mentioned appeal having been abandoned by the plaintiff; and that the costs of and occasioned by this application may be costs in the said appeal.

J. G. Alexander, for the defendants, in support of the motion, stated that the question was whether the defendants' cross-notice of appeal was to fall on the plaintiff's appeal being withdrawn, or whether it was to stand as a substantive appeal.

W. R. Kennedy, for the plaintiff, *contra*.

Cur. adv. vult.

Brett, M.R.—I have consulted with the other members of the Court of Appeal in regard to the question raised in this case, in order that the practice may be settled. We are of opinion that in this and similar cases the cross-notice, which the respondent gave under Order LVIII., r. 6, should be treated as a cross-appeal, but that, in the event of the original notice of appeal by the appellants being withdrawn, the respondents should have the right to elect whether they should continue or withdraw their cross-appeal. If the respondents determine to continue with their cross-appeal, then the original appellant should have the right of giving a cross-notice to the effect that he intends to bring forward the subject-matter of the first appeal. The order is, that the respondents are to treat their notice as an appeal, and they are to become the appellants. In the present case the respondents may have three days to determine whether under the circumstances they will adhere to their application, and if so the costs in this motion shall be costs in the appeal.

Cotton and Lindley, L.JJ. concurred.

Solicitors for the appellants, *F. Venn* and *Co.*

Solicitors for the respondents, *Harper* and *Batcock.*

(*a*) Reported by J. P. Aspinall, and F. W. Raikes Esqrs., Barristers-at-Law.

(*b*) Order LVIII., r. 6, is as follows:—It shall not, under any circumstances, be necessary for a respondent to give notice of motion by way of cross appeal, but if a respondent intends upon the hearing of the appeal to contend that the decision of the court below should be varied, he shall, within the time specified in the next rule, or such time as may be prescribed by special order, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not diminish the powers conferred by the Act upon the Court of Appeal, but may, in the discretion of the court, be ground for an adjournment of the appeal, or for a special order as to costs.—Ed.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Thursday, June 17, 1884.

(Before Butt, J.)

The British Commerce. (*a*)

Collision—Salvage—Commission on bail—Liability of wrong-doer—Practice.

In a damage action, the plaintiffs are not entitled to recover as part of their damages a sum paid by them as commission on bail given in an action brought against their ship by salvors whose services were necessitated by the collision.

The vessels A. and B. came into collision, in consequence of which salvage services were rendered to the B. by the C. The salvors instituted an action against the B., in which the owners of the B. tendered, but the salvors recovered more than was tendered them. The A. was condemned in the damage action brought by the B., and on reference to the registrar and merchants to ascertain the amount of the A.'s liability, the registrar allowed the costs incurred by the owners of the B. in defending the salvage suit, but struck out the commission on the bail given by the owners of the B. for the release of their vessel in the salvage action. On objection to the registrar's report:

Held, that, as commission on bail is not recoverable as defendants' costs in a salvage action, such item could not be recovered from the owners of the A.

Quære, whether the owners of the B. were entitled to the costs incurred by them in the salvage action.

The Legatus (*Swa.* 168) *doubted.*

This was a special case stated by the parties to a damage action for the opinion of the court as to the liability of the defendants, under the circumstances hereinafter stated, in respect of commission on ba given for the release of the plaintiffs' ship.

(*a*) Reported by J. P Aspinall and F. W. Raikes, Esqrs., Barristers-at-Law.

In consequence of a collision between the two vessels the *County of Aberdeen* and the *British Commerce*, salvage services were rendered by the steamship *Paris* to the *County of Aberdeen*. In respect of these services the owners, master, and crew of the *Paris* instituted a salvage action against the *County of Aberdeen*, in which action the *County of Aberdeen* was arrested, but released on her owners giving bail in 2000*l.*, for which they had to pay a commission of 1 per cent., amounting to 20*l.* A tender of 1000*l.* was overruled by the court, which awarded 2000*l.* In the damage action subsequently instituted by the owners of the *County of Aberdeen* against the *British Commerce*, the *British Commerce* was held alone to blame. On the reference to the registrar and merchants to ascertain the amount of the liability of the *British Commerce*, amongst other items claimed was the 20*l.* paid by the owners of the *County of Aberdeen* as commission on bail in the salvage action. This item the registrar refused to allow, to which objection was taken by the plaintiffs, and the question now came before the court by way of motion.

Bucknill, for the owners of the *County of Aberdeen*, in support of the motion.—In consequence of the wrongful act of the defendants this expense had to be incurred by the plaintiffs. If the ship had not been bailed out the plaintiffs would have had a claim for marshal's possession fees against the defendants, which would have greatly exceeded the 20*l.* paid as commission on bail. [BUTT, J.—Surely it only needs a statement of the facts to at once show that you must fail on this application. Your course is clear. You should tender. If the tender is adequate, then you get your costs; if inadequate, then you must bear the consequences.] The principle for which I am contending was acted upon by Dr. Lushington in *The Legatus* (1 Swa. 168), where he, under similar circumstances, allowed the plaintiffs in the damage action to recover from the defendants the costs incurred by them in the salvage action. That is the practice of the court, and it covers the present case. [BUTT, J.—I doubt whether that is correct, but you are now asking me to extend that practice to commission on bail, which the registrar tells me is never allowed. If I am bound by the practice laid down in *The Legatus* (*ubi sup.*), I am just as much bound by the practice as to commission on bail.]

J. P. Aspinall, for the defendants *contra*, was not called upon.

BUTT, J.—I cannot alter this report. In the first place, I am told that the 20*l.* would not by the practice of the court be allowed as between the immediate parties to a salvage action. Therefore, if I am bound by the practice of the court I am right in disallowing this commission on bail as against the defendants in the damage action, who were not parties to the salvage action. At the same time, although it is not necessary to decide it, I have my doubts as to the principle laid down in *The Legatus* (*ubi sup.*). I myself should want a great deal of persuasion to induce me to think that under circumstances like the present the defendants in the salvage action are entitled to be paid the costs of defending that action by the defendants in the damage action. It is enough for me now to say that I shall not extend that principle by applying it to commission for bail.

Application dismissed.

Solicitors for the plaintiffs, *Thomas Cooper and Co.*

Solicitors for the defendants, *Gregory, Rowcliffes, and Co.*

Friday, Nov. 14, 1884.

(Before BUTT, J.)

THE CLYDACH. (*a*)

Collision—"Narrow channel"—Falmouth Harbour—Regulations for Preventing Collisions at Sea, 1880, *art.* 21.

Art. 21 *of the Regulations for Preventing Collisions at Sea* 1880, *providing that "in narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship," applies to a steamship entering and passing up Falmouth Harbour, and if a steamer going into that harbour keeps to the side of the channel which lies on her port hand, she violates the regulations.*

THIS was a damage action *in rem* instituted by the owners of the British steamship *Cheerful*, against the owners of the French steamship *Clydach* to recover compensation for damages sustained by reason of a collision between the two vessels on Sept. 8, 1884, in Falmouth Harbour.

The defendants counter-claimed.

The facts alleged on behalf of the plaintiffs were as follows:—Shortly before 4.30 a.m. on Sept. 8, 1884, the steamship *Cheerful*, of 642 tons register, and laden with a general cargo, was approaching Falmouth Harbour, at the speed of about nine knots, on a voyage from Liverpool to London, *viâ* Falmouth, the weather being fine and clear, the tide about flood, and the wind a light breeze from the westward. Her regulation lights were duly exhibited and burning brightly, and a good look-out was being kept on board. In these circumstances, when the *Cheerful* was heading about N.N.E. and approaching the harbour at a short distance from Pendennis Point, making for the pier, the green and masthead lights of a steamship, which proved to be the *Clydach*, were observed by those on the *Cheerful* distant about a mile and bearing about a point on their starboard bow. About this time the engines of the *Cheerful* were reduced to half speed. When about off Pendennis Point the engines of the *Cheerful* were put to slow and her helm starboarded a little to keep along the land and make the pier. The two vessels were in a position to pass each other in safety starboard side to starboard side, but when the masthead and green lights of the *Clydach* were about three points on the starboard bow of the *Cheerful*, and were distant about 150 yards, her red light came into view and her green was shut in, rendering a collision imminent. The engines of the *Cheerful* were immediately reversed full speed, her whistle was blown, and the *Clydach* was loudly hailed to starboard her helm and reverse her engines; but she came on, and with her stem struck the *Cheerful* a violent blow on the starboard quarter, cutting her down below the water's edge and sinking her.

(*a*) Reported by J. P. ASPINALL and F. W. RAIKES, Esqrs., Barristers-at-Law.

The facts alleged on behalf of the defendants were as follows:—Shortly before 4.15 a.m. the French screw steamship *Clydach* of 620 tons register, laden with a cargo of iron ore, was leaving Falmouth Harbour by the channel nearest to Pendennis Point, and was keeping to that side of the fairway which lay on her starboard hand. The *Clydach* was heading about S. by W., and was making about three knots an hour. The regulation lights were duly exhibited and burning brightly, and a good look-out was being kept on board her. Under these circumstances the mast-head, then the red and then the green lights of the *Cheerful* were seen at almost the same moment about a mile and a half distant, bearing right ahead of the *Clydach*. The helm of the *Clydach* was ported and her whistle blown. The green light of the *Cheerful* was shut in, and the two vessels were then in a position to pass clear, port side to port side. The helm of the *Clydach* was then steadied. The vessels continued to approach each other, and would have passed port side to port side, when the *Cheerful* suddenly opened her green light and shut in her red, as if under a starboard helm, and caused imminent danger of collision. The engines of the *Clydach* were at once stopped and put full speed astern, but the *Cheerful* approached, and, with her starboard side abreast of the mainmast, struck the stem of the *Clydach*, causing much damage. The defendants charged the plaintiffs with breach of arts. 18 and 21 of the Regulations for Preventing Collisions at Sea.

Art. 21 of the Regulations for Preventing Collisions at Sea 1880 is as follows:

> In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship.

The entrance to Falmouth Harbour is divided by Black Rock into two channels, the Western and the Eastern. Pendennis Point is at the western entrance to the harbour. It was admitted by the plaintiffs that the *Cheerful* was entering the harbour on the western side of the West Channel.

During the plaintiffs' case evidence was tendered to prove that it was the practice for vessels entering Falmouth Harbour to enter on the western side of the West Channel. In support of the evidence it was contended that it should be admitted, because it showed that it was not "safe and practicable" for the *Cheerful* to enter the harbour on the eastern side, inasmuch as by so doing she would embarrass other vessels, who, knowing the practice, would not expect to meet a vessel entering on the eastern side; and that, moreover, the existence of such a practice would tend to prove negligence on the part of those on the *Clydach*, who, knowing the practice, should therefore have been prepared to manœuvre for a ship entering on the western side.

As against the evidence being admissible it was contended that a practice contrary to the provisions contained in the Regulations is inadmissible; and that, moreover, the *Clydach* being a French ship, those on board of her would know nothing of the practice.

Butt, J., admitted the evidence.

The plaintiffs also called evidence to prove that a considerable number of vessels anchored in the eastern portion of the harbour.

It was agreed that the place of collision was about three cables' lengths north of a line between Black Rock and Pendennis Point.

Dr. *Phillimore* (with him *T. T. Bucknill*) for the plaintiffs.—The 21st article of the Regulations ceased to apply after the *Cheerful* had passed the Black Rock, which is at the entrance to the harbour. The collision took place in the harbour, where the "narrow channel" rule is not applicable. Even assuming it to be applicable, it was necessary for the *Cheerful*, bound as she was for the pier, to cross over to the western side of the harbour. Moreover, the circumstances of the case were such as to render it unsafe and impracticable for the *Cheerful* to have entered on the eastern side. [BUTT, J.—It would require very strong circumstances to excuse a departure from the Regulations.] It has been proved that a large number of vessels anchor on the eastern side of the harbour, and that there was a practice to enter on the western side, and therefore it was not "safe and practicable" to enter on the eastern side.

Myburgh, Q.C. (with him *Stubbs*), for the defendants, were not called upon.

BUTT, J.—This appears to all of us to be a very clear case. It is a case of two steamships approaching one another from opposite directions, the *Cheerful* going in and the *Clydach* coming out of Falmouth Harbour. At the outset one of these vessels, the *Cheerful*, was to seaward of the other, and the other was inside the narrow channel between Pendennis Point and the Black Rock. The *Cheerful*, in direct violation of the international rules contained in art. 21 of the Regulations for Preventing Collisions at Sea, was entering and passing through that channel on the wrong side; that is to say, she insisted on keeping on that side which lay on her port hand, instead of keeping on that side which lay on her starboard hand. Her own captain says that he saw the lights of the *Clydach* coming out of the harbour somewhat more than a point on his starboard bow, and about a mile distant. What was his duty under those circumstances? His imperative duty was to keep to the starboard side of the channel. There is only one way in which he could excuse his departure from following that course, *i.e.*, by showing that under the circumstances it was not safe and practicable for him to obey the rule. Is there any reason appearing from the evidence which tends to such a conclusion? The only suggested reason offered as making it unsafe and impracticable to obey the rule was the presence of the lights of the *Clydach* on his starboard bow. Where were those lights when he first saw them? They were so nearly ahead and at such a distance that there could not have been the slightest risk in his crossing to the starboard side of the channel. Of course it is said that the lights visible were white and green, and, as the green was on the starboard bow of the *Clydach*, it was not then a position of danger. But with that I do not agree. The *Clydach* was coming out of the harbour, and, as she comes out, she would be extremely likely to show her green light to a vessel coming in; but that does not in itself show any probability or any disposition on her part to keep on that side of the channel which lay on her port hand, or to pass an incoming vessel starboard side to starboard side.

Therefore, no reason has been shown why the master of the *Cheerful* should not have obeyed

the directions contained in art. 21 of the Regulations for Preventing Collisions at Sea. The master of the *Cheerful* is therefore to blame at the very outset. We moreover believe the story told by the master of the *Clydach*, that he ported his helm to obey the rule, when he was at a considerable distance from the *Cheerful*. We think that the wrongful starboarding of the *Cheerful* was the immediate cause of the collision: but I think the whole of the difficulty was caused by the master of the *Cheerful* wilfully disregarding the directions contained in art. 21. Under these circumstances I have no hesitation in saying that the *Cheerful* is alone to blame for the collision.

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *Stokes*, *Saunders*, and *Stokes*.

Tuesday, Nov. 25, 1884.

(Before BUTT, J.)

THE REGALIA. (*a*)

Action of restraint—Part owners—Bond for safe return—Practice.

Where minority owners have instituted an action of restraint claiming security for the safe return of the ship to a named port within the jurisdiction, and a bond is given by the defendants for that purpose, such bond remains in force until the ship returns to that port, and the plaintiffs are not entitled to institute another action for further security upon the ship's return to another port within the jurisdiction, and if such second action is instituted it will be dismissed with costs.

THIS was a motion by the defendants in an action of restraint "to dismiss the action and to condemn the plaintiffs in all costs and damages through the arrest of the steamship *Regalia* and also in the costs of this application."

The plaintiff, John Robson, was the owner of two sixty-fourth shares in the steamship *Regalia*. In Oct. 1884 the managing owners, the registered owners of sixty-two sixty-fourth shares, having chartered the *Regalia* were about to send her on a voyage from the Tyne to Aarhus. On Oct. 13 the plaintiff commenced an action (1884, R. No. 2002, Fo. 365) in the Admiralty Division of the High Court, against the owners of the *Regalia*, and indorsed his writ as follows:

The plaintiff as owner of two sixty-fourth shares in the vessel *Regalia*, of the port of Newcastle-upon-Tyne, claims the sum of 500*l.* in respect of his said shares for the safe return of the vessel to the port of Newcastle.

The plaintiff caused the *Regalia*, then lying in the Tyne, to be arrested. In order to obtain her release the defendants' solicitors, on Oct., 14, undertook to put in bail, and in pursuance of such undertaking a bail bond was executed by two sureties for the sum of 500*l.*, the bond being conditioned that if the defendants should not pay what was "adjudged against them in the said action with costs, execution may issue forth against us (the sureties), our heirs, executors, and administrators, our goods and chattels for a sum not exceeding 500*l.*" (*b*) No further proceedings were taken in such action.

The *Regalia* having been released proceeded on her intended voyage, and on Nov. 11 arrived at the port of West Hartlepool, from whence her managing owners proposed despatching her on another foreign voyage. On Nov. 14 the plaintiff commenced the present action of restraint (1884, R. No. 2241, Fo. 427) in the Admiralty Division against the owners of the *Regalia*, in which action the indorsement on the writ was exactly similar to the indorsement in the first action. On Nov. 14 the plaintiff caused the *Regalia* to be arrested in the second action. In order to obtain her release the defendants' solicitors undertook to put in bail to the action and in pursuance of such undertaking a bail bond was executed by two sureties for the sum of 500*l.*

The defendants now moved the court to dismiss the present action.

J. P. Aspinall, for the defendants, in support of the motion.—The second action is unnecessary. The bond given in the first action holds good until the vessel returns to the port named, *i.e.* to Newcastle.

Bucknill, for the plaintiff, *contra*.—In the case of *The Margaret* (2 Hagg. 275) it was decided that, while the vessel was within the jurisdiction, the minority owners were premature in instituting a second action. It is, however, to be noticed that in that case Sir Christopher Robinson says as follows: "In the case before me the vessel is safe for the present; if she should prepare to go to sea the part owners may resort to the same remedy as before." [BUTT, J.—But if the vessel is lost prior to her return, the sureties are liable for 500*l.* under the first bond.] The present circumstances are those referred to in *The Margaret* (*ubi sup.*) and entitle the plaintiff to commence a second action.

BUTT, J.—I am of opinion that this second action is unnecessary and should be dismissed with costs, including the costs of this application.

Solicitors for the plaintiff, *Stokes*, *Saunders*, and *Stokes*.

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

Tuesday, Dec. 2, 1884.

(Before BUTT, J.)

THE ROBINSONS and THE SATELLITE. (*a*)

Co-ownership action—Sale of ship—Register—Guernsey—Admiralty Court Act 1861 (24 *Vict. c.* 10), *s.* 8.

The Admiralty Division has no jurisdiction over an action in rem, instituted under sect. 8 *of the Admiralty Court Act* 1861, *claiming an account of the earnings and sale of a ship when the ship is registered at the port of Guernsey, and not at any port in England or Wales.*

THIS was a motion by the defendant in an action *in rem*, instituted under sect. 8 of the Admiralty Court Act 1861, for the release of the vessels the *Robinsons* and the *Satellite*, and for an order dismissing the action with costs against the plaintiff.

The action was instituted on the 13th Nov. 1884, and the indorsement on the writ was as follows:

The plaintiff, as owner of thirty-two sixty-fourth

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

(*b*) As to the proper form of bail bond, see *The Robert Dickinson*, *post*, p. 341.—ED.

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

shares of the brig *Robinsons*, and thirty-two sixty-fourth shares of the brig *Satellite*, claims to have a sale of the said vessels, and that the accounts outstanding and relating to the earnings and management of the said vessels be referred to the registrar.

The following affidavit was filed on the 27th Nov. 1884 on behalf of the defendant:

I, George Allix, of Cæsarea House, Bridge-road, Southampton, in the county of Hants, shipowner and master mariner, make oath and say:

1. I am the above-named defendant, and owner of thirty-two sixty-fourths of the brig *Robinsons*, and thirty-two sixty-fourths of the brig *Satellite*.

2. This action is brought by the above-named plaintiff, the owner of the other thirty-two sixty-fourths of the said vessels, against me, the said defendant, for leave to sell the said vessels *Robinsons* and *Satellite*.

3. The said brigs or vessels *Robinsons* and *Satellite* are registered at and belong to the port of Guernsey, and not in any port of England or Wales.

4. An action was commenced by me in the Royal Courts of Jersey previous to the issuing of the writ in this action, against the plaintiff, for the purpose of having the accounts taken and adjusted between us in respect of the earnings of the said two vessels. Such action is now pending, and will shortly be heard.

In reply to this affidavit an affidavit was filed on behalf of the plaintiff, which alleged that the plaintiff was resident in Southampton, but did not traverse the allegation that the brigs were registered at the port of Guernsey, and not in any port of England or Wales.

Sect. 8 of the Admiralty Court Act 1861 is as follows:

The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners, or any of them, touching the ownership, possession, employment, and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it shall seem fit.

J. P. Aspinall in support of the motion.—The court has no jurisdiction to entertain this action. Sect. 8 of the Admiralty Court Act 1861 only gives jurisdiction in the case of ships registered at any port in England or Wales. The *Robinsons* and the *Satellite* are registered at Guernsey, and not in any port in England or Wales. The action should therefore be dismissed with costs.

Bucknill, for the plaintiffs, *contra*.—The parties live within the jurisdiction, and the contract was made in this country.

BUTT, J.—It seems that there is no part of this action which comes outside sect. 8 of the Admiralty Court Act 1861. If so, the court has no jurisdiction. I shall accordingly make the order in the terms of the motion.

Solicitors for the plaintiff, *Lowless* and *Co.*

Solicitors for the defendant, *Clarkson, Greenwell*, and *Wyles*.

Tuesday, Dec. 2, 1884.

(Before BUTT, J.)

THE MARION. (*a*)

Co-ownership—Sale of ship—Admiralty Court Act 1861 (24 Vict. c. 10), s. 8.

The High Court of Justice (Admiralty Division) will not, in a co-ownership action, order the sale of a ship on the application of either minority or majority owners, unless the applicants prove strong necessity for so doing.

THESE were applicants by way of motion and cross-motion for the sale of the steamship *Marion* under sect. 8 of 24 Vict. c. 10.

The plaintiff W. C. Lang, the owner of twenty-two sixty-fourth shares, had instituted an action of restraint against the majority owners C. B. Forwood and one Nash. Forwood was the managing owner, and owned thirty-eight sixty-fourth shares. Nash owned the remaining four sixty-fourth shares.

By order of the Liverpool District Registrar, the value of the shares in the *Marion* had been appraised.

From affidavits filed on both sides it appeared that the parties were unable to agree as to the employment or management of the vessel, that there was no probability of their coming to terms, and that the only means of putting an end to the difficulty was the sale of the ship.

Bucknill, for W. C. Lang, the plaintiff, in support of the motion.—It being impossible that the ship can be managed between her present owners, the court is asked to order a sale of the ship. [BUTT, J.—A part owner must make out an extremely strong case before he will induce the court to order the sale of the whole ship.] Sir Robert Phillimore did so on the application of minority owners in the case of *The Nelly Schneider* (4 Asp. Mar. Law Cas. 54; 3 P. Div. 152; 39 L. T. Rep. N. S. 360). Sir Robert Phillimore's reason for so doing is, that it would be greatly to the interests of the parties that their connection should be severed. [BUTT, J.—It is a strong thing for the court to say that it is for a man's interest to sell his ship when he himself says it is not.] The ship has been appraised by the marshal, and my clients are ready to buy Mr. Forwood's shares at the marshal's valuation. We are willing that your Lordship should so order.

Myburgh, Q.C., for the majority owners, in support of the cross-motion.—We as majority owners ask for a sale of the ship. We will undertake to buy Mr. Lang's shares at the marshal's valuation.

BUTT, J.—I think a very strong case should be made out before the court will order the sale of a ship on the application of part owners. It is asking the court to sell the ship whether the co-owners like it or not. If a man is unable to agree with his co-owners, his remedy is to sell his own particular shares. I will therefore not order a sale of the ship except by consent. I will not do it for either party without consent. I shall therefore dismiss both motions.

Solicitors for the plaintiff, *W. W. Wynne* and *Son*.

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

( ) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs Barristers-at-Law.

Tuesday, Dec. 9, 1884.

(Before BUTT, J.)

THE CITY OF LUCKNOW. (a)

Practice—Collision—Counsel's fee — Witnesses—Registrar.

In an action for damage by collision, where the damage to one vessel amounted to 20,000l., and to the other vessel to 2000l., three counsel were instructed on behalf of the plaintiffs, and the fees marked on their briefs were respectively seventy-five guineas, fifty guineas, and thirty guineas, and the registrar, on taxation, reduced these fees to sixty guineas, forty guineas, and twenty-seven guineas; the Court, on appeal from the taxation, allowed the original fees, holding that they were proper fees in a case of that magnitude. (b)

Semble, the cost of detaining witnesses on shore may be allowed, although such witnesses are not called at the trial. This is a matter in the discretion of the registrar.

THIS was a motion by the plaintiffs, in a damage action, arising out of a collision between the steamships *Simla* and *City of Lucknow*, "to review the assistant registrar's taxation of the plaintiffs' costs, so far as relates to the reduction of the fees paid to counsel on the hearing of the action and the disallowance of the amounts paid in respect of the detention of the witnesses Egsberg, Coyle, and Scott."

The items in dispute were:

	£.	s.	d.
Fee to Mr. R. E. Webster, Q.C. and clerk with brief and papers	82	10	0
Fee to Dr. Phillimore and clerk with brief and papers	55	0	0
Fee to Mr. A. E. Nelson and clerk with brief and papers	32	10	0
Three seamen, Egsberg, Coyle, and Scott, A.Bs. on board *Simla*, for detention on shore	35	0	0

These items were at first allowed by the registrar, whereupon the defendants filed the following objections:

As to item 1 (viz., fee to plaintiffs' leading counsel) it is submitted that the employment of a third counsel was unnecessary, having regard to the nature of the action, and that in any case the fee ought not to be allowed as against the defendants, inasmuch as the learned counsel did not appear in court in support of the plaintiffs' case or take any part at the trial of the action.

If, notwithstanding the above objection the court should consider the learned counsel to be entitled to a fee, then it is submitted that the amount allowed is excessive, except as including a special fee, it being the invariable practice of the learned counsel to charge a special fee of fifty guineas for undertaking a case in the Admiralty Division of the High Court of Justice, and which special fee it is not the practice to allow on taxation of party and party costs.

As regards items 2 and 3 (viz., fees to plaintiffs' second and third counsel), in case of any fee being allowed to the leading counsel under the above circumstances it is submitted that the fee of 55*l.* allowed to second counsel and clerk with brief and papers and of 32l. 10*s.* allowed to third counsel and clerk with brief and paper should be reduced to the usual amount of two-thirds of the fee of the immediately senior counsel. It should be remembered that the trial did not last six hours.

As to items 4 to 12 (viz., allowances for nine witnesses), it is submitted that the allowance of so large a number of witnesses for attending the trial, eighteen in all, out of whom nine only were called to give evidence, is out of all proportion to the questions of fact at issue in the action, and that all or some of the expenses of witnesses named in the above items (none of whom gave evidence on the trial) should be disallowed.

Thereupon the registrar reviewed his taxation and reduced the items as shown in his notes:

Notes of objection to taxation:

1. This was in my opinion a proper case for three counsel. The amount at stake was unusually large. The plaintiffs' ship *Simla* of 2172 tons, laden with a general cargo, having been totally lost, the plaintiffs claimed 20,000*l.*, the defendants 2000*l.* The papers also were very lengthy, the plaintiffs' brief and proofs extending to 340 folios, and the other documents laid before counsel to more than 300 folios more. That one of the three counsel for the plaintiffs did not appear at the trial seems rather to justify the employment of a third counsel in a case where so much was at stake. The defendants also had three counsel.

2. On the other hand I think that I ought to make some reduction in the amount of the plaintiffs' counsel's fees, which were: to the leading counsel seventy-five guineas; to the second counsel fifty guineas; to the third counsel thirty guineas. I am informed that the defendants' counsel's fees were: to the leading counsel (the Solicitor-General in addition to a special fee of fifty guineas which it was admitted could not have been recovered as between party and party on taxation) fifty guineas; to the second counsel forty guineas; to the third counsel twenty-seven guineas.

I cannot say that these items were inadequate for a case which though, the amount at issue was very large, did not involve any questions of peculiar difficulty, and for which, although the trial lasted barely more than one day, refreshers were paid on each side and have been allowed on taxation to the plaintiffs at the usual amounts. I have, therefore, on reconsideration, reduced the fees as follows: To the plaintiffs' leading counsel (who seems to have had no special fee) from seventy-five to sixty guineas; to the second counsel from fifty to forty guineas; to the third counsel from thirty to twenty-seven guineas, with refreshers of ten and five guineas respectively to the second and third counsel, who alone appeared on the second day of the trial.

3. Of the eighteen witnesses previously allowed I have, on revision, disallowed three. In explanation of the allowance of so many as fifteen witnesses, of whom fourteen belonged to the *Simla*, I should observe that the ship's crew numbered fifty, that the collision took place about 7.45 p.m., and that the fourteen witnesses allowed were selected from a much larger number of persons on board the *Simla* who had witnessed the collision, also that no less than five distinct charges of negligence were made by the defendants against those in charge of the *Simla*, viz., of want of look-out, of improper navigation, of not exhibiting a proper side light, of having improperly burnt a blue light, and of having improperly deserted their ship after the collision, and that different witnesses were detained in order to speak to different points.

Thereupon the plaintiffs on appeal filed the following objections to the registrar's taxation:

It is submitted that the fees paid to counsel herein having regard to the large sum involved, the voluminous documents and the number of witnesses engaged in the action and the several charges made against the plaintiffs by the defendants in their counter-claim, were fair and proper and ought to be allowed.

The three witnesses were on deck from the time the *City of Lucknow* was first seen until the collision, and they were material and necessary witnesses for the plaintiffs, and by counsel's advice on evidence were certified as such and were detained accordingly.

Dr *Phillimore*, for the plaintiffs, in support of the motion.—The findings of the assistant registrar speak to the importance of the case. Acting on counsel's advice the plaintiffs had eighteen witnesses in attendance at the trial. Only nine of these were called, in consequence of an intimation from your Lordship that more were unnecessary. It seems to be the practice in the registry only to allow such witnesses

(a) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

(b) See the remarks of Butt, J. on this subject in *The Mammoth*, *ante*, p. 289.—ED.

as are actually called. [BUTT, J.—My interposing does not show that it was improper on the part of the plaintiffs to have eighteen witnesses. I interpose when the evidence sufficiently satisfies me as to the points in dispute. Though nine witnesses may have proved sufficient, the plaintiffs could not tell so until the hearing?] The registrar has allowed three counsel, but reduced their fees. [BUTT, J.—For what reason? I can only say that my experience of common law cases was that in a case of this magnitude counsel got very much larger fees.]

Bucknill, for the defendants, *contra*, read the registrar's reasons and submitted that they were right.

BUTT, J.—If any mercantile firm of high standing had been called in to deal with an amount in which 20,000*l.* is claimed, their commission would have amounted to more than the three counsel's fees put together. I think these fees were reasonable and should be allowed. With regard to the witnesses, I am not so clear. There must be a discretion vested in the registrar, and unless there is some strong reason to suppose that he has acted wrongly, I do not think that I ought to interfere. I therefore do not propose to interfere with the discretion of the registrar on this point. The costs of this application are to be costs in the cause.

Solicitors for the plaintiffs, *Lowless* and *Co.*

Solicitors for the defendants, *Gellatly, Son*, and *Warton.*

Wednesday, Dec. 17, 1884.

(Before BUTT, J.)

THE ROBERT DICKINSON. (*a*)

Action of restraint—Bond—Value of shares—Practice—Rules of the High Court of Admiralty 1859.

In an action of restraint the proper form of bond is a bond for safe return, and not a bond to answer judgment in the action.

The bond will be conditioned to the appraised or agreed value of the plaintiff's shares, and not to double the value of such shares.

THIS was an action of restraint instituted by minority owners on the 4th Nov. 1884, against the steamship *Robert Dickinson.*

The claim indorsed on the writ was as follows:

The plaintiffs' claim is as owners of twenty-two sixty-fourths of the vessel *Robert Dickinson*, being dissatisfied with the management and employment of the said vessel by their co-owners, that they shall give them a bond in 15,000*l.* for the value of the shares in the said vessel, and for the safe return of the said vessel.

The sum of 15,000*l.* exceeded the estimated value of the plaintiffs' shares. The ship was arrested on the 12th Nov.

On the 24th Nov. a summons was taken out by the defendants for the release of the vessel upon a bond or bail to answer the action being given by the defendants in the sum of 6500*l.* On this summons coming on for hearing the registrar ordered that "upon defendants giving bail in the sum of 6500*l.* to answer judgment herein, the vessel *Robert Dickinson* might be released."

On the 1st Dec. the defendants tendered the plaintiffs a bond in the sum of 6500*l.* The form was as follows:

Whereas an action of restraint is now pending in the Probate, Divorce, and Admiralty Division (Admiralty) of the High Court of Justice between *Robert Dixon and others* v. *The remaining owners of the steamship Robert Dickinson.* Now therefore we (names of sureties) hereby jointly and severally submit ourselves to the jurisdiction of the said court, and consent that, if the defendants in this action shall not pay what may be adjudged against them in the said action with costs, execution may issue forth against us, our heirs, executors, and administrators, for a sum not exceeding 6500*l.*

The plaintiffs refused to accept this form of bond, and on the 2nd Dec. they entered a caveat against the release of the ship.

Thereupon the defendants took out a summons before Butt, J. asking that the caveat should be overruled, that the ship should be released on the defendants filing the bail bond already executed, and that the plaintiffs should be condemned in all damages and costs occasioned to the defendants by the entry of the said caveat release, and the consequent improper detention under arrest of the *Robert Dickinson*, and in the costs of the application. On this summons coming on for hearing, the judge dismissed the application, and held that the form of the bond ought to be for the safe return of the ship.

The defendants by special leave of the court now moved the judge in court to set aside the above order, and to order that the bail bond already filed by the defendants was good in form.

A summons taken out by the plaintiffs, that the court should settle the form of bond, was ordered to be taken in court at the same time.

The form of bond proposed by the plaintiffs was as follows:

Whereas an action of restraint is now pending in the Probate, Divorce, and Admiralty Division (Admiralty) of the High Court of Justice between *Dixon and others* v. *The remaining owners of the steamship Robert Dickinson*, and whereas the Honourable Mr. Justice Butt has ordered that bail be given for the safe return of the steamship or vessel *Robert Dickinson* to the port of Newcastle, and that the plaintiffs should not bear any portion of the expenses of the ship prior to the safe return as aforesaid, now therefore we (names of sureties) hereby jointly and severally submit ourselves to the jurisdiction of the said court, and consent that, if the said defendants, or we, the said (names of sureties) shall not in the event of the said steamship or vessel *Robert Dickinson* not safely returning to the port of Newcastle, or in the event of the said steamship or vessel incurring liabilities prior to the safe return as aforesaid, pay to the plaintiffs or to their solicitors the sum of *l.*, the appraisement value of the plaintiffs' shares in the said steamship or vessel, and any sum or sums they may become liable to pay in respect of any such liabilities as aforesaid and the costs of this action, execution may issue forth against us, our heirs, executors, and administrators, lands, goods, and chattels for a sum not exceeding *l.*

Dr. *Phillimore* (with him *Bucknill*), for the defendants, in support of the motion.—Prior to 1859 there was a special form of bond peculiar to actions of restraint:

The Apollo, 1 Hagg. 306;
The Margaret, 2 Hagg. 275.

Since 1859, in which year the Admiralty Court Rules came into force, the practice has been to give a bond to answer a judgment in the form tendered by the defendants. The practice is so stated in Pritchard's Admiralty Digest, 2nd edit. p. 651. Moreover, the form of bond provided by

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

the Admiralty Court Rules of 1859 is the form of bond tendered by the defendants. According to Rule 186, "The forms annexed to these rules, orders, and regulations shall be followed as nearly as the circumstances of each case will allow." The circumstances of the present case do allow of the form of bond as tendered giving the plaintiffs all security that they are entitled to. Moreover, the present form of bond has been in existence since 1859, and it should not, in the absence of strong reasons, be departed from. This practice, as formulated by the Admiralty Court Rules 1859, is preserved by Order LXXII. of the Rules of the Supreme Court 1883, and in Appendix A, part 2, No. 13, the form of bond given is similar in form to that tendered by the defendants:

Reg v. *Justices of Pirehill North*, 51 L. T. Rep. N. S. 534; 14 Q. B. Div. 13.

G. Bruce, Q.C. and *Raikes*, for the plaintiffs, *contra*, were not called upon.

BUTT, J.—I still adhere to the opinion which I pronounced in chambers. I think it perfectly clear that the form of bond tendered is not applicable to the circumstances of this case. There were certain Admiralty Court Rules made in 1859. Under Rule 186 the forms affixed thereto are to be followed so far as circumstances will permit. This is an action of restraint, and there is no prayer in the writ that the court will award any sum of money to the plaintiffs. The bond tendered is drawn in the following form. [The learned Judge then read the bond tendered by the defendants.] I think that form of bond is not applicable to actions of restraint, and ought never to have been employed. Rule 186 says that the forms are to be followed where the circumstances will permit, and, so far from thinking that the present circumstances are met by this bond, I consider its form to be nonsensical and to have no meaning. This motion must be dismissed with costs.

The plaintiffs' summons then came on for hearing.

G. Bruce, Q.C. and *Raikes*, for the plaintiffs, in support of the summons.—The form of bond proposed by the plaintiffs is drawn to protect the plaintiffs in case the vessel incurs liabilities on the voyage. It is submitted that the bond should be conditioned to double the value of the plaintiffs' shares. This originally seems to have been the practice:

Clarke's Praxis, tit. 12;
Abbott on Shipping, 11th edit., Appendix cccxciv.

Dr. *Phillimore* and *Bucknill*, for the defendants, were not called upon.

BUTT, J.—The plaintiffs' counsel have been unable to give me any good authority for extending the bond to cover the event of the vessel incurring liabilities prior to her safe return, or for conditioning it in double the value of the plaintiffs' shares. All that the minority owners are entitled to is a bond for the safe return of the ship to a named port, conditioned at the agreed or appraised value of the plaintiffs' shares. If the parties cannot agree on the value of the shares they must be appraised in the usual way. Each party must pay their own costs of this summons. (*a*)

(*a*) In consequence of this decision the following bond was filed: "Whereas an action of restraint for bail has been commenced in the High Court of Justice on behalf of Robert Dickson and others against the remaining owners of the steamship *Robert Dickinson* and against (names of interveners) intervening. Now therefore we (names of sureties) hereby jointly and severally submit ourselves to the jurisdiction of the said court, and consent that if they, the said remaining owners of the steamship *Robert Dickinson*, the defendants, or we the said (names of sureties) shall not in the event of the said steamship *Robert Dickinson* not safely returning from her present voyage to any loading port in England or Wales, whereof notice shall have been given to the plaintiffs when the vessel is at her port of discharge, pay to the plaintiffs or to their solicitors, Messrs. Pattison, Wigg, and Co., the sum of 6500*l*., being the agreed value of the plaintiffs' shares in the said vessel, execution may issue forth against us, our heirs, executors, administrators, lands, goods, and chattels, for the sum of 6500*l*."—ED.

Solicitors for the plaintiffs, *Pattison, Wigg, and Co.*

Solicitor for the defendants, *H. C. Coote.*

Tuesday, Jan. 15, 1885.

(Before BUTT, J.)

THE EARL OF DUMFRIES. (*a*)

Collision—Practice—Evidence—Engineer's log—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 285.

In a damage action the log kept by the engineer is admissible as evidence against his owners.

THIS was a damage action *in rem*, arising out of a collision between the steamships the *Boskenna Bay* and the *Earl of Dumfries*.

During the defendants' case, counsel for the plaintiffs while cross-examining the second engineer of the defendants' ship, proposed to put in evidence the log kept by the first engineer of the defendants' ship for the purpose of contradicting the evidence of the witness. Counsel for the defendants objected to the admission of such evidence.

Dr. *Phillimore* (with him *Bucknill*), for the plaintiffs, in support of the admission of the evidence.—The declarations of an agent are admissible evidence against his principal:

The Actæon, 1 Spinks Ecc. & Ad. 176.

The engineer is the agent of the defendants for the purpose of making entries in his log. A protest is admissible evidence. [BUTT, J.—I am not so sure of that, although I know that by the practice of this court it is very often put in.] The log kept by the mate of the defendants' ship is admissible evidence against them. By parity of reasoning the engineer's log is also admissible.

Hall, Q.C. (with him *Kennedy*), for the defendants, *contra*.—The engineer's log is very different to the official log, which was specifically directed to be received in evidence by sect. 285 of the Merchant Shipping Act 1854. (*b*) There is no legal duty upon the engineer to keep a log, and the entries should not be admitted as evidence against his owners.

BUTT, J.—This is a point upon which I have considerable doubt. It is clear that this engineer's

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

(*b*) Sect. 285 is as follows: All entries made in any official log book, as hereinbefore directed, shall be received in evidence in any proceeding in any court of justice, subject to all just exceptions."—ED.

log is not evidence in favour of the owners of the vessel. It, however, is not clear whether by the law of England it is admissible as evidence against them. Yet, as I have so strong an opinion in favour of admitting this and similar documents, I shall, in the absence of any authority against it, allow this log to be put in evidence. Upon the same principle by which the mate's log is admissible I think it may be said that the engineer's log is also admissible. Therefore, though not without doubt, I think this log may be put in.

The log was accordingly put in and read by plaintiff's counsel.

Solicitors for the plaintiffs, *T. Cooper* and *Co.*
Solicitors for the defendants, *Stokes, Saunders,* and *Stokes.*

Tuesday, Jan. 27, 1885.

(Before Sir JAMES HANNEN and BUTT, J.)

THE PALOMARES. (*a*)

ON APPEAL FROM THE CITY OF LONDON COURT.

Collision—Practice—Contempt of court—Warrant of arrest—Execution—Bailiff—City of London Court—County Courts Admiralty Jurisdiction Act 1868 (31 & 32 *Vict. c.* 71), *ss.* 23, 35.

A warrant of arrest issued in an action in rem, instituted for collision in the City of London Court, and directed to the high bailiff of the said court and others the bailiffs thereof, is not duly executed if executed by a clerk in the bailiff's office, who is not a bailiff, and hence the master of the vessel so arrested is not guilty of contempt of court in removing her.

Semble, if the warrant had been addressed to the clerk as an officer of the court it might, under the provisions of the County Courts Admiralty Jurisdiction Act 1868, *s.* 23, *have been duly served by him.*

THIS was an appeal from a decision of Mr. Commissioner Kerr, the judge of the City of London Court, refusing to commit the master of the steamship *Palomares* for alleged contempt of court.

A collision having occurred in the river Thames, on the 5th Nov. 1884, between the steamship *Racoon* (owned by the Mayor, Commonalty, and Citizens of the City of London) and the steamship *Palomares*, the owners of the *Racoon* instituted an action *in rem*, on the 8th Nov., in the City of London Court, against the steamship *Palomares*, to recover compensation for damages suffered by reason of the collision.

The following affidavit to lead the warrant of arrest was sworn on the 8th Nov. by Mr. Wm. Thomas Kirby, clerk to the City Solicitor:

1. I am informed and believe that on the 5th day of November instant the steamship *Racoon*, belonging to the plaintiffs, was run into and damaged by the steamship or vessel *Palomares*, in the river Thames, through the fault and mismanagement of those on board the last-named steamer.

2. No compensation in respect of such damage has been made to the plaintiffs, as I am informed and believe, and the aid and process of this court are necessary in that behalf.

3. The *Palomares* is now in the river Thames, within the jurisdiction of this court. She has discharged her cargo, and, as I am informed and believe, she is expected to sail immediately, and out of such jurisdiction, unless restrained by a warrant of this court, leaving the plaintiffs' claim unsatisfied.

Upon the margin of this affidavit the registrar of the court made the following order: "Let a warrant issue to arrest the steamship *Palomares*."

The warrant was accordingly issued, and was directed "To the high bailiff of the said court, and others the bailiffs thereof."

On the same day the warrant was executed by Edward Henry Watson, who was a clerk in the bailiff's office, and not a bailiff.

Mr. Watson executed the warrant by exhibiting it to those on board the *Palomares*, nailing a copy to the mast and putting a man in possession of the vessel.

On the same day the master of the *Palomares*, in disregard of the arrest, proceeded on his voyage to Newcastle with the man in possession on board.

On the 10th Nov. application was made by the plaintiffs to the judge of the City of London Court, upon an affidavit setting out the above facts, for a rule *nisi* calling upon the master of the *Palomares* to show cause why he should not be committed for contempt of court.

The rule was granted.

On the 24th Nov. cause was shown to the above rule, when documentary and *viva voce* evidence was given as to the circumstances under which the vessel had been removed from the jurisdiction. The learned commissioner reserved judgment till the 8th Dec., when he dismissed the rule with costs, holding that the warrant had not been legally executed, and that therefore, the master of the *Palomares* was guilty of no contempt in taking her to Newcastle.

The learned Commissioner, in his judgment, after dealing with the facts of the case, found that, assuming the warrant to have been duly executed, the master of the *Palomares* was guilty of contempt of court.

The learned Commissioner then proceeded as follows:—"Was the warrant duly executed? That the warrant was duly issued is clear; and that it was exhibited to those on board, and that a true copy of it was nailed to the mast is not to be doubted. But is this due execution? I think not. Those courts whose jurisdiction and procedure are derived from the civil law have an inherent power of delegating to anyone they see fit to appoint the execution of their decrees. But this has never been the case with our common law courts. In the case of our superior courts the sheriff is interposed between the Crown, in whose name the court acts, and the suitor; and he is responsible to the latter for any excess or deficiency in or misuse of any process of execution entrusted to him. When the County Courts were established in 1846 the same principle was applied. A high bailiff was appointed for each court by whom alone its process can be executed, and he was specially empowered like the sheriff to appoint bailiffs to assist him in the execution of the process which comes to his hands, and like the sheriff he is directly and personally responsible to the suitors. In the statute under which this court, which was constituted on the model of the County Court, issues its process the same principle is adopted. By sect. 17 of the London (City) Small Debts Extension Act 1852, it is enacted that there shall be one or more bailiff or

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs. Barristers-at-Law.

bailiffs of the court, and that such bailiff or bailiffs shall be appointed by the mayor, aldermen, and commons, and that one of the bailiffs, if there shall be more than one, shall be called the chief bailiff of the court, a designation which by a subsequent statute is converted into high bailiff. The 18th section next enacts that the bailiffs "shall by themselves serve all the summonses and orders, and execute all the warrants, precepts, and writs issued out of the court under the provisions of this Act," and that every such bailiff shall be responsible for all the acts and defaults of himself in like manner as the sheriff of any county in England is responsible for the acts and defaults of himself and his officers. These words "by themselves" are to be found in the clause of the County Court statute from which our clauses are copied; but in the County Court statute the words are "by themselves or by the bailiffs appointed to assist them." The omission of these latter words in our statute shows that the Legislature intended, and seems to me to require, that a bailiff of this court shall execute process himself and shall not delegate it to anyone else. And the subsequent words of our statute, making the bailiff responsible for the acts and defaults of himself, as is the sheriff for those of himself and his officers, seems to me to confirm this view, especially as in the County Court statute the words are that the high bailiff shall be responsible for the acts and defaults of himself and of the bailiffs appointed to assist him. It may be suggested that the Admiralty process of arresting a ship is not issued under this Act, viz., The London (City) Small Debts Extension Act 1852. But there is, I think, nothing in that. The jurisdiction in maritime cases is assigned to the court as it is constituted by law, and with all its incidents, with its registrar to record its proceedings and its bailiffs to execute its process. That process, framed under statute, is issued to the high bailiff and is to be executed by him or one of the bailiffs responsible under the statute to the suitor for his acts and defaults. Admiralty process can, on the statute I am now speaking of, be executed, I consider, by no one else. Nothing was said at the hearing to satisfy me or even to suggest that there was any power in a bailiff to delegate his authority to execute Admiralty process. Nevertheless, I have considered it my duty to examine the statutes for myself so as to satisfy my own mind on the subject. The high bailiff of the County Court is expressly authorised to appoint bailiffs to execute process by writing under his hand, and by the County Courts Act 1865, s. 4, the judge and officers of this court have the same powers and authorities, except the power of appointing officers. These words, "except the power of appointing officers," obviously deprive the high bailiff of this court of the power of appointing bailiffs, which in their absence he would have possessed. I have looked at the other County Court Acts, and at the Admiralty Acts which incorporate them, and I can find nothing to justify any bailiff of this court in delegating his authority. And I am consequently of opinion that no legal arrest was effected of the *Palomares*, her tackle, apparel, or furniture; that the ship consequently was not under arrest when she sailed out of the jurisdiction of the court; and, not being under arrest, that no contempt was committed by the captain of the vessel in so doing. The rule of court of the 15th Nov. will therefore be discharged with costs."

From this decision the plaintiffs appealed.

In support of the appeal the following affidavits were filed by the plaintiffs:

I, Sir John Braddick Monckton, of Guildhall, in the City of London, Knight, Town Clerk, make oath, and say as follows:

1. As the Town Clerk of the City of London I am, by virtue of my office, clerk of the several committees of the Corporation of London,

2. I have referred to the minutes of the Law and City Courts Committee of the Corporation of London, and from these I find, and I know of my own knowledge, that Edward Harry Watson was, on the 2nd day of May 1881, duly appointed by the said committee, in whose hand such appointments lie, on behalf of the plaintiffs to be clerk in the office of the High Bailiff of the City of London Court, and that the said Edward Harry Watson thereupon and thereby became, and has since, and up to the present time continued to be an officer of the said City of London Court.

I, Edward Harry Watson, of the City of London Court, held at Guildhall-buildings, in the City of London, clerk in the office of the High Bailiff of the said City of London Court, make oath and say as follows:

1. I have seen and perused an affidavit in this action, sworn by Sir John Braddick Monckton, and dated the 16th day of January 1885, and I am the Edward Harry Watson therein referred to, and the statements in the said affidavit, so far as they refer to me the said Edward Harry Watson, are in all respects true.

2. On the 8th day of November 1884 a warrant for the arrest of the steamship *Palomares*, duly issued under the seal of the City of London Court, was delivered to me for service and execution, and I proceeded on board the said steamship *Palomares*, and duly served and executed the said warrant of arrest on the said 8th day of November 1884.

The following Acts of Parliament were referred to, and are material to the judgment:

The London (City) Small Debts Extension Act 1852 (15 Vict. c. lxxvii.), s. 17:

That there shall be one or more bailiff or bailiffs of the court, and such bailiff or bailiffs shall be appointed by the mayor, aldermen, and commons . . . and one of the bailiffs of the court, if there shall be more than one, shall be called the chief bailiff of the court.

Sect. 18:

That the said bailiffs shall attend every sitting of the court for such time as shall be required by the judge, unless when their absence shall be allowed for reasonable cause by the judge, and shall by themselves serve all the summonses and orders, and execute all the warrants, precepts, and writs issued out of the court under the provisions of this Act . . . . and every such bailiff shall be responsible for all the acts and defaults of himself in like manner as the sheriff of any county in England is responsible for the acts and defaults of himself and his officers.

The County Courts Equitable Jurisdiction Act 1865 (28 & 29 Vict. c. 99), s. 4:

The judge and officers of the court held under the provisions of the London (City) Small Debts Extension Act 1852, hereinafter called the "City Court," shall respectively have and exercise the like jurisdiction, powers, and authorities in all respects, except the power of appointing officers, as are for the time being possessed and exercised by the judge and officers respectively of a Metropolitan County Court, and the chief clerk and the chief bailiff of the City Court shall henceforth be respectively styled the registrar and high bailiff thereof, the word "registrar" being interpreted to include the assistant clerks, and the words "high bailiff" the bailiffs of the City Court.

J. P. Aspinall, on behalf of the plaintiffs, in support of the appeal.—It is submitted that Watson was an officer of the court, and therefore competent to execute the warrant. The County Courts Admiralty Jurisdiction Act 1868 conferred

Admiralty Jurisdiction on County Courts. Sect. 23 regulates the mode in which process is to be executed in Admiralty actions. By that section it is provided that for the execution of any decree or order of a County Court the court may order, and the registrar on such order may seal and issue, and "any officer of any County Court may execute process according to general orders." Inasmuch as Watson was appointed by the corporation, and having regard to the provisions of sect. 23 of the London (City) Small Debts Extension Act 1852, that it shall be lawful for the mayor, aldermen, and commons, to order that the judge, clerk, bailiffs, and officers of the court, or any of them, shall be paid by salaries instead of fees," it is submitted that Watson was an officer of the court, otherwise no meaning can be given to the words "officers" as used in sect. 23 of the London (City) Small Debts Extension Act 1852. This contention is supported by the fact that the preceding sect. 11 provides that, in case assistant clerks shall be necessary for carrying on the business of the court, such assistant clerks shall be provided. Sect. 23 then deals with all the officials of the court, naming them as "judge, clerk, bailiffs, and officers of the court," in which latter category it is submitted that Watson is included. Therefore, assuming him to be an officer, it is submitted that there is nothing in the general orders to preclude him executing the warrant. Although in the general orders both of 1869 and 1875 there are special provisions applicable to Admiralty procedure, there is no provision that the warrant of arrest shall be executed by any specified officer. The object of so enacting was to enable the warrant of arrest to be executed by any officer of the court. Otherwise were the execution limited to the bailiffs, it is very possible to conceive that the bailiffs, owing to their various duties, would be incapable of promptly executing the warrant. The desirability of immediate execution of warrants of arrest was doubtless present to the mind of the Legislature, and hence it is submitted that it was expressly meant that such warrants might be executed by any officer of the court. The very fact that there are special orders applicable to Admiralty procedure is of itself proof that it was intended that the Admiralty procedure should differ from the ordinary County Court procedure. It is understood that the marshal of the Admiralty Court does delegate his authority to persons in his office to execute warrants of arrest. Reasoning by analogy, it is submitted that the same power exists in the bailiff of the City of London Court.

Lush-Wilson for the respondent, *contra*.—By sect. 35 of the County Courts Admiralty Jurisdiction Act 1868 it is provided (*inter alia*), that "General orders shall be from time to time made under this Act for the purposes in this Act directed, and for regulating . . . . the forms of processes and proceedings therein or issuing therefrom." It is submitted that the effect of this section is to give to the forms themselves a statutory force. The form of warrant in use in the County Courts is directed to the "high bailiff of the said court and others the bailiffs thereof," hence the form by its terms is a definition of the words "any officer," as used in sect. 23 of the County Courts Admiralty Jurisdiction Act 1868, and shows that the only persons competent to execute the warrant "according to general orders," within sect. 23 of the County Courts Admiralty Jurisdiction Act 1868, are the bailiffs. By Order XXXVIII. of the County Court Orders and Rules 1875 it is directed that the general rules of procedure shall apply to Admiralty proceedings, unless expressly ousted by the orders applicable to Admiralty proceedings. Inasmuch as the orders applicable to Admiralty proceedings are silent as to what persons shall execute warrants of arrest, the general orders are to be followed. If so, the execution of this warrant was restricted to the high bailiff or bailiffs, and there has not been a compliance with the orders. It is also submitted that a clerk in the bailiff's office is not an "officer" within the meaning of the word as used in sect. 23 of the County Courts Admiralty Jurisdiction Act 1868. Sect. 10 of the London (City) Small Debts Extension Act 1852 speaks of the "several clerks and other officers and servants." This shows that clerks are not included in the term "officers." The fact that sects. 18 and 21 of the London (City) Small Debts Extension Act 1852 provide that the bailiff shall be responsible for his acts and defaults, and require him to give security, show that the Legislature intended that the execution of process should be restricted to bailiffs alone. A close examination of the statutes relating to the City of London Court shows that the Legislature has been very jealous of having the process executed by a responsible officer.

Aspinall in reply.—The desirability of not restricting the execution of warrants of arrest to the marshal in the High Court is evidenced by the words of Order IX., r. II, of the rules of the Supreme Court 1883. The words are, "In Admiralty actions *in rem* the warrant of arrest shall be served by the marshal or his substitutes." Sect. 86 of the London (City) Small Debts Extension Act 1852 allows "every bailiff or officer" to execute "any process of execution." Arrest of a vessel being analogous to taking goods in execution, and Watson being an officer of the court for some purposes, it is submitted that he was competent to execute the warrant. The words in sect. 23 of the County Courts Admiralty Jurisdiction Act 1868, "according to general orders," define the mode of execution and not the persons by whom the process is to be executed The mode of execution in this case was "according to general orders," and therefore there was a valid arrest.

Sir JAMES HANNEN.—I am of opinion that this appeal must be dismissed. By the London (City) Small Debts Extension Act 1852, s. 18, the duty of executing all the warrants, precepts, &c., was entrusted to certain officers called bailiffs, and this Act restricted those officers from deputing their duties in this respect to anyone else. It is not now necessary to enlarge upon the reasons for this enactment. There are express words requiring that the bailiffs "shall by themselves serve all the summonses and orders, and execute all the warrants." If the matter had stood there there would probably have been no argument. It would, under those circumstances, be clear that it was competent for no one else but the bailiffs to execute the warrant. Mr. Aspinall, however, has called our attention to the County Courts Admiralty Jurisdiction Act 1868, s. 23, to which he says the learned commissioner did not direct his

attention. My own opinion is that the clerk Mr. Watson has been shown by the existing state of things to be an officer of the County Court, because the 11th section of the London (City) Small Debts Extension Act 1852, requires that when a clerk is paid by salary the power of appointment is to be in the corporation. In this case that has taken place. Watson has been appointed by the corporation, and they pay his salary, and that, in my opinion, does constitute him an officer of the court.

Sect. 23 of the County Courts Admiralty Jurisdiction Act 1861 provides that, "For the execution of any decree or order of a County Court in an Admiralty cause the court may order, and the registrar on such order may seal and issue, and any officer of any County Court may execute process according to general orders." I am disposed to think that there would be a power under the general orders to restrict the execution of process to particular individuals or class of individuals that might be indicated, but I do not think that the words "any officer of the County Court may execute process" are in fact annulled by the subsequent words "according to general orders," I think that the class of persons is constituted by that section of the Act who, unless something to the contrary is shown, would have the power to execute the orders of the court. On the other hand, it appears to be quite clear that it does not mean that any officer of the court may of his own motion execute the order. He must derive his authority from the court. In this particular case no authority has been conferred by the court upon the clerks in the bailiff's office to execute warrants. In fact the warrant according to its form is directed specifically "to the high bailiff of the said court, and others the bailiffs thereof." Without entering into the other questions which have been touched upon, I think it is sufficient for the present decision to say that the court might direct its orders to any clerk, including Mr. Watson, but, unless the court does so direct its orders, then it is not competent for the high bailiff to delegate his authority to any clerk to execute the orders. (*a*)

For these reasons I think that the decision of the learned commissioner was right, and therefore this appeal must be dismissed with costs.

BUTT, J.—I am of the same opinion, although I am not quite certain that I agree with my Lord in every reason. It appears to me that the London (City) Small Debts Extension Act 1852, s. 18, having prescribed that the bailiffs shall by themselves serve summons and execute warrants, the only answer suggested in argument to the observations of the learned judge on that section has been founded upon sect. 23 of the County Courts Admiralty Jurisdiction Act 1868, The view I take of the wording of that section is this, that, though I quite agree with my Lord that the clerks for some purposes are officers of the court, yet I do not think they are officers of the court within the meaning of the words as used in sect. 23 of the County Courts Admiralty Jurisdiction Act 1868. It seems to me to point to officers whose ordinary duty it is to serve summonses and execute warrants used in the proceedings. Though I am very far, in making these observations, from saying that I disagree with my Lord when he says, or intimates an opinion, that in any case it might be open to the judge by order to direct any officer of the court to execute the summons, and agreeing substantially with all my Lord has said, I think, the decision of the learned judge below was right, and this appeal must be dismissed.

Appeal dismissed with costs.

Solicitor for the plaintiffs, *The City of London Solicitor.*

Solicitor for the master of *Palomares*, *Mark Shephard.*

(*a*) These remarks of the learned President are in accordance with the decision of the Court of Exchequer in *Bell* v. *Hoyle* (L. Rep. 10 Ex. 220). In that case it was decided by Bramwell, Cleasby, and Amphlett, B.B., that where the judgment debtor under County Court process is the high bailiff of the court, the court is justified in appointing a special bailiff to levy execution and in directing the warrant to him, although the Acts 9 & 10 Vict. c. 95, and 30 & 31 Vict. c. 142 contain no provisions on the subject. The ground of this decision is the inherent power of every court, as part of its constitution, to appoint an officer to execute its process. This power was recognised so far back as the reign of Edward III. Thus in 1 Rolle's Abr. tit. "Court," p. 526 (F.) we find as follows: "Quel chose sera incident al court, si le roy grant un court per letters pattents al un corporation de un vil a tener pleas, &c., en cest case coment que la ne soit ascun clause en le pattent a faire un bailie, ou sargeant, d'executer les proces del court, a returner juries, &c., uncore ceo est incident a lour grant a ceo faire, car autrement ils ne poient tener un court." And in Comyn's Dig. tit. "Courts" (p. 8) it is said: "If the King grant conusance of pleas, the grantee shall have power to make process by petit cape, process upon voucher, or other process as incident, though no mention of it in the grant." According to Amphlett, B., "The moment it is found that there was a valid order made by the judge, it appears to me that he had an inherent power to appoint any other person whom he might think fit to enforce it." So in the present case, had the warrant been directed to Watson, he would have been competent, although not a bailiff, to validly execute the warrant of arrest. The principle upon which the present decision is grounded seems to have been acted upon in several earlier cases. Thus in *Rhodes* v. *Hull* (26 L. J. 265, Ex.) it was held that an arrest under a *ca. sa.* by a bailiff to whom the warrant is not addressed, even though he be engaged by the bailiff to whom it is addressed to assist in the arrest, is irregular, and the defendant will be discharged out of custody. So again in *Housin* v. *Barrow* (2 T. Rep. 122) Lord Kenyon decided that where the sheriff having directed a warrant to A. and all his other officers to arrest B., A. afterwards inserted the name of C., the arrest by C. was void. It is to be noticed that the present decision is only concerned with the execution of the warrant of arrest, and is not applicable to the service of summonses. By Order XXXIII., r. 6, of the County Court Rules, the registrar is required, upon the præcipe being filed, to issue a summons for service "by the solicitor, or if so required, by the bailiff of the court." In the Admiralty Court, Order X., r. 11, requires the warrant of arrest to be served by the "marshall or his substitutes," and Butt, J. has recently decided that a writ of summons in any Admiralty action *in rem* may be served by a solicitor's clerk and not necessarily by the marshal: (cf. *The Solis*, *post.*)—ED.

Tuesday, Feb. 3, 1885.

(Before BUTT, J.)

THE GETTYSBURG. (*a*)

Collision—Sale of ship and cargo—Freight—Practice.

Where in an action in rem for collision against ship and freight, in which the defendants' ship was held solely to blame, and, being still under arrest with the cargo on board was ordered to be sold, the Court on motion directed the marshal to discharge the cargo, to retain the same in his custody as security for payment of the landing and other charges and freight, if any, due from the owners or consignees of the cargo in respect of the same, and that in default of any application for the delivery of the cargo within fourteen days, the marshal should be authorised tn sell such part of the cargo as might be necessary to pay the said charges and freight, if any, due.

THIS was a motion by the plaintiffs in a damage action *in rem* instituted by the owners of the steamship *Arch Druid* against the steamship *Gettysburg* and her freight to recover compensation for damages occasioned by a collision between the two vessels.

The collision occurred on the 27th Oct. 1884 in Dungeness Roads. At the time of the collision the *Gettysburg* was bound from New York to Dunkirk with a cargo of petroleum in barrels. After the collision the *Gettysburg* was towed by salvors to Thames Haven.

The action was instituted on the 29th Oct.

On the 30th Oct. the *Gettysburg* was arrested in the sum of 2000*l.*, the cargo being at the same time arrested for freight. The owners of the *Gettysburg* entered an appearance, but did not give bail. The owners of the cargo made no application for its delivery.

The action was heard on the 28th Jan. 1885, when Butt, J. found the *Gettysburg* alone to blame for the collision, and ordered her to be sold.

The plaintiffs now moved the court as followes:

We, Thomas Cooper and Co., solicitors for the plaintiffs in this cause, give notice that we shall by counsel on the 3rd day of February 1885 move the judge in court to direct that the marshal do discharge the cargo of the above ship, retaining the same in his custody as security for payment of the landing and other charges and freight, if any, due from the consignees or owners of the said cargo in respect of the same, and that in default of any application for the delivery of the said cargo within fourteen days that the marshal be authorised to sell such part of the said cargo as may be necessary to pay the said charges and freight, if any, due, and that the said ship when discharged be removed from Thames Haven to London for the purposes of sale.

In support of the above motion an affidavit was filed by the plaintiffs in which, in addition to the above facts, it was alleged that the ship and cargo were subject to a claim for salvage in respect of services rendered after the collision, that Thames Haven was a most suitable place to discharge the cargo, and that the deponent believed that the owners of the cargo were lying by until the cargo had been discharged by the plaintiffs, and would then come forward and claim it.

Kennedy, for the plaintiffs, in support of the motion.—The owners of cargo are not prejudiced by the motion. The action being instituted in Oct. 1884, there has been ample time for them to intervene and protect their rights. The defendants have no interest in the present motion. We are asking for freight only in the event of its being due.

J. P. Aspinall, for the defendants, *contra*.—The court has no power to sell the cargo to realise freight. [BUTT, J.—I do not see how you are interested in this motion.] The cargo is in the custody of the shipowners. [BUTT, J.—It is in the custody of the court.] The court has no greater power to deal with the cargo than the shipowner. The shipowner could not sell it for payment of freight, and hence the court has no power to do so. It is not a perishable cargo, and there is therefore no reason why it should be sold. The proper course for the plaintiffs to have pursued would have been to issue a monition directing the cargo owner to bring in the freight.

Stokes, on behalf of the salvors, asked that if the cargo were sold his clients' lien might be preserved.

BUTT, J.—I am of opinion that the power of the court to deal with this cargo is not derived from the shipowner, and I think I have power to order its sale. I shall make an order in the terms of the motion, directing that the salvors' lien be preserved.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

Solicitors for the defendants, *M. Watson-Thomas.*

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

Tuesday, Feb. 3, 1885.

(Before BUTT, J.)

THE DIONE. (*a*)

Collision—Limitation of liability—Loss of life—Registered tonnage—Practice—Merchant Shipping Act Amendment Act 1862 (25 *&* 26 *Vict. c.* 63), *s.* 54.

The tonnage in respect of which shipowners are entitled to limit their liability under sect. 54 *of the Merchant Shipping Act Amendment Act* 1862 *is the tonnage appearing on the ship's register which was in force at the time of collision.*

In an action of limitation of liability, where the plaintiffs have paid into court, or are willing to pay in, 8*l. per ton in respect of damage to ship, goods and merchandise, but seek in respect of the life claims to pay into court, or give bail for an amount less than their total liability under the Merchant Shipping Act, the court, before fixing such amount, will require the plaintiffs to state on affidavit the names of the persons killed and injured, their condition in life, the number of those who are legally entitled to claim, the number of claims that have been settled, and the amounts paid in settlement.*

THIS was an action for limitation of liability instituted by the owners of the British steamship *Dione* in respect of a collision between her and the steamship *Camden* in the river Thames on the 3rd Aug. 1884.

In consequence of the collision the *Dione* sank, and considerable damage was done to the cargo laden on board her, and also to the *Camden*, and twenty-three lives were lost.

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

Actions were thereupon instituted against the *Dione* by the owners of the *Camden* and by the owners of the cargo laden on board the *Dione*.

The owners of the *Dione* admitted that she was solely to blame for the collision, but alleged that the same occurred without their actual fault or privity.

In an affidavit filed on behalf of the plaintiffs, it was alleged that the gross tonnage of the *Dione*, without deduction on account of engine room, was, according to the register in force at the date of collision, 698·39 tons; that deponent was advised and believed that the plaintiffs' liability in respect of loss of life and personal injuries could not possibly exceed the sum of 300*l.*, and that all persons entitled to claim against the *Dione* were resident in the United Kingdom.

To this affidavit the *Dione's* register, made in 1879, was annexed as an exhibit.

It was stated that twelve of the twenty-three lives lost were those of passengers, and that all the claims in respect of loss of life and personal injury, with the exception of two, had been settled.

The plaintiffs claimed (*inter alia*) that their liability in respect of damage to ship, goods, and merchandise should be limited to an amount not exceeding 8*l.* per each ton of the gross tonnage of the *Dione*, without deduction on account of engine room; and that on payment into court being made or bail being given for such sum as the court should deem right in respect of loss of life or personal injury caused by the collision, that all persons claiming in respect of loss of life or personal injury might be restrained from bringing actions against the plaintiffs.

The defendants, the owners of the *Camden*, denied that the tonnage on which the plaintiffs were entitled to limit their liability was 698·39 tons.

Subsequently to the collision the *Dione* was raised and re-registered. According to the register made in 1879 which was in force at the time of the collision, the gross tonnage of the *Dione*, without deduction on account of engine room, less space exclusively occupied by seamen and apprentices, amounted to 698·39 tons.

According to the register put in by the defendants, which was dated the 6th Nov. 1884, it appeared that the gross tonnage of the *Dione*, without deduction on account of engine room less space occupied exclusively by seamen and apprentices, amounted to 806·71 tons.

Raikes, for the plaintiffs, after stating the facts was stopped.

Baden-Powell for the owners of the *Camden*.—According to the register made after the *Dione* was raised it appears that the tonnage on which her owners are entitled to limit their liability is 806·71 tons, and not 698·39 tons. The register showing 698·39 tons was made as long back as 1879, and it is submitted that, having regard to the very serious discrepancy between the two registers, the court will not limit the plaintiff's liability according to the earlier register. The copy of the subsequent register now produced by the defendants is admissable evidence by virtue of sect. 107 of the Merchant Shipping Act 1854, which enacts that copies of registers are admissible evidence, and are *primâ facie* evidence of their contents. There is no indorsement on this subsequent register to show that the *Dione* has undergone any structural alterations. Hence there is a conflict between the two registers, and therefore the plaintiffs are not entitled on the evidence before the court to have their liability limited in accordance with the earlier register.

Raikes for the plaintiffs, *contra*.—By sect. 54 of the Merchant Shipping Act Amendment Act 1862, the tonnage on which shipowners are entitled to limit their liability is "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." The tonnage there referred to is the tonnage appearing on the register which was in force at the time of the collision:

The John McIntyre, 5 P. Div. 200.

This contention is supported by sect. 26 of the Merchant Shipping Act 1854, wherein it is enacted that the tonnage when ascertained and registered in accordance with the provisions of the Act shall ever after be deemed to be the tonnage. It is secondly submitted that the court should order the plaintiffs to pay a sum of money into court in respect of loss of life and personal injury less than their total liability under the statute. It is alleged in the affidavit that these claims cannot exceed 300*l.*, and therefore the court should order only that sum to be paid in.

BUTT, J.—I am of opinion that the copy of the register tendered in evidence by Mr. Baden-Powell is admissible. I however think that the registered tonnage contemplated by the Act of Parliament is the tonnage appearing on the official register which was in force at the time of collision. If so, the question raised by this subsequent register does not arise. Being satisfied that the registered tonnage is that set out in the plaintiffs' affidavit, I shall limit their liability accordingly. With respect to the application that the plaintiffs should be ordered to pay into court only 300*l.* in respect of loss of life and personal injury, I am not yet sufficiently informed of the circumstances of those claims to feel justified in so ordering. I shall require the plaintiffs to state on affidavit the names of those who perished and were injured, their condition in life, the number of those who are legally entitled to claim, and the number of claims that have been settled, and the amounts paid in settlement. When this has been done the registrar will be in a position to fix a reasonable sum.

Solicitors for the plaintiffs, *Waltons, Bubb* and *Walton*.

Solicitors for the owners of the *Camden*, *Thomas Cooper* and *Co.*

Tuesday, Nov. 25, 1884.

(Before BUTT, J.)

THE FAIRPORT. (*a*)

Master's wages—Damages for wrongful dismissal—Misconduct—Mortgagor—Mortgagee.

The taking away by a master of a ship to sea, after she has been taken possession of by the mortgagees, against their wishes, is such misconduct, even when done by the orders of the mortgagor, his

(*a*) Reported by J. P. ASPINALL and BULLER ASPINALL, Esqrs., Barristers-at-Law.

original employer, as will disentitle him to recover in an action in rem as against the mortgagees any compensation for dismissal by the mortgagees, upon their recovering possession of the vessel, before the term of his engagement has expired.

THIS was an appeal by way of motion from the registrar's report made in an action *in rem*, instituted by the late master of the steamship *Fairport*, against the vessel, to recover wages and disbursements.

The notice of motion was as follows:

Take notice that this Honourable Court will be moved on Tuesday, the 25th day of November, by counsel, on behalf of Mr. William Edward Bagshaw, the intervener in this action, on appeal from the report of the registrar, dated the 4th day of November, against the award, 87*l*. 10*s*., for damages under the agreement of the 12th May 1884, and the registrar's recommendation as to costs of action, and application will also be made that the costs of the action and of this application may be paid by the plaintiff.

In this action W. E. Bagshaw, the first mortgagee of the ship, had intervened.

The claim of the plaintiff was, prior to judgment, referred by an order of the court to the registrar to report upon.

By an agreement in writing, dated the 12th May 1884, it was agreed between James Jeffryes Wallace, the then sole owner of the *Fairport*, and the plaintiff, F. G. H. Little, that the plaintiff should be appointed to the command of the *Fairport*, "for the period of twelve months, at a salary of 25*l*. per month."

The ship was mortgaged to W. E. Bagshaw, who also held acceptances as collateral security for advances made to Wallace.

In consequence of J. J. Wallace failing to meet the acceptances which W. E. Bagshaw, the first mortgagee of the *Fairport*, held as a collateral security for repayment of money advanced by him to Wallace, Bagshaw instructed Messrs. Kay and Co., shipbrokers, on the 30th May 1884 to take possession of the *Fairport* under the mortgage.

In consequence of these instructions a carekeeper was sent on board the ship and formally took possession on the 6th June. On going on board he delivered the following letter to the plaintiff:

1, St. Michael House, Cornhill, E.C., 30th May, 1884.
To the Officer in charge of the s.s. *Fairport*.—My agents, Messrs. George Kay and Co. will take charge of your boat on arrival, and will receive the freight and pay the crew and port expenses, &c.
W. E. BAGSHAW,
Mortgagee of the s.s. *Fairport*.

The plaintiff at the reference proved that he had taken this letter to Wallace, who tore it up, and told him (the plaintiff) to mind his own business.

On the 10th June the plaintiff, by the directions of Wallace, took the vessel to sea, with the mortgagee's man in possession on board. After proceeding to one or two different ports, the *Fairport* reached Newport about the 23rd June, where she was arrested by a warrant at the suit of the mortgagee, who thereupon dismissed the plaintiff from his command.

The plaintiff claimed at the reference 483*l*. 4*s*. 8*d*., of which the registrar allowed 158*l*. 10*s*. 2*d*.

The claim in respect of wages was for "Wages for twelve months, under agreement, dated the 19th May 1884, 300*l*." Of this the registrar had allowed 87*l*. 10*s*.

The registrar's report, so far as is material, is as follows:

Whereas an appearance has been entered in this action for William Edward Bagshaw, the first mortgagee of the steamship *Fairport* as an intervener, and the claim of the plaintiff has by an order of court been referred to the registrar to report upon. . . . Under these circumstances I have held that the plaintiff is not entitled to recover against the ship thus improperly taken out of the hands of the mortgagee any expenses incurred by him in respect of the vessel after she left the river Thames. . . . The last point to notice is the question of wages. The plaintiff was engaged, as before stated, as master of the ship for a period of twelve months from the 12th May 1884, at a salary of 25*l*. per month, the plaintiff to find his own table charts and nautical instruments. He served in her to the end of June, when, as a consequence of her arrest by the mortgagee, the plaintiff was dismissed. The question has been argued by counsel whether the plaintiff can in this action, which is one for wages and disbursements, recover anything in the shape of compensation for wrongful dismissal. I have come to the conclusion that he can do so. In the case of *The Great Eastern* (17 L. T. Rep. N. S. 228; L. Rep. 1 A. & E. 384; 3 Mar. Law Cas. O. S. 58) Dr. Lushington decided to that effect in favour of seamen, and, by sect. 191 of the Merchant Shipping Act 1854, every master of a ship has the same rights, liens and remedies for the recovery of his wages which a seaman possesses. Then, as to the amount. It was not contended that he is entitled to the whole twelve months' wages. He will naturally look for, and obtain other employment, and, upon consideration of all the circumstances of the case, we consider he will be amply compensated by an allowance of wages for three months and a half at the agreed rate, which will be allowing him wages for nearly two months after his dismissal. I think he is entitled to his costs.

Bucknill, on behalf of the mortgagee, in support of the motion.—The plaintiff is not entitled to recover damages from the mortgagee for wrongful dismissal. The taking away of the *Fairport* to sea, in opposition to the wishes of the mortgagee, is such misconduct as should forfeit his right to wages. The registrar by his report has disallowed the plaintiff "any expenses incurred by him in respect of the vessel after she left the river," because the ship was "improperly taken out of the hands of the mortgagee." The registrar has therefore found that he was guilty of misconduct, and yet has given him not only wages earned up to the date of dismissal, but also damages for dismissal, although the master's misconduct has occasioned the mortgagee considerable expense.

Barnes, for the plaintiff, *contra*.—The plaintiff has a lien on the ship for damages for wrongful dismissal:

The Great Eastern (*ubi sup.*)

The registrar has found no misconduct on the part of the plaintiff. [BUTT, J.—Surely the fact that he disallowed him the expenses incurred in respect of the vessel after she was taken away and also speaks of the vessel being improperly taken away, is a finding of misconduct?] The registrar's reason for disallowing those items was because the mortgagee was not legally liable for them. The plaintiff acted only in obedience to the orders of Wallace, his original employer, and the registrar has not found that there was any collusion between them.

Bucknill in reply.

BUTT, J.—In this case the order of the registrar,

as it stands, will have the effect of taking out of the pocket of the mortgagee a sum of money claimed as compensation for dismissal by the master, who, in disobedience to the mortgagee, takes the ship off, with the mortgagee's man in possession. For the purposes of to-day I am only dealing with the damages. I am not going now to deal with the wages earned up to the date of dismissal. I am going to deal exclusively with the question of compensation for the wages which were not earned. In dealing with that, I do not intend to let the plaintiff have damages from the mortgagee. I care not what his rights are against the mortgagor. The fact that the mortgagee took possession of this vessel on the 6th June, as he had a right to do, and that the plaintiff then went off with the vessel, and so prevented the mortgagee from getting possession of his ship till a subsequent period, disentitles him to any claim against the mortgagee for damages. It is said that he has a right to these damages by virtue of a maritime lien on the ship. I cannot agree to that. He is entitled to wages for the time during which he properly served the legal owner on board ship, but not to compensation for dismissal.

Bucknill. — The effect of your Lordship's decision is that a claim amounting to 483*l.* is now reduced to about 60*l.* Under these circumstances the plaintiff should be ordered to pay all the costs.

BUTT, J.—This is a claim for compensation sounding in damages. I therefore do not think I ought to interfere with the registrar's suggestion. The plaintiff is to have the costs of the action and reference, but not of this motion.

Solicitor for the plaintiff, *Frederick Bradley.*

Solicitors for the mortgagee, *Ingledew, Ince,* and *Colt.*

Dec. 12 *and* 13, 1884.

(Before Sir JAMES HANNEN assisted by TRINITY MASTERS.)

EDWARDS, ROBERTSON, AND CO. AND OTHERS *v.* THE FALMOUTH HARBOUR COMMISSIONERS AND R. SHERRIS.

THE RHOSINA. (*a*)

Damage—Harbour master—Falmouth Harbour Commissioners—Berthing—Anchor—Jurisdiction—Harbours, Docks, and Piers Clauses Act (10 *&* 11 *Vict. c.* 27) 1847—*Pier and Harbour Orders Confirmation Act* 1870.

Where vessels were required by Act of Parliament to be berthed in a harbour under the directions and control of the harbour master, and damage was occasioned to a vessel by the alleged negligence of the harbour master, who, having fixed the place where the vessel was to be beached, gave an order, on the vessel nearing the spot selected, to let go the anchor, on which the vessel immediately settled and was damaged, the court, in an action by the owners of the vessel against the harbour commissioners (whose servant the harbour master was), held that such order was, under the circumstances, a negligent order; that the harbour master in so ordering was acting in the capacity of, and within the scope of, his authority as harbour master, and that therefore the harbour commissioners were liable.

Where a vessel is, in obedience to bye-laws, being beached under the directions of a harbour master, and for that purpose is properly passing through a place which is outside the jurisdiction and limits of the authority of the harbour commissioners, whose servant the harbour master is, and whilst so passing damage is occasioned to the vessel by the negligence of the harbour master in giving an improper order, the harbour commissioners are liable for the damage.

THIS was a damage action instituted *in personam* by the owners of the steamship *Rhosina*, against the Falmouth Harbour Commissioners and Richard Sherris, the harbour master of Falmouth Harbour, to recover compensation for damage occasioned to the *Rhosina* by the alleged negligence of the harbour master.

The Falmouth Harbour Commissioners are commissioners incorporated under the Falmouth Harbour Order 1870, confirmed by the Piers and Harbour Orders Confirmation Act 1870 (No. 2), and the Acts incorporated therewith. By the said order and Acts, the Harbours, Docks, and Piers Clauses Act 1847 and the General Pier and Harbour Act 1861 Amendment Act are incorporated therewith.

The plaintiffs by their statement of claim alleged (*inter alia*) that on the 29th Dec. 1883, the *Rhosina* arrived at Falmouth, and anchored in the outer harbour. On the 1st Jan. 1884 the *Rhosina* entered the inner harbour, under the orders, directions, and control of the defendant Sherris as harbour master (he being on board), for the purpose of being berthed on the hard in the inner harbour in order to ship a new propeller. The *Rhosina* was charged with rates for using and entering Falmouth Harbour. The *Rhosina* proceeded up the inner harbour, under the orders, directions, and control of the defendant Sherris as harbour master, and, on arriving near the hard, he negligently and wrongfully and improperly ordered and caused the crew of the *Rhosina* to let go the starboard anchor. In obedience to such orders the anchor was let go, and the vessel grounded on the said anchor, and was thereby greatly damaged.

The defendants, the harbour commissioners, by their statement of defence alleged (*inter alia*) that the *Rhosina* was not under the orders, directions, or control of the defendant Sherris, either as harbour master or at all. The defendant Sherris went on board the *Rhosina*, but, as the plaintiffs by their agents and servants had notice not to undertake any responsibility with regard to the ship, and the *Rhosina* did not proceed up the inner harbour under the orders, directions, or control of the defendant Sherris either as harbour master or at all. The order to let go the anchor was not negligent or improper. The damage to the *Rhosina* was solely caused by the negligent and improper conduct of the plaintiffs' agents and servants on board the *Rhosina*, in and about the management of the *Rhosina*, and in and about letting go the anchor in a negligent and improper manner, and in paying or letting out too much chain, and in not checking or taking proper and timely measures to check the chain, or by the faulty and defective tackle, gear, and machinery of the

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

plaintiffs' ship. Even if the damage was caused or contributed to by any act, control, or direction of the defendant Sherris, the defendant Sherris was not, in going on board the *Rhosina*, or in doing such act or exercising such control, or giving such order or direction, acting within the scope and limit of his employment and duty as harbour master in the service of the said defendants or by or with their authority. The place of the alleged happening of the alleged matters of complaint was outside the jurisdiction and limit of the authority of the said defendants.

The defendant Sherris by his statement of defence denied that the damage complained of was in any way caused or contributed to by any negligence on his part, and alleged that the accident happened outside the limits of the jurisdiction of the harbour commissioners.

The plaintiffs joined issue on these statements of defence, and further alleged that the plea as to the accident happening outside the jurisdiction showed no answer to their claim.

At the hearing the admitted facts were that on the 31st Dec. 1883 the *Rhosina* was lying at anchor in the outer Falmouth Harbour. It having been arranged that the *Rhosina* should be beached to have a new propeller put in, the place where she was to be beached was pointed out by Sherris to the master of the *Rhosina* and a Mr. Morgan, the superintendent engineer of the owners of the *Rhosina*. On the 1st Jan. 1884 Sherris went on board the *Rhosina*, there being a Trinity House pilot on board to navigate her to the inner harbour. Whilst being towed from the outer harbour to the place where she was to be beached, Sherris from time to time gave orders. The place from whence the *Rhosina* was being taken, and the place where it was intended to beach her, were both within the limits of the jurisdiction of the Harbour Commissioners as defined by the Falmouth Harbour Order 1870. In order to reach the place where the vessel was to be beached it was necessary to traverse a certain area of water, which was not within the jurisdiction of the harbour commissioners, but within that of the Falmouth Dock Company. On approaching the spot selected for beaching the *Rhosina*, Sherris gave orders to let go the starboard anchor. The anchor was accordingly let go, and 15 fathoms of chain being paid out, the anchor got under the ship's bottom and penetrated three of her plates.

The evidence on behalf of the plaintiffs was that the harbour master was superintending the beaching of the *Rhosina* as harbour master; that the 15 fathoms of chain were paid out in obedience to the orders of the harbour master; that at the time the order was given the vessel was smelling the ground; that the damage was solely caused by the negligence of the harbour master; and that the accident happened in waters under the authority of the defendants.

The evidence on behalf of the defendants was that Sherris went on board as a friend of the master merely to assist; that he had orders from the commissioners not to go on board vessels, but to give orders from his own tug; that at a conversation with the master on the previous day he had said that he would undertake no responsibility; that his object in ordering the anchor to be let go was to dredge and so stop the way of the ship; that the crew ought never to have paid out 15 fathoms; and that the accident happened in waters owned by the Falmouth Dock Company, and not in waters over which the Falmouth Harbour Commissioners had authority.

The following Acts of Parliament were referred to in the course of the arguments, and are material to the decision.

The Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27):

Sect. 52. The harbour master may give directions for all or any of the following purposes (that is to say), for regulating the time at which and the manner in which any vessel shall enter into or go out of, or lie in or at the harbour, dock, or pier, and within the prescribed limits, if any, and its position, mooring or unmooring, placing and removing whilst therein.

Sect. 53. The master of every vessel within the harbour or dock, or at or near the pier, or within the prescribed limits, if any, shall regulate such vessel according to the directions of the harbour master made in conformity with this and the special Act, and any master of a vessel who after notice of any such direction by the harbour master served upon him, shall not forthwith regulate such vessel according to such direction, shall be liable to a penalty not exceeding 20*l*.

Bye-laws made in pursuance of the Falmouth Harbour Order 1870, confirmed by the Pier and Harbour Orders Confirmation Act 1870 (No. 2):

3. Every vessel which enters the harbour, shall, so long as such vessel continues therein, be under the direction and control of the harbour master, and every pilot bringing a ship or vessel into the harbour, is to berth her under the directions of the harbour master, in such a position as will allow a clear passage for vessels entering or leaving the harbour. The master or other person in charge of the ship or vessel (if without a pilot) will be held responsible for the observance of this regulation. . . .

4. Every vessel shall be moored or berthed at such part of the harbour, and shall from time to time be removed from place to place to such situation or situations within the harbour, as the harbour master shall direct; and the owner or master who refuses or neglects to obey the directions of the harbour master with regard to the mooring, berthing, or subsequent removal of such vessel or craft, shall for every offence be liable to a penalty not exceeding 5*l*., and a further sum of 20*s*., after notice in writing, for every hour during which such directions are neglected.

23. All vessels, boats, and craft of every description, shall be moored and placed in such positions as the harbour master may direct; and no moorings shall be laid down without his sanction and approval in writing, and he may give directions for the removal of any vessel, boat, or craft, and for the taking up and removal of any anchors or moorings, and any person failing to obey his direction as to the mooring and placing of vessels, boats, or craft, or for the removal of any anchors or moorings, shall be liable to a penalty not exceeding 5*l*., and a further sum of 20*s*. for every day during which such directions are neglected.

By sect. 8 of the Falmouth Harbour Order 1870, confirmed by the Pier and Harbour Orders Confirmation Act 1870 (No. 2), it is provided:

The limits within which the commissioners shall have authority (which, except for the purpose of the rates to be levied under this order, shall be deemed to be the limits to which this order extends) shall include so much of the harbour of Falmouth as lies within the limits of the municipal borough of Falmouth, and is not within the limits defined by the 39th section of the Falmouth Docks Act 1859, or by the 65th section of the Falmouth Docks Act 1864 as the limits of the jurisdiction of the Falmouth Docks Company.

Sect. 39 of the Falmouth Docks Act 1859 (22 Vict. c. 16):

The limits within which the powers of the superintendent and dock master for the regulation of the docks shall be exercised, shall be the docks, tidal

harbours, entrance channel, works and property of the company, and a distance of one hundred yards in each direction therefrom respectively.

Sect. 65 of the Falmouth Docks Act 1864 (27 & 28 Vict. c. 127):

The limits within which the powers of the company's harbour master, dock master, or pier master, for the regulations of the company's harbour, dock, and pier, shall be exercised are the harbour, dock entrance, channel works, and property of the company, and a distance of one hundred yards in every direction from the same respectively.

Webster, Q.C., Dr. *Phillimore*, and *Barnes* for the plaintiffs.—Assuming the accident to have happened outside the limits of the jurisdiction of the harbour commissioners, yet, if the harbour master was acting as harbour master and was negligent, the defendants are liable. By reason of the Acts of Parliament ships are beached under the control and directions of the harbour master, and the master and crew are bound to obey his orders. If in carrying out that operation damage is occasioned by the negligence of the harbour master, the commissioners ought not to escape liability because the vessel happens to be physically outside their jurisdiction. The damage is a consequence of the harbour master's orders. Having regard to the duties of the harbour master as laid down by ss. 52 and 53 of the Harbours, Docks, and Piers Clauses Act 1847, and the bye-laws applicable to Falmouth Harbour, it is submitted that the operation of beaching comes within the scope of the harbour master's functions. If so, each particular manœuvre incidental to beaching is within his functions, and hence the manœuvre of letting go the anchor was within the scope of the harbour master's duties. Assuming the harbour master to have been a mere volunteer, he nevertheless would be liable under the circumstances of the present case.

Bucknill, on behalf of Capt. Sherris, the harbour master.—The accident was in no way caused or contributed to by the harbour master, but was wholly caused by the negligence of the crew of the *Rhosina*. His position was that of a volunteer, and the court should therefore require proof of more than ordinary negligence before holding him liable.

Cohen, Q.C. (with him *W. R. Kennedy*), for the Falmouth Harbour Commissioners.—The harbour commissioners are not necessarily liable because damage is occasioned by the orders of their servant. It is a question of fact as to what is the nature of the obligation incurred by the commissioners by reason of the harbour master's order:

Mills v. *Holton*, 2 H. & N. 14.

The order to let go the anchor was an order incidental to the navigation of the vessel from one place in the harbour to another. With that the harbour master has nothing to do, inasmuch as he has no authority to navigate vessels. It is submitted that the accident happened within the area of the dock company, and therefore outside the limits of the jurisdiction of the harbour commissioners. If so, they are not liable.

Dr. *Phillimore*, in reply, cited

Wilson v. *Brett*, 11 M. & W. 113; 12 L. J. 264, Exch.

Sir JAMES HANNEN.—As this case has taken some time, I have had an opportunity of discussing some of the points with the Elder Brethren, so that it is not now necessary to delay my decision by any further discussion with them. The first question of fact which I shall deal with is as to the place of the accident, although I do not attach the importance to it that has been attached to it during the progress of the case. So far as I have to deal with it as a matter of fact, I must say that I have come to the conclusion that the place named by the master of the *Rhosina* is not the correct place. I am of opinion that the accident happened further to the eastward. It appears to me that Mr. McKenzie's evidence on behalf of the defendants is quite convincing. He is a person whose occupation made him familiar with the harbour, and he says the *Rhosina* was brought to a standstill just in a line with himself and the shore, so that he is able to speak positively as to the place. I, however, am of opinion that, so far as jurisdiction is concerned, this question of place is quite immaterial if the harbour master was acting as harbour master. Suppose there had been no question as to his being on board the *Rhosina*. Suppose he had been—in obedience to the rules laid down by the commissioners—on his own steamer, and had said to the master of the *Rhosina*, "I require you to bring your ship to anchor at this spot," and suppose the place had happened to be just over the line where the dock company had jurisdiction, and suppose there had been a rock there on which the vessel had gone, it seems to me impossible to argue that the harbour commissioners would be entitled to say, "We are not responsible, because the orders of the harbour master brought the ship physically outside our jurisdiction." The damage would be a consequence of the orders of the harbour master acting as harbour master, and therefore the commissioners would be liable.

The question, therefore, really is whether Capt. Sherris was originally on board the *Rhosina* in his capacity of harbour master, or whether he afterwards assumed the duties of harbour master. Now, with regard to his first going on board this vessel there is unfortunately a conflict of evidence. The fact that he had already fixed the place where the vessel was to go, tends to show that he had, before he went on board the *Rhosina*, done that which properly belonged to his office of harbour master. I think he would have been strictly within his rights if he had left the matter there, and said, "I require you to beach the vessel in such and such a place; you must navigate the vessel up to that spot, and carry out all the necessary manœuvres for beaching her." I am inclined to think that that was the position in which the harbour master originally was. I think that, on the whole, he is to be believed when he states that the way in which he came on board the *Rhosina* was not that he came in the ordinary course of his business as harbour master, but that his coming arose out of a difficulty as to whether a mud pilot or a Trinity House pilot was to be engaged. I think, on the whole, the evidence shows that he did say that, if he was well enough, he would come down in the morning and give assistance. There is a conflict of evidence as to whether or not he further said that he would take no responsibility upon himself. But in the view I take of the case it is not necessary for me to decide whether he said so or not; for, even supposing he said so, if he did in fact, when on board the vessel, assume the duties of harbour master he

would be liable. It appears that he used these expressions not only to the master but also to Mr. Morgan. When he got on board, a state of things arose that might be expected from a divided command. There was the pilot, but the harbour master appears to have given directions which were acted upon.

I entirely assent to the argument addressed to me by the defendants' counsel, that it is no part of the duty of the harbour master to navigate the vessel, but it is, in my judgment, peculiarly part of the duty of the harbour master to say what berth and what moorings a vessel shall take, and what place in the harbour shall be occupied. That duty, in my judgment, applies equally to the beaching of a vessel as to the fastening her to buoys in the harbour; because it is obvious that the place where a vessel is to be beached must not be allowed to interfere with the navigation of the harbour. Now, the harbour master being on board, he appears to have gone forward and to have given a direction, the object of which was to fix the spot where the vessel was to be beached. In doing that, it appears to me that he was acting as harbour master. In my view of his duties, he would have the right of control over the place where vessels were to be anchored. Where a vessel's anchor shall be dropped for the purpose of beaching her is, in my judgment, within the duties of the harbour master. In my judgment although he had not originally, yet he then assumed the functions of harbour master in giving the order for the starboard anchor to be let go. For that act, if a negligent one, he and the harbour commissioners are liable. With regard to the propriety of the act, that is a question for the Trinity Brethren. In what I am about to say I am acting on their advice, which is that, in their judgment, what was done was grossly negligent. Even if, therefore, the harbour master is to be regarded as a volunteer, he would be personally liable. Cases have established the principle that, if a man has peculiar knowledge, his gross negligence is not excused by his being a volunteer. Now, the harbour master's functions extend all over the harbour, and he is a person who should, from his functions and special training, be fully capable, if he used his knowledge and skill properly, of giving directions for the beaching of a vessel. The case of a surgeon failing to use his surgical knowledge is a well-known example of this principle of law. Suppose a coachman gets another coachman to drive—the other coachman being in such circumstances merely a volunteer—and this second coachman drives at an excessive rate of speed and upsets the coach, he would not be excused from liability by saying he was a volunteer.

With regard to Capt. Sherris's act, what he says he intended to do was to let the anchor drop so that its crown should just touch the ground, and thus check the vessel's way, and so assist the action of the tug in getting the vessel's stem round to starboard. But I am advised that the effect of dropping the anchor, combined with the action of the tug, would be that the tug would draw the bows of the vessel in a direction to go over the anchor. That is precisely what happened, so that the reason which Capt. Sherris gives for the manœuvre condemns him I am further advised that the act of dropping the anchor at a time when it was known that the vessel was smelling the ground, and having regard to the position in which she was, was a manœuvre attended with danger. I am advised that it was such a manœuvre that no person having reasonable skill would have recourse to. The dropping an anchor for the purpose of dredging, and so checking the way of a vessel, is a delicate operation, and should be resorted to with the greatest care and safeguards, as having someone ready to stop the chain at the critical moment. Nothing of the kind was done. Capt. Sherris took no steps of the kind, but says he assumed that there would be somebody ready to stop it. I am advised that it was a manœuvre which, under the circumstances, cannot be justified, and that the harbour master ought, as a reasonable man, to have foreseen that he incurred risk of the vessel grounding on the anchor. For these reasons I am of opinion that the defendants are each and all of them liable.

Solicitors for the plaintiffs, *Ingledew, Ince,* and *Colt,* agents for *Ingledew, Ince,* and *Vachell,* of Cardiff.

Solicitors for the defendants, *Pritchard* and *Sons,* agents for *Genn* and *Nalder,* of Falmouth.

HOUSE OF LORDS.

March 21 *and* 24, 1884.

(Before the LORD CHANCELLOR (Selborne), Lords WATSON, BRAMWELL, and FITZGERALD.)

GRANT AND CO. *v.* COVERDALE, TODD, AND CO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party — Exception in charter-party — Commencement of lay days—Loading prevented by frost.

Where it is agreed by charter-party that a ship shall proceed to a certain dock and there load in the customary manner, an exception that the charterer is not to be liable for demurrage if the loading is prevented by frost is confined to such frost as prevents the actual loading on board of the goods which are in the dock ready to be loaded, and does not cover frost which prevents the shipper getting his goods to the dock.

By the terms of a charter-party a ship was to proceed to the port of loading, and there load a cargo of iron in the customary manner from the agents of the charterers.

The charter-party contained 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 . . . frost . . . or any other unavoidable accident preventing the loading." The ship arrived at the port of loading and went into dock, but after the loading had commenced a canal, through which part of the cargo had to pass in lighters in order to reach the dock, was made impassable by a severe frost, and the loading was delayed.

Held (affirming the judgment of the court below), that this delay was not within the exception in the charter-party which referred only to delays in "loading," which would not have been inter-

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

fered with by the frost if the cargo had been brought to the dock otherwise than by the canal.

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Lindley and Fry, L.JJ.), reported in 5 Asp. Mar. Law Cas. 74; 48 L. T. Rep. N.S. 701; and 11 Q. B. Div. 543, reversing a decision of Pollock, B., reported in 4 Asp. Mar. Law Cas. 528; 46 L.T. Rep. N.S. 632; and 8 Q.B. Div. 600.

The action was brought by the owners of the steamship *Mennythorpe*, the present respondents, against the charterers, the present appellants, for demurrage and damages for the detention of the ship, under circumstances which appear in the head-note.

The material portions of the charter-party were as follows:

Cargo to be supplied as fast as steamer can receive at all hatchways for loading, and to be discharged as fast as customary with steamers. Time to commence from the vessel being ready to load and unload and ten days on demurrage, over and above the said lay days, at 40*l.* per day (except in case of hands striking work, or frosts, 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).

The case was tried before Pollock, B. without a jury at the Glamorgan Summer Assizes in 1881, when all matters of fact were referred to a special referee to report.

The material facts found by him are set out fully in the report of the case before Pollock, B., who decided in favour of the defendants, but his decision was reversed by the Court of Appeal, as above mentioned, on the ground that the case was governed by the decision in *Kay* v. *Field* (47 L. T. Rep. N. S. 423; 4 Asp. Mar. Law Cas. 588; 10 Q. B. Div. 241).

From this judgment the present appeal was brought.

Webster, Q.C. and *Moulton* (*Bowen Rowlands*, Q.C. with them) appeared for the appellants, and contended that the loading was in fact prevented by frost within the meaning of the exception in the charter-party, for the forwarding of the iron from the wharf by the canal to the dock was all part of the loading and cannot be separated from it. They referred to

Kay v. *Field* (*ubi sup.*);
Adams v. *Royal Mail Steampacket Company*, 5 C.B. N.S. 492;
Hudson v. *Ede*, 3 Mar. Law Cas. O. S. 114; 18 L. T. Rep. N. S. 764; L. Rep. 3 Q. B. 412;
Fenwick v. *Schmalz*, 3 Mar. Law Cas. O. S. 64; 18 L. T. Rep. N. S. 27; L. Rep. 3 C. P. 313;
Kearon v. *Pearson*, 7 H. & N. 386; 31 L. J. 1, Ex.;
Postlethwaite v. *Freeland*, 4 Asp. Mar. Law Cas. 302; 42 L. T. Rep N. S. 845; 5 App. Cas. 599;
Tapscott v. *Balfour*, 1 Asp. Mar. Law Cas. 501; 27 L. T. Rep. N. S. 710; L. Rep. 8 C. P. 46.

The *Solicitor-General* (Sir F. Herschell, Q.C.) and *Brynmor Jones*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants, their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Selborne).—My Lords: I believe that none of your Lordships have any doubt that the order appealed from in this case ought to be affirmed. The whole question of course depends upon the terms of the charter-party, and the material terms are these: On the part of the shipowner it is agreed that the ship "shall (after discharging her cargo at Middlesborough) with all convenient speed sail and proceed to Cardiff East Bute Dock, or so near thereunto as she may safely get, and there load always afloat in the customary manner from the agents of the freighter, a full and complete cargo of about 1800 tons of iron." That is the shipowner's contract. The charterer contracts on his part: "Cargo to be supplied as fast as steamer can receive at all hatchways for loading" (I omit what relates to unloading and discharge), "time to commence from the vessel being ready to load and ten days on demurrage over and above the said lay days at 40*l.* per day (except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading)." Now the exception has reference to the loading and nothing else. It is important to observe with respect to any argument founded on the particular accidents enumerated, frosts, floods, or hands striking work, to which large general words are superadded, that those are in a printed form, and are meant therefore to suit each particular case as far as they can, but they are not introduced in contemplation of any particular case, this or any other. But the mention of "Cardiff East Bute Dock" is a part of the special terms of this particular contract, not of the printed form; it is manifest, therefore, that those words must be applied *reddendo singula singulis* according to the circumstances which may in point of fact be applicable to the particular case in the special contract. You cannot found upon anyone of them an argument of this sort, that it must of necessity have been introduced with reference to the particular place, and the particular circumstances of that place. With that observation I proceed to notice that it is not denied, and cannot be denied, that unless those words of exception according to their proper construction take this case which has happened out of the demurrage clause, the mere fact of frost or any other thing having impeded the performance of that which the charterer and not the shipowner was bound to perform will not in any degree absolve him from the consequences of keeping the ship too long. That was decided, under circumstances very similar in many respects, in the case of *Kearon* v. *Pearson* (*ubi sup.*), and decided expressly on the ground, as was pointed out I think by all the learned judges, certainly by Bramwell, B., by Wilde, B., and by Pollock, C.B., that there was no contract as to the particular place from which the cargo was to come, no contract as to the particular manner in which it was to be supplied, or how it was to be brought to the place of loading, and that therefore it could not be supposed that the parties were contracting about any such thing.

Now it really appears to me that when you observe that this exception in the contract is limited to "accidents preventing the loading," the only question is, what is the meaning of "loading," and whether this particular frost did, according to the facts, prevent the loading. There are two things to be done; the operation of loading is the particular operation in which both parties have to concur. Taken literally it is spoken of in the early part of

this charter-party as the thing which the shipowner is to do. The ship is to "proceed to Cardiff East Bute Dock," "and there load the cargo." No doubt for the purpose of loading the charterer must also do his part; he must have the cargo there to be loaded, and tender it to be put on board the ship in the usual and proper manner. Therefore the business of both parties meets and concurs in that operation of loading. When the charterer has tendered the cargo, and when the operation has proceeded to the point at which the shipowner is to take charge of it, everything after that is the shipowner's business, and everything before the commencement of the operation of loading, those things which are so essential to the operation of loading that they are conditions *sine quibus non* of that operation, everything before that is the charterer's part only. It would therefore appear to me to be most unreasonable to suppose, unless the words make it perfectly clear that the shipowner has contracted that his ship may be detained for an unlimited time on account of impediments, whatever their nature may be, to those things with which he has nothing whatever to do, which precede altogether the whole operation, which are no part whatever of it, and are perfectly distinct from it, but belong to that which is exclusively the charterer's business. He has to contract for the cargo, he has to buy the cargo, he has to convey the cargo to the place of loading and have it ready there to be put on board, and it is only when he has done those things that the duty and the obligation of the shipowner in respect of the loading arises. These words in the exception are as large as any words can be. They mention "strikes, frosts, floods, and all other unavoidable accidents preventing the loading." If, therefore, you are to carry back the loading to anything necessary to be done by the charterer in order to have the cargo ready to be loaded, no human being can tell where you are to stop. The bankruptcy, for instance, of the person with whom he has contracted for the supply of the iron, or disputes about the fulfillment of the contract, the refusal at a critical point of time to supply the iron, the neglect of the persons who ought to put it on board lighters to come down the canal for any distance, or to be brought by sea, or to put it on the railway, or bring it in any other way in which it is to be brought. All those things are of course practical impediments to the charterer having the cargo ready to be shipped at the proper place and time, but is it reasonable that the shipowner should be held to be answerable for all those things, and is that within the natural meaning of the word "loading?" Are those things any part of the operation of loading? Nothing I suppose is better established in law with regard to mercantile cases of this kind than the maxim *Causa proxima, non remota, spectatur*, and it appears to me that the fact that this particular wharf was very near the Cardiff East Bute Dock can make no difference whatever in principle if it was not the place of loading. If the cargo had to be brought from this wharf on the Glamorganshire Canal, however near it was, if it had to be brought over a passage which in point of fact was impeded, and over which it was not brought to the place of loading, to say that the wharf on the Glamorganshire Canal was upon a fair construction of the words within the place of loading, appears to me to be no more tenable than if the same thing had been said of a place a mile higher up the canal where, according to the actual contract, the persons were to supply the iron, and the owner of the iron might have been found. That really is quite enough to dispose of the whole argument.

The case of *Hudson* v. *Ede* (*ubi sup.*) was referred to. I understand that case as proceeding upon the same principles, but as containing an admission in point of fact of this distinction, that where there is, in a proved state of facts, an inevitable necessity that something should be done in order that there should be a loading at the place agreed upon, as for instance that the goods should be brought across part of a river from the only place from which they can be brought, even though that place is a considerable distance off, yet it being practically according to known mercantile usage the only place from which they can be brought to be loaded, the parties must be held to have contracted that the goods should be loaded from that place in the usual manner unless there was an unavoidable impediment. And of course, if the facts had been so about this particular wharf on the Glamorganshire Canal, if that had been the only possible place from which goods could be brought to be loaded at the East Bute Dock, that authority might have applied. But not only was that not the case, but in point of fact some parts of this very cargo not only could be, but actually were, brought up by carts to the East Bute Dock and put on board the ship, and I infer from the finding of the referee that the whole might have been done by carting, though I agree that it would have been at an expense which was preposterous and unreasonable if you are to look at the interest of the charterer. But, if the charterer has engaged that he will do a certain thing, he must of course pay the damage which arises from his not doing it, whatever the cause of his not doing it may be, whether it be his not being willing to incur an unreasonable expense or whether it be any other cause. Under these circumstances I think that your Lordships can have no hesitation in affirming the judgment appealed from, and I move your Lordships to do so with costs.

Lord WATSON.—My Lords: I am of the same opinion. This vessel had reached her destination at the East Bute Dock, and thereupon it became the duty of the charterer to load the vessel; that is to say, to bring the cargo either to the wharf or by means of lighters to the vessel's side and to put it on board her. The exception which he pleads is an exception in his favour, upon the obligation thus incumbent upon him, and it is for him to show that it extends to the case which he now maintains. I am of opinion that it cannot be so extended. I think that in this case "loading" means loading in the East Bute Dock, and I am not prepared to assent to a construction of this charter-party which would imply that the word "loading" had as many different meanings as there happened to be different merchants or manufacturers of iron rails in Cardiff who happened to select a different locality in order to store their rails for the purposes of shipment.

Lord BRAMWELL.—My Lords: I am entirely of

the same opinion. Whether, if these parties had met and talked over the possibility of frost preventing the passage of the iron from Crawshay's Wharf to this ship, or down the Glamorganshire Canal to Crawshay's Wharf, or any other conceivable difficulty arising from frost, whether in that case the shipowner would have agreed to bear the risk of it, the charterer bearing none of the risk of it, is more than I can say. It is utterly impossible to speculate upon such a thing as that. All that we can do is to deal with the particular words that they have used, as to which it is very likely that neither of them had in their minds any definite meaning. But the words to my mind are tolerably plain; they relate entirely to something which prevents the loading, that is to say, the actual putting on board of the cargo, and I think, when you couple that with the expression in the earlier part of the charter-party, that the vessel is to "proceed to the East Bute Dock or so near thereunto as she may safely get, and there load," the exemption or exception really does relate to the very act of loading. Then that being so, in the present case frost did not prevent the loading; what it did was to prevent the particular cargo which the charterer had provided from being brought to the place where the loading would not have been prevented.

Lord FITZGERALD.—My Lords: I also concur. One of the terms of the contract itself was performed: the ship arrived in due course at Cardiff East Bute Dock, the place of loading according to the contract, where she was, in the language of the contract, "to load in the customary manner from the agents of the freighter a full and complete cargo of about 1800 tons." "Cargo to be supplied as fast as steamer can receive at all hatchways for loading." "Time to commence from the vessel being ready to load." "Demurrage over and above the lay days at 40*l.* per day, except" (*inter alia*) "in case of frosts preventing the loading." There is another provision which is not undeserving of attention: "Steamer not to require to load before 9th Jan." It seems to me that the exception applies only where the accident prevents the loading at the place of loading, and not where it prevents or retards the transit or conveyance of the cargo to the place of loading. The shipper was bound to have a full cargo at the place of loading, and he took on himself all the risks consequent upon delay in transit. If he had had it there it could have been loaded within the lay days, and no case of demurrage would have arisen.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Clarke, Rawlins,* and *Co.*

Solicitors for the respondents, *Shum, Crossman, Crossman,* and *Prichard,* for *Turnbull* and *Tilly,* West Hartlepool.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 13 *and* 28, 1885.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

THE NEWBATTLE. (*a*)

ON APPEAL FROM BUTT, J.

Collision — Practice — Foreign Government — Counter-claim—Cross action—Security to answer counter-claim — Admiralty Court Act 1861 (20 *Vict. c.* 10), *s.* 34.

The Court of Admiralty has power under sect. 34 *of the Admiralty Court Act* 1861, *to stay proceedings instituted by a foreign Government in rem for collision until the Government has given security for the amount of the defendants' counter-claim.*

The words "cross action" in sect. 34 *of the Admiralty Court Act* 1861 *cover a counter-claim.*

THIS was an appeal from a decision of Butt, J., given in a motion by the plaintiffs in a damage action *in rem*, to set aside an order of the registrar staying all proceedings in the action until the plaintiffs had put in bail to answer the defendants' counter-claim.

The action arose out of a collision between the steamship *Louise Marie*, owned by the Belgian Government, and the steamship *Newbattle*. The action was instituted by the Belgian Government. The defendants counter-claimed and sought to stay the plaintiff's proceedings until bail had been given to answer their counter-claim.

At the hearing of the motion before Butt, J. the plaintiffs' counsel offered to prove on affidavit that the plaintiffs were the Belgian Government. This, however, the defendants did not require, it being assumed that the statement was correct.

At the hearing of the appeal it was alleged, on affidavit, that the *Louisa Marie* was the property of the King of the Belgians, and was used for the same purposes as his vessel the *Parlement Belge*: (cf. 4 Asp. Mar. Law Cas. 235; 42 L. T. Rep. N. S. 273.)

J. P. Aspinall, for the plaintiffs, in support of the motion.—There is no power under the Judicature Act to stay the plaintiff's action until security has been given to answer the counter-claim. The only power to do so is given by sect. 34 of the Admiralty Court Act 1861. (*b*) That section relates to cross actions only and not to counter-claims. In the case of *The Alexander* (5 Asp. Mar. Law Cas. 89; 48 L. T. Rep. N. S. 797) the court seems to have intimated that the

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

(*b*) Sect. 34 is as follows: "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, direct that the principal and the cross cause be heard at the same time and on 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 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."—ED.

word "cross action" in that section would not cover a counter-claim. [BUTT, J.—I am sure I never laid down any such doctrine. I have always been of opinion that since the Judicature Act that section applies as much to counter-claims as to cross actions. Dr. *Phillimore*, as *amicus curiæ*.—It was so decided by the Court of Appeal in a case in which I was counsel.] Secondly, the section only gives power to stay proceedings where the ship cannot be arrested. It is submitted that this must mean "cannot be physically arrested." In the present case there is nothing to prevent the *Louise Marie* being arrested, except the fact that she belongs to the Belgian Government, which fact does not prevent her arrest, but merely gives her a privilege extended to her by this court by the comity of nations. If the court chose it could order her arrest, and hence it cannot be said that she cannot be arrested. [BUTT, J.—Are there any cases in which the Court of Chancery has ordered security to be given for costs by a foreign Government suing as plaintiffs?] There are several cases in which the Court of Chancery has stayed proceedings instituted by a foreign Government until the Government has named somebody to answer a cross bill of discovery on the part of the defendants; but I have been unable to find any case where there has been a stay of proceedings until security for costs has been given by a foreign Government. [*Barnes* for defendant.—In *The Republic of Costa Rica* v. *Erlanger* (35 L. T. Rep. N. S. 19; 3 Ch. Div. 62), an order was made by the Court of Chancery against a foreign Government for security for costs. BUTT, J.—Then, Mr. Aspinall, if an order can be made for security for costs, why, by analogy, should not an order be made for security for damages?] Because the effect of such an order is to compel the foreign Government to submit to the jurisdiction in respect of a claim against them, it having been distinctly laid down in *The Parlement Belge* (4 Asp. Mar. Law Cas. 235; 42 L. T. Rep. N. S. 273; 5 P. Div. 197), and many other cases, that a foreign Government cannot be forced to submit to the jurisdiction. [BUTT, J.—The Belgian Government have already submitted to the jurisdiction by claiming, and I am now asked to prevent their prosecuting their claim until they have given security for the damage which their vessel has done.] That can only be done under sect. 34, which never was intended to cover such a case as this, but only cases where the defendants' vessel was at the bottom of the sea or continuously out of the jurisdiction.

Barnes, for the defendants, was not called upon.

BUTT, J.—In this case I am of opinion that there is no reason for interfering with the registrar's order. It is said that the plaintiffs are a foreign Government. This does not appear on the affidavit, but it has been assumed during the argument, and I now assume it to be so. Under these circumstances, the question is whether the plaintiffs, as a foreign Government, having voluntarily begun an action in this court, and arrested the defendants' ship, are entitled to go on with the action without giving security to answer the defendants' cross action or counter-claim. The Legislature has thought fit to provide that when for some reason the plaintiffs' ship cannot be arrested by the counter-claimant, security shall be given by the plaintiffs so that the defendants may secure payment of any sum they may recover. On the assumption which I have already mentioned, the plaintiffs' ship cannot be arrested, so that the case falls within sect. 34 of the Admiralty Court Act 1861. Mr. Aspinall has argued that though this case is within the words of the section, it is not within its intention. I think that it is within both the wording and the intention. It has also been contended that, assuming this to be so, the court, in its discretion, should not order the Belgian Government to give security. However, an authority from the Chancery Division has been cited that the practice has been to order foreign Governments to give security for costs. If so, by parity of reasoning, I do not see why a foreign Government should not be ordered to give security for damages. I must, therefore, dismiss this motion with costs.

From this decision the plaintiffs appealed.

Dr. *Phillimore* (with him *J. P. Aspinall*) in support of the appeal.—In the case of *The Seringapatam* (3 W. Rob. 41 n.), decided in 1848, in which the plaintiffs' vessel being lost in collision, the defendants were seeking to restrain their proceedings until they had given security to answer the defendants' cross-action. Dr. Lushington reluctantly decided that he had no such power. The remarks of that learned judge no doubt gave rise to the statute under consideration. In that case it was physically impossible that the ship could be arrested, owing to her being at the bottom of the sea, and to that state of circumstances only has the statute been applied. In the present case the *Louise Marie* is privileged from arrest by the comity of nations: (*The Parlement Belge*, *ubi sup.*) This case is not within the mischief contemplated by the statute, as there can be no reasonable doubt that the King of the Belgians will pay whatever is adjudged against him.

Barnes, for the respondents, cited

The Emperor of Brazil v. *Robinson*, 6 A. & E. 801; 1 N. & P. 817;
The King of Spain v. *Hullet*, 1 Dow. & Clark, 169;
The United States of America v. *Prioleau*, 2 H. & M. 559;
Westlake's International Law, sect. 182.

BRETT, M.R.—It seems to me that this case is clearly within the words of the Act of Parliament. What is there to take it out of the section? It is said that this order ought not to have been made on a sovereign prince. There are some orders which ought not to be made on a sovereign prince, but there are some which ought. In the case of *The Parlement Belge* (*ubi sup.*), the defendant, who was a sovereign, appeared under protest, and the question there raised was whether the Admiralty Court could seize a sovereign's ship carrying the insignia of sovereignty. It, however, has always been held that if a sovereign comes into an English court as plaintiff, and avails himself of its procedure, the court may make all proper orders against him. How far that will go I do not know. In this case, the plaintiff having instituted his action in the English Admiralty Court, an order that he shall be restrained from proceeding until he gives security to answer the defendants' counter-claim is not in my opinion an order which touches his dignity. The court may very well do that within the comity of nations. The plaintiff

has submitted himself to the jurisdiction of the court by instituting his action, and therefore the court says, "We will not exercise our jurisdiction in your favour unless you give security." What may be the result as to execution or seizing the ship afterwards is quite another thing. We, however, do not anticipate that if the judgment goes against the King of the Belgians he will not pay.

Cotton, L.J.—I think that this order was right. There was a counter-claim, and that, as it seems to me, is the same as a cross action. The section gives the court power to stay the proceedings in the principal action until the plaintiff in that action has given security to answer the defendants' cross action. It is very true that the court could not seize the ship. But all the order does is to stay the plaintiffs' proceedings until he has given security to answer the defendants' counter-claim. If a sovereign comes in and institutes a suit in an English court he submits himself to all proper orders being made upon him. It is true that the court cannot make an order to seize a sovereign's ship; but where the plaintiff has the security of the defendants' vessel it is only right that the court should put the defendants in the same position and give them an equivalent security. I am of opinion that the section applies as much to a foreign sovereign as to any other suitor. This appeal must therefore be dismissed.

Lindley, J.—I also think that the order made by Butt, J. is a proper order. The principal cause was instituted by a foreign sovereign. Thereupon the defendant counter-claims, and I have no doubt whatever that a counter-claim is a cross action within the meaning of the statute. The case is brought within the language of the section, whatever may have been the intention of the Legislature, and it also seems to me to be within the mischief. In these circumstances the judge is asked to stay the plaintiff's proceedings until he gives security for the amount of the defendants' counter-claim. This he has done. He says, "I shall stop your action unless you give security." He clearly had the power to do it, and I think he was quite right to do so. This appeal must therefore be dismissed with costs.

Appeal dismissed.

Solicitors for the plaintiff, *Clarkson, Greenwell,* and *Wyles.*

Solicitors for the defendants, *Ingledew, Ince,* and *Colt.*

Tuesday, Oct. 28, 1884.

(Before Brett, M.R., Cotton, and Lindley, L.JJ.)

The Mersey Docks and Harbour Board *v.* The Overseers of Llaneilian. (*a*)

Poor rate—Lighthouse—Tower of lighthouse used as telegraph station—Rateability—"Beneficial occupation"—The Mersey Docks Acts.

The appellants appealed against a poor rate made by the respondents in accordance with a supplemental valuation of rateable hereditaments in the parish of Llaneilian, wherein the appellants were assessed in respect of a lighthouse, telegraph station, houses, buildings, and land at Point Lynas, at the gross estimated value of 305*l.*, *and rateable value of* 244*l.*

The appellants were incorporated as a body of public trustees by the Mersey Docks and Harbour Act 1857, *and the property, powers, rights, and privileges of the Liverpool Dock Trustees, including the right to levy certain harbour and light dues on vessels entering the port of Liverpool, were vested in the appellants. The tolls were so fixed that, with the other receipts of the appellants applicable to conservancy purposes, they should not be higher than necessary for conservancy expenditure, and therefore no profits were receivable by the appellants from the occupation of any of the property.*

The lighthouse consisted of a tower and a dwelling-house adjoining. In the tower there was the light-room, which contained the flash-light with clock-work for regulating the flashes, and also a room used for working a telegraph wire which was one of the connections of the wire from Birkenhead to Holyhead, maintained by Her Majesty's Postmaster-General for the exclusive use of the appellants under an agreement. The dwelling-house adjoining the tower and the other premises were occupied by the light-keepers as servants of the appellants.

The tower of the lighthouse had no occupation value, except as a lighthouse and as a telegraph station.

The appellants contended that it was not rateable on the ground that it was not and could not be the subject of any beneficial occupation; and they contended that the premises other than the tower ought to be assessed upon their value to be let from year to year, supposing they were not used for the light or telegraph, but were disconnected therefrom, and applied to any other purposes for which they might be available.

The respondents contended that the whole of the premises ought to be assessed upon their existing value to the existing occupiers.

Held, that the tower was incapable of profitable occupation either as a lighthouse or as a telegraph station, in consequence of the restrictions as to profits contained in the Mersey Dock Acts, and was therefore not rateable; but that the adjoining premises must be assessed at a valuation which took into consideration the existence of the tower and its use as a lighthouse and telegraph station, and not at their value supposing them to be disconnected from and independent of the tower.

Judgment of Lord Coleridge, C.J. and Mathew, J. (5 *Asp. Mar. Law Cas.* 284; 51 *L. T. Rep. N. S.* 62) *varied.*

This was an appeal from a judgment of Lord Coleridge, C.J. and Mathew, J. (reported 51 L. T. Rep. N. S. 62; *ante*, p. 248) on a special case.

Bigham, Q.C. and *Carver* for the Board.—We do not argue the point that was taken in the court below upon the 430th section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), conceding that it does not apply to the present case. The appellants are expressly restricted by statute from making any profit out of their property used for conservancy purposes, and here the tower, both as a lighthouse and as a telegraph station, is so used. In neither capacity therefore is the tower rateable. There is no such distinction between the two uses of the tower as the Divisional Court has drawn. The adjoining premises must be considered without reference to the tower. [Cotton, L.J.—Supposing a collection of artisans' houses

(*a*) Reported by A. A. Hopkins, Esq., Barrister-at-Law.

to be built in the immediate neighbourhood of some great factory, are not the values of those houses enhanced by the existence of the factory?] It does not follow that they will be. They cited

The Commissioners, &c. of New Shoreham v. *The Overseers of Lancing*, 22 L. T. Rep. N. S. 434; L. Rep. 5 Q. B. 489;
The Metropolitan Board of Works v. *The Overseers of West Ham*, 23 L. T. Rep. N. S. 490; L. Rep. 6 Q. B. 193;
Mersey Docks v. *Cameron*, 12 L. T. Rep. N. S. 643; 11 H. of L. 443;

M'Intyre, Q.C. (*Marshall* with him) for the overseers.—A tenant might rent the whole of the dock estate, and the lighthouse would increase the value of that estate. The lighthouse therefore is rateable. It does not follow that property is not rateable because you cannot get a hypothetical tenant for it. They referred to

R v. *Coke*, 5 B. & C. 797.

Brett, M.R.—I cannot say that the facts are very clearly stated in the case, or that the questions asked are put in very clear terms, but it seems to me that there are two kinds of buildings upon Point Lynas, first, a tower, which is occupied by the appellants, and, secondly, certain houses close to the tower, which are also occupied by the appellants. As to the tower, it is used as a lighthouse, and for the purpose of working a telegraph wire from it, and, as far as I can see, I should say that the truth is, that it is neither used for nor useful for any other purpose. The houses, however, close to it, are used and occupied as dwelling-houses by the servants of the appellants, who are there for the purpose of working the light and the telegraph. These houses are dwelling-houses, and, with the tower, are all the property of the dock board. The use of the tower is certainly regulated by Acts of Parliament, which deals with its use both as a lighthouse and a telegraph station. Those Acts of Parliament have treated it as what is called conservancy apparatus—that is, apparatus for the safety of shipping coming into the port of Liverpool. That conservancy apparatus causes to the dock board large expenditure, and in respect of that expenditure the dock board is certainly entitled to the receipts from its other sources of income, but it seems to me plain that, upon the proper construction of the Acts of Parliament, the receipts may never legally exceed the expenditure. When, therefore, you come to consider the case of a hypothetical tenant who may be supposed to rent this tower, you must suppose him to rent it subject to the Acts of Parliament, because if he did not do so he would have no power to levy tolls at all. But if he takes it subject to the Acts of Parliament, he must also take it subject to the burden imposed thereby, which, in this case, is that he never can charge more than will be sufficient to pay the expenses. Therefore, if this is so, there never can be any profitable occupation of the tower, it has been struck with sterility by statute, and can have no beneficial value. Therefore, as far as regards the tower, both as a lighthouse and as a telegraph station, it being in both capacities subject to the Acts of Parliament, I think that in neither capacity is it rateable, for in neither capacity is it, or can it be, the subject of any beneficial occupation; and, apart from the purposes for which it is used, the case finds that it is not useful for any other purpose.

As to the dwelling-houses, it is clear, to my mind, that they are capable of beneficial occupation, for there is nothing in the Acts of Parliament to prevent the dock board letting them at any time, and a hypothetical tenant would certainly be willing to pay some rent for them. But then the question arises what is the true measure of rateable value in respect of these houses? The suggestion that in order to get at that value the revenues of the dock board are to be taken into account is contrary to every decided case. They must be treated as buildings capable of being let as dwelling-houses, but in a particular position with regard to something else. The neighbourhood must be taken into account—that is plain. A house has a greater letting value as a dwelling-house if it is in the neighbourhood of Grosvenor-square than if it is in the neighbourhood of St. Gile's; and similarly buildings which are capable of being let as workmen's cottages will certainly have a greater letting value if they are in the neighbourhood of some large factory than if they are not. In such a case, then, the existence of the factory might properly be taken into account, because it affects the letting value of the cottages. Coming, then, to the facts of this case, there is here a lighthouse and a telegraph station in existence, and to be used for those purposes in connection with the port of Liverpool. It is obvious that, as long as that state of things lasts, workmen will be wanted to work the light and the telegraph station. Where will these workmen live? It is obvious that they can most conveniently live in the adjoining houses. The hypothetical tenant, therefore, might fairly take into consideration the fact that the dock board would probably want these houses for its work people, and therefore the existence of the tower, used by the dock board as a lighthouse, and a telegraph station is a circumstance which the tenant might properly take into consideration, and in respect of which he might be willing to give a higher rent for these houses as dwelling-houses. To that extent, then, and to that extent only, as it seems to me, we may take into account the existence of the tower. This, I think, is the case put in the third question, and therefore the rateable value will be fixed at 76*l*. Some question arose as to which of the questions did put this case, but I think it is clearly the third, for, if not, there is no difference between the third and fourth questions; for the fourth question contemplates the striking of the tower out of the calculation entirely, and estimating the value of these cottages as if the tower did not exist. Therefore, it seems to me that the true answer in this case is that the tower is not to be rated, because it has no occupation value, but that the houses are to be rated at 76*l*.

Cotton, J.L.—In this case there are substantially two questions. The first two questions upon the case are in reality one, because they both relate to the tower in its two different capacities, the one as a lighthouse, the other as a telegraph station. In my opinion the telegraph station and lighthouse are upon the same footing. They are both used for conservancy purposes, and the case finds that the tower has no value except as a lighthouse or telegraph station. But being thus

used for conservancy purposes, the tower would only be capable of beneficial occupation by reason of the light dues and the use of the telegraph; but these receipts are so restricted by Acts of Parliament that they cannot be fixed so as to produce a beneficial or profitable result to the board. Any hypothetical tenant, therefore, who took these premises must take them subject to these parliamentary fetters, and the result of course would be that he could not possibly obtain any beneficial or profitable result. In my opinion, therefore, the tower cannot be rated in respect of the lighthouse and telegraph, and it is found that it has no other occupation value; therefore our answer must be in favour of the appellants.

On the second point, as to the dwelling-house, the difficulty in my mind is to understand what are the alternatives presented, but I think that the fourth alternative means that the lighthouse is to be left out of sight in the calculation altogether, but that, according to the third alternative, if the existence of the tower is to be taken into account, 76*l.* is to be the rateable value. I think the third alternative is the right one. The tower is not to be rated in respect of its use as a lighthouse or telegraph station, but as a fact it is so used, and the fact of its being so used necessitates that there shall be servants there, and the necessity of servants being there to work the tower may be taken into account in considering the value of such houses as those servants would probably occupy. Any person taking these houses would be influenced as to the amount of rent by the fact of the adjoining tower being used for such a purpose, and there would be a greater probability of the houses being occupied at a beneficial rent from the fact that this tower existed and was so used. I think therefore that the tower cannot be disregarded altogether, but must be taken into consideration to this extent, though the board is not to be rated in respect of it. The third alternative seems to put this view, and therefore the rateable value is the amount there fixed, namely 76*l.*

Lindley, L.J.—I am of the same opinion, for the same reasons. Mathew, J. seems to have seen his way to distinguish between the case of the tower used as a lighthouse, and the case of the tower used as a telegraph station. I cannot find any ground for any such distinction in the case.

Judgment varied.

Solicitors for the appellants, *Venn* and *Co.*, for *A. T. Squarey*, Liverpool.

Solicitors for the respondents, *Ravenscroft* and *Co.*, for *W. Fanning*, Amlwch.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Nov 27 *and* 28, 1884.

(Before Lord Coleridge, C.J., Mathew and Smith, JJ.)

Smith *v.* Dart and Son. (*a*)

Charter-party—Cancellation clause—Construction—Excepted perils—Ship to arrive at port of loading free of pratique on or before a certain day—Charterer's option to cancel.

The cancellation clause in a charter-party being for the benefit of the charterers, and the arrival of the ship on a date therein named being a condition precedent to the duty of the shipowner to load, the excepted perils mentioned in the charter-party have no application to such a clause, and hence, where the ship is prevented by these perils from arriving at the port of loading by the date mentioned, the charterers have the right to cancel.

In an action for breach of charter-party, an expression of opinion by the judge that a certain port is a "safe loading place" is not a misdirection if he leaves the question to the jury.

A shipowner agreed by charter-party that his vessel should "proceed to three safe loading places between C. and M., both inclusive, commencing with the easternmost place as ordered after arrival in Spain . . . . and there load from the charterer or his agent 7000 cases of oranges . . . . and being so loaded should therewith proceed, &c. . . . . (the act of God, the Queen's enemies, restraints of princes and rulers, pirates, civil commotion, riots, strikes, fire, frosts, floods, and all and every other dangers and accidents of the seas, rivers, and steam navigation of what nature or kind soever during the said voyage always mutually excepted . . . . Should the steamer not be arrived at first loading port free of pratique, and ready to load on or before the 15th Dec. next, the charterer has the option of cancelling or confirming this charter-party."

The vessel arrived at the first loading port ordered on the 13th Dec., but was not free of pratique there on or before the 15th Dec., communication with the shore being impossible in the then state of the sea and weather, whereupon on the 16th Dec. the charterers' agents gave notice to the master that they cancelled the charter-party, and refused to load the vessel.

Held, in an action by the shipowner for breach of the charter-party, that the excepted perils clause could not be read into the clause providing for the arrival of the vessel at the port free of pratique on or before a certain day, and that the charterers were therefore entitled under the said clause to cancel the charter-party.

This was an action brought by John William Smith, as owner of the steamship *Spark*, against Joseph H. Dart and Son, fruit merchants in the city of London, to recover damages which the plaintiff alleged had been incurred by him in consequence of a breach by the defendants of a charter-party made on the 14th Nov. 1881 between the plaintiff and the defendants.

(*a*) Reported by J. Smith Esq., Barrister-at-law.

The charter-party in question was, so far as material, in the following terms:

Nov. 14, 1881.

It is this day mutually agreed between Mr. John W. Smith, owner of the good steamship called the *Spark*, s.s., classed 100 A 1, of the measurement of 863 nett / 1342 gross tons or thereabouts, and Messrs. Jos. H. Dart and Son, of London, merchants, that the said steamer, being tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed proceed to three safe loading-places between Castellon and Malaga, both inclusive, commencing with easternmost place, as ordered, after arrival in Spain (steamer having liberty of taking outward cargo last voyage from any port to any port for owner's benefit), or so near thereto as she may safely get, and there load from the charterer or his agents 7000 cases of oranges and or other lawful merchandise, no oranges or other cargo to be stowed in combings of the hatches not exceeding what she can reasonably stow and carry over and above her cabin tackle, apparel, provisions, and furniture, and being so loaded, shall therewith proceed to London and Hull, or so near thereto as she may safely get, and deliver the same agreeably to bills of lading, and so end the voyage, said bills of lading to be signed at any rate of freight, but at not less than chartered rate, without prejudice to this charter-party (the act of God, the Queen's enemies, restraints of princes and rulers, pirates, civil commotion, riots, strikes, fire, frosts, floods, and all and every other dangers and accidents of the seas, rivers, and steam navigation of what nature and kind soever during the said voyage always mutually excepted). And the charterer does hereby promise and agree to load the said steamer with the said cargo at the port or ports of loading, and to receive the same at the port or ports of delivery as herein stated, and also pay freight as follows: Two shillings and sixpence, 2*s.* 6*d.* Hull, 2*s.* 6*d.* London, in full of all port charges, dues, and pilotages, &c., other goods if shipped to pay in full and fair proportion thereto. Payment whereof to become due and be made as follows: Cash for steamer's ordinary disbursements at port or ports of loading, not exceeding 100*l.* in all, to be advanced on account of freight subject to cost of insurance only, and remainder on right and true delivery of the cargo in cash. Seven weather working days (Sunday and holidays excepted) to be allowed the charterer (if not sooner despatched) for loading, and to be discharged as fast as steamer can deliver, in a safe berth as ordered by charterer. Lay-days not to commence before the 1st Dec. next should the steamer be ready to load previously, time occupied shifting ports not to count as lay-days. Should the steamer not be arrived at first loading port free of pratique and ready to load on or before the 15th Dec. next, charterer has the option of cancelling or confirming this charter-party. Ten days on demurrage at 35*l.* per day to be paid for each and every day the steamer is detained over and above the said lay days, the cargo to be taken from alongside at merchant's risk and expense, and to be properly stowed by a regular stevedore appointed by charterer or his agents at the expense and risk of the steamer, he being wholly under the direction of the master, the charge not to exceed what other steamers pay. Steamer shall not be ballasted with sand or mud, or anything prejudicial to the cargo. It is also agreed that, for security and payment of freight, dead freight, and demurrage, the said owner or master shall have an absolute lien and charge on the said cargo.

And there were also other provisions as to the employment of charterers' agents for the ship's business, the ventilation of the steamer during the homeward voyage, the giving notice of any delay occurring in the course of it, the charterers' right to tranship in consequence thereof, the announcement of the ship's arrival at her outward port of discharge, liberty to load ore or lead or other dead weight for owner's benefit at any port or ports, but no other fruit but charterers' was to be shipped, and the penalty for the non-performance of the agreement was to be the estimated amount of freight.

Pursuant to the charter-party the *Spark* proceeded to Carthagena in Spain, and there, on the 11th Dec., Messrs. Dart and Co., of Valencia, ordered her to Burriana to load, at which port she arrived on the 13th Dec, but was not free of pratique there on or before the 15th Dec., communication with the shore being impossible in the then state of the sea and weather.

On the 15th Dec. the *Spark* was compelled, by stress of weather, to quit her anchorage off Burriana, and put in at Valencia, and there, on the 16th Dec., Messrs. Dart and Co., of Valencia, made the following indorsement on the charter-party:

The within-named steamer, not being free of pratique on the 15th Dec., at first loading place, Burriana, we, agents for the charterers, hereby cancel the charter-party;

and wholly refused to load the *Spark* under the charter-party.

The *Spark* then took on board, but not under the charter-party, 4972 cases of oranges supplied by the agents of the charterers, and delivered them under bills of lading for freight, and the plaintiff now sued the defendants for 253*l.* 10*s.* damages, being the dead freight lost to him in consequence of the defendants' refusal to load the vessel under the charter-party.

The plaintiff alleged that Burriana was not a safe loading place within the meaning of the charter-party, and that the above-mentioned circumstances were a breach of the charter-party.

The defendants denied that Burriana was not a safe loading place within the meaning of the charter-party, and pleaded that, as the vessel had not arrived at her first loading port free of pratique on or before the 15th Dec., they were entitled to cancel the charter-party and refuse to load the vessel.

At the hearing of the case, Hawkins, J., after leaving to the jury the question whether Burriana was a safe loading place, at their request stated that, in his opinion, it was a safe loading place. The jury found that Burriana was a safe loading place, and that it was solely due to the severity of the weather that the vessel had not pratique on Dec. 15, and the learned judge entered judgment for the defendants in accordance therewith.

Hall, Q.C. (with him *Witt*) now moved on behalf of the plaintiff that judgment should be entered in the action for the plaintiff, or in the alternative for a new trial on the ground that the learned judge misdirected the jury. First, the learned judge misdirected the jury in telling them, when they came back into court for further directions, that in his opinion the port of Burriana was, on the evidence given, a safe loading place within the meaning of the charter-party. [Lord COLERIDGE, C.J.,—The question having been originally left to the jury in a manner to which no exception is taken, the court would scarcely be disposed to lay much stress on this point.] Secondly, the vessel arrived at Burriana on the 13th Dec., and but for the perils of the sea would have been free of pratique there on the 15th Dec. The clause excepting the dangers of the seas and navigation must be read into the clause providing for the arrival of the vessel at her first loading place free of pratique and ready to load on or before the 15th Dec., and as the vessel was prevented from fulfilling that clause solely by the dangers excepted, the charterers' option to cancel never arose, and, in pretending to cancel the charter-

party and refusing to load the vessel, they committed a breach of the agreement, for which the plaintiff is entitled to compensation. *Barker* v. *M'Andrew* (12 L. T. Rep. N. S. 459; 18 C. B. N. S. 759; 2 Mar. Law Cas. O. S. 205) was an action against a shipowner for not having his ship ready to load pursuant to the guarantee contained in a charter-party. There the shipowner agreed that the ship, being tight, staunch, and every way fitted for the voyage, should, with all convenient speed sail and proceed to the usual loading place, "guaranteed for cargo in all this month," or so near thereunto as she might safely get, and there load, &c., and an action being brought, alleging as a breach of the charter-party that the vessel was not ready to receive the agreed cargo until long after the time stipulated, the defendant pleaded that the vessel was hindered and prevented by the dangers of seas, rivers, and navigation, and it was held that the plea was a good answer to the action, and that the expression in the charter-party "guaranteed for cargo in all this month," which was admitted to mean "ready to receive cargo within the month," did not take the case out of the exception. Again, in *Harrison* v. *Garthorne* (16 L. T. Rep. N. S. 508; 1 Asp. Mar. Law Cas. 304) it was agreed by charter-party that a vessel, being tight, staunch, and strong, and every way fitted for the voyage, should with all convenient speed sail and proceed to Alexandria, to arrive within a margin of three weeks from the 15th Nov. 1870, and it was held on demurrer, the ship not having arrived within the three weeks, and an action having been brought for breach of the charter-party, that the clause excepting the dangers of the seas was a sufficient answer to the action, and that no breach of the charter-party had been committed. The same considerations apply in the present case, and the non-arrival of the vessel on or before the 15th Dec. being clearly caused by the dangers of the seas, the charterers' option to cancel did not arise, and judgment ought to be entered for the plaintiff.

Nelson (with him *Finlay*, Q.C.) for the defendants.—In *Barker* v. *M'Andrew* (*ubi sup.*) the guarantee that the vessel should be ready within a month was not, as in the present case, a condition precedent to her right to be loaded. In *Crookewit* v. *Fletcher* (1 H. & N. 893; 26 L. J. 153, Ex.) there was a charter-party in which it was stipulated that a vessel was to sail from Amsterdam on or before the 15th March next, and it was held, notwithstanding that the charter-party contained the usual clause excepting the dangers of the seas, that the writing in the margin of the words, "wind and weather permitting, with cargo or in ballast, for ship's benefit," after the words "March next," avoided the charter-party, and that the stipulation that the vessel should sail on or before March next was a condition precedent to her being loaded. There, as in this case, the action was by the shipowner against the charterer for default in loading, and the court, after a full examination of the numerous cases on the point, gave judgment in favour of the defendants. Here also the clause is perfectly unqualified, and the arrival of the ship free of pratique on or before the 15th Dec. was a condition precedent to her being loaded. As the plaintiff failed to fulfil this condition the defendants' option to cancel the charter-party arose, and the port in question having been declared to be a safe loading place within the meaning of the charter-party, judgment was rightly entered for the defendants.

Hall, Q.C. in reply.

Nov. 28.—The following judgments were delivered by the Court:—

Lord COLERIDGE, C.J.—In this case two points were raised for the consideration of the court. In the first place, it was said that the learned judge who tried the case misdirected the jury, the complaint being based not upon any alleged mistake of the learned judge in point of law, but upon the propriety of the mode in which he left to the jury the question as to whether Burriana was a safe loading place or not within the language of the charter-party. Now the charter-party provided that the plaintiff's vessel should proceed to three safe loading places between Castellon and Malaga, both inclusive, commencing with the easternmost place as ordered after arrival in Spain, and there load from the charterers or their agents certain cases of oranges, and there was also a provision later on in the agreement that, "should the steamer not be arrived at first loading port free of pratique, and ready to load on or before the 15th Dec. next, charterer has the option of cancelling or confirming this charter-party." This being the language of the charter-party, the facts of the case were, that the plaintiff's vessel having proceeded to Carthagena, and arrived there on the 11th Dec., the charterers or their agents ordered her to the port of Burriana as her first loading place. The vessel arrived at Burriana on the 13th Dec., but communication with the shore being impossible by reason of the roughness of the sea and the bad state of the weather, she was not free of pratique there on or before the 15th Dec. as required by the clause of the charter-party which I have just read. Under these circumstances the defendants claimed to be entitled by the terms of this clause to cancel the charter-party, and did so cancel it and refused to load the vessel. The plaintiff, however, contended that the defendants were not entitled to cancel the charter-party under the clause, and commenced this action against them to recover damages for the breach of the charter-party which, as he alleged, they committed by refusing to load the vessel there, and one of his contentions in the action was that Burriana was not a safe loading place within the meaning of the charter-party. It is quite plain that this must be a question for a jury, but it is said that the learned judge exceeded his province in directing the jury upon this point. After a careful examination of the summing-up of the learned judge I cannot see that there is any force in this objection, especially when the evidence given in the case is duly taken into consideration. The evidence was, that the port in question was exposed to many points of the compass, and that in consequence landing thereat was frequently impossible, but it was further shown that it was a port from which, as a matter of fact, large quantities of fruit were shipped, and therefore it was in every respect an open question for the jury as to whether this port—admittedly a port of great resort—was within the meaning of the charter-party a safe loading place. This question my learned brother submitted in due course to the jury, and I do not see how he could have done so in any better manner than he actually

did, since to my mind none could fail to understand from his summing-up that it was purely a question of degree for the decision of the jury. It is not, however, strongly urged that up to this point any misdirection had taken place, but the jury having retired, after a time returned and asked for further directions, and my learned brother again stated the evidence that, although this port was an open port, yet, nevertheless a large trade was there carried on, and that, as a matter of fact, a ship had only, on the setting in of bad weather, to bank up her fires and go out to sea, and then come back when the weather had moderated, to avert all danger, and that in his opinion the port was a safe port. It seems to me that the course he took was perfectly right, and I see nothing to complain of in anything that my learned brother did. I think that the finding that it was a safe port was, especially having regard to the way in which business was conducted in this place, correct and the finding which ought to have been arrived at, and, as far as this point is concerned, I think that the verdict ought to stand.

But a second point was taken on the part of the plaintiff. By the charter-party it was, as I have said, agreed that should the steamer not be arrived at the first loading port free of pratique and ready to load on or before a day fixed, the charterer was to have the option of cancelling or confirming the charter-party. The fact was, that the vessel arrived two days before the day so fixed, but communication with the shore being impossible on account of the state of the sea and the weather, she was not, on the day fixed, free of pratique there, and in consequence of this the charterer exercised the option of cancelling the charter-party, which he understood the clause in question gave him. It is with this that the plaintiff's second contention has to do. There is, he points out, in the earlier part of the charter-party the usual clause excepting, amongst other things, all dangers and accidents of the seas, rivers, and steam navigation of what nature and kind soever during the said voyage, and he contends that, inasmuch as the vessel was off the port before the day fixed, and was only prevented from being free of pratique there on the day fixed by reason of the dangers of the seas excepted in the clause I have mentioned, the charterers' option to cancel did not arise by reason of the operation of that clause. The question, therefore, for the decision of the court is, whether the stipulation that the vessel should be at the port in question, free of pratique and ready to load, is an independent stipulation overriding the whole of the charter-party, or whether it is subject to the operation of the clause excepting the dangers of the seas. I have come with regret to the conclusion that it is an independent stipulation, and that it overrides the whole of the charter-party, and that, as the steamer did not arrive in time to be at the port free of pratique on the day fixed, the charterer had the option of cancelling the charter-party, and on these grounds I am of opinion that this motion must be dismissed.

MATHEW, J.—I am of the same opinion. With reference to the first point raised by the plaintiff, I do not think that the question was fairly open to the observations made by counsel thereupon. It is admitted that the learned judge, in his summing-up, pointed out to the jury what the question was which they had to decide. They had heard the evidence as to what was the real amount of danger to which the ship was exposed at the place of loading, and the direction of the learned judge in point of law was perfectly correct, viz., that it was for them to say whether the vessel would have been exposed in taking in a cargo there to an unreasonable amount of danger. But the learned counsel for the plaintiff argued that the learned judge dictated to the jury what their finding should be. In my opinion, at the very utmost it can only be said that he told them what his own opinion was. I hope the time has not yet come when a judge is to be prevented from giving his own opinion on any question that a jury may have to decide, so long as at the same time he directs them properly what the law upon that question is.

I now pass to the second point raised on behalf of the plaintiff. With reference to that I must say that at first I was inclined to agree with the learned counsel for the plaintiff that the clause in the charter-party containing the well-known exceptions of, amongst other things, the dangers of the seas was applicable to and governed the later clause, providing that the vessel was to be at the first loading port free of pratique on or before the 15th Dec. On further consideration, it appears to me that, if this restriction is to be put on the clause in question, the effect would practically be to wipe it out of the charter-party altogether. At any rate, the clause would read, "Should the steamer not be arrived at first loading port free of pratique, and ready to load on or before the 15th Dec., then unless she is prevented from doing so by the perils of the seas, the charterers are to have the option of cancelling the charter-party." The clause in question, however, is a clause which imposes on the shipowner no obligation, the enforcement of which could be made the subject of an action, and is therefore distinguishable from another class of clauses, by which a shipowner undertakes to do something which if he fails to do he will be liable to an action for breaking his contract. It is a clause, too, in a contract for the shipment of fruit, and it was clearly therefore important to the charterer that there should be as little delay as possible, and it must be remembered that contracts with reference to produce of this description frequently contain such stipulations as this, that the charterer is to be free of all responsibility under the charter-party unless the vessel arrives within a certain time. Shipowners enter into their contracts on the presumption that all will go well, and must abide by the result if they neglect to leave a sufficient margin in their calculation. In this particular case it is clear that the shipowner ran his calculations too fine, and the consequence was, that the vessel had to put back to Valencia, and was therefore not at the port of loading free of pratique and ready to load on the day stipulated. The charterer, then, in my opinion, had the option of cancelling the charter-party, and rightly exercised it. I think, therefore, for these reasons, that this motion must be dismissed with costs.

SMITH, J.—I am of the same opinion, and quite

agree with my Lord and my learned brother, and for my part I have no sympathy with the plaintiff, although of course the case must be decided without sympathy with either the plaintiff or the defendant. As to the first point I am unable to see that there is any objection to be made to the summing-up of the learned judge who tried the case. When the jury returned to ask for further directions he again told them what the law on the subject was, in a manner to which no exception is taken, but he also told them what his own opinion on the point was. If such an objection as this is to be considered a good ground for obtaining a new trial, judges will be absolutely debarred from saying anything to a jury to assist them. No one says that the learned judge laid down to them any principle that was not good law. All he did was to say to them, "If you ask me what my opinion is, I should say that it is a safe port." To my mind it is quite impossible to say that a new trial ought to be granted on such a ground as this.

Now we come to the other point, which is, in my opinion, a point of considerable importance. The question is, whether the exception of the perils and dangers of the seas applies only to the contract of voyage or to the whole of the charter-party. I am of opinion that it applies only to the contract of voyage. It is conceded that no action would have lain against the shipowner for failing to arrive at the port in due time by reason of the operation of what I may call the "perils" clause. That clause therefore is put into the charter-party in favour of the shipowner, because otherwise, if that clause had not been inserted, the shipowner would have been bound to have his vessel at the port of loading in due time, and, if she had gone to the bottom on the way, or in any other manner failed to reach the specified place at the specified time, he would have been liable to an action for damages for breach of his contract. That clause therefore is a clause inserted in favour of the shipowner. The "option" clause, on the contrary, is a clause inserted in favour of the charterer. His position is, that he insists in his contract on having the ship there by the 15th Dec. free of pratique. What is the meaning of this? It means that he has goods of a perishable nature at risk, and that he insists on having the ship ready to load them by a certain day. The shipowner agrees, and enters into a contract that it shall be so. He does not indeed contract to be there in any event so as to be liable for damages if he fails to be there, but he does contract that if he is not there the charterer is to have the option of cancelling the charter-party. I do not think that it is possible for us to limit this stipulation, for I think that the "perils" clause applies only to the contract of voyage and not to the whole charter-party. I agree, therefore, with my Lord and my learned brother that there ought not to be a new trial in this case, and that this motion ought to be dismissed.

Motion dismissed with costs.

Solicitors for the plaintiff, *Pritchard* and *Sons*, for *A. M. Jackson*, Kingston-upon-Hull.

Solicitors for the defendants, *Lowless* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Wednesday, Feb. 25, 1885.

(Before BUTT, J.)

THE NASMYTH. (*a*)

Salvage—Agreement—Crew—Costs.

Where the master of a salving ship agreed to render salvage services for a reasonable named sum, the Court refused, in a salvage action instituted by some of the crew, to depart from the terms of the agreement upon the ground that the crew were not actual parties to it, holding that such a course would be prejudicial to the interests of commerce.

In a salvage action the mere offer by the defendants to pay a sum named in an agreement made prior to the rendering of the services without payment into court is a bad plea.

Where seamen instituted a salvage action in the High Court, and sought to dispute an agreement made by their master for 200*l., which the court upheld, apportioning* 40*l. to the crew, the plaintiffs were condemned in the costs of the action.*

THIS was a salvage action instituted by certain of the officers and crew of the steamship *Wordsworth* against the steamship *Nasmyth*, for services rendered to the *Nasmyth*, her cargo and crew.

The *Nasmyth*, a steamship of 1303 tons nett, was on the 16th Sept. 1884, in lat. 46° 17′ N. and long. 30° 3′ W., bound on a voyage from New York to Liverpool, when her screw shaft broke. She was then put under sail, and proceeded on her course for twelve days, until the 28th Sept. when she fell in with the steamship *Wordsworth* off Cape Clear. In answer to a signal from the *Nasmyth*, "Can you tow me?" the *Wordsworth*, a steamship of 1303 tons register, bound on a voyage from Newcastle, in New Brunswick, to Sharpness Point, bore down upon the *Nasmyth*. At this time the wind was a strong breeze from S.W. and the weather moderate. The *Wordsworth*, after having been made fast, began to tow at about 9 a.m., and at about 5 p.m. on the same day reached Queenstown harbour, where the *Nasmyth* was anchored, and the *Wordsworth* resumed her voyage. It was alleged on behalf of the plaintiffs that the said services entailed considerable extra labour, and that the two ships rolled heavily during the towage.

The defendants by their statement of defence pleaded that, on the *Wordsworth* falling in with the *Nasmyth*, and prior to the commencement of the services, the following agreement was entered into between the masters of the two vessels:

Stamp 6d.

S.S. *Nasmyth*.
Sept. 27, 1884.

I hereby agree to pay to the owners of the s.s. *Wordsworth* the sum of two hundred pounds on his anchoring us safe in Queenstown, for assistance rendered. Agreed by both masters. Providing that the towage is completed without any hitch, otherwise to be settled by arbitration.

(Signed) F. W. RENDLE, Master s.s. *Nasmyth*.
(Signed) A. C. COOKE, Master s.s. *Wordsworth*.

Paragraph 8 of the statement of defence was as follows:

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

The defendants were always ready and willing to pay, and before action tendered to the owners of the *Wordsworth*, on behalf of all concerned, the said agreed sum of 200*l*.

The defendants had not paid the 200*l*. into court.

The value of the *Nasmyth* was 23,000*l*., of her cargo 28,875*l*., and of her freight 790*l*. The value of the *Wordsworth* was 30,000*l*., of her cargo 4000*l*., and of her freight 1600*l*.

Deane, for the plaintiffs, submitted that his clients were not bound by the agreement, and that, having regard to the value of the property salved, and the extra labour entailed by the services, they were entitled to a substantial reward.

Sir *Walter Phillimore*, for the defendants, *contra*.—The court should uphold the agreement. The services merely consisted in towing the *Nasmyth* for about eight hours in fine weather. The plaintiffs in this action will be amply rewarded by their share of the agreed sum of 200*l*. The defendants were always ready to pay the 200*l*., and hence this action was unnecessary. Even assuming it to be necessary it should not have been instituted in the High Court, and the plaintiffs should be condemned in costs:

The Agamemnon, 48 L. T. Rep. N. S. 880; 5 Asp. Mar. Law Cas. 92.

BUTT, J.—The plea raised in paragraph 8 of the statement of defence is, to my mind, a bad plea. It is only an offer without a payment of money into court. The agreement appears to me to be a fair agreement made in a *bonâ fide* way, and one by which the master of the *Wordsworth* had power to bind his owners and crew. I think it would be extremely prejudicial to the maritime interests of this country if, after an agreement of this kind had been entered into, any one of the seamen might be at liberty to come into this court and upset it on the ground that he was not a party to it. I shall uphold the agreement for 200*l*., which, in my opinion, is reasonable in amount, and apportion 140*l*. to the owners, 20*l*. to the master, and 40*l*. to the crew according to their ratings, and I condemn the plaintiffs in the costs of the action. Even if it were necessary to bring the action at all, which I very much doubt, it ought to have been brought in the County Court and not here.

Solicitors for the plaintiffs, *Rollit* and *Sons*, Hull.

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

Monday, March 2, 1885.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE RIPON. (*a*)

Collision—Lights—Rules for the navigation of the river Humber—Regulations for Preventing Collisions at Sea—Compulsory pilotage—Merchant Shipping Act 1873 (36 *&* 37 *Vict. c.* 85), *s.* 17.

The rules for the navigation of the river Humber are regulations "contained in or made under the Merchant Shipping Acts 1854 *to* 1873," *within the meaning of sect.* 17 *of the Merchant Shipping Act* 1873; *and hence their infringement will be visited with the result prescribed by that Act.*

Where a two-masted vessel, in pursuance of art. 2 *of the Rules for the Navigation of the River Humber, carries a second riding light astern in the position therein prescribed, and continues to carry such light after she gets under way and is crossing the river for the purpose of warning vessels going up or coming down of her position, the carrying of such a light at such a height above the deck is a breach of the regulations, and cannot be deemed to be the showing of a stern light within the meaning of art.* 11, *or warranted by the "special circumstances of the case," within art.* 24.

The exhibition of an improper light, or the failure to carry the regulation lights, is not excused by the fact that it was done in obedience to the orders of a compulsory pilot, it being the duty of the master to see that the lights required by the regulations are carried.

THIS was an action *in rem* instituted by the owners of the steamship *Essex* against the steamship *Ripon* to recover compensation for damages occasioned by a collision between the two vessels on the 16th Nov. 1884, in the river Humber.

The defendants counter-claimed.

It was alleged on behalf of the plaintiffs that the *Essex*, a steamship of 943 tons register, laden with a general cargo, left the Humber Dock entrance at Hull shortly before 5.50 a.m. on the 16th Nov. 1884, bound on a voyage from Hull to Copenhagen. After leaving the dock entrance the head of the *Essex* was put down river, her regulation lights were duly exhibited, and her speed through the water was about three to three and a half knots an hour. In these circumstances, as the *Eseex* was proceeding down river well to the southward of mid-channel, two white lights were observed about half-a-mile distant, and about two points on the port bow which were taken to be those of a vessel at anchor. Immediately afterwards the green and masthead lights of a tug with towing lights came into view at about the same distance and bearing about a point on the port bow. The *Essex*, finding the tug did not port her helm, but kept her course across the river, eased her engines and hard-a-starboarded her helm so as to pass under the stern of the tug and any craft that she might have in tow, although no lights of any such tow were visible to indicate the fact. After the *Essex* had altered two to three points to port, her engines were stopped, her whistle was blown, and the tug was hailed whether she had anything in tow, and if so to tow ahead. The *Essex* was then hailed to go full speed astern, but in fact her engines had been put full speed astern, and at the same moment it was observed by those on board the *Essex* that the tug had a vessel in tow, which proved to be the *Ripon*, which was the vessel showing the two white lights. At the same time the *Ripon's* green light also came in view and the vessels collided, the *Essex* striking with her stem the starboard side of the *Ripon*.

The plaintiffs (*inter alia*) charged the defendants with improperly exhibiting two white lights.

It was alleged on behalf of the defendants that the *Ripon*, a steamship of 1567 tons and 300 feet long, bound on a voyage from Alexandria to Hull,

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

was on the 16th Nov. 1884 in the Humber in charge of a Trinity pilot by compulsion of law. At about 4.15 a.m. the *Ripon*, which had anchored on the previous evening in Hull Roads, got under way in charge of the pilot, and in tow of the steam-tug *Pioneer* and dropped up the river head on to the flood tide until she was off the Victoria Dock piers, and waited in readiness to enter the Victoria Dock, but at 5.15 a.m. the *Ripon* was hailed by the dock officials that she was to proceed up the river to the Albert Dock. The *Ripon* and the *Pioneer* had their respective masthead and regulation side lights duly exhibited, and the *Pioneer* also carried her proper towing light. The *Ripon* also had a bright light exhibited aft from the main peak at a height of forty feet from the deck, which she carried as an after-riding light, and which by the pilot's orders was kept hoisted. On receiving orders to go to the Albert Dock it was necessary for the *Ripon* to bring her head up the river, and for that purpose the helm of the *Ripon* was put hard-a-port, and with the aid of the tug she was turned round till she was athwart the river heading to the southward. When the *Ripon* was in this position, lying with her engines stopped, those on board the *Ripon* observed at a distance of about half-a-mile and about a beam on her starboard side the masthead and red light of the *Essex* coming down the river. The helm of the *Ripon* was kept hard-a-port, and the *Pioneer* continued to tow her head round as before, and when the *Essex* was about two cables' length distant the whistle of the *Pioneer* was sounded, and the *Essex* was hailed, but the *Essex* continued to come on, and when at a short distance from the *Ripon* opened her green light and then with her stem struck the *Ripon* on her starboard side.

The Regulations for the Navigation of the River Humber 1882 were made by Order in Council under the provisions of the Merchant Shipping Act Amendment Act 1862, sect. 32 of which is as follows:

In the case of any harbour, river, or other inland navigation for which such rules are not, and cannot be, made by or under the authority of any local Act, it shall be lawful for Her Majesty in Council, upon application from the harbour trust or body corporate, if any, owning or exercising jurisdiction upon the waters of such harbour, river, or inland navigation, or if there is no such harbour trust or body corporate, upon application from persons interested in the navigation of such waters, to make rules concerning lights or signals to be carried, and concerning the steps for avoiding collision to be taken by vessel navigating such waters; and such rules when so made shall, so far as regards vessels navigating such waters, have the same effect as if they were regulations contained in table (C.) in the schedule to this Act, notwithstanding anything in this Act or in the schedule thereto contained.

Rules for the Navigation of the River Humber:

1. All vessels, as well sailing vessels as steamers (except dumb craft), while navigating or anchored or moored in the river Humber or in any part of the river Trent at or below Gainsborough, shall observe and obey the "Regulations for Preventing Collisions at Sea" set out in the first schedule annexed to an Order in Council made in pursuance of the Merchant Shipping Act Amendment Act 1862 and dated the 14th day of August 1879, and as varied and amended by an Order in Council made as aforesaid, and dated the 26th day of August 1881, with the exceptions and additions made in the following rules.

2. All vessels as aforesaid when at anchor in the river Humber or in any part of the river Ouse at or below Goole, or in any part of the river Trent at or below Gainsborough, shall, between sunset and sunrise, instead of the light prescribed by article 8 of the said regulations, exhibit from the forestay or otherwise near the bow of the vessel, where it can best be seen, 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 at a distance of at least one mile; and, in addition thereto, all vessels having two or more masts shall exhibit another white light at double the height of the bow light at the main or mizen peak, or the boom topping lift, or other positions near the stern where it can best be seen.

Regulations for Preventing Collisions at Sea:

Art. 11. 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.

Art. 24. Nothing in these rules shall exonerate any ship, or the owner or the 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 the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

At the hearing it was admitted by the plaintiffs' counsel that the *Essex* was to blame in not having a good look-out.

Hall, Q.C. (with him *Bucknill*) for the plaintiffs.—It being admitted that the *Ripon* was carrying, in addition to her masthead and side lights, her after-riding light, it is clear that she has infringed art. 2 of the Regulations, which provides that a steamship when under way shall only carry the masthead and side lights. The Humber Rules being "made under the Merchant Shipping Acts 1854 to 1873," viz., under the provisions of the Merchant Shipping Act Amendment Act 1862, s. 32, disobedience to them is to be visited with the consequences that result from an infringement of the Regulations for Preventing Collisions at Sea, as provided by sect. 17 of the Merchant Shipping Act 1873:

The Lady Downshire, 39 L. T. Rep. N. S. 236; 4 P. Div. 26; 4 Asp. Mar. Law Cas. 25.

Therefore, unless it is shown by the defendants that the infringement could not possibly have contributed to the collision, the *Ripon* should be pronounced to blame:

The Fanny M. Carvill, 32 L. T. Rep. N. S. 646; L. Rep. 4 A. & E. 417; 2 Asp. Mar. Law Cas. 478.

As a matter of fact, it is submitted that the exhibition of the after-riding light did conduce to the collision, inasmuch as it led those on board the *Essex* to assume that the *Ripon* was a vessel at anchor, exhibiting the two white lights required by art. 2 of the Humber Rules.

Sir *Walter Phillimore* (with him *W. R. Kennedy*), for the defendants, *contra*.—It is submitted that the exhibition of the after-riding light was a precaution required by the provisions of art. 24 of the Regulations. The *Ripon* was some 300 feet long, and was lying athwart the river, which are "special circumstances" requiring the exhibition of an after-light. Art. 11 requires a stern light to be shown to an overtaking vessel, and it is submitted that this riding-light should be looked upon as a stern light to warn other vessels that the *Ripon* was lying athwart the river. If, under art. 24, the "ordinary practice of seamen or the special circumstances of the case" required the exhibition of a light aft, it is immaterial where that light was carried, and for what purpose it had previously been used. Pilotage being compulsory in the Humber (*The Rigborgs Minde*, 5 Asp. Mar. Law Cas. 123; 49 L. T. Rep. N. S.

232; 8 P. Div. 132), and this light having been left where it was by the orders of the pilot, the defendants are exempt from liability:

The Argo, Swa. 462.

Hall, Q.C. in reply.—The exhibition of this after light at a height of about forty feet cannot be said to be required by the "special circumstances of the case," nor can it possibly be looked upon as the stern light contemplated by art. 11 of the Regulations:

The Pacific, 51 L. T. Rep. N. S. 127; 9 P. Div. 124; 53 L. J. 67, P. D. & A.; 5 Asp. Mar. Law Cas. 263.

The exhibition of a light prohibited by the Regulations is not within the province of the pilot, and, even should he order it to be exhibited, it is the duty of the master to see that the regulations as to lights are obeyed.

BUTT, J.—In this case it is now admitted that the *Essex* was in fault. I think there can be no doubt that, taking the evidence of the witnesses called on behalf of the *Essex*, and taking also the admitted fact that the *Ripon* had, as well as the riding light at her peak and a masthead light at the foremast head, a green light burning, a better look-out on the *Essex* would have earlier discovered the real state of things, and so the collision might have been avoided. It is therefore impossible to justify the conduct of those in charge of the *Essex* for not having stopped their engines before they did. It is stated by the master of the *Essex*, and one or two witnesses, that the tug's lights were seen. The tug had two white lights at her masthead, which, under ordinary circumstances, indicates that the tug has something in tow. It is true that the master says that tugs not unfrequently do move about in the dock without taking the towing lights down, although they may have nothing to tow. He says he thought the tug was towing a barge without a light astern, and in that state of things he passed down within a short distance. Common prudence ought to have induced him to stop his engines before he did. It does him no injustice if I say that he did not stop his engines until his vessel had altered two and a half points under a starboard helm. The *Essex* is therefore to blame.

Then the question arises, am I also bound to find the *Ripon* to blame? I have come to the conclusion that I am. I do it with regret, not only from the view I take of the case, but also from that taken by the gentlemen who assist me, who, so far as they are concerned, would have no hesitation in finding the *Essex* alone to blame. I, however, feel constrained to hold that the *Ripon* was to blame for breach of the rules. There is a statutory rule which I have no hesitation in holding is one that comes within the purview of sect. 17 of the Merchant Shipping Act 1873, and it is this: "The lights mentioned in the following articles, and no other, shall be carried in all weathers from sunset to sunrise." It is clear that the *Ripon* whilst under way was not exhibiting the lights required by the rule, but was carrying a white globe light at her peak. If that rule had stood alone, she ought never to have carried that light whilst under way. The question is whether, in keeping the light there, she did infringe the rule. It is said she did not, because she was turning in the river, and it was no more than a prudent thing, within the requirements of art. 24, to keep the light where it was. It was a thing, if I understand the defendants' contention, required by the "ordinary practice of seamen, or by the special circumstances of the case." I am by no means prepared to say that the special circumstances of the case would not warrant the *Ripon* showing a light at her stern; but what light? I do not think art. 24 would warrant her in keeping up a riding light in the place prescribed for vessels at anchor. The utmost I think that art. 24 would do would be to allow such a light to be shown over the stern in the position in which vessels being overtaken by another vessel may exhibit a light. I refer to the position of the light contemplated by art. 11 of the Regulations. I think the practice of seamen, or the special circumstances of the case, might have justified the *Ripon* in showing a light astern, but not in carrying the light where she did at a height of forty feet from the deck. She therefore has infringed the statutory rule.

Can it be said that that infringement could not by possibility have contributed to the collision? It seems to me impossible to say that it could not have contributed. It is said by the plaintiffs that they were misled by the lights, thinking they indicated a vessel at anchor, and that therefore their attention was given to other matters and not directed to the *Ripon*. In these circumstances it is impossible to say that the breach of the rule might not have conduced to the collision. I myself go a step further, and have no hesitation in finding as a fact that those on the *Essex* did mistake the two lights for the lights of a vessel at anchor. I, however, do not think that the lights were so misleading as to justify me in finding the *Ripon* to blame apart from the statute. Therefore, the *Essex* being guilty of improper navigation, and the *Ripon* having committed a breach of the rules, the only remaining question is, whether the *Ripon* is exempt from liability by the fact that she was being navigated by a pilot in waters where pilotage is compulsory. It was the pilot who directed the riding light to be left where it was, but even so I hold that I cannot excuse the owners of this ship on that ground. Once assume the light to be carried where it was, that was an infringement of the statutory rule, and I think that the officers in charge of the ship ought not to allow a pilot to have lights improperly carried in contravention of the rules. Suppose the pilot from some freak reversed the side lights, and put the red light where the green ought to be and the green light in the place of the red, could the officers excuse themselves for allowing that? A master must consider for himself whether the law in respect to lights is being infringed, and if it is he must take steps to stop such infringement. I think that is a matter which, being the subject of a statutory rule, the master is bound to look to himself. Not having done so, his owners are liable, and therefore I pronounce both these vessels to blame.

Solicitors for the plaintiffs, *Rollit* and *Sons*, Hull.

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

March 3 *and* 11, 1885.

(Before BUTT, J.)

THE SOLIS. (*a*)

Practice—Action in rem—Writ of summons—Service—Default action—Rules of the Supreme Court, Order IX., rr. 11, 12; *Order XIII., rr.* 12, 13; *Order XLVII., r.* 14.

In an action in rem, service of the writ of summons by a solicitor or his clerk, and not by the marshal, is a valid service.

THIS was a default action *in rem*, brought by James Gibb Ross, the assignee of a bottomry bond, to enforce payment of the bond against the Spanish ship *Solis*, her cargo and freight.

The action was instituted on the 17th Nov. 1884, and the writ of summons was served on the *Solis* by the plaintiff's solicitors' clerk on the same day. No appearance was entered by or on behalf of the defendants. A statement of claim was filed.

March 3.—The plaintiff now sought to obtain judgment by default, and, in accordance with the provisions of Order XIII., r. 12, had filed the following affidavit of service of the writ of summons:

I, John Bruce, clerk with Messrs. Hill, Dickinson, Lightbound, and Dickinson, of 10, Water-street, in the city of Liverpool, the solicitors in this action for the above-named plaintiff, make oath and say:

1. That I did, on the 17th day of Nov., in the year of our Lord 1884, serve the writ in this action by affixing the same for a short time on the mainmast of the steamship or vessel *Solis*, the vessel proceeded against, which was at the time of service lying in the Langton Dock, Liverpool, and, on taking off the same, by leaving a true copy thereof affixed in its place. The original of the said writ is hereto annexed and marked with the letter A.

2. The said writ appeared to me to have been regularly issued out of and under the seal of the Admiralty Division of Her Majesty's High Court of Justice, Liverpool District Registry, at the suit of the above-named plaintiff against the above-named defandants, and dated the 17th day of Nov. 1884 and marked 1884 (Letter R) No. 3030, to which said writ and copy a memorandum was subscribed and due indorsements were made thereon, pursuant to the statute in that case made and provided.

3. And I further say that I did afterwards, on Monday, the 17th day of Nov. 1884, indorse on the said writ the day of the week and month of such service, according to the statute in that case made and provided.

Upon the plaintiff applying for judgment, BUTT, J. remarked that, according to the affidavit of service, the writ of summons had been served by the solicitor's clerk and not by the marshal, whereas he required to be satisfied that in actions *in rem* it was not necessary for the writ to be served by the marshal before he would give judgment for the plaintiff. The case was accordingly adjourned, in order that the plaintiff's counsel might investigate the practice on this point.

March 11.—*Bucknill* for the plaintiff.—Service of the writ by the solicitor's clerk is in accordance with the existing practice of the court. The present practice is regulated by the Rules of the Supreme Court 1883. Order LXVII., r. 14, requires that the service of an instrument by the marshal is to be verified by his certificate, whereas service by a solicitor or his clerk is to be verified by affidavit. Inasmuch as Order XIII., r. 12, which is applicable to default actions *in rem*, speaks of the "filing by the plaintiff of a proper affidavit of service," the inference is that those who framed the rules contemplated the writ of summons being served by a person other than the marshal. The fact that Order IX., r. 11, specifically requires the warrant of arrest to be served by the marshal, whereas Order IX., r. 12 is silent as to what person is to serve the writ of summons, is another argument in favour of the plaintiff's contention that it was never intended that the writ should be served by the marshal. Again, the form of indorsement on a writ of summons *in rem*, given in appendix A. form 11, is "this writ was served by X. Y.," and no mention is made of the marshal. The old practice can have no bearing on the question, owing to the fact that actions *in rem* are now commenced by writ of summons, which was not the practice in this court prior to the Judicature Act, such actions being then commenced by the warrant, which acted both as writ and warrant. Reference was made to the Admiralty Court Rules 1859 and Clerke's Praxis, tits. 1, 2, 3.

BUTT, J.—I am much obliged for the assistance given me by Mr. Bucknill in enabling me to determine the question raised in this case. The registrar and the marshal have also furnished me with some valuable information as to what the practice has been, and from this it is quite clear that before the separation of the warrant and the citation it was the practice for the marshal to effect service of both. They were then, as I understand, one instrument. The present difficulty arises from the abrogation of the old practice without any express provision in the new rules as to how the writs of summons, which are substituted for the citations, are to be served. The practice since this abrogation has been to allow the solicitor or his clerk to effect the service of the writ of summons, on some person other than the marshal. What occurs to me is that it is very doubtful whether a man has the right to go on board a ship and nail a writ of summons upon the mast, or whether that is not a trespass. Possibly that question may some day arise in more striking and more momentous form than it does now. I shall not anticipate that difficulty to-day.

There is, however, one thing which raises a strong inference in favour of the present practice, and that is the language of the new Rules of Court. Thus it is quite clear, because it is the subject of a special rule, that, where an instrument is served by the marshal, the verification of its service is not required by affidavit, but by the marshal's certificate. I refer to Order LXVII., r. 14, which provides that "The service of any instrument by the marshal shall be verified by his certificate. The service of any instrument by a solicitor, his clerk, or agent, shall be verified by an affidavit." That rule draws a broad distinction between a marshal's certificate and the solicitor's affidavit. Then rule 12 of Order XIII. provides that "In all actions not by the rules of this order otherwise specially provided for, in case the party served with the writ, or in Admiralty actions *in rem* the defendant"—the words are varied, because in Admiralty actions the defendant is not served—"does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, and if the writ is not specially indorsed under Order III., r. 6, of a

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

statement of claim, the action may proceed as if such party had appeared, subject, as to actions where an account is claimed, to the provisions of Order XV." Therefore, that rule distinctly contemplates the service of the writ of summons being verified by affidavit. If the marshal were required to serve the writ, then, in my view, no affidavit would be necessary, because his certificate would, by Order LXVII., r. 14, be enough. Therefore, when Order XIII., r. 12, requires an affidavit of service, it would appear that that rule contemplates service by a solicitor or his clerk; and therefore, although I have very serious doubts on this point, which have not been altogether removed, I shall not interfere with the existing practice, and I treat this as a proper affidavit, and I make a decree as prayed by the plaintiffs.

Solicitors for plaintiffs, *Gregory, Rowcliffes, and Co.*

Dec. 9 and 10, 1884.

(Before BUTT, J.)

THE PALERMO. (*a*)

Limitation of liability—Foreign ship—Crew space—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *s.* 21, *sub-sect.* 4—*Merchant Shipping Act* 1867 (30 & 31 *Vict. c.* 124), *s.* 9.

The owners of a foreign ship, in limiting their liability, are entitled to the deductions in respect of crew space allowed by the Merchant Shipping Act 1854, *s.* 21, *sub-sect.* 4, *if the provisions of that Act have been complied with, although there has been no compliance with the requirements of the Merchant Shipping Act* 1867, *s.* 9.

THIS was an action for limitation of liability by the owners of the German steamship *Palermo* in respect of damages occasioned by a collision with the steamship *Rivoli* on the 25th Aug. 1883.

In consequence of the collision, the *Rivoli* sank and five of her crew were drowned. In a damage action instituted against the *Palermo*, the Court pronounced both vessels to blame for the collision. The plaintiffs, by their statement of claim, alleged as follows:

4. The plaintiffs admit that the said collision was partly caused by the improper navigation of the *Palermo*.

5. The claims of all the personal representatives of those of the crew of the *Rivoli* who were drowned against the plaintiffs have been satisfied.

6. The collision occurred without the actual fault or privity of the plaintiffs.

7. The plaintiffs believe that the claims against them in respect of the loss of the *Rivoli*, and of the goods, merchandise, and personal effects on board her at the time of the collision will exceed the aggregate amount of 8*l.* per ton on the gross tonnage of the *Palermo*, as calculated for the purpose of limitation of liability.

8. The gross tonnage of the *Palermo*, after due allowance in respect of closed-in spaces on the upper deck solely appropriated to the berthing of the crew was 1048·06 tons. (*b*)

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

(*b*) The sole question in this case was whether the owners of the foreign ship, in calculating the tonnage of their ship for the purposes of limiting their liability, were entitled to deduct crew space, and no question seems to have been raised as to the quantum of the deduction; but it will be noticed that, upon the figures given, the gross capacity of the ship—viz., 1071·94 tons, less crew space, viz., 27·93 tons—equals 1044·01 tons, and not 1048·06 tons as claimed.—ED.

9. The sum of 8*l.* per ton on the gross tonnage of the *Palermo*, after deducting crew space as aforesaid, is 8384*l.* 9*s.* 8*d.*, and the plaintiffs are willing and hereby offer to give bail or to pay into court, as shall be ordered, the said sum of 8384*l.* 9*s.* 8*d.*, together with interest thereon at the rate of 4 per cent. per annum from the date of collision until payment.

The defendants, by their statement of defence denied paragraphs 8 and 9 of the statement of claim; and in paragraph 2 alleged as follows:

2. The defendants allege that the tonnage of the *Palermo*, on which the amount of her statutory liability is to be calculated, exceeds 1048·06 tons, and deny that the plaintiffs are entitled to the allowance in the 8th paragraph mentioned.

The register of the *Palermo* was as follows:

	Cubic metres.		British tons.
(*a.*) Space below measurement deck	2877·6	=	1015·70
(*b.*) Space above measurement deck:			
One house	115·2	=	40·67
One forecastle	44·1	=	15·57
Gross capacity of the ship	3036·9	=	1071·94
Less:			
1. Space for crew	67·9	=	27·93
2. Engine, boiler, & bunkers	575·4	=	203·12
Nett capacity	2393·6	=	840·89

In an affidavit filed by the plaintiffs and verifying the above register, it was alleged that the space for the crew consists, and did consist, at the time of the collision, of permanently closed-in spaces on the upper deck solely appropriated to the berthing of the crew.

The following Acts of Parliament were referred to and are material to the decision:—

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

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 1; 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, and 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 accommodation of passengers or crew, 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.

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 con-

strued with and as part of the Merchant Shipping Act 1854 hereinafter termed the principal Act.

Sect. 54, after specifying the liability of British and foreign shipowners, proceeds as follows:

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 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 (17 & 18 Vict. c. 104) 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 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 ships shall be deemed to be of the tonnage denoted in their certificates of registry and other papers, in the same manner, to the same extent, and for the 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.

The 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.

Sect. 9. The following rules shall be observed with regard 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 feet measured on the deck or floor of such place.

(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 4 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 register 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."

Stubbs, for the plaintiffs, after stating the facts, was stopped by the Court.

Bucknill, for the defendants, *contra*.—It is submitted that the plaintiffs are not entitled to any deduction on account of crew space. In *The Franconia* (4 Asp. Mar. Law Cas. 1; 39 L. T. Rep. N. S. 57; 3 P. Div. 164) it was decided that foreign shipowners were not entitled to such deduction unless the provisions of the Merchant Shipping Act of 1867 had been complied with. According to sect. 9, sub-sect. 5, no deduction in respect of crew space is to be allowed "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.'" That has not been done, and therefore the plaintiffs are not entitled to the deduction claimed. The three Acts of 1854, 1862, and 1867 are to be read together, and in *The Franconia* (*ubi sup.*) it was held that a foreign ship which is claiming the benefit of these deductions must comply with the provisions applicable to British ships. The Act of 1867 was intended to be a restriction on the Act of 1854, and such seems to have been the opinion of Brett, L.J. in *The Franconia* (*ubi sup.*). If so, it is necessary that the provisions of this later Act should be complied with before parties can limit their liability under the later or the earlier Act.

Stubbs for the plaintiffs.—The plaintiffs are claiming the deductions allowed by the Act of 1854, and not those allowed by the Act of 1867. There having been a compliance with the provisions of the Act of 1854, the plaintiffs are entitled to the deductions allowed by that Act. It is submitted that the Court of Appeal did not decide in *The Franconia* that foreign shipowners were entitled to no deductions in respect of crew space, unless the Act of 1867 had been complied with. The Act of 1867 was not intended to restrict the earlier Act, but rather to enlarge it. In *The Franconia* James, L.J., at p. 176 (3 P. Div.), speaks of the Act of 1867 as giving "a further allowance for the space occupied by the sailors' berths." We are not claiming that further allowance, but only the allowance allowed by the Act of 1854, with the provisions of which we have complied.

Cur. adv. vult.

Dec. 10.—BUTT, J.—This is an action for limitation of liability which was argued before me yesterday. The question raised is, whether the plaintiffs, who are the owners of a German vessel, are entitled in limiting their liability to deduct from the ship's registered tonnage certain spaces which were inclosed for the use of the crew. It was contended on behalf of the plaintiffs that they were entitled to deduction in respect of such spaces under the provisions of the Merchant Shipping Act 1854. It was contended by the other side that in the case of *The Franconia* (*ubi sup.*) the Court of Appeal had in effect decided that the owners of a foreign ship were not entitled to these deductions unless there had been a compliance with the provisions of a later Act of Parliament, the Merchant Shipping Act of 1867. I have carefully considered the case of *The Franconia* (*ubi sup.*), and I do not understand it to so decide. As I understand it, the Court of Appeal decided this—not that the *Franconia*, which was a German ship, was not entitled to deduct from her registered tonnage the spaces allotted to the crew which were inclosed and above the upper deck, those being the deductions contemplated by the Act of 1854, but that she was not entitled to further deductions under the later Act of 1867 unless she had complied in all respects with the requirements of that Act. Mr. Bucknill has contended, on behalf of the defendants, that the later Act is to be read as one with the Merchant Shipping Act of 1854, and that therefore a decision on the later Act was a decision on the earlier Act. I am by no means of that opinion. I think that the owners of this German ship are perfectly entitled to make the deductions under the Act of 1854, and so I hold. I therefore pronounce for the limitation of liability as prayed by the plaintiffs.

Solicitors for the plaintiffs, *Stokes, Saunders*, and *Stokes*.

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

HOUSE OF LORDS.

July 25, 29, 31, *and Aug.* 1, 1844.

(Before Lords BLACKBURN, WATSON, and FITZGERALD.)

CAYZER, IRVINE, AND CO. *v.* THE CARRON COMPANY: THE MARGARET. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Contributory negligence—Thames Conservancy Rule No. 23—*Merchant Shipping Act* 1873 (36 *&* 37 *Vict. c.* 85), *s.* 17.

Where a ship has infringed a rule of navigation which is not within sect. 17 *of the Merchant Shipping Act* 1873 *she will not be held to blame for a subsequent collision, unless it be shown that her disobedience was one of the proximate causes of such collision.*

Rule 23 *of the Thames Conservancy Rules provides that "steam-vessels navigating against the tide shall, before rounding" certain points, "ease their engines and wait until any other vessels rounding the point with the tide have passed clear." A collision occurred off Blackwall Point, between a vessel proceeding down the river against the tide and one coming up the river with the tide. It was alleged that the former had not complied with the above rule.*

Held (reversing the judgment of the court below), that, assuming that she had disobeyed the rule. she could not be held to blame for the collision, it appearing to have been caused solely by the reckless navigation of the other vessel, and such rule not being one of the regulations for preventing collisions within the meaning of sect. 17 *of the Merchant Shipping Act* 1873.

The above rule is not confined to the seaward side of a line drawn from Blackwall Point to Bow Creek.

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Baggallay and Lindley, L.JJ.), reported in 5 Asp. Mar. Law Cas. 204, 50 L. T. Rep. N. S. 447, and 9 P. Div. 47, who had varied a judgment of the judge of the Admiralty Division (Butt, J.) reported in 5 Asp. Mar. Law Cas. 137, 49 L. T. Rep. N. S. 332, and 8 P. Div. 126.

The action was brought by the appellants, as owners of the steamship *Clan Sinclair*, against the respondents, as owners of the steamship *Margaret*, in respect of a collision which occurred off Blackwall Point, in the river Thames, under circumstances which are fully set out in the reports in the Courts below.

Butt, J. held that the collision had been caused by the reckless navigation of the *Margaret*, and pronounced her solely to blame, but on appeal the Court of Appeal held the *Clan Sinclair* partly to blame, in not having complied with rule 23 of the Thames Conservancy Rules (set out above), by easing her engines and waiting, and varied the decree accordingly.

The owners of the *Clan Sinclair* appealed.

C. Russell, Q.C., *Myburgh*, Q.C., and *Hollams* appeared for the appellants;

Webster, Q.C., *C. Hall*, Q.C., and Dr. *Phillimore*, for the respondents.

The arguments appear sufficiently from the judgments of their Lordships.

(*a*) Reported by C. E. MALDEN Esq., Barrister-at-Law.

The following cases were cited or referred to:

The Libra, 4 Asp. Mar. Law Cas. 439; 6 P. Div. 139; 45 L. T. Rep. N. S. 161;
The Khedive, 5 App. Cas. 876; 43 L. T. Rep. N. S. 610; 4 Asp. Mar. Law Cas. 360;
The Magnet, 2 Asp. Mar. Law Cas. 478; L. Rep. 4 A. & E. 417; 32 L. T. Rep. N. S. 129;
The Fanny M. Carvill, 2 Asp. Mar. Law Cas. 565; 32 L. T. Rep. N. S. 646;
The Harton, 9 P. Div. 44; 5 Asp. Mar. Law Cas. 213; 50 L. T. Rep. N. S. 370;
The Sisters, 3 Asp. Mar. Law Cas. 122; 1 P. Div. 117; 34 L. T. Rep. N. S. 338;
Dowell v. *General Steam Navigation Company*, 5 E. & B. 185;
Davies v. *Mann*, 10 M. and W. 546;
Tuff v. *Warman*, 5 C. B. N. S. 573;
Spaight v. *Tedcastle*, 4 Asp. Mar. Law. Cas. 406; 6 App. Cas. 217; 44 L. T. Rep. N. S. 589;
Radley v. *London and North-Western Railway Company*, 1 App. Cas. 754; 35 L. T. Rep. N. S. 637;
Hay v. *Le Neve*, 2 Shaw Sc. App. 395;
The Fenham, L. Rep. 3 P. C. 212; 3 Mar. Law Cas. O. S. 484; L. T. Rep. N. S. 329.

Myburgh, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships gave judgment as follows:—

Lord BLACKBURN.—My Lords: In this case it appears to me that the principal point to which we have to direct our attention is the question of fact which is involved, for I think that it is more a question of fact than a question of law. The first thing to be considered is, what is the meaning of rule 23 of the rules and bye-laws for the regulation of the navigation of the river Thames? That rule is: "Steam-vessels navigating against the tide, shall, before rounding the following points" (including Blackwall Point) "ease their engines, and wait until any other vessels rounding the point with the tide have passed clear." I may first of all mention a point not raised below, on which the House did not require that any answer should be given by the respondents' counsel; it was this: The rules for the navigation of the Thames down to rule 16 apply, some of them to all the navigation of the river, and some only to navigation of particular parts of the river. After rule 16 there comes this heading: "Bye-laws and rules regulating the navigation of the river between Yantlet Creek and a line drawn from Blackwall Point to Bow Creek." Now, the effect of that heading no doubt is to say that the rules which immediately follow it, including rule 23, *primâ facie* are only to apply to vessels when they are lower down than the line drawn from Blackwell Point to Bow Creek. A glance at the chart will show that this line would exclude the greater part of what, in my view of the words, is to be taken as being Blackwall Point, which the vessels are to round. The *Clan Sinclair*, although rounding Blackwall Point, never was in fact to the seaward side of the line from Blackwall Point to Bow Creek, and therefore it was contended that rule 23 did not apply; but I think that it is impossible to put that construction upon rule 23, which in express terms says that "steam-vessels navigating against the tide shall, before rounding Blackwell Point, ease their engines and wait;" and it is impossible, I think, to construe that as meaning that Blackwell Point is to be excluded from that rule. It is a clumsy mode of expressing the intention of the framers of the rule, and they should have provided against it; but they must have intended that the heading

confining these rules to below a line drawn from Blackwall Point to Bow Creek shall not apply to rule 23. That necessarily follows, because it is regarding the rounding of Blackwall Point. Now, as to what is the "rounding of Blackwall Point," we have, I believe, all the information that can be given to us by the production of the Ordnance Survey and the Admiralty chart. Upon looking at them we find that, after you have come down the river and have passed the Isle of Dogs, you come where the course of the Thames is north with a little west in it, in a line nearly straight, which may be called a reach. Then the course of the Thames curves round, and at a point below a line drawn to Bow Creek—somewhat below the point—the course of the Thames is south with a little east in it, in what may also be called a reach; so that these two parts of the river are very nearly parallel, and any vessel that comes from one reach of the river into the other must necessarily go round the intervening land. That intervening land is called "Blackwall Point," and I cannot doubt that it is the Blackwell Point to which the rule refers.

Now what is meant by that rule is a question upon which I would not willingly unnecessarily pronounce a decisive opinion, because, before doing so, one should have more definite ideas than I possess as to what were the objects which made those who framed the rule give that direction. I think it is quite plain that they were of opinion, and I have no doubt quite rightly, that the vessels taking a sweep round those points would be in some danger if they both kept up their full speed there, and, for reasons which are no doubt quite sufficient, they thought that the right course for preventing that danger was to direct that when a vessel was going against the tide, and was aware that another vessel was coming round the point, it should not go on at full speed so that both should turn at once, but that it should "ease and wait," whatever that easing and waiting meant. But the first question as to which there appears to be some difference of language, if not of opinion, between the judge of the Admiralty Court and the Master of the Rolls, is as to what is the meaning of "before rounding" and "ease their engines and wait until any other vessels rounding the point with the tide have passed clear." Now, I cannot bring myself to think that Butt, J. is right in the opinion which he seems to have expressed that the meaning of the rule was that the vessels which were in the straight, or nearly straight, reach before they began to turn at all, were to wait there until all vessels that might be seen across the land coming in the opposite direction had passed. The effect of that, I think, would be very inconvenient, and would be to hamper the navigation very much, because all the vessels going down the river would remain gathered together in one spot until all that were coming up had passed by; and it is not the meaning which I should have attributed to the words. I think the fair meaning would be pretty nearly what is expressed by Brett, M.R., that you begin to round when there is so much curving and rounding of the river that the vessels going down the river begin to turn round the land, they then begin to round, and when they have come so far down that the curving of the river ceases, and they begin to go straight, they then cease to round. How much the rounding is to be before the rule applies is a question which I would rather not decide until it becomes necessary to do so, but, in my view of the rule here, it would certainly be somewhere before you come as far down as the spot where the *Zephyr* was lying, and I should be inclined to think that it was not necessary to begin so early as the point opposite the mouth of the dock out of which the *Clan Sinclair* came. Now, taking that to be the case, it would follow that, when you are applying the rule to this case of the *Clan Sinclair* coming down there, there was a part of its course during which the rule would apply to it, and when it should consequently have eased and waited. What the easing and waiting means is a matter of some difficulty. The fact that the vessel is to ease and wait when it is aware that another steamer is coming round with the tide implies that those who have the charge of the vessel are to keep a better look-out than would generally be cast upon them by law, because they are to look out and see whether any other steamers are coming up with the tide on the other side, although those steamers are then so far away that you only see them across the land, and that consequently it would not be necessary to notice them or to report them except for this rule. That is only material as getting rid of the question whether the blame, if blame there was, was entirely that of the pilot. I pass by that, only observing that that is the effect of it. Now, when we have got that we have to see whether there was blame on the part of the *Clan Sinclair*, identifying for this purpose and for the reason I have already indicated the *Clan Sinclair* with its pilot, and not identifying it with the pilot any more. Upon that it does seem that there was a time, I will not say how long before, when the pilot of the *Clan Sinclair*, if the look-out had reported it to him, would have been made aware that there was another vessel coming up with the tide, which, if they both went on their course, would meet when rounding. That being so, there was a time earlier than the time at which he knew it when he ought to have eased and waited, whatever that may mean. I think myself that the question how much he would ease and wait is a question of degree. I think that there can be no doubt that the rule cannot be construed in such a way as to require those who have the management of the ship to stop and cast anchor. It cannot mean that they are to ease their engines and cease to work them so far as to lose all control over the ship. That would be an absurd conclusion, and it would be productive of very great danger. They must keep some way on in order to have some control over the ship.

There does seem to be a difference between Butt, J. and Brett, M.R. as to what degree of control they should keep. I think that Butt, J. and his nautical assessors, acting upon the idea that there might be some way beyond what was necessary to keep mere steerage way, to keep the control, came to the conclusion that you might give a reasonable latitude to the rule, and that you were not to say that it was transgressed unless it was exceeded considerably. Brett, M.R. seems to have laid it down as his view that it was necessary, in order that the rule should be observed at all, to construe it very strictly, and that therefore the speed necessary to keep control

was not to be exceeded at all. I do not know which of the two is the right view. I myself should be rather more inclined to agree with Butt, J. than with Brett, M.R., but I do not think it necessary to decide that point. But either way there would be a question of degree. It may be that the speed here may have been greater than it ought to have been; but then comes the question. If the rule was transgressed in that way, was that transgression of the rule the cause of the accident? Now, upon that I think there is no difference between the rules of law and the rules of Admiralty to this extent, that where anyone transgresses a navigation rule, whether it is a statutory rule, or whether it is a rule that is imposed by common sense, what may be called the common law, and thereby an accident happens of which that transgression is the cause he is to blame, and those who are injured by the accident, if they themselves are not parties causing the accident, may recover, both in law and in Admiralty. If the accident is a purely inevitable accident, not occasioned by the fault of either party, then the common law and Admiralty equally say that the loss shall lie where it falls—each party shall bear his own loss. Where the cause of the accident is the fault of one party, and one party only, Admiralty and common law both agree in saying that that one party who is to blame shall bear the whole damage of the other. When the cause of the accident is the fault of both, each party being guilty of blame which causes the accident, there is a difference between the rule of Admiralty and the rule of common law. The rule of common law says, as each occasioned the accident, neither shall recover at all, and it shall be just like an inevitable accident, the loss shall lie where it falls. Admiralty says, on the contrary, that if both contributed to the loss it shall be brought into hotchpot and divided between the two. Until the case of *Hay* v. *Le Neve* (2 Shaw Sc. App. 395), which has been referred to in the argument, there was a question in the Admiralty Court whether you were not to apportion it according to the degree in which they were to blame; but now it is, I think, quite settled, and there is no dispute about it, that the rule of the Admiralty is, that if there is blame causing the accident on both sides, they are to divide the loss equally, just as the rule of law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls. Now, upon that there must always be a question whether or not, if there is neglect of any rule, that neglect is the cause of the accident. Upon that the case of *The Khedive* (5 App. Cas. 876; 4 Asp. Mar. Law Cas. 360; 43 L. T. Rep. N. S. 610) has been referred to. In that case the rule was a rule by statute, and it was enacted positively that if the rule was not obeyed the breach of it should in itself be deemed to be blame. When the statute imposing the rule is short of that, it is necessary to see that the actual transgression has been in fact the cause of the accident to some extent, it does not matter how much, and that is matter of proof. I do not think that the judges of the Court of Appeal for a moment meant to say that the transgression of this rule was in itself sufficient unless it was an occasion of the accident; but I do think that, their attention not having been called to it, they forgot that, though there was a transgression of a rule, it was not necessarily the cause of the accident which afterwards happened. If they had had their attention called to that, they would surely have mentioned something about it in their judgments. It seems to me to be the most important and difficult point in the case. They would surely have given some ground for saying that they thought the transgression of the *Clan Sinclair*, which, in their view, was slight, was the cause of the accident, but they did not say a syllable about it. It seems to have been hastily assumed that, if there was blame attributable to the *Clan Sinclair*, it must have been the cause of the accident. Not one word is said about it. There was no attempt to say that any authorities show that the rules of the Court of Admiralty and the rules of a court of law as to what amounts to being a fault occasioning the accident differ in the slightest degree. The nature of the thing of course requires that in applying those rules you should look to what the nature of the accident is and to what the neglect is. If it is two ships, they are to be governed by the same rules of law and evidence as if it were two carts in the street; but when you come to apply that you must remember that a ship is a thing which cannot be stopped in an instant like a cart, and cannot be moved from one side to the other like a cart, and when you have to look out for miles instead of for yards, the application of the rules becomes very different. Upon that the only case which I am aware of which seems to point to there being any difference between the rules of law and of Admiralty is the case of *The Fenham* (L. Rep. 3 P. C. 212; 3 Mar. Law Cas. O. S. 484; 23 L. T. Rep. N. S. 329), where there are expressions used by Lord Romilly, M.R. which seem to point to his having thought that the burden should lie upon those who infringed a rule to show that the infringement was not the cause of the collision. Now, I am not at all sure that, with proper qualifications and restrictions, that would not be a fair enough rule when applied to such a thing as a collision at night where there was an absence of lights. But when you come to apply it to such a case as this, and say that it is shown that the *Clan Sinclair* and the *Clan Sinclair's* people are blameable for this loss (and it is only for this purpose that I am identifying the *Clan Sinclair* with the pilot) because the *Clan Sinclair* ought to have eased sooner and waited sooner, I do not think it at all follows, as a reasonable rule of evidence, to say that that occasioned the accident unless the *Clan Sinclair* can show that it did not. [His Lordship then went through the evidence at some length, coming to the conclusion that the *Margaret* was to blame, and continued:]

Then it is said that the collision was owing to the *Clan Sinclair* being where she was. Undoubtedly in one sense that is so. If the *Clan Sinclair* had been some hundred yards higher up the river, the fact which made it a matter of rashness for the *Margaret* to run where it did would not have existed. But that is not a sufficient ground for saying that the fact of the *Clan Sinclair* being there was the cause of the accident. The *Clan Sinclair* would not have been there at the time when she was there if it had not been that that vessel did not ease and wait so soon, perhaps, as it ought to have done; but that was not the cause of the accident,

which was caused by the *Margaret*, knowing where the *Clan Sinclair* was, attempting to pass between it and the *Zephyr* where there was not sufficient room. Then Mr. Webster endeavoured to argue this, and he laid down a very sound, general rule: he said that, where there are regulations to be observed in the management of vessels at sea, the one vessel has always a right to suppose that the other vessel will do its duty, and do all that ought to be done. That is very true, and where it applies I think it is a very sound rule to go by. But in this case the *Margaret* had not the slightest ground for believing that the *Clan Sinclair* would stop, or rather had stopped, four or five hundred yards higher up the river; the *Margaret* saw perfectly well where the *Clan Sinclair* was, and had a right to suppose that it would ease and stop as soon as it saw a vessel coming with the tide; and in fact the *Clan Sinclair*, the moment it saw the *Margaret*, did ease and stop, even to the extent of backing, so that there seems to be some ground for saying that that vessel's head did go a little to the north. But that was not sufficient to occasion the *Margaret* to run between the *Clan Sinclair* and the *Zephyr* as it did, when the space was too narrow for the vessel to go through. As far as I can perceive, it would have been perfectly safe and perfectly unobjectionable for the *Margaret* to have run up keeping nearer the south shore, and keeping the *Clan Sinclair* on its starboard side, That being so, it does not seem to me, in point of fact, to have been made out at all that the neglect of duty in not obeying rule 23 (assuming as I do without deciding it that the conclusion to which the Court of Appeal came, that there had been a neglect of duty, was right) was a part of the fault which occasioned the accident; and that being so, it is a case in which the *Margaret*, and the *Margaret* alone, being to blame, the *Margaret*, and the *Margaret* alone, must pay the damage. The consequence is that, taking that view, I move your Lordships to reverse the decision of the Court of Appeal, and to restore the decision of the Court of Admiralty.

Lord WATSON.—My Lords: I concur in the judgment which has been moved by my noble and learned friend. I think that it is matter of regret that these sailing rules for the direction of persons navigating the river Thames should be expressed in language so ambiguous. I refer, of course, only to rule 23, which is before the House in the present case, and to the heading of the section in which the rule occurs. I agree with Lord Blackburn that one part of rule 23 is express, namely, that part which applies to both sides of Blackwall Point, both to vessels coming down the river against the tide and vessels going up the river against the tide. I do not think that, when the terms of a rule are sufficiently explicit, they can be controlled or overborne by a mere heading such as we have to deal with here. No doubt the heading is a part of the rules, and as part of the rules a part also of the statutory enactment; still, though it may be called in aid when the enactments are ambiguous, I do not think that it can in any case be intended to override the plain terms of a rule like this. The more ambiguous portions of the rule are those which refer to "rounding the points," in this case rounding the Blackwall Point. These have given rise to a good deal of discussion, and I can only say that, in my opinion, it is unfortunate that mariners have for their guide doubtful words, to which learned authorities have attached widely different meanings. I do not think that any of the definitions which have been given are very satisfactory. They come very much to this that "rounding the point" is "rounding the point," but what "the point" is, and at what particular part of the river the "rounding" is to commence, and where it is to end, these definitions leave almost as much in the dark as the rule itself. The other expression occurring in rule 23 which gives rise to some difficulty, is the expression "ease and wait." That obviously does not mean that the vessel shall stop; it means that she shall proceed at a slower pace than ordinary, with, however, a particular object, that of remaining, I think, upon one side of the apex of the point until the vessel approaching with the tide either shall have reached the point or shall have passed her; it is immaterial to decide which for the purposes of this case. Now, in the courts below different views were taken as to the import of the rule, and what constitutes strict compliance with it. In both courts it was held by the men of skill who advised the judges that the *Clan Sinclair* might have gone slower than she did without losing the control of the vessel; that is to say, keeping her steerage way; but, while the judge of the Admiralty Court was of opinion that her excess of speed over the quantum necessary to keep her going was not such as to constitute any departure from the rule, the learned judges of the Court of Appeal took a different view, and held that it was. Had I to decide the question at this moment, my inclination would be to concur with Butt, J.; but I do not think it necessary for the purposes of the case to decide that point, and for this reason: this rule has no statutory sanction attached to it; it has no provision analogous to that in the Merchant Shipping Act of 1873, which declares a mere departure from the statutory rules to constitute fault—fault from which the offending vessel can only excuse herself by showing that "the circumstances of the case made departure from the regulation necessary." But in the case of a rule like this mere disobedience is not enough; it must be shown that it constituted fault in this sense, that it was actively contributing to the collision. To express it otherwise, it must be shown to have been one of the proximate causes of the collision.

Some observations which appear to me to have an important bearing upon the facts of the present case were made by Lord Selborne, L.C. in *Spaight* v. *Tedcastle* (6 App. Cas. 217; 4 Asp. Mar. Law Cas. 406; 44 L. T. Rep. N. S. 589). His Lordship there said: "When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiff cannot be established merely by showing that if those in charge of the ship had in some earlier stage of navigation taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred." I read these words to explain the pith of the sentence which follows, and is in these terms: "Such an omission ought not to be regarded as contributory negligence if it might, in the circumstances which actually hap-

pened, have been unattended with danger but for the defendant's fault, and if it had no proper connection as a cause with the damage which followed as its effect." Now, I assume in favour of the respondents that the *Clan Sinclair* violated rule No. 23. In my opinion that rule must be regarded as prescribing to shipmasters and others navigating the Thames certain reasonable precautions to be taken by all who have occasion to be in that part of the river near Blackwall Point, and I think that a vessel which is proved to have disregarded these precautions must accept the onus of showing that the neglect of them did not contribute to any collision or damage which may have occurred at the time or subsequently. But then I am of opinion that the *Clan Sinclair* has discharged herself of that onus. I think it is made out by the evidence that nothing was either done or left undone by those who were navigating her which can reasonably be regarded as one of the causes of the collision. The result was to bring the vessel a good deal further down the Thames than she ought to have been; and if that conduct on the part of the *Clan Sinclair* had been such as to place the *Margaret* at this disadvantage, to throw her into difficulties, and make it doubtful what course she ought to pursue, then I could hardly have excused the *Clan Sinclair* from contribution to the collision in the present case. But the fact was not so. The new and wrong position into which I assume the *Clan Sinclair* had been brought by her neglect of the rule was perfectly apparent to those on board the *Margaret*, apparent for a considerable time and a considerable distance, for a time and distance of such an appreciable extent that they could, with ordinary care, have avoided the collision which ensued; and the ground of my judgment is shortly this, that, assuming there was a breach of the rule and culpable neglect at the time, yet the consequences of that neglect could have been avoided by ordinary care on the part of the *Margaret*. Instead of exhibiting ordinary care and prudence, those in charge of that vessel adopted a reckless course of navigation, which is described so well in the opinions of some of the judges in the court below, that I need say nothing further about it. On these grounds I concur in the judgment proposed.

Lord FITZGERALD.—My Lords: I also concur, and I assume for the purposes of the case that upon the true interpretation of rule 23 the *Clan Sinclair* had begun to round Blackwall Point at the time when her captain saw the masts of the *Margaret* over the headland. The words of the rule are "before rounding," and I assume that she had begun to round at that time, and then what she was to do was "to ease her engines." I do not mean to say that the obligation to ease depended at all upon her seeing the other vessel. As a rule of sound navigation three things are imposed upon a vessel navigating against the tide. First, when she comes to either of these headlands she must ease. No interpretation has been given to the word "ease" either in argument or in evidence, but it is known to anyone who goes on steam-vessels that a usual precaution of a steam-vessel, in order to keep her completely handy and under command, is to ease her. She is then bound, when approaching any of these headlands, to ease in the first instance. I assume that there are some of those headlands where you cannot see across, and where you may be met by a vessel passing the point immediately. But when a vessel navigating against the tide is aware that a vessel is rounding the point with the tide, coming in the opposite direction, she is to wait until that vessel has passed her. I assume that to be the true construction of the rule, and that the obligation upon the *Clan Sinclair* was to ease, and that when the pilot or the captain became aware that the *Margaret* was coming in the opposite direction with the tide he ought to have waited in that eased condition and completely under command; and if it was for me to form an opinion as to whether there had been a substantial compliance by the *Clan Sinclair* with the requirements of this rule, I confess that I should be inclined to adopt the view of the judge of the Admiralty Court, and not to adopt the too rigid rule laid down by the Court of Appeal. But that is not necessary upon the present occasion; for upon the main question, assuming rule 23 to apply exactly, and that there was not a sufficient compliance with it by the *Clan Sinclair* in this respect, that her speed might have been less than it actually was, yet that leaves untouched the main question in the cause, which is one of fact, Did the breach of the rule by the *Clan Sinclair* contribute to the collision? It is said that if she had rigidly complied with the rule, if her speed had been more reduced, she would not have been abreast of the *Zephyr*, and that if she had not been abreast of the *Zephyr* the calamity would not have arisen. In one respect that may be quite correct, but it is no answer to the inquiry upon which we are at present She was seen by the *Margaret* a considerable time beforehand under steam. It was seen by the *Margaret* that she was alongside and abreast of the *Zephyr*, The *Margaret* was then a sufficient distance off, and was completely under control. She had two courses open to her free from danger—one to pass to the north of the *Zephyr*, and the second to pass to the south of the *Clan Sinclair*. She did not do either, but for some reason (and possibly, if I were at liberty to speculate, it was the reason which is found in these collision cases too often to be the cause of the calamity, namely, taking the short cut in place of adopting a more safe course) she adopted another, and a dangerous and reckless course, namely, that of passing between the *Clan Sinclair* and the *Zephyr*, and under such circumstances as to make it extremely probable that she would come into collision with one or the other. She came into collision with the *Clan Sinclair*. The latter had immediately before, and when it became apparent that there was danger, used all the precautions in her power to avoid it, but her efforts were ineffectual. I conceive it to be clear, upon a true view of the case, that the *Clan Sinclair* did not cause the calamity either wholly or in part, and that therefore the decision of the Court of Admiralty was correct.

Order appealed against reversed. Judgment of the Admiralty Division restored. Cause remitted to the Admiralty Division.

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

Solicitors for the respondents, *Freshfields* and *Williams.*

Nov. 4, 6, 7, *and Dec.* 5, 1884.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN, BRAMWELL, and FITZGERALD.)

SEWELL *v.* BURDICK. (*a*)

Bill of lading—Indorsement by way of security—Transfer of property—Bills of Lading Act 18 *&* 19 *Vict. c.* 111)—*Liability for freight.*

A shipper of goods, who has indorsed a bill of lading in blank and delivered it to the indorsee simply by way of security for money advanced, does not thereby pass the property in the goods to the indorsee, so as to transfer to him all liabilities in respect of them within the meaning of sect. 1 *of the Bills of Lading Act* (18 *&* 19 *Vict. c.* 111). *Consequently the indorsee cannot be made liable in an action by the shipowner for freight.*

Judgment of the Court of Appeal reversed.

Lickbarrow *v.* Mason (1 *Sm. L. C.* 753, 8*th ed.*) *discussed and explained.*

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R. and Baggallay, L.J., Bowen, L.J. dissenting), reported in 5 Asp. Mar. Law Cas, 298, 51 L. T. Rep. N. S. 453, and 13 Q. B. Div. 159, reversing a judgment of Field, J. (reported in 5 Asp. Mar. Law Cas. 79, 48 L. T. Rep. N. S. 705, and 10 Q. B. Div. 363) upon further consideration.

The action was brought by the respondent, Mr. James Burdick, on behalf of himself and others, the owners of the steamship *Zoe*, against the appellants, Messrs. Sewell and Nephew, bankers at Manchester, the indorsees for value of a bill of lading, to recover the sum of 174*l.* 8*s.* 9*d.*, with interest, for freight, primage, and disbursements on sixty cases of spinning machinery shipped in the plaintiffs' steamship *Zoe* in 1880 by one Nercessiantz, and caried from London to Poti, a port in the Black Sea. The action was tried before Field, J. and a special jury in April 1882. In the course of the trial the jury were, by consent of both parties, discharged, and the learned judge adjourned the case for further consideration. The case was argued on further consideration in Nov. 1882, and in Feb. 1883 the learned judge delivered judgment in favour of the defendants, the now appellants. It appeared that in the bill of lading Henry Head and Co., as agents, were named as the shippers, and the goods were made deliverable at Poti "unto Mr. D. S. Nercessiantz, Kutais, or to his or their assigns, freight, primage, and disbursements of the said goods to be paid at destination, as per margin, or in default of such payment the owners or agents to have an absolute lien on the goods, discharging them in their name aud holding them till all costs, freight, primage, interest, and insurance should be paid in full, and to have liberty to sell the goods by auction and retain the freight and primage and all charges." The *Zoe* reached Poti with the goods in the month of September, and, as no one appeared to clear the goods, they were on the 14th Oct. 1880 landed and warehoused at the Russian Custom-house, with the usual stop for freight. On the 26th Oct. Nercessiantz, who had previously had business transactions with the defendants, applied to them for a temporary loan of 300*l.* to enable him to complete the payment in this country for the goods, and as security for the advance he deposited with the defendants the bill of lading of the goods. By the Russian law goods landed and not cleared within twelve months are liable to be sold for duty and charges, and, as Nercessiantz did not appear to claim the goods in question, they were sold by the Russian Custom officials, but the proceeds were insufficient to do more than to satisfy their claim. The present action for the freight of the goods was then brought by the plaintiff against the defendants as the owners of the goods of which they held the bill of lading. Field, J. found as a fact that Nercessiantz, in depositing the bill of lading, and the defendants in making the advance, did not intend anything more than a pledge, and did not intend that the property in the goods should pass so as to make the defendants liable for the freight as the real owners of the goods, but that it was intended to leave the general property with Nercessiantz, contemplating that he would deliver the goods to the parties for whom he had bought them, and that the possession of the bill of lading would enable the defendants to stop their advance out of the proceeds, by making them a necessary party to the delivery, or, at the lowest, to put it in their power to compel the borrower to redeem the pledge, and thus obtain the only document by which he could obtain delivery of the goods and perform his contract; but his judgment was reversed, as above mentioned.

The defendants then appealed to the House of Lords.

Nov. 4, 6, 7.—The *Solicitor-General* (Sir F. Herschell, Q.C.) and *Danckwertz*, for the appellants, contended that the transaction was only a contract of pledge, which leaves the property in the pledgor. The judgment of the court below was founded on *Lickbarrow* v. *Mason* (2 T. R. 63; 1 H. Bl. 357; 2 H. Bl. 211; 5 T. R. 683; 6 East, 20, n.), which only relates to stoppage *in transitu*, and not to this point:

Gibson v. *Carruthers*, 8 M. & W. 321.

The real question is what was the contract between the parties. *Lickbarrow* v. *Mason* only decided that where there has been an indorsement for value the right of stoppage *in transitu* is gone. The same point was raised in *Newson* v. *Thornton* (6 East, 17), and the judges did not take the extreme view of the effect of *Lickbarrow* v. *Mason* which the Court of Appeal took in this case. The property remains in the pledgor:

Turner v. *Liverpool Docks*, 6 Ex. 543;
Jenkyns v. *Brown*, 14 Q. B. 496;
Meyerstein v. *Barber* 3 Mar. Law Cas. O. S. 449; L. Rep. 2 C. P. 38 and 661; 15 L. T. Rep. N. S. 355; 16 L. T. Rep. N. S. 569; in H. of L., L. Rep. 4 H. of L. 317; 22 L. T. Rep. N. S. 808;
Franklin v. *Neate*, 13 M. & W. 481.

Such a transaction as this is a pledge and not a mortgage, and only passes a special property;

Harris v. *Birch*, 9 M. & W. 592;
Donald v. *Suckling*, L. Rep. 1 Q. B. 585; 14 L. T. Rep. N. S. 772;
Halliday v. *Holgate*, L. Rep. 3 Ex. 299; 18 L. T. Rep. N. S. 656;
Re Westzinthus, 5 B. & Ad. 817;
Spalding v. *Ruding*, 6 Beav. 376;
Kemp v. *Falk*, 5 Asp. Mar. Law Cas. 1; 7 App. Cas. 573; 47 L. T. Rep. N.S. 454.

The Bills of Lading Act refers to the general property in the goods, such as would pass to a purchaser:

Smurthwaite v. *Wilkinson*, 11 C. B. N. S. 842;

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

Short v. *Simpson*, L. Rep. 1 C. P. 248; 13 L. T. Rep. N. S. 674;
The Freedom, 1 Asp. Mar. Law Cas. 23; L. Rep. 3 P. C. 594; 24 L. T. Rep. N. S. 452.

They also referred to Blackburn on Sale, Benjamin on Sale, and Arnould on Insurance.

C. Hall, Q.C. and *Edwyn Jones*, for the respondent, argued that the whole property passed by the indorsement, the court having adopted the special verdict in *Lickbarrow* v. *Mason*, and the judgment of the Court of Appeal was right. The object of the Bills of Lading Act was to pass the property that the indorsee might be able to sue, and he must take the liabilities with the rights. Here the intention of the parties was that the property should pass, otherwise the creditor could not dispose of the goods. They referred to

Coxe v. *Harden*, 4 East, 211;
Pease v. *Gloahec*, 2 Mar. Law Cas. O. S. 394; L. Rep. 1 P. C. 219; 15 L. T. Rep. N. S. 6;
The Figlia Maggiore, 3 Mar. Law Cas. O. S. 97; L. Rep. 2 A. & E. 106; 18 L. T. Rep. N. S. 532;
The St. Cloud, Br. & Lush. 4; 30 L. J. Ex. 259;
Fox v. *Nott*, 6 H. & N. 630;
The Nepoter, 3 Mar. L. Cas. O. S. 355; L. Rep. 2 A. & E. 375; 22 L. T. Rep. N.S. 177;

in addition to *Re Westzinthus*, *Spalding* v. *Ruding*, *Short* v. *Simpson*, *The Freedom*, and *Halliday* v. *Holgate*, cited by the appellants. *Harris* v. *Birch* *ubi sup.*) was only a decision on the Stamp Act.

Danckwertz, in reply, referred to

Lloyd v. *Guibert*, 2 Mar. Law Cas. O. S. 283; L. Rep. 1 Q. B. 115; 13 L. T. Rep. N. S. 602.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 5.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Selborne).—My Lords: This appeal raises the question whether, under the Bills of Lading Act of 1855 (18 & 19 Vict. c. 111), every holder of a bill of lading, indorsed in blank, who has taken it by way of security for an advance of money (and has not afterwards parted with it), is liable, by reason of such indorsement only, to an action for freight by the shipowner, although he may not have obtained delivery of the goods, or derived any other benefit from his security. The difference between the learned judges in the court below mainly, if not altogether, turned upon the question whether, according to the authorities, from *Lickbarrow* v. *Mason* (1 Sm. L. C. 753, 8th ed.) downwards, the effect of an indorsement and deposit of a bill of lading, while the goods are *in transitu*, by way of security for a loan, is to pass the whole legal title to the goods, or only to pledge them, passing at law a "special property," and leaving the "general property" in the shipper. That question was much debated in *Glyn, Mills, and Co.* v. *East and West India Docks Company* (6 Q. B. Div. 475; 4 Asp. Mar. Law Cas. 345; 43 L. T. Rep. N. S. 584), where Brett, L.J. expressed the same opinion on which he acted in the present case, Bramwell, L.J. taking the opposite view. Lord Blackburn, in his opinion on that case when it reached this House (7 App. Cas. 591; 4 Asp. Mar. Law Cas. 580; 47 L. T. Rep. N. S. 309), adverted to the point, but thought it unnecessary to express any opinion upon it. In the present case the true question is whether "the property" in the goods "passed to the indorsee upon or by reason of the indorsement" within the meaning of those words as used in the Bills of Lading Act of 1855. It was considered by Brett, M.R. and Baggallay, L.J., that, if the object of the indorsement and deposit was (as they thought) to pass the whole legal title to the goods to the appellants as indorsees, leaving an equitable interest only in the shipper, it was a necessary consequence that "the property passed" to them within the meaning of the statute, and that the respondent, the shipowner, was entitled to recover under the statute in this action. They clearly used the words "legal" and "equitable" in that technical sense which they have acquired in English law. I am not myself satisfied that this consequence is necessary; but I admit that there are difficulties in the way of the contrary view, as there are also difficulties (arising from the strong and unqualified language used by judges of great authority, from the time when *Lickbarrow* v. *Mason* was decided downwards) in the way of the opinion that an indorsement and deposit of a bill of lading, in a case like the present, operates by way of pledge, and not as an assignment of the whole legal title to the goods.

The facts here are simply an indorsement in blank, and deposit of the bills of lading, so indorsed, by way of security for money advanced. There are no special circumstances, except that the indorsee never did obtain, and that it was never possible for him (in fact) to obtain, delivery of the goods. I should not feel greatly embarrassed, if there were no other authority, by the mere terms in which the custom of merchants was found in *Lickbarrow* v. *Mason* (5 T. R. 683), viz., that "bills of lading are, after the shipment and before the voyage performed, negotiable and transferable by the shipper's indorsement and delivery . . . and that, by such indorsement and delivery, the property in such goods is transferred." This, it may be said, is the language of the Bills of Lading Act. But I do not understand it as necessarily meaning more than that "the property" which it might be the intent of the transaction to transfer, whether special or general, passes by such an indorsement, according to the custom of merchants. The finding must be reasonably understood. It cannot, for instance, mean that the property will be transferred when there is no consideration. But, although the custom as found seems to me to be consistent with the view taken by Field, J. and Bowen L.J. in the present case, I have more difficulty in saying that the language of Buller, J., in the earlier stages of *Lickbarrow* v. *Mason* (2 T. R. 63) is so. And in some later cases other great judges have not only followed, but have even gone beyond that language. The Court of Queen's Bench, in *Re Westzinthus* (5 B. & Ad. 817), held that a right of stoppage *in transitu* might be exercised against the interest remaining in the shipper, subject to the security created by the indorsement and deposit of the bill of lading; but they did so on the ground, not that the shipper retained any legal title or interest, but that he had an equity of redemption, of which the form in which the question then arose enabled the court to take notice. And, although it is true that in *Harris* v. *Birch* (9 M. & W. 592) the Court of Exchequer, then composed of Parke, Alderson, Gurney, and Rolfe, BB., decided a question of stamp duty upon the ground that an indorsement and deposit of a bill of lading by

way of security operated as a pledge, and Coleridge, J. in *Jenkyns* v. *Brown* (14 Q. B. 496) considered it to pass a special property only to the indorsee, leaving the general property in the shipper, and in *Meyerstein* v. *Barber* (L. Rep. 2 C. P. 38, 661; 3 Mar. Law Cas. O. S. 449; 15 L. T. Rep. N. S. 355; 16 L. T. Rep. N. S. 569) all the judges of the Common Pleas and in the Exchequer Chamber concurred in that view, yet, on the other hand, when *Meyerstein* v. *Barber* (L. Rep. 4 H. of L. 317; 22 L. T. Rep. N. S. 808) came to the House of Lords, where the judgments of those courts were affirmed, Lord Hatherley, L.C. and Lord Westbury used strong language of an opposite kind. Lord Hatherley, L.C. said: "If anything could be supposed to be settled in mercantile law, I apprehend it would be this, that, when goods are at sea, the parting with the bill of lading is parting with the ownership of the goods;" and afterwards: "I apprehend that it would shake the course of proceeding between merchants, as sanctioned by decided cases, if we were to hold that the assignment of the bill of lading (the goods being at the time at sea) does not pass the whole and complete ownership of the goods, so that any person taking a subsequent bill of lading, be it the second or be it the third, must be content to submit to the loss which would arise from that state of facts." These words are hardly, if at all, qualified by the context, "so that," &c.; although, in a later sentence, as to which see the remarks of Lord Blackburn in *Glyn, Mills, and Co.*, v. *East and West India Dock Company* (*ubi sup*), the proposition is less absolute: "When the vessel is at sea, and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which, for the purpose of conveying a right and interest in the property, is the property itself.' Lord Westbury's language is similar, perhaps stronger. "No doubt," he said, "the transfer of it (the bill of lading) for value passes the absolute property in the goods." He quoted some words of Erle, C.J., to which I shall afterwards refer, as having the same sense; he spoke of the first holder for value of the bill of lading as having "the legal ownership of the goods," "the legal right in the property," "both the right of property and the right of possession, passing by a symbol, the bill of lading, which is at once both the symbol of the property and the evidence of the right of possession." To reconcile these expressions with those used in the same case by the judges of the Common Pleas and in the Exchequer Chamber is scarcely possible, and yet no dissent from the views of those learned judges was expressed in this House; on the contrary, their reasoning, and especially that of Willes, J., was referred to with apparent approval, particularly by Lord Hatherley, L.C. and Lord Chelmsford. In such a conflict, not of decisions, but of judicial phraseology, if not of doctrine, it becomes important to remember that it is often dangerous to infer, even from very strong words when used *diverso intuitu*, conclusions on other subjects which, if they had been present to the minds of the speakers, might perhaps have led to their being more guarded or qualified. None of the cases to which I have referred arose upon the statute with which your Lordships have now to deal; they related, some to the right of stoppage *in transitu*, some to competing claims between holders for value of different parts of the same set of bills of lading. It may well be that, as against all such claims, and against parties setting up interests adverse to the title of the indorsee for value, such words as "the legal ownership," "the legal right," "the right of property in the goods," might be used, and the property which passed to the indorsee might be described as "absolute," in a sense substantially true, even though such property might, as between the indorsee receiving and the shipper depositing the bill of lading by way of security, be special only and not general; and though the most apt term for a scientific definition of the transaction, as between the borrower and the lender, may be, not assignment or transfer, but pledge.

In such a state of authority it is important to see how the matter stands in principle. In principle, the custom of merchants, as found in *Lickbarrow* v. *Mason*, seems to be as much applicable and available to pass a special property at law by the indorsement, when that is the intent of the transaction, as to pass the general property, when the transaction is, *e.g.*, one of sale. In principle, also, there seems to be nothing in the nature of a contract to give security by the delivery of a bill of lading indorsed in blank, which requires more, in order to give it full effect, than a pledge, accompanied by a power to obtain delivery of the goods when they arrive, and, if necessary, to realise them for the purpose of the security. Whether the indorsee, when he takes delivery to himself, may not be entitled to assume, and may not be held to assume towards the shipowner, the position of full proprietor is a different question. But, so long at all events as the goods are *in transitu*, there seems to be no reason why the shipper's title should be displaced, any further than the nature and intent of the transaction require. This is not inconsistent with what was said by Erle, C.J., in *Meyerstein* v. *Barber* (*ubi sup.*), that "the indorsement and delivery of the bill of lading, while the ship is at sea, operate exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do." That learned judge cannot have meant that possession of the symbol is, for every purpose, the same thing as actual possession of the goods; what he did mean was, that the indorsement and delivery of the bill of lading, by way of pledge, which he considered to be the effect of the transaction in that case, was equivalent, and not more than equivalent, to a delivery by way of pledge of the goods themselves. Lord Hardwicke, in *Snee* v. *Prescot* (1 Atk. 245), thought that there was a difference between an indorsement of a bill of lading in blank and a personal indorsement, and for some purposes I think there is much reason for that opinion. If, from a personal indorsement, the inference might properly be drawn that a title by assignment, as distinguished from pledge, was meant to pass to the indorsee, it would not, in my opinion, follow that the same inference ought to be drawn from an indorsement in blank. Part of the custom of merchants, found in *Lickbarrow* v. *Mason*, was, that "indorsements of bills of lading in blank may be filled up by the person to whom they are delivered or transmitted, with words ordering the delivery

of the goods to be made to such person; and, according to the practice of merchants, the same, when filled up, have the same operation as if it had been done by the shipper." Whether it is or is not usual in practice to fill up the blank with any name before taking delivery, it is certainly not to be implied from the custom, as thus found, that the operation of the indorsement, while it remains in blank, is necessarily to all intents and purposes exactly the same as if it were filled up with the holder's name. So long as it remains in blank it may pass from hand to hand by mere delivery, or it may be redelivered to the shipper without any new transfer or indorsement, which would not be the case if there were a personal indorsement. It would be strange if the Bills of Lading Act has made a person whose name has never been upon the bill of lading, and who, as between himself and the shipowner, has never acted upon it, liable to an action by the shipowner upon a contract to which he was not a party. I am not, however, sure, that, for the decision of the present appeal, it is really necessary to rely, either upon any difference between a personal indorsement and one in blank, or upon the distinction between such a form of security as in English law might be held to pass the whole legal title, and a simple pledge. The statute with which your Lordships have now to deal is introduced by a preamble, the material part of which is, that "by the custom of merchants, a bill of lading of goods being transferrable by indorsement, the property of the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property." The 1st section enacts, that "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or 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." The 2nd section provides that "nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement." There is nothing else material in the Act. This statute contemplates the passing of "the property in the goods," by the indorsement of the bill of lading, as a thing which may, or may not happen, according to the nature and intent of the contract or dealing, for the purpose of which that indorsement is made; and it seems to provide for those cases only in which the property so passes as to make it just and convenient that all rights of suit under the contract contained in the bill of lading should be "transferred to" the indorsee, and should not any longer "continue in the original shipper or owner." One test of the application of the statute may, perhaps, be whether, according to the true intent and operation of the contract between the shipper and the indorsee, the shipper still retains any such proprietary right in the goods as to make it just and reasonable that he should also retain rights of suit—the word is "suit," not "action"—against the shipowner under the contract contained in the bill of lading. If he does, the statute can hardly be intended to take from him those rights and transfer them to the indorsee. If they are not transferred to the indorsee, neither is the indorsee subjected to the shipper's liabilities. It is very difficult to conceive that when the goods are still *in transitu*, when the substance of the contract is not sale and purchase, but borrowing and lending, and when the indorsement and deposit of the bill of lading is only by way of security for a loan, it can be the intention of either party thereby, without more, to divest the shipper of all proprietary right to the goods, and to take from him and transfer to the indorsee all rights of suit under the contract with the shipowner. That some proprietary right—his original right, subject only to the creditor's security—remains in him is indisputable. If that proposition needed illustration from authority, it would be found in the cases of *Re Westzinthus* (*ubi sup.*), *Spalding* v. *Ruding* (6 Beav. 376), and *Kemp* v. *Falk* (7 App. Cas. 573; 5 Asp. Mar. Law Cas. 1; 47 L. T. Rep. N. S. 454). Can it be that he is by the statute deprived of all remedies, legal and equitable, under the bill of lading as long as it remains in the hands of the secured creditor? The creditor in the ordinary course of things will do nothing until the time for payment or delivery of the goods arrives.

Can it, then, be material whether the proprietary right thus remaining in the shipper while the goods are *in transitu* is legal or equitable? The statute relates to a subject of general mercantile law in which not Englishmen only, but foreigners also, may be, and often are, concerned. Foreign as well as British indorsements of bills of lading by way of security for advances which may be made abroad, perhaps in countries not governed by English laws, are liable to be affected by it whenever recourse must be had to British courts. It seems to me to be inconceivable that the construction of the words "the property in the goods" in such a statute can have been intended to depend upon any such technical distinction as that made in English law, but by no means in the laws of all other countries in which the customs of merchants prevail, between legal and equitable titles. It is to be observed, further, that the statute contemplates *beneficium cum onere*, and not *onus sine beneficio*. It may be reasonable if the indorsee has the benefit, as he would if he were a purchaser out and out, or if under his title as indorsee of the bill of lading he obtained delivery of the goods to himself, that he should take it with its corresponding burden *quoad* the shipowner. But it would be the reverse of reasonable to impose on him such a burden when he has neither entered into any contract of which it might be the natural result, nor, having taken a mere security, has obtained any benefit from it. This observation is fortified by the fact that the statute does not appear to distinguish between indorsements subsequent and those anterior to its enactment. On the other hand, it seems impossible to suppose the Legislature to have passed this statute without some reference to the custom proved in *Lickbarrow* v. *Mason*, and to the law, whatever may be

the true view of it, established on the same subject by later authorities in the English courts. And if, as I think, it ought to be understood with some reference to that custom and to those authorities, I cannot persuade myself that its operation is altogether restricted to cases of out-an-out sale, or that an indorsee of a bill of lading, by way of security, who converts his symbolical into real possession by obtaining delivery of the goods ought never to derive any benefit from it. The authorities decided upon the statute appear to me to be most easily reconciled with its apparent objects and with each other by a view which, if hardly consistent with expressions to be found in some other cases, nevertheless seems to me to have a real and substantial foundation in reason and good sense—viz., that the indorsee by way of security, though not having "the property" passed to him absolutely and for all purposes by the mere indorsement and delivery of the bill of lading while the goods are at sea, has a title, by means of which he is enabled to take the position of full proprietor upon himself, with its corresponding burdens, if he thinks fit, and that he actually does so, as between himself and the shipowner, if and when he claims and takes delivery of the goods by virtue of that title. The authorities decided upon by the statute are *Fox* v. *Nott*, *Smurthwaite* v. *Wilkins*, *The Figlia Maggiore*, and *The Freedom*. Another case, *Short* v. *Simpson*, was also cited during the argument at your Lordships' bar. In *Fox* v. *Nott* (6 H. & N. 63, A.D. 1861) the only question determined was that the shipowner retained his remedy by action against the shipper after the indorsement of the bill of lading, a case provided for by the 2nd section; but some of the learned judges expressed opinions bearing upon the general construction of the statute. Pollock, C.B. said: "The indorsee of the bill of lading may be sued under this statute, because by taking the goods he also takes the liability to the freight." Martin, B. said: "The statute means an actual vesting of the property, as by bargain and sale;" and Wilde, B. said: "I agree with my brother Martin that the Act applies only to an absolute transfer of the goods, and was never intended to deprive a person who made advances on the security of the bill of lading of the benefit of the original contract of the shipper to pay the freight." In *Smurthwaite* v. *Wilkins* (11 C. B. N. 842, A.D. 1862) the indorsee for value of a bill of lading, who had indorsed it over to a third party, was held not to be liable to the shipowner. Erle, C.J. said: "The contention on the part of the plaintiff is that, the property in the goods passing to the defendants by the assignment of the bill of lading under the Act, they are liable for the freight, although they never received the goods. . . . The contention is, that the consignee or assignee shall always remain liable, like the consignor, although he has parted with all interest and property in the goods by assigning the bill of lading to a third party before the arrival of the goods. The consequences which this would lead to are so monstrous, so manifestly unjust, that I should pause before I consented to adopt this construction of the Act of Parliament. The person who received the goods was always considered liable for the freight; but that was not by virtue of an original liability as a contracting party, but on a contract implied from his acceptance of the goods. Looking at the whole statute, it seems to me that the obvious meaning is that the assignee who receives the cargo shall have all the rights and liabilities of a contracting party; but that, if he passes on the bill of lading by indorsement to another, he passes on all the rights and liabilities which the bill of lading carries with it." Vaughan Williams, J. agreed. "Looking," he said, "at the preamble and at the general scope and intention of the statute, I can entertain no doubt that the view presented by my Lord is the true one;" and he explained the effect of "the general scope" of the Act to be "that, where the right of property leaves the party, the rights and liabilities under the contract leave him also." A case like the present, of a security on an indorsed bill of lading, not acted upon, and which, in fact, never could be acted upon by taking delivery of the goods, but at the same time not transferred to any other person, differs *in specie* from that of a man who has transferred the bill of lading by indorsing it over to another. But I cannot see that it would be more reasonable to make the holder of such a security, which he has never realised, and never can realise, liable under the statute, than if he had parted with the bill of lading to somebody else. The cases of *The Figlia Maggiore* (18 L. T. Rep. N. S. 532; 3 Mar. Law Cas. O. S. 97; L. Rep. 2 A. & E. 106) and *The Freedom* (22 L. T. Rep. N. S. 175) were determined in the Court of Admiralty under another statute, which, as Dr. Lushington, and his successor, in my opinion, rightly held, gave that court jurisdiction when, and only when, there was, independently of that statute, a right of action or suit; and, in those particular cases, it appears to have been held that there was no such right of action or suit unless it was given by the Bills of Lading Act. In both of them the plaintiffs, indorsees by way of security of bills of lading, had claimed and obtained delivery of the goods, and then had brought actions against the shipowners for damages which they had sustained through breaches of the contracts contained in the bills of lading; and they were held entitled to recover. This was right, if an indorsee, under such circumstances, may rightly be held entitled to the benefit of the statute, as having elected to complete his potential and inchoate title by taking possession of the goods, and as placing himself towards the shipowner in the position of proprietor. May it not be said that "the property in the goods" then, if not before, "passes" to him "by reason of the indorsement?" The principle of the liability which, under some circumstances, was held, even before the statute, to attach to the indorsee taking delivery, was regarded by Erle, C.J., in *Smurthwaite* v. *Wilson*, as elucidating the policy and objects of the statute itself; and both he and Pollock, C.B., in *Fox* v. *Nott*, spoke of "taking the goods," and "receiving the cargo," as the test of its application. The authorities on that subject (*Jesson* v. *Solly*, 4 Taunt. 52; *Stindt* v. *Roberts*, 17 L. J. 166, Q.B.; *Wegener* v. *Smith*, 15 C. B. 285; *Chappell* v. *Comfort*, 10 C. B. N. S. 802) seem, from this point of view, to deserve consideration. The decision of the Court of Admiralty in the case of *The Freedom* was affirmed by Her Majesty in Council, upon the advice of the Judicial Committee (24 L. T. Rep. N. S. 452: 1 Asp. Mar. Law Cas. 28;

L. Rep. 3 P. C. 594); and, although it was on a point as to which the Admiralty had only a statutory jurisdiction, concurrent with the courts of common law, and though in all Admiralty cases the appeal now lies to this House, still this, as the decision of a court of final appeal, ought not, in any later case, to be lightly departed from. The case of *Short* v. *Simpson* (13 L. T. Rep. N. S. 674; L. Rep. 1 C. P. 248) did not really require anything to be decided as to the effect of the statute, and nothing was, in fact, so decided. It was there held that, *quocunque modo*, whether under the statute or independently of the statute, the shipper, to whom a bill of lading which he had indorsed and delivered to his creditor by way of security was re-indorsed and re-delivered upon payment of the loan, was remitted to his original rights.

Upon the whole, I cannot dissemble that this case appears to me to be attended with some considerable difficulties. But those difficulties are mainly technical, arising out of a comparison of the language of the statute with various and not always consistent forms of expression, found in authorities not decided with a view to any such consequences as those which the statute would produce. They deal with questions between unpaid vendors of goods comprised in bills of lading and *bonâ fide* indorsees of the same bills of lading for value, or between competing and adverse claimants to priority as *bonâ fide* holders for value of the bills of lading themselves. The statute, on the other hand, deals with questions between shippers and indorsees of bills of lading claiming under them, and between indorsees and shipowners. The preponderance of principle and reason appears to me to be against the proposition that, as between those parties, it can have been intended by, or can be the effect of, the statute to make the creditor of the shipper liable, in effect, as his surety to the shipowner, with whom he was never brought in contact, by reason only of the deposit with him, by way of security, of a bill of lading indorsed in blank; his right, under that deposit, being, whether at law or in equity, special and not general, and the shipper retaining, whether at law or in equity, the real and substantial property in the goods, subject to the security. It had not, until the present case, been directly or indirectly determined, by any authority, that such is the effect of the statute. My conclusion is, that the appellants ought to be exonerated, by your Lordships' judgment, from the respondents' action, and that the order of the Court of Appeal ought to be reversed, with costs.

Lord BLACKBURN.—My Lords: The judgment of Field, J. was reversed by the order now under appeal. The case was tried before him without a jury, and I think it is necessary to see what he had to determine. There was no question between vendor and vendee nor of stoppage *in transitu* raised, for there was neither a vendor nor a stoppage. The law and decisions as to stoppage *in transitu* might be relevant in construing the statute 18 & 19 Vict. c. 3, but did not otherwise affect the rights of the parties. It was not suggested that the defendants were, at the time the goods were shipped, in any way interested in the goods, nor that they were, either as undisclosed principals or otherwise, parties to the contract in the bill of lading until it was delivered to them after the ship had sailed and the goods were in the hands of the shipowners to be carried under the bill of lading, and were not yet delivered, with an indorsement in blank by Nercessiantz the consignee named in the bill of lading. I do not think that, either at the trial or on the argument, it was at all disputed that at common law the remedy of the shipowner under a bill of lading was by enforcing his lien upon the goods, or by bringing an action on the contract against anyone who, at the time when the goods were shipped, was a party to the bill of lading, either as being on the face of it a contracting party or as being an undisclosed principal of such a party. In either of these cases he might be sued as having been from the beginning a party to the contract. Some attempts had been made to say that the contract in a bill of lading might, under some circumstances at least, be transferred to an assignee in a manner analogous to that in which the contract in a bill of exchange was transferred by the indorsement of the bill of exchange; but I think, since the decision in *Thompson* v. *Dominy* (14 M. & W. 403) in 1845, it has been undisputed law that under no circumstances could anyone, not a party to the contract from the beginning, sue on it in his own name. Any action on the contract at common law must be brought in the name of an original contractor, and no action could be brought on the contract against one who was not liable to be sued as an original contractor. But ten years later the Bills of Lading Act (18 & 19 Vict. c. 111) was passed. The preamble states this as one of the objects which the Legislature had in view: "Whereas, by the custom of merchants, a bill of lading being transferable by indorsement, the property in the goods may thereby pass to the indorsee" (which I think for a long time before 18 & 19 Vict.—A.D. 1855—was undisputed), "but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner" (this, it is to my mind clear, refers to *Thompson* v. *Dominy*), "and it is expedient that such rights should pass with the property." The mode in which the Legislature carry out the object thus expressed in the preamble is by sect. 1: "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or 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."

The case made on the statement of claim was that "the property" had passed upon or by reason of the indorsement to the defendants, not that they were before that a party to the contract in the bill of lading, but that by virtue of the Act 18 & 19 Vic. c. 111, when the property passed they became subject to the same liabilities as if the contract contained in the bill of lading had been made with themselves. It is not disputed that the delivery of the bill of lading to the defendants with the indorsement of the consignee on it in blank was an indorsement, nor that whatever interest then passed to them still remained in them. What was in issue was, whether upon or by reason of that indorsement "the property" passed. The first and most important question

to be decided in this case is, what is the true construction of 18 & 19 Vict. c. 111? Does the "property" in the goods there mean any legal property in the goods, so as to be satisfied by proof that a legal property passed accompanied by a right of possession, so as to entitle the transferee to maintain trover, though it was intended by the parties, and was as between them, to be by way of security only, the transferor retaining a right of redemption either by way of a common law retention of the general property, though the pledgee had a right to the possession and a property as pledgee, a right exceeding a lien, or the whole property at law having passed by way of mortgage, the transferor retaining an equity of redemption, which in 1855 was an equitable right, enforceable only in a court of equity? I think that all the judges below were of opinion that, if the right reserved was the general right to the property at law, what was transferred being only a pledge (conveying, no doubt, a right of property and an immediate right to the possession, so that the transferee would be entitled to bring an action at law against anyone who wrongfully interfered with his right), though *a* property, and a property against the indorser, passed "upon and by reason of the indorsement," yet *the* property did not pass. And I agree with them. I do not at all proceed on the ground that this being an indorsement in blank, followed by a delivery of the bill of lading so indorsed, had any different effect from what would have been the effect if it had been an indorsement to the appellants by name. The case of *The Freedom* (*ubi sup.*) was cited, and I think there are expressions used in the judgment delivered in that case by Sir Joseph Napier which indicate that the Judicial Committee were not of that opinion. It is said: "The plaintiffs were consignees for sale, but as part of the transaction a bill of exchange was drawn by the consignors for nearly the full value of the goods; the bills of lading were indorsed by them and forwarded to the plaintiffs, by whom the draft of the consignors was accepted and paid in due course." If that was the transaction (and whether it was so or not, the Judicial Committee proceeded on the assumption that such was the transaction), the plaintiffs in *The Freedom* were in exactly the position of Church in the case of *Newsom* v. *Thornton* (6 East, 17), the case to which I shall have to refer afterwards. Church had the bill of lading indorsed to him as a factor or consignee for sale, and had therefore a right to hold the goods as against the indorser as a security for all his advances; and he had authority at common law to sell the goods, and before the arrival of the ship to transfer the bill of lading in furtherance of a sale, but he had no authority to pledge either the goods or the bill of lading. It is true that, by the Factors Acts, the plaintiffs in *The Freedom* would have had a power, which Church had not, to pledge the bill of lading, but, as they did not exercise that power, it could make no difference. The judgment then proceeds: "The legal title to the property in the goods specified in the bills of lading was thus transferred to and vested in the plaintiffs. The right of suing upon the contract in the bills of lading was transferred to them by force of the statute 18 & 19 Vict. c. 111." The judgment then proceeds to show, I think correctly, that the dictum of Martin, B. (reported in *Fox* v. *Nott*, *ubi sup.*) was not necessary for the decision in that case, and goes on: "Their Lordships are satisfied that it was intended by this Act that the right of suing upon the contract under the bill of lading should follow the property in the goods therein specified; that is to say, the legal title to the goods as against the indorser." It certainly seems to me that their Lordships thought that "the property" passed within the meaning of the 18 & 19 Vict. c. 111, if any legal right to hold as against the indorser passed. The statute which their Lordships had to construe was 24 Vict. c. 10, s. 6, which is in these terms: "The High Court of Admiralty shall have jurisdiction over any claim by the owner" (*i.e.*, of the goods) "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 ship, 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." It is not necessary to put a construction on the 24 Vict. c. 10, s. 6. I think that there are very good reasons for contending that a person who has possession of an indorsed bill of lading without any right at all to hold it against the indorser without being owner of any interest in the goods, is not an "assignee" within the meaning of this enactment, and consequently that what I understand to be the actual decision of Dr. Lushington in *The St. Cloud* (Brow. & Lush. 4), that such a person could not sue under the Admiralty Act, may have been right enough. It is not necessary to decide that. But I agree with what was said in *The Nepoter* (L. Rep. 2 A. & E. 375; 3 Mar. Law Cas. O. S. 355; 22 L. T. Rep. N. S. 177), that it is contrary to all rules of construction to interpolate any reference to the Bills of Lading Act into the Admiralty Act. I think, therefore, that the actual point decided in *The Freedom* might be quite right, for the plaintiff in that action had a property, and a very substantial property, in the goods as against the indorsers, and everyone else perhaps, and was in every sense an assignee of the bill of lading. The opinion expressed on the construction of 18 & 19 Vict. c. 111, that in that Act the property meant a legal title as against the indorser, was perhaps unnecessary, and I think not sound. The words used in the statute are not such as *primâ facie* to express such an intention. No one, in ordinary language, would say that, when goods are pawned, or money is raised by mortgage on an estate, the property, either in the goods or land, passes to the pledgee or mortgagee, and I cannot think that the object of the enactment was to enact that no security for a loan should be taken on the transfer of bills of lading unless the lender incurred all the liabilities of his borrower on the contract. That would greatly, and I think unnecessarily, hamper the business of advancing money on such securities which the Legislature has, by the Factors Acts, shown it thinks ought rather to be encouraged. It is not uncommon to reduce into writing the agreement between the banker and his customers as to the terms on which the bills of lading deposited by them as securities are to be held. Such was the

case in *Glyn* v. *East and West India Dock Company* (*ubi sup.*), as to which I shall have more to say hereafter. When there is such a writing, it is, in the absence of fraud, conclusive between the parties as to what they intended. And I do not in the least question that such a writing may be so expressed as to show that between the parties the transfer was a mortgage, though of goods, in the manner with which everyone is familiar with regard to lands. The equity of redemption in such a case was an equitable estate only, and in 1855 enforceable in equity, not at law. Where there is neither a symbolical delivery by a transfer of a bill of lading, nor an actual delivery of the goods themselves, there may be (though there seldom is) a substantial difference in the rights of the lender according as the transaction is of the one kind or the other. In *Howes* v. *Ball* (7 B. & C. 481) Ball sold and delivered a coach to John Howes (since deceased) under an agreement in writing, in which there was this clause: "And further I, John Howes, do agree that Thomas Ball do have and hold a claim upon the coach until the debt be duly paid." John Howes died without having paid the debt. Ball, after his death, seized the coach, for which seizure the action was brought by the executor. Had that agreement amounted to a mortgage by John Howes to Ball, I take it there could have been no doubt that the mortgagee would have had as much right against the executor of John Howes as he would have had against John Howes himself. But it was held that it did not amount to a mortgage, but only to an agreement that Ball should have a right of hypothec, and, there having been no delivery by Howes to Ball, the decision was that, though so long as John Howes lived and held the property in the coach Ball might have justified a seizure as against him, he could not justify a seizure as against his representatives. In *Flory* v. *Denny* (7 Ex. 581), where the agreement was "as an additional security for a loan to assign all the debtor's right and interest in a chattel," it was held to be a mortgage, and to operate so as to transfer the property, without any delivery, as a bargain and sale out and out of the goods would, though an agreement to create a pledge would, according to *Howes* v. *Ball*, have conveyed no property of any kind in the goods without a delivery.

But where the goods are at sea, and there is a transfer of the bill of lading, there is a delivery of possession, symbolical, it is true, but all that can be given. The question whether there was a mortgage or only a common law pledge, or hypothec, it being accompanied by delivery, might affect the question what was the court in which those rights were to be enforced, but does not affect the substance of the rights. The borrower, if ready and willing to pay the money, might in the one case be able to bring an action at law against the lender who refused to allow him to redeem, and in the other have to sue in equity, but as it would equally be a pledge his rights would be the same in substance. I am therefore strongly inclined to hold that, even if this was a mortgage, there would not have been a transfer of "the" property within the meaning of the 18 & 19 Vict. c. 111. This is contrary to the opinions not only of Brett, M.R. and Baggallay, L.J., but of Field, J. also. Bowen, L.J., who agreed with Field, J. in thinking that this was not a mortgage but only a pledge, did not express any opinion as to what would have been the law if it had been a mortgage. I believe all the noble and learned Lords who heard the argument are agreed with him in thinking that in this case it was only a pledge. I do not, therefore, intend to express a final decision that an assignee of a bill of lading by way of mortgage is not as such liable to be sued under the 18 & 19 Vict. c. 111; but only to guard against its being supposed that, even if Brett, M.R. and Baggallay, L.J. were right in holding this a mortgage, I, as at present advised, should agree in their conclusion that the defendant could be sued. I now proceed to consider the question on which the Court of Appeal were divided in opinion, but the majority made the order now appealed against. The question is stated by Brett, M.R. to be: "Does the indorsement of a bill of lading as a security for an advance by a necessary implication which cannot be disproved pass the legal property in the goods named in the bill of lading to the indorsee with an equity in the indorser, the borrower, to redeem the bill of lading by payment or to receive the balance, if any, on a sale?" Field, J. had held, and Bowen, L.J. agreed with him, that it might so operate, if so intended by the parties at the time, but did not so operate if it was intended to be no more than a pledge as distinguished from a mortgage. I do not understand that any one of the judges below disputed that if it was a question of intention depending on the evidence, the finding of Field, J. was right; but the majority in the Court of Appeal proceeded on the principles laid down by Brett, L.J. in *Glyn* v. *East and West India Dock Company* (*ubi sup.*). In that case the terms on which the bill of lading was delivered to Glyn and Co. were reduced to writing, and the question, therefore, whether it was intended to deliver it by way of pledge only, or by way of a mortgage, depended on the construction of that writing. Whether Brett, L.J. thought that on the construction of the written instrument it was intended to be a mortgage, I do not know; I do not think he proceeded on that ground. He said it was a mortgage, and that the effect of the statute 18 & 19 Vict. c. 111 was to transfer the right to sue and the liability to be sued to Glyn and Co. Bramwell, L.J. was of an opposite opinion on both points. He thought that Glyn and Co. had a special property and a right of possession, and no more. In the House of Lords I said: "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 and Co.'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 shipowner's lien, and were entitled to maintain an action against anyone who, without justification or legal excuse, deprived them of that right." All the noble and learned Lords agreed in this. I think, therefore, the decision of this House is a strong authority in support of the position which I have before advanced, that the rights of a mortgagee having taken a bill of lading, and the rights of a pawnee having taken a bill of lading, are in substance the same. I did

not think it necessary to point out that the question which the House in *Glyn* v. *The East and West India Dock Company* had to decide, and did decide, would have been just the same if the 18 & 19 Vict. c. 111 had never been passed, or had been repealed, and consequently that it was unnecessary to express any opinion on the construction of that Act; but it obviously was so.

Before proceeding further, I wish to point out what, in my opinion, is a great misapprehension as to the effect of the decision of this House in *Lickbarrow* v. *Mason* (*ubi sup.*), and as to the weight to be given to the opinion of Buller, J. delivered in this House, and reported in a note to 6 East, 20. I have already said that in this case there is no sale, no vendor, and no vendee, and no stoppage *in transitu*; so that this misapprehension, as I think it is, is not so material as it might be in some other cases. A demurrer on evidence, as is pointed out by Eyre, C.J. in delivering the unanimous opinion of the judges in *Gibson* v. *Hunter* (2 H. Bl. 205), not *Gibson* v. *Minet*, as is by mistake said in the note in 6 East, though not familiar in practice, was a proceeding known to the law. He explains it, and states his very confident expectations (which have been justified by the result) that no demurrer on evidence would again be brought before the House. It may be well to point out the dates. The demurrer on evidence in *Lickbarrow* v. *Mason* was in 1787. The only case of a demurrer on evidence in what were then recent times was *Cocksedge* v. *Fanshawe* (1 Doug. 118), on which judgment had been given in this House in 1783. Neither in the King's Bench nor in the Exchequer Chamber was any question raised in *Lickbarrow* v. *Mason* as to the mode in which the questions discussed were raised. In 1790 the writ of error from the decision of the Exchequer Chamber was brought before the House of Lords. The law peers at that time were Lord Thurlow, Lord Loughborough, and Lord Kenyon. When it was argued does not appear, but it was argued, and the same question as had been asked of the judges in *Cocksedge* v. *Fanshawe* was asked of the judges. Six judges (including all the survivors of those who had joined in Lord Loughborough's judgment in the Exchequer Chamber) answered in favour of the respondent. The three judges who had given judgment in the King's Bench answered in favour of the appellant. This House delayed giving its opinion till 1793. In the meantime, in 1791, there was a demurrer to evidence in *Gibson* v. *Hunter* (2 H. Bl. 205), which was brought before this House. The case in this House is reported in 2 H. Bl. 187. On the 7th Feb. 1793 this House gave judgment, awarding a *venire de novo*. One week afterwards, on the 14th Feb. 1793, this House delivered judgment in the long-pending case of *Lickbarrow* v. *Mason*, awarding in that case also a *venire de novo*. Lord Loughborough was himself at that time Lord Chancellor. I should have thought, if anything was clear, it was that this House did not decide anything, except that on that demurrer to the evidence no judgment could be given. Certainly the last conclusion that I should draw is that stated by Field, J., that the House in which Lord Loughborough was chancellor decided, "presumably" on the opinion delivered by Buller, J., against the judgment of Lord Loughborough, which six judges to three had thought right. Neither can I at all agree in the opinion expressed by Field, J., that the opinion of Buller, J. has always been taken as the law, and been adopted and followed as the law up to the present day. It never was published till 1805, in a note to *Newson* v *Thornton* (6 East, 17). I have for many years been of opinion, and still remain of opinion, that much of what Buller, J. expresses in that opinion as to stoppage *in transitu* was peculiar to himself, and was never adopted by any other judge, and is not law at the present day. But it is not necessary to pursue this subject further, as I agree with Bowen, L.J. that neither the statement of the custom of merchants in the special verdict in *Lickbarrow* v. *Mason*, nor the opinion of Buller, J., justifies the inference that the indorsement of a bill of lading for a valuable consideration must pass the entire legal property, whatever was the intention of the parties. In *Lickbarrow* v. *Mason* Turing was an unpaid vendor to Freeman. He had indorsed the bill of lading to Freeman, and had not, therefore, any right, except that of stopping the goods whilst *in transitu*, if Freeman became insolvent without having paid for the goods, and that right he had, though the indorsed bill of lading had been sent on to the vendee, so long as that bill of lading remained in the vendee's hands. But before any such stoppage Freeman, for valuable consideration, indorsed the bill of lading to Lickbarrow, who, whether as mortgagee or pledgee, had a legal property accompanied by a right of possession. The point which I understand to have been decided in *Lickbarrow* v. *Mason* was that, on the transfer of the bill of lading to Lickbarrow, the goods ceased to be *in transitu*, the shipowner from that time no longer holding them as a middleman to carry the goods from the unpaid vendor, Turing, to Freeman, his vendee, but holding them as agent for Lickbarrow. It was held first in *Re Westzinthus* (*ubi sup.*) and then in *Spalding* v. *Ruding* (*ubi sup.*) that where the *transitus* was thus put an end to by what was in reality only a pledge, the stoppage might be made available in equity so far as the rights of the pledgee did not extend. I thought, and still think, that the reason why the stoppage could not be made available at law was because the shipowner no longer held the goods as a middleman, as the transferee of the bill of lading for valuable consideration and *bonâ fide*, so as to give him a security, whether by way of mortgage or by way of pledge, had a legal property in the goods which he could enforce as against the shipowner.

Such being my view of the law, whether it was right or wrong, I expressed myself accordingly in *Kemp* v. *Falk* (7 App. Cas. 573; 47 L. T. Rep. N. S. 454), so as to show that I thought so; but there was nothing in that case to call for a decision on the point now before this House. In *Newsom* v. *Thornton* (*ubi sup.*) Lord Ellenborough says: "I should be very sorry if anything fell from the court which weakened the authority of *Lickbarrow* v. *Mason* as to the right of a vendee to pass the property of goods *in transitu* by indorsement of a bill of lading to *bonâ fide* holders for a valuable consideration and without notice. For as to *Wright* v. *Campbell* (4 Burr 2047), though that was the case of an indorsement of a factor, it was an outright assignment of the property for value. Scott, the indorsee,

was to sell the goods and indemnify himself out of the produce the amount of the debt for which he had made himself answerable. The factor at least purported to make a sale of the goods transferred by the bill of lading, and not a pledge alone. This was a direct pledge of the bill of lading, and not intended by the parties as a sale. A bill of lading, indeed, shall pass the property upon a *bonâ fide* indorsement and delivery where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do if so intended, but it cannot operate further." Lawrence, J. says, speaking of *Lickbarrow* v. *Mason*, "All that that case seems to have decided is, that where the property in goods has passed to a vendee, subject only to be divested by the vendor's right to stop them when *in transitu*, such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration and *bonâ fide*, and by indorsement of a bill of lading given him a right to recover them." And Le Blanc, J. says that what they then determine "will not break in at all on the doctrine of *Lickbarrow* v. *Mason* that the indorsement of a bill of lading upon the sale of goods will pass the property to a *bonâ fide* indorsee, the property being intended to pass by such indorsement." In *Glyn* v. *East and West India Docks* (*ubi sup.*) Brett, L.J., says (speaking of an opinion of Willes, J.) "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*, namely, that such an indorsement passes the legal property," by which I understand him to mean the whole legal property. But neither in that case nor in the case now at bar does he refer to any authority to that effect. Expressions used by judges have been cited which, I think, only show that they did not carefully consider their language, where no question of the kind before us was under discussion. And, as far as I know, there is no decision subsequent to *Lickbarrow* v. *Mason* which proceeds on such a ground, whilst *Newsom* v. *Thornton* proceeds expressly on the ground that the indorsement of a bill of lading, when intended to be a pledge only, is not valid if made by one who has no authority to make a pledge. I do not know that I am justified in saying that it is a decision that, if it was made by one who had authority to make a pledge, it would be good as such, though I think that appears to have been Lord Ellenborough's opinion, and I do not think any authority was cited on the argument at the bar to show that such is not the law. No case was cited at the bar, nor am I aware of any in which it has been held that a transfer of the bill of lading for value necessarily, whatever might be the intention, passed the whole legal property. Brett, M.R., says: "If the general understanding of merchants had not been in accordance with the verdict of the jury in *Lickbarrow* v. *Mason* accepted in its largest sense, there would, one would think, have been cases in the books raising the question." With submission to him I think no weight can be given to this absence of authority until it is shown that there have been cases in which it became material to consider whether an indorsement intended to be and operating as a pledge at law had a less effect than an indorsement operating against the intention as a mortgage. I have already given my reasons for thinking that in substance the right would be the same. Without, therefore, deciding the question whether a mortgage would render the mortgagee liable under the 18 & 19 Vict. c. 111, I decide that mainly for the reasons given by Bowen, L.J., this transfer did not operate as a mortgage. I therefore am clearly of opinion that the order made by the Court of Appeal should be reversed with costs, and the judgment of Field, J. restored.

Lord BRAMWELL.—My Lords: I concur. This action would not have been maintainable at common law. Is it maintainable under the 18 & 19 Vict. c. 111? That depends upon whether the applicants are indorsees of the bill of lading "to whom the property in the goods therein mentioned has passed upon or by reason of such indorsement." It is found, as a fact, and rightly found, as is admitted, that all that was intended in the transaction was a pledge. This would give the appellants a property, but, as put by Bowen, L.J., not "the" property. As I understand Brett, M.R., if this could be, then the appellants are right; but he thinks it could not be, that *Lickbarrow* v. *Mason*, or rather Buller, J.'s judgment shows that, when a bill of lading is indorsed to give any title to the transferee, the entire property is passed, and that in such a case as this nothing but an equitable right to redeem remains in the transferor. It is for those who assert this to prove it. I cannot prove the negative that it is not so, and logically and reasonably I might content myself with saying that it is not proved to me—that I see no reason and no authority in support of it. But I go further. I think that authority and reason are against it. I will not discuss or examine the cases. They do not, in my opinion, justify the contention. I will not examine them in detail. That has been done by the Lord Chancellor. I understand his conclusion to be that the expressions of the learned judges which have been relied upon should be read and interpreted *secundum subjectam materiam*. I agree. In no case has the present matter been under consideration. As to the reason and principle which should govern, I ask why should the transfer of the bill of lading have a greater effect, contrary to the parties' intention, than the handing over of the chattels themselves would have? They could be pledged if on shore, but, being at sea, no actual delivery, which is necessary to a common law pledge, can take place. There can, however, be a symbolical delivery by transferring the bill of lading. Why should the effect be different? Then consider the inconvenience of holding that the pledgor has only an equitable right; that he may repay the loan at the day appointed, but thereby acquire no legal title to the possession of the goods; that the pledgee may sell and pass the entire property to one not having notice of the equitable title. Consider what difficulties would be put on those who lend on such securities if this action was maintainable. The banker who lent money on a bill of lading for goods which arrived in specie, but damaged by perils of the seas so as to be worthless, might lose the money lent and the freight. Another consequence would be, that the transferee of the bill of lading, though only interested to the amount of the loan on it, would

be the person to bring actions on the contract to carry. It is true that, unless he can do so in all cases, he can in none, even where his interest is to the extent of the full value of the goods. Either this was not thought of by the Legislature, or, if it was, they thought that no case could be included unless all were, and that it was better to include none than all. It is to be observed that the statute in its preamble says that by indorsement the property "may" pass. It is to be remembered also, as pointed out by my Lord Chancellor, that this law bears upon foreigners out of the kingdom. I am the more surprised at this contention on the part of Brett, M.R., as he has always so ably and powerfully contended that mercantile laws, contracts, and usages should be as free as possible from technicality.

I am of opinion that the appeal should be allowed. I cannot truly say that I have any doubt on the matter. I take this opportunity of saying that I think there is some inaccuracy of expression in the statute. It recites that, "by the custom of merchants, a bill of lading, being transferable by indorsement, the property in the goods may thereby pass to the indorsee." Now, the truth is, that the property does not pass by the indorsement but by the contract in pursuance of which the indorsement is made. If a cargo afloat is sold, the property would pass to the vendee, even though the bill of lading was not indorsed. I do not say that the vendor might not retain a lien, nor that the non-indorsement and non-handing over of the bill of lading would not have certain other consequences. My concern is to show that the property passes by the contract. So if the contract was one of pledge, the property would be bound by the contract, at least, as to all who had notice of it, though the bill of lading was not handed over. There is, I think, another inaccuracy in the statute, which indeed is universal. It speaks of the contract contained in the bill of lading. To my mind there is no contract in it. It is a receipt for the goods, stating the terms on which they were delivered to and received by the ship, and therefore excellent evidence of those terms, but it is not a contract. That has been made before the bill of lading was given. Take, for instance, goods shipped under a charter-party, and a bill of lading differing from the charter-party, as between shipowner and shipper at least the charter-party is binding: (*Gledstanes* v. *Allen*, 12 C.B. 202.) These distinctions are of a verbal character and not perhaps of much consequence; but I am strongly of opinion that precision of expression is very desirable, and had it existed in such cases as the present there would not have been the contradictory opinions which have been given.

Lord FITZGERALD.—My Lords: Field, J. in the court below came to the conclusion that the transaction under investigation was intended by the parties to operate as a pledge only. There can be no doubt that the inference thus drawn by the learned judge was correct in fact. It seems to follow that the pledgees acquired a special property in the goods with a right to take actual possession should it be necessary to do so, for their protection or for the realisation of their security. They acquired no more, and subject thereto the general property remained in the pledgor. I am of opinion that the delivery of the indorsed bill of lading to the defendants as a security for their advance did not by necessary implication transfer the property in the goods to the defendants. They were not, therefore, "indorsees of a bill of lading to whom the property in the goods passed by reason of the indorsement," so as to make them, without more, "subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with them." The judgments which have been just delivered are so very full, and so able and satisfactory, that it would be mere affectation on my part to attempt to do more than express my concurrence.

Order appealed from reversed. Order of Field, J. restored. Respondent to pay the costs in the court below and in this House.

Solicitors for the appellant, *Hare* and *Co.*, for *H. J. Leech*, Manchester.

Solicitors for the respondent, *Lowless* and *Co.*

Nov. 28, *Dec.* 1 *and* 2, 1884.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN and WATSON.)

SEWARD *v.* OWNER OF THE VERA CRUZ.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Admiralty Division — Jurisdiction — Action in rem—Admiralty Court Act 1861, *s.* 7 *—Lord Campbell's Act.*

The Admiralty Division has no jurisdiction to entertain proceedings in rem for damages occasioned by loss of life, the words "damage done by any ship" in sect. 7 *of the Admiralty Court Act* 1861 *not covering an injury resulting in loss of life, and not extending the provisions of Lord Campbell's Act so to include an action in rem. Judgment of the Court of Appeal affirmed.*

The Franconia (2 *P. Div.* 163; 3 *Asp. Mar. Law Cas.* 435; 36 *L. T. Rep. N. S.* 640) *overruled.*

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Bowen and Fry, L.JJ.), reported in 9 P. Div. 96, and 5 Asp. Mar. Law Cas. 270, reversing a judgment of Butt, J.

The action was brought *in rem* against the owner of the *Vera Cruz*, a Spanish vessel, and her freight and cargo, by the appellant, as administratrix of William Seward her husband, to recover damages under Lord Campbell's Act (9 & 10 Vict. c. 93) for the loss of her husband and son, who were drowned in consequence of a collision between the *Vera Cruz* and the British vessel *Agnes*, in the Mersey, in August 1882. The *Vera Cruz* was arrested at Liverpool in July 1883. The defendant appeared under protest, and contended that the Admiralty Division had no jurisdiction to entertain the action, but Butt, J. held himself bound by the decision of the Court of Appeal in *The Franconia* (2 P. Div. 163; 3 Asp. Mar. Law Cas. 435; 36 L. T. Rep. N.S. 640), and decided in favour of the jurisdiction (see 5 Asp. Mar. Law Cas. 254; 51 L. T. Rep. N. S. 24). This decision was reversed by the Court of Appeal, as above mentioned, that court holding that they were not bound by the decision in *The Franconia* (*ubi sup.*), as the court was equally divided in that case.

The plaintiff now appealed to the House of Lords. *G. Bruce*, Q.C. and *French* appeared for the

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

appellant, and contended that the Admiralty Division had jurisdiction to entertain an action under Lord Campbell's Act for damages for the death of a person who was killed by a collision with a foreign ship, and to arrest such ship as security. The jurisdiction depends on recent statutes, but the older authorities as to the jurisdiction of the Admiralty Court may be looked at. Originally that court exercised jurisdiction, independent of any Act of Parliament, over all torts committed on the high seas. See

The Volant, 1 Wm. Rob. 383;
The Hercules, 2 Dod. 353;
The Ruckers, 4 C. Rob. 73;
The Lagan or *Mimax*, 3 Hagg. Adm. 418;

and the American case *De Lovio* v. *Boit* (2 Gallison, 398), which was decided by Story, J. upon the English authorities, and sums them up. There is no prohibition except in the cases of torts committed in the body of a county. If the court has this jurisdiction, it can, by virtue of recent statutes, exercise it either *in rem* or *in personam*. The Admiralty Court Act of 1840 (3 & 4 Vict. c. 65), s. 6, makes no distinction between damage done by and damage received by a ship. *The Bilbao* (1 Mar. Law Cas. O. S. 5; 3 L. T. Rep. N. S. 338; Lush. 149) was decided on the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104, s. 527), and that case was followed by the Admiralty Court Act 1861 (24 Vict. c. 10), on which the present question turns. We contend that the words of sect. 7, giving jurisdiction "over any claim for damage done by any ship" are wide enough to include this case, and by sect. 35 this jurisdiction may be exercised by proceedings *in rem* or *in personam*. Lord Campbell's Act was passed before this, in 1846, and it did not create a fresh cause of action, but only removed a difficulty in procedure caused by the death:

Read v. *Great Eastern Railway Company*, L. Rep. 3 Q. B. 555; 18 L. T. Rep. N. S. 82.

[Lord BLACKBURN referred to *Pym* v. *Great Northern Railway Company*, 4 B. & S. 396.] The words of the Admiralty Act are wide enough to include all damage, direct or consequential, and this jurisdiction is practically convenient, and in the case of a foreign ship it is difficult to see what other remedy there is. Sect. 2 of Lord Campbell's Act, providing for a jury, creates no difficulty, for since the Judicature Acts there may be a jury in the Admiralty Division, and a proceeding *in rem* is *inter partes*. As to the origin of the Admiralty jurisdiction *in rem*, see

Clerke's Admiralty Practice, 1722, tit. 24, 28;
The Bold Buccleuch, 7 Moo. P. C. 267;
The Two Ellens, 1 Asp. Mar. Law Cas. 208; L. Rep. 4 P. C. 161; 26 L. T. Rep. N. S. 1.

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), by sect. 514, which gives jurisdiction to the Court of Chancery over the liability of shipowners in respect of loss of life, shows that the Legislature intended the Admiralty Court to deal with cases under Lord Campbell's Act. The words "damage done by any ship" should receive a wide construction:

The Malvina, Lush. 493; 1 Mar. Law Cas. O. S. 218; 6 L. T. Rep. N. S. 369; Br. & Lush. 57;
The Diana, Lush. 539;
The Sarah, Lush. 549;
The Uhla, 3 Mar. Law Cas. O. S. 148; 19 L. T. Rep. N. S. 89; L. Rep. 2 Ad. & Ecc. 29, n.;
The Excelsior, L. Rep. 2 Ad. & Ecc. 268; 19 L. T. Rep. N. S. 87; 3 Mar. Law Cas. O. S. 151;
The Industrie, 1 Asp. Mar. Law Cas. 17; L. Rep. 3 Ad. & Ecc. 303; 24 L. T. Rep. N. S. 446;
The Clara Killam, L. Rep. 3 Ad. & Ecc. 161; 23 L. T. Rep. N. S. 27;
The Sylph, 3 Mar. Law Cas. O. S. 37; L. Rep. 2 Ad. Ecc. 24; 17 L. T. Rep. N. S. 519;
The Beta, L. Rep. 2 P. C. 447; 20 L. T. Rep. N. S. 988;
The Guldfaxe, L. Rep. 2 Ad. & Ecc. 325; 3 Mar. Law Cas. O. S. 201; 19 L. T. Rep. N. S. 748;
The Explorer, 3 Mar. Law Cas. O. S. 507; L. Rep. 3 Ad. & Ecc. 289; 23 L. T. Rep. N. S. 604.

Smith v. *Brown* (L. Rep. 6 Q. B. 729; 1 Asp. Mar. Law Cas. 56; 24 L. T. Rep. N. S. 808) is in favour of the respondent, but it is in conflict with *The Beta* (*ubi sup.*). Since the decision in *The Franconia ubi sup.*) in 1877 this jurisdiction has been frequently exercised, and found practically convenient. The objections taken in the court below as to its practical working apply equally to the procedure under the Merchant Shipping Act 1854, sect. 514, and the balance of justice and of convenience is in favour of our contention.

Dr. *Phillimore* and *Bucknill*, 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 (Selborne).—My Lords: Both Mr. Gainsford Bruce and Mr. French have argued this case with so much ability that your Lordships have received all that assistance which it would be possible for counsel to give in order to appreciate the question to be now decided, and therefore, as the result has been to satisfy your Lordships that the judgment appealed from is right notwithstanding the very considerable conflict of opinion and authority which there was upon the point before, it does not seem to your Lordships necessary to call upon the learned counsel on the other side. This is an action *in rem* essentially. By the rules of court there are certain provisions made for actions *in rem* in the Probate, Divorce, and Admiralty Division as distinct from the ordinary class of actions. Although it might have been possible to bring an ordinary action, in all respects of the same kind as could be brought in the Queen's Bench Division, in the Probate, Divorce, and Admiralty Division, and though I should be far from entertaining any doubt as to the jurisdiction of that division to deal with such an action in this, as in any other case (but not more in this than in any other case) if no objection were taken, and no transfer asked for or made, yet this is not an action of that kind. This is an action brought in a form appropriate to actions *in rem* in the Admiralty Division, of the same kind as might have been brought in the Court of Admiralty before the Judicature Acts were passed, and this question must be determined exactly in the same manner as if the action had been so brought, and as if the Judicature Acts had never been enacted. Now, the question whether such an action lies or not depends altogether upon the construction and effect of the 7th and 35th sections of the Admiralty Court Act of 1861. I do not myself think that there are any other sections in that Act which are material to the question to be determined. What it

noticeable is, that most of the sections are expressed in definite terms, leaving no opening for any doubt or question as to the particular cases in which a new jurisdiction is to be given, or an old jurisdiction extended to the Admiralty Court. But this 7th section is expressed in perfectly general words: "The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship;" and the question which your Lordships have to determine is what is meant by these words "claim for damage done by any ship," whether they can, according to sound principles of construction, be held to include such causes of action as arise under Lord Campbell's Act when death has occurred by reason of the "wrongful act, neglect, or default" of some other person. That 7th section must be construed with the 35th, on which no doubt this action is founded: "The jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem*, or by proceedings *in personam*." That section undoubtedly, according to the natural meaning of the words, shows that while an option to proceed *in rem* or *in personam* is given as to the jurisdiction conferred by the Act, yet from the very nature of such an option every case provided for by the Act is regarded as a proper case for a proceeding *in rem*, and accordingly the appellant, considering that the 7th section brought cases under Lord Campbell's Act within the purview of the Admiralty jurisdiction, justly upon that hypothesis held it to mean such actions as were capable of being brought by a proceeding like the present *in rem*: and if the action cannot be so brought, then I apprehend it will follow *ex converso* that the 7th section does not extend to this description of claim.

Now one thing is quite clear, and that is that whether this particular kind of action can be brought within those words does not depend upon any expressed intention of the Legislature to bring it within the clause, for there is not the slightest reference whatever in that clause to any particular case or class of cases. If it necessarily or properly comes within the words "any claim for damage done by any ship," according to the reasonable construction of those words in connection with the clause which authorises proceedings *in rem* to enforce such claim, then no doubt the words, being general, would include it; but express or special inclusion is certainly not indicated. Upon that point I cannot but observe that the argument founded on the 13th section in the Act seems to me not to assist the appellant, because, when the Legislature did intend, under certain special conditions, to deal with cases of which this might be one, it has done so, and that in so many words, and a reference to the jurisdiction given to the Court of Chancery in England by the ninth part of the Merchant Shipping Act 1854 makes the intention definite and clear. But there is nothing of that kind in this section, and unless the proposition can be made out that this kind of action necessarily, or at all events legitimately, falls within the words "claim for damage done by any ship," there is not the smallest indication of any intention of the Legislature to include it. It must be remembered that Lord Campbell's Act is the source of the right, if the right exists, and we must look to that Act to see whether a claim made under that Act can naturally or properly be described as a "claim for damage done by any ship." The first observation which occurs is this—there is not a word about ships in Lord Campbell's Act. It is an Act which deals with a category of cases, which may include injuries done by persons responsible for the navigation of ships to persons suffering by faults in that navigation, but it only includes them as part of a much larger and more general category of cases, and without any express reference to or mention of any particular case which may fall under that category. Therefore no one can say that Lord Campbell's Act relates expressly to claims for damage done by ships; and this section in the Act of 1861 relates to that and to nothing else. Maritime damage by ships is the subject of that legislation; general injuries resulting in loss of life by wrongful acts and so forth, are the subject of the other. It is not very likely that when the legislation goes on such different lines it should be intended indirectly to affect by the one legislation, and in a peculiar manner, a particular case which may or may not arise under the other legislation. But that is not all. Inasmuch as there can be no right of action whatever unless it comes within the terms of Lord Campbell's Act, let us see whether those are terms which can be brought reasonably and naturally and consistently within the interpretation sought to be imposed on the 7th section of the Act of 1861, which statute turns the action into an action *in rem* at the option of the plaintiff. Now, what are the words? "Whensoever the death of a person shall be caused by a wrongful act, neglect, or default"—all words plainly applicable only to a person doing an act, or guilty of a neglect or default, and not to an inanimate instrument or thing like a ship—"and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof"—"to maintain an action and recover damages" plainly points to a common law action—"then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured." Well, it is to my mind, as plainly as possible, a personal action given for a personal injury inflicted by a person who would have been liable to an action for damages, manifestly in the common law courts if the death had not ensued. Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim, *Actio personalis moritur cum personâ*, because the action is given in substance, not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime; but death is essentially the cause of the action, an action which he never could have brought under circumstances which if he had been living would have given him, for an injury short of death which he might have sustained, a right of action, which might have been barred either by contributory negligence, or by his own fault, or by his own release,

or in various other ways. Every word of that legislation being, as it appears to me, legislation for the general case, and not for particular injury by ships, points to a common law action, points to a personal liability, and a personal right to recover, and is absolutely at variance with the notion of a proceeding *in rem*. But the matter does not stop there, because the peculiarity of the legislation is this, that the action being given for the benefit of the wife, or husband, parent and children of the dead person, "the jury" (it is assumed that there would be a jury) "may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct:" and there are some other provisions, one as to the time within which the action is to be brought, another as to what the plaintiff is to do: "In every such action the plaintiff on the record shall be required, together with the declaration to deliver to the defendant or his attorney, a full particular," and so on. It is impossible not to see, and the proposition is too clear to admit of dispute, that if the 7th section of the Act of 1861 has the effect of transferring that action to the Court of Admiralty to be brought under the Admiralty rules and system, tried without a jury, and enforced *in rem* and not *in personam*, without making any person individually a defendant as liable to an action for damages, without making any person a defendant on the record and declaring against him, to whom or to whose attorney full particulars can be delivered, and so on, the Act of 1861 has materially varied the effect of the Act which gives the right of action.

Now, if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so. For that principle I may refer to *Hawkins* v. *Gathercole* (6 De G. M. & G. 1). That case arose under the Judgment Act (1 & 2 Vict. c. 110), s. 13, which provided that a judgment should be binding (*inter alia*) on all the interest of the debtor in "lands, tenements, rectories, advowsons, tithes," and so forth, and that for the amount of the judgment these different descriptions of property to which he might be entitled should be charged in the same manner as if "the person against whom the judgment should have been entered up had power to charge the hereditaments, and had by writing under his hand agreed to charge them with the amount of the debt." The question arose as to an ecclesiastical benefice. By the restraining Act of Elizabeth a clergyman had no power to charge his benefice, but Lord Cranworth thought when the case came before him in the first instance that those words in sect. 13 relieved him from the want of power indirectly in that particular case, and in favour of the creditor did away with the effect of the restraining Act of Queen Elizabeth, putting him in the situation of a man who could charge and who had charged. But that decision was reversed. It was held that all those general words about tithes and rectories and so on were capable of a reasonable application to subjects not affected by any particular legislation; and that the statue of Elizabeth not being referred to in any way, the Act being *in diversâ materiâ*, and not containing the slightest indication of any such intention, was not unnecessarily to be repealed or altered by such general words. I need not read more from the case than the words of Turner, L.J. (at p. 31): "Can," he says, "the statute of Elizabeth be held to be practically repealed" (and of course alteration in any important particulars is *pro tanto* the same) "by such general words as are contained in the 13th section of this statute? I venture to think that it cannot, grounding that opinion upon the authorities to which I have generally referred, and adding to them the 11th case in Jenkins' Fifth Century, in which it is thus said: 'A special statute does not derogate from a special statute without express words of abrogation.'" To me it seems to be not only easy, but right, to construe the words in the Act of 1861 in a sense in which they are quite inapplicable to this particular cause of action, and leave all the provisions of Lord Campbell's Act in full force and effect, not modified or interfered with; because in truth "damage done by any ship" was a form of expression naturally applicable to that description of damage—maritime damage—as to which, in cases falling within the jurisdiction of the Admiralty Court, the ship was treated as, so to say, *in delicto*, and was liable to a proceeding *in rem*, such as the 35th section contemplated.

I think that I have said all that is really necessary. The argument from the Merchant Shipping Act, as it appears to me, manifestly fails. There, where the Legislature did intend for certain purposes, for the purpose of giving effect to the limited liability, and administering a fund brought into court to answer that liability, that this description of claim against the owners of the ship should be brought into account as well as other claims, it made provisions giving a jurisdiction to the Court of Chancery, which, as it was exercisable by the Court of Chancery and not otherwise, has since been transferred to the Court of Admiralty; it made provision giving a jurisdiction in those cases to the Court of Chancery, in order to effect the express and manifest intention of the Legislature for that particular and limited purpose, and it would involve so much and only so much modification of the provisions of Lord Campbell's Act as might be necessary to give effect to the intention so declared. But there is nothing of that kind here. What you have bearing upon that subject is in the enactment which applies only to the case of competing claims, and the case where the rule of limited liability is to be applied, and a fund is brought into court to answer it. That is not the case here. The judgment appealed from appears to me to be entirely right, and I move your Lordships to dismiss the appeal with costs.

Lord BLACKBURN.—My Lords: I am entirely of the same opinion. Before Lord Campbell's Act, where a person had been injured from any of the causes mentioned in the 1st section of that Act, and had died, the maxim *Actio personalis moritur*

cum personâ applied; he could not sue, for he was dead, and it did not survive to anybody whomsoever to sue for the damages occasioned by the accident which had caused injury to him resulting in death. That Lord Campbell, or rather the Legislature at the instance of Lord Campbell, thought fit to alter; and I think that when that Act is looked at it is plain enough that, if a person dies under the circumstances mentioned when he might have maintained an action if it had been for an injury to himself which he had survived, a totally new action is given against the person who would have been responsible to the deceased if the deceased had lived, an action which, as it is pointed out in *Pym* v. *Great Northern Railway Company* (2 B. & S. 759; 4 B. & S. 396), is new in its species, new in its quality, new in its principle, in every way new, and one which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances suffers pecuniary loss by the death. That is a personal action, if personal action there ever can be. It is quite plain (it does not require much more than to state it) that if a man who has the custody and management of a ship manages it in such a way that by his negligence, or from any other cause which is mentioned in sect. 1, a person is killed, that man is liable under Lord Campbell's Act; and also if that man is a servant acting for a superior (the shipowner is generally speaking the person), if he is the servant of the shipowner who is the principal, the shipowner is answerable under this cause of action. That being so, the Legislature by the Merchant Shipping Act of 1854, when they were renewing former enactments which limited the liability of a shipowner according to the value of his ship, thought fit to say, if the owner of the ship is as such made liable under Lord Campbell's Act (for that is what they meant), it shall be included in those claims which are to be divided rateably according to the value of the ship to which the liability of the shipowner is limited: and a jurisdiction was given by the 514th section to the Court of Chancery to enforce the limitation of the liability, and for that purpose it had various collateral powers.

Now, that was the state of things in 1854 and down to 1861, and I think there cannot be the least doubt that at that time the remedy which the widow, parent, or child would have, the action being brought in form by the administrator with all the provisions which have been already read, providing that the matter should be properly done, would be a personal action, and a personal action only; and whether the liability of the person who was sued was because he was the owner of the ship, in which case he would have a limit to his liability under the Act of 1854, or because he was the owner of a stage coach, it would be a personal liability, and a personal liability only. Now the Legislature undoubtedly had full power to enact that the Court of Admiralty should have what jurisdiction they choose to give it. The question really, when it is looked at, depends upon the construction of the 7th section of the Admiralty Court Jurisdiction Act (for I do not think that any of the others really go to it or throw any light upon it), the words there used being that the Court of Admiralty shall have jurisdiction over any claim for damage done by any ship. That being so, what do these words mean? If the question now raised had been that which the Court of Queen's Bench, of which I was then a member, treated as raised in *Smith* v. *Brown* (L. Rep. 6 Q. B. 729; 1 Asp. Mar. Law Cas. 56; 24 L. T. Rep. N. S. 808)—that really was a case under Lord Campbell's Act and under Lord Campbell's Act only, but it was treated as general—if the question now raised had been whether personal damage to a man who lived was within that 7th section of the enactment, I should have had, as I then had, some doubt about the matter, and it would have carried me so far that, if that had been the question now raised, I certainly should have wished to hear the case argued out to the end before giving an opinion upon it one way or the other. But the question raised here being exclusively whether the liability of a shipowner as a person, under Lord Campbell's Act, to make good damages for the negligence of his servant who happens to be master of the ship, comes within the words "damage done by any ship," I decidedly say that I do not think it does. The Legislature, in using such general words as those, cannot have had in contemplation all the numerous and important subjects which, had they been considering Lord Campbell's Act, they would have had. For instance, no one seems to have thought of the case of a Swedish ship or a French ship on the high seas drowning an Englishman, and afterwards coming into England. There would have been a very serious international question raised in that case whether the English Legislature had enacted (as it beyond doubt had full power to enact) that when the ship came into England there should be power to enforce against the Frenchman or the Norwegian reparation for the loss of life which his own law did not give, though the accident which caused it happened on the high seas. In this particular instance the Spaniard's ship is in the Mersey, and is in English waters when the occurrence takes place, but the point upon the construction of the Act of 1861 would have been just the same if the collision by which the accident had occurred had been in the Bay of Biscay; there would have been no difference that I can perceive in the matter, and that is obviously a very serious question indeed which should be carefully considered in inquiring whether the Legislature when passing that Act intended it to have any such meaning. That is no reason for saying that, if the words of the statute plainly and obviously have that meaning and show that that was intended, foolish and rash and improvident as we may think it to have been, we must not give them that effect. But when the question comes to be whether there are words in any way pointing to liability under Lord Campbell's Act, or to the defendant's liability under Lord Campbell's Act, that seems to me to be a very strong argument indeed for saying that the words are not to be so construed, and consequently that the Court of Admiralty had not in 1862 any such jurisdiction as is now claimed.

Lord WATSON.—My Lords: Notwithstanding the very full and able argument which has been addressed to the House by the counsel for the appellant, I entertain no doubt that a right of action such as is given by Lord Campbell's Act in a case like the present is not a "claim for damage done by a ship" within the meaning of the 7th section of the Admiralty Court Act 1861. Upon that ground, and upon that ground only,

I am of opinion with your Lordships that the appeal ought to be dismissed.

Order appealed from affirmed and appeal dismissed with costs.

Solicitors for the appellant, *Leslie* and *Hardy*, for *Bradshaw* and *Townsend*, Barrow-in-Furness.

Solicitors for the respondent, *Gregory, Rowcliffes*, and *Co.*, for *Hill, Dickenson*, and *Co.*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

May 6, 8, 19, *June* 13, 26, *Dec.* 20, 1884, *and Feb.* 14, 1885.

(Before Brett, M.R., Bowen and Fry, L.JJ.)

The Heinrich Bjorn. (a)

ON APPEAL FROM SIR JAMES HANNEN.

Necessaries—Foreign ship—Maritime lien—Action in rem—Bottomry bond—3 & 4 Vict. c. 65, s. 6.

A contract entered into with the managing owner of a ship for a loan of money to be laid out in necessaries places the lender in the same position as a material man supplying the goods.

3 & 4 Vict. c. 65, s. 6, does not create a maritime lien in respect of necessaries supplied to a foreign ship, and hence material men cannot enforce their claim by proceedings in rem against the ship when in the hands of subsequent purchasers for value. (b)

A written agreement, made between the managing owner of a ship and another party, by which it is agreed that, in consideration of an advance for necessaries supplied to and for the use of the vessel, the managing owner undertakes to return the amount advanced "on the return of the said barque from her present voyage," and authorises the lender to cover the amount advanced by insurance on the barque, but which is silent as to maritime interest, is not a contract of bottomry, there being no words in the contract purporting to pledge the ship as security for the loan, and it not appearing that the parties ever had any intention of creating a bottomry bond (Brett, M.R. dubitante).

The Ella A. Clarke (8 *L. T. Rep. N. S.* 119; 1 *Mar. Law. Cas. O. S.* 325; *Br. & Lush.* 32) *reversed.*

This was an appeal by the defendants in a necessaries action from the decision of Sir James Hannen, by which he decided that the plaintiffs were entitled to recover so much of their claim as had been in fact expended in necessaries (5 Asp. Mar. Law Cas. 145; 49 L. T. Rep. N. S. 405; 8 P. Div. 151).

The plaintiffs were Messrs. C. and C. J. Northcote, shipbrokers, carrying on business at Liverpool.

The *Heinrich Bjorn* was a Norwegian vessel, and in March 1882 was lying in the port of Liverpool. Gunder Abrahamsen, the then managing owner, was in England, and was indebted to the plaintiffs on a general account unconnected with the ship, and required a further advance. Gunder Abrahamsen owned five sixth shares in the *Heinrich Bjorn*. The freight of the ship being

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

(b) According to this decision, the only effect of the statute is to enable the material man to enforce his claim in the Admiralty Court by arrest of the ship; but his claim against the *res* commences only from the date of the arrest, and all persons having claims on the *res* prior in date to the arrest, whether they be purchasers, mortgagees, or persons having maritime liens, take precedence of his claim. Prior to 1840, which was the date of the statute under consideration, it had been decided in many prohibitions that the Admiralty Court had no jurisdiction over claims for necessaries; but it is to be noticed that in every such case the necessaries were supplied on land and not on the high seas. According to the judgment of the court the law relating to necessaries was, prior to the 3 & 4 Vict. c. 65, as follows: "Ever since the 13 Rich. 2, c. 5, the judges of the Admiralty Court were restrained from 'meddling of anything done within the realm,' and were confined to things done upon the high sea." According to *Bridgman's case* (Hobart's Rep. 11), the contract of the master upon the high seas is a contract effecting the hypothecation of the ship; thus we find the following passage on p. 12: "But I was of opinion clearly that the Admiral Law is reasonable, that if a ship be at sea and take leake, or otherwise want victual or other necessaries, whereby either herself be in danger or the voyage defeated, that in such case of necessity the master may impawn for money or other things to relieve such extremities by employing the money so." Hence, in the case of necessaries supplied upon the seas, it is to be presumed that the Admiralty had jurisdiction, and that a maritime lien existed in respect of such supplies. The following authorities support this proposition: *Palmer* v. *Pope* (Hobart's Rep. 79, 212); *Justin* v. *Ballam* (2 Ld. Raymond, 805); *Bridgman's case* (Hobart's Rep. 11); Coke's Inst. part 4, c. 22, p. 134. The absence of more numerous and more direct authorities is no doubt due to the fact that such supplies partake so much of the character of salvage, and salvage reward being so much greater than the actual value of the supplies, that persons making supplies have preferred to bring their claim as salvage rather than as a claim for necessaries. In the American case of *De Lovio* v. *Boit* (2 Gall. 398), Story, J., in a learned and luminous judgment, after reviewing all the authorities on the question, decided that the Admiralty had jurisdiction over all maritime contracts, wheresoever the same may be made or executed, and hence he concluded that a policy of insurance was within the jurisdiction. According to this learned judge, the words "things done upon the sea," as used in the 13 Rich. 2, c. 5, are to be interpreted as meaning all things touching the sea—that is, maritime affairs in general. Therefore, prior to 1840, necessaries supplied upon the sea gave the same remedies as collisions or salvage upon the sea, and when we find the Legislature extending the jurisdiction to cover salvage, collision, and necessaries supplied within the body of a county, the argument that if a maritime lien be given in the case of salvage and collision it is also given in the case of necessaries is of great force. It is, however, noticeable that in the judgment of the court no reference is made to this contention. The learned judges seem to have assumed that prior to 1840, no jurisdiction existed in respect of necessaries wherever supplied, and that, therefore, the statute 3 & 4 Vict. c. 65 was to be construed without any regard to the previous history of necessaries. The grave inconveniences attaching to this decision are in themselves an agreement against its correctness, and, should the question be taken before a higher tribunal, it is to be hoped that, in the interests of expediency, as well as in the interests of commerce, the House of Lords will see its way to arriving at a different conclusion. If there be no maritime lien, not only may injustice be done through tradesmen losing their money, but commerce will also be affected owing to the difficulty which masters of foreign vessels will find in getting supplies unless they at once pay for them. Some of the incidents of maritime liens are, no doubt, objectionable; but experience shows that tradesmen need every protection when dealing with certain classes of foreign vessels.—Ed

in the hands of other persons, the plaintiffs refused to make the advance, but agreed to supply Gunder Abrahamsen with money for necessaries for the ship, provided they could get security for such advance. To this Abrahamsen agreed, and an agreement was drawn up on the 23rd March, by which it was agreed that, in consideration of the plaintiffs advancing an amount of about 600*l.* "for necessaries supplied to and for the use of the barque *Heinrich Bjorn*," Abrahamsen undertook to return the amount advanced, with interest and all charges, on the return of the vessel from her then voyage.

This agreement is set out in full in the judgment of the court.

The sum required for the disbursement of the ship for its outward voyage was estimated at 350*l.* Instead of paying 350*l.* of the debt due from Abrahamsen to the plaintiffs, and the plaintiffs advancing that sum to Abrahamsen for the purchase of necessaries, it was agreed that this amount should be settled in account between them as though this had been done by the plaintiffs handing Abrahamsen a cheque for 350*l.* as for necessaries, which he immediately returned to the plaintiffs in discharge of so much of the debt due from him to them.

The *Heinrich Bjorn* was subsequently sold to the defendants in this action, who had knowledge of the plaintiffs' claims.

May 6, 8, 19, *June* 13 *and* 26.—*Myburgh*, Q.C. and *Pike* for the appellants, the defendants.—On the facts the defendants are entitled to judgment. It is also submitted that in law the plaintiffs have no cause of action against the *res* in the hands of the defendants. Notwithstanding the decision of Dr. Lushington in *The Ella A. Clark* (8 L. T. Rep. N. S. 119; Br. & Lush. 32; 1 Mar. Law Cas. O. S. 325), that 3 & 4 Vict. c. 65, s. 6, gave a maritime lien in respect of necessaries supplied to a foreign ship, it is submitted that there are good and sufficient reasons why this court should overrule that decision. Prior to 1840 the Admiralty Court had been prohibited from exercising jurisdiction over necessaries. The 3 & 4 Vict. c. 65, s. 6, was passed to give the Admiralty Court the same jurisdiction over necessaries as the common law courts possessed, the only difference being that the plaintiff in the Admiralty Court was allowed to enforce his remedy by seizure of the ship. There are no express words in the Act creating a maritime lien, and in their absence it is submitted that the Legislature never contemplated the creation of so important a right in favour of the material man. Though Dr. Lushington decided in *The Ella A. Clark* (*ubi sup.*) that the 3 & 4 Vict. c. 65, s. 6, did create a maritime lien, it is yet to be noticed that on the several occasions when this question came before him, he entertained very different opinions:

The Alexander, 1 W. Rob. 288; 1 N. of Cas. 188;
The Ocean, 2 W. Rob. 368;
The West Friesland, Swa. 454;
The Gustaf, 6 L. T. Rep. N. S. 660; Lush. 506; 1 Mar. Law Cas. O. S. 230;
The Ella A. Clark (*ubi sup.*);
The Pacific, 10 L. T. Rep. N. S. 541; Br. & Lush. 243; 2 Mar. Law Cas. O. S. 21.

It is true that there are passages in judgments of the Privy Council approving of Dr. Lushington's decision in *The Ella A. Clark* (*ubi sup.*), but these at the best are dicta, which this court should not follow:

The Two Ellens, 26 L. T. Rep. N. S. 1; L. Rep. 4 P. C. 161; 1 Asp. Mar. Law Cas. 208;
The Rio Tinto, 5 Asp. Mar. Law Cas. 224; 9 App. Cas. 356; 50 L. T. Rep. N. S. 461.

The reasoning of Dr. Lushington's decision in *The Ella A. Clark* (*ubi sup.*) is founded on the fallacious assumption that where a proceeding *in rem* is given a maritime lien is created. This assumption was subsequently rejected by Dr. Lushington himself and other learned judges:

The Pacific (*ubi sup.*);
The Gustaf, (*ubi sup.*);
The Two Ellens (*ubi sup.*).

It has been held that no maritime lien is created by sect. 5 of the Admiralty Court Act 1861, which gave the Admiralty Court jurisdiction over necessaries supplied to a British ship, and it is submitted that this and the earlier Act giving jurisdiction over necessaries supplied to a foreign ship are *in pari materiâ* and should be construed alike. Secondly, assuming the court to be of opinion that 3 & 4 Vict. c. 65, s. 6, did create a maritime lien, it is submitted that, inasmuch as the goods were supplied to the managing owner in this country, they were not "necessaries" within the proper meaning of the word, and therefore no maritime lien attached to the ship. The word "necessaries" implies necessity, which does not exist if the owner is present when the goods are supplied. It being the duty of the master to take the ship back to the owner, he must "necessarily" buy materials for that purpose. If an owner is devoid of funds he can always sell the ship, whereas a master cannot:

The Sophie, 1 W. Rob. 369;
The Albert Crosby, L. Rep. 3 Ad. & Ecc. 37;
Jonson v. *Shippen*, Raym. 982;
The Duke of Bedford, 2 Hagg. 294;
The Helgoland, Swa. 491;
The St. Yago de Cuba, 9 Wheat. 409;
Conkling's United States Admiralty Practice, pp. 73, 79.

The mere fact of the agreement between Abrahamsen and Messrs. Northcote speaking of the advance being made "for necessaries supplied to and for the use of my barque *Heinrich Bjorn*" is not by itself sufficient, if the plaintiff fails to prove that the money was in fact expended in necessaries:

Guion v. *Trask*, 8 W. R. 266; 29 L. J. 337, Ch.;
Greens v. *Briggs*, 6 Hare, 395;
The Helena Sophia, 3 W. Rob. 265.

Hall, Q.C. and Dr. *Raikes* for the respondents, the plaintiffs.—In the absence of strong reasons, the court should not overrule the decision of Dr. Lushington in *The Ella A. Clark* (*ubi sup.*), that 3 & 4 Vict. c. 65, s. 6, created a maritime lien, a decision which has been acted upon for over twenty years, and also approved of by the Privy Council on several occasions. That no maritime lien is given by the Admiralty Court Act 1861, s. 5, supports the respondents' contention, that Act applying only to necessaries supplied to a British ship, in which case the material man has other remedies than those given by a maritime lien. Where a proceeding *in rem* is given, it is to be presumed, in the absence of reasons to the contrary, that the Legislature meant to create a maritime lien:

The Bold Buccleugh, 7 Moo. P. C. 267;
The Alexander, 1 W. Rob. 288; 1 N. of Cas. 188.

Although the Admiralty Court was prohibited from exercising jurisdiction over claims for necessaries, it is to be noticed that in the cases in which prohibition was granted the necessaries were supplied on land and not on the high seas. There is, therefore, no decision which decides that prior to 1840 the Admiralty Court had not jurisdiction over necessaries supplied on the high seas, and that no maritime lien existed under such circumstances. It may, therefore, have been the intention of the Legislature to create a maritime lien in respect of necessaries supplied on land, just as it created a maritime lien in the case of damage or salvage "within the body of a county." There is no English authority drawing a distinction between goods supplied to a master and goods supplied to an owner, whereas there are several American cases in which it has been decided that, provided the owner is devoid of personal credit, a necessaries action will lie:

St. Yago de Cuba, 9 Wheaton, 409;
Thomas v. *Osborn*, 19 How. 22;
The James Guy, 1 Ben. 112;
The Nestor, 1 Sumn. 73, 81;
The Grapeshot, 9 Wall. 140;
The Kalorama, 10 Wall. 204.

It seems unreasonable that the master, who is only the agent, should be able to create a maritime lien, and that the owner, the master's principal, should not be able to do so:

The Riga, L. Rep. 3 A. & E. 516; 1 Asp. Mar. Law Cas. 246; 26 L. T. Rep. N. S. 202;
Steinbank v. *Shepard*, 22 L. J. 341, Ex.;
Ladbroke v. *Cricket*, 2 T. Rep. 649.

Even if no maritime lien attached, yet, as the defendants were purchasers with notice of the plaintiffs' claim, the plaintiffs have a charge upon the ship which entitles them to proceed *in rem*. It is also submitted that the agreement amounts to a bottomry bond, and should be treated as such.

Myburgh, Q.C. in reply.

Dec. 20.—The Court having doubts as to whether or not the agreement entered into between the plaintiffs and Abrahamsen constituted a bottomry bond, counsel were heard on this point.

Myburgh, Q.C. for the defendants.—The agreement does not purport to be a bottomry bond, and it was never so intended. The agreement by its terms excludes all maritime risk. The lender has an alternative security. In the event of the return of the ship from her voyage he is to look to the borrower for repayment; if she is lost on the voyage he has a charge upon the policies of insurance. No maritime interest is provided for. In the absence of the above necessary incidents of a bottomry bond, the agreement cannot be treated as a bottomry bond:

The Atlas, 2 Hagg. 48;
The Emancipation, 1 W. Rob. 124;
Steinbank v. *Shepard*, 22 L. J. 341, Ex.

Hall, Q.C. for the plaintiff.—The agreement entered into between the plaintiffs and Abrahamsen contains all the essentials of a bottomry bond. The agreement to repay the sum lent is conditional "on the return of the said barque *Heinrich Bjorn* from her present voyage." It is not necessary that a maritime premium should be expressly stated:

The Empusa, 41 L. T. Rep. N. S. 383; 5 P. Div. 6; 4 Asp. Mar. Law Cas. 185;
The Mary Ann, L. Rep. 1 A. & E. 14.

The reserving of personal liability does not invalidate the bond:

The Nelson, 1 Hagg. 177;
The Zodiac, 1 Hagg. 320.

The form of a bottomry bond is immaterial provided its purport is clear:

The Kennersley Castle, 3 Hagg. 7;

An owner can bottomry as well as a master. Prior to the legislation relating to mortgaging ships it was a very usual way for an owner to raise money. This is shown by reference to 19 Geo. 2, c. 37, s. 5, which prohibited the owner from so doing under certain circumstances:

The Dante, 4 N. of Cas. 408;
The Duke of Bedford, 2 Hagg. 294;
The Barbara, 4 Ch. Rob. 2;
The Draco, 2 Sumn. (Amer.) 156.

Myburgh, Q.C., in reply, cited
The Royal Arch, Swa. 269.

Cur. adv. vult.

Feb. 14, 1885.—The judgment of the court was delivered by

Fry, L.J.—On the 23rd March 1832 Gunder Abrahamsen was the owner of five sixth shares in the Norwegian ship *Heinrich Bjorn*, and was the managing owner of the ship, which was then lying in Liverpool under the care of Messrs. Brodersen, Vaughan, and Co., shipbrokers there. Shortly before this date, viz., on the 10th March, a charter-party of this ship from Liverpool to Tabaxo and back to Liverpool had been negotiated by the plaintiffs, Messrs. Northcote, who were shipbrokers of London, and who had for years acted for Abrahamsen. On the 23rd March 1882 Abrahamsen, having come from Norway to London, entered into a transaction with the plaintiffs in a memorandum of agreement signed by Abrahamsen, which was as follows: "In consideration of C. and C. J. Northcote advancing me, Gunder Abrahamsen, by cash or acceptance, an amount of about 600*l*., say six hundred pounds British sterling, for necessaries supplied to and for the use of my barque *Heinrich Bjorn* of Kragerœ, Norway, I hereby undertake to return them the whole amount so advanced me, with interest and all charges, on the return of the said barque *Heinrich Bjorn* from her present voyage as concluded for me by C. and C. J. Northcote, as per charter-party dated the 10th March 1882. I hereby declare that I, Gunder Abrahamsen, am sole managing owner of the said *Heinrich Bjorn*, and that the only part owner with me in her is the present master, J. Boe, who owns one-sixth, say one-sixth, share. C. and C. J. Northcote are also authorised by me to cover the said amount advanced me by insurance on ship, &c., out and home, at my cost. This insurance to be effected either here or in Norway." It appears from the evidence tendered by the plaintiffs in this case that Abrahamsen, shortly after the transaction in question, went into liquidation, and that the five-sixths of the vessel belonging to his estate were, prior to the commencement of this action, sold to Nativig, Aaldborg, and others, who are therefore amongst the defendants in the present proceedings.

The question in this action is, whether the present owners can be effected with liability under the contract of the 23rd March 1882, and as they were not parties to that transaction they can only be so affected if the contract in question created

a charge upon the ship which they purchased. The case was commenced and continued down to the hearing as a cause for necessaries, without any suggestion that the contract in question was a contract of bottomry, and apparently on the hypothesis that a contract for the supply of necessaries created a maritime lien. The same view seems to have been acted upon by both parties at the trial, and we do not find that the learned judge's attention was drawn to the inquiry whether that view of the nature of a contract for necessaries was correct, nor to the question whether the contract could be considered as, or was in fact, a contract of bottomry. On the contrary, the questions raised at the trial, and the questions on which therefore evidence was given, appear to us to have been, first, whether the contract produced was a *bonâ fide* contract, or whether, as the defendants alleged, it was a scheme for charging on the ship the private debts of the part owner; and, secondly, whether the plaintiffs' claim for necessaries was or was not too large. When, however, the case came before us on appeal, the point was raised whether a contract for necessaries does, by the law of England, create a maritime lien, and this question was accordingly argued before us at length; and at a later stage the further question whether the contract sued on was not in truth a bottomry contract was raised, and argued before us by one counsel on each side. We will approach these questions in the opposite order to that in which they were argued. Both sides have more or less relied on the parol evidence given in this case as to the true result of the contract. We entertain grave doubts whether the evidence can be relied upon for that purpose. We think that it was perfectly admissible on the issue before the learned President, viz., whether the contract was a fraud or not; but we think that it is not admissible to qualify or show the real relation of the parties to a written agreement. Taking the contract, then, as expressed in the written document signed by Abrahamsen, it must be inquired whether it charges the ship, and whether the lender assumes the maritime risk. It appears to us that the contract creates no charge upon the ship. On the contrary, the security taken is of an alternative kind; in the event of the return of the ship from her present voyage, the lender is to look to the borrower personally, and to enforce the liability created by the words "I hereby undertake." In the event of the ship being lost on her voyage, the lender is to look to the equitable charge on the policies which is created by the authority given to the lenders to insure the ship at the cost of the borrower. For the same reason it appears to us that the lender does not take the maritime risk. On the contrary, he takes a contract which gives him an alternative security, excluding all risk at all. This is not, as it appears to us, one of those cases in which the parties, having previously intended to create a bottomry contract, have erred in some particular, in which case the court may reject the erroneous particular. On the contrary, the notion of bottomry was absent from the minds of all the parties. The evidence is not addressed to it. It is not mentioned in the written document, in the pleadings or in the judgment of the learned President, or in the arguments before us, till some observations on it fell from the learned junior counsel for the respondents. We therefore feel bound to conclude that the contract in question was not a contract of bottomry.

The question therefore arises, does a contract entered into with a managing part owner for the loan of money to be laid out in necessaries for a ship create a maritime lien? It is, we think, clear that such a loan places the lender in the same position as the person who has actually supplied the necessaries to a ship. Before the passing of the statute 3 & 4 Vict. c. 65, no such lien was recognised by the law of England. This point was fully discussed in a passage in Abbott on Shipping, which has often been referred to, and the conclusion arrived at by the learned writer is beyond doubt a correct statement both of the civil law and of the old law of England on the point. "Every man," says the learned Chief Justice (Abbott on Shipping, 5th edit. pp. 108, 109), "who had repaired or fitted out a ship, or lent money to be employed in those services, had by the law of Rome, and still possesses in those nations which have adopted the civil law as the basis of their jurisprudence, a privilege or right of payment in preference to other creditors, upon the value of the ship itself, without any instrument of hypothecation or any express contract or agreement subjecting the ship to such a claim. This privilege exists in France not only while the ship remains in the possession of the owner, but even after a sale to a third person for some period of time. It appears," he adds, "that the law of England has not adopted this rule of the civil law with regard to repairs and necessaries furnished here in England. A shipwright, indeed, who has taken a ship into his own possession to repair it, may not be bound to part with the possession until he is paid for the repairs, any more than a tailor, smith, or other artificer, in regard to the object of his particular trade, unless there be a special agreement to give credit for a certain period, or such an usage in the trade as is equivalent to a special agreement. But a shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessaries for a ship, are not by the law of England preferred to other creditors, nor have any particular claim or lien upon the ship itself for the recovery of their demands." In the case of *The Neptune* (3 Knapp P. C. C. 94), decided by the Privy Council in 1835, not only was the law as laid down by Lord Tenterden accepted as governing the case of material men suing *in rem*, but as carrying with it the further conclusion that material men have no lien on the proceeds of a ship sold under a decree of the court for the payment of seamen's wages." "This decision," says Dr. Lushington, in *The Pacific* (Br. & Lush, 245), "took away the last vestige of Admiralty jurisdiction in the case of necessaries; and from that date till the recent statutes the material man had no *locus standi* whatever in the Admiralty Court." The next inquiry, therefore, is whether the Legislature of the present reign has created a lien on the ship in favour of material men which did not previously exist. By the 3 & 4 Vict. c. 65. s. 6, passed in the year 1840, it was enacted "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, or damage re-

ceived by any ship or seagoing vessel, or in the nature of towage, or for necessaries supplied to any foreign 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 when the services were rendered or damage received or necessaries furnished in respect of which such claim is made." This clause gives the Admiralty jurisdiction in respect of four kinds of claim: (1) For salvage services rendered to any ship; (2) for damage received by any ship; (3) for towage services rendered to any foreign ship (*a*); (4) for necessaries supplied to any foreign ship; and in order to understand the operation of the clause it seems necessary to inquire how the law stood with reference to these claims before the statute was passed. Shortly, that law was as follows: that ever since the 13 Rich. 2, c. 5, the judges of the Admiralty Court were restrained from "meddling of anything done within the realm," and were confined to things done upon the high sea; so that whilst in respect of salvage services rendered and damage done by collision on the high seas it recognised a maritime lien in favour of the person rendering the services or sustaining the damage, it had no jurisdiction whatever where the services were rendered or damage done within the body of a county; that as regards towage, which was only then coming into use, the court had no jurisdiction whatever (per Dr. Lushington, *The Wataga*, Swabey, 167); that as regards necessaries supplied to a foreign ship the court had no jurisdiction at all; and that in no case had the English law recognised the supply of necessaries or the doing of repairs as constituting a maritime lien. Such being the position of the law with regard to these several claims, the clause just read gives the Court of Admiralty jurisdiction with regard to all of them, whether the ship in question was within the body of a county or upon the high seas; but the clause is silent as to the nature of the jurisdiction, and words simply giving jurisdiction do not seem appropriate or adequate to the creation of so important a right as that conferred by a maritime lien, a right towards which the law of England was less friendly than the law of Rome and of the countries which have adopted the civil law. It has been suggested that the way in which necessaries are associated with salvage and damage implies an intention to give in respect of necessaries the same lien as existed in respect of salvage; but the argument is not satisfactory, especially when it is observed (1) that necessaries are more closely associated with towage, which give no lien, than with salvage or damage: (2) that the 4th section of the same Act gave the court jurisdiction to decide all questions of salvage, damage, wages, or bottomry; and that this was so far from creating a lien in favour of a master's wages, though the word wages is closely associated with claims protected by maritime liens, that the Legislature subsequently interpose to give a master this lien. Indeed, it is difficult to suppose that, if the Legislature had intended to create a maritime lien, it would not have done so in express words. When, as on two occasions during this reign it has been the case, the Legislature has been minded to create a maritime lien in favour of a master's wages, it has done so by express words. Thus, by the statute 7 & 8 Vict. c. 112, s. 16, it was enacted that all the rights, liens, privileges, and remedies (save such remedies as are against a master himself) which by that Act, or by any law, statute, custom, or usage, belonged to any seaman not being a master mariner, in respect to the recovery of his wages, should, in the case of the bankruptcy or insolvency of the owner of the ship, also belong and be extended to master mariners in respect to the recovery of wages due to them from the owner of any ship belonging to any of Her Majesty's subjects. And almost precisely similar words, omitting those relating to the bankruptcy or insolvency of the owner, are found in the Merchant Shipping Act 1854, s. 191. But how and in what manner was the new jurisdiction thus given to the Admiralty Court by the statute of 1840 to be exercised? The answer is, that it must be exercised in the manner familiar to the Court of Admiralty and to all courts regulated by the civil law, either by an arrest of the person of the defendant if within the realm, or by the arrest of all personal property of the defendant within the realm whether the ship in question or any other chattel, or by proceedings against the real property of the defendant within the realm: (*The Charkieh*, L. Rep. 4 Ad. & Eccl. 59, 91; *The Alexander*, 1 W. Rob. 294.) But if the material man may thus arrest the property to enforce his claim, how does his claim differ from a maritime lien? The answer is, that a maritime lien arises the moment the event occurs which creates it; the proceeding *in rem*, which perfects the inchoate right, relates back to the period when it first attached. "The maritime lien travels with the thing into whosesoever possession it may come" (*The Bold Buccleugh*, *ubi sup.*), and the arrest can extend only to the ship subject to the lien. But, on the contrary, the arrest of a vessel under the statute is only one of several possible alternative proceedings *ad fundandam jurisdictionem*. It creates no right in the ship or against the ship at any time before the arrest; it has no relation back to any earlier period; it is available only against the property of the person who owes the debt for necessaries, and the arrest need not be of the ship in question, but may be of any property of the defendant within the realm. The two proceedings therefore, though approaching one another in form, are different in substance. In the one case the arrest is to give effect to a pre-existent lien; in the other the arrest is only one of several alternative modes of procedure, because, to use the language of Dr. Lushington in *The Volant* (*ubi sup.*), "it offers the greatest security for obtaining substantial justice in furnishing a security for prompt and immediate payment."

We shall now inquire how far the authorities are consonant with the conclusion that the statute 3 & 4 Vict. c. 65, s. 6, gave no maritime lien to the material man. For if on examining

(*a*) The learned judge here seems to assume that the jurisdiction conferred by the statute is limited to towage services rendered to foreign ships. However, on reference to the words of the section it would seem that the jurisdiction is in respect of claims for towage to any ship, either British or foreign, whether she be within the body of a county or upon the high seas. This appears to be an extension of the ancient jurisdiction exercised by the Admiralty Court over claims for towage services rendered on the high seas: (cf. Williams and Bruce's Admiralty Practice, 152).—Ed.

them it should appear that any clear course of decision or practice had arisen in favour of such a lien, we should be very unwilling to disturb it. The first contested case which came before the courts on the statute of 1840 was the case of *The Alexander* (*ubi sup.*), in Nov. 1841, where the question mooted was whether the Act gave a remedy in favour of persons who had supplied necessaries before the Act came into operation. In the course of his discussion of that question Dr. Lushington said: "The statute does not create a lien upon the vessel at all; the debt has no foundation upon the statute. The effect of the statute is expressly declared in the 6th section in these terms: 'That the Court of Admiralty shall have jurisdiction to decide all claims and demands whatever for necessaries supplied to any foreign ship or seagoing vessel, and to enforce the payment thereof.' The statute, therefore, simply confers upon the court a jurisdiction to be employed in every lawful mode which the court has the power to exercise for enforcing the payment; it might be by arresting the person of the owner if he were resident here, or by arresting the property in case a necessity occurred." The same case came before the court in March 1882, when Dr. Lushington observed "that when the recent statute conferred upon this court a jurisdiction in these matters, or rather perhaps revived an ancient jurisdiction long prohibited, it never was nor could be intended to alter the law, but merely to give a new remedy which was rendered necessary in the peculiar case of foreign ships." It is perhaps scarcely to be doubted that the jurisdiction given by the statute was a new one and not an old one revived, for the jurisdiction formerly asserted was of course prohibited on the ground that it did not exist. In 1845 the case of *The Ocean* (2 W. Rob. 368) came before the same learned judge, and the point decided was, that articles supplied for the equipment of a vessel building in a foreign dockyard were not necessaries within the statute in question. But in the course of the judgment the learned judge made these observations: "Before the statute was passed all claims for salvage and all questions of damage, as well as demands for towage services where the transaction took place within the body of a county, were cognizable in the courts of common law alone. If this court had proceeded to adjudicate in the matter it would have been subjected to a prohibition. For the convenience of parties who might so render services or receive damage it was deemed expedient to restore the ancient jurisdiction of the Court of Admiralty;" *i.e.*, if we rightly read the learned judge in cases arising within the body of a county. In *The Flecha* (1 Sp. Eccl. & Adm. 438, July 1854) Dr. Lushington said that not the least important amongst the reasons for the passing of the section of the statute in question "was that the law of this country might in that respect be assimilated to the general law of the maritime states of Europe," which is the first statement that we have been able to find from the lips of this learned judge which at all tends towards the conclusion that the material men would acquire a lien under the statute. In 1859 Dr. Lushington, however, further departed from his view that the statute created no maritime lien in favour of the material men. In *The West Friesland* (Swa. 454), which was a cause of necessaries brought by the material men against the subsequent purchasers of the ship, Dr. Lushington said that the purchaser of a ship takes subject to liens, and pronounced for the plaintiffs. This case went to the Privy Council, and there the court observing that important questions of law had been raised in the argument expressed no opinion upon them, but reversed the decision of the Admiralty Court on the facts of the case, holding that the material men failed to raise a case on those facts. This case, therefore, comes to nothing as an authority on the point in question; and whatever may have been the exact nature of Dr. Lushington's decision in that case, he seems to have soon reverted to his early view, for in the year 1862, in the case of *The Gustaf* (Lush. 508), Dr. Lushington in his judgment said: "Claims for necessaries moreover do not possess *ab origine* a lien; but carry only a statutory remedy against the *res*, which is essentially different." In the year 1861 was passed the statute 24 Vict. c. 10, of which the 5th section, omitting an immaterial proviso, is as follows: "The High Court of Admiralty shall have jurisdiction over any claim 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." By sect. 35 of the same Act it was declared that "the jurisdiction conferred by this Act on the High Court of Admiralty may be exercised either by proceedings *in rem* or by proceedings *in personam*." It is evident that the 5th section of this Act is closely connected with the enactment which has been under discussion hitherto, and the view which it will be seen was adoped by Dr. Lushington that these two statutes were *in pari materiâ* appears to us to be well founded. In the year 1863 the case of *The Ella A. Clark* (*ubi sup.*) came before Dr. Lushington on a question arising on the statute 3 & 4 Vict. c. 65, where the learned judge held that a claim for necessaries supplied to a foreign ship might be enforced by proceedings *in rem* under the statute notwithstanding a subsequent and *bonâ fide* transfer to a British owner. "When the Legislature thought fit," said the learned judge, "to put masters' wages on the same footing as seamen's wages they did, as relates to this court, constitute masters' wages a maritime lien, and looking through the several recent statutes I am led to the general conclusion that when the Legislature has appointed the proceeding *in rem* they intended to give the same remedy as heretofore was in use in this court in the administration of justice in the cases of maritime lien, though no express words may be used to that effect." This language of the learned judge is perhaps not absolutely free from ambiguity, because it refers to remedy only and not to rights; but the decision rests upon the proposition that wherever the Legislature had by recent legislation given a proceeding *in rem* there it had created a maritime lien. It is remarkable that the distinction between the language of the Legislature when it gave a maritime lien to the master for his wages and when it gave a proceeding in respect of necessaries did not attract the notice of the learned judge. In the following year 1864 arose the case of *The Pacific* (*ubi sup.*). There the plaintiff sued the vessel, which was a British ship, for necessaries supplied, and the defendants, who

were mortgagees, intervened. The case therefore arose under the statute of 1861, but Dr. Lushington reviewed the whole law on the subject, in a judgment of which the following are material portions: "The decision of the Privy Council in the case of *The Neptune* (3 Knapp. 94), given in the year 1835, took away the last vestige of Admiralty jurisdiction in the case of necessaries, and from that date till the recent statutes the material man had no *locus standi* whatever in the Admiralty Court. His only remedy was in the common law courts; and there, unlike the mortgagee, he could proceed only against the shipowner, not against the ship. This state of things was altered by 3 & 4 Vict. c. 65, s. 6, which gave the court jurisdiction over claims for necessaries supplied to a foreign ship; but that statute not applying to British ships, the 24 Vict. c. 10, s. 5, gave jurisdiction over claims for necessaries supplied to any ship subject to two provisoes, viz., that the supply should have been made elsewhere than in the port to which the ship belongs, and that at the date of the institution of the suit the shipowner should not be domiciled in this country. These enactments may seem diverse, but the reason for them is plain and uniform. Against the foreign vessels a real action is given to the material man in all cases, because the owner is assumed to be beyond the jurisdiction; and it is also denied against a British vessel in case the necessaries have been supplied in the home port, because the presumption is that the supply was made upon the personal credit of the owner, who would there be known and trusted. In short, the remedy against the ship is given only where a personal action against the owner would be fruitless; and not even then where the supply is to be assumed to have been made on his personal credit. The material man, therefore, by the mere fact of his supplying necessaries, in no case obtains the ship as a security until he institutes his suit in this court; and in the case of a British ship like the present he may never obtain it at all if by reason of the owner having a domicil in this country the suit cannot be instituted. This, I think, shows that the material man has not a maritime lien, for a maritime lien accrues from the instant of the circumstances creating it, and not from the date of the intervention of the court." In *The Troubadour* (1 A. & E. 302; 16 L. T. Rep. N. S. 156; 2 Mar. Law Cas. O. S. 475) a case of necessaries against a British ship, which occurred in 1866, Dr. Lushington followed his decision in *The Pacific* and reasserted that until institution of suit a necessaries man has no claim upon the vessel. In 1871, in *The Two Ellens* (*ubi sup.*), Sir Robert Phillimore had to determine whether, as the law then and now stands, the material man has a maritime lien upon a British ship under the statute of 1861; and after reviewing several of the decisions of Dr. Lushington, he expressed his inability to acquiesce in the reasoning on which the judgment in *The Pacific* (*ubi sup.*) was founded, or to reconcile that reasoning with the judgment in *The Ella A. Clarke* (*ubi sup.*). "The two statutes ought," he said, "I should have ventured to think, to be construed as being *in pari materiâ*." He further said that he should have thought that in the case of material men there was an inchoate lien before the institution of the suit, but nevertheless he determined to follow Dr. Lushington in the case of *The Pacific*, and held that there was no such lien. This case was naturally carried to the Privy Council, when the decision of the court below to the effect that no maritime lien was created by the statute of 1861 against a British ship, was upheld. In the course of the judgment, which was delivered by Mellish, L.J., he, after referring to the statute of 1840, said: "In the construction of this section, it has been held in several cases in the Court of Admiralty that there is a maritime lien in the case of supplies and necessaries furnished to a foreign ship; and their Lordships do not mean to intimate any doubts as to the validity of those decisions, but they are of opinion that those decisions may be supported upon the ground that, though it is perfectly true that the only words used in the section are 'that the High Court of Admiralty shall have jurisdiction'—which words seem hardly sufficient in themselves to create a maritime lien—yet, looking at the subject-matter to which that section relates, it appears designed to enlarge the jurisdiction which the Court of Admiralty already had in matters forming the subject of a maritime lien. These are strong grounds for holding that, as respects salvage, and as respects collision, which already gave a maritime lien when they occurred on the high seas, it was intended that they should also, when they occurred in the body of a county, equally give a maritime lien;" and that being so as to salvage and collision, it might be well said that 'necessaries' immediately following it was intended that the same rule should apply in the case of necessaries." If this were really a decision on the point in question, it would no doubt be of the last importance; but to us it appears that the court merely suggested a distinction between the two statutes which rendered, in their opinion, a decision on the later enactment not conclusive on the earlier one. In the case of *The Pieve Superiore* (L. Rep. 5 P. C. 482; 2 Asp. Mar. Law Cas. 319; 30 L. T. Rep. N. S. 887), in 1874, the Privy Council again accepted the view that sect. 6 of the Act of 1861 did not confer any maritime lien, for the reasons given in the case of *The Two Ellens* (*ubi sup.*).

The result of this long catena of authorities is hardly satisfactory. It shows that for several years Dr. Lushington repelled the notion that the statute of 1840 created any maritime lien in favour of a material man; it shows that in one or more cases he admitted the opposite view, but that at a yet later date he reverted to the earlier conclusion, and that in the one case, that of *The Ella A. Clarke*, in which he formally decided in favour of the lien, he did so on a principle of construction, namely, that when the Legislature gave a proceeding *in rem* then it created a maritime lien; and that this principle was rejected by the learned judge himself in the next case of *The Pacific*, and by the Privy Council in the case of *The Two Ellens*. It appears to us that upon the whole the current of authorities is against the existence of the lien. But the most important result, in our opinion, is the negative one that there has been no settled or uniform current of authority or of practice in the Admiralty Court in favour of the lien, and that the question is

therefore properly open for decision on principle. In our opinion, the two statutes of 1840 and 1861 ought (notwithstanding the observation of Mellish, L.J. in *The Two Ellens*) to be construed as *in pari materiâ*, and we think that the decision of the Privy Council in that case lends confirmation to the conclusion at which we arrive, namely, that whilst the statute of 1840 has enabled the material man to enforce his claim in the Admiralty Court, and as one means of relief has given him a right to arrest the ship, it has given him no maritime lien, and consequently no right against the ship till action brought. It does not appear to us probable that the Legislature, whilst giving a remedy against both foreign and British ships, should have created a lien in the one case which it did not create in the other. To hold that the remedies are alike in the two cases is, we think, more consistent with international comity than an opposite decision would be. Mr. Hall suggested that, if there was no maritime lien, nevertheless the defendants in the present case were purchasers with notice of the plaintiffs' claim. But whilst notice of an equitable lien affects a purchaser of the legal estate, notice of a mere personal claim against the vendor has no such effect, and it appears to us that there is no pretence for contending that the supply of necessaries creates any equitable lien against the ship. This argument, which indeed Mr. Hall did not press upon us, is untenable. Our conclusion is, that the appeal must be allowed and the plaintiffs' action dismissed with costs here and in the court below. I have the authority of the Master of the Rolls for saying that, though he concurs in the earlier part of the judgment with difficulty, he approves without qualification of the latter part of it, viz., that portion relating to the question of maritime lien.

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

Solicitors for the defendants, *Plews, Irvine, and Hodges.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Friday, April 17, 1885.

(Before MANISTY and LOPES, JJ.)

THE STEAMSHIP THANEMORE LIMITED *v.*

THOMPSON AND OTHERS. (*a*)

Practice—Service out of the jurisdiction—Action against underwriters — Co-defendants served within the jurisdiction—Order XI., r. 1 (*g*)

The plaintiff brought his action in England on a policy of marine insurance against several underwriters. He served his writ of summons on two of the underwriters who were within the jurisdiction, and applied for leave under Order XI., r. 1 (*g*), *to serve his writ on the other defendants, who were residing out of the jurisdiction in Scotland, as being necessary parties to the action.*

Held, that the plaintiff ought to be allowed to serve his writ out of the jurisdiction; and that Order XI., r. 1 (*g*), *was framed to meet such a case.*

THIS was an application for leave to serve a writ out of the jurisdiction, which had been referred by Smith, J. at Chambers to the Divisional Court.

The plaintiffs brought their action in the High Court of Justice on a policy of marine insurance against forty-four underwriters who had subscribed the policy in question.

Only two of the above underwriters resided in England within the jurisdiction; the remainder resided or carried on business in Glasgow.

The plaintiffs served a writ of summons upon the two defendants who were in England, and applied for leave to serve the other defendants, who were out of the jurisdiction, with the writ, on the ground that they were necessary and proper parties to the action already commenced in the High Court.

An affidavit in support of the application showed that the steamship *Thanemore* was registered in the port of Barrow, and traded between that port and the United States. The repairs of the said steamer, which formed the subject-matter of the action, were effected in Liverpool, and the evidence of the shipwrights there was necessary to support the claim, and the ship was in Liverpool on an average once in every month; the defendants within the jurisdiction had been properly and duly served; the action was set down to be tried in Liverpool, in or near which town all the material witnesses resided; and the cost of trying the action there would be much less than in Scotland, where every witness would have to be sent from England; and if leave to serve the defendants out of the jurisdiction were not granted, a separate action in Scotland would have to be brought against them.

By Order XI., r. 1:

Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the court or a judge whenever—

(*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

G. Barnes for the plaintiff.—I apply *ex parte* for leave to serve the defendants out of the jurisdiction with a writ of summons in this action. Those within the jurisdiction have been duly served with a writ of summons, and the action is one that is properly brought in the High Court. All parties may be joined as defendants by the plaintiff against whom he has the right to relief whether jointly, severally, or in the alternative. Therefore, all these defendants can now be properly joined as parties. Where partners were sued, one of whom was out of the jurisdiction, upon proof of proper service on the other partner within the jurisdiction, leave to serve the writ upon the defendant abroad has been granted:

Lightowler v. *Lightowler* W. N. 1884, p. 8.

On these grounds I ask for leave to serve the writ on the defendant abroad.

MANISTY, J.—I think leave ought to be granted. The parties are here sued jointly, and are severally liable. The majority happen to be in Scotland, but the minority in England have been duly served, and the action is one that ought properly to be tried in this country.

LOPES, J.—I am of the same opinion. The defendants out of the jurisdiction are proper parties to be joined in this action with the defendants in England. I think that Order XI., r. 1,

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

sub-sect. (*g*), was intended to meet this very case. *Leave granted.*

Solicitors for the plaintiffs, *Field. Roscoe*, and *Co.*, for *Bateson, Bright*, and *Warr*, Liverpool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, Feb. 9, 1885.

(Before BUTT, J.)

THE CHARLES JACKSON. (*a*)

Co-ownership action—Reference—Registrar's report—Stay of execution—Costs—Practice.

A managing owner, who had not delivered accounts for nine years, instituted a co-ownership action for settlement of accounts, and for payment of the balance found due to him, and claimed certain items in respect of materials supplied to the ship for which he had not paid, and for which the defendants were being sued in the Queen's Bench Division. The registrar in his report allowed the plaintiff these items. Upon application to confirm the report, and for judgment, the court decreed payment of the amount found due by the registrar, but stayed execution until the defendants were protected against the claims in the Queen's Bench Division, and refused the plaintiff the costs of the action upon the ground of delay in rendering his accounts.

Quære: Is a managing owner entitled to recover against his co-owners in respect of sums of money due to third parties on account of the ship, but which he has not paid?

THIS was an action instituted by Peter Lawson, as managing owner of ten-sixteenths of the vessel *Charles Jackson*, against John Curwen and others, as owners of three-sixteenth shares, for settlements of the accounts of the said vessel, and for payment of the sums found due to him.

The action was instituted on the 12th July 1883.

On the 1st Aug. 1884 Butt, J. ordered that the matters in dispute should be referred to the registrar to report thereon.

On the 23rd Jan. 1885 the ship was sold by the plaintiff in pursuance of an order of court. This order was made with the consent of the parties. The proceeds of the sale realised 760*l.*, which was paid into a bank to abide the event of the action.

The reference was heard on the 15th Dec. 1884, when the registrar found that there was due to the plaintiff the sum of 257*l.* 14*s.* 6*d.*, and recommended that "each party ought to pay his own costs of the reference, and a moiety of the reference fees."

In an affidavit sworn on the 31st Jan. 1885 on behalf of the defendants, it was alleged as follows:

5. In the accounts of the plaintiff filed in the above action the plaintiff claimed, as managing owner of the said vessel *Charles Jackson*, to have paid moneys, and to have made disbursements on my and the other defendants' behalf in respect of the said ship, and amongst such moneys so alleged to be paid and disbursements made are included large sums of money as paid by the plaintiff to Messrs. Ritson and Co., of Maryport, in the county of Cumberland, ship chandlers and shipwrights, Messrs. Michael Hutchinson and Co., of Liverpool, ship chandlers, Messrs. Hayton and Simpson, also of Liverpool, shipbrokers, and Messrs. Caleb Smith and Co., also of Liverpool, shipbuilders and engineers.

6. The said Messrs. Ritson and Co., Hutchinson and Co., Hayton and Simpson, and Caleb Smith and Co. have recently commenced four different actions against me and other owners of the said vessel to recover certain sums of money which they allege to be due from them to me and the other owners in respect of the said vessel *Charles Jackson*, and which sums of money I verily believe were included in and formed part of the accounts filed in this action by the above-named plaintiff, and claimed by him as being payments made by him on behalf of myself and the other defendants.

7. I caused an appearance to be entered to the said four actions so brought against me as aforesaid by Messrs. Ritson, Hutchinson and Co., Hayton and Simpson, and Caleb Smith and Co., and I am informed and believe a summons was issued by the plaintiffs in the said four actions pursuant to the Rules of the Supreme Court 1883, under Order XIV., rule 1, to sign judgment against me, notwithstanding appearance, but on the hearing of such summons I am informed and believe I was allowed to defend such four actions, and which leave was affirmed upon an appeal.

8. I have caused to be served on the plaintiff a third-party notice pursuant to the Rules of the Supreme Court 1883, Order XVI., r. 48, claiming to be indemnified by the plaintiff against all liability in respect of the said four actions brought against me and the other defendants on the ground that such liability (if any) was improperly incurred by the plaintiff on his own responsibility, and not in any way on my behalf or with my authority or consent, and I have caused to be delivered my statements of defence in the said four actions.

It appeared that no accounts had been delivered for nine years prior to the action, and that the defendants were defending the action upon the ground that they had never been able to see or investigate the plaintiff's accounts.

The plaintiff was now moving that:

1. The report of the registrar, dated 15th Dec. 1884 in this action be confirmed.

2. That judgment be entered for the plaintiff in accordance with such report, with costs of the action and of this application and judgment.

3. That the costs of the plaintiff as between solicitor and client of the proceedings for and in relation to, and for the sale and completion of the sale of the said ship *Charles Jackson* be paid out of the proceeds of such sale, or in the alternative that the defendants pay such costs as were incurred by reason of their opposition to such sale and the application for leave to sell.

Bankes for the plaintiff.—I ask that judgment be entered in accordance with the registrar's report, and that the plaintiff be allowed the costs of the action. He is also entitled to be paid the expenses incurred by him in selling the vessel.

Raikes, for the defendants, *contra*.—The court should not let execution go in this action without protecting the defendants against the claims that are being made against them in the Queen's Bench Division. Although the plaintiff has not paid these items they are allowed in the Registrar's report. Should the plaintiffs in the Queen's Bench Division get judgment, the defendants will have to pay these items twice over. The plaintiff is not entitled to the costs of this action, inasmuch as he has failed to deliver accounts for nine years. He by his own conduct has necessitated the present action.

BUTT, J.—This is an action of partnership account. It appears that no accounts have been

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

delivered for nine years by the managing owner, the plaintiff in this action, whose *primâ facie* duty it was to deliver them at some earlier date. Under these circumstances, I cannot give the plaintiff the costs of this action. But as to the costs incurred by the plaintiff in selling the ship, I do not forget that that sale was carried out by consent, and that the order of court for the sale was by consent. I therefore think the plaintiff is entitled to deduct all those costs from the proceeds of the sale. Those are not costs of litigation. I therefore order that the defendants pay their share of the plaintiff's costs of the sale of the vessel, or rather that the plaintiff may deduct the cost from the proceeds.

As to a stay of execution, I understand that the defendants have suffered judgment against them by certain claimants, and that the plaintiff in this action has been allowed the amounts of those judgments in the registrar's report, I think that until the defendants are satisfied that those common law actions are stopped and that they are not in jeopardy from them, they ought not to part with their money to the plaintiff. I think they are entitled to be protected. It may be that if the plaintiff gets execution in the action before me the plaintiffs in the common law actions will also get execution against the defendants, the result of which will be that the defendants will have to pay twice over. That is not just. I therefore will not allow execution to go in this action against the defendants until they are protected in the other actions. I moreover am not so clear that the plaintiff is entitled to judgment for amounts which he has not paid. I am not at all prepared to say that I should allow a managing owner, under ordinary circumstances, to have a judgment in respect of claims which he has not paid. As I propose to deal with this matter the question is immaterial, but I am by no means satisfied that the plaintiff is entitled to judgment in respect of the sums claimed in the Queen's Bench action.

Dr. *Raikes*.—Will your Lordship allow it in this way, execution stayed with liberty to apply?

BUTT, J.—Yes; I see no objection to that. The more proper way would be to confirm the report and not make a decree.

Dr. *Raikes*.—Stay of execution will protect my clients.

BUTT, J.—I shall make the ordinary decree for payment, but execution not to go until the court is satisfied that the defendants are secured against the claims in the Queen's Bench Division, with liberty to either party to apply. I also order that the plaintiff is entitled to deduct his share of the expense of selling the ship from the proceeds of the sale.

Solicitors for the plaintiff, *Speechly, Mumford, and Landon*.

Solicitors for the defendants, *Helder and Roberts*.

Tuesday, March 11, 1885.

(Before BUTT, J.)

WHITE *v.* DITCHFIELD; THE MEREDITH. (*a*)

Co-ownership action—Managing owner—Time charter—Liability of co-owner.

Where a ship, having been chartered out and home under a time charter, is being brought home under a voyage charter in consequence of the time charter having been broken, the purchaser of shares purchasing during such homeward voyage is not liable for losses incidental to the voyage out under the time charter.

Semble, that a managing owner may be entitled to some reasonable sum as a commission on profits, although he owns shares in the ship and no express agreement as to his remuneration has been entered into.

THIS was an action *in personam*, instituted by John White, late managing owner of the steamship *Meredith*, against S. J. Ditchfield, the owner of one sixty-fourth share, to recover 33*l.* 9*s.* 4*d.*, the defendant's alleged share of the losses sustained by the ship during the years 1873 to 1877.

On the 25th June 1884 the plaintiff's claim was, by an order of court, referred to the registrar to report thereon.

The Registrar's report was as follows:

Whereas by an order of court, dated 25th June 1884, all matters in dispute in this action were referred to the registrar, assisted by merchant, to report thereon. Now I do hereby report that I have, with the assistance of Mr. Sidney Young, of London, merchant, carefully examined the claim filed by the plaintiff, together with all accounts and vouchers and the papers and proceedings produced and brought in, and having on July 24th last and the 5th Dec. inst. heard the evidence of John White, the plaintiff, and also what was urged by counsel for the plaintiff, and by the solicitor for the defendant, I find that there is due to the plaintiff the sum of 6*l.* 12*s.* 8*d.*, with interest thereon at 4 per cent. per annum, as stated in the schedule hereto annexed. I am also of opinion that the plaintiff should pay the costs of the reference. This is a claim by the late managing owner of the ss. *Meredith* for a balance of only 33*l.* 9*s.* 4*d.*, the proportion alleged to be due from the defendant as owner of one sixty-fourth share of losses sustained by the ship during rather more than three years, from November 1873 to January 1877. The claim, though of small amount, was complicated and troublesome to investigate. (1) The balance of 17*l.* 13*s.*, claimed as due for the first of the three periods comprised in the accounts (Nov. 1873 to Feb. 1874) has been wholly disallowed, on the ground that the defendant, who had acquired his share while the ship was on her homeward voyage from the Black Sea, was not liable for a share of a loss previously sustained on the ship's outward voyage under another charter-party. (2) The balance of 26*l.* 8*s.* 10*d.*, claimed for the second period (March 1874 to April 1875), was admitted to be due. (3) The balance of 10*l.* 12*s.* 6*d.* credited to the defendant for the third period (April 1875 to January 1877) has been increased by the disallowance to the plaintiff of two sums of 6*l.* 9*s.* 8*d.* and 2*l.* 14*s.* The former of these sums was claimed as the defendant's share of a loss of 501*l.* 0*s.* 9*d.* sustained by the ship whilst employed by the plaintiff as one of his own line of steamers on a voyage to Hayti and Jamaica and back without a charter and without the defendant's authority. The second sum of 2*l.* 14*s.* has been credited to the defendant as his share of a reduction made in the commission charged by the plaintiff for the management of the ship. For this he had claimed in all 341*l.* 14*s.* 8*d.*, being at the rate of 2½ per cent. on the gross freight earned during his management, in lieu of which 190*l.* has been allowed, or about 100*l.* a year during the same period. By these disallowances the plaintiff's claim has been reduced from

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

33*l.* 9*s.* 4*d.* to 6*l.* 12*s.* 8*d.*, and considering also that the plaintiff ceased to be managing owner in the latter part of 1878, but did not bring the present action until very nearly six years later, in March 1884, I am of opinion that he ought to pay the costs of the reference.

SCHEDULE.

	Claimed. £ s. d.	Allowed. £ s. d.
1. Nov. 1873-Feb. 1874	17 13 0	.....
2. March 1874-April 1875	26 8 10	26 8 10
	44 1 10	26 8 10
Deduct,		
3. April 1875-Jan. 1877 credited	10 12 6	19 16 2
	33 9 4	6 12 8

The following petition in objection to the registrar's report was filed by the plaintiff:

Whereas by an order of court, dated the 25th day of June 1884, all matters in dispute in the action of White *v.* Ditchfield were referred to the registrar and merchant. And whereas the said registrar by his report, dated the 31st day of December, found that only the sum of 6*l.* 12*s.* 8*d.* was due to the plaintiff, and that the plaintiff should pay the costs of the reference. Your petitioner submits that the decision of the registrar was wrong in law in holding that the defendant was not liable in respect of an existing contract, entered into in regard to the s.s. *Meredith* prior to the date when defendant purchased his shares in the said vessel, and on a subsequent voyage, during which loss was sustained by the employment of the said ship, and further that the registrar improperly exercised his discretion in disallowing the plaintiff his commission for management of the said ship and making the plaintiff pay the costs of the reference, and your petitioner will therefore ever pray, &c.

In answer to this petition the defendant filed an answer in support of the report.

According to the evidence given at the reference it appeared that the defendant had become the registered owner of one sixty-fourth share in Jan. 1874; that on the 7th Oct. 1873 the *Meredith* was chartered under what was alleged to be a time charter, from Middlesborough to Taganrog; that on the ship arriving at Kertch the charterer broke the charter; that the ship was then brought home under a voyage charter; and that it was during this homeward voyage that the defendant purchased his share.

The plaintiff now appealed from the registrar's report.

Bigham, Q.C. (with him *Atherley-Jones*) for the plaintiff.—The registrar was wrong in law in holding that the defendant was not liable in respect of the losses incurred under the time charter. It is true that at the time the defendant bought his share the ship was being brought home under another charter, but it is submitted that the recharter was an incident of the voyage out under the time charter. The defendant would clearly be liable for losses incurred on the voyage home, even though they were incurred previous to his buying the share. [BUTT, J.—I am by no means sure of that.] So it is submitted, and if so, the voyage home being merely an incident in the time charter, the defendant is liable for all losses incurred from the departure of the *Meredith* from England. The defendant is bound to stand in the shoes of the vendor from whom he bought. The purchaser of shares in a ship is entitled to the profits accruing to the shares. If so he must also bear the liabilities. Underwriters in case of total abandonment, and mortgagees on taking possession, are entitled to the freight accruing due. In the same way they must take possession subject to all just burdens on the ship. [BUTT, J.—I am not clear that underwriters take the burdens in cases of abandonment.] It is also submitted that the registrar was wrong in reducing the item of commission. It was argued on behalf of the defendant at the reference that a co-owner like the plaintiff was not entitled to commission on the profits. It may be that the registrar has acted upon that fallacious principle in reducing the plaintiff's claim.

Bucknill, for the defendant, was not called upon.

BUTT, J.—I am very clearly of opinion that there is no liability on the part of Mr. Ditchfield to contribute towards any portion of the loss arising on the voyage that was to have been performed under the time charter. The time charter was at an end before the defendant purchased his share, and therefore he cannot be liable in respect of any loss arising out of it. I am not quite satisfied, although I do not decide the point, that he is necessarily liable for any portion of the loss incurred on the homeward voyage prior to the purchase of his share. The plaintiff, however, is not appealing in respect of that matter. That settles the first question.

On the second point, the only result of my interfering with the registrar's report would be to add a few pounds to the amount allowed the plaintiff. It is a small matter in figures, though perhaps important in principle. I do not agree at all with the contention which was taken before the registrar on behalf of the defendant, that in cases where the managing owner is a co-owner and has an interest in the adventure, that therefore he is not entitled to any commission on the profits. I think it is almost the universal practice for a managing owner under those circumstances to have some remuneration. The amount I think is usually fixed, but I am not aware that there is any hard and fast practice as to the amount where it has not been previously settled. Knowing that Mr. Smith, the assistant registrar, has had considerable practice in these matters, and that he was assisted by Mr. Young, who has the widest and most extensive experience, I cannot, in the absence of any evidence that the registrar was wrong, interfere with his allowance. This appeal must be dismissed with costs.

Solicitor for the plaintiff, *R. Routledge.*

Solicitors for the defendant, *Thomas Cooper* and *Co.*

HOUSE OF LORDS.

Nov. 14, 17, 18, *and Dec.* 5, 1884.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN and WATSON.)

ANDERSON, TRITTON, AND CO. *v.* OCEAN STEAMSHIP COMPANY. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

General average contribution—Liability of owners of cargo—Salvage.

Where a master enters into a towage contract, rendering the shipowners liable to pay a sum of money named in the contract whether the services prove beneficial or not, and the ship and cargo are thereby saved, the remuneration agreed upon may be the subject of a general average contribution. The fact that a shipowner has become liable to pay,

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

and has paid, a sum of money for services rendered to the ship and cargo, and that such payment was reasonable, does not show conclusively that the whole of such sum is chargeable to general average. Before the owners of cargo can become liable for a general average contribution it must be left to the jury to find what sum should properly be charged to general average under the circumstances.

Judgment of the Court of Appeal reversed.

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Baggallay and Bowen, L.JJ.), reported in 50 L. T. Rep. N. S. 171; 5 Asp. Mar. Law Cas. 202, and 13 Q. B. Div. 651, reversing a decision of the Divisional Court (Grove, Lopes, and Mathew, JJ.), directing judgment to be entered for the defendants, the present appellants.

The action was brought by the respondents, as owners of the steamship *Achilles*, to recover a sum of 162*l.* 11*s.* 7*d.*, alleged to be due from the appellants, as owners of a portion of the cargo, as a general average contribution. The *Achilles* ran aground on a shifting sand-bank in the Hankow river in China, and her master, believing the ship and cargo to be in danger, signalled to another steamship, the *Shanghai*, for assistance. With the help of the *Shanghai* the *Achilles* got off the bank uninjured. An arrangement existed between the owners of steam-vessels trading to the Hankow river to the effect that, if any vessel was in danger and signalled for assistance, she should pay the assisting vessel a sum of 10,000 taels (2500*l.*), whether the services rendered were beneficial or not, and that no services should be rendered for more than twenty-four hours. The master of the *Achilles* was aware of this arrangement when he signalled to the *Shanghai*. The arrangement was embodied in an agreement drawn up and signed after the *Achilles* had got off the bank, and a sum of 2691*l.* 19*s.* 6*d.* was paid by the respondents to the owners of the *Shanghai* for the services and expenses. It was in respect of this sum that the general average contribution was claimed.

The action was tried before Cave, J. and a jury, and he gave judgment for the plaintiffs, but the Divisional Court directed judgment to be entered for the defendants. Their decision was reversed as above mentioned by the Court of Appeal, and the defendants, the cargo owners, appealed to the House of Lords.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *Cohen*, Q.C., and *Barnes* appeared for the appellants, and contended that there was no agreement binding on the shipowners to pay any definite sum. The ship was, no doubt, in danger, and the salvors were entitled to *quantum meruit* for their services, but the circumstances show that there was not at that time any binding agreement to pay 10,000 taels. These were not, properly speaking, "salvage services," for they were only to continue for twenty-four hours whatever the condition of the *Achilles* might have been at the end of that time, and the money was to be paid whatever the result, an arrangement which cannot bind the cargo owners. The jury have not found any contract, and if the *Shanghai* had brought an action in the Admiralty Court for salvage services this agreement could not have been set up in answer to her claim. In any case the agreement can only bind the shipowners, not the cargo. There cannot be a general average contribution unless there is a salvage agreement enforceable in the Admiralty Court, and this agreement could not be enforced, being unreasonable. It is against public policy, and, even if good against the ship, it cannot stand against the cargo. They cited

Lohre v. *Aitchison*, 4 Asp. Mar. Law Cas. 168; 4 App. Cas. 755; 41 L. T. Rep. N. S. 323;
The Hector, 3 Hagg. Adm. 95;
The Clifton, 3 Hagg. Adm. 120;
The Princess Alice, 3 Wm. Rob. 138;
The Glenduror, 24 L. T. Rep. N. S. 499; 1 Asp. Mar. Law Cas. 31; L. Rep. 3 P. C. 589;
The Medina, 3 Asp. Mar. Law Cas. 305; 35 L. T. Rep. N. S. 779; 2 P. Div. 5;
The Waverley, 24 L. T. Rep. N. S. 713; 1 Asp. Mar. Law Cas. 47; L. Rep. 3 A. & E. 369;
Nicholson v. *Chapman*, 2 H. Bl. 257;
Newman v. *Walters*, 3 B. & P. 612.

H. Matthews, Q.C., *G. Bruce*, Q.C., and *H.D. Greene*, who appeared for the respondents, were requested to confine their arguments to the points: (1) Whether the agreement was against public policy; (2) Whether it was binding on the cargo-owners; (3) Whether it was reasonable. They argued that it was binding on the shipowners, and, therefore, if they were compelled to make the payment, it was a case of general average. The test is, was it judicious to make the sacrifice at the time? The agreement in fact bound the owners:

Arthur v. *Barton*, 6 M. & W. 138;
Beldon v. *Campbell*, 6 Ex. 886.

There was a reasonable necessity here, and it appears from the evidence that the sum paid was not, in fact, unreasonable. Whether any particular expenditure does or does not give rise to a general average contribution, depends upon whether it was, in fact, judicious:

Birkley v. *Presgrave*, 1 East, 220;
Kemp v. *Halliday*, 6 B. & S. 723; L. Rep. 1 Q. B. 520; 2 Mar. Law Cas. O. S. 370; 14 L. T. Rep. N. S. 762;
Moran v. *Jones*, 7 E. & B. 523.

[Lord BLACKBURN.—The point is, was the case properly left to the jury, and have they found the payment reasonable as against the appellants here?] In finding it reasonable as to the ship they have found it reasonable as against all parties. The *Shanghai* was herself in danger, and as to what is a reasonable amount in such a case see *The Waverley* (*ubi sup.*):

The Minnehaha, 15 Moo. P. C. 133;
The Medina (*ubi sup.*).

If the agreement was reasonable it was a sacrifice for the general good, and the cargo-owners are bound. No doubt, if the services had not been effectual, there would not have been a general average loss, but the *Achilles* and her cargo were in fact benefited, and as she could not have got off the bank at less expense, nor have set aside the agreement as inequitable, it must fall within the rule as to general average. It was, in fact, a salvage agreement:

The Undaunted, Lush. 90; 2 L. T. Rep. N. S. 520;
The Melpomene, 1 Asp. Mar. Law Cas. 515; L. Rep. 4 A. & E. 129; 29 L. T. Rep. N. S. 405;
The E. U., 1 Spinks Ecc. & Ad. 63.

The ship was in peril requiring assistance, and the agreement to pay the 10,000 taels was reasonable, and a payment for the general good stands

on the same footing as a material sacrifice. If the services had failed the whole burden would have fallen on the ship. This was not a case of duress such as *The Helen and George* (Swab. 368). The salvors were themselves in danger, and are entitled to substantial remuneration:

The Phantom, 2 Mar. Law Cas. O. S. 442; L. Rep. 1 A. & E. 58; 15 L. T. Rep. N. S. 596.

The question of "public policy" is covered by the finding of the jury that the agreement was reasonable.

Cohen, Q.C. in reply.—The agreement is inequitable on the face of it, and would have been invalid as against the shipowners if they had not subsequently ratified it. It is inconsistent with the principles of salvage law, as administered in the Admiralty Court. See

The City of Chester, 5 Asp. Mar. Law Cas. 311; 9 P. Div. 182; 51 L. T. Rep. N. S. 485;
The De Bay, 8 Asp. Cas. 559; 5 Asp. Mar. Law Cas. 156; 49 L. T. Rep. N. S. 414.

At the conclusion of the arguments their Lordships took time to consider their judgments.

Dec. 5, 1884.—Their Lordships gave judgment as follows:—

Lord BLACKBURN.—My Lords: The first paragraph of the statement of claim is as follows: "In consideration that the plaintiffs, at the request of the defendants, had taken on board a ship of the plaintiffs, called the *Achilles*, certain goods of the defendants, to be carried on board the said ship from Hankow to London, the defendants promised that they would contribute and pay their just share and proportion, in respect of the said goods, of any general average loss that might arise or happen to the ship during the said voyage." The statement then proceeds to aver that the ship with the goods on board took the ground, and that the ship and crew were in danger of perishing, and that "her master and crew, being unable to rescue the said ship or the said cargo from the said danger, help and assistance were obtained, and were necessary and proper for that purpose, for which the plaintiffs were obliged to pay, and did pay, 2691*l.* 19*s.* 6*d.*, and the ship and cargo were by means of the said help and assistance preserved." If there was a general average loss to which the defendants were to contribute it is not now in controversy that the defendants' proportion of 2691*l.* 19*s.* 6*d.* would be 162*l.* 11*s.* 7*d.*, and for that sum the action was brought. There can, however, I think, be no doubt that the plaintiffs are not tied down to recover that exact amount or nothing. If it was proved that there was a claim for general average, but that the amount for which the claim was made out was less than 2961*l.* 19*s.* 6*d.*, the plaintiffs might still recover the proper percentage of that amount actually made out. The defendants by their statement of defence put the plaintiffs on proof of everything, and contended, and I rather think still contend, that the plaintiffs are not entitled to recover anything. But they seem to have had doubts upon that subject, and therefore bring 75*l.* into court. What the effect of this mode of pleading might be on the costs I do not stop to inquire. It certainly shows, to my mind, that, besides the issue whether there was a general average at all, there was a serious issue as to what the amount was to which the cargo had to contribute as a general average. I may as well clear away a matter of prejudice. If anyone is insured in the ordinary form his insurers would have to indemnify him for general average. It is, therefore, usual enough for a merchant who is insured to hand over the defence to his insurers; if they can make out that the merchant is not liable at all, there is no claim on the insurers; if they can make out that the amount payable is less than is demanded, the claim on the insurers is less. I think it very likely that in this case insurers are defending the action in the name of the defendants, though I do not know that it is so, but that makes no difference in the law, and should make none as to the findings of fact. No more contribution is exigible from the owner of a parcel of goods that are insured than from the owner of a parcel that is not insured.

On the trial evidence was produced on the part of the plaintiffs only, the defendants calling none. At the close of the case it was submitted that there was no case, and various objections were taken. One of these I may now notice: There was evidence—I do not now say more—that not only the ship, but also the cargo, were exposed to a peril from which the master and crew were unable to rescue them; that the assistance of the *Shanghai* was requested and was granted; and there was evidence that by the assistance of the *Shanghai* the ship and cargo were saved from that peril. Mr. Cohen's objection, if I understood him rightly, was that, assuming all to be true which this could prove, it would show a claim for salvage for which the owners of the *Shanghai* might have brought a suit in the Court of Admiralty against the ship and cargo, and that in that court the amount of the fair reward would have been decided by the Admiralty, taking everything into consideration; the peril to the *Shanghai*, which does not seem to have been great, being one element, and the sum which the owners of the *Shanghai* in all cases demanded being another, but not a conclusive one. But I think this was not a tenable point. The owners of the *Achilles* paid the amount demanded by the *Shanghai* as a disbursement; after they had been paid the owners of the *Shanghai* could not have brought any suit. And I think it would be a very unjust rule of law that the cargo owners should go free from a payment which they might have been forced to make to the owners of the *Shanghai* because the owners of the *Achilles* did not put the *Shanghai* to a suit in the Court of Admiralty, but, rightly or wrongly, paid as a disbursement the whole amount demanded. I do not think that the owners of the *Achilles* could, by paying the claim of the *Shanghai*, entitle themselves to recover more from the goods owners than the *Shanghai* could have recovered in a salvage suit against the goods owners, but I do not see why they might not recover whatever it was fair and just should be paid as a contribution. General average, as is explained in Abbott on Shipping, part 3, chap. 8, p. 342 (5th edit.), is founded on the Rhodian law, which, however, in terms did not extend further than to cases of jettison; but its principle applies, and it has been applied, to other cases of voluntary sacrifice for the benefit of all, that is, if properly made. Those things which are actually saved in the sense explained in Abbot on Shipping, part 3, chap. 8, sect. 13, p. 355 (5th edit.), must contribute. In *Kemp* v. *Halliday* (6 B. & S. 746)

I said: "In order to give rise to a charge as regards general average, it is essential that there should be a voluntary sacrifice to preserve more subjects than one exposed to a common jeopardy, but an extraordinary expenditure incurred for that purpose is as much a sacrifice as if instead of money being expended money's worth were thrown away. It is immaterial whether the shipowner sacrifices a cable or an anchor to get the ship off a shoal, or pays the worth of it to hire those extra services which get her off. It is quite true that so long as the expenditure by the shipowner is merely such as he would incur in the fulfilment of his ordinary duty as shipowner, it cannot be general average," And I may observe that in the specimen of an adjustment given in Abbott on Shipping (part 3, chap. 8, sect. 16. p. 359, 5th edit.), and sanctioned by Lord Tenterden's high authority, one of the items allowed is "expense of bringing the ship off the sands, 50*l*." That item must have been a disbursement to pay for services hired. I think that the promise stated in the first paragraph of the statement of claim is one that would be implied by law in every contract for the carriage of goods. The shipowners have, I think, a lien till the contributions are paid or secured. The goods owner may raise the question whether any, and if any what, contribution is due, by offering to pay what, if anything, he admits to be due, demanding the goods, and if refused bringing trover, and so raising the question whether he has been ready and willing to pay enough. But I see no reason why the same question should not be raised in this form of action. Questions of this sort are generally more conveniently settled by average adjusters as arbitrators, or by stating a case on any question of law on which the opinions of average adjusters differ; but the action having been brought must be disposed of.

I have come to the conclusion that, on the evidence given at the trial it was not a simple issue whether the whole sum actually paid by the shipowners to the owners of the *Shanghai* was chargeable to general average, and, if that was not made out, that nothing was to be recovered. I do not think that it would follow merely from the shipowner having become liable to pay and having paid that sum, that the whole of it was chargeable to general average. I think it might well be that on this evidence the proper conclusion was that something differing from that sum might be chargeable, and I think that, till it is ascertained whether any sum was chargeable, and what that sum was, the case is not ripe for decision. And I do not think that the answers by the jury to the questions asked by the learned judge at the trial suffice to enable this House to solve that question. I have therefore come to the conclusion that neither the judgment given by Cave, J. in favour of the plaintiffs for the whole amount, nor the order of the Divisional Court entering judgment for the defendants, nor the order now appealed against restoring the judgment below, can be supported, and that the only course that can be adopted by this House is to order a new trial. The principles on which I come to this conclusion have not often been discussed in a court of law; they probably often come before average adjusters, and are of great importance. The contract of the shipowner is to carry on the goods to their destination. In *Beldon* v. *Campbell* (6 Ex. 886) it is said by Parke, B., with, I think, perfect accuracy, "there is no doubt of the power of the master by law, but some as to what extent it goes, to bind the owner. The master is appointed for the purpose of conducting the navigation of the ship to a favourable termination, and he has as incident to that employment a right to bind his owner for all that is necessary, that is upon the legal maxim, *Quando aliquid mandatur, mandatur et omne per quod pervenitur ad illud.*" And I think that if the question here raised had been whether the owners of the *Achilles* were bound by a contract made by their masters to pay the owners of the *Shanghai* the sum in question, the first questions asked by Cave, J. would have been perfectly right. I do not, however, think that on the evidence any question of the authority of the master to bind his owners really was raised. The two sets of shipowners had a common agent, Drysdale, Ringer, and Co., and I should rather conclude that Drysdale, Ringer, and Co. were the persons who, on behalf of the owners of the *Shanghai* agreed to send out the *Shanghai* to help the *Achilles* as soon as the master of the *Achilles* signalled that he wanted help, and that the amount of remuneration to be paid by the owners of the *Achilles* to the owners of the *Shanghai* was not discussed or settled between the captains at all, but was settled in the first instance by Drysdale, Ringer, and Co, and afterwards the two sets of shipowners ratified and agreed on what they settled. I think, therefore, that it was quite clear that there was a contract binding on the owners of the *Achilles* to pay the sum of 2691*l.* 19*s.* 6*d.* to the owners of the *Shanghai*; whether it was made by themselves or by their master for them is, as far as regards the binding of the owners of the *Achilles*, unimportant. But neither the owners of the ship nor their master have authority to bind the goods, or the owners of the goods, by any contract. The master has, I think, authority to make for his owners all disbursements which are proper for the general purposes of the voyage, and when once those disbursements are paid for, either by the master ou of funds belonging to the owner which the master has, or by funds which the owners themselves apply to discharge a contract which they either could not dispute because the master had bound them to make it, or did not choose to dispute, I think that the disbursement, in so far as it is a disbursement for the salvation of the whole adventure from a common imminent peril, may properly be charged to general average. But I think there is neither reason nor authority for saying that the whole amount which the owners of the ship choose to pay is, as a matter of law, to be charged to general average. And though I quite agree that there is some evidence here that the *Achilles* and her cargo were both in danger, and were both saved by the services of the *Shanghai*, and though I also agree that it is not a question of law whether the amount of the sum charged as a disbursement was exorbitant or not, still I cannot find that any question as to the amount was submitted to the jury.

It seems to me that if such a question had been submitted to a jury there is much in the evidence that might make it very doubtful whether the jury would think this sum properly chargeable against the owners of the goods if uninsured. If

they thought the charge was against the underwriters, there is a common enough impression, not confined to jurymen, that the underwriter's trade is such as to make it right to be liberal in deciding any doubtful question against them. I do not think this ought to influence, but it might do so. I cannot, however, find that the opinion of the jury was taken at all as to the amount. On a new trial that question may be raised, and it may be a subject of great difficulty to say what evidence bears on it, and what the proper directions to the jury should be. I think it better not to prejudice the question further than by saying that the fact that the owners of the *Achilles* had by contract, made either by their master or by themselves, became bound to pay this sum, and had paid it, is not, I think conclusive that the whole of it was chargeable to general average, though part of it may be. If your Lordships agree in this opinion, I think that the order of this House should be for a new trial, and that all the costs of the trial, and in the Divisional Court, and in the Court of Appeal, are thrown away; and that as neither party can be said to have succeeded in this House, each party should bear his own costs in this House. I therefore move accordingly.

The LORD CHANCELLOR (Selborne) and Lord WATSON concurred.

Order appealed from reversed, except so far as it rescinds the order of the Queen's Bench Division that judgment be entered for the defendants. Cause remitted with directions for a new trial.

Solicitors for the appellants, *Waltons, Bubb,* and *Walton.*

Solicitors for the respondents, *Flux, Son,* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Oct. 30, 31, *and Nov.* 10, 1884.

(Before BRETT, M.R., COTTON and LINDLEY, L.JJ.)

UZIELLI AND CO. *v.* THE BOSTON MARINE INSURANCE COMPANY. (*a*)

Marine insurance—Reinsurance—Notice of abandonment to reinsurers—Sue and labour clause—"Factors, servants, or assigns."

The plaintiffs had (as agents for a French insurance company) effected with the defendants a policy of marine insurance upon a large number of steamers, as per list attached to the policy; the policy being a reinsurance applying to policies issued by the French company, subject to the same terms, clauses, and conditions as those policies, but to cover total loss only. The policy contained the ordinary suing and labouring clause in favour of the assured, their "factors, servants, and assigns." One of the vessels named in the list attached to the policy, and therein insured for 1000*l.*, *went ashore. The policy issued by the French company upon this vessel was itself a policy of reinsurance effected by some of the original underwriters of the vessel. The owner of the vessel served notice of abandonment upon the original underwriters, but not upon the French company or upon the defendants; the original underwriters refused to accept the notice, and took steps to get her off, and eventually brought her into dry dock at Leith at considerable cost and expense. At Leith the original underwriters agreed with the owner to pay him* 88 *per cent. of her value, and take her; but, apart from this agreement, the vessel was a constructive total loss. The French company paid to the original underwriters who had reinsured with them their proportion of the* 88 *per cent., together with their proportion of the expenses, making together* 112 *per cent. of the sum so insured. The French company now sought to recover from the defendants the amount so paid by them to the original underwriters:*

Held (varying the judgment of Mathew, J.), that the notice of abandonment to the original underwriters was sufficient, and that, as between the reinsurers and reinsured, no such notice was necessary; that the plaintiffs were not entitled to recover on the policy itself more than 1000*l.*; *and that they could not recover any more under the suing and labouring clause, as the original underwriters were not their factors, servants, or assigns.*

THIS was an appeal from a judgment of Mathew, J., sitting without a jury.

It appeared that in the month of February 1881 the owners of a vessel called the *Rose Middleton,* effected with certain underwriters at Lloyd's a policy of insurance upon that vessel for a sum of 1500*l.*, and also insured her in certain insurance clubs. In the same month the Lloyd's underwriters reinsured that risk for 1500*l.* with the plaintiffs, who were acting as agents and insurance brokers for a company called the Compagnie l'Armement of Paris. This policy contained a sue and labour clause.

In the course of 1881 the plaintiffs, acting on behalf of the French company, effected with the defendants a policy for 345,073*l.* upon 443 vessels, as per list attached to the policy. Upon the list appeared the *Rose Middleton,* therein insured for 1000*l.* The policy appeared on the face of it to be a policy of reinsurance applying to policies issued by the French company, "subject to the same terms, clauses, and conditions as the original policies, and to pay as may be paid thereon, but to cover the risk of total loss only." There was also the ordinary sue and labour clause in favour of the assured, "their factors, servants, and assigns."

In the month of October 1881 the *Rose Middleton* went ashore, and her owners, having elected to treat her as a total loss, gave notice of abandonment to the original underwriters and clubs; but no notice of abandonment was given to the plaintiffs or to the French company, or to the defendants. The underwriters and clubs refused to accept the notice and succeeded in getting the vessel into port at Leith at considerable expense, and there agreed with her owners to pay them 88 per cent. of her value; but, apart from this agreement, it appeared that the vessel was a constructive total loss. The vessel was then sold by the underwriters.

Thereupon the plaintiffs, on behalf of the French company, became liable to pay, and paid to the underwriters, their proportion of the 88 per cent. and their proportion of the salvage

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

expenses, less the proceeds of the sale, the total of the amount working out at 112 per cent. of the 1500*l.* insured, namely 1680*l.*

The plaintiffs brought an action against the defendants to recover that amount.

Mathew, J. at the trial gave judgment for the plaintiffs for 1120*l.*, being 112 per cent. upon the 1000*l.* for which the vessel in question was insured with the defendants.

The defendants appealed.

Finlay, Q.C. and *Edge* for the appellants.—The judgment ought to have been for the defendants. The policy effected by the plaintiffs with the defendants was to "cover the risk of total loss only" and there has been no total loss; the owner and underwriters did not treat her as a total loss, but came to terms about her on another footing. But even if there was a total loss, the defendants have had no notice of abandonment; such notice is necessary in the case of reinsurers:

Phillips on Insurance, s. 1506;
Arnould on Marine Insurance, 5th ed. p. 104.

But if this is not so, the plaintiffs can only recover the 88 per cent. of the amount insured, for that is all they have paid in respect of the loss; they claim the excess under the sue and labour clause, but that only applies to the assured, their "factors, servants, and assigns," in this case the original underwriters were none of these things. They cited

Lohre v. *Aitcheson*, 41 L. T. Rep. N. S. 323; 4 Asp. Mar. Law Cas. 168; 4 App. Cas. 755;
Kidston v. *The Empire Marine Insurance Company*, 15 L. T. Rep. N. S. 12; 16 *Ib.* 119, 286; L. Rep. 1 C. P. 535; 2 *Ib.* 357; 3 Mar. Law Cas. O. S. 400, 468.

Cohen, Q.C. and *Barnes*, for the respondents, were asked to argue the last point only.—The original underwriters who sued and laboured did so as the servants of the plaintiffs. The policy contains the words "to pay as may be paid thereon," and these words impose the same liability upon the defendants as that which the plaintiffs bore. They cited

Mackenzie v. *Whitworth*, 32 L. T. Rep. N. S. 163; L. Rep. 10 Ex. 142; 1 Ex. Div. 36; 44 L. J. 81, Ex.;
Dixon v. *Whitworth*, 40 L. T. Rep. N. S. 718; 4 Asp. Mar. Law Cas. 327; 4 C. P. Div. 374.

Cur. adv. vult.

Nov. 10.—Brett, M.R.—In this case the action is brought by the plaintiffs, who are the assured under the policy, against the defendants, who are the insurers, and the action is to recover for a total loss. The case was tried by Mathew, J. and he gave judgment for an amount which is 112 per cent. of the sum insured by the policy, and thereupon the defendants appealed to this court. Now, this policy upon which this action is brought is a policy of reinsurance effected by persons who are themselves reinsurers under another policy, and accepted by the defendants to the amount of 1000*l.* Now, the judgment has given the plaintiffs more than 1000*l.*, and the defendants have argued four objections to that judgment before us. First, they said that the policy was an insurance against total loss only, that there was in fact no total loss, and therefore judgment should have been given for them; secondly, they said that no notice of abandonment had been given to them by the plaintiffs; thirdly, that the judgment was too large, because they are not liable under the circumstances to pay more than 88 per cent. of the 1000*l.*; and fourthly, that the plaintiffs cannot under the circumstances recover anything under the sue and labour clause. As to the first point, I think it is obvious that there was a constructive total loss of the vessel; the argument advanced on that point seemed to me to answer itself. As to the point upon the notice of abandonment, it is admitted that the plaintiffs gave no such notice to the defendants, but the policy is entered into between subsequent insurers, who under it became in their turn assured, and inasmuch as due notice was given by the owner to the first insurers, it seems to me that, according to the rules of insurance law, that is amply sufficient. Then comes the third question as to what is the subject-matter of this policy, and on this point we must again remember that it is a reinsurance policy entered into by reinsurers. It is still, I think, a policy upon the ship; but then comes the question of what is the plaintiffs' interest in the ship. It is true that they have no interest as owners, but it is clear that they have an insurable interest, and it is equally clear that that interest is the loss which they might suffer under their policy of insurance. Now supposing they had insured this ship to its full value, their loss might then be more than the full value, by reason of their having to pay something under the sue and labour clause, and therefore the interest they would have at risk would be the amount which they might have to pay under their policy. If, therefore, they had insured themselves in this policy to the full amount and more of the sum for which they were themselves insurers, then I should not have said that they were over-insured, their interest at risk being what I have stated. What they have insured then is the interest which they have at risk, but to what extent? Only to the extent of 1000*l.*; they stand their own insurers as to any excess. If that be the nature of this policy, then the plaintiffs cannot recover more than 100 per cent. of the amount for which they insured. The plaintiffs, therefore, are entitled to recover 1000*l.* under this policy, and they cannot recover more unless the sue and labour clause is applicable. That brings me to consider and construe the sue and labour clause in such a case as this, in a policy of reinsurance upon a policy of reinsurance. By the terms of the clause it shall be lawful under the policy for the assured, "their factors, servants, and assigns, to sue labour," &c. It was the difficult question raised as to the meaning of this clause in this policy that made us hesitate about giving judgment at once. Speaking for myself, I should be anxious to give it the largest possible interpretation, so that where there has in fact been a suing and labouring which has been advantageous to every insurer, the assured might be held entitled to recover under this clause. But here the actual suing and labouring was not done by the plaintiffs themselves, but by the underwriters of Lloyd's Association, who were not employed by them, and who were not their "factors, servants, or assigns." If the word "agents" had been used, I should have hesitated still more in coming to this conclusion; but the words used are those of the common form, and are not, I think, wholly sufficient to cover this particular loss in a reinsurance policy upon a reinsurance policy. The judgment must therefore be varied to this extent, that the plaintiffs must have judgment

for 1000*l*. This point was scarcely glanced at in the argument before the learned judge, and substantially the respondents have succeeded on the appeal. We therefore dismiss the appeal with costs.

Cotton, L.J.—I agree.—There have been two principal contentions put forward on the part of the appellants: first, that they are not liable at all; secondly, that if they are liable, they are only liable to the extent of the 88 per cent. paid to the original insurers, I will add nothing to what has been said about the total loss, in my opinion it is clear that there was a total loss. Then it was said that notice of abandonment ought to have been given to the defendants, but in my opinion there was no need to do so; notice of abandonment was given to the original insurers, but they did not accept it; they could not give such notice to any other persons without accepting the abandonment. The defendants, therefore, are liable for something, and in order to see for what we must look at the contract. Now the policy is a policy of reinsurance applying to policies issued by the French company, "subject to the same terms, clauses, and conditions as the original policies, and to pay as may be paid thereon, but to cover the risk of total loss only." The conditions show that this was an insurance upon a ship effected by persons whose interest in the ship was not as owners; but, as having this interest, that they were liable upon the policies issued by them to a certain extent upon the ships mentioned in the list. Therefore I agree with the Master of the Rolls, that the liability of the defendants is for 1000*l*. The words "to pay as may be paid thereon" have been relied on to limit that liability to the 88 per cent. paid to the original insurer, but in my opinion they have not that effect, they only provide that the defendants are to repay the plaintiffs whatever they may have had to pay under their policies, subject only to a total loss occurring. Total loss has occurred, and they are liable to pay to the extent of 100 per cent.—that is 1000*l*.—for everything which the plaintiffs properly paid under their policy. I will not go again through the argument raised upon the sue and labour clause. In my opinion that clause is not so framed as to make the acts of the underwriters at Lloyd's the acts of the French company, and no additional burden can be made out of that clause beyond the 1000*l*.

Lindley, L.J.—I am of the same opinion. Several questions have been discussed. The first point that there was, in fact, no total loss fails; when one looks at the figures it becomes too clear for argument. Upon the second point, that there was no notice of abandonment to the defendants, it seems settled law that no notice is necessary in such cases. There is an American decision in a case of *Hastie* v. *De Peyster* (3 Caines, N. Y. 190), in which Kent, C.J. and Livingstone, J. so decided in carefully reasoned judgments, and since then it has been accepted as law, though the point is not very familiar in this country. The plaintiffs, therefore, are entitled to recover something, the question is how much? They sue to recover 112 per cent., being the 88 per cent. they paid as for a total loss, and the remainder which they paid under the sue and labour clause in the policy. In this policy there are three clauses to be considered: the first is that by which the policy is expressed to be upon a ship to the extent of 1000*l*.; the second is a special clause as to this being a policy of reinsurance; and the third is the sue and labour clause. It seems to me that but for the second clause the case would stand thus, that the plaintiffs would only be entitled to recover 88 per cent., that is in respect of the total loss; they do not bring themselves within the sue and labour clause for the reasons given by the Master of the Rolls, and I do not think they would have done so even if the word "agents" had been used; but the special clause to which I have alluded gives them a right to recover all their risk incurred, and everything which they have paid under the French policy up to 100 per cent.

Judgment varied.

Solicitors for the plaintiffs, *Waltons, Bubb,* and *Walton.*

Solicitors for the defendants, *Lowless* and *Co.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Saturday, Jan. 24, 1885.

(Before Mathew, J.)

Levy and Co. *v.* The Merchants' Marine Insurance Company. (*a*)

Marine insurance—Insurance against absolute total loss—Constructive total loss becoming absolute total loss—Mortgagees—Insurable interest.

When mortgagees of a ship by agreement with their mortgagors effect an insurance on the ship at the mortgagors' expense and hold the policy as part of their security, they have an insurable interest entitling them to sue on the policy, even if their mortgage has been paid off, where they have been compelled to pay to the mortgagors the value of the ship by reason of some default on their part, and the mortgagors have ceded to them their rights under the policy upon receipt of such payment.

A policy against absolute total loss only covers any such loss of the thing insured as is sufficiently complete to entitle the owners to recover without notice of abandonment, and hence where a ship is driven ashore, and by the continuous action of the perils of the seas becomes a total loss, the assured are entitled to recover, even though the ship were at the time of being driven ashore a constructive total loss only.

The mortgagees of a ship agreed with the mortgagors to effect an insurance on the ship at the mortgagors' expense, the policy to be held by them as part of their security. After the ship had sailed, the mortgagees effected an insurance against absolute total loss only. On the voyage the ship was driven ashore in a gale, and, having become a constructive total loss, notice of abandonment was given by the mortgagees to the underwriters. The mortgagors immediately gave notice that they would look to the mortgagees as if they were their underwriters for a full insurance, and recovered from them the full value of the ship. The ship remained for two months exposed to the perils of the sea, when she became a complete

(*a*) Reported by W. P. Eversley, Esq., Barrister-at-Law.

wreck, and was then sold without prejudice to the rights of the parties. After the sale, but before this action, the mortgage was paid off. The mortgagors ceded to the mortgagees their rights under the policy when they were paid the full value of the ship.

Held, in an action by the mortgagees against the underwriters claiming for an absolute total loss, that the mortgagees, though their mortgage had been paid off, had still an insurable interest in the ship; and, secondly, that, as the ship when sold had become an absolute total loss from perils which were continuous, the plaintiffs were entitled to recover.

This was an action upon a policy of insurance on a ship for 1000*l.*, the insurance being against the risk of absolute total loss only.

The case was tried before Mathew, J., without a jury, when the learned judge reserved judgment.

The facts and arguments are fully stated in the judgment.

Cohen, Q.C., and *Moulton* for the plaintiffs.

C. Russell, Q.C. and *J. G. Barnes* for the defendants.

Cur. adv. vult.

Jan. 24.—Mathew, J.—In this case the plaintiffs sought to recover for a total loss upon a policy of marine insurance alleged to have been entered into with them upon a vessel called the *Ardenlea*. The policy was in a peculiar form, namely, against absolute total loss only, and the question raised as to the meaning of the policy was one which, so far as I know, had not before been made the subject of discussion in a court of law. Now, the circumstances which gave rise to the action were shortly these:—Messrs. Levy, the plaintiffs, towards the end of the year 1881, had agreed with the firm of Carrara and Co. to advance the sum of 2000*l.* upon a mortgage of the vessel in question, and the advance was to be secured by two bills of the mortgagors, payable at six months and twelve months, for 1000*l.* each, and it was further agreed that the plaintiffs should effect an insurance upon the ship with their own underwriters, but at the expense of the mortgagors. It was intended in the ordinary course that the policy should be held by the mortgagees as part of their security. Now, the *Ardenlea* was an old ship. She had had some repairs done to her shortly before at Greenock, and had been purchased by the Messrs. Carrara for 2500*l.* It was intended that she should go in ballast from Greenock to Cardiff; that at Cardiff she should take on board a cargo of coals, and proceed to Gibraltar; and that when she reached Gibraltar she should be dismantled, and used from that time forward as a hulk. It is hardly necessary to say that an insurance on such a vessel is not very readily effected; and the only quotation that the plaintiffs obtained from their underwriters was one of 8*l.* 8*s.* per cent. for that voyage. Now, owing to an unfortunate mistake of their brokers, the plaintiffs were under the impression that they were entitled to look upon the ship as covered with the underwriters for an insurance for the voyage at that rate; they were mistaken, and, labouring under the mistake, they informed Messrs. Carrara that the ship was covered, and Messrs. Carrara sent the vessel to sea under the impression that that representation was correct. As a matter of fact the insurance had not been effected by their brokers, and all that the plaintiffs were able to do was to effect an insurance against absolute total loss upon the ship upon the voyage from Greenock to Cardiff at the rate of 40*s.* per cent. What occurred to the vessel was this: She sailed from Greenock about the 19th Nov., and shortly after she got to sea she encountered a serious gale; she came into collision with a steamer, and was ultimately, as is detailed by the protest, driven ashore, and no doubt most seriously damaged. The position in which the plaintiffs found themselves was one of considerable difficulty. Messrs. Carrara at once gave them notice that they intended to look to them as if they were their underwriters upon the ship, because they said the ship had been sent to sea upon a representation made to them by the plaintiffs that she was fully protected by insurance, and the plaintiffs had some difficulty in determining how they would act under the circumstances. But, when the plaintiffs found that Messrs. Carrara insisted upon the view that they had taken, they placed themselves in communication with the underwriters, and did what appears to me to have been the best in the interests of all parties with reference to the insurance. I may say that Messrs. Carrara ultimately established the position they took in the first instance, and succeeded in recovering, by a judgment of the Court of Appeal, from the present plaintiffs the full value of the ship. Notice of abandonment was given to the defendants, and the defendants took steps to ascertain what was the condition of the ship, and in the result the plaintiffs and the defendants came to the conclusion, as I am satisfied, that the ship, as she lay immediately after the stranding, was a constructive total loss. The ship remained from November to January exposed to the perils insured against, and in January, after the original injury to the ship had been seriously aggravated and increased by the perils to which she was exposed, by the consent of the plaintiffs and defendants, but without prejudice to their respective rights, she was sold, as the only thing possible to be done with her under the circumstances. It is only necessary to say further that the plaintiffs, who held the bills of Messrs. Carrara for the amount of their advance, were paid the amount of their bills as they became due. At the time the vessel was sold they were still mortgagees. At the time when the action was brought they had indemnified Messrs. Carrara for the loss of the ship, but their mortgage had been paid off in the way that I have described.

It was contended for the defence that the plaintiff could not recover on two grounds—first, from the absence of an insurable interest; and, secondly, that there was no absolute total loss within the meaning of the policy. Upon the first point, it was said that the insurance must be taken to have been effected to protect the mortgagees, or the mortgagors, or both. If for the mortgagees, it was urged that their mortgage had been paid off, and therefore their interest was extinguished. If for the mortgagors, it was urged that the insurance was not in fact what the mortgagors had authorised, and that therefore the underwriters were not liable. If for both, the result, it was said, must be the same, for what protected neither interest could not protect both. Now, I think it clear that the insurance was intended to cover, and did cover, the interest of both the mortgagees and the mortgagors. The policy in

terms covered the ship, and it was not necessary that the nature of the interest which was intended to be covered should be stated. There is no ground, it seems to me, for the contention that the mortgagors did not sanction an insurance as between them and the defendants. They insisted, as they were entitled to do, that the plaintiffs were, under the circumstances, liable to indemnify them for the loss of their ship, and they agreed to cede to the plaintiffs their claim to the proceeds of the insurance, in order to enable them to acquit themselves of their loss. In other words, they were willing that the plaintiffs, as their underwriters, should succeed to all their rights under the policy against the defendants, but they never intended to exonerate the underwriters from their liability, as is clear from the correspondence, and particularly from their letter to the plaintiffs of the 7th Dec. 1881. It is true that the plaintiffs refused in the first instance to admit that they were bound to indemnify the mortgagors; but, having been compelled to pay them the value of the ship, they accepted their proposal for the transfer to them of the mortgagors' interest and policy, and I see no ground, either in law or in equity, on which the defendants can complain of what has been done. The objection, therefore, that there was no insurable interest appears to me to fail the defendants.

The other ground of defence was that there was no absolute total loss within the meaning of the policy. It was said that, as the vessel survived her first disaster, the defendants were not liable. Several witnesses, who were experts in the business of underwriters were called by the defendants to prove that the words "absolute total loss" had a customary meaning, namely, the total annihilation of the subject of the insurance; but the witnesses, in my judgment, failed to show that the words had any other than their ordinary meaning. The witnesses appeared to me to be stating their opinion as to the meaning of the insurance, and their view of the intention with which the particular form of words had been adopted by underwriters, and not the result of their experience as to any conventional meaning of the word "absolute." The policy must, therefore, be construed without the help of any proof of usage to explain its meaning. It seems to me that in the policy in question the phrase "absolute total loss" is meant to be contrasted with "constructive total loss," and that the underwriters intended to be exempt from losses which were not actually but only technically total. It is clear, with reference to a risk of this description, the underwriters would be prudent to insist upon absolute proof of loss, and to protect themselves from the speculative questions to which a notice of abandonment might give rise—first, as to the extent and cost of repairs; and, secondly, as to the value of the ship when repaired. Accordingly, it seems to me that the underwriters meant to restrict their liability to a destruction of the ship so complete as would entitle the owners to recover whether a notice of abandonment had been given or not. In this case the vessel was stranded in the month of November, and upon the evidence before me I am satisfied that she was then a constructive total loss, but that a notice of abandonment would be necessary, or at any rate would be prudent, if the plaintiffs intended to recover under a policy for a total loss, that policy being in the ordinary form. Here the vessel remained exposed to the perils insured against down to the 17th Jan. following, when she was sold, as she lay with her gear and tackle. She was stripped by the purchaser, and it did not appear that to the purchaser the bill was of any value whatever. It seems to me that when she was sold she had become a complete wreck, and to repair her would be practically to rebuild her. Her timbers, no doubt, held together, but she was no longer a ship. She was in the condition to entitle the owner to claim for a total loss without abandonment: (*Cambridge* v. *Anderton*, 2 B. & C. 691). The only mode of turning what was left of her to account was to sell her as she lay. It was not practicable to restore her to her former character as a sea-going ship. This seems to me to be the legitimate inference from the documentary evidence before me, and no witnesses were called by the defendants to rebut this inference. It was contended by the defendants that, as the ship was in the first instance a constructive total loss only, the liability of the underwriters had ended, and that subsequent loss by perils insured against was not covered by the policy. But if this were so, and the vessel had been knocked to pieces the day after she stranded, or if she foundered in the attempt to get her off, the plaintiffs would have had no claim under the policy. This could not have been intended, and was, in view of the matter, repudiated even by the witnesses who were called by the defendants. It was further suggested that, if the original loss grew into an absolute loss, that result was due to the neglect and default of the plaintiffs, and that, therefore, the defendants were not liable. The only neglect charged upon the plaintiffs was their failure to have the vessel removed to a place of safety. But, even if it were clear this could have been done, it could only have been accomplished at an expense which no prudent owner would have incurred, for, when she was got to a place of safety, the cost of repairs, added to the cost of getting her off, would have exceeded probably by a large amount her value when repaired. The plaintiffs were not bound to throw away their money. They were not called upon to do anything that a prudent owner would not have done, and the removal of the vessel from where she lay was not what any prudent owner would have attempted. I think that the vessel became a wreck from perils which were continuous, or, at any rate, recurrent in their operation from the time she stranded, and the effects of which could not be averted by any means which the plaintiffs could reasonably have adopted. The principle of insurance law applicable to the case appears to me to be illustrated by the decisions of *Mullett* v. *Shedden* (13 East, 304) and *Stringer* v. *The English and Scottish Marine Insurance Company* (L. Rep. 4 Q.B. 676; on appeal, 3 Mar. Law Cas. O. S. 440; 22 L. T. Rep. N.S. 802; L. Rep. 5 Q. B. 599). The loss, in my judgment, ultimately became an absolute total loss within the meaning of the policy, and I therefore think that the plaintiffs are entitled to recover. My judgment is for the amount of the policy, with interest from the date of the sale.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Blewitt* and *Tyler*.

Solicitors for the defendants, *Waltons*, *Bubb*, and *Johnson*.

March 14 *and April* 1, 1885.

(Before HUDDLESTON, B.)

SCARAMANGA AND OTHERS *v.* MARTIN MARQUAND AND CO. (*a*)

Charter-party—Negligent navigation by shipowner's servants—Cargo in part salved—Salvage expenses—Payment of salvage expenses by underwriters—Right of owner of cargo to recover amount of expenses against shipowner.

The plaintiffs under a charter-party shipped a large quantity of rye on board one of the defendants' ships, to be carried from the port of T. to the port of A. Owing to the negligent navigation of the defendants' servants the ship was cast ashore, and a large quantity of the rye was lost; but a considerable quantity was saved by the Salvage Association, who were employed by the underwriters of the cargo with the assent of the defendants. The average statement was prepared, and the sum assessed was agreed to by the plaintiffs, and the Salvage Association were paid by the underwriters the expenses claimed by them. The plaintiffs brought their action to recover the amount of the salvage expenses so paid by the underwriters. The plaintiffs recovered a verdict for an amount to be settled out of court. The question of law involved in the case was reserved for further consideration. The defendants contended that they were not liable because the plaintiffs themselves had not paid the expenses, and the payment under the circumstances was voluntary.

Held, on further consideration, that the plaintiffs were entitled to recover the amount of the salvage expenses, as, without their being incurred, the remainder of the cargo could not have been sent to its destination, which was for the benefit of the defendants, and that the payment under the circumstances was not voluntary.

THIS was an action tried before Huddleston, B. in which the plaintiffs sought to recover two sums, first, for the non-delivery of a large quantity of rye shipped on board the steamship *Earl of Dumfries*, belonging to the defendants, and chartered by the plaintiffs; and, secondly, for the proportion of charges and expenses claimed by the Salvage Association in respect of the cargo as adjusted by the average statements. Owing to the course adopted during the argument it is unnecessary to refer at any greater detail to the first point.

The material facts appear sufficiently in the judgment of the learned judge.

C. Russell, Q.C. and *Barnes*, for the plaintiffs, moved for judgment.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *Finlay*, Q.C. and *Bucknill*, for the defendants. —The second point in dispute between the plaintiffs and defendants is the claim of the former for "proportion of charges and expenses claimed from the plaintiffs in respect of the cargo as per average statement." There are two answers to that claim: A person who sues in respect of a breach of contract for money paid must prove that he has paid or is under an obligation to pay it. The plaintiffs have not paid the money nor were they under any obligation to pay it. This money was paid by the underwriters of the cargo, by whom the salvage expenses were incurred, and not by the plaintiffs. In fact, the underwriters are trying to recover from the shipowners the moneys paid by them for the salvage of the cargo. If the plaintiffs had salved the cargo themselves they might have recovered, but there is no privity of contract between the defendants and the underwriters. Again, the correspondence between the parties shows that this money was paid by the underwriters in respect of matters for which the plaintiffs have admitted their liability to pay. It is a voluntary payment and cannot be recovered.

G. Barnes in reply.—The underwriters having paid this amount to the Salvage Association under their policy of insurance, could clearly be subrogated to the rights of the plaintiffs, who have a claim against the shipowners for the negligence of their master:

North of England Iron Steamship Insurance Association v. *Armstrong and others*, 21 L. T. Rep. N. S. 822; 3 Mar. Law Cas. O. S. 330; L. Rep. 5 Q.B. 244.

The residue of this cargo could not have been sent to its destination except at the expenditure of the amount claimed. The plaintiffs are damnified to that amount. The defendants were bound to forward the cargo. The Salvage Association are called in, and save the rest of the cargo. The plaintiffs admit that this action is brought on behalf of the underwriters, but that does not prevent them from recovering. As to the other point, the average adjustment was made at the instance of the defendants, and the money has been paid. This was not a voluntary payment, and it left untouched the ultimate liability of the defendants for the negligence of their captain.

Cur. adv. vult.

April 1.—HUDDLESTON, B.—This action was brought by the plaintiffs upon a charter-party and bill of lading against the defendants, who were owners of the ship, for default in delivery of a large quantity of rye which had been shipped at Taganrog for Altona by the *Earl of Dumfries*. The *Earl of Dumfries* was wrecked on the voyage off the coast of Portugal, and the jury, after a long inquiry, found that that was occasioned by the negligence of the defendants' master. The questions raised on further consideration were with reference to the damages. They divided themselves into two heads, the one the actual loss of a portion of the rye, the other as to the expenses incurred in saving the remainder. I have to decide upon the principle; the amount under each head is to be settled by agreement out of court. With reference to the loss of the rye actually incurred, the defendants alleged that the plaintiffs were not entitled to recover at all, or, in any event, not beyond nominal damages, because they had sold the rye to one Lichtenstein, who again had sold it to Schutt and Co., of Berlin, who were assignees of the bill of lading and of the policy of insurance, and that therefore the property had passed out of the plaintiffs and was vested in the vendees. The plaintiffs contended that they were trustees for others, and, as the contract of sale from them to Lichtenstein and Schütt was at a fixed price "sound delivered," the risk of sound delivery was still the plaintiffs', and gave them an

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

interest and right to sue. It will not become necessary to decide these points, as letters were produced from the vendee and the sub-vendee authorising the plaintiffs to join them as plaintiffs, and I should do so if necessary.

The other question as to the salvage expenses arose in this way: The underwriters had as was usual in such cases, employed the Salvage Association with the assent of the defendants, the correspondence showing that the defendants gave instructions, and were continually in communication with the Salvage Association, who sent out a steamship, the *Queensferry*, and rescued a large portion of the cargo, and, though the expenses were very heavy, there was a large margin of rye saved beyond what those expenses would amount to. Kroeplin was Schütt's agent at Hamburgh, and the defendants delivered through Slowman, their agent, to Kroeplin the whole of the rye saved from the *Earl of Dumfries*. Before doing so they required and received from Kroeplin through Slowman a deposit of 50,000 marks to answer general average and charges under an agreement undertaking to pay not only freight but general average. The average statement was prepared by an average stater at Hamburgh; the Salvage Association were paid their claim by the underwriters of the cargo, and the defendants deducted from the 50,000 marks the balance between the payment so made to the Salvage Association and the amount adjusted, and returned the residue to the plaintiffs through Slowman. The defendants contended that, as it had not been paid by the plaintiffs, the plaintiffs could not recover. It is clear that the remainder of the rye could not have been sent to its destination without these expenses which were incurred in consequence of the defendants' master's negligence, and were for the benefit of the defendants. If the rye had been completely lost they would have been obliged to have paid the full amount of the loss to the plaintiffs; and if the plaintiffs had paid this money they could have recovered it from the underwriters, and the underwriters upon payment would be subrogated into the rights of the insured as against the defendants (*Dickinson* v. *Jardine*, L. Rep. 3 C. P. 639), and as the underwriters could recover from the defendants through the plaintiffs for the value of the goods lost, so they can for the amount of the salvage expenses paid. The Salvage Association, having a lien upon the salvage could have compelled Schütt to pay them those expenses before delivery of the rye. Schütt on payment could have recovered that amount from Lichtenstein, and Lichtenstein from the plaintiffs, and the plaintiffs could have recovered it from the underwriters, who could have sued the defendants in the plaintiff's name, and, to avert this circuity of payments, the sum was paid in the first instance by the underwriters of the cargo and the Salvage Association with the assent of all the parties.

It was further contended that inasmuch as the amount had been paid under an agreement, that it was a voluntary payment, and could not be recovered back. It is quite clear that that agreement was an arrangement merely to adjust the general average and not the question of ultimate liability, and was subject to the defendants' liability for the negligence of their captain. If the question of such liability had not been raised (as it would seem from the correspondence at that time not to have been) the money would have been paid under a mistake of fact and so would be recoverable. I am therefore of opinion that the plaintiffs are entitled to recover both for the rye actually lost and for the salvage expenses, and I give judgment for the plaintiffs with costs for the amounts to be settled out of court.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Waltons, Bubb,* and *Johnson.*

Solicitors for the defendants, *W. A. Crump* and *Son.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Wednesday, March 4, 1885.

(Before Butt, J.)

The Leptir. (a)

Wages action—Owners of cargo—Freight—Abandonment—Salvage.

Where a salving ship takes a crew off a vessel in distress and puts men on board of her, refusing to allow her own crew to return, and the two vessels are in company navigated into port, there is no such abandonment of the ship as to put an end to the contract of carriage, and consequently there will be freight due upon the consignees requiring delivery of the cargo, such freight being pro ratâ, assuming the port not to be the port to which the cargo ought to have been taken under the contract of carriage.

This was a wages action instituted *in rem* on the 2nd July 1884 by two able seamen and a steward against the Austrian brig *Leptir* and her freight.

A warrant of arrest was issued, and the vessel was arrested at Cardiff, her cargo being also arrested for freight. The owners of the *Leptir* did not appear.

At the time when the plaintiffs were earning the wages claimed, the ship was chartered from Hayti to Queenstown or Falmouth for orders for a port in the United Kingdom, or on the Continent between Bordeaux and Hamburg. During the performance of this charter-party, the *Leptir* met with severe weather, and was brought into Cardiff by salvors, who subsequently instituted a salvage action on the 27th May.

After the vessel's arrival at Cardiff, the owners of cargo at once applied for delivery of the cargo to them at Cardiff, without payment of freight, but the shipowners and the salvors both refused to accede to this request. The owners of cargo thereupon took out a summons, in the action instituted by the salvors, for the release of the cargo, and an order was made for such release upon bail being given in respect of the salvage services. The cargo, however, was not in fact released from arrest at the time when the present wages action was instituted, viz., on July 2, 1884.

On the 18th July the owners of the cargo entered an appearance in the wages action, and issued a summons for the release of their cargo.

At the hearing of this summons, the judge ordered the cargo to be released, and ordered the

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs. Barristers-at-Law.

solicitors for the owners of the cargo to give an undertaking either to bring into court the freight if any due, or to give bail for the amount thereof.

There was no appearance on behalf of the owners of ship, and the plaintiffs having in due course filed their statement of claim, the action as against the ship came on by default, when judgment was given for the plaintiffs, but their claim could not be satisfied out of the ship, the proceeds of which had been consumed in paying the claims of the salvors. The plaintiffs therefore sought to recover their wages against the freight in the hands of the cargo owners, and for this purpose served them with the statement of claim, with a notice that they delivered the claim for the purpose of raising the question whether freight was or was not due.

The plaintiffs by their statement of claim, after stating that they had served on board the *Leptir* and earned wages, alleged as follows: "On the 3rd July the said ship was in Cardiff, and there was then and still is due and owing in respect of the time when the plaintiffs were serving as aforesaid, or part thereof, freight for the carriage of cargo in the said ship," and they claimed in addition to their wages ten days double pay, wages until the date of final settlement, and the expenses of their proceeding to their respective homes.

The owners of cargo delivered a defence alleging that,

2. In or about the month of May 1884 the *Leptir*, laden with a cargo of logwood, and bound from Hayti to Queenstown or Falmouth for orders, was towed into Cardiff by the Russian barque *Pehr Brahe*, which had picked up the *Leptir* at sea a derelict.

3. There was not at the commencement of this action, nor is there now, any freight due from the now pleading defendants as owners of the said cargo in respect of the same.

5. The now pleading defendants say alternatively that the abandonment of the *Leptir* by the plaintiff, and the rest of the crew was wrong and unjustifiable, and that on that ground no wages became due and payable to the plaintiffs in respect of the said voyage.

At the hearing of the action the following evidence was given by one of the plaintiffs in support of the claim:

The brig *Leptir* having left Hayti with a cargo of logwood on the 11th April 1884, bound to Queenstown for orders, began to make a considerable quantity of water on and after April 30. In consequence of the pumps being choked thirty tons of cargo were thrown overboard, and the forehold was bailed out with buckets. On the 8th May the Russian barque *Pehr Brahe* being sighted, signals were hoisted, and a consultation was held as to what should be done, but nothing was said to the crew as to leaving the *Leptir*. On coming up with the *Pehr Brahe* the *Leptir's* master was taken on board the Russian barque in the *Leptir's* boat. The master of the *Leptir* then ordered the boat to return and fetch the crew, but not to bring any clothes or baggage. The crew of the *Leptir* were then taken on board the *Pehr Brahe*. On the next morning the mate of the *Leptir* asked the master of the Russian barque to be allowed to return to the *Leptir*, the crew all being ready and willing to do so. The master of the *Pehr Brahe* refused permission, but shortly afterwards sent four of his own men and their clothes on board the *Leptir*. In consequence of this the master and mate of the *Leptir* quarrelled with the master of the *Pehr Brahe*. The two vessels proceeded for England, keeping in company with one another and in sight until the night prior to the vessels arriving at Cardiff, when the *Leptir* was lost sight of in consequence of heavy weather. During the voyage the crew of the *Leptir* assisted in working the *Pehr Brahe* in the place of those who had gone on board the *Leptir*, and were paid by the master of the *Pehr Brahe* for so doing. On the 24th May the vessels arrived at Cardiff, when the master and crew of the *Leptir* immediately proceeded to their vessel, which they found flying the Russian national flag. The Russians refused to allow them to board the *Leptir*. The master, however, succeeded in getting on board, but was forcibly ejected by the Russians. Later on the same day the *Leptir's* crew were allowed, through the intervention of the Austrian consul, to go on board her. The *Leptir* was arrested in a salvage action on the 27th May, her cargo being then on board of her. The Russians then left her.

In cross-examination the witness admitted that when he left the *Leptir* she was in considerable peril, and that some of the crew brought their effects on board the Russian barque.

J. P. Aspinall, on behalf of the plaintiffs, submitted that there was no such abandonment of the ship as put an end to the contract of carriage, and that the shipowners were entitled to freight under the contract, as the goods had been delivered at a port within the words of the contract; or in any event to *pro ratâ* freight, and that the owners of cargo were not entitled to their goods without payment of freight for the carriage thereof. [He was then stopped by the Court.]

Bucknill for the defendants, the owners of cargo. —No freight is due from the cargo owners to the shipowner, because there was an abandonment by the master and crew of the *Leptir*. On the evidence it is submitted that when the crew left the *Leptir* they had the intention of abandoning her. The witness called on behalf of the plaintiffs has admitted that some of the *Leptir's* crew had their effects ready to take off the ship, and that some of them did in fact take them on board the Russian barque. [BUTT, J.—If the evidence were that the crew packed up everything they possessed, it might perhaps show that they had the intention of abandoning their vessel, assuming they had fallen in with no other ship, but not if another ship came up, as was the fact.] Assuming there to have been an abandonment, on the authority of *The Cito* (45 L. T. Rep. N. S. 663; 4 Asp. Mar. Cas. 468; 7 P. Div. 5), no freight is due. [BUTT, J.—I do not intend to carry *The Cito* a step further than it has gone. Moreover, the abandonment must be justifiable to be within the case of *The Cito*; and can it be said that the Russian barque being there ready and willing to assist, an abandonment under such circumstances could be justifiable?] But if the seamen improperly abandoned the ship, they have forfeited their wages. [BUTT, J.—Is that so if they abandon with the consent of the master?] In this case the evidence shows that they intended to abandon whether he consented or not.

BUTT, J.—I am very clearly of opinion in this case that on the facts there was no abandonment of this ship within the proper meaning of the word, and therefore the case of *The Cito* (*ubi sup.*) does not apply. But, as I said before, I should be strongly inclined to say that, even if there had been an abandonment without any intention on the part of the crew to return and save the vessel, yet, having regard to the fact that the Russian barque was willing to assist, such an abandonment would have been so improper that the cargo-owners would have been entitled to recover damages against the shipowner for the wrongful act of his crew, which assumes therefore that the contract of affreightment was not thereby put an end to. That being so, it follows that some freight

is due. I leave out of consideration what the amount is, and I pronounce for the claims, referring the amount to the registrar to ascertain what is due to the plaintiffs. The freight, which is *pro ratâ*, is, I suppose, a heavy freight. I pronounce for the plaintiffs' claim with costs.

Solicitors for the plaintiffs, *Fielder* and *Sumner*.

Solicitors for the owners of cargo, *Pritchard* and *Sons*.

March 10, 18, 19, *and* 31, 1885.

(Before BUTT, J.)

THE OWNERS, MASTER, AND CREW OF THE STEAMSHIP GLENAVON *v.* THE OWNERS OF THE CARGO ON THE STEAMSHIP GLENFRUIN.

THE GLENFRUIN. (*a*)

Salvage—Cargo owners—Contract of carriage—Warranty of seaworthiness—Bill of lading—Excepted perils.

The warranty of seaworthiness implied in a bill of lading is an absolute warranty that the ship shall be in fact fit for the voyage, and not merely that the shipowner shall take all reasonable care to make her so fit; and hence a latent defect in the screw-shaft existing prior to the commencement of the voyage, and resulting in the breaking of the shaft, is a breach of the shipowner's warranty of seaworthiness, although the shipowner may have taken all reasonable precaution in the selection of the shaft.

The excepted perils in a bill of lading have no application to the case of a ship sailing in an unseaworthy condition; and hence they are no defence to an action brought for loss or damage to the charterer's goods occasioned by such unseaworthiness.

Where a screw-steamship carrying cargo under a bill of lading containing the exception "accidents of the seas and of navigation," becomes disabled through her main shaft breaking in consequence of a latent defect in existence prior to the sailing of the vessel, and another vessel belonging to the same owners renders salvage services, such owners are precluded from recovering salvage against the cargo by reason of the services becoming necessary through the breach of their warranty of seaworthiness. In these circumstances the right of the crew of the salving ship to recover for the services is not affected by such unseaworthiness; but the owners of the cargo, having to pay such salvage, are entitled to recover by way of counterclaim, from such of the plaintiffs as are owners of the salved ship, the full amount which they, the owners of cargo, have to pay to the crew for salvage; and the same rule applies to the case of an owner of a salving ship who is not also the owner of the salved ship.

THIS was a salvage action instituted *in personam* by the owners, master, and crew of the steamship *Glenavon*, against the owners of the cargo laden on board the steamship *Glenfruin*, for salvage services rendered thereto.

The *Glenavon* was an iron screw-steamship of 2985 tons gross register, with engines working up to 2650 horse-power, and was manned by a crew of sixty-six hands. At the time the salvage services were rendered she was on a voyage from Japan and China to New York laden with a cargo of tea.

The *Glenfruin* was at the time the services were rendered on a voyage from Hankow to London, laden with a cargo of tea. The value of the *Glenfruin* and her freight was 70,000*l.*, and of her cargo 158,000*l.* Sixty-two sixty-fourth shares in the *Glenavon* and sixty-two sixty-fourth shares in the *Glenfruin* were owned by the same nineteen persons. The remaining two sixty-fourth shares in the *Glenavon* were held by a Mr. William Houston, and the remaining two sixty-fourth shares in the *Glenfruin* by another gentleman.

The facts alleged on behalf of the plaintiffs were as follows:—On the 18th June 1884 the *Glenfruin* had broken her main shaft, and on the 26th June, at about noon, she being then in the Indian Ocean about 2°22′ N. lat. and 68°39′ E. long., she was observed by those on board the *Glenavon* flying signals for assistance. On the *Glenavon* coming up with the *Glenfruin* it was discovered that the breakdown of the *Glenfruin's* machinery was due to a fracture in the screw-shaft. After the breakdown, efforts had been made to repair the shaft, and an engineer from the *Glenavon* went on board the *Glenfruin* to render assistance. On the morning of the 27th June the *Glenavon* began to tow the *Glenfruin*, and continued so doing until the 2nd July, when the repairs to the shaft of the *Glenfruin* were completed and her engines set ahead. It being uncertain whether the repairs would hold, it was agreed that the *Glenavon* should stay by the *Glenfruin* until she had passed Cape Guardafui. On the 4th July Guardafui was passed, and at noon on the 5th, as the *Glenfruin's* engines continued to work well, and Aden was only 350 miles distant, the *Glenavon* parted company and proceeded on her voyage. The *Glenfruin* eventually reached London in safety. The towage extended over about 900 miles, and the weather was fine during the rendering of the services.

The defendants by their statement of defence alleged as follows:

4. The cargo laden on board the *Glenfruin* at the time mentioned in the statement of claim was so laden by or for the several owners thereof, the defendants, on the terms of certain contracts by bills of lading then entered into between the plaintiffs, the owners of the steamship *Glenavon* and the defendants (or the shippers of the respective goods who endorsed the bills of lading to the defendants and thereby passed the property in the goods respectively to the defendants), whereby the plaintiffs contracted to carry the said cargo to London, and there deliver it to the defendants on payment of freight, and the act of the said plaintiffs in towing and assisting the *Glenfruin*, as alleged, was done only in fulfilment of their said contracts, as aforesaid, to carry her cargo to London, or for the purpose of enabling their own vessel to earn the freight on the said cargo, or for the purpose of avoiding their liability for the non-delivery of the said cargo to the defendants at London aforesaid, or for the sake of bringing their own vessel (which had put to sea in an unseaworthy condition) safe into port, and was in any case an act done for the sole behalf and advantage of the said plaintiffs, and was not, so far as the said plaintiffs are concerned, a salvage service.

5. The cargo of the *Glenfruin* was also laden on board her under the said contracts on the terms that the said vessel should be seaworthy for the voyage, and the defendants say that the said vessel, the *Glenfruin*, was not seaworthy for the said voyage, and was not reasonably fit to carry the said cargo to its destination at the time when she sailed on the said voyage, in this, that

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

the screw-shaft of the said vessel was defective, unsound, and in improper condition and improperly fitted, and in consequence thereof, and for no other cause, the shaft broke down, and the upper part of the bearing in the immediate proximity of the shaft broke away, and the *Glenfruin* became in need of and received the assistance of the *Glenavon*, as in the statement of claim set out, and the said plaintiffs are not entitled to make any claim upon the defendants in respect of the said assistance.

6. Under the circumstances aforesaid the plaintiffs, the owners of the steamship *Glenavon*, or such of them as were and are owners of the *Glenfruin*, are not entitled to any salvage remuneration. The defendants also submit that any remuneration which the master and crew of the *Glenavon* are entitled to against them is of small amount, and that the defendants are entitled to recover the same from the plaintiffs, the owners of the *Glenavon*, or some of them, by way of counter-claim, as hereinafter stated.

By way of counter-claim against the plaintiffs, the owners of the steamship *Glenavon*, or such of them as were also the owners of the *Glenfruin*:

1. The defendants have suffered damage by breaches of contract by bills of lading of the said cargo shipped thereunder on board the *Glenfruin* at Hankow by the defendants and signed by or for and on behalf of the said plaintiffs, or some of them; or alternatively, the said goods were supplied under the said bills of lading by various shippers at Hankow on board the *Glenfruin*, and which were signed as aforesaid and indorsed to the defendants to whom the property in the said goods thereby passed.

2. The plaintiffs (the shipowners) made default in delivery of the said goods respectively and only delivered the same subject to certain claims which they were bound to pay and discharge, and which they had not and have not paid or discharged, and which they have left the defendants liable to pay.

3. The said vessel *Glenfruin* was not seaworthy for the voyage on which the said goods were shipped, and not reasonably fit to carry the said goods to their destination at the time when she sailed on the said voyage in the respects mentioned in the fifth paragraph of the defence, and in consequence thereof the said shafting broke down and the bearing broke away, and the said vessel became in need of and received the assistance in the statement of claim mentioned.

Particulars of damage:

1. Whatever sum may be awarded to the master and crew of the *Glenavon* for salvage.

2. If the defendants are held liable to the owners of the *Glenavon*, or any of them, for any sum for salvage or other sums, the defendants claim such sum or sums from the plaintiffs, the owners of the *Glenavon*, or such of them as were also owners of the *Glenfruin*.

The defendants counter-claim:

Judgment for whatever sum or sums they are entitled to recover from the plaintiffs, the owners of the *Glenavon*, or any of them, and such further and other relief as the case may require.

The plaintiffs, by their reply, alleged as follows:

1. They join issue on so much of the statement of defence as does not consist of allegations contained in the statement of claim.

2. The plaintiffs, the owners of the *Glenavon*, say alternatively, that if they contracted as alleged in the fourth paragraph of the defence (which they deny), their act in towing and assisting the *Glenfruin* as alleged was not done in fulfilment of the said contract, or for the purpose of avoiding their liability for the non-delivery of the said cargo to the defendants at London. The plaintiffs also deny that the *Glenfruin* had put to sea in an unseaworthy condition.

3. The plaintiffs, the owners of the *Glenavon*, also say alternatively as aforesaid, that the *Glenfruin* was seaworthy for the said voyage and reasonably fit to carry the said cargo to its destination at the time when she sailed on the said voyage. The plaintiffs deny that the screw-shaft of the said vessel was defective, unsound, or in an improper condition or improperly fitted, and they deny that in consequence thereof the *Glenfruin* broke down as alleged.

4. Alternatively, the plaintiffs, the owners of the *Glenavon*, say that if they contracted to carry the said goods on board the *Glenfruin*, which they deny, they did so on the terms of certain bills of lading which excepted loss or damage from machinery and all and every the dangers and accidents of the seas and of navigation, of whatever nature or kind, and the plaintiffs say that the breaking of the shaft of the *Glenfruin* was an excepted peril within the meaning of the said bills of lading.

5. In the alternative, the *Glenfruin*, as a fact, broke down during the said voyage owing to the existence of a latent defect in her lower shaft, against the existence of which it was impossible to provide, and could not have been discovered by the exercise of any ordinary care, skill, prudence, and foresight, and of the existence of which the said plaintiffs were ignorant.

At the hearing of the action evidence was given on behalf of the plaintiffs as to the nature of the salvage services. It was also proved that the screw-shaft had been bought from a first-class firm, that the flaw was due to a latent defect which it would have been impossible to discover, and that the owners of the *Glenfruin* had used all reasonable diligence in the selection of the shaft.

Russell, Q.C., *Cohen*, Q.C., and *Bucknill* for the plaintiffs.—It is submitted that the implied warranty of seaworthiness is not an absolute warranty that the ship shall be in fact fit for the voyage, but only that the shipowner shall take all reasonable care to make her so fit. If the court is precluded by authority from so holding, the plaintiffs nevertheless contend that the warranty is modified by the terms of the bill of lading. By the contract contained in the bill of lading loss or damage caused by "the accidents of the seas and of navigation" is excepted. In the present case the liability of the defendants to pay salvage remuneration is due not only to the vessel's unseaworthiness, but to the unseaworthiness *plus* the state of the weather, which together made it necessary to take assistance, and so rendered the defendants liable to pay salvage. The loss of the defendants is therefore due to an accident of navigation:

Nugent v. *Smith*, 1 C. P. Div. 444; 3 Asp. Mar. Law Cas. 198; 34 L. T. Rep. N. S. 827;
Steel v. *The State Line Steamship Company*, 37 L. T. Rep. N. S. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72.

In *The Miranda* (27 L. T. Rep. N. S. 389; L. Rep. 3 A. & E. 561; 1 Asp. Mar. Law Cas. 440), which was a case of salvage where the two ships belonged to the same owner and the assistance was rendered necessary owing to the salved ship having broken her screw-shaft, Sir Robert Phillimore awarded salvage as against the cargo. Where the shipowner has used all reasonable care and skill in the selection of the shaft, the fact of its breaking owing to a latent defect is an accident touching the motive power of the ship, and therefore an "accident of navigation" excusing the shipowner from all loss thereby caused:

Phillips v. *Clark*, 2 C. B. N. S. 156;
Lloyd v. *General Iron Screw Collier Company*, 10 L. T. Rep. N. S. 586; 2 Mar. Law Cas. O. S. 32; 3 H. & C. 284;
Grill v. *General Iron Screw Collier Company*, 18 L. T. Rep. N. S. 485; 3 Mar. Law Cas. O. S. 77; L. Rep. 3 C. P. 476.

It may be contended by the defendants, on the authority of *Steel* v. *State Line Steamship Company* (*ubi sup.*), that the plaintiffs cannot avail themselves of the excepted perils, because they have no application to a ship sailing in an

unseaworthy state. The decision of the House of Lords was, however, confined to the particular excepted perils in the bill of lading then under consideration. Moreover, in the present case the "accident of navigation" happened after the commencement of the voyage, whereas in *Steel* v. *The State Line Steamship Company* (*ubi sup.*) the cause of the damage was the negligence of the crew prior to the sailing of the ship.

Webster, Q.C., *Tyser*, and *Barnes* for the defendants.—The owners of the *Glenfruin* are liable to the owners of cargo for any loss occasioned by providing an unseaworthy ship, and they therefore are liable in respect of any salvage remuneration which may be due in respect of the services rendered to the cargo. *The Miranda* (*ubi sup.*) is not in point, inasmuch as Sir Robert Phillimore refrained from dealing with the question of unseaworthiness on the ground that no evidence had been given as to the vessel's condition when she sailed. Even assuming that case to be in point, it has since been overruled by subsequent decisions. The implied warranty of seaworthiness is an absolute warranty that the ship shall in fact be fit for the voyage:

Lyons v. *Mells*, 5 East, 428;
Kopitoff v. *Wilson*, 34 L. T. Rep. N. S. 677; 3 Asp. Mar. Law Cas. 163; 1 Q. B. Div. 377;
Steel v. *State Line Steamship Company* (*ubi sup*).

The excepted perils in the bill of lading have no application to an unseaworthy ship, the unseaworthiness of which was the efficient cause of the loss:

Steel v. *State Line Steamship Company* (*ubi sup*)
Tattersall v. *The National Steamship Company Limited*, 50 L. T. Rep. N. S. 299; 12 Q. B. Div. 297; 5 Asp. Mar. Law Cas. 206.

According to the decision of the House of Lords all the exceptions in a bill of lading must be taken to refer to a period subsequent to the sailing of the ship.

Cohen, Q.C., in reply cited
Kay v. *Wheeler*, L. Rep. 2 C. P. 302.

Cur. adv. vult.

March 31.—BUTT, J.—The plaintiffs are the owners, master, and crew of the steamship *Glenavon*, of 2385 tons gross register, manned by a crew of sixty-six hands. The defendants are the owners of the cargo laden on board the steamship *Glenfruin*, a vessel of about the same size as the *Glenavon*. At the time of the salvage services the *Glenfruin* was bound from Hankow to London with tea. The *Glenfruin* and her freight were of the value of 70,000*l.*, and her cargo of the value of 158,000*l.*, making 228.000*l.* in all. On the 18th June 1884 the main shaft of the *Glenfruin* broke in the Indian Ocean. Her machinery was thereby for the time rendered useless, and she was particularly unmanageable under sail. On the 26th June the *Glenavon*, also laden with tea, and bound on a voyage from Japan and China to New York, fell in with the *Glenfruin*. There were twenty-one owners of shares in the two ships, nineteen of whom held amongst them sixty-two sixty-four shares of each vessel; the remaining two sixty-four shares in each ship were held by a person who was not a part owner in the other. It was agreed that, for the purposes of this suit, the values of the *Glenavon*, her freight and cargo, should be taken to be equal to those of the *Glenfruin*, her freight and cargo. At the request of the master of the *Glenfruin*, the *Glenavon* took hold of her and towed her on her voyage a distance of about 900 miles. By the the shaft of the *Glenfruin* had been repaired so that she could use her engines, though not at full speed. As it was uncertain whether the repairs to the shaft would hold good, the *Glenavon* kept in company of the *Glenfruin* till the 5th July, when the *Glenfruin's* engines continuing to work well, the *Glenavon* left her and proceeded for New York. The weather was fine during the salvage services. The *Glenfruin* reached her port of destination in safety. The bills of lading of the *Glenfruin* contained the following amongst other exceptions: "The act of God, the Queen's enemies, pirates, robbers by land or sea; restraint of princes, rulers, or people, loss or damage from machinery, boilers, or steam, or from explosion, heat, or fire on board, in hulk, or craft, or on shore; jettison, barratry, misfeasance, error in judgment; any act or neglect or default whatsoever of pilots, master, or crew, in the management or navigation, of the ship; risks of craft, or hulk, or transhipment, and all and every the dangers and accidents of the seas, rivers, and canal, and of navigation, of whatsoever nature or kind, are excepted."

The principal questions raised and discussed in the case were: (1) Was the breakdown of the *Glenfruin's* shaft caused by unseaworthiness? (2) Does the implied warranty of seaworthiness in the bill of lading amount to a contract by the shipowners that the ship (including her machinery) shall be in fact reasonably fit for the voyage, or only that due care shall be taken to make her so fit? (3) Was the warranty qualified, or were the shipowners otherwise exempted from liability for the breaking of the shaft by the exceptions in the bill of lading? With reference to the first of these questions, it appears from the evidence that very few, if any, of these large shafts are turned out, even by the best makers, without some flaws in the welding. If one of such flaws is of a serious nature, it is apt to extend from the strain put upon it by the working of the engines, and in course of time so to weaken the shaft as to make it unfit for the purposes for which it is designed. This is almost always, if not always, the cause of the breaking of the shafts of large steamers. The shaft in question had been made by one of the best firms, and after its completion it was impossible for that firm, or for the owners of the ship to discover the flaw until it was laid bare by the breaking of the shaft. That flaw was a very serious one. It had no doubt gradually increased during the four years the shaft was in use, and the defect culminated in the breakdown on a voyage on which the ship had met with no more than ordinary weather. I find as a fact that, when the *Glenfruin* started from Hankow, the shaft was not reasonably fit for the voyage; in other words, that the ship was unseaworthy. On the second question—viz., that relating to the nature and extent of the warranty of seaworthiness—I am, I think, concluded by authority. I have always understood the result of the cases from *Lyon* v. *Mills* (5 East, 428) to *Kopitoff* v. *Wilson* (*ubi sup.*) to be, that under his implied warranty of seaworthiness the shipowner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage. Had those

cases left any doubt in my mind it would have been set at rest by the observations of some of the Peers in the opinions they delivered in the case of *Steel* v. *The State Line Steamship Company* (*ubi sup.*).

Thirdly, I am of opinion that the exceptions in the bill of lading have not the effect either of limiting the implied warranty or of otherwise exempting the shipowner from liability to the owners of cargo for damage or loss occasioned by the breaking of the shaft. It appears to me that the reasonable construction of the exceptions relied on by the plaintiffs—viz., "all and every the dangers and accidents of the seas, rivers, and canal, and of navigation of whatever nature or kind"—must be "dangers and accidents" happening to a seaworthy vessel, and that the exception has no application to the case of a ship which was unseaworthy at the time of sailing, and the unseaworthiness of which was the efficient cause of the loss or damage. In the case of *Steel* v. *The State Line Steamship Company* (*ubi sup.*). to which I have already referred, the decision of the House of Lords was that the exceptions contained in the bill of lading then under consideration were exceptions of matters subsequent to the sailing of the ship with the goods on board. I can see no reason for taking a different view of the exceptions in the bill of lading in the present case. The result is, that the part owners of the *Glenavon*, who were also part owners of the *Glenfruin*, would be liable to the owners of cargo on board the *Glenfruin* for any loss occasioned by the breakdown of the machinery. In other words, such part owners (plaintiffs in the present suit) would be liable to reimburse the defendants any amount of salvage that I might award. To avoid what is termed "circuity of action," I must decline to make any award in favour of those plaintiffs. There is, however, one of the plaintiffs (Mr. William Houston, the owner of two sixty-fourth shares of the *Glenavon*) who is not a part owner of the *Glenfruin*, and who would therefore be entitled to his proportion of the salvage that would have been awarded to the plaintiffs had none of them been part owners of the *Glenfruin*. Again, I do not understand it to have been contended, either in the pleading or in the argument, that the master and crew of the *Glenavon* are not entitled to salvage remuneration. Having regard to all the circumstances of the case, and bearing in mind that the two ships for practical purposes must be taken to have belonged to the same owners, and that the cargo only of the *Glenfruin*, and not ship, freight, and cargo, are proceeded against in this action, I award 40*l.* to the plaintiff William Houston, 50*l.* to the master, and 250*l.* to the officers and crew of the *Glenavon*, according to their respective ratings. There will also be judgment for the defendants on their counterclaim against the owners of the *Glenfruin* for the amount of salvage I have awarded.

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

Solicitors for the defendants, *Waltons, Bubb,* and *Johnson.*

Tuesday, March 24, 1885.

(Before BUTT, J.)

JAMES BURNESS AND SONS v. THE PERSIAN GULF STEAMSHIP COMPANY LIMITED.

THE BUSHIRE. (*a*)

Collision—Both ships to blame—Breach of contract—Damages — Charter party — Bill of lading—Damage to cargo.

The Admiralty Court rule that in cases of collision the damages are to be equally divided where both ships are to blame, does not apply to actions for breach of contract of carriage brought by owners of cargo against the carrying ship to recover damages for loss of, or injury to, their goods, and hence the plaintiffs in such actions are entitled to recover their full damages from the owners of the carrying ship.

THIS was an action *in personam*, instituted by charterers for breach of charter-party and bill of lading against the Persian Gulf Steamship Company Limited, the owners of the steamship *Bushire.*

The plaintiffs claimed 1000*l.* damages for non-delivery of cargo shipped under the said bill of lading on board the *Bushire* at Cardiff for delivery at Aden.

The plaintiffs by their statement of claim alleged as follows:

5. Whilst the said goods were being carried by the defendants for the plaintiffs under the said charter-party and bill of lading, the defendants, by their servants, so negligently and unskilfully navigated the said steamship *Bushire* that, on or about the 28th Sept. 1884, she came into collision with the steamship *Bernina* and sank, whereby the said goods were totally lost to the plaintiffs.

6. Alternatively while the said goods were being carried for the plaintiffs by the defendants under the said charter-party and bill of lading, the *Bushire* came into collision with the *Bernina* on or about the 28th Sept. 1884 and sank, whereby the said goods were totally lost to the plaintiffs.

The defendants by their defence alleged as follows:

2. The defendants deny that the plaintiffs are entitled to the sum of 1000*l.*, and say, on the contrary, that they are only entitled to the sum of 500*l.*, which the defendants now tender and pay into court, and offer to pay the plaintiffs' costs up to the date of this tender, and say that the said sum is sufficient to satisfy the plaintiffs' claim.

3. In answer to paragraphs 5 and 6 of the statement of claim, the defendants admit that the vessel, the *Bushire*, did collide on or about the 28th Sept. 1884 with the steamship *Bernina*, but they only admit that they were partly to blame for the said collision, and say as a fact that the steamship *Bernina* was also partly to blame for the said collision, and say that they are only liable to pay the sum of 500*l.*, being half the damages sustained by the plaintiffs in consequence of the loss of the said goods.

March 24.—The action came on for hearing before Butt, J.

Barnes, for the plaintiffs, after stating the facts, was stopped by the Court.

Newson for the defendants.—In accordance with the practice of this court, that where both ships are held to blame the damages are equally divided, the owners of the *Bushire* are only liable for half the plaintiffs' damages. [BUTT, J.—Surely that practice is not applicable to an action like the present, for breach of contract.] In the case of

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs. Barristers-at-Law.

the *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (48 L. T. Rep. N. S. 546; 10 Q. B. Div. 521; 5 Asp. Mar. Law Cas. 65) Brett, L.J. uses language indicating that the practice is not confined to actions of tort, and hence is applicable to the present case. [BUTT, J.—Is there any case of breach of contract to which the rule has been applied?] I have been unable to find any case; but the defendants rely upon the remark of Brett, L.J., that "if these ships had belonged to different owners, the loss of the cargo on board one of them being the result of negligence on the part of both . . . . the owners of each of the two ships would have been bound to pay in the result half of the loss which was claimed."

BUTT, J.—It seems to me that this, being an action for breach of contract, and not a case of tort, is not governed by the Admiralty Court practice of the division of damages where both vessels are to blame. I must therefore pronounce for the full amount of the plaintiffs' claim. If there is any dispute as to the amount, it must be referred to the registrar.

Solicitors for the plaintiffs, *Waltons, Bubb,* and *Johnson.*

Solicitors for the defendants, *Lowless* and *Co.*

Tuesday, Feb. 17, 1885.

(Before BUTT, J.)

THE VICTOR COVACEVICH. (*a*)

Collision—Practice—Inspection by Trinity Masters—Admiralty Court Act 1861 (24 *Vict. c.* 10), *s.* 18.

In a collision action the court will not order the vessels to be examined by the Trinity Masters prior to the hearing of the action except under very unusual circumstances, and especially not where the party applying has had the opportunity by his witnesses of inspecting the vessel himself.

THIS was a motion by the plaintiffs in a collision action *in rem* for an order that the defendants' barque, the *Victor Covacevich,* might be examined prior to the hearing of the action by the Trinity Masters to be appointed for the trial, and that her lights might be exhibited in the screens, and the foresail and mainsail set during such examination.

The collision occurred between the plaintiffs' steamship *Hermon* and the barque *Victor Covacevich* in the English Channel, off Hastings, at about 4 a.m. on the 15th Jan. 1885. One of the plaintiffs' charges against the *Victor Covacevich* was that she was not carrying her lights in accordance with the Regulations for Preventing Collisions at Sea.

In support of the motion, affidavits were filed in which it was alleged that the *Victor Covacevich* had been inspected by the plaintiffs' surveyors, who reported that the screens for the lights of the *Victor Covacevich* were not in accordance with the requirements of the Regulations for Preventing Collisions at Sea, that it was therefore impossible for those on board the *Hermon* to have seen the *Victor Covacevich's* lights, and further that having regard to the bearings of the two vessels the foresail of the *Victor Covacevich* was set in such a way as to obscure her lights to those on board the *Hermon.*

The *Victor Covacevich* was a foreign ship.

Sect. 18 of the Admiralty Court Act 1861 (24 Vict. c. 10), is as follows:

> Any party in a cause in the High Court of Admiralty shall be at liberty to apply to the said court for an order for the inspection by the Trinity Masters or others appointed for the trial of the said cause, or by the party himself or his witnesses, of any ship or other personal or real property, the inspection of which may be material to the issue of the cause, and the court may make such order in respect of the costs arising thereout as to it shall seem just.

J. P. Aspinall, for the plaintiffs, in support of the motion.—The court has power under sect. 18 of the Admiralty Court Act 1861 to grant the motion. [BUTT, J.—Is there any precedent for this application?] There have been several cases in which the Trinity Masters have inspected the ship. [BUTT, J.—Those were cases in which the inspection took place after the action had come on for hearing. So far as I am concerned, I will never order an inspection at this stage of the proceedings except under very unusual circumstances.] The *Victor Covacevich* is a foreign ship, and it is possible that she may be removed out of the jurisdiction. Should it at the hearing appear necessary to inspect her, great injustice would be done to the plaintiffs if she had in the interim been removed out of the jurisdiction.

Dr. *Raikes,* for the defendants, was not called upon.

BUTT, J.—This appears to me to be an endeavour to substitute for the ordinary practice an irregular practice, which is to be resorted to only under very unusual circumstances. In the present case the plaintiffs will have abundant evidence to prove the question raised as to lights when the case comes on for hearing. I am of opinion that the time has not yet arrived for this application. Moreover, I think there would be the gravest inconvenience in adopting a course which would tend to encourage the substitution of the reports of experts for the evidence in the case. I should be very indisposed to grant such an application under any circumstances; but it appears to me to be clear that in this case the plaintiffs have had ample opportunity of inspecting these lights and their position, and the mode in which they are screened. It is not suggested that they cannot obtain evidence of these facts, and, that being so, I have no hesitation in refusing this application. It must be dismissed with costs.

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

Solicitors for the defendants, *Waltons, Bubb,* and *Johnson.*

March 17, 18, *and* 24, 1885.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE EUROPEAN. (*a*)

Collision—Steam steering gear—Liability of shipowner—Negligence—River Thames—Dangerous machine.

Where a ship comes into collision in a crowded river with another vessel by reason of her patent steam steering gear going wrong and getting out of control, and it is shown that such steering gear

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

has on a previous occasion gone wrong in a similar way, and that after being carefully examined by a competent engineer, who has not been able to discover any defect, it has been replaced in the ship without alteration, such user in a crowded river, the hand gear on the ship being available, is evidence of negligence, rendering the shipowner liable for the damage occasioned by the collision.

The rule that a man is bound to maintain his property in such a condition that it is not dangerous to the public, applies to fixed and immovable property only, and not to movable chattels, and hence does not apply to a ship and the parts thereof, so as to make the shipowner, in the absence of negligence, liable for a collision caused by a defect in the construction in the ship's steam steering gear.

The user of a ship steered by steam steering gear in a crowded river is not the user of a dangerous machine in such a way as to render the shipowner, in the absence of negligence, liable for damages resulting from a collision occasioned by a failure of the steering apparatus.

Tarry *v.* Ashton (34 *L. T. Rep. N. S.* 97; 1 *Q. B. Div.* 314) *explained.*

THIS was a collision action *in rem*, instituted by the owners of the sailing vessel *Nio* against the screw steamship *European*, to recover compensation for damage occasioned by a collision between the two vessels in the river Thames.

The facts alleged on behalf of the plaintiffs were as follows:—

Shortly before 2 p.m. on the 24th Aug. 1884, the *Nio*, a brig of 171 tons register, was lying at Huntley's Wharf on the south side of the river Thames in Greenwich Reach, properly moored and made fast with her starboard side against the wharf and her head down the river. The weather was fine and the tide high-water slack. In these circumstances the screw steamship *European* was observed to be proceeding down the river about mid-channel, distant about two cables' lengths, and on the *Nio's* port quarter. Suddenly the *European* was seen to be heading for the *Nio's* port side, as if under a port helm, and very shortly afterwards the *European* with her stem struck the *Nio* on the port side about amidships.

The defendants by their statement of defence, after stating that the *European*, a steamship of 1736 tons, bound from London to New York, was, on the 21st Aug. 1884, being steered down the river by means of her steam steering gear, alleged as follows:

3. The vessel left the Millwall Dock the same afternoon; and in leaving the dock and proceeding down the river her steam steering gear had worked perfectly true in accordance with the various changes ordered, but in the circumstances aforesaid as the man at the wheel was attempting to steady the helm, in obedience to an order in that behalf received by him, the steam steering gear suddenly failed, and the wheel flew hard aport, and the vessel's head began to pay off to starboard. Orders were at once given to starboard and hard astarboard, but the wheel could not be got over, and the vessel could not be given a starboard helm.

4. Immediately it was found that the *European* could not be got to steer and that the steam steering gear had failed, her engines were stopped and reversed full speed and her anchor let go, and steam shut off the steam steering gear, and the hand gear got to work, but before her headway could be stopped, she with her stem came in contact with the port side of the *Nio*.

5. The defendants deny that the *European* was negligently or improperly navigated, or that there was any negligence on the part of the defendants, or anyone for whom they were or are liable, or by any improper or defective equipment of the *European*.

6. The said failing of the steam steering gear to act happened without any negligence or default on the part of the defendants, or of anybody for whom they are responsible, and the said collision was not occasioned by any neglect, default, or mismanagement on the part of those on board the *European*, or the defendants, or anyone for whom they are responsible, and the said collision was the result of inevitable accident.

At the hearing of the action it was proved that the steam steering apparatus was a patent of Messrs. Higginson, of Liverpool, of which five hundred had been supplied to different ships; that on the vessel's inward voyage from America the apparatus had failed in a similar way to the present case when she was coming up the Thames; that in consequence of such failure the apparatus was examined by the foreman of Messrs. Higginson, who was unable to discover the cause of its failure, and pronounced it to be in perfect order; that it had been placed on board the *European* in 1884, that it had never failed except on the two occasions mentioned, and that the steam could be shut off and the helm worked by hand alone. Two expert witnesses on behalf of the plaintiffs stated that, under certain circumstances, when the full pressure of steam was put on for the purpose of putting the wheel hard over, it was possible that the sudden pressure of steam would in that particular patent so affect the parts of the machine that the wheel might get out of control.

Finlay, Q.C. (with him *Bucknill*) for the plaintiffs.—It is submitted that on the evidence the defendants have been guilty of negligence, making them liable for the damage to the plaintiff's vessel. It is admitted by the defendants that on the vessel's inward voyage, about a fortnight previous to the present accident, the steam steering gear failed in precisely the same way as on the present occasion. It is also admitted that the defendants were unable to ascertain the cause of this failure, and nevertheless started down a crowded river like the Thames without any guarantee that the steering apparatus might not fail to work, as it had done before. It clearly would be negligence if the apparatus had failed to act properly on a dozen previous occasions, and the court should not absolve the defendants from liability because there has been a failure of the machinery on only one previous occasion. Shipowners have no right to entrust the control of a large ship in a crowded river to machinery about the efficiency of which there is any doubt, and if damage is caused by that machinery failing to act properly, they are guilty of negligence, rendering them liable to the owners of the property damaged. It is also submitted that on the principle laid down in *Tarry* v. *Ashton* (34 L. T. Rep. N. S. 97; 1 Q. B. Div. 314) the defendants are liable, even assuming them to have been guilty of no negligence. A shipowner owes a duty to the public, to so maintain his ship as not to be a source of danger to others. The user of a ship steered by steam steering gear in a crowded river like the Thames is the user of a "dangerous machine" within the meaning of *Powell* v. *Fall* (43 L. T. Rep. N. S. 562; 5 Q. B. Div. 597), and, therefore her owners are liable for damage

occasioned by its use, although they may not have been guilty of negligence.

Sir *Walter Phillimore* (with him *Gorell Barnes*) for the defendants.—If this collision was due to any negligence, it was the negligence of the patentees of the machine, for whom the shipowners are not liable:

Quarman v. *Burnett*, 6 M. & W. 499; 4 Jur. 969;
The Virgo, 35 L. T. Rep. N. S. 519; 3 Asp. Mar. Law Cas. 285;
Hughes v. *Percival*, 49 L. T. Rep. N. S. 189; 8 App. Cas. 443;
The Warkworth, 51 L. T. Rep. N. S. 558; 9 P. Div. 146; 5 Asp. Mar. Law Cas. 326.

The defendants were guilty of no negligence:

The William Lindsay, 29 L. T. Rep. N. S. 355; L. Rep. 5 P. C. 338; 2 Asp. Mar. Law Cas. 118.

After the failure on the first occasion the machine was taken to pieces by a competent engineer and was pronounced by him to be without defect. Under those circumstances the defendants did all that a reasonably prudent man could to insure the proper working of the steering apparatus. The cases of *Tarry* v. *Ashton* (*ubi sup.*) and *Powell* v. *Fall* (*ubi sup.*) have no application to the present circumstances. The principle acted upon in *Tarry* v. *Ashton* (*ubi sup.*) was expressly limited by Parke, B. in *Quarman* v. *Burnett* (*ubi sup.*) to immovable property, and it therefore has no application to a ship. A ship, even though steered by steam steering gear, cannot be called a "dangerous machine" in the sense that a locomotive driven along the highway is so called, and therefore the case does not fall within *Powell* v. *Fall* (*ubi sup.*).

Bucknill in reply.

Cur. adv. vult.

March 24.—BUTT, J.—The plaintiffs, the owners of the brig *Nio*, seek to recover damages for an injury done to their vessel by the steamship *European*, owned by the defendants. On the afternoon of the 24th Aug. 1884 the *Nio* was lying properly moored at Huntley's Wharf on the south side of Greenwich Reach, in the river Thames, when the *European*, a large steamer bound from Millwall Dock to New York, ran into her, doing considerable damage. The *European*, which was in charge of a duly licensed pilot, was being steered by steam steering apparatus, of which Messrs. Higginson, of Liverpool, are patentees. All went well, and the vessel properly answered her helm until she arrived at the place in question, when suddenly some derangement of the steam steering gear occurred, the ship's helm went hard over to port, the helmsman being unable to control or move it. The ship's engines were at once stopped and reversed, and her anchor was let go, but she ran into the *Nio* before her way could be stopped. The evidence clearly establishes that all that could be done to avoid the collision was done after the machinery went wrong.

The plaintiffs contended that the defendants are liable, even assuming that neither they nor their own servants were guilty of negligence. In support of this proposition the plaintiffs rely on a class of cases of which *Tarry* v. *Ashton* (*ubi sup.*) is an example. I think, however, they are not entitled to succeed on this contention. Those are cases where the defendants were persons in possession of real property, and with reference to them the rule of law seems to be that they must take care that their property is so used or managed that other persons are not injured, and that, whether their property be managed by their own immediate servants or by contractors with them or their servants, the same rule does not apply to the use or management of movable chattels. This distinction is clearly pointed out by Parke, B. in delivering the judgment of the Court of Exchequer in the case of *Quarman* v. *Burnett* (*ubi sup.*). The case of *Powell* v. *Fall* (*ubi sup.*) was also relied on by the plaintiffs' counsel in support of the contention stated above. That was the case of damage to a hayrick by fire from a locomotive steam-engine being driven along the high road. There is, in my opinion, no analogy between that case and the present. Moreover, in that case, it seems to have been admitted throughout that the defendants, the owners of the engine in question, were liable for the injury complained of, although occasioned by no negligence of theirs or their servants, unless the Locomotive Acts protected them. I have, therefore, no hesitation in holding that the defendants in the present case are not liable, unless the damage was caused by the negligence of themselves or their servants. Was it occasioned by such negligence?

I have already found that there was no negligence after the derangement of the machinery occurred; but it was proved that on the way up the Thames on the inward voyage of the *European*, immediately preceding the voyage in question, a precisely similar difficulty had arisen below Gravesend, and that in consequence the use of the steam steering gear had been discontinued, and the vessel had been steered by hand up to the docks. Shortly afterwards the machinery was taken to pieces and readjusted by a competent fitter, who, however, failed to discover the cause of this derangement, and there was, therefore, no assurance that the vice, whatever it may have been, had been cured during the overhaul. I do not forget that there is evidence in the case that some five hundred of Messrs. Higginson's steam "quartermasters," as they are called, have been supplied to different ships, and that they have generally worked well, and without developing the defect now under consideration. What that defect may be is a question on which, on the evidence, neither the Elder Brethren of the Trinity House nor myself have arrived at a definite conclusion, although the evidence of Mr. Gray and Mr. Flannery would seem to point to a radical error of construction.

I cannot, however, help thinking, having regard to what had happened to the machinery only a few days before, that to trust the control of a ship of 1736 tons net register to the self-same apparatus in the crowded and intricate navigation of the Thames was an act imprudent in itself, and likely to cause damage to the property of other people. It was the less justifiable because there would appear to have been no objection to the use of the hand steering gear alone. I feel constrained to hold that this constituted negligence on the part of the defendants, and to pronounce for the damages proceeded for.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

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

Tuesday, March 31, 1885.

(Before BUTT, J.)

THE FOSCOLINO. (*a*)

Limitation of liability—Loss of life—Damage to ship, goods, and merchandise.

In an action for limitation of liability, where it appeared that all the claims in respect of loss of life had been settled, the Court ordered that upon payment in of 8*l. per ton, all persons having any claim, either in respect of loss of life or damage to ship, goods, or merchandise, should be restrained from bringing any action in respect of the collision.*

IN this case the owners of the s.s. *Foscolino* sought to limit their liability in respect of loss of and damage to ship and cargo, and in respect of loss of life and personal injury arising out of a collision with the s.s. *Venetia* on June 14, 1884.

In their statement of claim the plaintiffs alleged that the *Venetia* was sunk and three of her crew were drowned in the collision; they admitted liability for the collision; they alleged that claims had been made in respect of ship and cargo, and that they had compromised and paid the claims made in respect of the whole loss of life occasioned by the collision. They alleged that the sum of 8*l.* per ton on the gross registered tonnage of the *Foscolino* was 8607*l.*; that they were willing to pay the same into court or give security for the same; that they were willing and offered to give security, if the court should so order, to cover claims for possible further loss of life or personal injury occasioned by the collision.

The plaintiffs claimed a declaration that they were not answerable in damages in respect of loss of life or personal injury, either alone or together, with loss or damage to ship, goods, &c., to an aggregate amount exceeding 15*l.* per gross registered ton, or for loss of, or damage to, ship, goods, &c., to an aggregate amount exceeding 8*l.* per gross registered ton; that the amount for which they were liable in respect of loss of life or personal injury, either alone or together, with loss or damage to ship, goods, &c., was 16,138*l.*, and no more; that the amount for which they were liable for loss of, or damage to, ship, goods, &c., was 8607*l.* and no more; that upon paying into court or giving security for 8607*l.*, together with interest, and upon giving security (if so ordered) for such further sum as to the court should seem fit, for possible claims for loss of life or personal injury, all further proceedings and actions should be stayed, and that all persons interested in the *Venetia* or her cargo, or having any claim in respect of loss of life or personal injury, should be restrained from bringing any action in respect of the collision, and that proper directions should be given for ascertaining all persons having just claims in respect of loss of life or personal injury, or loss of, or damage to, ship, goods, &c., and that the said sum might be rateably distributed among the persons making out their claims, and that proper directions might be given for excluding any claimants who should not bring in their claims within a certain fixed time.

The owners of ship and cargo entered an appearance and admitted the plaintiffs' right to limitation of liability as regards themselves. The plaintiffs at the hearing produced an affidavit showing the names of all persons killed, their condition in life, the number and position and age of the persons asserting and entitled to assert life claims, and showing that all these claims had been settled by payment of sums of money and the amount of such payments.

The plaintiffs thereupon applied for judgment as claimed, without giving any security for the life claims, and upon payment into court of the 8607*l.*, the amount of their limited liability in respect of ship, goods, &c., and the court made such order accordingly. In drawing up the judgment the registrar omitted all mention of the life claims and confined the judgment so as to limit the plaintiffs' liability only in respect of ship, goods, &c.

On the 31st March 1885 *Aspinall*, on behalf of the plaintiffs, applied to the court to direct that the judgment might be drawn up so as to protect the plaintiffs against all possible future life claims without giving further security than that already given in respect of ship and cargo. It was argued that some one of the claimants already settled with might make a further claim, and if the plaintiffs were not protected against such claims they might have to contest actions brought by paupers from whom they could get no costs, whereas if such actions were restrained in this action all claims would be barred unless brought within the time limited by the advertisements. It was also pointed out that, unless the plaintiffs got their limitation in respect of life claims, there could be no advertisements.

Bucknill for owners of cargo.

BUTT, J. thereupon directed that the judgment should be drawn up in the form asked for, and the judgment was accordingly drawn up as follows:

The Judge, having heard counsel on all sides, pronounced that the owners of the steamship *Foscolino* are entitled to limited liability according to the provisions of the Merchant Shipping Act 1854 and the Merchant Shipping Act Amendment Act 1862; and that in respect of loss of life or personal injury, or of loss or damage to ship, goods, merchandise, or other things caused by reason of the improper navigation of the said steamship on the occasion of the collision between the said steamship and the steamship *Venetia* on the 14th June 1884, the owners of the said steamship *Foscolino* are answerable in damages to an amount not exceeding 16,138*l.*, such sum being at the rate of 15*l.* for each ton of the registered tonnage of the said vessel, without deduction on account of engine room; and that in respect of damage to ship, goods, merchandise, or other things alone the owners of the said steamship *Foscolino* are answerable in damages to an amount not exceeding 8606*l.* 17*s.* 8*d.* of the said sum of 16,138*l.*, being at the rate of 8*l.* for each ton of the registered tonnage of the said vessel, without deduction on account of engine room. The judge ordered that upon payment into court of the said sum of 8606*l.* 17*s.* 8*d.*, together with interest thereon at the rate of 4 per cent. per annum from the date of the said collision until such payment into court, and also upon payment of the costs incurred on behalf of the plaintiffs in the consolidated action 1884, L. No. 1523, fo. 254 and 1884.

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

F. No. 1104, fo. 279, all proceedings in the third consolidated action be stayed. The judge further ordered that three advertisements should be inserted, at an interval of not less than a week between each advertisement, in each of the following newspapers, viz., the *Times*, the *Shipping and Mercantile Gazette*, and the *Daily Telegraph*, intimating to all persons having any claim in respect of loss or damage caused as aforesaid that if they do not come in and enter their claims on or before the 1st July next they will be excluded from claiming to share in the amount for which the owners of the steamship *Foscolino* are answerable as aforesaid, the last of such advertisements to be inserted on or before the 16th June next ensuing. And he referred all claims brought in or hereafter to be brought in in this action to the registrar, assisted by merchants to ascertain the amount thereof. The judge also condemned the plaintiffs in the costs of the action.

Solicitors for the owners of the *Foscolino*, *Botterell* and *Roche*.

Solicitors for the owners of the *Venetia*, *Thomas Cooper* and *Co.*

Solicitors for the owners of the cargo laden on board the *Venetia*, *Stokes*, *Saunders*, and *Stokes*.

Friday, May 1, 1885.

(Before Sir JAMES HANNEN.)

THE SERAGLIO. (*a*)

Salvage—Practice—Arrest by telegram—Contempt of court—Affidavit of value—R. S. C. Order IX., r. 12.

It having been the practice of the Admiralty Court and of the Admiralty Division to give directions by telegraph to the officers of customs to arrest a ship immediately on the issue of the warrant, and before the warrant itself can have reached the officer, such arrest is valid, and if the owner or master remove her out of the jurisdiction after the officer of customs has taken possession of her, he is guilty of contempt of court, notwithstanding the provisions of Order IX., r. 12, *as to the mode in which service of the warrant is to be effected.*

THIS was a motion by the defendants in a salvage action for the release of the salved vessel *Seraglio*, her cargo, and freight, "without filing an affidavit as to the values of the property arrested, the solicitors for the defendants undertaking to file such affidavit within three days." The plaintiffs, who were the owners, master, and crew of the steamship *Gazelle*, after the institution of the action, obtained a warrant of arrest. The *Seraglio* being at Plymouth, notice of the issue of the warrant was telegraphed by the marshal to the Custom House officer at that port. On receipt of the telegram the Custom House officer went on board the *Seraglio* and arrested her. The master of the *Seraglio*, however, in obedience to his owner's orders, took the vessel with the Custom House officer on board and proceeded to Cardiff, where the warrant of arrest was duly served upon her.

The following affidavit of William Henry Raeburn, resident in Glasgow, one of the defendants, was filed in support of the motion:—

1. My said firm are the owners of the steamship *Seraglio*.

2. This is an action for alleged salvage services rendered by the plaintiffs on the 24th inst. to the steamship *Seraglio*, whereby the latter was towed into Plymouth. My firm never received from the plaintiffs or any person on their behalf any application for payment for the said alleged services, but on the 27th inst. the vessel, which was then in Plymouth, was arrested at the plaintiffs' suit about half past seven in the evening. The said vessel was then about to proceed to Cardiff for the purpose of loading cargo and sailing from the latter port on Saturday next for Bombay under charter.

3. About ten o'clock on Monday night I received a telegram from my agents at Plymouth, Messrs. Weekes, Phillips, and Co., informing me that the vessel had been arrested by telegram at the suit of the plaintiffs, and as I believed that the arrest was not legal, and I had had no demand from the plaintiffs for any sum claimed by them, I telegraphed to Weekes, Phillips, and Co. that the vessel was to proceed to Cardiff for the purpose of loading.

4. I declare that all blame attaching to taking the vessel from Plymouth is solely chargeable to myself this deponent. The master would not have removed the vessel without receiving the orders he did from me.

5. I declare that in ordering the master to proceed to Cardiff I did not intend any disrespect to this honourable court. It being late at night I was unable to consult my solicitors, as I should have done had I received the telegram in the daytime, and I say that I was not aware that a vessel could be arrested by telegram or without any claim being made by the plaintiffs on my firm for their alleged salvage services. It was important that the said vessel should arrive at Cardiff as soon as possible, and she was taken there direct.

6. If in what I have done I have committed any disrespect to this honourable court, I beg to tender my apology for the same, but in acting as aforesaid I honestly believed that the arrest of the *Seraglio* was, in the circumstances, improper, and I am advised that it could only have been legally effected by production and service of the warrant itself on board.

Order IX., r. 12, is as follows:

In Admiralty actions *in rem*, service of a writ of summons or warrant against ship, freight, or cargo on board, is to be effected by nailing or affixing the original writ or warrant for a short time on the mainmast or on the single mast of the vessel, and on taking off the process, leaving a true copy of it nailed or fixed in its place.

Bucknill, for the defendants, in support of the motion.—Having regard to the fact that the defendant is resident in Glasgow, and that the affidavit of value will be filed within three days, it is submitted that the court should accede to the motion. There was no contempt in taking the vessel to sea, inasmuch as she had never been legally arrested, and was therefore not within the jurisdiction of the court. Order IX., r. 12, requires the original warrant to be affixed to the mast for a short time, and on its being taken off, a copy being left in its place. In the present case there had only been notice by telegram of the issue of the warrant, which was not sufficient.

J. P. Aspinall, for the plaintiffs, *contra*.—It is submitted that the defendant is not entitled to the motion. He is seeking a favour. He is not entitled to the release of the ship until he has filed an affidavit of value. Having been guilty of contempt, the court should not grant him the favour he seeks. According to the practice of this Division a vessel may be arrested by telegram, just as in the Chancery Division notice of an injunction may be given by telegram:

Ex parte Langley, 41 L. T. Rep. N. S. 388; 13 Ch. Div. 110.

Sir JAMES HANNEN.—The defendant, who is the owner of the *Seraglio*, is asking a favour of the

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

court, which gives me an opportunity of marking my sense of his conduct by refusing it. I have only to deal with this matter as a contempt of court. There is no doubt about the proper way of serving a warrant of arrest, but equally also no doubt as to the manner in which notice of its issue may be communicated. In the present, notice of the issue has been given in precisely the same manner in which notice of the granting of an injunction is given in the Chancery Division, viz., by telegram. In the Chancery Division, though no doubt a formal injunction is obtained, the means of communication having in these days become more rapid, the telegraph is employed to give notice of its being granted. Everyone knows that in matters of business he cannot with safety disregard a notice given by telegram; and so it must also be understood that a litigant cannot disregard a notice sent to him by telegram by an officer of the court. This is so even if there were any reason to doubt the authenticity of the telegram; in those circumstances inquiry should be made. In the present case nothing can be more flagrant than the conduct of the owner of the *Seraglio*, who appears to have taken this course in order to test the law. I think I am taking the most lenient view I can of the matter by accepting his apology, but I shall not so again in any other case. The motion must be dismissed and the defendant condemned in the costs.

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitors for the defendants, *Miller, Smith*, and *Bell*.

HOUSE OF LORDS.

March 26, 27, *and* 30, 1885.

(Before the LORD CHANCELLOR (Selborne), Lords BLACKBURN, WATSON, and FITZGERALD.)

INGLIS *v.* STOCK. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance—Insurable interest in goods—Sale "free on board."

D. and Co. agreed in writing to sell to B. 200 *tons of sugar of a certain quality at an agreed price, "f.o.b." at H., payment by "cash in London in exchange for bills of lading." B. resold to the respondent at an increased price, but on the same terms. D. and Co. also sold* 200 *tons of sugar to the respondent upon the same terms. D. and Co.'s agent shipped* 390 *tons of sugar in one ship to satisfy these two contracts. The usual course of business was not to appropriate specific bags of sugar to particular contracts till after the shipment, and after D. and Co. had received the bills of lading. The ship and cargo were totally lost by perils of the sea before any appropriation was made, but D. and Co., after hearing of the loss, appropriated* 200 *tons to B.'s contract, and* 190 *tons to the respondents, and he paid the contract price and obtained the bills of lading. He had a floating policy of insurance on goods, and declared under it in respect of the sugar so lost.*

Held, in an action on the policy (affirming the judgment of the court below), that the respondent had an insurable interest in the sugar, and was entitled to recover.

Held (per Lord Blackburn), that an undivided interest in a parcel of goods may be described generally as an interest in goods in the same manner as if it were an interest in every portion of the goods.

THIS was an appeal from the judgment of the Court of Appeal (Brett, M.R. Baggallay and Lindley, L.JJ.) reported in 51 L. T. Rep. N. S. 449; 12 Q. B. Div. 564; 5 Asp. Mar. Law Cas. 294, reversing a judgment of Field, J. reported in 47 L. T. Rep. N. S. 416; 9 Q. B. Div. 708; 4 Asp. Mar. Law Cas. 596, upon further consideration.

The action was brought by the respondent against the appellant, who was an underwriter, on a policy of insurance on goods, under circumstances which appear in the head note and in the judgment of the Lord Chancellor, and also in the reports in the courts below.

The *Solicitor-General* (Sir F. Herschell, Q.C.), *Cohen*, Q.C., and *Barnes* appeared for the appellant, and contended that the question was whether the property had passed to the respondent before the loss, so that the goods might attach to the floating policies. In order to carry out the contracts to advantage, it was necessary for Drake and Co. so to distribute the sugar as to equalise the saccharine averages; they shipped one amount of sugar and did not appropriate it so as to pass the property to the respondent till a later date. The risk had not attached to the policies at the date of the loss, and nothing that happened later could make it attach. See *Anderson* v. *Morice* (1 App. Cas. 713; 3 Asp. Mar. Law Cas. 290; 35 L. T. Rep. N. S. 566; [Ex. Ch.] L. Rep. 10 C. P. 609; 3 Asp. Mar. Law Cas. 290; 33 L. T. Rep. N. S. 355). Drake and Co. kept the right of specifically appropriating, and of deciding on whom the short delivery should fall, in their own hands. The price to be paid varied according to the apportionment, and till the property had passed the price is not due, and the respondent could not be made liable for it. Drake and Co. did not determine which bags were to be Beloe's and which the respondent's till the bills of lading arrived after the loss, and then the purchasers might have rejected them. The judgment of the court below rests on a finding as to the course of business which was not supported by the evidence. A loss before the appropriation no more affected the purchasers than a loss before the shipment. If Drake and Co. had become bankrupt before the apportionment the sugar would have passed to their assignees. The respondent had no interest in it at the time of the loss, as no property would pass till specific goods were separated from the bulk. The contract of insurance necessarily implies that there shall be specific goods covered at the time of the loss. There was no implied authority to appropriate after the loss. They also referred to

Seagrave v. *Union Marine Insurance Co.*, L. Rep. 1 C. P. 305; 2 Mar. Law Cas. O. S. 331; 14 L. T. Rep. N. S. 479;
Blackburn on Sales, p. 122;
Benjamin on Sales, c. 5.

C. Russell, Q.C., *Reid*, Q.C., and *Danckwerts*, 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:—

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

The LORD CHANCELLOR (Selborne).—My Lords: The question in this case is, whether the plaintiff had at the time of the loss of the steamer *City of Dublin* in the river Elbe, on the 4th Feb. 1881, an insurable interest in 3900 bags of sugar, part of that vessel's cargo. The Court of Appeal, reversing a judgment of Field, J., decided in the plaintiff's favour. By two contracts, dated respectively the 7th and 12th Jan. 1881, which were, except as to dates and parties, identical in their terms, Messrs. Drake and Co., merchants of London, agreed to sell to one Beloe and to the plaintiff respectively, 200 tons each of German beetroot sugar, to be shipped from Hamburgh. The material terms of the contract between Drake and Beloe are these:—"London, Jan. 7th, 1881, Messrs. W. Beloe and Co. We have this day sold to you for your account 200 tons German beet sugar of the crops 1880-1881, at 21*s.* 9*d.* per cwt. of 50¾ kilos. net f.o.b. Hamburgh for 88 degrees net saccharine contents." I need not read all the details. "The sugar shall analyse between 85/92 net both inclusive; sixpence per cwt. to be paid or allowed for each degree above or below eighty-eight, fractions in proportion; but anything above ninety-two not to be paid for. The analysis is to be effected by a public German chemist." Then, omitting some immaterial points, it goes on: "for January delivery at Hamburgh payment by cash in London in exchange for bills of lading; less two months' interest at 5 per cent. per annum. Any dispute arising out of this contract to be settled by arbitration of two London brokers in the usual way." By another contract dated the 7th Jan., the plaintiffs bought from Beloe the sugar which Beloe had contracted to buy from Drake and Co., upon substantially the same terms, except that the price to be paid for it to Beloe was to be 21*s.* 10½*d.* per cwt., subject to like variations between the same limits; and that the average analysis of the whole contract was "not to exceed ninety." The price therefore in each case was to be variable, according to the percentage of saccharine matter in the sugar; the goods were in each case to be delivered at Hamburgh free on board, and consequently were, after shipment, to be at the purchaser's risk; and the bills of lading were to be retained by the vendors till the purchase moneys were paid. The plaintiff and Beloe at Bristol, and the agents of Drake and Co. at Hamburgh, engaged space for these sugars in a general ship, the *City of Dublin*, one of a line of steamers trading between Bristol and Hamburgh. The shipping agents at Bristol being informed by the plaintiff of his two purchases from Beloe and Drake and Co., and learning from Beloe that Drake and Co. were his vendors, advised their correspondents at Hamburgh that 400 tons of sugar would be coming for that ship's cargo from Drake and Co. I do not think it material, but it is proper to know that the plaintiff did not know from whom Beloe had bought, and Drake and Co. did not know that Beloe had sold to the plaintiff till after the loss. The quantity actually put on board the *City of Dublin* at Hamburgh was only 3900 bags or 390 tons. As to this, I think it enough to say that if the plaintiff would have had an insurable interest in 4000 bags, under the circumstances of the case he had, in my opinion, such an interest though the quantity was short by ten tons. No other sugar belonging to Drake and Co. was put on board this ship. The 3900 bags were, therefore, specially separated, from the bulk of the vendors' own sugar; and they were shipped under Drake and Co.'s contracts with Beloe and the plaintiffs, with a view to, and in fulfilment of, the agreement of Drake and Co., as vendors, to put the purchased sugars "free on board." The present controversy arises out of the manner in which this was done. Each bag was distinguished by a mark denoting its percentage, according to certified analysis, of saccharine matter; and ten bills of lading, for parcels bearing marks corresponding to those on the bags, were made out in an impersonal form and sent, according to the contracts, to Drake and Co., to be retained by them till the time of payment should arrive. The aggregate consignment, except as to the deficiency of 100 bags, was proper and suitable to fulfil the two contracts, without exceeding, as to either of them, the average of 90 per cent. of saccharine matter; and, according to the evidence of Mr. Hales, a partner in the firm of Drake and Co., it was made up and "ordered forward" as being "so divisible." But no particular bags were then set apart or marked as applicable to the one contract more than the other; it was thought sufficient by Drake and Co., or their agents, to leave this to be done when the bills of lading came forward. There would be no practical difficulty in doing it in a proper and reasonable way, even if the plaintiff had not produced Beloe's contract, inasmuch as neither purchaser could claim, and Drake and Co. were not to be paid for any excess beyond 90 per cent. of the average analysis of the whole contract, though it was conceivably possible that it might have been done perversely and unreasonably. The decision was, in fact, made by Drake and Co., who forwarded invoices of the parcels attributed to each purchaser on the evening of the 4th Feb., after they had received notice of the loss. In the division so made the deficiency of ten tons was ascribed to the plaintiff's contract, being the later in date. No question was raised by the plaintiff or by Beloe; and the purchase moneys were paid by the plaintiff according to the contracts and invoices. But by this, which was done after the loss, the underwriters were, of course, not bound. It is contended, on the part of the appellant, that under these circumstances, and for want of a proper division before the loss, the shipment had not the effect of divesting the prior title of Drake and Co., the vendors, or of passing any interest in these sugars to the plaintiff. This argument appears to me to confound two very different things—the appropriation necessary as between vendor and purchaser, and the division, as between purchaser and purchaser, of specific goods actually appropriated to the aggregate of the two contracts. I do not think it follows that there could be no appropriation by the vendor of which the purchasers might take the benefit, merely because the parcels of goods appropriated were mixed in the act of appropriation so as to require some subsequent division or apportionment. Whether this may have happened by previous agreement or course of dealing between all the parties, in which case there could be no serious doubt, or by accident, error, or want of proper care on the vendor's part, appears to me to make no difference in principle. The purchasers might possibly be

entitled to reject, but the vendors could not, in my opinion, without their consent, retract the appropriation. In the present case I see no reason to doubt that the difficulty arising from the confusion of parcels—material only to the settlement of the amount payable by the plaintiff to his two vendors—if not solved by consent or by arbitration, for which each contract provided, would have been soluble by principles of law applied to the facts and the terms of the contracts. The necessity for doing this, and the fact that it had not been done at the time of the loss, do not in my opinion sufficiently distinguish this case from *Brown* v. *Hare* (3 H. and N. 484; 4 Ib. 822), and earlier authorities to the same effect. The goods were, by the act of the vendors, separated from all other goods belonging to them; they were shipped "free on board" in what was for that purpose the purchaser's ship, under two contracts so to deliver them, in both which contracts, subject to the payments to be made by him to Drake and Co. and Beloe, the plaintiff was then, though Drake and Co. did not know it, solely interested. I cannot infer from any part of the evidence that in so shipping them indiscriminately the vendors intended to break, instead of fulfilling, their contracts, and to take upon themselves, contrary to those contracts, the subsequent risk of loss, and the liability to freight. Yet this, as it seems to me, would be the necessary result of the appellant's argument. I think that the order appealed from is right, and I move your Lordships to affirm it, and to dismiss the appeal with costs.

Lord BLACKBURN.—My Lords: I also agree that there is no occasion to hear the counsel for the respondent. The respondent had insured himself by floating policies to the extent of 5000*l*. One of the policies is set out as a sample policy. It is a policy for 4000*l*., part of 5000*l*., and is marked in the margin No. 4247. By it the respondent caused himself to be insured in respect of goods conveyed in a steamer "from the continent of Europe between Havre and Hamburgh, both ports included, $\frac{\text{and}}{\text{or}}$ Rouen, $\frac{\text{and}}{\text{or}}$ Nantes, to Bristol upon any kind of goods and merchandise, beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship at as above, upon the said ship, &c., including all risks of craft, and so shall continue, and endure during her abode there upon the said ship, &c., and, further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandises whatsoever, shall be arrived at as above upon the said ship, &c, until she hath moored at anchor twenty-four hours in good safety and upon the goods and merchandises until the same be there discharged and safely landed." Then I pass over a sentence which is immaterial for the present purpose. "The said ship, &c., goods and merchandises, &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*., part of 5000*l*., on sugar to be hereafter valued and declared. To follow policy for 4000*l*., No. $\frac{3}{4246}$ dated the 6th Dec. 1880." The meaning of "to be hereafter valued and declared," is that if the insured has several adventures out, all within the description in the policy, he may select at his pleasure which is to be protected by the policy; and, on his giving notice of such a selection to the insurers, the policy is as if it had named that adventure from the beginning. Of course, if adventures have been previously named, these come first, and, whether these prior subjects of insurance are lost or not, the policy is equally *pro tanto functus officio*. And I believe the practice is, if there is nothing to show that the first adventure which came in safe was selected not to be under the policy, it is taken to be so, though there is no declaration. The meaning of "To follow policy for 4000*l*., No. $\frac{3}{46}$" is, that, there being consecutive policies, any loss declared is to be borne first by the earlier policies, and that it is not until after the policy No. $\frac{3}{4246}$ is exhausted, either by losses or declared adventures which have come in safe, that the underwriters on the policy which follows are to bear the balance of the loss, if any.

There is not, as far as I remember, any other difference between a policy in the present form, with a declaration that it is on sugar valued at 3800*l*., and sailed in the *City of Dublin* steamer, which sailed from Hamburgh to Bristol on the 3rd Feb. 1881, and an ordinary policy for the same sugar, valued at the same sum, on the same steamer, on the same voyage. The appellant is an underwriter for 150*l*. on each of these consecutive floating policies.

There is no dispute, at least now, that the *City of Dublin* is such a steamer, and the voyage such a voyage as was within the terms of the policies, nor that the values and declarations were properly given, nor that there was enough left unexhausted on the policies to enable the underwriters to pay a total loss. But it was said that the situation of the plaintiff with regard to the sugars was not such as to give him an insurable interest. And I have no doubt that, in order to recover against an underwriter, the assured must show that he suffers loss in respect of the thing insured. In case of an insurance on goods, if he shows that he had at the time of the loss the whole legal property in the goods which were lost, he undoubtedly does show it. But I do not agree that this is the only way in which he can show an insurable interest in goods, or that any relation to goods such that if the goods perish on the voyage the person will lose the whole, and if they arrive safe will have all or part of the goods will not give an interest which may be aptly described as "goods." In the present case there has been a good deal of extraneous matter brought into the discussion. I think if it had been remembered that the three contracts—viz., that of the 7th Jan. between Drake and Beloe, that of the same date between Beloe and the respondent, and the contract of the 12th Jan. between Drake and the respondent—were all in writing, and it had been seen that they are so expressed that, in my opinion, there is no doubt as to their construction, the objection would have been much more clearly raised, not, I think, for its benefit. Drake and Co., of London, who were large importers of beet sugar manufactured in Germany, made a contract with Beloe, of Bristol, who bought to sell again. There are, I gather, trading lines of steamers running from Hamburgh to Liverpool, Leith, and Bristol, and, it may be, other places; but to London, if a steamer is wanted from

Hamburgh, it must be chartered, but of course it may be chartered. By the contract Drake and Co. bound themselves to Beloe to supply 200 tons of German beet sugar of the crop of 1880-81. It was not only to be German beet sugar, but it was to analyse between 85 and 92, "but anything above 92 not to be paid for." No portion of the sugar now in dispute was either below 85 or above 92, so that this term does not come into operation. The sugar was to be "net free on board at Hamburgh," and it was for January delivery at Hamburgh. The price was to depend upon the "average analysis of the whole contract. Should the average analysis of the whole contract exceed 90, such excess is not to be paid for." The Solicitor-General raised an argument on this clause which I shall notice by-and-by. The price was to be paid in London in exchange for bill of lading. Now, under this contract the first thing to be done was by Beloe, the buyer. He must let Drake, the seller, know in good time on what ship the goods were to be shipped free on board, for, till he knew that, Drake could not put the goods on board. As soon as he had secured room in the steamer he selected, and let Drake and Co. know in good time on what steamer they were to ship them, Drake and Co.'s part of the contract begins; they are bound to have there at Hamburgh, and to ship free on board that ship, 200 tons of sugar answering in all respects to the description in the contract. Provided that sugar of the proper quantity and description was put on board that ship, it was no concern of Beloe's where or how Drake and Co. got it. So soon as they had done that they had fulfilled their part of the contract so far. But the price was to be paid in London in exchange for bill of lading; and no doubt from that it is to be implied that Drake and Co. were to take a bill or bills of lading for the sugar they put on board, and were in due time to be ready and willing to give the bills of lading in London in exchange for the price. If Drake and Co. did this Beloe was bound to pay the price. Now, Beloe had on the same day, but whether before or after he had made the contract with Drake and Co. does not appear, made a contract with the respondent to supply him with 200 tons of sugar at $1\frac{1}{2}d.$ a cwt. higher price than that at which Drake had agreed to supply Beloe. As the respondent knew where he wanted the sugar, this was to be shipped "free on board A 1 steamer to Bristol." The description of the sugar was the same as that in the contract between Drake and Beloe, except that it was said "average analysis not to exceed 90." The Solicitor-General said that if the average analysis exceeded 90 Beloe was bound to take it from Drake, but not to pay the excess in price; but the respondent was not bound to take this more valuable lot at all, but would be in his right if he rejected it. What would have been the case if that point had been raised by the facts we need not inquire, though I have a strong suspicion that a jury would not much favour it. But, looking at the documents, it appears that not only were the averages under 90, but that by no possible shuffling of the 3900 bags actually put on board the *City of Dublin* could 2000 bags have been selected the average of which would exceed 90. The respondent did not know, and had no reason to inquire, where Beloe was to get the sugar with which he was to supply him. He saw Edward Stock, the agent for the Bristol line of steamers, and, according to the evidence, his directions were to secure room for the 200 tons in the steamer which would leave at the end of the month; and on the 11th Jan. E. Stock and Son, the Bristol agents for the steamers, wrote to Nisstle and Günther the following letter:—"There are 200 tons of sugar sold for shipment the second half of this month, but we have not yet ascertained the names of the shippers. There are also further parcels in treaty," and so forth. This, it must be noticed, was before the contract between Drake and the respondent on the 12th Jan., and how there can be any doubt raised that the respondent did his best as far as regards securing room on that steamer to take on board the sugar which Beloe was to ship or cause to be shipped, I am unable to conceive. He had to advise Beloe of this, and it is sworn that he did so, and I see no possible reason for doubting that he did. The position of things, then, as between Beloe and the respondent was this: The respondent had done his part, and unless Beloe by himself, or Drake, or anyone else, put the proper quantity of sugar of the proper description on board the steamer, the respondent had a right of action against Beloe. If Beloe did put the proper quantity on board he was entitled to recover the price in exchange for bills of lading, and it was no answer that the goods had perished at sea before the bill of lading was offered. He did send an invoice specifying the marks and numbers of 2000 bags undoubtedly put on board, which he alleged had been shipped on the respondent's account. If these were proper bills of lading for the sugar shipped, it is difficult to imagine a clearer case of the loss of sugar. It is said that the bills of lading which he offered to give in exchange for the cash, were not the bills of lading of goods shipped for the respondent in the *City of Dublin*, and, therefore, the respondent was not bound to pay in exchange for such bills of lading; instead of being liable to pay Beloe the price he had an action against him for breach of contract in not shipping as he ought to have done. This requires us to notice some more of the evidence.

When the respondent had made his contract with Drake on the 12th Jan., he at once proceeded to Edward Stock and Sons, who, on that very day advised Nisstle and Co. that the 200 tons were coming; so that he had done his part in securing room for that 200 tons, and if Drake and Co. have not shipped them he has a cause of action against them. They did not ship the whole 200 tons, but only 190 tons, 10 tons or 100 bags meant to be shipped having been delayed. For that Drake and Co. sent an invoice and received payment; and, as I said about Beloe, if Drake and Co. have offered the respondent bills of lading for goods which were not shipped for him, he has a cause of action against them, and was not bound to pay. But if Drake and Co. have fulfilled their contract, and the bills of lading are those referring to the 1900 bags, then the subsequent loss by perils of the sea is no answer. The respondent must pay the price, and has lost it, and that is as clear a loss as can well be. When Drake and Co., or rather their agents at Hamburgh, were shipping the sugar and held the mate's notes, it was no doubt their business to see that a proper bill of lading

for each separate shipment was signed; and if at any time before the bills of lading left Hamburgh they had been allocated to each shipment, no objection, not even an idle one, could have been raised. But instead of doing so the whole of the bills were sent in a lump to London that they might be allocated there. This was perfectly *bonâ fide*. Drake and Co. had no interest in favouring one more than the other, and were to be paid exactly the same price per bag, whether they allocated it to the one or to the other. And if they had done this before the loss, I do not see what damage either Beloe or the respondent could have sustained by the allocation being made in London instead of in Hamburgh. Now, I have been quite unable to see, even if the respondent had sustained some damage, that it could have been damage going to the whole root of the matter, so as to form a defence against an action by either Drake and Co., or Beloe, for not paying for the goods in exchange for the bills of lading; that is, supposing the respondent, because prices had greatly fallen, or from any other motive, had wished to get off. And if it were so, I think the case would fall entirely within what Lord Hatherley in *Anderson* v. *Morice* (3 Asp. Mar. Law Cas. 290; 35 L. T. Rep. N. S. 566; 1 App. Cas. 713) says is the principle of *Sparkes* v. *Marshall* (2 Bing. N. S. 671). The insurers have no right to call upon the insured to exercise a possible option to be released from his contract. But the loss having happened before the actual allocation, the respondent's loss, when it happened, was a loss not of 200 tons, but of 200 tons parcel of 390 tons; so that the loss, though exactly the same, is said not to be the same in description, because it is a loss of an undivided portion of the goods instead of being a loss of the goods themselves, I am quite unable myself to perceive why that should make the slightest difference. In the merits certainly it does not. I am quite unable to perceive why an undivided interest in a parcel of goods on board a ship may not be described as an interest in goods just as much as if it were an interest in every portion of the goods. No authority was cited in order to show that it was not so, and I can see no reason for it. Then, that being so, of course it follows that there is no defence at all, and this is my opinion.

This, however, is not the ground on which the Court of Appeal decided. They thought that there was shown to be a custom, or course of dealing, which rendered Drake and Co.'s conduct a literal fulfilment of the contract. I am not satisfied that, on the evidence, such a custom or course of trade was shown. I do not say that it is not, but I should at least wish to hear the respondent's counsel before deciding on that ground. On the other, as I have already intimated, I have no doubt at all.

Lords WATSON and FITZGERALD concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Waltons, Bubb,* and *Walton.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, May 12, 1885.

(Before BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.)

THE FRIEDEBERG. (*a*)

ON APPEAL FROM BUTT, J.

Collision—Reference—Costs.

The rule of the Admiralty Court, in damage actions, that where more than a third of the plaintiff's claim at the reference is disallowed he is condemned in the costs of the reference, is not a hard and fast rule fettering the judge's discretion, and the judge is entitled, and ought to exercise his discretion as to costs according to the circumstances of each particular case.

THIS was an appeal by the defendants in a collision action *in rem*, from a decision of Butt, J., condemning the defendants in the costs of the action, and directing each party to bear their own costs of the reference, including a moiety of the reference fees.

The collision occurred in the Bristol Channel, between the barques *Nourmahal* and *Friedeberg*, on the 18th July 1882.

The action was heard on the 23rd April 1884 by Sir James Hannen, who pronounced the defendant's vessel, the *Friedeberg*, alone to blame, and referred the amount of the plaintiffs' damages to the registrar, but reserved the question of costs until the amount of the damages had been ascertained.

The plaintiffs, at the reference, brought in a claim amounting to 1262*l.* 13*s.* 8*d.*, of which the registrar allowed 166*l.* 18*s.* 9*d.*

The report of the Registrar, so far as is material, was as follows:

I beg further to report that the claim as made by the plaintiffs has been disallowed to a great extent under the following circumstances: On the morning of the 18th July 1882 the two ships *Nourmahal* and *Friedeberg* were at anchor in Penarth Roads. The *Nourmahal*, a wooden barque of 846 tons register, was in ballast, bound for Cardiff. The *Friedeberg*, an iron barque of 795 tons, was laden with coals, and bound to Valparaiso. Between nine and ten a.m. of that day the *Friedeberg* having, with the assistance of a steam tug, got up her anchor, proceeded, and in attempting to cross the bows of the *Nourmahal*, drove down on her, and having hooked the *Nourmahal's* cable with her anchor, the port side of the *Friedeberg* came into collision with the starboard bow of the *Nourmahal*. In order to clear the cable the *Nourmahal* had to heave in her anchor, and whilst so doing the two vessels were lashed together for a time, and were held by the *Friedeberg's* tug, though, perhaps, drifting a little with the tide, until the *Friedeberg* let go her starboard anchor which held the ships, the tug then leaving them. Some time afterwards, when the two vessels in this condition had swung with the tide, the *Friedeberg's* master engaged another tug, the *Porthill*, to tow the *Nourmahal* clear of the *Friedeberg* and to a safe anchorage.

The *Nourmahal's* hawser was then given to the tug, which proceeded to tow her ahead. From this point there is great conflict as to what subsequently occurred. The plaintiff states that the tug towed the *Nourmahal* a very short distance ahead, and then called upon her to drop her anchor; that the master refused to do so on the ground that it was too near, and would be giving

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

the *Friedeberg* a foul berth; and that he called and signalled to the tug to let his ship drop astern so as to regain her original anchorage, passing the *Friedeberg's* port side; that instead of obeying these directions the tug proceeded to turn to starboard under a port helm, with the *Nourmahal* in her wake, until the latter took the ground about a quarter of a mile from the *Friedeberg* on her starboard beam. On the other hand, the statement is that the tug towed the *Nourmahal* to a safe and good anchorage, at least half a mile distant; that on getting there the master of the *Nourmahal* refused to anchor there, and insisted on his ship being turned and taken to a spot indicated by him; that the master of the tug warned him that if the attempt was made the ship must go aground; but on his insisting he made the attempt, and the ship did take the ground.

It does not seem necessary that I should decide which of these two statements is most consistent with the real truth, though we are decidedly of opinion that the *Nourmahal* had been towed to a considerable greater distance than her master represents before the tug proceeded to turn her. I am advised by the assessors that when the tug had towed the *Nourmahal* free of the *Friedeberg* she was not in a position of danger or of difficulty; that it required only ordinary skill and experience to place her in as good anchorage ground as she was at the time of the collision. I am of opinion therefore, that, whether her getting aground is to be attributed to the fault of those on board the tug or of those on board the *Nourmahal*, the *Friedeberg* is not responsible for the consequences.

It then became necessary to consider what portion of the total damage sustained by the *Nourmahal* is due to the grounding. With respect to this, the master of the *Nourmahal* admitted that for forty minutes the ship was driving and being pulled over the bank. The chief officer also stated that the ship struck the ground heavily, and heeled over on her side, which caused her to strain very much, and she dragged and bumped very heavily for about half a mile. There is no suggestion that she made any water in the interval between the collision and the grounding, though she did make water directly after grounding. Notwithstanding these statements the owner and the two surveyors employed by him, when the ship got into dock, made light of the damage from the grounding, stating that it was confined to the forefoot, and that from 30*l.* to 40*l.* would suffice to repair it, and they attributed the necessity for all the other repairs to the damage occasioned by the collision before the grounding. With this view I am unable to agree, and I have the entire concurrence of the gentlemen who assist me, in concluding from all the facts and evidence that the damage from the actual collision was comparatively slight, and the more serious injury to the ship was the result of the grounding, which rendered it necessary to strip, remetal, and recaulk the ship. After careful consideration the amount allowed in the schedule is in our opinion ample for the repairs and expenses occasioned by the collision, and includes the expense of placing her in dry dock for the purpose of ascertaining if the contact of the vessels had scraped off or injured any copper below what was visible whilst she was afloat.

The Registrar made no recommendation as to costs. The plaintiffs thereupon served notice of motion upon the defendants calling upon them to show cause why they should not be condemned in the costs of the action and the reference.

Dec. 18, 1884.—*Phillimore* for the plaintiffs.

Bucknill for the defendants.

Butt, J.—This is a case in which the question of costs is in the discretion of the court. That discretion, as in all cases of discretion, must be exercised with reference to some rule or reason, and not capriciously. The case is one in which the whole injury arose (not in legal sense, but speaking generally) from the wrongful acts of the defendants' servants on board the *Friedeberg*. She came wrongfully into collision with the *Nourmahal*, and it was in the course of being towed free from that collision that the latter sustained the injury which she got, some of it by the collision and some of it in being towed to a safe place. It is very true that it is found that the *Nourmahal* sustained the bulk of the injury in the course of the towage after she had been taken to a place of safety, and therefore, legally, it was not a consequence of the collision. But I think it quite clear that there was a very fair question whether it was not legally a consequence of the collision, and that being so, I do not think any fault ought to be found with the owners of the *Nourmahal* for bringing their action in this court, because, had they brought it in the County Court, they would at once have debarred themselves from that second portion of their claim. Therefore, I think it is a case in which the plaintiffs ought to have their costs of the action. With regard to the costs of the reference, I cannot see if it was reasonable for the plaintiffs to bring their claim in a superior court, how it can be said that they could not reasonably have put it forward before the registrar. They did put it forward, and failed on the larger part of it, and I think their failure must disentitle them to costs. They have taken the chance of the award and failed. The next question is, ought they to pay the costs of the reference? Having regard to all the circumstances of the case, I think not. I think the proper order to make is that the plaintiffs have the costs of the action, and each party to pay his own costs of the reference.

From this decision the defendants now appealed.

Hall, Q.C. (with him *Bucknill*) for the appellants.—Having regard to the fact that the registrar has found that the plaintiffs are only entitled to recover the sum of 166*l.* 18*s.* 9*d.*, it is submitted that the action ought never to have been brought in the High Court, and that the plaintiffs should be condemned in the costs. It is also submitted that inasmuch as the plaintiffs at the reference brought in a claim amounting to 1262*l.* 13*s.* 8*d.*, of which only 166*l.* 18*s.* 9*d.* has been allowed, they should, in accordance with the practice of the Admiralty Court, be condemned in the costs of the reference. The rule upon which that court acts is that where the registrar disallows more than one-third of the plaintiff's claim, the plaintiffs are condemned in the costs. Dr. Lushington, in the case of *The Empress Eugenie* (Lush. 138), condemned the plaintiff in costs where he had failed to substantiate his claim upon a question of law only. According to that learned judge, "I think I should be making a dangerous precedent if I were upon such grounds to relax the ordinary and salutary rule of the court." It is true that in *The Gleaner* (38 L. T. Rep. N. S. 582; 3 Asp. Mar. Law Cas. 582), and a few other cases the court has departed from the rule, but in the absence of strong reasons the court should follow the practice and condemn the plaintiff in the costs of the reference. In the present case the findings of the registrar clearly show that the plaintiffs must have had ample opportunity of knowing that the defendants were not liable for the larger portion of the claim.

Beaufort (with him Sir *Walter Phillimore*), for the respondents, was not called upon.

Brett, M.R.—The Court of Admiralty has always had a discretion as to costs, and even if it

had not originally it has been given it by the Judicature Act. When a court has such a discretion it is intended that the court shall exercise it in each individual case. If, therefore, a hard-and-fast rule is laid down, the judge's discretion is fettered. With all deference to that eminent judge, Dr. Lushington, when he laid it down as a general rule that if on a reference the plaintiff did not recover a certain proportion of his claim he was to be deprived of or to pay the costs, he did what was wrong. In laying down such a rule he was fettering his own discretion, and that of his successors, which he had no legal power to do. As to the rule which has been alluded to, I doubt if it is a good rule, and in many cases it must work injustice. But inasmuch as the judge of the Admiralty Court is bound to exercise his discretion in each particular case it is wrong to say that there is any rule by which he can be bound. In the present case the learned judge has exercised his discretion, and has given his reasons for the conclusion to which he came, viz., that the plaintiff was entitled to the costs of the action, and ought not to pay the costs of the reference. There is really no ground for interfering with the decision of the learned judge, and, moreover, we also think there is another objection, viz., that there is no appeal from the decision below. On all these grounds we think this appeal must be dismissed.

BAGGALLAY and BOWEN, L.JJ. concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Tufnell Southgate*, agent for *Dixon* and *Barker*, of Sunderland.

Solicitors for the defendants, *Hill, Dickinson, Lightbound*, and *Dickinson*.

May, 2, 4, *and* 5, 1885.

(Before COTTON, LINDLEY, and FRY, L.JJ.)

PHELPS, STOKES, AND Co. *v.* COMBER. (*a*)

Bill of exchange—Drawing against particular shipments of goods—Marginal advice of draft—Specific appropriation of shipments—Stoppage in transitu.

J., P., and Co., merchants at Pernambuco, having in the course of their business received orders from customers to purchase goods on their account in New York, instructed S. J. and Co., their agents at Liverpool, to purchase the goods and have them shipped to J., P., and Co. S. J. and Co. then instructed R. B. B., the agent at New York of J. P. and Co. and S. J. and Co., to purchase the goods. R. B. B. purchased the goods and shipped them to J., P., and Co., sending with them the invoices and bills of lading. To provide himself with funds to purchase the goods R. B. B. drew bills of exchange on S. J. and Co. in which were the words "and charged to account as advised." Attached to each bill was a counterfoil headed "Advice of draft." This was addressed to S. J. and Co., mentioned the number, date, and amount of the bill, and concluded with these words (mutatis mutandis), "Against shipments per steamship Glensannox, No. 6, N. Y. to Brazil vid Baltimore. Please protect the drafts as advised above, and oblige drawer, R. B. B. New York, May 9, 1879." These bills were sold for value in New York, and R. B. B. advised S. J. and Co. of the bills, and at the same time forwarded a statement of account. On presentation of the bills for acceptance S. J. and Co. detached the counterfoils and kept possession of them.

On the 10th June 1879 (while the plaintiffs, P., S., and Co. were the holders of these bills, drawn, according to this course of business, in respect of a shipment to J., P., and Co., to whom the bills of lading were at the same time sent) S. J. and Co. suspended payment. The same day the failure was known in New York, and R. B. B., under some pressure from P., S., and Co., telegraphed to J., P., and Co., "Having pledged documents and shipments Glensannox, hold proceeds subject order P., S., and Co." The ship Glensannox arrived at Pernambuco on the 11th June, and the goods were delivered to the customers (of J., P., and Co.) who had ordered them, the purchase money being received by J., P., and Co. The Court found that the bills of lading had been delivered to the customers before the telegram was received. The bills of exchange were dishonoured by S. J. and Co. when presented for acceptance. J., P., and Co. claimed to retain the purchase moneys against moneys alleged to be due to them by S. J. and Co.

Held (affirming the decision of Bacon, V C., 51 L. T. Rep. N. S. 16; 26 Ch. Div. 755), that the goods were not specifically appropriated to meet the bills of exchange, and therefore that P., S., and Co. were not entitled to have the purchase moneys applied in payment of the bills.

Frith v. Forbes (7 *L. T. Rep. N. S.* 261; 4 *De G. F. & J.* 409) *distinguished.*

Held also, on appeal, that even if the telegram had reached J., P., and Co. before the transitus was at an end, it would not operate to stop them in transitu.

AT the date of the agreement hereinafter mentioned, Phelps, Stokes, and Co., the plaintiffs, were bankers at New York; Thomas Comber the defendant, was a member of the firm of Johnston, Pater and Co., of Pernambuco, merchants, and of the firm of Johnston, Comber, and Co., of Bahia; Samuel Johnston and Co. were merchants at Liverpool, and the bankers and agents of the Pernambuco and Bahia firms; and Carruthers Charles Johnston was the sole representative of the Liverpool firm, and also the larger partner in the Pernambuco and Bahia firms.

By an agreement made the 11th Dec. 1877, between C. C. Johnston, of Liverpool, of the one part, and R. B. Borland of the other; after reciting that C. C. Johnston was desirous of appointing the said R. B. Borland as agent to represent the partnership firms of Samuel Johnston and Co. of Liverpool, Johnston, Pater, and Co. of Pernambuco, and Johnston, Comber, and Co. of Bahia, on commission in the United States of America for the term of five years from the 1st Jan. 1878, upon the terms and conditions thereinafter contained, it was agreed between the parties thereto as follows:

That the said R. B. Borland shall, for and during the period of five years from the said first day of Jan. 1878, enter into the service of the said C. C. Johnston, and well and faithfully act for him as agent on commission, as may from time to time be required by him, the said C. C. Johnston, in the United States of America, and shall and will, during the said term, diligently attend the business concerns of the said C. C. Johnston and the said firms of Samuel Johnston and Co., Liverpool,

(*a*) Reported by FRANK EVANS, Esq., Barrister-at-Law.

Johnston, Pater, and Co., Pernambuco, and Johnston, Comber, and Co., Bahia. That all business transactions by the said R. B. Borland on behalf of the said firms shall be charged by commission only, in conformity with the rates which have been heretofore charged by the said R. B. Borland since the 1st Jan. 1873, under a written agreement and power bearing date 28th Dec. 1872. Provided, however, that in cases of mutual agreement, the scale of commissions may be modified by the parties to this agreement as circumstances warrant.

That the said R. B. Borland shall not enter into any speculative business whatever, but confine himself entirely to that of commissions only, and in case of any other commissions being offered to him by other firms, he shall first submit the same for the approval of the said C. C. Johnston, in writing, before proceeding with the transaction thereof.

That the said R. B. Borland shall be at liberty to make advances on shipments of produce consigned to the said C. C. Johnston, to the extent of not exceeding three-fourths of the net value thereof, and he is hereby authorised and empowered to draw on the said Samuel Johnston and Co. for the amount of all such advances, and also for the amount of any orders given by the said firms of Samuel Johnston and Co., Johnston, Pater, and Co., and Johnston, Comber, and Co.

That the said R. B. Borland shall use his best endeavours and utmost exertions in obtaining consignments of and orders for produce in connection with the said firms.

From the date of the agreement, until May 1879, R. B. Borland was the general agent in New York of the three firms.

The ordinary course of dealing between the firms and Borland was as follows: The Pernambuco and Bahia firms, having received instructions from persons in Brazil for the purchase of North American goods, instructed the Liverpool firm to purchase the goods and have them shipped to the Pernambuco and Bahia firms. The Liverpool firm then instructed Borland, as their agent at New York, to purchase the goods, and he purchased them and shipped them to the Pernambuco and Bahia firms, at the same time sending them the invoices and bills of lading of the shipments. To provide himself with money to pay for the goods Borland drew bills of exchange on the Liverpool firm and sold the bills in New York in the ordinary way on the market. The bills of exchange were not drawn for the precise amount of the shipments, but for round sums, which were brought into the account current between the Liverpool firm and Borland. Every bill of exchange drawn by Borland had annexed to it a counterfoil with a perforated line between the bill and the counterfoil, the bill and counterfoil being together in the following form:

Advice of Draft.

To Messrs. Samuel Johnston & Co., Liverpool.

No. of Draft 401.

Date May 9th, 1879.

Amount 1500*l.* 0/0.

Against Shipts. per s.s. *Glensannox* No. 6, N.Y. to Brazil via Balt.

Please protect the drafts as advised above, and oblige drawer. R. B. Borland, New York. May 9th, 1879.

Exchange for 1500*l.* 0/0

New York, May 9th, 1879.

Sixty days after sight of this first of exchange (second and third of same tenor and date being unpaid) pay to my order the sum of 1500*l.* sterling, value received, and charge the same to account as advised.

(Signed) R. B. Borland.

To Messrs. Samuel Johnston and Co., Liverpool.

No. 401. Payable in London.

Borland advised the bills drawn by him to the Liverpool firm, and with his advice forwarded a statement of the account current between them.

On presentation of the bills of exchange for acceptance, Samuel Johnston and Co. accepted the bills, and detached the counterfoils, and retained them in their own possession.

In May 1879 the Pernambuco firm ordered the Liverpool firm to send certain goods to them for some of their customers in Brazil; the Liverpool firm sent the order to R. B. Borland, who bought the goods in New York.

R. B. Borland sent the goods, with the invoices and the bills of lading, by the steamship *Glensannox* to the Pernambuco firm, to the order of the customers who had ordered the goods from that firm, and to pay for the goods drew three bills of exchange upon the firm of Samuel Johnston and Co. One numbered 401 was dated the 9th May 1879, and was drawn for a sum of 1500*l.* payable on the 23rd July 1879, and the other two numbered respectively 402 and 404, were dated the 16th May 1879, and drawn for sums of 1500*l.* and 2000*l.* respectively payable on the 30th July 1879.

Each of the bills of exchange had the usual counterfoil attached, and was in the form above, *mutatis mutandis*.

R. B. Borland sent the bills of exchange, and copies of the bills of lading, to Samuel Johnston and Co., and in the meantime sold the bills to Phelps, Stokes, and Co., in New York.

On the 10th June 1879, whilst Phelps, Stokes, and Co. were the holders of the bills, Samuel Johnston and Co. stopped payment, and on the same day, immediately on ascertaining this fact, the plaintiffs and R. B. Borland telegraphed to Pernambuco, informing Johnston, Pater, and Co. (who had been previously instructed as to the purchase and shipment of the goods, and as to the three bills being drawn against and charged on the said goods) that they must hold the said shipments by the *Glensannox*, and the proceeds of the sale thereof, as security to the plaintiffs as the holders of the bills. The telegram was as follows:

Having pledged documents and shipment *Glensannox* hold proceeds subject order Phelps, Stokes, and Co. and Bank British North America.

The *Glensannox* arrived at Pernambuco on the 11th June, and the defendant, or his firm of Johnston, Pater, and Co., obtained possession of the goods, transferred them to the Brazilian purchasers, and received the proceeds, which they claimed to retain against a debt, or balance of account, due to them from the Liverpool firm.

There was some conflict in the evidence whether the goods had arrived at Pernambuco before the telegram was received.

The bills of exchange, on presentation for payment, were dishonoured by the Liverpool firm, and the plaintiffs in the present action claimed to have the amount of the three bills in their hands paid out of the proceeds of the goods, on the ground that they had been specifically appropriated to meet the bills; but Bacon, V.C. held there was no such appropriation, and dismissed the action: (51 L. T. Rep. N. S. 16; 26 Ch. Div. 755.)

The plaintiffs appealed.

R. T. Reid, Q.C. and *Northmore Lawrence* for the appellants.—The bills of exchange, with the "advices of draft" annexed, gave the plaintiffs a lien or charge on the goods against which the bills were drawn, and the goods or the proceeds were specifically appropriated to meet the bills:

Frith v. *Forbes*, 7 L. T. Rep. N. S. 261; 4 De G. F. & J. 409;

Robey and Co.'s Perseverance Ironworks v. *Ollier*, 27 L. T. Rep. N. S. 362; L. Rep. 7 Ch. App. 695;

Banner v. *Johnston*, L. Rep. 5 E. & I. App. 157;

Ex parte Arbuthnot; Re Entwistle, 3 Ch. Div. 477;

Ranken v. *Alfaro*, 36 L. T. Rep. N. S. 529; 5 Ch. Div. 786;
Ex parte Banner; Re Tappenback, 34 L. T. Rep. N. S. 199; 2 Ch. Div. 278;
Ireland v. *Livingston*, 27 L. T. Rep. N. S. 79; L. Rep. 5 E. & I. App. 395.

Even if there was no specific appropriation, the telegram to Pernambuco operated as a stoppage *in transitu* of the goods by Borland acting for the benefit of the plaintiffs:

Ex parte Golding, Davies, and Co; *Re Knight*, 42 L. T. Rep. N. S. 270; 13 Ch. Div. 628;
Kemp v. *Falk*, 47 L. T. Rep. N. S. 454; 7 App. Cas. 573.

Marten, Q.C. and *F. Thompson*, for the defendants, were not called upon.

Cotton, L.J.—This is an appeal from a judgment of Bacon, V.C., and the object of the appellants is to make out that they have a lien on certain goods. The facts of the case are rather complicated. There was a firm at Pernambuco and another at Liverpool, and Mr. Borland was, I will assume, appointed agent in New York on behalf of those two firms. There was another firm at Bahia, but I leave that out because it is immaterial. The parties to the Liverpool firm and the Pernambuco firm were, I think, practically the same people, but it is unnecessary to consider that now. The course of business was this: The Pernambuco firm, having received instructions from natives to buy goods for them, sent to the Liverpool firm, and the Liverpool firm directed Mr. Borland to buy in North America whatever was required by the Pernambuco firm. Then Mr. Borland shipped the goods, not to the Liverpool firm from which he received the instructions as to buying them, but to the Pernambuco firm. In order to provide himself with money to pay for the goods, Mr. Borland drew bills on the Liverpool firm, and discounted or sold them in the market. The appellants are persons who bought certain bills which had been drawn by Borland on the Liverpool house in order to provide for cargo which he was sending to the Pernambuco house for the benefit of the native buyers.

Now, the first question which was argued, and which we have to decide, is whether the purchasers of those bills had, either by independent agreement, or by the agreement which it is alleged appears on the face of the bills, a lien or charge on the cargo sent to Pernambuco for the amount of the bills. It is unnecessary to go through the evidence on the question as to whether there was any express charge besides that which it is alleged appears upon the bills, because, in my opinion, the evidence does not show that there was anything like an agreement outside what appears on the bills to give to the purchasers of the bills a charge on the cargo, to pay for which the bills were undoubtedly drawn. But then we come to the bills of exchange, and they are in a somewhat extraordinary form, because annexed to each bill, as it would be presented in Liverpool, there was a counterfoil or margin of paper to be detached in Liverpool, with a perforated line showing where it was to be torn off. [His Lordship read one of the counterfoils, as set out above, and continued:] It is said that that of itself, reasonably interpreted, and as it would be reasonably understood by any banker or other person dealing with these bills, creates a charge upon the goods to buy which this bill had been drawn and negotiated. I cannot accede to that view. What is it? It is not a direction to be shown to or sent to the persons who are to receive the cargo; it is simply a direction to be sent to the persons who have ordered the cargo to be sent, and into whose hands the cargo would never come, they not even having the bills of lading, and it is to be detached by them. I do not say it would have created a charge even if sent to the persons to whom the cargo was sent. I am by no means satisfied that merely saying that the bill is drawn against a certain cargo, even when that notice is sent to the person to whom the cargo is consigned, will give a lien or charge on the cargo. But here the direction is sent to entirely different persons; and I should say, not being a mercantile man, that if that direction is sent, not to the person who is to have the command of the goods, or to whom the goods are consigned, but to someone who is a correspondent or agent of that person, and on whom the bills are drawn for the purpose of providing for that cargo, it is a mere indication to him that the bills of exchange are really bills drawn under the arrangement that he should accept bills for the purpose of enabling cargoes to be purchased and shipped to their correspondent in Pernambuco. It is to satisfy the person to whom the bills are sent that they are bills legitimately drawn under the arrangements existing between the parties, and also to tell him how he is to keep the accounts with reference to that and other shipments. To my mind it in no way conveys anything like the idea that there is an intention to create a charge or lien on the cargo.

But it is said that there is the authority of two eminent judges in *Frith* v. *Forbes* against that view. When *Frith* v. *Forbes* is relied upon, as it often is, almost every judge before whom the case comes says that it must have been decided on the special circumstances of the case. James, L.J., when it came before him in *Robey and Co.'s Perseverance Ironworks* v. *Ollier*, said: "I am of opinion, therefore, that the plaintiffs have no such lien as they claim, and that their bill was rightly dismissed. The decision in *Frith* v. *Forbes* turned upon special circumstances, and can hardly be treated as governing any other case." James, L.J., therefore, clearly did not understand the case of *Frith* v. *Forbes*, as laying down the principle that a mere statement communicated to the consignees of goods that the bill is drawn against those goods, will of itself give a charge. Mellish, L.J. said: "I am of the same opinion. The indorsement of a bill gives only a right to the bill, and I do not think that any mercantile man would suppose, because he saw in the bill the words 'which place to account cargo per A.,' that he was to have a lien on that cargo." James, L.J. also said: "I am not prepared to say that, merely because a bill of exchange purports to be drawn against a particular cargo, it carries a lien on that cargo into the hands of every holder of the bill." Upon what special ground *Frith* v. *Forbes* was decided it is hardly necessary for us now to consider; but it is obvious that, although the question as to whether the plaintiffs in that case had a lien or charge created in favour of themselves, was of importance, yet the real question was whether Forbes and Co., who were the defendants, could insist upon their general lien as against the claim of the plaintiffs (assuming the

plaintiffs had a claim), Forbes and Co. having received the goods under special instructions with reference to the bills, intending that they should accept the bills and provide for payment. Forbes and Co. refused to accept the bills, and yet wanted to keep the goods for themselves, and that really was the principal matter of contest. Without entering further into *Frith* v. *Forbes*, it is sufficient, in my opinion, to say that here the direction was not given to the person to whom the goods were consigned, but to another person, who never would have the goods in his possession or under his control. I should also mention that in the case referred to, of *Ex parte Devers*; *Re Suse* (51 L. T. N. S. 437; 13 Q. B. Div. 766), one at least of the present Lords Justices said that *Frith* v. *Forbes* was decided under special circumstances, and Lindley, L. J. expressed himself as not considering that it laid down the general principle which was there contended for. But I think we ought not to consider *Frith* v. *Forbes* as an authority governing the present case, and I am of opinion, especially having regard to the distinction which I have mentioned, that there was no charge on the cargo created in favour of the billholders, either by express agreement, or by that which appears on the face of those bills, or rather on the face of the documents temporarily annexed to the bills, but to be severed from them when the bills were accepted in Liverpool.

Now we come to the other part of the case. The failure of the Liverpool firm was known in New York on the 10th June, and then there was an interview between Mr. Borland and the plaintiffs, who had purchased the bills. It is unnecessary to consider what took place between them, because I decide the case entirely without reference to that. On the same day a telegram was sent to the Pernambuco firm, and for the purpose of my judgment I will assume, though I do not decide, that that telegram reached the Pernambuco firm at the time when the transitus of goods was not at an end, that is to say, while the goods were still *in transitu*.

Now, let us consider what stoppage *in transitu* is. It is a right given to an unpaid vendor, at any time while the goods are still *in transitu*, that is to say, while they are in the hands of the shipowner as carrier. It is a retaking by the unpaid vendor on the cancellation of the contract as some people say, or, as I should rather say, a resumption of possession, for the purpose of insisting on his lien for the price, at any time while the goods are in the hands of the carrier, and have not reached the hands of the purchaser or consignee, and are not in his possession. What is the consequence of the vendor resuming possession? The vendor cannot exercise the right to the prejudice of purchasers for value, but if he takes possession before the purchase money has been paid, he may say: "I cannot prejudice you, but I can hold the goods till you pay me the money." If there has been a mortgage, he can seize the goods subject to the rights of the mortgagee to have the money paid. The consequence of his taking possession of the goods to enforce his vendor's lien is, that he has a right, before he hands over the goods, to receive from the purchasers any money which may be still unpaid by them. Now is this telegram in any way a stoppage *in transitu?* In my opinion it is not. [His Lordship read the telegram above set out, and continued:] Now, in my opinion, on the mere construction of that document, it is not a declaration that the vendor intends to retake possession. It assumes that the goods will be handed over to the purchasers, and that they will be paid for, because it is not "hold the goods," but "hold proceeds" subject to the order of Phelps, Stokes, and Co. Now I omit all reference to the question how far this telegram would have been effectual to stop the goods *in transitu* if it had been sent to the consignees, and not to the carrier; but I in no way express any opinion in favour of the view that it would have been effectual if it had been sent to the consignees. It is not, in my opinion, anything which expresses an intention to retake possession; it is simply an attempted direction as to the way in which the proceeds of this cargo are to be dealt with, and in my opinion there was no right to give any such direction. The case of the Pernambuco firm was, that they had already money in the hands of their agents at Liverpool, who, they say, were largely indebted to them; that the bills were drawn as against that. And what they have done is to carry the proceeds of this cargo to their own credit in the account between themselves and the Liverpool firm. Whether that is right or not we need not now decide. All we have to decide is, that the plaintiffs, the holders of these bills of exchange, have not, either in consequence of the lien claimed on the goods, or in consequence of what is said to be, but is not, a stoppage *in transitu*, any right to have the proceeds of these goods applied in payment of the bills. In my opinion, the appeal fails.

Lindley, L.J.—I am of the same opinion. The first question is, What rights, if any, did the plaintiffs acquire, as the discounters of these bills, to have the goods against which they were drawn applied specifically in taking up the bills. Now, as mere discounters of bills of exchange not accompanied by a bill of lading, they would have no such right at all; but it is said that, in consequence of what took place between Mr. Borland and the plaintiffs, and having regard to that memorandum attached to the bills of exchange, the discounters of the bill acquired that right. The bill of exchange had attached to it a memorandum which is, I fancy, rather unusual, but it is an important document. [His Lordship stated the effect of the counterfoil, and continued:] That memorandum was annexed to each of the bills of exchange when the plaintiffs discounted them, and it appears that in the course of business between the parties the bills of exchange, with that memorandum attached, would be presented for acceptance to the Liverpool firm, Samuel Johnston and Co.; that Samuel Johnston and Co. would then tear off that memorandum and keep it. It is a direction, advice, or order to them; and they tear it off and keep it in order that they may have the memorandum and act upon it. The discounters of the bill, the plaintiffs, are then left with the bills of exchange, but they do not get the bills of lading. The bills of lading were never attached to the bills of exchange at all, and the plaintiffs never get the ordinary security on the goods which discounters of bills of exchange with bills of lading annexed would

get. The bills of lading were sent to Pernambuco and so were the goods; neither the bills of lading nor the goods were sent to Liverpool. Can it be established that, under these circumstances, the plaintiffs have any lien on the goods at all by virtue of this memorandum? In other words it comes to this, whether a transaction under such circumstances as these can for any purpose be regarded as practically equivalent to getting the bill of lading. It is clear that that question only has to be asked to answer itself, and from such a transaction that result is wholly unknown so far as I am aware. Quite apart from *Frith* v. *Forbes*, there is no case which warrants the idea that in a transaction of this kind the discounter of the bill of exchange gets a lien on the goods against which it was drawn. *Frith* v. *Forbes* is clearly distinguishable on the ground to which Cotton, L.J. has alluded; and it appears to me that, so far as authorities and decisions go, they are rather against than in favour of the contention that by this memorandum, and what took place when the bill of exchange was discounted, the discounter got any claim on the goods. I quite concur in the view taken by Bacon, V.C. that the discounters made inquiries whether these were honest commercial bills drawn against goods in the ordinary way, and that they trusted to the solvency and respectability of the drawees. That appears to be the real truth of the transaction so far.

It is then said that, apart from that, the plaintiffs have a lien, if not on the goods, at all events on the proceeds of the sale of the goods, by what took place on the 10th June 1879. At that time the ship was about to arrive at Pernambuco—she did arrive on the 11th June. The bills of lading had gone forward to Pernambuco; the Liverpool firm had not got them, and did not intend to have them, still less had the discounters of the bills. But, under more or less pressure and certain threats, Borland seems to have sent a telegram to Pernambuco. I am like the Vice-Chancellor, I do not treat those threats as amounting to duress. But Borland was under constraint to send the telegram on which so much stress has been laid. That telegram began with a statement which was inaccurate in point of fact, because he never had pledged the goods. What effect, if any, had that telegram on the rights of the parties? I confess it appears to me to have had none whatever. Mr. Borland had no right at that time to dictate to the Pernambuco firm how they were to deal with the proceeds of the sale of those goods. It is said that he was in a position to stop the goods *in transitu*. I will assume that he was, and that he was agent for the vendors, or in such a position that he might have stopped the goods *in transitu*. He certainly did nothing of the kind, and never intended to do anything of the kind, and the probability is, that if he had thought of it, he would have seen it was hopeless for him to try to stop the goods *in transitu* at all. In point of fact, as I understand from the evidence, the goods had arrived in Pernambuco, and the bills of lading had been handed to the native buyers before this telegram reached the hands of the Pernambuco firm, I think that is made out when one comes to study the time, though it runs very fine. [His Lordship discussed the evidence on this point, and continued:] It so happens that the telegram came too late to stop the goods, and what is quite as important to my mind, is that there was no intention on the part of Borland to stop them. He wanted to impound, for the present plaintiffs, the proceeds of the sale of the goods, and he had no right to do that. This is a most unfortunate occurrence so far as the plaintiffs are concerned, but it does not appear to me to be consistent with the principles on which this court and the other courts in this country always act in matters of this kind to hold that they are entitled to succeed in this action. The plaintiffs are in the unfortunate position of being unsecured and not secured creditors.

Fry, L.J.—I entirely concur in what has been said by my brother Lord Justices. On the first point, it appears to me that, whether you look at the parol evidence or at the advice or draft attached to the bill of exchange, no specific lien or appropriation is made out. I adopt the language of James, L.J. in *Robey and Co.'s Perseverance Ironworks* v. *Ollier*, where he said: "I am not prepared to say that merely because a bill of exchange purports to be drawn against a particular cargo it carries a lien on that cargo into the hands of every holder of the bill." It appears to me that in the present case all that took place was some assertion of what was perfectly true, that these bills were drawn against an actual transaction, and that they were not accommodation bills. If the argument which has been addressed to us were to succeed it would appear to me to follow that every bill of exchange which represented a real transaction, at the bottom of which, to use a common expression I believe, there were goods, would be a bill giving a lien upon the goods which formed the subject of that transaction. That appears to me to be neither law nor mercantile usage.

With regard to the "advice of draft," it appears to me that there was no intention whatever of creating by that instrument any charge in favour of the bill of exchange. The nature of the instrument really contradicts any such contention. The document was to be presented to the drawee of the bill; it was to induce him to accept the bill, and on acceptance it was to be retained by him. This "advice of draft," therefore, would neither travel into all the hands which might hold the bill of exchange, nor would it travel into the hands of those to whom the bill of lading would come. It would go, therefore, neither with the bill of exchange nor with the bill of lading, and if it went with neither it seems to me that it was very ill calculated to create a charge on the produce of the one in favour of the holder of the other. With regard to the second question I come to the same conclusion as my learned brethren. Assuming even, which I do not for the present moment doubt, that Mr. Borland may have had the right of stoppage *in transitu*; assuming, which I certainly am not yet convinced of, that he might have stopped *in transitu* by a notice addressed neither to the shipowners nor to the captain, but to the consignee—I say, assuming both those propositions in favour of the appellants, that it remains to be considered whether Mr. Borland did exercise such a right of stoppage as he might have had. In my judgment he neither exercised it nor intended to do so. The telegram which he sent suggests that he had already created a pledge upon the property by some

previous transaction, and purports to give effect to that pledge by a direction as to the mode in which the proceeds of the cargo should be dealt with. In my opinion, he had no right to give any such direction with regard to the cargo, and therefore, whatever Mr. Borland's rights to stop *in transitu* might have been, in my judgment, if he had the right, he did not exercise it. The appeal, therefore, must be dismissed with costs.

Appeal dismissed with costs.

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

Solicitors for the defendant, *Field, Roscoe,* and *Co.*, for *Bateson, Bright,* and *Warr,* Liverpool.

May 19 *and* 21, 1885.

(Before Cotton and Lindley, and Fry, L.JJ.)

Brown, Shipley, and Co. *v.* Kough. (*a*)

Bill of exchange—Drawing against particular shipments of goods—Letter of advice—Specific appropriation—Equitable assignment.

The purchasers of bills of exchange, on the face of which there is a direction to the drawees to charge the amounts thereof against particular shipments of goods, who do not receive therewith the bills of lading, do not obtain thereby any lien or charge on the shipments. The statement in the bills only amounts to a representation that the bills are regular and actually drawn against shipments, and not accommodation bills. And even when, in addition to such a direction in the bills of exchange, the letter of advice by the consignors to the consignees incloses the bills of lading, and states that against the consignments the consignor's value on them for a particular sum in favour of the bill holder (naming him), there is no specific appropriation of the shipments or the proceeds of sale to meet the bills.

If the court in Frith *v.* Forbes (7 *L. T. Rep. N. S.* 261; 4 *De G. F. & J.* 409) *did not rely on the special circumstances of that case as showing in fact that a specific appropriation had been agreed on, but intended to lay down as a principle of law that such a letter of advice of itself constituted a specific appropriation in favour of the consignor, the decision in* Frith *v.* Forbes *is now overruled.*

The plaintiffs B., S., and Co., purchased at the New York Market, in the ordinary way, from A. B. and Co., provision merchants at New York, bills of exchange, drawn by A. B. and Co. on the defendant K. (a provision merchant in London), an example of which was: "Exchange for 2,500l. Sixty days after sight of this first of exchange (second and third unpaid) pay to the order of B. S., and Co., in London, 2500l., sterling, value received, and charge the same to account of cheese per 'Britannic' and lard per 'Greece' as advised." On the same day B., S., and Co. wrote K.: "We inclose bill of lading for 1558 *boxes [of cheese] per Britannic,' and against these, and lard per 'Greece,' we value on you at sixty days' sight for 2500l., favour B., S., and Co." The proved course of dealing between A. B. and Co. and K. was, that A. B. and Co. were in the habit of drawing on K. in anticipation of sales, the bills frequently referring to specific shipments; that K. was not under any agreement to accept bills; that any bills accepted by K. were on the general credit of the drawers; that, as between K. and A. B. and Co. there was no specific appropriation of the shipments to meet the bills; that the proceeds of sale of the shipments were carried to the credit of A. B. and Co. in their general account with K.; and that the amount of bills accepted by K. were carried to the debit of A. B. and Co. in the same account.*

A. B. and Co. having suspended payment, K. refused to accept the bills. On the arrival of the "Britannic" and "Greece" in England, K. took possession of and sold the shipments of cheese and lard, and claimed to retain a portion of the proceeds of sale in payment of the balance due to him on his general account with A. B. and Co.

Held, affirming the decision of Chitty, J. that the shipments were not specifically appropriated to meet the bills, and, therefore, that B., S., and Co. were not entitled to have any of the proceeds of sale applied in payment thereof.

Archibald Baxter and Co., who were provision merchants at New York, on the 5th and 6th Aug. 1875, consigned to Thomas Kough, one of the defendants, a provision merchant in London, carrying on business as "Jones Brothers," a quantity of lard per the ship *Greece*, and a quantity of cheese per the ship *Britannic*. Baxter and Co. were in the habit of consigning goods to Kough, and drawing bills of exchange upon his firm. There was no evidence that there was a separate account of the consignments, or that the money arising from sales had been treated as belonging to the consigning firm.

On the 5th Aug 1875 Baxter and Co. drew a bill of exchange in the following form:

Archibald Baxter & Co.

New York, 5th Aug. 1875.

Exchange for £2500.

Sixty days after sight of this first of exchange (second and third unpaid), pay to the order of Messrs. Brown, Shipley and Co., in London, two thousand five hundred pounds sterling, value received, and charge the same to account of cheese per *Britannic*, and lard per *Greece* as advised.

Messrs. Jones Brothers, London.

(Signed) Archibald Baxter and Co.

No. 3512.

On the same day Archibald Baxter and Co. wrote and sent to Kough a letter, of which the material part was as follows:

Inclosed please find invoice and bill of lading for fifty tierces lard on account of Mr. Chidley. . . . We are shipping you further about 3000 boxes choice cheese. . . . We inclose bill of lading for 1558 boxes per *Britannic*, and against these and lard per *Greece* we value on you at sixty day's sight for 2500*l.* favour Brown, Shipley, and Co.

On the 6th Aug. 1875 Archibald Baxter and Co. drew a bill of exchange in the following form:

Archibald Baxter & Co.

New York, 6th Aug. 1875.

Exchange £1000.

Sixty days after sight of this first of exchange (second and third unpaid) pay to the order of Messrs. Brown, Shipley, and Co., in London, one thousand pounds sterling, value received, and charge the same to account of cheese per *Britannic*.

Messrs. Jones Brothers, London.

(Signed) Archibald Baxter and Co.

No. 3515.

On the 6th Aug. 1875 Archibald Baxter and Co. sent Kough the following letter:

Confirming our respects of yesterday we have now to hand you invoice for 3298 boxes and B. L. for 1740 boxes cheese per *Britannic*, on account of which we value on

(*a*) Reported by Frank Evans, Esq., Barrister-at-Law.

you at sixty days for 1000*l.* favour Brown, Shipley, and Co.

We expect by to-morrow's German mail to draw to a point.

The plaintiffs purchased the bills of exchange from Archibald Baxter and Co., and afterwards, on the 7th Aug. 1875, Archibald Baxter and Co. stopped payment.

On the 24th Dec. 1875 Archibald Baxter and Co. were adjudicated bankrupts in New York, and the defendant Tappan was appointed trustee in the bankruptcy.

Before the goods arrived, or the bills of exchange were presented for acceptance, Kough had notice that Archibald Baxter and Co. had stopped payment, and when the bills were presented for acceptance on the 17th and 18th Aug. 1875, he refused to accept them. On the 19th and 20th Oct. 1875, he refused to pay them when they were presented for payment.

The consignments, on their arrival in England, were taken possession of by Kough, and sold, and he claimed, out of the proceeds received by him, to retain certain sums alleged to be due to him on his general account with Archibald Baxter and Co. The rest of the money he paid into court in a suit of *Dennistoun* v. *Kough*.

The plaintiffs in the present action claimed a declaration that they were entitled, in priority to all other persons, to a valid charge on the consignments, and the proceeds of sale thereof, for the amount of the two bills of exchange, and were entitled to have such proceeds applied in or towards satisfaction of the bills.

Chitty, J., before whom the case was heard, found that there was no special agreement when the plaintiff purchased the bills, but that the bills were purchased on the market in the ordinary way. The evidence on this point is stated in the judgment of Chitty, J.

The course of dealing between Archibald Baxter and Co. and the defendant Kough is fully stated in the judgments of Chitty, J. and the Court of Appeal. Shortly stated, it was that although the New York firm were in the habit of drawing on Jones Brothers in anticipation of sales, and the bills so drawn frequently referred to certain consignments, Jones Brothers were not under any engagement to accept the bills; that when Kough did accept bills, he did so on the general credit of the drawers, and that there was, as between these two firms, no specific appropriation of consignments to meet bills, the net proceeds of the sales of all consignments being carried to the credit of the general account of Archibald Baxter and Co., with Jones Brothers, and the amount of all bills drawn by Archibald Baxter and Co. and accepted by Jones Brothers, being debited against Archibald Baxter and Co. in the same account.

There was conflicting evidence of certain mercantile men with regard to the meaning and effect of such bills of exchange as those set out above, but the only passage material to this report is one which occurred in the affidavit of Mr. G. E. Bowring, of No. 7, East India-avenue, in the city of London, merchant, which was in these words:

I say that mercantile men, when purchasing bills of exchange, on the face of which there is a direction to the persons on whom such bills are drawn to charge the amounts thereof against particular shipments of goods or merchandise, do not, according to my experience of the custom of merchants, understand therefrom that they obtain any lien or charge upon those particular shipments, but only that the bills are regular, and are actually drawn against shipments, and are not accommodation bills; and that it is the custom of merchants, when buying bills of exchange, if they desire to have a lien or charge on the goods shipped, against which such bills are drawn, to require to have delivered to them the bills of lading and other shipping documents relating to those goods.

Rigby, Q.C., *M. D. Chalmers*, and *T. H. Carson*, for the plaintiffs.

Romer, Q.C. and *Stallard* for Kough.

Robinson, Q.C. and *Yate Lee* for Tappan.

Chitty, J.—This case has occupied a considerable time, chiefly by reason of the supposed state of the authorities, but it appears to me to be a simple case. The plaintiffs are holders of certain bills of exchange, drawn by Baxter and Co., of New York upon their agents in Liverpool, Jones & Co.; the plaintiffs claim to have an equitable charge upon the proceeds of certain cargoes which were consigned about the same time that the bills were drawn by Baxter and Co. to Jones and Co. The property in the goods consigned at the time of these transactions was undoubtedly in Baxter and Co., and it was competent for them to create a valid charge or lien on the goods. The plaintiffs claim to be equitable assigns. The other parties to the action, are the defendant Tappan—who is the trustee in the bankruptcy of Baxter and Co., the consignors, and the owners of the cargo, subject to the questions which will have to be decided in this action—and the defendant Kough, who represents the house of Jones and Co. at Liverpool, the consignees of the cargoes and drawees of the bill. After the bill had been bought by the plaintiffs in New York, Baxter and Co. became bankrupt, and notice of their bankruptcy reached the defendant Kough in this country before the bills were presented or the goods were received by him, and he declined to accept the bills of exchange which were afterwards presented to him in due course. The plaintiffs, as they claim an equitable charge, must found their case upon agreement. An agreement to pay out of the fund is a good equitable charge. It matters not whether it be to pay an existing debt, or a sum of money advanced at the time, or whether it be a bill of exchange; but it must be shown, on the part of those who assert an equitable charge, that they have obtained it by agreement. The agreement may be shown by producing a written document which is clear, or the agreement may be fairly derived from the course of dealing; and where there is a contest as to an oral agreement, the court must decide whether there is such an oral agreement or not. The point which the plaintiffs have to make out in this case is, that there is an agreement amounting to an equitable charge or an equitable assignment of part of the fund. Such an agreement may be shown by the general terms which the parties came to with reference to the supposed course of dealing, and may be derived also from the course of dealing itself, relating to transactions that have been entered into, or transactions which it is proposed should be entered into, or it may be shown, by the special terms agreed upon at the time when the transaction takes place. There never was any special agreement at the time when the bills were bought by the plaintiffs. So far the case stands clear of all difficulty. The

plaintiffs bought the bills on the market in the ordinary way, and therefore they are thrown back upon some terms which are alleged by them to have been arranged on a previous occasion, and to have been intended to govern the course of dealing in regard to the purchase of the bills throughout the transactions which might thereafter ensue. Have the plaintiffs shown any such agreement as that? The evidence on the part of the plaintiffs is complained in paragraph 3 of the affidavit of Mr. Johnson, a member of the plaintiffs' firm. He says: "Prior to purchasing the said bills of exchange I made inquiries of Archibald Baxter, a member of the firm of Archibald Baxter and Co., by whom the said bills were drawn, and he personally assured me that all bills that would be drawn by him upon his correspondents in England, including Jones Bros. of London, were regular, and against shipments specified in the advices of his said firm to his correspondents, including Messrs. Jones Bros., upon whom said bills were drawn." That statement simply amounts to this, that when the plaintiffs purchased the drafts they were assured that the bills were good mercantile bills—not accommodation bills, but bills actually drawn against shipments specified in advices—in other words, that they were regular bills drawn in the ordinary course in a proper mercantile transaction. There is not one word there which shows that the parties buying the bills were to have a charge on the proceeds, and it appears from the rest of the evidence that such a thing had not entered into the minds of the parties at all. [His Lordship discussed some other evidence on this head, and continued:]

The plaintiffs have failed to prove an agreement relating to the particular transaction, or any agreement derived from the course of dealing as between the drawers and sellers of the bills and the purchasers of the bills. The course of dealing between the consignors and consignees was this: The consignees, Jones Brothers, were under no obligation to accept the bills. The goods which they were receiving were more or less of a perishable nature, and, before they accepted any particular bill, they considered what the cargo was, and only accepted the bill when they thought that the cargo would form a sufficient security. But they did not rely on the particular cargo which was coming forward, because the course of business was that the proceeds of the sales of the various cargoes, of which they were in course of receipt, were carried to a general account, and when they accepted the bills they had the security of the general account, that is to say, the proceeds of the various cargoes then either undisposed of or in the course of being disposed of, out of which they could have repaid themselves the amount of acceptances. The course of dealing between the consignors and consignees, if it be looked to with a view to assist the plaintiffs, so far from being favourable to them, is adverse to them.

I propose now to say a few words on the particular documents, on which great reliance was placed in the opening of the case. I assume that it is now settled law that a mere reference, on the face of the bill, to a cargo, showing that the bill is drawn (to use a term in mercantile language) as against the cargo, does not create any charge or lien in favour of the bill holder as against the cargo or the proceeds of the cargo. In *Robey and Co.'s Perseverance Iron Works* v. *Ollier* (27 L. T. Rep. N. S. 362; L. Rep. 7 Ch. App. 695) Mellish, L.J. says: "The indorsement of a bill gives only a right to the bill, and I do not think that any mercantile man would suppose, because he saw in the bill the words 'which place to account cargo per A.,' that he was to have a lien on that cargo." And in *Ex parte Arbuthnot; Re Entwistle* (3 Ch. Div. 477), the bill on the face of it referred to the cargo, the words being, "and place the same to account cotton shipments, as advised, with or without further advice," but it was there held that there was no specific appropriation. In the case before me the bills of exchange do contain such an intimation. In the first bill, the one for 2500*l.*, the words are, "and charge the same to account of cheese per *Britannic* and lard per *Greece*," with the words "as advised." On the same day a letter of advice was sent by the drawer of the bill to the consignee of the cargo, that is to say, by Baxter and Co. to Jones Brothers, containing these words, "we enclose bill of lading 1558 boxes per *Britannic*, and against these and lard per *Greece* we value on you at sixty days for 2500*l.*" The second bill of exchange refers to a cargo in the same way as the first, with this exception, that it does not contain the words "as advised," and the letter of advice is in similar terms to the letter which I have already read. The plaintiffs undoubtedly started this case on a footing very different from that which they have been able to maintain after the evidence that has been gone into. It is stated in the 9th paragraph of the statement of claim that there was a distinct communication to the plaintiffs of the letters of advice before they bought the bills, that the plaintiffs "purchased the said bills on the faith of the letters, and in the belief that by the said bills and letters the said consignments and the proceeds of sale thereof were specifically appropriated to meet the said bills," but when the evidence is examined, it is admitted that there is not one tittle of evidence to support that statement beyond such evidence as is found on the face of the bills themselves. Counsel for the plaintiffs attempted to give great force to the words, "as advised" in the first bill, knowing that when they did that, to a certain extent they were weakening their case upon the second bill. It appears to me that the words "as advised" having regard to the circumstances of this case, make no difference whatever. If there had been a contest between the parties as to whether the letters of advice had been communicated or not, the insertion of those words upon the face of the bill might have been material; but I am asked to take the words "as advised," and to draw the inference from them that there was a specific agreement with reference to creating a charge on the cargo, in the face of the facts which are proved. I have all the facts before me as to what did take place, and upon those facts I say unhesitatingly that there is no ground for the suggestion that there was any specific agreement entered into at the time. The words "as advised" were put in without any reason, and without any intention on the part of the person who inserted them on the face of the bill to refer to any particular agreement. That the words "as advised" were thrown in without any special ground is, to my mind, clear, and it is acknowledged that there is no distinc-

tion between the case arising on the bill of the 5th Aug. and the case arising on the bill of the 6th Aug., and on the face of the latter bill there are no such words. There are words thrown in which, to my mind, have no special meaning, and I decline to infer from the words "as advised," that there was an agreement, when I am satisfied in point of fact that there was none. The letters of advice were sent by the consignors to the consignees, but, if there was no agreement binding the consignors, and creating as against them an equitable obligation to allow the proceeds of the goods to be applied in payment of the bills, the letters of advice amount only to instructions by the principal to the agent, which, of course (unless embodied in an agreement between the principal and the purchaser of the bill), would be revocable at will. And in the case before me such instructions would, of course, be revoked by the bankruptcy which intervened shortly after the letters of advice were sent, because, by the intervention of the bankruptcy, the property in the goods was changed, and Baxter and Co. were no longer owners of the goods, but the trustee in bankruptcy became the owner in their place. From what I have stated it appears to me that this case is really free from any substantial difficulty, but I bear this in mind, that I am not deciding whether Jones and Co. have, by reason of some general lien, a right to have the goods applied to discharge their general debt. With that I am not concerned. The only parties who are contesting the matter before me are the plaintiffs, who claim the charge, and the defendant (Tappan), the trustee in bankruptcy of Baxter and Co., and Mr. Kough, representing his firm of Jones and Co., who are combined in opposing the claim of the plaintiffs. After what I have stated, I consider it unnecessary to go through the cases at any length, and I do not propose to do so. *Frith* v. *Forbes* (7 L. T. Rep. N. S. 261; 4 De G. F. & J. 409) is relied upon by the plaintiffs, and that is a case which appears to have been misunderstood. I say that, because James, L.J. (from whom irrelevant statements seldom fell) says it is a case which must not be misunderstood, and he has given at least one explanation of it in *Ex parte Arbuthnot*; *Re Entwistle*. He there said: "The case of *Frith* v. *Forbes* must not be misunderstood. The court there held, that in a transaction between principal and agent a direction given by the principal to the agent as to the application of the proceeds of the sale of particular goods was binding on the agent, and that he could not set up against it his own general lien." Baggallay, L.J., referring to what had fallen from James, L.J. on a former occasion, adopted, in fact, what James, L.J. had said. Possibly he put it a little stronger than it would appear that James, L.J. himself did, but no doubt he was satisfied as to what James, L.J. meant, having heard what had fallen from him during the course of the argument before them. Baggallay, L.J. said, quoting James, L.J., with approval, "In *Robey and Co.'s Perseverance Ironworks* v. *Ollier*, *Frith* v. *Forbes* was commented upon, and James, L.J. then said that the decision in that case depended upon special circumstances and could not be treated as governing any other case." I will make one other observation on *Frith* v. *Forbes*, which is this, that Begbie and Co. were not parties contesting the matter in the Court of Appeal. (*a*) There is ground for saying, having regard to a passage in the judgment of Knight Bruce, L.J. (4 De G. & J. 418), that there were some facts which were adverse to Begbie and Co. which do not appear upon the face of the report, and which may have constituted sufficient ground why Begbie and Co. should not argue the case. The passage which I refer to is that which shows that there were letters from the assignees in bankruptcy of Begbie and Co., which letters the Lord Justice considered had a material bearing upon the case. *Frith* v. *Forbes* was a decision between the holders of the bills and the defendant Forbes, who had taken cargoes without having accepted the bills, and the circumstances no doubt were very special. It is not for me to say that the particular case was wrongly decided. I am quite satisfied to say that it is a decision which cannot be treated as an authority binding me in any way in this case. I think it is unnecessary to go through the other decisions, because I have stated the principle upon which I proceed.

It appears to me that for the reasons I have given the plaintiffs case fails, as against the defendants, and therefore that the action must be dismissed.

The plaintiffs appealed.

Rigby, Q.C. and *Carson*, for the appellants, cited

Frith v. *Forbes*, 7 L. T. Rep. N. S. 261; 4 De G. F. & J. 409;
Citizens' Bank of Louisiana v. *First National Bank of New Orleans*, L. Rep. 6 E. & I. App. 352;
Burn v. *Carvalho*, 4 My. & Cr. 690;
Ex parte Waring, 19 Ves. 345;
Robey and Co.'s Perseverance Ironworks v. *Ollier*, 27 L. T. Rep. N S. 362; L. Rep. 7 Ch. App. 695;
Ex parte Arbuthnot; *Re Entwistle*, 3 Ch. Div. 477;
Ex parte Devers; *Re Suse*, 51 L. T. Rep. N. S. 437; 13 Q. B. Div. 766;
Phelps, Stokes, and Co. v. *Comber*, *ante*, p. 428;
Ranken v. *Alfaro*, 36 L. T. Rep. N. S. 529; 5 Ch. Div. 786;
Ex parte South; *Re Row*, 3 Sw. 392;
Lowery v. *Steward*, 11 Smith's N. Y. Rep. 239.

Their arguments sufficiently appear from the judgment.

Romer, Q.C. and *Stallard* for Kough.—*Frith* v. *Forbes* does not govern this case, which must be considered apart from authority. [Cotton, L.J.—We all agree that, but for *Frith* v. *Forbes*, we should not have to call on you.] We ask the court to hold that this case, so far as it lays down a principle, is not good law. It has certainly not been followed in any reported case. Probably there were other facts before the court which do not appear in the report.

Robinson, Q.C. and *Yate Lee* for Tappan.

Carson replied.

Cotton, L.J.—This is an appeal from a judgment of Chitty, J. deciding that the plaintiffs, who purchased in New York bills drawn on Jones and Co., have no specific charge or lien on the proceeds of goods remitted to that firm in England. Now these bills are in a form not at all unusual. Though they are bills of exchange, yet they contain a reference to the proceeds of certain cargoes

(*a*) See the remarks as to this in the judgment of Lindley, L.J., *post*.

or remittances of goods against which the bills were to be charged. In the bills there are these words, "Sixty days after sight of this first of exchange (second and third unpaid) pay to the order of Messrs. Brown, Shipley and Co., in London," those are the plaintiffs, a certain sum of "pounds sterling value received, and charge the same to account of cheese per *Britannic*." In the second bill there are also the words "and lard per *Greece*." Then there are in one bill, but not in the other, the words, "as advised." The appellants do not rely upon that as in itself giving them a charge, but they look to the advice, as expressed in one case on the face of the bill of exchange, but not expressed in the other. And, as I understand their argument, they say that the advice—that is, the letter which went to the English firm, Messrs. Jones and Co., before they received these goods—did specifically appropriate, in favour of the drawers of the bills and consignees of the goods, the proceeds of those goods to pay the bills which Baxter and Co. had drawn, and which they expected to be accepted by the English firm. Now, one must here get rid of one point. Jones and Co. never, in fact, accepted the bills, and in that state of circumstances, unless there is something exceptional in the case, those who received consignments with such letters as these, are bound to accept the bills of exchange. In other words, having regard to the terms of the letters, they have the goods sent to them with an implied intention, if not an expressed one, that they are to receive them only in case they will undertake the obligation imposed upon them by accepting the bills, and that if they do not, then the goods shall be returned either to the consignor or to anyone who may have got from the consignor a good charge upon or an assignment of the goods. We have not to decide that question, but, in the absence of special circumstances, I should think that would not be disputed. But what the appellants require is something very much more. They say that, even though there was no acceptance, the proceeds of these goods would be specifically appropriated for the benefit of Baxter and Co., and that they are assigns of the right of Baxter and Co. I am dealing now with the first question, whether there was any right in Baxter and Co. to say that there was that specific appropriation. The material words of the letter referring to this are these: "We inclose bill of lading for 1558 boxes per *Britannic*, and against these and lard per *Greece*, we value on you at sixty days sight for 2500*l*., favour Brown, Shipley and Co." Now, we have really no evidence as to what the effect is, between consignors and consignee, of such advices as these. If the acceptances are not given, then, *primâ facie*, the right of the consignor is to say: "Hold the goods to my order; do not deal with them as goods which you have a right to take," but there is no evidence of what further right there is.

Now, in my opinion, if we deal with this case independently of mercantile usage, it comes to this. Here is a firm in America drawing on a firm in England, and they say: "We have drawn on you; we have sent you a remittance of goods which will be sufficient to indemnify you against any liability which you will undertake by means of your acceptances—that is to say, we are sending goods, the proceeds of which will come into the general account between us, as for that bill of exchange, when you have accepted it, and when you pay it." That is really an inducement to the consignee, on the drawing of the bill of exchange, to put himself under the obligations which he will undertake by giving the acceptance. But that is not sufficient for the appellants, They must show that the proceeds of these goods were specifically appropriated, after an acceptance given, or before acceptance given, so as, in favour of the consignors, to make the goods specifically appropriated, and appropriated only to payment of these bills. It is remarkable that, although in this case evidence has been given as to what would be the proper result of the words contained in the bills of exchange, no word is said in the evidence as to what, in favour of the consignor, would be the effect of the terms contained in these letters as regards the consignors having drawn against these consignments.

In my opinion it would be quite wrong to attribute to these letters and to this advice any such result as is claimed on behalf of the appellants. It is said that, in deciding that there is no such appropriation in favour of the consignors, we should be deciding against *Frith* v. *Forbes*. *Frith* v. *Forbes* is a case which has been mentioned constantly, but never, I think, followed in any case. Possibly there has never been a case so much like *Frith* v. *Forbes* as the present case, but we cannot disregard what James, L.J. said in *Robey and Co.'s Perseverance Ironworks* v. *Ollier*, and *Frith* v. *Forbes* was decided on special circumstances, and could hardly be treated as governing any other case. It is a common practice between merchants abroad and merchants in England to remit goods with a letter stating that they are remitted, that certain bills have been drawn against them, and that the bills of exchange do also refer on their face to the consignments in the same way. James, L.J. must therefore, have considered that there was something special in the circumstances in *Frith* v. *Forbes* showing that there was an appropriation there in favour of the consignor, and showing that there was a transfer of that appropriation for the benefit of the bill holders, which we cannot gather distinctly from the report of that case. But here we have evidence on behalf of both the consignors and the consignee, showing that the result of the dealings between them, in transactions similar to this, was that the goods and the proceeds, where acceptances had been given, were not considered as appropriated, but that they were carried to the credit of the general account. That disposes of any appropriation, because, if there is to be an appropriation, the goods and the proceeds must be carried to an account showing that they are obtained simply for the purpose of paying these acceptances, and that until the acceptances are paid the consignee has no right to them. That evidence might possibly have been met by showing that, on looking at the accounts, these proceeds appeared to be so dealt with as to make it impossible for Jones and Co. to deny that there was an appropriation. For instance, if it had been shown that there was a separate account of these shipments, or that the money when received had been treated, even though carried into the general account, as money which still remained the money of the consignors, then the evidence would have been met. But there is no such evidence at all

as far as we can see. If it had appeared on the accounts (which have not been put in evidence) that on the moneys received from the proceeds of goods interest had been credited to the American firm, it would have been impossible then to say that there had been a specific appropriation. If interest had been credited, the money must have been received and employed by Jones and Co. for their general purposes. Interest is paid for the use of money, and if the money was appropriated for the specific purpose of answering these bills, it is difficult to see how any interest could be credited on these proceeds to the consignors: but we must take it on the evidence that in the dealings between the parties similar to this there was no appropriation at all.

Now, undoubtedly we cannot find in the report of *Frith* v *Forbes* what it was on which the judges decided that there was an appropriation in favour of the consignors. It may be that there were letters which tended to support the judges in that conclusion, or it may be that, Begbie and Co. not disputing it, there were circumstances pointing to that conclusion because, although as pointed out by Mr. Carson, it is evident that both below and in the Court of Appeal Begbie and Co. were represented, yet they seem to have taken, neither in the court above nor in the court below, any strong part in the argument. If the Lords Justices did, in *Frith* v. *Forbes*, lay down that a letter such as this, without anything more, constituted an appropriation in favour of the consignor, so that the goods must be kept as a specifically appropriated fund in his favour, I should say that they drew a conclusion which was not justified, and the sooner one says that, in my opinion, the better. It may be that there was other evidence, but in my opinion it is not the correct conclusion from letters of advice such as this, that there was an appropriation in favour of the consignor, and that the proceeds of the goods should be kept as a specific fund appropriated for the payment of bills. That, in my opinion, would be a wrong conclusion, and, as far as we can see (that was pressed upon us by Mr. Carson), that was all that the judges had to go upon in *Frith* v. *Forbes*. Of course, there may be dealings between consignors and consignees in transactions like these which do show that, whatever the terms of the letters were, there was that contract between them. They might, by appropriating the goods, and by passing accounts which show that appropriation, prove that those were really the terms on which they carried on business, and on which they contracted, and then there would be no difficulty as regards appropriation. But here, in my opinion, there was no appropriation simply on the letters. We have evidence here that this was not acted upon as an appropriation, and that really will dispose of the whole case of the payment here.

I may mention a case, which has not yet been referred to, of *Inman* v. *Clare* (Johns. 769), before Lord Hatherley, in which, there being a question of appropriation, that was decided by reference to a custom which existed in Liverpool. Merchants in Liverpool received the goods, and there was (which it is hardly necessary for me to inquire into here, after the opinion I have given on the first part of the case) a clear transfer by letter to the holder of the bills of the right which the drawers and consignors had. But, as regards the other part of the case, it has not been contended that, if these bills stood alone, they would give a good charge.

It was contended that the bills of themselves, by the terms of the letter, would be a transfer of the right of the drawer to the persons in whose favour these bills were drawn. In my opinion, it would be wrongly construing the terms of this document to say that, if there were any such appropriation, the bills transferred the benefit of that appropriation from the drawer of the bills to the billholder. How it can be contended that that was the effect in the case of the second bill, I can hardly conceive, because the words there are "charge the same to account of cheese per *Britannic*," the words of the other bill being "and charge the same to account of cheese per *Britannic*, and lard per *Greece*, as advised." That, construing it fairly, simply comes to this: "When your acceptances (which must be given if you take the goods) are paid, then, as a matter of account, treat the bills as exhausting any credit you may have obtained by our having remitted to you these particular goods."

In my opinion, the appellants fail on the essential part of their case, namely, in showing that there is any appropriation, in favour of the drawers of the bills, of the cargo, or of the proceeds of the cargo.

Lindley, L.J.—The plaintiffs here are purchasers of certain bills of exchange drawn by Archibald Baxter and Co. upon Jones Bros., Jones Bros. being represented by the defendant Kough. [His Lordship read the first bill and continued:] Now the first question to which I will address myself is this, Did those bill of exchange, taken by themselves, give the plaintiffs any specific charge upon the goods—the cheese and the lard—therein referred to? I look at the case quite apart from any question of appropriation between the consignors and the consignees, or anything which transfers the right to the appropriation. I cannot find anything, either in *Frith* v. *Forbes*, or in the general law, or in the evidence which is adduced in this case, which goes that length. Looking at the bills of exchange *per se*, apart from anything else, there is no language in them which amounts to anything of the sort. We must bear in mind that the controversy in this case has arisen when the bills of exchange have not been accepted, and that we are asked to say, according to the argument, that the bills of exchange in themselves give Brown, Shipley, and Co. an equitable right to the goods which were assigned to the acceptor, and which the acceptor was to deal with when he had accepted the bills. I cannot find in the documents any language whatever which gives the plaintiff any interest in the proceeds of the goods which were consigned by the drawer. I think it has been felt throughout, that the case cannot be put upon the bills of exchange simply as a declaration and as documents of charge. Then the appellants' case is put very ingeniously in another way. It is said that, however that may be, there was an appropriation, by the drawers of the bills, the consignors, Baxter and Co., of this cheese and lard to this particular bill; that is to say, that Archibald Baxter and Co., the drawers, and consignors, were entitled, as against Jones Bros., to have the bills taken up by

these particular goods. That is, as I understand, the meaning of it. Now, that is a question of inference of fact. Was there anything of the sort? There is the advice note which runs in this way: "We inclose bill of lading for 1558 boxes per *Britannic*, and against these and lard per *Greece*, we value on you at sixty days sight for 2500*l*., favour Brown, Shipley, and Co." Now there is the uncontradicted evidence of Mr. Kough showing that in point of fact these parties did not deal upon the footing of there being any specific appropriation such as is contended for; and in the face of that, I cannot draw the conclusion from the document and that evidence that there was any such specific appropriation. It is not at present disputed that these goods were consigned to Jones Bros. as against these bills, or that the bills were drawn as against these goods, or that as Jones Bros. did not choose to accept the bills, they ought to return the goods; of course that is plain enough, but any specific appropriation, such as is contended for, seems to me to be negatived by the evidence in the case. Now, supposing there was no specific appropriation as between the consignor and the consignees, of course, there could be no transfer of the right to specific appropriation, and the case, therefore, fails on that ground. That is how it appears to me the matter would stand apart from authority, and looking only at the documents and the facts.

But then it is said that we cannot decide this case in the manner without overruling *Frith* v. *Forbes*. Now, I confess I do not see any material distinction between this case and *Frith* v. *Forbes*, unless it be in Mr. Kough's affidavit, which negatives any specific appropriation between drawer and acceptor. In *Frith* v. *Forbes* it is to be observed that there was no controversy between the consignors and the consignees. Begbie and Co. appear to have been represented by counsel before the Court of Appeal, and it seems to have been rather assumed, if not in the court below in the Court of Appeal, that there was that appropriation. Turner, L.J. came to the conclusion that there was an appropriation between the consignors, and the consignees and acceptors, and he put it in this way: "Now, in the letters written by Begbie and Co. to Forbes and Co. with reference to each of these bills, it is in terms expressed that the bills were drawn against the consignment, terms which, as I understand their import, could not be construed otherwise than as meaning that the bills were to be paid out of the proceeds of the consignment." These remarks are open to this observation. I do not know whether the Lord Justice meant to say that in point of law there was a specific appropriation, that that was his inference of fact—that, having regard to the correspondence and the evidence in that case, and having regard to the line of conduct which Begbie and Co. took, he came to the conclusion, as a matter of fact, that these expressions bore that meaning. If that was all he meant, of course there is nothing in it. Whether he was right or wrong, we are not bound to draw the same inference of fact. It is only an application of legal principle that we are bound to follow. Of course I see the difficulty there is in ascertaining exactly what he meant to say. He may have meant to say that these two documents, the letter of advice and the acceptance, amounted in point of law to a specific appropriation. If he did, I confess it seems to me to be rather startling, and not consistent with what I understand the law to be as decided in other cases, and the law upon which business is conducted in this country. I do not think he can have meant that. I think he must have meant, under the circumstances of the case present to his mind, to have come to the conclusion that there was that appropriation, which, be it observed, Begbie and Co. never denied at all. Then he also came to the conclusion that, if there was that appropriation as between the consignor and the consignee, the benefit of it was transferred to the holders of the bill. There is a difficulty about that, a difficulty which I need not face here, because, to my mind, this case breaks down in this anticipatory step. As Kough's evidence shows, there was no appropriation—in fact there was no right to appropriate or transfer. But there is a difficulty in the second step in *Frith* v. *Forbes*, which it is impossible not to see; and, I confess, it is difficult to reconcile that with the other cases, and in particular with what Lord Hatherley distinctly said in *Inman* v. *Clare*, that if the drawer of the bill had the right of specific appropriation of the goods he did not pass that by negotiating the bill. It is put here by Mr. Rigby that there was a special bargain. That is dealt with in this particular case by cutting away the subject matter of the bargain. If the consignors had no right to the appropriation, of course they could not in that case bargain to give it to the plaintiffs. I have made these remarks on *Frith* v. *Forbes*, because it does appear to me to be extremely difficult to reconcile it with the principle of our decision. I do not see how to distinguish it except by the passage in Mr. Kough's affidavit, which shows that there was no specific appropriation as there was in *Frith* v. *Forbes*.

Under these circumstances, I think the view taken by Chitty, J. is right, and that the appeal ought to be dismissed.

Fry, L.J.—The question we have to consider arises upon a bill of exchange. There are two bills of exchange, but I will confine my observations to one, the bill of exchange of the 15th Aug. and the letter of the same date, written by Baxter and Co. to Mr. Kough. Two arguments have been addressed to us in this case, and they require to be taken separately. The first is, that the direction in the bill of exchange to "charge the same," that is, the 2500*l*., "to account of cheese per *Britannic* and lard per *Greece*, as advised," constitutes a lien, or specific appropriation or charge, in favour of Messrs. Brown, Shipley, and Co., to whose order the bill was drawn. That is the point of view to which the evidence has been addressed, and it is a point of view which, as I understand, Mr. Rigby adopted in his argument. There is a second argument based on the bill, taken together with the letter of advice, an argument which I understand Mr. Rigby to have by no means abandoned, but, on the contrary, to have pressed upon us, though Mr. Carson, in the course of his very able argument to-day, has preferred to press more strongly the second argument upon us. To my mind, it is not correct to hold that these words of direction in the bill of exchange constituted any lien or any charge. Upon that point there is evidence before us of mercantile men with regard to the meaning and

effect of such words in a bill of exchange, and, although the evidence is not harmonious, the view which I conceive to be the true one is expressed by several witnesses, one of whom is Mr. Bowring, and I will read from his affidavit a passage which, according to my view, expresses the true conclusion of the effect of such an instrument. [His Lordship read the paragraph above set out, and continued:] I may observe that what passed between the firms in America, on the drawing of the bills of which these are part of the series, appears to me to confirm that conclusion. I think what Brown, Shipley, and Co. were anxious for was to be satisfied that the bills of exchange which they were about to purchase were real mercantile bills, and not accommodation bills. The same point drew some observations from Mellish, L.J. in *Robey and Co.'s Perseverance Iron Works* v. *Ollier*, which has been so often referred to in the course of this discussion. He said: "The indorsement of a bill gives only a right to the bill, and I do not think that any mercantile man would suppose, because he saw in the bill the words 'which place to account cargo per A.,' that he was to have a lien on that cargo. A mercantile man who is intended to have a lien on a cargo expects to have the bill of lading annexed; if there is no bill of lading annexed, he only expects to get the security of the bill itself." That is my view of the true effect of that direction in the bill, and I think that, whether I look at the preceding cases, or at the evidence in this case, that conclusion is supported. Now, the second argument, which is the one Mr. Carson especially pressed upon us, arises upon that direction, coupled with the letter of advice of the same date; and the way in which Mr. Carson has put it before us is this: He has said that the letter of advice creates a lien in favour of the maker of the bill, and that by the direction on the face of the bill that lien is transferred to the person to whose order the bill is drawn. Now, the first inquiry therefore is this: Does the letter of advice in this case create any specific appropriation in favour of the maker of the bill? I have already read the words of the advice: "We enclose bills of lading," describing what they are for, "and against these and lard, per *Greece*, we value on you at sixty days' sight for" so much. In other words, it merely amounts to having said: "We send a certain bill of lading, and value on you at sight" for a certain amount. In my judgment, the statement that they are sending the bill of lading, and that they value at that amount, is merely a statement of the motive which they suggest to the drawee why he should accept the bills; and no doubt he cannot refuse to accept the bills and at the same time take the bills of lading. Therefore, as between the drawer and the drawee, it imposes a condition on the acceptance of the goods. The consignee cannot accept the goods without accepting the bills. But I think that it goes no further, and I do not think that such language, in mercantile law, has the effect of creating any specific appropriation.

Now, it is not a little worthy of observation that, in the present case, so little do the appellants appear to have thought of this part of their present contention, that there is no evidence of mercantile men addressed to this part of the case, although it is one upon which the evidence of mercantile men would have been relevant as giving the meaning of the direction in the bill of exchange. But, further, in the present case there is distinct evidence to show that there was, in fact, no specific appropriation of these goods; and, although there was this mode of drawing the bill of exchange, and the method of advising that they had been drawn had been in force between the parties to this transaction for some considerable time previously, no specific appropriation had been made of the cargoes against the proceeds of goods. The Lords Justices who have preceded me have dealt with that part of the case so fully that it is not necessary for me to do more than to say that I have arrived on that evidence at the same conclusion. I think, therefore, whether we look at the course of dealing, or the language of the letter of advice, that was not adequate to create a specific appropriation in favour of the maker of the bill. But, even supposing that it had been, I am bound to say that I feel great difficulty in the second step of the argument, which is this, that the direction in the bill of exchange assigned or transferred the specific appropriation from the maker of the bills to the persons to whose order they were drawn. I am unable to think that mere words of direction have any such operation. Those words of direction appear to me to be merely what they purport to be, a direction as to the account against which the bills are to be drawn; and I do not think they are intended to transfer any lien, supposing that it existed. That is the view which I take of the effect of the direction in the bill of exchange, nor can I help observing that there would, to my mind, be very considerable difficulty in holding that an instrument at the same moment operated as a bill of exchange and as an equitable assignment. I agree that it is not necessary to express any concluded opinion on the point, and I therefore abstain from so doing; but it would require some argument to convince me that the same instrument could have that operation. Very difficult questions would arise. A bill of exchange is a negotiable instrument, taken in the ordinary course of business, and free from the equities between the original parties to the transaction. An equitable assignment is not a negotiable instrument, and need not at all be free from the equities between the parties. If the same instrument creates the one and the other, does the equitable assignment travel to the hand of every holder of the bill of exchange, or if not, where does it stop? If it travels into the hands of all the holders of the bill, is it like a bill of exchange free from equities, or is it like an ordinary equitable assignment? Those are questions which, it appears to me, are worthy of consideration, and would have to be considered before the court could say that this instrument operated in both ways.

The main stress of the argument, no doubt, has been, and very justly so, the case of *Frith* v. *Forbes*, and Mr. Carson has pressed upon us very forcibly the importance of not departing from legal authorities. I feel the full weight of that observation. At the same time it must be borne in mind that cases are authorities for principles of law and not for conclusions of fact, and, as has been already pointed out by Lindley, L.J. it may well be that the true conclusion of that case is that the Lords Justices, upon the

facts before them, there came to a particular conclusion of fact with regard to the existence of the equitable assignment and the transfer of it to the bill holders. If they had intended to lay down any general principles, that case would not have been dealt with as it has been by the courts subsequently. The observation of James, L.J., that that case probably governed no other, is a very opposite observation, if in *Frith* v. *Forbes* the decision was a decision on an issue of fact, and it was not an observation likely to have fallen from the Lord Justice if *Frith* v. *Forbes* laid down a principle of law. I think, therefore, we are not constrained on that case to come to any particular conclusion on the facts of this case, and that Chitty, J. was right in the conclusion to which he came. The appeal therefore will be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Paine, Son,* and *Pollock.*

Solicitors for the defendant Kough, *Hill, Son,* and *Rickards.*

Solicitors for the defendant Tappen, *G. L. P. Eyre* and *Co.*

Wednesday, June 17, 1885.

(Before Brett, M.R., Baggallay and Bowen, L.JJ., assisted by Nautical Assessors.)

The Stanmore. (a)

ON APPEAL FROM THE PRESIDENT (SIR JAMES HANNEN) OF THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Collision — Approaching steamships — Lights — "Risk of collision"—Regulations for Preventing Collisions at Sea, art. 18.

Art. 18 *of the Regulations for Preventing Collisions at Sea, directing that, when two steamships are approaching so as to involve risk of collision, they shall slacken their speed, or stop and reverse, if necessary, is applicable not only where the officer in command sees or ought to see there is actual risk of collision, but also where he sees the other vessel doing something which may involve risk of collision.*

The steamships C. and S. were approaching one another at night, starboard to starboard, and when at a distance of a quarter of a mile the green and masthead lights of the S. were seen by those on the C. to close in and come more into line. The Nautical Assessors advised the court that such alteration in the bearing of the lights was an indication to the officer in charge of the C. that the S. had in all probability ported, and that porting on the part of the S. would, in the circumstances, involve risk of collision.

Held (affirming the court below), that the probability that the S. had ported rendered it incumbent on the C., on seeing the alteration of the lights, to have at once reversed her engines in compliance with Art. 18 *of the Regulations for Preventing Collisions, and that in default of so doing she must be held to blame for the collision.*

This was an appeal by the plaintiffs, the owners of the steamship *Cornwall,* in a collision action *in rem,* from a decision of Sir James Hannen, holding both ships to blame.

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

The collision occurred about 12.30 a.m. on the 9th Sept. 1884, in the North Sea, off Whitby, between the steamship *Cornwall,* of 419 tons register, and the steamship *Stanmore,* of 1269 tons net.

The facts alleged by the plaintiffs were as follows:—The *Cornwall,* which was on a voyage from London to Sunderland, was, shortly before 12.30 a.m., making about eight knots an hour on a N.N.W. course. In these circumstances the whistle of a steamship, which proved to be the *Stanmore,* was several times heard ahead. The engines of the *Cornwall* were stopped a few minutes afterwards, and the *Stanmore's* green and masthead lights were seen about a point and a half on the starboard bow, and distant about half a mile. The vessels, as they neared each other, would have passed in safety starboard to starboard; but when about three points on the starboard bow the red light of the *Stanmore* came into view, and her green was shut in, causing danger of collision. The engines of the *Cornwall* were at once ordered to be reversed full speed, but before the order could be completely carried out the green light of the *Stanmore* came again into view, and a collision became imminent. As the only possible chance of escape the engines of the *Cornwall* were at once set on full speed ahead, and her helm was put hard-a-starboard; but the *Stanmore,* with her stem, almost directly struck the *Cornwall* on the starboard bow, in consequence of which she sank.

The facts alleged by the defendants were as follows:—The *Stanmore,* which was on a voyage from Newcastle to New Orleans, was making about eight and a half knots on a S.S.E. course. In these circumstances the masthead and red lights of a steamer, which proved to be the *Cornwall,* were seen about three-quarters of a mile distant bearing about three-quarters of a point on the starboard bow. The engines of the *Stanmore* were immediately put to half speed, and her helm put hard-a-port, so as to bring the vessels red to red. The *Cornwall,* however, instead of keeping her course, starboarded and shut in her red and opened her green light, and caused risk of collision. Although the engines of the *Cornwall* were immediately stopped and reversed, the vessels came into collision. The defendants charged the plaintiffs (*inter alia*) with neglecting to stop and reverse their engines before the collision or in due time.

According to the evidence of the master of the *Cornwall,* who was in charge at the time of collision, he saw the *Stanmore's* green and masthead lights about a point and a half on his starboard bow, distant about half a mile. When the *Stanmore* got about three points on his starboard bow he saw her masthead and green lights coming more in a line. This told him the *Stanmore* was porting, and when the red light came into view on the starboard bow, and distant about a quarter of a mile, he ordered his engines full speed astern.

Dec. 13, 1884.—The case came on for hearing before Sir James Hannen, assisted by Trinity Masters.

The learned President (Sir James Hannen), after finding that the vessels were approaching starboard to starboard, and that the *Stanmore* was to blame for having ported to a green light, dealt with the case of the *Cornwall* as follows:—

Then there remains the further question whether the *Cornwall* is to blame. That depends upon whether or not she reversed her engines in time. Her case is that, observing a change in the position of the *Stanmore's* lights, her speed was reduced to easy. The change which it is alleged was seen on board the *Stanmore* was that her lights were brought more nearly in line, and that is the only thing which the master of the *Cornwall* refers to. He says he comes to the conclusion that the *Stanmore* was porting her helm. It was observed by the Trinity Brethren at the time that the mere fact of the green light and the white light being brought more nearly in a line did not conclusively establish that the *Stanmore* was turning under a port helm, because the bringing the lights into a line would depend upon where the side light was, side lights being differently placed in different ships. It is the first time that this point has been presented to my consideration as involving any element of uncertainty, but I should think that it must depend upon the distance of the lights and upon the state of the atmosphere whether a judgment can be formed as to whether the light is in one place or another when they are being brought into line, and there must be some position when an opinion can be formed whether the vessel is turning one way or the other. Be that as it may, I have put this specific question to the Elder Brethren: If the master of the *Cornwall* was of opinion that the *Stanmore* was under a port helm, and was so approaching him, was he justified in abstaining from reversing until the red light came into view, which is what he says he did? For though he came to the conclusion that the *Stanmore* was under a port helm, and that there was danger, yet he did not do anything until the *Stanmore* had come round so much as to show her red light. The answer which has been given to me by the Trinity Brethren, and in which I entirely concur, is, that he was not justified in waiting so long. It is true that the placing of the side lights might affect his conjecture as to the meaning of the lights coming into a line. This point was not taken by the man himself nor by counsel, but putting it at its highest, it would only show that there was an element of uncertainty as to what the movements of the ship were, and it might be that she was under a port helm, as she, in fact, turned out to be. Then, if it might indicate that the vessel was under a port helm, it was not justifiable on the part of the master of the *Cornwall* to wait until the course of the *Stanmore* had been so much altered that her red light was brought into view, before he took the necessary precautions required by the law of reversing his engines in order to prevent a collision. He says himself he believed the *Stanmore* was under a port helm, and he knew that it was dangerous. I am therefore of opinion that he failed in his duty in not having reversed sooner, and that upon that ground the *Cornwall* is also to blame.

From this decision the plaintiffs now appealed.

Sir *Walter Phillimore* and *Bucknill* for the appellants.—The duty of the *Cornwall* to stop and reverse her engines is regulated by art. 18 of the Regulations for Preventing Collisions. According to that article steamers are bound to ease or stop and reverse their engines when approaching one another so as to involve risk of collision. In order that the officer in charge may judge whether the ships are so approaching, it is necessary that some small space of time should elapse in which he may form a judgment:

The Emmy Hease, 50 L. T. Rep. N. S. 322; 9 P. Div. 81; 5 Asp. Mar. Law Cas. 216.

He is not bound to instantly stop and reverse his engines. In the present case those on board the *Cornwall* stop and reverse as soon as they see the *Stanmore's* red light, which shows them as a fact that she has ported. The fact of the green and masthead lights coming into a line is an indication that the vessel has probably ported, but nothing more. The officer in command of a ship at night ought not to act upon the probable and possible manœuvre of an approaching vessel.

Hall, Q.C. and *Barnes*, for the respondents, were not called upon,

Brett, M.R.—In this case it appears that the two vessels were meeting going as nearly as possible on opposite courses, and it was night time. They were meeting so that they would pass starboard side to starboard side if they had both kept on their courses; if so, there would have been no danger of collision. Their duty therefore was to keep on, or else both to starboard. However, in fact, one of them ports. To my mind it is not sufficient to say that she ported, because suppose, as I tried to point out in the case of *The Beryl* (51 L. T. Rep. N. S. 554; 9 P. Div. 137; 5 Asp. Mar. Law Cas. 321), she had been carrying no lights, and had ported, and had thereby in fact brought about danger of collision, there would be no culpability on the part of the officer in command of the other ship in not manœuvring for this porting, because without lights he could not have known the other vessel had ported. These regulations are made in order to teach sailors how to act when circumstances arise which they know have arisen. It is not enough that the circumstances have in fact arisen, if the officer does not and cannot know. Now the *Stanmore* did in fact port when a little more than a quarter of a mile distant, and when on the *Cornwall's* starboard bow. The gentlemen who assist us gave it as their opinion that that produced risk of collision, and even without their valuable assistance I cannot conceive that anyone accustomed to ships could doubt it would be so.

Now comes the question whether the risk of collision was indicated to the officer in charge of the *Cornwall*, so that he ought to have acted to avoid it. The evidence is, that he saw the white and green lights coming more into a line. It was suggested, when that evidence was given in the Admiralty Court, that it would show him the *Stanmore* had ported, upon which the Trinity Masters informed the learned President that it depended upon the position of the side lights. What that means I do not quite understand. Assuming what they said was perfectly correct, then arises this question: Although the alteration in the lights does not show as a positive fact that the *Stanmore* had ported, does it show that she has in all probability ported? Now, something must have happened to account for the alteration in the position of the lights. We have therefore asked the gentlemen who assist us these two questions: Would the fact of

the green and white lights coming more into a line indicate to the captain of the *Cornwall*, as a sailor, that in all probability the *Stanmore* had ported? They answer Yes. We then put this question: If the *Stanmore* ported at a little more than a quarter of a mile, being in the position in which she was on the starboard bow of the *Cornwall* did that produce risk of collision? They answer Yes. Therefore it is to be taken that the alteration in the position of the lights would not indicate as a certain fact that the *Stanmore* had ported, yet things showed that in all probability she had ported. In these circumstances what is the officer's position? Then you come to a point of reasoning which sailors must learn, and it is this: if in all probability a ship has done something which, if she has done it, produces risk of collision, ought not the officer in charge of the other ship to think there is risk of collision? In order to insure safety and to avoid risk of collision, which is the great object of the Regulations, I think that when an officer sees something which ought to indicate to him that another ship has done something involving risk of collision, he ought to act to avoid that risk. This is carrying the rule further than it has been carried before. If he ought to have acted, it is plain that his duty under the circumstances was not only to stop but also to reverse his engines. I therefore think that the officer in command of the *Cornwall* did not fulfil the duty imposed upon by the Regulations, and that the *Cornwall* must be held also to blame.

Baggallay, L.J.—I have only one further observation to make, and it is this, that that which we are informed by our assessors would be the effect produced upon the mind of a sailor who knew his duty was the effect actually produced upon the master of the *Cornwall*. For on looking at the evidence I find this: "Q. What did you see then? A. I saw her masthead and green lights come more in a line with each other. Q. That told you she was doing what? A. Porting."

Bowen, L.J.—In my opinion also the finding of the assessors brings this case within the express words of the regulation. The ships were approaching at night starboard to starboard. When the ships came close the captain of the *Cornwall* saw the green and masthead lights coming in a line. He did not see that the *Stanmore* had ported, but he saw the manœuvre which, in the opinion of our assessors and of the Trinity Masters below, would lead a reasonable sailor to infer that there was a strong probability that she was porting. If she had ported it is admitted that it involved danger. If this manœuvre which he saw reasonably led him to think that she had ported, the hypothesis as to risk of collision had begun. Stopping his engines was not sufficient, and therefore reversing was not necessary.

Judgment affirmed.

Solicitors for the appellants *Thomas Cooper and Co.*

Solicitors for the respondents, *Ingledew, Ince, and Colt.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Dec. 10, 11, *and* 20, 1884.

(Before Mathew and Day, J.J.)

The Barrow-in-Furness Mutual Ship Insurance Company Limited *v.* Ashburner. (a)

Marine insurance—Mutual ship insurance company—No stamped policies—Action to recover unpaid.

A., prior to 1878, *kept several vessels insured in the B. Mutual Ship Insurance Company, paying the entrance fees and calls thereon, and after* 1878 *continued to deal with the company in the same way, except that after that date no policies were issued, the practice of the members being that after the expiration of the first time policy no new policy was issued, but instead thereof stamped receipts were given for calls.*

On Dec. 29, 1880, *and Feb.* 25, 1881, *the company, with A.'s assent, duly passed resolutions for transferring its business, credit, and effects to a new company on the terms of the new company paying all the debts, liabilities, and obligations subsisting on the* 25*th March* 1880. *The new company was registered on the* 3*rd Feb.* 1882, *the business up to that time being carried on sometimes in the name of the new company and sometimes in the name of the old, the business of the old being purported to be carried on by the new. Both before and after the registration A. continued the same course of business as before, but paid no call after the* 9*th Jan.* 1882, *when he paid a call made on the* 29*th June* 1881 *for losses previous to the* 29*th Dec.* 1880. *In an action by the new company against A. to recover the amount of three calls made on the* 21*st Sept.* 1881 *and on the* 25*th Jan.* 1882 *for losses prior to the* 25*th Feb* 1881, *and on the* 25*th March* 1882 *for losses subsequent thereto:*

Held, that the plaintiff company was entitled to recover all the amounts claimed as money paid at the request of the defendant.

Re The London Marine Insurance Association; J. W. Smith's case (21 *L. T. Rep. N. S.* 97; *L. Rep.* 4 *Ch.* 611) *distinguished.*

This was a special case stated for the opinion of the court by agreement between the parties in an action brought by the Barrow-in-Furness Mutual Ship Insurance Company Limited against Thomas Ashburner, to recover the sum of 342*l.* 5*s.* 3*d.* for calls, contributions, and interest thereon due from the defendant as a member of the company under the circumstances therein stated, which, so far as material were as follows:

The Barrow-in-Furness Mutual Ship Insurance Company was completely registered and incorporated under the provisions of the statutes 7 & 8 Vict. c. 110 and 10 & 11 Vict. c. 78, in the year 1858, and the defendant was duly admitted a member thereof in June 1868, and subject to the facts hereinafter stated insured, and continued to keep insured, several vessels in the said company, and paid the entrance fees and calls thereon. He was elected treasurer of the company on the 27th Nov. 1878, and continued to act as such until the 29th June 1881.

Up to the year 1879 a policy was issued by the

(a) Reported by J. Smith Esq., Barrister-at-law

company to the defendant on all ships proposed by him to the company for insurance and accepted, but after that date no policies (with the exception hereinafter stated) were issued by the company mentioned, or any company succeeding it before the commencement of the action. The last policies issued to the defendant (with the exception above-mentioned) were issued on two accepted proposals of the 31st March and the 11th Oct. 1879 respectively. The practice of the other members of the company, and the practice of the defendant after the expiration of the policies mentioned, was that after the expiration of the first time policy no new policy was issued, but instead thereof stamped receipts were given for calls.

On the 29th Dec. 1880, at a special general meeting of the company, summoned for that purpose in accordance with rule 91 (*a*) of the rules and regulations, the following resolutions were reduced to writing, and twice read and put to the vote, and were on both occasions carried unanimously:

Resolved that the business, credits, assets, and effects of the company be transferred to a company to be called the Barrow-in-Furness Mutual Ship Insurance Company Limited on the terms of the said intended company paying and discharging all the debts, liabilities, and obligations of the company entered into, and subsisting, and capable of taking effect as at the 25th March last.

Resolving that the Barrow-in-Furness Mutual Ship Insurance Company be and the same is hereby absolutely dissolved.

The defendant was present at the meeting, and took an active part in the discussion of the proposals and voted in favour of the said resolutions. The proposed articles of association, in the form in which they were subsequently registered, were read over at this meeting, and explained to the meeting by the solicitor for the company, and were approved of.

The said resolutions were unanimously confirmed at a subsequent special general meeting held for that purpose on the 25th Feb. 1881. The defendant was not present at this meeting, but he had on the 10th Jan. 1881 given the secretary of the said company a proxy to vote for him at the said meeting.

On the 11th April 1881 the memorandum and articles of association subsequently registered were signed by seven persons who were directors of the old company, and at a meeting of the company held on the 19th April 1881 it was intimated to the members present by the secretary that the company had been registered as a limited company. This was found to be a mistake, but until the mistake was discovered the company acted as if it had been so duly registered.

On the 22nd June 1881 a consent to take the name of a subsisting company was signed by two directors of the old company.

On the 29th June 1881, at what purported to be a meeting of the new company, directors were elected, and the secretary of the old company was elected secretary of the new company. The defendant ceased to be treasurer at this date.

The new company was duly registered on the 3rd Feb. 1882 under the name of the Barrow-in-Furness Mutual Ship Insurance Company Limited, with a memorandum and articles of association.

After the passing of the foregoing resolutions, and until the registration of the new company, business was carried on as before, sometimes in the name of the new company, and sometimes in the name of the old company, but the business of the old company was purported to be carried on by the new company.

The defendant after the passing of the said resolutions, and before the registration of the new company, continued to keep his vessels on the books of the company, as insured, and paid calls upon the said vessels, and intended to remain insured as before, but no policy of insurance was given to the defendant.

On the 6th April 1881 the defendant wrote to the secretary of the company, in reply to an application for calls made up to the 25th March 1881, complaining that six sixty-fourths of a certain ship had not been withdrawn according to notice, giving a list of the share of his vessels insured in the company, and asking for a corrected account. The alterations were made as requested, and some time after the defendant examined the register of insurances.

(*a*) The 91st and 92nd of the rules and regulations of the company, as contained in the deed of settlement were:

91. That absolute dissolution of the company shall be made only in case a resolution for that purpose is reduced into writing, and twice read and put to the vote, and carried each time by a majority of at least two-thirds in number of the members present, personally or by proxy, at a special general meeting expressly summoned for the purpose, and entitled among them to at least two-thirds of the whole number of votes for the time being held by all the members of the company; and if such resolution shall also be confirmed by a like majority at a subsequent special general meeting, to be held at any time after the expiration of fourteen days, and before the expiration of two calendar months next after the general meeting at which such first resolution is passed, then the company shall be dissolved (except only for the purposes mentioned in the next rule) from the date of such second general meeting.

92. That in case of dissolution the directors shall, with all convenient speed call in, sell, dispose of, and convert into money, all such parts of the estate and effects of the company as shall not then already consist of money; and a general account, estimate, and valuation shall be made by the directors of the said estate, and of all assets and liabilities of the company, which account and valuation are to be submitted to a special general meeting of the company, and, when approved by such meeting, shall be binding upon the members; and upon settling such final account, all the surplus estate and moneys (if any) of the company (after payment of all just demands upon the company or all the debts or liabilities of the company, after exhausting and applying all the assets of the company, are to be divided and appropriated to and among, and be paid to or by the members (as the case may be) in proportion to the respective amounts of their insurances in the company at the time of such dissolution. But no member who omits to put in his claim, and (if required) establish his title to the share in such surplus, falling due to him, within two years after the special general meeting, held for winding up the company's affairs, shall be entitled to any share or interest therein, but the same is to be applied and divided as part of the surplus capital of the company, for the benefit of and among the then ascertained parties among whom the rest of the capital is to be distributable; but such omission to claim shall not exempt any such member from any liability to contribute to the discharge of the liabilities remaining against the company. But notwithstanding any such resolution for the dissolution of the company, the said deed of settlement, and all the privileges, rights, and liabilities of the members shall continue in full force until the affairs of the company have been wound up, and the debts and credits, assets, and property of the company have been paid, got in, realised, and divided as aforesaid, and for these purposes, and until such time as aforesaid, the company shall be deemed to be still subsisting.

On the 11th Sept. 1881 the defendant proposed a vessel for insurance, and paid an entrance fee for the same. No policy was then issued for this vessel, but on July 14, 1882, the directors of the new company, after a letter from the defendant of July 11, 1882, demanding the return of the entrance fee, executed a time policy from Sept. 11, 1881, to Sept. 11, 1882, but claimed to retain the same for a lien on it for calls unpaid by the defendant. With the exception of this policy, no policy was issued by the new company to the defendant or to any member before the commencement of the action. No call was ever made on the vessel for which this policy was issued.

After the registration of the new company the defendant continued the same course of business as before, as shown by letters of the 1st and 11th April 1882, giving notice of withdrawal of shares in certain ships.

The defendant having failed to comply with the requests of the company's secretary for the payment of amounts alleged to be due from the defendant to the company, the writ in the action was issued on July 29, 1882, the claim of the plaintiff company being for three calls with interest, made respectively on Sept. 21, 1881, Jan. 25, 1882, and March 25, 1882, amounting in all to 342*l.* 5*s.* 3*d.* These calls were made to meet actual losses which had happened to vessels whose owners had paid the usual entrance fee, and who had made proposals which were duly accepted, but no policy had been issued for any of these vessels.

All the losses which had happened before the 29th Dec. 1880, and all the working expenses up to that date, were, with the exception of a liability of 375*l.*, included in a call made on June 29, 1881, which was paid by the defendant on Jan. 9, 1882.

Between the 29th Dec. 1880 and the 25th Feb. 1881 two vessels were lost, involving a liability of 1330*l.* 10*s.* The defendant's share of this liability, if any, would be one-seventh of that amount. The call of Jan. 25, 1882, was made to cover this liability.

There were no losses between Feb. 25 and June 29, 1881.

The Court of Chancery of the County Palatine of Lancaster, upon the application of the defendant, by orders made on April 30, June 18, and Aug. 13, 1883, ordered the defendant's name to be removed from the register of members of the plaintiff company.

It was agreed by the parties that the question of amending the statement of claim by adding the name of the old company as plaintiffs, and all questions of amendment, should be for the court.

The question for the opinion of the court was whether the plaintiffs were entitled to recover the sum of 342*l.* 5*s.* 3*d.*, or any and what part thereof.

Collins, Q.C. (with him *R. G. Digby*) for the plaintiff company.—The circumstance that there were no policies is not material, the action not being on the policy:

Read v. *Anderson*, 51 L. T. Rep. N. S. 55; 13 Q.B. Div. 777;

Rosewarne v. *Billing*, 9 L. T. Rep. N. S. 441; 33 L. J. 55, C. P.

In *Rosewarne* v. *Billing* it was held that, if a broker be employed to make wagering contracts, such as are illegal under the 8 & 9 Vict. c. 109, s. 18, and at the request of his principal pays the amount due under such contracts, he can recover the amount so paid from his principal, and the illegal nature of the contract with reference to which the money is paid is no defence to an action founded on such a claim, and in *Read* v. *Anderson* the same view was taken, the contract sued upon not being a wagering contract, although the action related to betting and wagering. So here, although the action deals with insurance matters, yet, as it is not an action to recover a loss under a policy, the fact that there were no policies is immaterial, and the plaintiffs are entitled to recover the amount paid for the defendant to those members who have suffered losses. The new company also, having all the rights of the old company transferred to them, stands in the same position as the old company, of which the defendant was clearly a member:

The Hull Flax and Cotton Mill Company v. *Wellesley* 2 L. T. Rep. N. S. 728; 6 H. & N. 38.

[He was stopped by the Court.]

Box (with him *C. Russell*, Q.C. and *Sim*).—This action can only be founded on an agreement for the insurance of ships, and it was long ago decided in *Re London Marine Insurance Association*; *J. W. Smith's case* (21 L. T. Rep. N. S. 97; 3 Mar. Law Cas. O. S. 280; L. Rep. 4 Ch. 611), by Selwyn and Giffard, L.JJ. (affirming James, V.C.), that under 35 Geo. 3, c. 63, no agreement for insurance of ships could be valid unless duly stamped according to that Act, and that there was therefore in that case, which was a case of an association formed on the principle of mutual insurance, no evidence of a binding mutual contract for insurance having been entered into. The law is the same at the present time under 30 & 31 Vict. c. 23, ss. 7 and 9. The defendant is not estopped from denying that he was a member of the company, since in *Smith's case* (*ubi sup.*) there was payment of entrance fees and calls, and yet the applicant was not held to be estopped from denying his membership. Further, the Court of Chancery of the County Palatine of Lancaster has removed the defendant's name from the list of members of the plaintiff company.

R. G. Digby in reply.—*Smith's case* (*ubi sup.*) was distinguished in *Re The Teignmouth and General Mutual Shipping Assurance Association*; *Martin's claim* (26 L. T. Rep. N. S. 684; 1 Asp. Mar. Law Cas. 325; L. Rep. 14 Eq. 148), where it appeared that it was the practice of the association to issue unstamped policies, but the widow of a member was, notwithstanding that the policy was not stamped, held entitled to recover the balance due thereon on the ground that there was a sufficient admission of liability in the books of the association to establish the relation of debtor and creditor.

Cur. adv. vult.

Dec. 20.—Day, J.—In this case I am of opinion that the plaintiffs are entitled to the judgment of the court. The case is one which in itself presents a very considerable difficulty, and it presents additional difficulty by reason of the very ingenious use which has been made by the learned counsel for the defendant of the case of *The London Marine Insurance Association*; *J. W. Smith's case* (21 L. T. Rep. N. S. 97; 3 Mar.

Law Cas. O. S. 280; L. Rep. 4 Ch. 611), decided in 1872 by the Court of Appeal. Now, this case is without doubt a case of authority, and a case which is binding in authority upon us, and if I were of opinion that it was really applicable to this case it would be my duty to find in accordance with the decision therein. But, after very careful consideration of that case, I have come to the conclusion that nothing was decided in it which really assists us in coming to a determination in this case. As far as I can understand it, all that is decided there is that, upon the evidence available, and under the circumstances proved to have existed there, Smith was not liable to be put upon the list of contributories of the mutual insurance club that was being wound-up under the control of the Court of Chancery. Here, in my judgment, it is not necessary to determine whether the defendant was or was not a member of this company—certainly not whether he was a member of this company so as to be liable to be put upon the list of contributories, and to be dealt with as a member for all purposes. What we have to determine is simply whether, upon the facts stated in the case, the defendant Ashburner is liable to make good to the plaintiff company the sums of money which they claim specifically in this action, and I am of opinion that he is so liable, and for these reasons: It seems that, at one time, no doubt the defendant was a member of what I may term the old company. He was an assurer on a duly stamped policy, and he was a member. To what extent he was a member to my mind it is unnecessary to inquire, but to some extent undoubtedly he was a member. On the 29th Dec. 1880 and on the 25th Feb. 1881 resolutions were passed for winding-up or putting an end to the old company, and transferring the business to what is termed the new company. A resolution was passed with the assent and to some extent by the exertions of Ashburner, a resolution to which he was undoubtedly a party—that the business credit, assets, and effects of the company be transferred to a company, which I will call "the new company"—meaning thereby the present plaintiffs—"on the terms of the said intended company paying and discharging all the debts, liabilities, and obligations of the company entered into and subsisting and capable of taking effect as at 25th March last." It seems to me to be perfectly clear that, whether the defendant Ashburner be a member of the old company or a member of the new company, as he led and induced the new company to take upon themselves the liabilities of the old company, any moneys paid by them under this resolution would be moneys paid at his request. It seems to me clear and beyond argument that, as to any liabilities such as are referred to in this resolution, the discharge of those liabilities must be contributed to by the defendant. The liabilities were undertaken at his instance, the moneys have been paid at his request, and it does not lie in his mouth to say that he was not at that time a member of the old company. He induced the new company to pay these moneys for his benefit and advantage upon the representation that he would discharge as though he were a legal member of the old company all liabilities which might be thus undertaken by the new company. Whether he was legally or not legally a member of the old company, therefore, I do not care to inquire.

But there are other portions of this claim arising otherwise than in respect to liabilities subsisting and capable of taking effect on the 25th of March last. There are liabilities which have been subsequently acquired, and no doubt they cannot be dealt with upon the footing of the resolution of the 29th Dec., but must be dealt with upon other and independent grounds. What, then, do I find took place after this new company commenced business? I find that, although the defendant Ashburner never had, with the new company, any policy upon which he could have sued, or on which he could have enforced any legal right, still he continued to insure his ships with the new company in the irregular manner in which the new company carried on its business, dispensing with stamped policies of insurance, and carrying on what they termed a mutual insurance by a system of accounts. The defendant undoubtedly had several ships thus continuously insured. In fact he seems to have been more or less active in reference to these transactions. I find evidence that several ships belonging to him were—I do not like to use the word "insured"—but I will say, dealt with in this irregular way. I find that on the 6th April 1881 he writes to the secretary of the company asking for a corrected account of his insurances, and he sets out a number of ships in which he appears to be interested, and specifies the amounts which are insured upon them. He makes proposals to the company again in Sept. 1881, and pays an entrance fee. No policy was ever issued to him. I find that on the 1st April he writes to the company withdrawing some shares upon some ships, clearly implying that other shares in the same ships remained insured with the company. He does the same by another letter of the 11th April, but after a while, when premiums have accumulated against him and he is applied to for payment, he declines to pay the moneys which are demanded of him in respect to those insurances, and it is said he is not liable to do so because there were no stamped policies of insurance. There is no doubt whatever that he could not enforce in a court of law any claim whatever in payment of those policies; but the question we have to determine, as he is not suing on the policies, is not, whether he could have established a claim upon the policies, but whether he has or has not put himself in such a position towards the company that he is liable to pay the sums of money that the company claim of him. Now the company during this time have been making payments to other persons who have been similarly dealt with, and to my mind they have been making those payments at the request of the defendant, because the defendant has been keeping his ships insured in this irregular manner with them, upon the understanding existing between himself and all those persons with whom he was acting that they would pay him all losses which accrued due to him whether they were legally bound to pay him or not—still that they would pay him. He has been keeping his ships insured in this way on the understanding that the company, which is a limited company, represented by its officers, would pay, and they have paid the persons who have been thus irregularly insured, and have

incurred liabilities to pay them—not indeed liabilities which would be strictly enforceable in a court of law, but such as were to be discharged at the request of all the members from time to time. It seems to me, therefore, that so far as moneys have been paid by the plaintiffs in pursuance of these persistent and continuous implied requests by the defendant, the defendant is bound to repay those moneys as moneys paid at his request by the plaintiffs. For these reasons the plaintiff company is, in my opinion, entitled to our judgment.

MATHEW, J.—I concur in the judgment which my learned brother has just delivered. The able argument addressed to us by Mr. Box, who appeared for the defendant, led me to doubt whether our judgment ought not to be for the defendant, and certainly with a great part of that argument I entirely agree; but, after consideration, it appears to me that the learned counsel has failed to answer the view of the case taken by my Brother Day in the course of the argument, and which has been the basis of his judgment just delivered. As, therefore, my doubts are not sufficient to lead me to differ from the opinion of my learned brother, I think that judgment must be for the plaintiff company, with costs.

Solicitor for the plaintiff company, *R. B. D. Bradshaw*, Barrow-in-Furness.

Solicitor for the defendant, *J. H. Pinkney*, Barrow-in-Furness.

Wednesday, March 11, 1885.

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

HOUGH AND CO. *v.* HEAD. (*a*)

Marine insurance—Time policy—Chartered freight —"Loss of hire which may arise from accidents occurring between certain dates" — Accident within the prescribed dates, and loss of hire afterwards—Underwriter not liable.

The plaintiffs chartered their vessel for six months from the date when the vessel was put at the charterer's disposal, namely, the 21st March 1881, *with the option to the charterers of continuing the charter for a full period of six months.*

By clause 6 *of the charter-party it was provided "that in the event of loss of time by deficiency of men, collision, breakdown of engines, and the vessel becomes incapable of steaming or proceeding for more than forty-eight working hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage. . . . The acts of God, the Queen's enemies, fire, and all and every other dangers and accidents of machinery, or of the seas, rivers, and navigation of whatever nature and kind always mutually excepted."*

The plaintiffs insured against loss of chartered freight by two policies, one of which for 1200*l. was underwritten by the defendant as an underwriter for* 150*l.*

The insurance effected was "At and from and for and during the space of six calendar months from the 15*th April to the* 14*th Oct.* 1881, *both days inclusive, for* 1200*l., on chartered freight, to pay only loss of hire not exceeding* 2000*l. which may arise in clause* 6 *of charter-party for accidents occurring between the* 15*th April and the* 15*th Oct., but free of claim arising from deficiency of men."*

During the currency of the policy, viz., on the 27*th June* 1881, *the vessel, while going through the Straits of Magellan, struck something which injured her bottom, but did not prevent her from proceeding on her voyage, and she arrived at Liverpool on the* 18*th Nov. She was put into dock on the* 28*th Nov., and on the* 30*th Nov. the charterers gave notice to the plaintiffs that the hire would cease as per charter-party until the vessel was in a fit state to resume employment. The repairs were completed on the* 30*th Dec.* 1881.

Held, that the underwriter was not liable for loss of freight, because, although the accident which necessitated the repairs and caused the loss of hire happened within the six months prescribed in the policy, there was no loss of freight within that particular time.

SPECIAL CASE.

2. The plaintiffs are owners of s.s. *Presnitz*, and on the 12th March 1881, by a charter-party of that date, chartered their said vessel to Messrs. Laws, Surtees, and Co. for six months, commencing from date when the vessel was put at charterers' disposal, with the option to charterers of continuing the charter for a further period of three or six months, the charter being of the sole use of the vessel to the charterers for the period of the said hire.

2. The freight for the hire of the vessel was to be 12*s.* 6*d.* per gross register ton per month, payable in London monthly in advance in cash, and in proportion for any part of a month.

3. A copy of the charter-party is annexed hereto marked "A," and is to be taken as forming part of this case. Clause 6 of the charter-party was as follows:

That in the event of loss of time by deficiency of men, collision, break-down of engines, and the vessel becomes incapable af steaming or proceeding for more than forty-eight working hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage. Should any difference arise between the parties to this contract, either in principal or detail, the same shall be referred for arbitration at London to two persons, one to be chosen by each contracting party, with power for them to call in a third, and a decision of a majority shall be final and binding. (The acts of God, the Queen's enemies, fire, and all and every other dangers of accidents of machinery, or of the seas, rivers, and navigation, of whatever nature and kind always mutually excepted.) That in the event of the steamer being lost, the money advanced upon the current month shall be returned in proportion to the number of days which she may not have completed of that month.

4. The vessel was placed at charterers' disposal on, and the six months' charter commenced from, the 21st March 1881.

5. The plaintiffs, on the 4th April, 1881, caused themselves to be insured against loss of chartered freight to the extent or sum of 2000*l.*, by two policies of insurance, one for 800*l.* (which is not in question in this action) and the other for 1200*l.*, the latter being effected at Lloyd's and underwritten by the defendant as an underwriter for 150*l.* portion of such 1200*l.*

6. A copy of the policy is annexed hereto marked "B," and is to be taken as forming part of this case. It will be seen that the insurance effected was:

At and from and for and during the space of six calendar

(*a*) Reported by H. D. BONSEY, Esq., Barrister-at-Law.

months from the 15th April to the 14th Oct. 1881, both days inclusive.

And for

1200*l.* on chartered freight.

To pay only loss of hire, not exceeding 2000*l.*, which may arise in clause 6 of charter-party for accidents occurring between 15th April and 10th Oct., but free of claim arising from deficiency of men.

7. During the currency of the six months, from the 15th April to the 14th Oct., covered by the policy, viz., on or about the 27th June 1881, and while the vessel was going through the Straits of Magellan on a voyage to the west coast of South America, something happened which is thus described in the "Protest" extended by the master of the vessel on arrival at his port (Talcahuano), on the west coast aforesaid, which was all that was known of the occurrence to those on board the vessel at the time of the happening:

The twenty-seventh day of June last, when the steamer was proceeding through the Straits of Magellan, on which date, at about quarter-past three in the afternoon, weather clear, and going full speed, heading south-south-east along the land, vessel suddenly struck something with her bottom amidships, which, however, must have been very soft, for the ship did not lose her headway. The engines were immediately stopped, and soundings having been taken all round, the depth of water was found to range from seven fathoms forward to eleven fathoms aft. Ship having been sounded, and finding that she was making no water, proceeded on voyage.

8. The six months' charter expired on the 21st Sept. 1881, the vessel being then on a voyage, and the charterers exercised their option of continuing the charter for a further period of three months at the time and in the manner provided by clause 11 of the charter-party; the charter under the said charter-party thus being extended to and terminating on the 21st Dec. 1881.

9. The vessel arrived at Liverpool on the 18th Nov., and, after discharging her cargo there, was put into dry dock for inspection on the 28th Nov., when her keel was found to be broken, and other damages to her bottom to have been suffered, necessitating considerable repairs. This damage had, although unknown until she was docked as aforesaid, been, in fact caused by the said accident in June 1881.

10. On the 30th Nov. 1881 the charterers gave a notice to the plaintiffs, the notice being, so far as material, in the following terms:

This steamer having broken her keel, and become incapable of steaming for some time, we give you notice that the hire will cease, as per charty-party, until the vessel is in a fit state to resume employment. We understand the accident took place in the Straits of Magellan during her outward voyage.

11. The repairs were not completed, nor could the vessel be got into an efficient state to go upon a voyage, until the 30th Dec. 1881. The charter, as has been stated, terminated on the 21st Dec. 1881.

12. The claim under the policy was adjusted by London average adjusters as being 56*l.* 11*s.* 1*d.* per cent. of the said 1200*l.*, the proportion of the defendant in respect of the 150*l.* underwritten by him being 84*l.* 16*s.* 7*d.* This claim, however, is in respect of the whole time occupied by the repairs. The amount will have to be reduced to 61*l.* 13*s.* 10d, in the event of it being decided that the defendant is liable for loss of hire up to the 21st Dec. (inclusive) only.

13. The contention of the plaintiffs is that the defendant is liable, under the terms of the policy, for loss of hire during the charter, under clause 6 of charter-party, in respect of the accident which occurred in June, although the cessation of payment of the hire did not occur until after the 14th Oct.

14. The defendant contends that he is not so liable, because there has been no loss of hire under the charter-party, and that the charterers are liable under the charter-party for the freight during the repairs, and that, even if there has been any loss of time it did not occur before the 14th Oct. 1881, and was not covered by the policy.

The questions for the decision of the court are:

(*a*) Whether charterers were entitled, under clause 6 of the charter-party, to refuse to pay the hire from the 30th Nov. 1881.

(*b*) If so, whether the defendant is liable under the policy in respect of the loss of hire consequent on such refusal to pay by the charterers.

(*c*) If so, is he liable for the sum of 84*l.* 16*s.* 7*d.*, or only for 61*l.* 13*s.* 10*d.*?

If the court shall answer question *a* and question *b* in the affirmative, judgment shall be entered for the plaintiffs for such sum as the court, under question *c*, shall determine, with costs.

If the court shall answer questions *a* and *b*, or either of them, in the negative, judgment is to be entered for the defendant, with costs.

Pollard for the plaintiff.—By the terms of the charter-party payment of hire was to cease in the event of loss of time by collision, and I ask the court to draw an inference that the vessel struck some floating wreckage, and that would be an accident caused by collision. Alternatively, I contend that the damage, and consequent loss of hire, was caused by "a danger of the sea," which was "mutually excepted," and I lay stress on the word "mutually," because it is unusual in a clause of this kind. It must mean that if the damage and delay was caused by a danger of the sea, no freight would be payable by the charterers, and there would consequently be a loss of hire for which the underwriters would be liable. The underwriter has contracted to pay for loss of hire for accidents within certain dates, not for loss of hire within certain dates. If I show that there was a loss of hire caused by an accident which happened within the prescribed dates that is sufficient. In *Furneaux* v. *Bradley* (1 Park. Ins. 365) the ship was damaged within the time of the policy, but the condition of the ship could not be ascertained until after the expiration of the policy, the question was whether there was a total loss by the accident, and it was held a partial loss only. He also referred to Phillips on Insurance, 3rd ed. p. 684.

Barnes for the defendant,—I do not dispute the law referred to, but the distinction is that those are policies on ships. The whole of the freight which was at risk within the time specified in the policy was paid, and the underwriters were not liable for anything else. The plaintiff had insured something at risk during these periods, and nothing outside. [MANISTY, J.—The clause in the charter-party provides that loss of hire is to cease if the vessel becomes incapable of steaming or proceeding for more than forty-eight working hours, and that must mean from the time of the accident.] Yes; that must be the true construction of the charter-party, and, as a matter of

fact, the vessel was not incapable of proceeding, and was on her voyage for some months afterwards. He cited

Havelock v. *Geddes*, 10 East, 555;
Ripley v. *Scaife*, 5 B. & C. 167.

GROVE, J. (having stated the facts).—It was argued by Mr. Pollard on behalf of the plaintiffs, from what I will call the main point of the case, that although no damage was done, and no freight was prevented being earned during the particular period of the six months from the 15th April to the 14th Oct., yet as the damage which was subsequently discovered was due to an accident between those two dates, and was also within the period of the charter-party, which did not expire until the 21st Dec. 1881, that the underwriters were liable. It was also argued that the damage was caused by a collision, and therefore came within clause 6 of the charter-party referred to as the clause for damage, within which alone the underwriters would be responsible on their policy. Thirdly, it was argued that as this was a danger of the sea, and of navigation, and as such danger was mutually excepted in the charter-party, the parties contemplated no payment of freight during the time arising from such accident; that there was a loss of freight to the shipowner, and that therefore the plaintiffs, who were the shipowners, had a right to recover upon this policy of insurance.

I am of opinion, as I have said, that the defendants are entitled to judgment, and I may say I entertain that opinion upon all the three points, but more especially upon the first point, which goes to the root of the whole matter.

I am of opinion that this, being a time policy, was a policy intended to meet the injury by loss of freight during the prescribed period—namely, from the 15th April to the 14th Oct. 1881. Mr. Pollard's argument is that as the words are to pay loss of hire which may arise from accidents occurring between the 15th April and the 14th Oct., and as this accident occurred during that time, it does not matter whether the damage occurred during that time, provided it occurred within the duration of the charter-party. His argument is that, if it were otherwise, the language would have been, "to pay a loss of hire not exceeding, &c., which may arise between the 15th April and the 15th Oct." Mr. Pollard contends, further, that there would be no reason, if such were the intention of the policy, to use the words "For accidents occurring." It appears to me there is a sufficient reason. The underwriter does not intend to be liable, as I construe this clause, for anything else but for accidental damage occurring; therefore, there is a sufficient reason for inserting the words "for accidents occurring during this period." If it were to be said, as contended by Mr. Pollard, that the defendants are liable for subsequent damage caused by an accident within the prescribed period, although no freight was lost during that time. In that case the underwriters would incur an unknown liability for the whole period of the charter-party, and there is nothing to show why the period of the accident should be limited between the 15th April and the 14th Oct. What is a time policy of this sort generally directed to? It is a limitation of period by which the insurers know that their liability is limited by the two termini of the period, and if they are to incur contingent liability for a matter, the fundamental cause of which occurred during that period, and the effects of which are not perceptible or injurious, or do not occasion any risk or any loss against which the parties may be supposed to insure during that period, it becomes a vague indefinite matter, and one would not construe a policy in such a sense unless the words were so inevitably clear that one could not come to any other conclusion. Now, with regard to a time policy and the nature of the risk, Mr. Arnould says, at page 350, "the two extremes of the time are the termini of the risk, and the adventure begins and ends with the term wherever the ship may then happen to be, and whether or not the object of the voyage be accomplished or not. The risk once begun under a time policy necessarily ceases when the time in the policy comes to an end. Upon the instant that the policy attaches the insurer's right to the full premium is complete and the right of the insured for full indemnification in case of loss, therefore there is no suspension of the risk. Whether the ship be at sea or in port it continues to run until the expiration of the period insured.' Mr. Arnould there is rather contemplating a policy on the ship or possibly on the cargo, but is there any reason why this should not apply to a policy on freight? The object of the underwriter is to limit himself to a certain time, and the object of the party effecting the insurance is to narrow as much as possible the premium they have to pay, so as to enable them to insure what they possibly might think the most dangerous time without paying a higher premium for an insurance during the whole voyage, or the whole period of the charter-party. Probably here the assured thought that the dangerous time in the Straits of Magellan, or that the period during which the ship would be passing through the Straits of Magellan would be between April and October, and this, as we all know, is a dangerous passage, a narrow channel which is liable to storms, and consequently to accidents to ships, and they have limited their policy to that period, and thereby pay a much less premium than if they effected a policy for the whole period of their charter-party upon the ship. Then is not that a reasonable construction of the clause? What is the policy? They are "to pay loss of hire not exceeding 2000*l.*, which may arise for accidents," that is an inaccurate expression, I suppose it means, "from accidents occurring between the 15th April and 15th Oct." The limit of time applies, to my mind, as much to the words "loss of time," as to the words "for or from accidents," and the reason for inserting the words, "for accdents," is that it is a policy to meet accidents, and not to meet other matters, which could not be called other accidents; therefore, there is a full reason for inserting the word "accidents." I am of opinion, therefore, and it appears to me to be the only reasonable construction I can give to the matter, that this policy was a policy upon risk of freight during a period beginning the 15th April and ending the 14th Oct. As there was no freight lost during that period—the freight was paid the whole of the time—the policy did not attach, and, therefore, the underwriters are not liable.

I am also in favour of the defendant on the other two grounds. According to the ordinary

meaning of language, which we must apply to these matters, this could not be said to be a collision, this was, as far as one can form an opinion, the running upon a bank, either of sand or ground, something which is said to be soft, not a hard rock, but which it turned out injured the keel of the vessel. If you call that a collision, stranding is a collision, everything in which a vessel meets with an impediment, or strikes a rock or the ground is a collision. In the ordinary acceptation of language would you call that a collision? No case has been cited by Mr. Pollard which goes anything like as far as that. He has referred to a case where it was held that a vessel coming in and striking against a pier or a dock was a collision. That is a very different case to this. Collision appears to me to contemplate the case of a vessel striking another ship or boat, or floating buoy, or other navigable matter, something navigated, and coming into contact with it. It, so to speak, imports as it were two things. It may be that one is active and the other is passive, but still in one sense they each strike the other. That does not apply to striking on the ground at the bottom. I am, therefore, of opinion on that point the plaintiff fails, though it is unnecessary to decide that, if I am right on the first and main point.

I also think there is no exemption of freight in this case within the exception in the general words of clause 6 of the policy, "accidents" of seas and navigation always excepted. I am, therefore, of opinion that the defendant is entitled to my judgment.

MANISTY, J.—I am of the same opinion as to the result.

The charter is really for six calendar months, commencing on the day the vessel was put at the disposal of the charterers at Cardiff, that was the 21st March 1881, so that the charter is absolute for six months commencing 21st March and, of course, ending 21st Sept. 1881. Then there is an option given to the charterers to extend the period either for three or six months. Now, that the charter was known to the underwriter is obvious, because reference is made to it in the policy of insurance, and bearing in mind, therefore, that the terms of the charter are six months, ending 21st Sept., with the option of extending it, really and truly is the same as if another charter had been entered into, so far as freight is concerned. What then is the risk which the underwriter undertook and what was the subject-matter of the policy. The subject-matter is chartered freight and the term of the risk is six months from 15th April to 14th Oct., not the six months relating to the charter-party, but it is a time policy for six months upon chartered freight during the period. Those being the termini in the policy and the extent of the risk, let us see what the risk was. It was to pay only loss of hire not exceeding 2000*l*., which may arise in clause No. 6 of the charter-party. If it stopped there, I suppose there would be no doubt that that would confine it to the loss of hire mentioned and arising in clause 6, but then it goes on, "for accidents occurring between 15th April and 15th Oct." But then the words which follow that are, to my mind, very significant, and show exactly why this was introduced about accidents —for accidents occurring between those times, "but free of claim arising from deficiency of men." Now, if you turn to the charter-party, you see exactly what is meant. I, the underwriter, will be answerable for loss of hire that is caused by accident, but I will not be liable for loss owing to deficiency of men. The charter-party, clause 6, is: "That in the event of loss of time by deficency of men, collision, break-down of engines, and the vessel becomes incapable of steaming or proceeding for more than forty-eight working hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage. Should any difference arise between the parties to this contract, either in principle or detail, the same shall be referred for arbitration at London to two persons, one to be chosen by each contracting party, with power for them to call in a third, and a decision of a majority shall be final and binding (The acts of God, the Queen's enemies, fire, and all and every other danger and accidents of machinery, or of the seas, rivers, and navigation of whatever nature and kind always mutually excepted). That in the event of the steamer being lost the money advanced upon the current month shall be returned in proportion to the number of days which she may not have completed of that month." So that when the underwriter said: "I will not be subject to a claim arising from deficency of men," he meant this, I will only be liable for accidents such as collision, break-down of engines, or loss of the steamer. It seems to me that that entirely explains how it came to pass that they inserted the words "to pay loss of hire for accidents occurring." If that is so, clause 6, with the exception of what Mr. Pollard very much relies upon, namely, the general words about the acts of God, and so on, is clear and distinct, and I consider that it is pretty well settled law that, if there is an express covenant or an express stipulation as to when the hire is to cease, the hire of the ship or anything else, you do not imply that it is to cease, in any other event. An express agreement that it shall cease in certain events excludes the implication that it is to cease in other events. That is a general principle applicable to all deeds and policies, and charters, and everything else. Then if that be so, the case, as it seems to me, lies in a very narrow compass. I entirely agree that this was not collision, it was not the break-down of engines, it was not the loss of the ship. These are the cases which are specified in clause 6, and it was not one of them. But then, Mr. Pollard says, there is this other clause in the charter-party, namely, dangers and accidents of the seas are mutually excepted. Then the agreement is, that that being so, any danger of the sea which caused any delay would entitle the charterer to say, "I am exempted from payment of freight during the time of that delay." That is entirely and absolutely inconsistent with this express clause, that the delay must be for forty-eight working hours. That again would be a strong argument to show that those general words were never meant to be applicable to the cause which arose. But it seems to me that those observations go a long way to show that the defendant is not in the wrong. If the specified cases in the 6th clause would apply in any other sense, namely in the sense of its being a

collision, then do they apply to this case? It is in the case of a collision which renders the vessel incapable of steaming or proceeding until she is again in an efficient state to resume her voyage. That was not this case. It never did prevent her steaming or proceeding for a single hour. She did proceed, and for several months proceeded, from June down to the 28th Nov.

I quite agree with my brother Grove, that the risk of the policy only continues during the period from the 15th April to the 15th Oct., and during that period there was no loss. I do not think it ever entered the minds of either party that if at some subsequent time there should be a loss owing to an accident which occurred during the time of the existence of the policy, and that time only brought into existence by an extension of the period for which the charter was made, it is the same as if there had been a new charter, as in this case the six months had run out and the charter had not been extended, and then a new charter had been entered into, so that there was no chartered freight for three months more. The argument must go to the length of saying that although the charter ran its course and expired, and there was no loss, yet there was during the existence of another charter, and during another period when there was chartered freight, the discovery of an accident which occurred during the currency of the policy. It seems to me that would be a most extraordinary construction to put upon this policy of insurance. For these and other reasons which I will not go into it seems to me that the defendants are entitled to our judgment.

Lopes, J.—I am clearly of opinion that the defendants are entitled to judgment in this case.

It is an action brought by shipowners against underwriters on a policy of insurance, and it is most material to see what the risk is in respect of which the insurance was given. The two clauses in the policy that are material for the purposes of ascertaining what the risk was appear to me to be these:—First, that the insurance effected was at and from and for and during the space of six calendar months, from the 15th April to 14th Oct. 1881, both days inclusive, and was on 1200*l.* chartered freight, to pay only loss of hire not exceeding 2000*l.*, which may arise in clause 6 of charter-party, for accidents occurring between 15th April and 15th Oct., but free of claim arising from deficiency of men. Those are the two clauses from which it is to be inferred what the risk insured against was. Now, it appears to me that the risk which the underwriters undertook was this, the loss of chartered freight between the 15th April and 15th Oct. The thing at risk in that policy was the chartered freight between those days. Therefore, in order to entitle the plaintiffs to recover in this action, if that is the true construction of the policy, there must have been a loss of chartered freight arising between the 15th April and the 15th Oct. in respect of an accident occurring between those two dates. Two things are necessary therefore; there must be a loss of the chartered freight between those two dates in respect of an accident occurring between those two dates. Now, it is true that the accident occurred between those dates; but it is also true that there was no loss of any chartered freight between those two dates, and that being as I consider the true construction of this charter-party, on that ground alone the plaintiffs would not be entitled to recover, because every penny of the chartered freight which was earned between those two dates had been paid.

Then, with regard to the other point, putting aside the question of time—the 15th April and 15th Oct.—has there been any cesser of the payment of the chartered freight such as is contemplated by the charter-party and covered by the policy? It appears to me that it is perfectly clear that there has not. I do not desire to go through the reasons which have been already so fully given by my brothers, but clearly nothing has happened which was provided for in the earlier part of clause 6 of the charter-party.

Then it is said the general words which appear further on in the clause applied. Now, it is perfectly clear law that those words would not create a cesser of payment of freight by themselves, and unless you can connect those general words with the earlier part of clause 6 they would be absolutely ineffectual for that purpose. It appears to me that the general words constitute an independent clause applicable to other purposes, and cannot be connected in any way with the earlier part of clause 6. Therefore, on that ground also, I think the defendants would be entitled to succeed.

Judgment for the defendant with costs.

Solicitors for the plaintiff, *Lyne* and *Holman*.
Solicitors for the defendant, *Parker, Garrett*, and *Parker*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, May 5, 1885.

(Before Sir James Hannen and Butt, J.)

THE PRINCESS. (*a*)

ON APPEAL FROM THE GREAT YARMOUTH COUNTY COURT.

Collision—Consequential damage—Rotten wood—Board of Trade.

Where a ship is damaged by collision and on opening her up to effect the repairs rendered necessary by the collision, certain parts of her not injured by the collision are found to be rotten and to require renewing, the cost of such renewal cannot be charged to the collision damage, although such parts but for such opening up would have lasted for some years.

This was an appeal by the defendant from a decision of the judge of the County Court of Norfolk (Admiralty Jurisdiction) in a collision action *in rem* instituted by the owners of the dandy trawler *Speedwell* against the fishing smack *Princess*.

The action was instituted on the 7th Jan. 1885. Prior to the institution of the action, the defendant admitted his liability, and tendered to the plaintiff the sum of 70*l.*, in satisfaction of his claim. The plaintiff refused to accept the tender, which was paid into court on the 10th Jan. 1885. On the action coming on for trial on the 13th Feb. 1885, the judge of the County Court,

(*a*) Reported by J. P. Aspinall and Butler Aspinall Esqrs., Barristers-at-Law.

after hearing counsel and solicitor for the plaintiff and defendant respectively, made an order that it should be referred to the registrar to assess the amount of the damages, with a direction that, if any point of law was raised at the reference, the registrar should reserve it for the decision of the County Court judge. In accordance with this order, the registrar, after hearing evidence, found the following facts :—

1. That the damage caused to the *Speedwell* by the collision between her and the *Princess* on the 28th Sept. 1884 was surveyed soon after she returned into Yarmouth Harbour by Mr. Edmund Fleming, the surveyor agreed upon by both parties, and that in accordance with his survey, dated the 6th day of Oct. 1884, the *Speedwell* was docked, and the repairs specified in the survey were carried out by Messrs. Fellows and Son.

2. That while such repairs were being carried out, certain defects and deterioration in the timber heads, not visible externally, were discovered, and Mr. Paxton, the local surveyor to the Board of Trade, in the course of his official duties, when visiting Messrs. Fellow's shipbuilding yard, inspected the *Speedwell*, and called the attention of the plaintiff, and also of Mr. J. H. Fellows and his foreman, to the timber heads, intimating to them that the parts which were defective or deteriorated must be replaced by new work before she could go to sea again, and if such repairs as he required had not been carried out, it was within the knowledge of the plaintiff and of Mr. J. H. Fellows that the Board of Trade would have had power to detain the *Speedwell* under sect. 6 of the Merchant Shipping Act 1876.

3. That Messrs. Fellows and Sons accordingly, with the knowledge and approval of the plaintiff, carried out such additional repairs as were necessary to satisfy the requirements of the Board of Trade surveyor, and to put the *Speedwell* into a fit and proper state to go to sea again, and in accordance with the usual course of business in such cases, but without any instructions from the plaintiff and without his knowledge, they entered the several items of the repairs in their day-book and ledger under two separate accounts, one being headed "damage account," which amounted to a total of 37*l.* 16*s.* 2*d.*, and included only the repair of the damage actually caused by the collision, and the other being headed "owner's account," which amounted to a total of 35*l.* 15*s.* 8*d.*, and included the repairs rendered necessary by the deterioration of the timber heads; but, after the work was completed, Messrs. Fellows and Son, by the express desire of the plaintiff, furnished him with one bill for the entire work, amounting to 73*l.* 11*s.* 10*d.*

4. That the defects and deterioration in the timber heads were not in any way caused by the collision, but resulted either from bad workmanship when the *Speedwell* was repaired in 1878 or from ordinary wear and tear since that date.

5. It was, however, contended on behalf of the plaintiff that the additional repairs were rendered necessary in consequence of the collision, although the defects were not caused thereby, inasmuch as it was established in evidence that the *Speedwell* was in good condition, capable of doing the work of a first-class fishing boat, and might reasonably have been expected, notwithstanding these defects, if the collision had not occurred, to have pursued her ordinary employment for four or five years longer without needing any substantial repairs; but, in consequence of her port side being open to repair the damage actually caused by the collision, the other latent defects were disclosed and brought to the official notice of the Board of Trade surveyor, and the plaintiff was consequently forced to incur the expense of additional repairs which he would not otherwise have been subjected to.

6. The point therefore which I reserve for the decision of the judge is, whether, under the above circumstances, the plaintiff is entitled to recover the whole cost of the repairs done to the *Speedwell* or only the cost of repairing the damage actually caused by the collision.

On the question of law raised in the registrar's report coming before the learned County Court judge, his Honour decided in favour of the plaintiff, saying, "that the principle on which he had to decide the case was clearly established. The principle he had acted on in cases of collision on the highway had been that the wrongdoer, if he ran into a neighbour's carriage and did damage, and in its repair it was made substantially new, it was not his fault but the fault of the wrongdoer. He had held that the plaintiff was entitled to all the costs incurred in making the carriage what it was at the time of collision. He should act in the same manner with regard to collisions at sea. The principle was clearly stated in the cases which had been referred to. What were the facts in the case? This vessel was prosecuting her business on the fishing station. She was, as was found by the report, and, as was established in evidence, in good condition, and capable of doing the business of a first-class fishing boat, and could have pursued her ordinary business for four or five years but for the collision. In his judgment she had a right to be put in that condition again; and if in doing so something arose not anticipated at the time of collision, so much the worse for the defendant. The plaintiff was entitled to have the vessel put in a condition to render her fit for the purposes required. When the vessel was stripped after the collision, it turned out that some of her timber heads were in such a condition that she could not go to sea until they had been repaired. She was at sea when she was struck, and could have continued to carry on her business four or five years without repairs. Why should not the plaintiff pay for making her fit to go to sea again? The defendant must put the vessel into the condition she was when she was collided with, and, cost what it might, the defendant would have to do it."

From this decision the defendant now appealed.

Bucknill, for the defendant in support of the appeal, was stopped.

Sir *Walter Phillimore* for the respondent.—The decision of the learned County Court judge is right and should be affirmed. The same principle was acted upon by Dr. Lushington in the case of *The Egyptian* (8 L. T. Rep. N. S. 776; 2 Mar. Law Cas. O. S. 56). Had it not been for the collision, the necessity to replace the timber heads would not have arisen for some four or five years. *Primâ facie*, a wrongdoer is liable for all the consequences of his wrongful act. Even if only a part of the damage is attributable to the wrongdoer, and that part cannot be distinguished from the rest, the wrongdoer is responsible for the whole.

THE PRESIDENT (Sir James Hannen).—We think the decision of the learned County Court judge cannot be supported. The point here raised was very forcibly commented on by Dr. Lushington in the case of *The Alfred* (3 W. Rob. 232, 239), when he says that if shipowners attempt to include repairs not rendered necessary by the collision in the amount of their damages, they would be guilty of fraud. In the present case the damage occasioned by the collision can be easily discriminated. All that the report shows as to the rotten timber heads is that, in consequence of the collision, the Board of Trade inspector was given the opportunity of seeing that it was his duty to require the owner of the *Speedwell* to do further repairs than those rendered necessary by the collision. To charge such repairs upon the defendant would be like

the case of a man who, having been knocked down by a cab, is told by the doctor that he is suffering from a disease which rendered an operation necessary, and claims from the cabowners, not only compensation for the accident, but also the doctor's fee for the operation. We are clearly of opinion that we cannot affirm this decision. As the defendant has paid 70*l.* into court, which is more than the amount of the repairs for which he is liable, we must find for the defendant.

BUTT, J., concurred.

Appeal allowed.

Solicitors for the plaintiff, *Ingledew, Ince,* and *Colt.*

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

HOUSE OF LORDS.

March 19, 20, 23, *and May* 12, 1885.

(Before Lords BLACKBURN, WATSON, and FITZGERALD.)

SVENDSEN *v.* WALLACE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

General average—Perils of the seas—Putting into port to repair—Expenses of reloading cargo—Particular average.

Where a vessel laden with cargo is compelled to put into port to repair an injury caused by perils of the seas, the expense of reloading the cargo, necessarily unloaded for the purpose of repairing the injury, and the expenses incurred for port charges, pilotage, and other charges subsequent to reloading, are not chargeable to general average.

A ship sprang a dangerous leak while on a voyage, and it become necessary, for the safety of ship and cargo, to put into a port of refuge to repair; and when in port it was found necessary to unship the cargo in order to repair the ship.

Held (affirming the judgment of the court below), that the expenses of reloading the cargo after the repairs had been completed were not general average expenses.

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R. and Bowen, L.J., Baggallay, L.J. dissenting), reported in 5 Asp. Mar. Law Cas. 232; 50 L. T. Rep. N. S. 799; 13 Q.B. Div. 69, reversing a judgment of Lopes, J., reported in 48 L. T. Rep. N. S. 795; 5 Asp. Mar. Law Cas. 87; 11 Q. B. Div. 616.

The action was brought by the appellants as owners of the ship *Olaf Trygvason* against the respondents, the cargo owners, to recover a general average contribution. The defendants disputed their liability in respect of charges for reshipping the cargo, and for outward pilotage and port dues at St. Louis in Mauritius, where the ship had been obliged to take refuge for repairs, in consequence of having sprung a leak on a voyage from Rangoon to Liverpool.

The facts are very fully set out in the judgment of Lord Blackburn, and at p. 87 of these Reports.

C. Russell, Q.C., *Cohen,* Q.C., and *Warr* appeared for the appellants, and contended that the question depended upon whether the decision in *Atwood* v. *Sellar* (4 Asp. Mar. Law Cas. 153; 41 L. T. Rep. N. S. 83; 4 Q.B. Div. 342; on appeal. 42 L. T. Rep. N. S. 644; 4 Asp. Mar. Law Cas. 283; 5 Q. B. Div. 286) governs this case. The Court of Appeal distinguished it, but we say that it applies, and that the going into a port of refuge, landing, warehousing, and reloading the cargo, are all one continuous transaction, which gives rise to general average. The expenses may be said to be incurred when the steps which necessarily lead to them have been taken:

The Copenhagen, 1 C. Rob. 289.

The deviation to a port of refuge in consequence of a leak is as much an "extraordinary sacrifice" as cutting away a mast, and there is no other distinction or difference in principle between this case and *Atwood* v. *Sellar* (*ubi sup.*). See

Da Costa v. *Newnham,* 2 T. Rep. 407;
Job v. *Langton,* 6 E. & B. 779;
Plummer v. *Wildman,* 3 M. & S. 482;
Power v. *Whitmore,* 4 M. & S. 141;
Hallett v. *Wigram,* 9 C. B. 580;
Moran v. *Jones,* 7 E. & B. 523;
Stuart v. *Pacific Steamship Company,* 1 Asp. Mar. Law Cas. 528; 2 Asp. Mar. Law Cas. 32; 27 L. T. Rep. N. S. 820; 28 L. T. Rep. N. S. 742; L. Rep. 8 Q. B. 88, 362;
Whitecross Wire Company v. *Savill,* 46 L. T. Rep. N. S. 643; 8 Q. B. Div. 653,

which all favour our contention.

Abbott on Shipping, 5th ed.; 3 Kent's Commentaries, p. 235; 2 Arnould on Insurance, 2nd ed., s. 335; Lowndes on General Average, 3rd ed., pp. 106, 110, 111; and Phillips on Insurance, ss. 1320 1326, were also referred to.

Webster, Q.C., *Myburgh,* Q.C., and *Barnes,* for the respondents, argued that much depended on whether the case was to be decided on general principles, or on the practice of average adjusters. The respondents rely on principle and custom. On principle the first cause must govern all the allocation of expenses, according as it is a general average sacrifice or sea damage causing a particular average loss; or the expenses must be incurred to prevent the existence of a common danger. *Atwood* v. *Sellar* (*ubi sup.*) does not extend to this case, or, if it does, it is to that extent wrong. The ship is repaired for the benefit of the owner, and it may earn freight; it is not necessarily for the benefit of the cargo owner that the goods should go on in the same bottom. As to the duty of the shipowner to repair, see

Moss v. *Smith,* 9 C. B. 94;
Benson v. *Chapman,* 2 H. L. Cas. 696;
Benson v. *Duncan,* 3 Ex. 644;
Shipton v. *Thornton,* 9 A. & E. 314;
Abbott on Shipping, 5th ed., p. 241;
Wilson v. *Bank of Victoria,* 3 Mar. Law Cas. O. S. 449; 16 L. T. Rep. N. S. 9; L. Rep. 2 Q.B. 203;

and the judgment of Cockburn, C.J. in *Atwood* v. *Sellar* (*ubi sup.*), citing *Worms* v. *Storey* (11 Ex. 427) and *De Cuadra* v. *Swann* (16 C. B. N. S. 772), but he goes beyond any previous authority. The master is bound to repair the ship if necessary, acting as agent of the owner to enable him to earn his freight. The dividing line between general and particular average is when the goods are in safety. The argument for the appellants loses sight of the shipowner's obligation to the cargo owner. *Da Costa* v. *Newnham* (*ubi sup.*) is no doubt in favour of the appellants, but it cannot now be considered law. The expenses incurred after the cargo is in safety are not the subject of general average. They are not the consequence of putting into the port of refuge.

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

The expenses of landing and storing the goods are not properly general average charges, and should be disallowed on strict principle, but they have been allowed by custom: (see Benecke on Marine Insurance p. 191.) We rely on *Power* v. *Whitmore* (*ubi sup.*) so far as it modifies *Plummer* v. *Wildman* (*ubi sup.*). When the goods are once in port the principle of the decision in *Atwood* v. *Sellar* (*ubi sup.*) ceases to apply. See

Hall v. *Janson*, 4 E. & B. 500;
Job v. *Langton* (*ubi sup.*);
Walthew v. *Mavrojani*, 3 Mar. Law Cas. O. S. 382; 22 L. T. Rep. N. S. 310; L. Rep. 5 Ex. 116;
Harrison v. *Bank of Australasia*, 25 L. T. Rep. N. S. 944; 1 Asp. Mar. Law Cas. 198; L. Rep. 7 Ex. 39,

on the principles of general average. Simply putting into a port of refuge does not give rise to a general average, unless it is to avoid a common danger, and then it ceases when the danger ceases. The dividing line is to be drawn there. A particular average loss making it the duty of the master to go into port cannot give rise to a general average contribution. See

The Rona, 5 Asp. Mar. Law Cas. 259; 51 L. T. Rep. N. S. 28.

They also cited

Hallett v. *Wigram* (*ubi sup.*);
Birkley v. *Presgrave*, 1 East, 220.

Cohen, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 12.—Their Lordships gave judgment as follows:—

Lord BLACKBURN.—My Lords: The question intended to be brought before this House is raised in a somewhat unusual way. The appellants, plaintiffs below, are the owners of a vessel, the *Olaf Trygvason*. The nationality of the vessel is immaterial. She took on board at Rangoon a cargo of rice. A bill of lading for the whole cargo was signed, of which the material part is as follows: "Shipped in good order and well conditioned by the Bombay Burmah Trading Corporation Limited in and upon the good ship called the *Olaf Trygvason*, now riding at anchor in the Rangoon river, and bound for Scilly, Falmouth, Plymouth, or Cowes for orders. 13,583 bags cargo rice to be delivered in the like good order and well conditioned, at the port of discharge (the act of God, the Queen's enemies, fire, and all and every other dangers and accident of the seas, rivers, and navigation of whatsoever nature and kind excepted) unto order or to its assigns. Freight for the said goods payable as per charter-party." The ship was ordered to Liverpool. The respondents, defendants below, are merchants in London who purchased the cargo of rice and became assignees of the bill of lading. On the arrival of the ship at Liverpool the respondents, as holders of the bill of lading and consignees of the whole cargo, were entitled to have the cargo delivered to them on discharging the lien of the shipowners. But the captain had a lien on it, not only for the freight, as to which there was no dispute, but also for the payment of such disbursements as formed a charge on the cargo, as to the amount of which there was and is a dispute, and also for any amount which the cargo had to contribute to general average, as to the amount of which also there was and is a dispute. This often occurs, and it gives rise to a difficulty which is well expressed in the preamble to the average bond signed in this case: "Whereas the said ship lately arrived in the port of Liverpool, on a voyage from Rangoon, and it is alleged that during such voyage she met with bad weather, and sustained damage and loss, and that sacrifices were made and expenditure incurred which may form a charge on the cargo or some part thereof, or be the subject of a general average contribution, but the same cannot be immediately ascertained, and in the meantime it is desirable that the cargo should be delivered." The mode in which this difficulty is commonly dealt with has at least for more than eighty years (see *Myer* v. *Vander Deyl*, in 1803, Abbott on Shipping, 5th ed. p. 362) been that the captain agrees to give up his lien on payment of the freight payable on delivery, and the various consignees of the cargo agree, in consideration thereof (and, if required, give security), to pay to the owners of the ship the proper proportion of any particular or other charges which may be chargeable on their respective consignments, or of any general average to which the owners of such consignment as such may be liable. As in the present case there was only one owner of the whole cargo, and no dispute as to either the quantity of the cargo or the amount of the freight, this left only two things to be determined, the amount of the special charges on the cargo which were payable by the respondents, and the amount of the general average charges of which the respondents have to pay the proportion payable in respect of the cargo and of the freight paid in advance at Rangoon, which in effect was a part payment of the price of so much of the cargo, the proportion payable in respect of the ship and of the freight not yet paid being payable by those interested in them. The facts as to what took place on the voyage, what were the disbursements actually made, and under what circumstances they were made, cannot be proved by legal evidence without much delay and expense, but at least, when there is no suspicion of fraud or falsehood, the ship's papers enable an average adjuster of competent skill to approximate to them sufficiently to decide the case as an arbitrator, if the parties choose to give him authority so to act, or, if they do not so authorise him, to apply the principles generally acted on by average adjusters, so as to produce a practical result on which the parties can, and generally, if the average adjuster is of repute, do act, as having the moral weight of an award, though either party may, if they please, question his findings, either of fact or of law, for it is not an award. In the present case two firms of repute, Lowndes and Ryley, of Liverpool, and W. Richards and Son, of London, were employed to prepare adjustments. Each, as is usual, prefixed to the statement extracts from the ship's papers, showing the state of facts on which they acted. These are almost identical, and I think, looking at the two adjustments, they are agreed up to a certain point, and, if it is open to me to form my opinion from the ship's papers, I should say that so far no reasonable person could differ from them.

The vessel sailed from Rangoon on the 30th March 1880. She took the ground at low tide, but got off at high tide, and proceeded on her voyage after this accidental stranding. Till the 19th May she continued on her voyage, and on that

day she deviated from the course of the voyage and ran for Mauritius. During these seven weeks she encountered strong winds and heavy seas, which caused the ship to strain, and labour, and make water. There was nothing, however, beyond ordinary perils of the seas, except that some spars and canvas were sacrificed in order to erect a windmill to assist in working the pumps. The cost of replacing those, less the usual allowance of one-third new for old about 10*l.* is allowed in general average by both adjusters. But it is clear that the vessel did not run for Mauritius on account of the windmill, and, except as evidence confirmatory of the extent to which she was leaking by the 19th May, this is not material. Had the deviation not been justified by a sufficient cause it would have rendered the shipowners liable (see *Davis* v. *Garrett*, 6 Bing. 716); and therefore it is important to see what was the state of the vessel on the 19th May. Not only was she leaking at the rate of nine inches an hour, but when she came to anchor on the 22nd in the harbour of St. Louis she was found in the harbour to be making 10½in. of water per hour, so that, though there is no extraordinary weather noticed, the leak had in that day and a half increased greatly, and it was necessary to hire a considerable number of shore labourers who were employed to pump her. The surveyors, who saw her on the 22nd whilst afloat in the harbour, found her still making 10½in. an hour, and recommended the cargo to be discharged until the leak stopped, or the vessel became sufficiently lightened to be placed in dry dock. On the 4th June the whole cargo with the exception of about 100 tons having been discharged, the surveyors again examined her, and found the vessel still making 7in. of water per hour. They recommended the vessel to be put in dry dock for further examination of her bottom, which was done. It seems impossible to come to any other conclusion than that the vessel, though perhaps she might have reached her destination with such a leak, would have been in great danger, and consequently that it was quite justifiable to run into St. Louis; nor can it, I think, be disputed that everything which was done after the vessel came into harbour until the vessel was removed into the dry dock was reasonably done with a view to the common safety of ship, cargo, and freight, which, while such a leak existed, were not in safety even in the harbour. Both adjusters must have agreed on this, for I find that each of them allows as general average all the extra expenses up to that date, including port dues and pilotage inwards, the hire of the labourers who pumped, the expenses of the survey, and the expense of landing the portion of the cargo unshipped between the 22nd May and the 4th June, as well as the cost of replacing the spars, &c., sacrificed to make a windmill, amounting, in the whole, in round numbers to nearly 300*l.* to general average. And if that had been all there would have been no difference between them, and probably no dispute between the parties. But a difference, which anyone who has read the case of *Atwood* v. *Sellar* (41 L. T. Rep. N. S. 83; 4 Asp. Mar. Law Cas. 153; 4 Q. B. Div. 342; on appeal, 4 Asp. Mar. Law Cas. 283; 42 L. T. Rep. N. S. 644; 5 Q. B. Div. 286), and was aware that the members of the firm of W. Richards and Sons are leading members of the association mentioned in the fifth paragraph of the special case there stated, and that Mr. Lowndes was the eminent average adjuster mentioned in the sixth paragraph, must have anticipated, arose. Messrs. Lowndes and Ryley charged to general average the expenses of warehousing and insuring the cargo when on shore, amounting in round numbers to 190*l.*, and the expenses of reshipping the cargo, amounting in round numbers to 446*l.*, and the outward dock dues, amounting in round numbers to 20*l.*, and the outward pilotage, about 5*l.*, to general average. They charge about 30*l.* as special average to cargo, and nothing to freight. Messrs. W. Richards and Sons charged the expenses of the cargo on land, amounting in round numbers, as already stated, to 190*l.*, to cargo, as well as the smaller item of 30*l.*, as to which there is no controversy; and the other items which Messrs. Lowndes charge to general average, amounting in round numbers to near 500*l.*, to freight. Both agree in charging the expenses of taking the ship into dry dock, and the much more heavy expenses of repairing the vessel, amounting altogether to 1866*l.*, to ship and owners, so that there is no dispute as to those items. There is some difference apparently as to the value put upon the ship as a contributory subject into which it is not necessary to inquire. The result is, Lowndes and Co., apportioning the general average as they made it out amongst the subjects contributory as they valued them, made Messrs. Wallace, as owners of the cargo and the prepaid freight, liable to pay as contribution to general average 740*l.*, and in respect of particular average 30*l.*, in all, 770*l.* I omit shillings and pence. Messrs. Richards and Sons made them liable to pay as contribution to general average 467*l.*, as particular average on the cargo 215*l.* (including the 30*l.*), in all 681*l.* I again omit shillings and pence. Messrs. Wallace paid that sum, and for the difference between it and 770*l.* this action was brought.

There were two issues joined, one on a plea that there was a custom so general as to have the effect of being incorporated in all contracts by which the rule of practice of adjusters contended for by the respondents was established, which was denied. The other was a general plea of payment before action of 681*l.* 13*s.* 1*d.*, to which the plaintiffs replied that they had received it, but that it was not enough to satisfy their claim. Both issues came on to be tried before Lopes, J. and a special jury. The judge ruled that there was no evidence fit to be left to the jury in support of the custom. On this there has been no appeal to this House. The jury were discharged on the issue as to the sufficiency of the payment, and that was reserved for further consideration. No evidence was called on this issue, and nothing was said as to how the facts were to be ascertained if it became material to ascertain any of them not expressly admitted. I do not think it was supposed, by either side, certainly, from the terms of his judgment, not by Lopes, J., that anything could depend on the special circumstances; it was not until in reading the judgment of Bowen, L.J. I came upon this opinion, "The question whether extraordinary expenditure after the entry into a port of refuge is rightly chargeable to general average necessarily depends on the circumstances of each case," and on further consideration agreed in it, that I became aware of the importance of having

some means of ascertaining what the circumstances were. Without some such power no judgment except a *venire de novo* could be given, unless it could be laid down as a general proposition of law, either that no expenses of warehousing the cargo and afterwards reshipping it in a port of refuge can ever be general average expenses, or that they must always be so. I am not prepared to assent to either proposition. Any State may, by its Legislature, enact that within its territories the law shall be either way. Judging merely from the language of their codes (which, however, is often apt to mislead, unless construed with reference to their law and usage), I should say that some foreign nations have enacted in opposite ways. There is, however, no English enactment on the subject. I have no doubt that both parties would, if it had occurred to anyone that it was necessary or even desirable so to do, have readily agreed to give the court power to look at the ship's papers, and, if it thought fit, draw inferences from them as an average adjuster would do. I propose to deal with this case as if such a power was given. In *Simonds* v. *White* (2 B. & C. 811) Abbott, C.J. says: "The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another shall contribute to make good his loss, is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument as upon a general rule of maritime law. The obligation may be limited, qualified, or even excluded by the special terms of a contract as between the parties to the contract, but there is nothing of that kind in any contract between the parties to this cause. There are, however, many variations in the laws and usages of different nations as to the losses which are considered to fall within this principle." The point decided in that case was that the loss was to be adjusted according to the law of the place of the destination, in that case Russia, and that the Russian adjuster was to adjust it according to the Russian law, which, of course, was to be gathered from the Russian edicts and the decisions of the Russian judicature; and that, though the ship and the parties were English, the goods owners could not recover back so much of the money as would not have been charged to them on an adjustment of average made according to the law of England. As in the present case the place of delivery was English, this is an authority, if one was required, to show that the law and usage of foreign nations, where they differ from our own, are irrelevant. But it will be observed that Abbott, C.J. expressly says that a contract might alter the whole, and in *Wilson* v. *Bank of Victoria* (16 L. T. Rep. N. S. 9; 2 Mar. Law Cas. O. S. 449; L. Rep. 2 Q. B. 203) it was intimated that a custom tacitly making it part of the contract that any particular principle should be applied might alter the whole. I think that unless it was proved that there was such a custom as to be tacitly incorporated, it could have no such effect. And I have no doubt that the issue which has not been brought here by appeal was rightly decided. I think, however, there is much force in the concluding observations of Manisty, J. in *Atwood* v. *Sellar* (*ubi sup.*). I agree with him at least thus far, that a general practice, long continued amongst English adjusters, affords strong ground for thinking that the practice is one which is not in general inconvenient, and that it throws a considerable onus on those who impugn it to show that the particular circumstances are not such as to render an adherence to the practice in that case against principle. Before proceeding further, I think it desirable to consider what is the question raised on the issue reserved for further consideration. The plaintiffs claimed the sum which Messrs. Lowndes and Ryley made payable, viz., 770*l*. The defendants had paid the sum which Messrs. W. Richards and Sons made payable by them. The issue was whether all that was really due had been paid. It is to be observed, first, that the points on which Messrs. W. Richards and Sons differ from Messrs. Lowndes and Ryley are not all in favour of the defendants. If the 190*l*. which represent the warehousing rent, and fire insurance are properly charged to cargo, the defendants have to pay the whole of it. If it is properly charged to general average, they have only to pay their proportion of it, or somewhat less than one half. That, if it stood alone, would make nearly 100*l*. more payable by the defendants. But if the 450*l*., which is the cost of reshipping, is properly charged to freight, the defendants are not liable to pay any portion of it. If it is properly charged to general average, they would have to pay about half of it. So that that item makes a difference of about 230*l*. If, in addition, the 20*l*. for the cost of going out of port is properly charged to freight, that makes a further difference of about 10*l*. It is not, therefore, necessary to decide anything more than whether these two items are, under the circumstances of the case, properly chargeable to general average or not. If they are not so chargeable, the order appealed against is right, for the defendants have paid enough, and more than enough, whether the 190*l*. is properly chargeable to cargo or not, and it is unnecessary to consider that question except in so far as it may throw light on the principles which are to guide the decision of the first and most important one. I do not think it necessary to inquire what would be the proper course if the seeking the port of refuge had been solely for the purpose of doing repairs, the cargo not being in any danger. Such a case may perhaps sometimes, though rarely, occur. Nor do I think it necessary to inquire what would be the proper course if the ship and cargo were both safe in the harbour of refuge. and the unloading of the cargo was entirely for the purpose of facilitating the repairs. Such a case seems more likely to happen than that first supposed. I think, on examining the two adjustments, and exercising the power which I have assumed to be given, there can be no doubt that the cargo on board the ship, leaking to the extent which she did, was not safe even in harbour until the ship was so far lightened that she could be taken into dry dock. Should the expense of reloading her, after the repairs were made, be charged to freight, the goods having been taken out under such circumstances? I think it should. I am afraid I have not understood the reasoning on which Cockburn, C.J. in his judgment in *Atwood* v. *Sellar* (*ubi sup.*) comes to a contrary conclusion. If I have, I must express dissent from it. The

ordinary contract between shipowner and merchant is, that the goods shall be carried to their destination, and shall there be delivered, unless prevented by the excepted perils. And this generally should be done in the original ship, Whenever the ship is disabled it must, in order literally to fulfil this contract, be necessary to repair the ship so far as to make her fit to carry on the cargo, and if any part of the cargo has been taken out to reship it. *Rosetto* v. *Gurney* (11 C. B. 188) was a case between the owners of corn insured from Odessa to Liverpool and their underwriters. The plaintiffs claimed for a total loss, and the underwriters paid money into court. The cargo was at Cork in a very damaged state, but by great skill, and at considerable cost, was prevented from turning into manure, and was sold at Cork, a considerable part of it being still corn. The verdict was entered for a total loss. A rule for a new trial was obtained on various grounds, one, on which it was made absolute, was that the judge had not properly directed the jury as to the effect of the extra cost of conveyance in a new bottom from Cork, the port of distress where the wheat was sold, to Liverpool, the port of destination. The Court say as to this: "If the voyage is completed in the original ship it is completed upon the original contract, and no additional freight is incurred. If the master tranships because the original ship is irreparably damaged, without considering whether he is bound to tranship, or merely at liberty to do so, it is clear that he tranships to earn his full freight; and so the delivery takes place upon the original contract."

There never was in the present case any question as to the *Olaf Trygvason* being irreparably damaged; but she was so far damaged that it was certain that there would be some delay (it turned out to be about six weeks) before the *Olaf Trygvason* was in a fit state to carry the goods on to Liverpool. And if there had been a good ship at St. Louis willing to carry the goods to their destination for less than the agreed freight from Rangoon, it might have been for the benefit of all that the goods should be shipped on that vessel at once, carried on, and delivered to the consignee without delay. Such was the course pursued in *Shipton* v. *Thornton* (9 A. & E. 314), where the original shipment was from Singapore to London in the *James Scott*. She put into Batavia in distress, and there the goods were transhipped into the *Mountaineer* and the *Sesostris*, carried to London, and there delivered to the owner of the *James Scott* at a cost less than the amount of freight which he would have earned had the goods been caried on in the *James Scott*. He delivered them to the consignee, who produced the original bill of lading by the *James Scott*. The consignee refused to pay freight at the rate in the bill of lading of the *James Scott* from Singapore to London, though he paid that from Batavia agreed on in the bills of lading of the *Mountaineer* and the *Sesostris*. The decision was, that whether or not the captain was bound to tranship he was at liberty to do so, and having done so had earned his full freight. The expense which he had incurred to earn it being certainly not general average, but I think a particular average paid by the shipowner to earn his freight. My conclusion is that if, instead of transhipping, the captain waits till the original ship is repaired, and then reships on that original ship, the cost of so doing should not be general average, but particular average to earn the full freight. Cockburn, C.J. seems to think that in all cases where the ship is disabled, whether she can be repaired or not, the original contract is dissolved, and a new one formed by law. This seems to me in direct conflict with the two decisions I have just cited; and even if it were so, I think it is somewhat in the nature of a *petitio principii* to say that one of the terms of the new contract should be that the cost of transhipment or reshipment, as the case may be, should be general average. The judgment, however, of the Court of Appeal, delivered by Thesiger, L.J., does not proceed on this ground. I have some difficulty, after reading the statement as to the grounds on which the Court of Appeal proceeded, given by Baggalay, L.J. in his judgment in the present case, in saying on what ground it does proceed. The special case in *Atwood* v. *Sellar* (*ubi sup.*) was express that the ship was injured by a voluntary sacrifice, and was thereby compelled to put in to Charleston to repair the said damage. It is not expressly said either way whether the cargo was in any danger. Baggallay, L.J., who was a party to that judgment, says that it was decided on the ground that putting into the port of refuge was necessary for the safety of both ship and cargo, and that he at least thought that it was immaterial what was the cause of that necessity. Yet I think there is much reason for doubting if Thesiger, L.J. quite agreed in this. He says: "The principle which underlies the whole law of general average contribution is that the loss, immediate and consequential, caused by the 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 enable it to proceed on the 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 ceases." This is, I think, a fair statement of the argument of the respondents' counsel in the present case. Afterwards, he says, the going into port, the unloading, warehousing, and reloading, are at all events parts of one act or operation contemplated, resolved upon, and carried through for the common safety and benefit, and properly to be regarded as continuous." This was much relied on by the counsel for the respondents. If I thought it was the state of the case before the House, I should consider whether in such a case it might not fairly be argued that the whole of these operations were to be considered as parts of the expense of repairing the damage, and therefore, in a case where the cause of the damage was such that the expense of repairing it ought to be borne by all, as was the case in *Atwood* v. *Sellar*, to be borne by all; but that in a case where the cause of the damage was such that the expense of repairing it ought to be borne by the ship only, which is the present case, to be borne by the ship

only. But having come to the conclusion that such is not the state of the case before the House, I do not enter into this inquiry. Having come to the conclusion that, under the circumstances of this case, the expenses of reloading, &c., should not be placed to general average, and that being enough, if your Lordships agree with me, to show that the respondents have paid more than enough, it is not necessary to consider whether the smaller sum of 20*l.* ought also to have been charged to ship or freight, and not to general average. I agree with Bowen, L.J. in what he says, that is a more difficult question than the other. And as the amount is not sufficient to turn the scale, it is not necessary to decide it. I should think it seldom involved any sum so great as to be of practical importance, and I prefer leaving it undecided. I shall therefore move that the order appealed against be affirmed, and the appeal dismissed, the appellants to pay the costs.

Lords WATSON and FITZGERALD concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors: For the appellants, *Field, Roscoe,* and *Co.*, for *Bateson, Bright,* and *Warr*, Liverpool; for the respondents, *Waltons, Bubb,* and *Walton.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Tuesday, Feb. 10, 1885.

(Present: Lord BLACKBURN, Sir BARNES PEACOCK, Sir ROBERT COLLIER, Sir RICHARD COUCH, and Sir ARTHUR HOBHOUSE.)

MATWIEF *v.* WHYTOCK.

THE YOURRI; THE SPEARMAN. (*a*)

ON APPEAL FROM THE SUPREME CONSULAR COURT OF CONSTANTINOPLE.

Collision — River Danube — Fog — Negligence — Titre 2, *cap.* 2, *art.* 34 *of Danube Commission Rules.*

Under art. 34, *cap.* 2, *titre* 2, *of the Danube Regulations, directing that, where two steamships meet going in opposite directions, "ils sont tenus de se diriger de telle sorte qu'ils viennent tous deux sur tribord. A cet effet, le bâtiment qui remonte le fleuve doit appuyer vers la rive gauche, et celui qui descend vers la rive droite," vessels going down the river are bound to keep to the right bank, and if a vessel in a mist after sunset keep to the left bank and come into collision with another vessel, the breach of the rule is negligence.*

THIS was an appeal by the master of the Russian steamship *Yourri* from the decision of the Supreme Consular Court of Constantinople sitting in Vice-Admiralty, holding the steamships *Yourri* and *Spearman* both to blame for a collision in the river Danube.

The collision occurred on the 9th Dec. 1882.

On the 20th Dec. 1882 the master of the *Yourri* instituted a damage action against the *Spearman* and her freight.

On the 30th Jan. 1883 the master of the *Spearman* instituted a cross action against the *Yourri.*

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

The case on behalf of the appellants was as follows:—

The *Yourri*, a Russian steamship of 92 lasts, was, at the time of the collision, on a voyage from Lisbon to Odessa with a general cargo and passengers, and in charge of a pilot licensed by the European Commission of the Danube. Shortly before 6 p.m. on Dec. 9, 1882, the *Yourri*, with her regulation lights duly exhibited, was being navigated down the river a little to the starboard side of midstream, and was proceeding at a slow rate of speed. The weather, which had been a little misty, was then fine but dark. In such circumstances a vessel, which proved to be the *Spearman*, was observed ahead. The helm of the *Yourri* was at once put hard-a-port and her engines stopped, but the *Spearman*, coming on at great speed apparently under a starboard helm, struck the port bow of the *Yourri* and did her so much damage that she shortly afterwards sank.

The case on behalf of the respondents was as follows:—

The *Spearman*, a steamship of 651 tons net, was, on the 20th Dec. 1882, bound to Galatz from Sulina. At about 4.45 p.m. the *Spearman*, being on the starboard side of the river, was preparing to anchor for the night when the *Yourri* was seen right ahead. At this time it was still daylight, and, though the weather was hazy, both banks of the river were visible. On the *Yourri* being reported the helm of the *Spearman* was put hard-a-port and her engines reversed full speed astern. Notwithstanding the endeavours of the *Spearman* to avoid collision, the port bow of the *Yourri* struck the *Spearman*, causing her considerable damage. The current swung the *Yourri* round the bow of the *Spearman*, and, the ships parting, the *Yourri* sank close to the left bank of the river.

On the 14th Feb. 1884 the Supreme Consular Court of Constantinople delivered judgment finding both vessels to blame, the *Yourri* for being navigated on the wrong side of the river in contravention of art. 34, cap. 2, of the Danube Rules, and the *Spearman* for being navigated after sunset without lights in violation of the Danube Regulations, which violation contributed to the collision.

The regulations applicable to the navigation in question are the Danube Regulations, of which art 34, c. 2, is as follows:

Lorsque deux bâtiments à vapeur ou deux bâtiments à voiles navignant par un vent favorable se rencontrent faisant route en sens contraire, ils sont tenus de se diriger de telle sorte qu'ils viennent tous deux sur tribord, ainsi qu'il est d'usage à la mer. A cet effet, le bâtiment qui remonte le fleuve doit appuyer vers la rive gauche, et celui qui descend vers la rive droite. Il en est de même, lorsque la rencontre a lieu entre un bâtiment à vapeur et un bâtiment à voiles navignant par un vent favorable.

The master of the *Yourri* was appealing from the above decision, and submitted that it should be varied by the *Spearman* being held alone to blame for the following among other reasons:

1. Because it appears by the evidence that the *Yourri* was being navigated in a careful and proper manner, and in obedience to all the rules in force for the navigation of the Danube.

2. Because it appears by the evidence that the helm of the *Yourri* was ported as soon as the *Spearman* was or could be seen by those on board the *Yourri* to be meeting the *Yourri*, and this was in compliance with the regulations in force.

3. Because, assuming that both vessels were about in midstream, the *Yourri* did all that could be required of her by porting as and when she did.

4. Because the learned judge was wrong in finding that the *Yourri* was navigating on the left or port side of the river.

5. Because, if she had been so navigating, that of itself would be no breach of the regulations.

6. Because it appears by the evidence that the collision and the damage consequent thereon are imputable solely to the negligence of those on board the *Spearman*.

The respondents submitted that the decision ought to be affirmed for the following among other reasons:

1. That the *Yourri* was, at the time of the collision, coming down the left or wrong side of the Danube, and that she neglected to comply with article 34 of the Regulations for the Navigation of the River Danube, and also article 21 of the Regulations for Preventing Collisions at Sea.

2. That, having regard to the terms of the said article 34 and the breach of it by the *Yourri*, she is responsible for the collision.

3. That the *Yourri* was being navigated at an improper speed, and that her steam whistle was not being sounded, and that she neglected to comply with article 34 of the Regulations for the Navigation of the River Danube and article 13 of the Regulations for Preventing Collisions at Sea.

4. That those on board the *Yourri* neglected to slacken her speed or stop and reverse her engines in due time.

5. That a sufficient look-out was not kept on board the *Yourri*.

6. That the judgment was right in holding the *Yourri* in the wrong, and that she caused the collision.

Sir *Walter Phillimore* and *Stubbs* for the appellants.—On the evidence it is submitted that the *Yourri* was being carefully navigated on the starboard side of the river. Even assuming the *Yourri* not to have been keeping to the right bank there has been no breach of the rule. The rule provides that when two ships "se recontrent, faisant route en sens contraire," they must direct their course "qu'ils viennent tous deux sur tribord." In order to carry out this provision they are directed to "appuyer" towards the right and left banks respectively. The rule therefore is confined to cases where two ships are meeting, and hence it is submitted that the words "doit appuyer" mean "should bear towards" and not "keep to." If they mean "keep to" the right or left bank, as the case may be, the vessels would never meet at all.

Webster, Q.C. (with him *Barnes*) for the respondents, was not called upon.

Their Lordships' judgment was delivered by

Lord BLACKBURN.—Their Lordships do not think it necessary to call upon the respondents' counsel. The first important question is, what upon the evidence is the correct view of the facts. There is a good deal that is not in dispute at all. The *Yourri* was going down the river Danube and the *Spearman* was coming up. When the *Yourri* had got near the spot where the collision took place there was, according to all the evidence, a certain degree of mist, which, on the balance of the evidence, seems to have been sufficiently great to prevent seeing across the river. That being the case, there would be an obvious object and reason for the vessel that was coming down the river to steer so near to one shore or the other that it could see that shore and guide itself in going down the river. If she were to keep in the middle of the river when the mist was such that she could not see either shore, she would not know where she was going, and she must come nearer to either one side or the other to guide herself. Having that obvious desire, the question would be, did the *Yourri* go to the left side to guide herself, or did she go to the right? Now, as to that question, the whole of the evidence shows that she went to the left, and, in addition to that, after the collision took place she was found on the left side. What effect the collision might have had in moving the vessel from the spot where the collision took place to one side or the other would not matter here. It might have had some effect in pushing the vessel farther from or nearer to the shore, but it is quite clear that there is not upon this evidence any ground for saying that the court below was wrong in the conclusion that the vessel could not have been pushed to the spot where her hulk was found lying unless she was upon the left-hand side of the river instead of the right-hand when the collision happened.

That fact being established then comes the question that is put as a matter of law: Was it a right decision of the Consular Court to hold that it was negligent in the vessel coming down the river, especially when there was a fog and approaching night, to go to the left-hand side instead of going to the right? That of course very much depends upon what is the construction of the rule which has been referred to. That rule seems decidedly to say that, in the river, the vessel that is going down shall keep to the right bank. This ship, the *Yourri*, did not keep to the right bank when the fog came on, and it was necessary to keep to one bank or the other to guide her. She might and ought to have gone to the right side, and then she would have known that no vessels coming up the river could meet her, unless they were neglecting their duty by going to the wrong side. She would then have been safe. As it was, she went for no reason apparently on the left-hand side when she ought not to have done so, and their Lordships think it would be very dangerous indeed in the case of a river navigation to put any other construction on the rules than to say that it is a neglect of duty for the vessel that is to keep to the one side or the other, according as the rules may be, not to do so. It is very necessary that all vessels should know that going down the Danube they should keep to the right bank, and in coming up keep to the left bank, and that it is a neglect of duty and negligence to come across to the other side. That being so, that this neglect of duty, if it was one, was the cause of the accident, or contributed to it, is a matter that can hardly admit of dispute at all. Had the *Yourri* not improperly gone to the left-hand side, the *Spearman* would never have met her. The *Spearman* was held to blame for not having lights, and the court below thought that the absence of lights partly contributed to the accident, and that decision has not been appealed against. The result is, that the judgment of the Supreme Consular Court must be affirmed, and this appeal dismissed with costs, and their Lordships will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellants, *Stokes, Saunders, and Stokes.*

Solicitors for the respondents, *Thomas Cooper and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, June 16th, 1885.

(Before Brett, M.R., Bagallay and Bowen L.JJ., with Nautical Assessors)

The Rhosina. (a)

Damage—Harbour master—Falmouth Harbour Commissioners—Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 *Vict. c.* 27), *ss.* 52, 53.

It being with the scope of the authority of the harbour master of Falmouth Harbour, upon the proper construction of the Acts relating thereto, to regulate the place and manner of beaching a vessel therein for repairs, an order given by him to those in charge of a vessel to let go their anchor in such a way that the vessel sits upon it in beaching and is thereby injured, is negligence, for which the Harbour Commissioners, as his employers, are liable.

Where a vessel is, in obedience to bye-laws, being beached in a harbour under the directions of the harbour master, and in order to reach the place of beaching selected by the harbour master she is properly passing through waters outside the limits of the authority of the Harbour Commissioners (whose servant the harbour master is), and while outside such limits damage is occasioned to her by the negligence of the harbour master in giving an improper order, the Harbour Commissioners are liable for the damage thereby occasioned.

This was an appeal by the Falmouth Harbour Commissioners from a decision of Sir James Hannen in an action instituted by the owners of the steamship *Rhosina* against the Falmouth Harbour Commissioners and Richard Sherris, the harbour master.

The plaintiffs claimed compensation for damage occasioned to the *Rhosina* by the alleged negligence of the harbour master. Sir James Hannen gave judgment in favour of the plaintiffs (52 L. T. Rep. N. S. 140; 5 Asp. Mar. Law Cas. 350; 10 P. Div. 24).

On the 29th Dec. 1883 the *Rhosina* had put into Falmouth and anchored in the outer harbour. In order to ship a new propeller, it became necessary that the *Rhosina* should be beached on the hard in the inner harbour at a place selected by the harbour master. On the 1st Jan., before the *Rhosina* left the outer harbour, the harbour master went on board. The *Rhosina* then entered the inner harbour, there being a Trinity House pilot on board. On nearing the spot selected by the harbour master, he gave orders to let go the starboard anchor, on which the *Rhosina* grounded, and was thereby damaged. At the time when the harbour master gave such order, the *Rhosina* was smelling the ground and a tug was towing on her starboard bow. The place from whence the *Rhosina* was being taken and the place where it was intended to beach her were both within the limits of the authority of the harbour commissioners as defined by the Falmouth Harbour Order 1870. In order to reach the place where the *Rhosina* was to be beached it was necessary to pass through an area of water which was not within the jurisdiction of the harbour commissions, but within that of the Falmouth Dock Company.

On behalf of the defendants it was pleaded that Capt. Sherris went on board the *Rhosina* as a friend of the master to assist in beaching her, and not in his official capacity of harbour master; that the negligence occasioning the damage was that of the crew, and that the accident happened in waters within the jurisdiction of the Falmouth Dock Company, and not in waters over which the Falmouth Harbour Commissioners had authority.

Sir James Hannen held that the manœuvre of beaching the *Rhosina* was within the duties of the harbour master; that the order to let go the anchor was in the circumstances negligent; that in so ordering Sherris had assumed the functions of harbour master; that, although the place where the *Rhosina* grounded was not within the limits of the authority of the harbour commissioners, such fact was no defence to the action; and that the defendants were each and all of them liable.

From this decision the Falmouth Harbour Commissioners appealed.

The harbour master did not appeal.

The following Acts of Parliament are material to the decision:—

The Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27):

Sect. 52. The harbour master may give directions for all or any of the following purposes (that is to say), for regulating the time at which and the manner in which any vessel shall enter into or go out of, or lie in or at the harbour, dock, or pier, and within the prescribed limits, if any, and its position, mooring or unmooring, placing and removing whilst therein.

Sect. 53. The master of every vessel within the harbour or dock, or at or near the pier, or within the prescribed limits, if any, shall regulate such vessel according to the directions of the harbour master made in conformity with this and the special Act, and any master of a vessel who after notice of any such direction by the harbour master served upon him, shall not forthwith regulate such vessel according to such direction, shall be liable to a penalty not exceeding 20*l.*

Bye-laws made in pursuance of the Falmouth Harbour Order 1870, confirmed by the Pier and Harbour Orders Confirmation Act 1870 (No. 2):

4. Every vessel shall be moored or berthed at such part of the harbour, and shall from time to time be removed from place to place to such situation or situations within the harbour, as the harbour master shall direct; and the owner or master who refuses or neglects to obey the directions of the harbour master with regard to the mooring, berthing, or subsequent removal of such vessel or craft, shall for every offence be liable to a penalty not exceeding 5*l.*, and a further sum of 20*s.* after notice in writing, for every hour during which such directions are neglected.

Cohen, Q.C. and *W. R. Kennedy*, for the Falmouth Harbour Commissioners, in support of the appeal.

Webster, Q.C., Sir *Walter Phillimore*, and *Barnes*, for the plaintiffs, were not called upon.

The argument was substantially the same as that in the court below.

Brett, M.R.—The first question is, what was the harbour master doing, and was that within his authority as harbour master? He wanted the ship to be stranded in a particular part of the harbour and in a particular way, viz., stern first.

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

When the vessel came close to the place he found there were obstacles to her being put on stern first, unless she could be manœuvred in a particular way. He was of opinion that the ship would, in the circumstances, go on head first, and in order to get her on stern first he said, "Let go your anchor till it touches the ground, and let the tug tow on the starboard bow; the anchor will check her, and she will take the ground in the way I wish." Supposing that is what he wanted to do, he was attempting to regulate the manner in which the vessel should lie in the harbour, and to regulate the placing of her in a particular spot. It seems to me that, if he was doing this, he was doing something which was within his power under sect. 52 of the Harbours, Docks, and Piers Clauses Act 1847. But it has been suggested that it was not he who ought to have been giving orders in this particular place, but the dock master, because the order was given within the ambit of the property of the dock company. To my mind the dock master had no authority to give any orders at all with regard to this ship, because she was not going to do any of the things within the property of the dock company, which the dock master had a right to regulate. It is true that the vessel was passing through the water over and above the property of the dock company, but the dock company has no property in the water. The ship was going to the place where she was to be stranded, and that was, as is admitted, a place over which the harbour commissioners have control.

Then it is said that the harbour commissioners are not liable because the order with regard to the beaching of the vessel was given within the ambit of the property of the dock company. Looking at sect. 8 of the Falmouth Harbour Order 1870 and at sect. 39 of the Falmouth Dock Act 1859, it seems to me that the order was given in a place which was not within the ambit and authority of the harbour commissioners. But if the harbour master gives an order regulating the manner in which a vessel shall lie in the harbour, does it make it less the act of the harbour master as harbour master because the order is given in water above property where he has no jurisdiction? It seems to me impossible to say that. If this was an order given as harbour master, then it was an order which he had authority to give, because it related to the manner in which the vessel was to be put on the hard in that part of the harbour over which he had jurisdiction. It was next contended that Capt. Sherris acted as a friend of the master of the *Rhosina*, and not as harbour master at all. The learned President has, however, come to the conclusion that, though it might be that the harbour master originally went on board the *Rhosina* as a friend to help the captain to navigate his vessel into the harbour, yet when they came near to the place where the vessel was to be put on the hard, the harbour master assumed the authority of harbour master, and gave an order as harbour master. That is a question of fact on which I absolutely agree with the learned judge. The harbour master says that he gave no orders as to the navigation of the ship, but merely recommendations. But when he came near the scene of the accident, he then took the command into his own hands, and gave an order to the chief mate. He distinguishes between doing nothing, making recommendations and giving orders. It is said that he was not bound to give orders, but I think it would be very dangerous to say that a harbour master would have a right to be absent if there was difficulty in stranding the ship. Supposing that, instead of beaching the vessel in the spot he had selected, her master had begun to beach her fifty yards off, can anyone say that he would not be bound to resume his office of harbour master and order her to be placed elsewhere? To my mind, if anything was going wrong, it would not only be within his authority, but it would be his duty, to exercise his authority as harbour master. As to the way in which the harbour master exercised his authority, I have asked the gentlemen who assist us these two questions: The first is: "Was the manœuvre described, viz., whilst the ship was smelling the ground to let go the starboard anchor in order to check the ship while the tug on the starboard bow was towing her to starboard, an unskilful manœuvre?" The answer is, "Most certainly." The tug was pulling her clean over the anchor in shallow water and the harbour master's only excuse is, that he thought there would be water enough if the anchor went under the finer part of the ship. The Nautical Assessors have advised us that it was unskilful, and that in itself decides the case. The answer to the other question, however, makes it quite clear. It is this: "Ought the harbour master to have given precautionary orders that he desired to have the chain stopped at eight fathoms or directly it touched the ground before he ordered the anchor to be let go?" If he had given such orders, it would have been next to impossible that they could have been obeyed; but it was impossible to expect the chain to be stopped unless he gave orders of the most precautionary kind, and therefore he ought to have so ordered. That advice was given to the learned president, and the same advice is given to us now. Therefore, both as regards the law and the facts, this judgment is right and must be affirmed.

Baggallay, L.J.—I am of the same opinion. On the occasion in question the *Rhosina* was on a voyage from Cardiff to New Orleans in ballast, and, having damaged her screw propeller, she went into Falmouth to have it repaired. She remained in the outer harbour for two or three days, when it was deemed expedient to remove her into the inner harbour. On the morning that she was to be removed, it appears that the harbour master went on board to accompany the vessel round from the outer to the inner harbour. He gave no orders until she approached the bank in the inner harbour. After two or three suggestions he then gave the order which our assessors say was improper. Was that order given in such a way as to render the harbour commissioners responsible? That depends upon whether he was acting within the scope of his authority as harbour master. By sect. 52 of the Harbours, Docks, and Piers Clauses Act 1847 authority is given to the harbour master to regulate the time at which and the manner in which the vessel shall enter into, go out from, or lie in the harbour, and the position it shall take up therein. When passing over from the dock company's property to the inner harbour, the harbour master gave an order which clearly was within the meaning of the Act of Parliament

That is further borne out by the bye-laws of the commissioners, regulating the mooring and berthing of vessels. By these bye-laws not only is the harbour master to give directions, but a penalty is imposed on the captain of a vessel who refuses to obey his orders. This appears to be an order directly given within the provisions of the general Act and the bye-laws. The harbour master being bound to give proper directions, and having failed to do so, the commissioners are clearly liable.

BOWEN, L.J. concurred.

Judgment affirmed.

Solicitors for the plaintiffs, *Ingledew, Ince*, and *Colt*, agents for *Ingledew, Ince*, and *Vachell*, of Cardiff.

Solicitors for the defendants, *Pritchard* and *Sons*, agents for *Genn* and *Nalder*, of Falmouth.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Friday, June, 19, 1885.

(Before POLLOCK, B.)

CLARKE *v.* THE MILLWALL DOCK COMPANY.

Landlord and tenant—Distress for rent—Privileged goods—Ship while building to be paid for by instalments—Constructive delivery—Property in ship.

A shipbuilder contracted to build a ship for the plaintiffs, which was to be paid for by nine different instalments at various stages of its construction; at the payment of each instalment the property in the ship as completed up to that time was to vest in the plaintiff.

During the building of the ship the shipbuilder became in arrear in respect of his rent, and the defendants, his landlords, distrained upon the ship for the amount of rent so due.

The plaintiff paid under protest the amount claimed and brought this action to recover the amount.

The plaintiff contended that the arrangement between the shipbuilder and himself rendered the ship free from liability to distress.

Held, under the circumstances of the case, that the ship was liable to distress, and that the case did not come within any of the exceptions which exempt goods on the premises of a tenant from liability to distress for rent due to the landlord.

THIS was an action tried before Pollock, B. without a jury, to recover a sum of money by the plaintiff under protest under the following circumstances:—

The plaintiff, who was the executor of one France, alleged in his statement of claim that in the months of September and October 1883, the defendants wrongfully detained from the plaintiff a certain ship called the *Swillington*, the property of the plaintiff, as the executor of France, and compelled the plaintiff to pay the sum of 1721*l.* 12*s.* 1*d.* before the defendants would realise the said ship to the plaintiff.

The defendants in their defence denied the detention of the ship, but said that at the time of the alleged detention it was not the property of the plaintiff, but of one Gilbert; and that they did not compel the plaintiff to pay the said sum, nor did he pay it under protest.

They further stated that before the alleged detention the said Gilbert held certain premises and dry docks as tenant thereof to the defendants under a demise at a certain monthly rent thereby reserved, and 1630*l.* 9*s.* 11*d.* of the said rent was then due from the said Gilbert to the defendants, and the defendants, while the said Gilbert was such tenant, and while the arrears of rent remained so due, entered on the said premises and dry dock and seized the said ship as a distress for the arrears of rent, and lawfully detained the ship under the distress for a reasonable time and until they were paid the sum of 1721*l.* 12*s.* 1*d.*, the amount of the arrears and lawful expenses of and in relation to the distress, when the defendants delivered the ship to the plaintiff and Gilbert, which was the alleged detention.

It appeared from the facts of the case that one Gilbert entered into a contract in Oct. 1882 with one France, whom the plaintiff represented, to build a steamship named the *Swillington* in the dock leased by the defendants to Gilbert. The price was to be 8000*l.*, which was to be paid in nine instalments, each instalment becoming due on the completion of a certain amount of work done to the ship, agreed on by the parties. During the building of the ship Gilbert drew upon France for more than the amount due for the work actually done and completed.

It also appeared from the books of France that he bought material necessary for the building of the ship which he shipped to Gilbert, and which was used for that purpose.

France died on the 27th Aug. 1883.

Gilbert in the meantime had become in arrears with his rent due to the defendant company which he was unable to pay, and on the 11th Sept. 1883 the defendants distrained for the sum of 1630*l.* 9*s.* 11*d.*, for rent due.

On the 2nd Oct. 1883 the plaintiff paid the defendants the sum of 1721*l.* 12*s.* 1*d.* under protest, and the ship was released. The plaintiff sought to recover the whole of this sum in the action on the ground that the steamship had been illegally distrained upon as the property in it had passed to him from Gilbert.

Finlay, Q.C. (*R. A. M'Call* with him).—The plaintiff is entitled to recover the amount claimed by him in the action; the distress was wrongful; the ship was not rightfully seized by the defendants, for the property in it had passed to the plaintiff. The defendants, of course, say that the property in the ship was still in Gilbert when the seizure took place; they let their dock for the purposes of public trade, and must be taken to know that the ships in it from time to time are not the property of the lessee, and which cannot be seized to satisfy arrears of rent due from him; and things brought to a place where a public trade is carried on are privileged from distress:

Simpson v. *Hartopp*, Willes, 512; 1 Sm. L. C. 450; *Muspratt* v. *Gregory*, 1 M. & W. 633, 655 (per Parke, B.)

Parke, B., in the latter case (p. 655), after citing from Gilbert on Distress, that valuable things in the way of trade shall not be liable to a distress, says that "the principle upon which the exemption is founded appears with great distinctness from these authorities to be the protection of

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

trade . . . . and that the principle of the rule is the public good and the freedom of commerce." The effect of the agreement between France and Gilbert, with reference to the building of this steamer, was to pass the property in the vessel, so far as it was built up from time to time, in France, when the latter paid the stipulated instalments. Consequently, at the time of the distress, the steamer, so far as she was built, was France's and not Gilbert's property, and on the principle of exemption laid down by Parke, B. was not liable to be seized for the arrears of rent.

Cohen, Q.C. (*W. Graham* with him).—Judgment ought to be for the defendants. This ship was not privileged from distraint. Besides, France knew of the pecuniary liability of Gilbert to the defendants, as appears from his letters; and, indeed, he had paid money to them on his behalf; in one letter he recognised their right to detain the ship till the rent was paid, for he writes, "and you may depend upon it they (the defendants) will not part with the boat (the *Swillington*) till paid." Lord Abinger in *Muspratt* v. *Gregory* (p. 662), points out that every one of the cases excepted from the law of distress is a case in which the trade is one that consists in dealing with other men's goods; here the steamship was Gilbert's, and until delivery over to the plaintiff remained his. There is no case where goods are privileged which are not brought upon the tenant's premises for the purpose of being worked up or managed in the way of his trade or employment:

Parsons v. *Gingell*, 4 C. B. 545;
Smith's Landlord and Tenant, 218;
Woodfall's Landlord and Tenant, 410.

The goods of lodgers and certain chattels used by agricultural tenants required special legislative enactments to exempt them from distress. The steamship was Gilbert's property, and so was liable to be seized:

Swire v. *Leach*, 18 C. B. N. S. 479;
Miles v. *Furber*, 27 L. T. Rep. N. S. 756; L. Rep. 8 Q. B. 77.

The exceptions to the liability to distress are not general but special:

Lyons v. *Elliott*, 33 L. T. Rep. N. S. 806; 1 Q. B. Div. 210.

The claim of the plaintiff is not recoverable in an action of this kind:

Glynn v. *Thomas*, 11 Exch. 870.

Finlay, Q.C. in reply.—The letters of the deceased France do not prejudice him, for they do not amount to a waiver of his right to insist that this ship was not distrainable for Gilbert's arrears of rent. As to the case of *Parsons* v. *Gingell* (*ubi sup.*). I say in the first place it is irrelevant; next, that it has been overruled by *Miles* v. *Furber* (*ubi sup.*). Bayley, J., in his judgment in *Adams* v. *Crane* (3 Tyrwh. 326), remarks that the privilege of goods from distress "has been from time to time increased in extent, according to the new modes of dealing established between parties by the change of times and circumstances, one of which modern modes of dealing is the case of a factor." The question here, no doubt, arises for the first time. It is submitted that it is not necessary that the goods should be actually delivered to the occupier of the premises for the purposes of his trade, but a constructive delivery would be sufficient. Every time that France paid an instalment to Gilbert there was a constructive delivery of so much of the ship as was completed for the purpose of being finished by Gilbert in his capacity of shipbuilder and therefore the ship was altogether free from liability to be distrained.

POLLOCK, B.—This case is one of very great general interest, and no doubt raises a question of importance both as regards law and as regards commerce. The action is brought by the plaintiff, Mr. Clarke, who is executor of one William France, who had a contract whereby a man named Gilbert, a shipbuilder, was to build for him a certain ship called the *Swillington*. That ship was to be built upon a contract, the material parts of which are set out in the papers before me. I may state it shortly by saying it is a contract of the nature of that which was discussed in the case of *Woods* v. *Russell* (5 B. & Ald. 942), and several other cases, whereby the builder is not to complete the whole ship and then to be paid for the whole ship before any property in any part of the ship passes, but it is a contract whereby the portions of the ship were to pass to the person for whom it was being built as payments were made from time to time. Now I need not, for the purposes of this case, enter into any discussion as to the effect of such a contract as that, which was well considered in several cases where the question arose as between the builder of the ship and the vendees or assignees as to at what moment of time the particular property passed. That is a very interesting head of law which need not be examined in this case. But the defendants here claim to have detained the ship because they were the landlords of Gilbert who built the ship; and I have no doubt, upon the facts before me, that such a tenancy existed as entitled them to distrain as against Gilbert in respect of all property for which a distress could be taken.

Therefore the only question which results from these facts now before me is this, whether or no this vessel, as between Gilbert and France, was an article which could be distrained upon by the defendants, the landlords, as against their tenant, Gilbert. I do not think it is necessary, as has been done by learned judges before now, to go back to the root of the rule of law which gave to a landlord the right of distress. I think it is sufficient to say that from time to time, from very natural feelings of equity, the judges have made exceptions to the general rule that all goods found upon the premises of a tenant are subject to distress. I may only refer to that class of goods within which it is said by the plaintiff the ship in question comes, namely, goods which are upon the premises of the tenant for purposes of the carrying on of his trade. It is observable that the decisions on that class of case have commenced, and as far as I know have been continued throughout in all the cases that have existed, as based upon, as far as the relative position of the parties is concerned, "the principle of things sent or delivered to a person exercising a trade to be carried on, wrought or managed in the way of his trade or business, as a horse in a smith's shop, materials sent to a weaver, or cloth to a tailor to be made up. These are privileged for the sake of trade and commerce." I have cited that from the judgment of Willes, C.J. in *Simpson* v. *Hartopp*

(Willes 512), the well-known case; and in the notes to Smith's Leading Cases a number of cases will be found, all of which come within the category of cases in which the goods have been sent by some person to be made up. Now I am far from saying that the law should be laid down upon so narrow a principle that we should look for exactly the same circumstances in a new case as the circumstances upon which the old cases have been decided. I am sure I should be the last to adopt such a principle as that; but I think it always extremely important to remember this, in cases of this kind where a rule of law has been established by long usage, that the rule of law cannot be always extended to all the cases in which it could be upheld as founded upon the reasonableness on which the rule was originally based. That seems to me to be a very important point to be borne in mind. That, no doubt, was what was in the mind of Lord Abinger, who I am sure was a man who never clung to anything like a narrow view of law, when he said in the case of *Muspratt* v. *Gregory* (1 M. & W., p. 661), that he was "afraid of trusting to his own judgment with regard to the public good as a principle upon which we are to make rules or to engraft exceptions. I do not know whether the time may not come when the public good may require that all goods should be exempted from distress." The obvious remark to be made on that is, that the time has come in certain of the cases, for instance, in the good of lodgers, in which a proper course has been taken, and the Legislature has interfered. So again the Legislature will interfere in this and other cases if that time has come. But I cannot agree with what was said by Mr. Finlay in his reply, that this is a case in which, as was said in *Miles* v. *Furber* (*ubi sup.*) by the court, to allow a distress would affect the very principle of business. That, I think, is a very good *ratio decidendi*. The case of a pawnbroker, the case of a carriage sent to a coachmaker for sale, and the case, possibly, of a ship sent to a dock for repair, are cases in which a man could not carry on his business if the landlord could always come in and take the goods of a third person so sent to his premises.

Now just let us look for a moment at what are the real facts in the present case. Gilbert is building a ship. It is open to him to make any contract he likes. He may make the usual old contract that the ship should be built, and when built, he should be paid for it. He may make the contract that it should be paid for in, I think, nine different instalments. Each time the vesting of the property out of Gilbert, the builder, into France, the person for whom the ship is being built is a mere matter of private and independent contract between the parties; and, although such a course of business is known, it cannot be said that it could be predicated beforehand with any certainty what would be the precise contract, or whether there would be any such contract at all between the parties. Therefore it cannot be said that the business of a shipbuilder could not be carried on with safety if his landlord could come in and take goods from his premises. Therefore it seems to me that I should be legislating rather than laying down the law if I were to say that the law exempted articles within the circumstances existing in the present case. There was one other point taken by Mr. Finlay, and he took it, partly independently, very properly as arising out of his main point, and it was this: that the very contract between the landlord and the tenant here showed that the ships would be built on these premises, and also that the ships would come in for repairs, and therefore that ships would not be distrainable. Now, as far as the matter rests with ships coming in for repair, I have not to deal with that question, nor do I see any difficulty or inconsistency in saying that those might not be distrainable. But with regard to ships that were being built there, then I think the question is this: Can I infer from the conduct of the parties that there was anything on the part of the landlord whereby he intended not to exercise the power of distress which he would have by the law of the land? It is common knowledge that the landlord may, either by express words or by his conduct, from which an inference may be drawn, consent that the goods of a third person brought on the premises shall be exempt from distress. Those cases are collected, as other cases of the kind are, in Smith's Leading Cases. They are referred to in page 464 of the 8th edition. But those are cases in which the question has not been whether, from the character of the tenancy, there has been anything unusual. The facts have been that the parties have brought the goods on to the premises with the knowledge of the landlord, and the landlord, either by express language or by conduct, has clearly shown that he does not intend to exercise his right with regard to those particular goods. In those cases, of course, it would not be consistent with equity or reason that he, having so expressed his opinion, should afterwards withdraw it and attempt to exercise his common law right. In the present case I find nothing of that kind. No doubt there is something which furthers the argument of Mr. Finlay when the general principle is considered, but I find nothing which would enable me to say that this case should be decided on its own particular facts, and I must be very careful in dealing with a well-known and well-established right, such as the right of distraint, not to create any new exception merely by reason of what may seem to be fit and proper between these particular parties, the landlord and the tenant, when I am considering the rights of other parties arising out of the matter in hand. It seems to me, therefore, on these grounds that the plaintiff has failed in establishing his claim. One other point I must allude to shortly, and that is this: It is admitted now with regard to 70*l.*, which was an amount arising out of the rent due from the use of tools and plant, and also with regard to something like 200*l.*, which was rent not then due, that there was a claim for rent above that amount actually due, and therefore that this holding of the ship in question was wrongful. If this action had been an action between landlord and tenant the solution of the question would have depended on different grounds which I need not allude to now. I think it is sufficient to say that, as I understand the law, no action of this kind can be maintained against a person who, up to a certain point, or to a certain amount, has properly held this ship as a lien for his claim unless a tender was made for the amount actually due. Therefore there must be judgment for the defendants with costs, and the defendants, as Mr. Cohen properly says, will

be prepared to hand over any amount found due to the plaintiff upon account taken.

Judgment for the defendants.

Solicitors for the plaintiffs, *Eyre* and *Co.*, for *Clarke* and *Son*, Leeds.

Solicitors for the defendants, *Blunt, Tebbs*, and *Lawford.*

Thursday, June 25, 1885.

(Before Denman, J.)

The Great Indian Peninsula Railway Company *v.* Turnbull. (*a*)

Charter-party—Advance freight—Repayment of—"Steamer lost or not lost"—Loss by negligent navigation.

Goods were shipped under a charter-party containing the following stipulation:—"Four-fifths of the freight (calculated on the quantity shipped) to be advanced and paid in cash in one month from the steamer's sailing from her last port in Great Britain (steamer lost or not lost)," The steamer sailed on the 12th July; was lost through the negligence of her master on the 19th July; the loss was known on the 21st July; on the 26th July the charterer paid four-fifths of the freight to the shipowner. In an action by the charterer against the shipowner to recover damages for breach of contract:

Held, that notwithstanding the clause "steamer lost or not lost," the charterer was entitled to take into account and recover the advance freight so paid and the premiums of insurance, in addition to the prime cost of the goods.

Further consideration.

The action was brought by the Great Indian Peninsula Railway Company against Charles Turnbull to recover 2290*l.* 1*s.* 3*d.*, being the amount of damage suffered, as it was alleged, by the plaintiff company by reason of the breach of contract of the defendant.

The plaintiffs, in their statement of claim, alleged that they had suffered damage by reason of the defendant's breach of a charter-party of his steamship *Leverrier*, dated the 26th June 1884, and made between the plaintiffs and the defendant, and also by reason of the breach of two bills of lading of goods shipped by the plaintiffs on board the said vessel, in pursuance of the said charter-party, the defendant, having, as it was alleged, made default in delivery of the said goods, namely, 2006 tons of coal; and the plaintiffs further alleged that whilst the said goods were being carried by the defendant for the plaintiffs under the said charter-party and bills of lading, the defendant by his servants so negligently and unskilfully navigated and managed the said vessel that on or before the 19th July 1884 she stranded near Cape Spartel, whereby the said 2006 tons of coal were wholly lost to the plaintiffs, and the plaintiffs sustained other losses, expenses, and charges; that four-fifths of the freight, amounting to 1324*l.* 19*s.* 2*d.*, was paid in advance by the plaintiffs to the defendant, pursuant to the said charter-party and bills of lading; and that the prime cost of the coal, together with the four-fifths of freight advanced, bills of lading, insurance, policy, and agent's commission, amounted to 2290*l.* 1*s.* 3*d.*, which sum the plaintiffs claimed to recover from the defendant.

The defendant denied the breaches of the charter-party and bill of lading, and the negligent and unskilful navigation and management of the vessel, and said that the said goods were lost solely by the dangers and accidents of the seas excepted by the said charter-party and bill of lading; and the defendant also contended that, if the facts as alleged were true, the plaintiffs were not entitled to recover the said sum from the defendant.

By the charter-party aforesaid it was agreed between the defendant, the owner of the *Leverrier*, and the plaintiffs, through their agents, that the said ship should with all convenient speed proceed to Birkenhead, and there load in the usual and customary manner a cargo of coal, and, being so loaded, should proceed therewith to Bombay, or so near thereunto as she might safely get, and deliver the said cargo in the usual and customary manner, the act of God, the Queen's enemies, restraint of princes and rulers, fire, and all and every other the dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever always mutually excepted, and, amongst other stipulations contained in the said charter-party it was agreed that freight was to become due upon the due delivery of cargo, and was to be paid upon the weight then ascertained at the rate of 16*s.* 6*d.* per ton on the quantity delivered to the consignees in Bombay, less first cost and insurance of coal delivered short of the quantity stated in the bill of lading, and the charter-party then proceeded:—

But four-fifths of the freight, calculated on the quantity shipped, to be advanced and paid in cash in one month from the vessel's sailing from the last port in Great Britain (steamer lost or not lost) and the remainder found to be due to be paid in cash in Bombay.

Bills of lading were afterwards signed by the authority of the master in accordance with the terms of the charter-party, the clause as to freight being:

Freight is to become due upon the due delivery of the cargo, and is to be paid upon the weight ascertained on delivery of the cargo in Bombay, at the rate of 16*s.* 6*d.* per ton of 20 cwts. on the quantity delivered to the consignees in Bombay, but four-fifths of the freight (calculated on the quantity shipped) to be advanced and paid in cash in one month from the steamer's sailing from her last port in Great Britain (steamer lost or not lost) and the remainder found to be due to be paid in cash in Bombay, less first cost and insurance of coal undelivered of the quantity herein stated to have been shipped.

The *Leverrier* loaded a cargo of coal under the charter-party at Birkenhead, and sailed thence for Bombay on the 12th July; on the 19th July she stranded on Cape Spartel, on the coast of Morocco, the loss being known in England on the 21st July; on the 28th July the plaintiffs paid to the defendant four-fifths of the freight calculated on the quantity of coal shipped.

The action came on for hearing before Denman, J. and a special jury, when a verdict was found and judgment entered for the plaintiffs, subject to the further consideration of the question of law as to the measure of damages.

Barnes (with him *C. Russell*, Q.C.) for the plaintiffs.—The items in dispute are the premiums of insurance and the four-fifths of the freight paid in accordance with the terms of the charter-

(*a*) Reported by J. Smith Esq., Barrister-at-Law.

party within one month of the steamer's sailing, which the defendant contends the plaintiffs are not entitled to recover, notwithstanding that the ship was lost by the negligence of his servants. It is contended on the part of the plaintiffs that the words "steamer lost or not lost" must mean "lost or not lost by any of the perils and accidents of the seas, rivers and navigation" excepted in the first part of the charter-party, and cannot be extended to mean "lost or not lost by any means including negligent navigation." The plaintiffs have actually paid the four-fifths of the freight stipulated in the charter-party, and this advance freight so paid is part of the value of the cargo which has been lost by the negligence of the defendant's servants. The true measure of damages is the value of the cargo at the port of destination. The goods would have been worth more there by reason of four-fifths of the freight having been paid, and the plaintiffs are, therefore, entitled to recover this sum back from the defendant,

Sir *Farrer Herschell* Q.C. (with him *Bucknill*) for the defendant.—The defendant is not liable to be called upon to repay the amount paid by the plaintiffs for advance freight and insurance. As to the insurance, there is most clearly no principle on which the underwriters of cargo—who are, of course, the real plaintiffs in the case—can sue for the payment for the second time of premiums which they have already received once. The main point, however, is as to the four-fifths of the freight paid in advance. Now, this is an action by charterers against shipowners for the breach of a contract, and the clear words of the contract sued upon are to the effect that four-fifths of the freight are to be paid by the charterer to the shipowner whether the steamer is "lost or not lost." The words "steamer lost or not lost" must be held to have some meaning, and it was clearly the intention of the parties that they should have some meaning; but if, the steamer having been lost, it is to be held that the charterer is entitled to recover the advanced freight back from the shipowner, no meaning whatever is given to these words, and they might just as well have been omitted from the charter-party. It is submitted that this amount, although spoken of as freight to be advanced, is really money paid as consideration for receiving the goods on board and entering into an undertaking to carry them (*Kirchner* v. *Venus*, 12 Moo. P. C. 361), and never acquired the legal character of freight.

Barnes in reply.—The measure of damage is the loss we have sustained by not having our goods delivered to us at Bombay, and the value of a cargo at its point of destination, obviously includes the premium paid for its insurance on the voyage thither. This is clearly laid down in Arnould on Insurance, vol. 1, 4th edit. p. 304; 5th edit. p. 322, where it is said that: "With regard to goods, the long-established rule in this country is that their value for the purposes of insurance, when not fixed by the policy, is the amount of the prime cost, together with the charges of shipping them on board, stamp duty, and broker's commission for effecting the policy; the whole covered with the premium and insurance on the premium: (*Usher* v. *Noble*, 12 East, 646; *Tuite* v. *The Royal Exchange Company*, 1 Park on Insurance, 8th edit. 224, 225.)" The words "steamer lost or not lost," mean "lost or not lost by the act of God, the Queen's enemies, restraint of princes, and the dangers and accidents of the seas, rivers, and navigation," and cannot be extended to cover a loss which has been found to be caused by their own negligence. According to the contention of the defendant, the clause would have applied if he had deliberately blown up the ship, and the construction, is, therefore, wholly unreasonable. The true and only test is the value of the cargo at Bombay, which is clearly enhanced by the payment of four-fifths of the freight, and the plaintiffs are, therefore, entitled to recover.

Denman, J.—I am of opinion that the plaintiffs are entitled to recover the whole of the amount claimed by them. I think that in this case we must look at the contract between the parties as contained in the charter-party and bills of lading, in which we find a stipulation in the following terms:—"Four-fifths of the freight (calculated on the quantity shipped) to be advanced and paid in cash in one month from the steamer's sailing from her last port in Great Britain (steamer lost or not lost)." These being the words of the bargain, it is contended on behalf of the defendant that the money paid in pursuance of this clause is paid, not as freight, but as consideration for taking the goods on board. Now, what is there to support this contention? I am unable to see anything, and, in my opinion, there is nothing to show that the real bargain was other than what it is expressed to be in the charter-party, namely, that the money should be paid as freight. Then, this advance freight having been paid by the plaintiffs to the defendant, the steamer was actually lost through the negligence of the defendant or his servants, and the question arises, What was the loss thereby entailed on the plaintiffs? I think that the freight, in so far as it had been paid by the plaintiffs, was clearly a part of their loss, and that they ought to recover it from the defendant. As to the insurance, I was at first impressed by the argument of the learned counsel for the defendant, that the underwriters having already received the premiums once could not rightly sue for them again; but, on consideration, it appears to me that the contrary contention is correct, that what we ought to consider in this matter is the commercial value of the goods at the port of arrival, and if the ship had arrived, the price which would have been obtained for it at Bombay would have included all the reasonable expenses of taking it thither from a mercantile point of view, including, of course, insurance. There is, in my opinion, no force in the argument that the money paid is paid in consideration of the cargo being taken on board, and not freight in its strictest sense. The shipowner merely stipulates that when the cargo is well started on its voyage he shall be paid a certain amount of freight so that he may not be out of pocket as to all the expenses of carrying the cargo until the conclusion of the voyage, but, on the contrary, have money in hand for the payment of his disbursements. I think it is equally clear that the premium of insurance is one of the things which ought properly to be taken into consideration in ascertaining that value. The case of *Kirchner* v. *Venus* (12 Moo. P. C. 361) was cited in the course of the argument on the

first point, but I do not think that that case affects the case before us, turning as it does on the peculiar terms of the contract between the parties there. Here I think we must look at the substance of the bargain between the parties, and at that alone. For these reasons I am of opinion that judgment must be entered for the plaintiffs for the full amount claimed.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Waltons, Bubb* and *Walton.*

Solicitors for the defendant, *W. A. Crump* and *Son.*

July 31, *Aug.* 3 *and* 6, 1885.

(Before Lord Coleridge. C.J. and Fry, L.J.)

The Mogul Steamship Company Limited *v.* McGregor, Gow, and Co. and others. (*a*)

Conspiracy—Restraint of Trade—Combination of shipowners—Circulars—Interim injunction.

The defendant shipowners had combined together, and their agents in China had issued circulars there to the effect that exporters in China who confined their shipments of goods to vessels owned by the combined lines should be allowed a rebate payable half-yearly, on the freight charged. Any shipment at any port in China by an outside steamer to exclude the shipper of such shipment from participating in the return during the whole six-monthly period within which it had been made.

The plaintiffs, on the ground that such combination was a conspiracy entered into with the object of ruining them (the plaintiffs), and of driving away competition, applied for an interim injunction to restrain the defendants from continuing to issue these circulars, and from otherwise acting in restraint of trade.

Held, that, as the plaintiffs had not shown that the refusal of this application would result in irreparable injury to them, and as they might recover ample compensation in damages if they succeeded at the trial, and the cause of action being doubtful, this was not a case in which the court would grant an interim injunction.

Held, that such combination, if proved according to the plaintiffs' contention, would be a conspiracy within the principle laid down in Rex. *v.* Eccles, (1 *Leach C. C.* 274).

This was an application for an interim injunction which had been referred by Day, J. at chambers to the Divisional Court, that the defendants might be restrained, until the trial of the action, from publishing certain circulars, and from acting in any way so as to prevent shippers of goods from shipping goods in China by the plaintiffs' vessels, and from acting so as to prevent the said vessels loading in China at proper freights and upon fair and proper terms, and that the defendants might be ordered to withdraw any of the said circulars already circulated.

The plaintiff company was incorporated in 1883 for the purpose of acquiring shares in certain steamships known as the *Sikh, Afghan, Pathan,* and *Ghazee,* which trade between Chinese and Australian ports and London. The defendants McGregor, Gow, and Co., T. Skinner and Co., D. J. Jenkins and Co., the Peninsular and Oriental Steam Navigation Company, the Ocean Steamship Company, and William Thomson and Co., were firms competing with the plaintiffs, and owned numerous vessels trading in the same seas.

The defendants in 1879, in combination with other shipowners, formed a ring or "conference" (as it is known in the shipping trade), and offered to allow to such shippers of cargo as were willing to confine their shipments of goods exclusively to "conference steamers" a rebate of 5 per cent. upon the freights charged. The plaintiffs alleged that by reason of such combination and conspiracy they (the plaintiffs) were prevented from obtaining cargoes for their vessels, and that shippers had been and were thereby coerced and induced to forbear from shipping cargoes by steamers belonging to the plaintiffs. Further, that the defendants, with intent to injure the plaintiffs, had agreed to refuse and had refused to accept cargoes from shippers at Chinese ports without an undertaking by the shippers not to ship any cargoes by "non-conference steamers."

The plaintiffs' claim was for damages for conspiracy, and an injunction. The circulars in respect of which the plaintiffs were now seeking an interim injunction were addressed to shippers at the Chinese ports, and signed by the defendants' agents in China, and ran as follows:

Shanghai, May 10, 1884.

Dear Sirs,—To those exporters who confine their shipments of tea and general cargo from China to Europe (not including the Mediterranean and Black Sea ports) to the Peninsular and Oriental Steam Navigation Company, Ocean Steamship Company, McGregor, Gow, and Co., Glen, Castle, Shire, and Ben lines, and to the steamships *Oopack* and *Ningchow*, we shall be happy to allow a rebate of 5 per cent on the freight charged. Exporters claiming the returns will be required to sign a declaration that they have not made nor been interested in any shipments of tea or general cargo to Europe (excepting the ports above named) by other than the said lines. Shipments by the steamships *Albany, Pathan,* and *Ghazee,* on their present voyages from Hankow, will not prejudice claims for returns. Each line to be responsible for its own returns only, which will be payable half yearly, commencing Oct. 30 next. Shipments by an outside steamer at any of the ports in China or at Hong Kong will exclude the firm making such shipments from participation in the return during the whole six-monthly period within which they have been made, even though other branches may have given entire support to the above lines. The foregoing agreement on our part to be in force from present date till April 30, 1886. We are, &c.

Shanghai, May 11, 1885.

Dear Sirs,—Referring to our circular dated May 10, 1884, we beg to remind you that shipments for London by the steamships *Pathan, Afghan,* and *Aberdeen,* or by other non-conference steamers at any of the ports in China or at Hong Kong, will exclude the firm making such shipments from participation in the return during the whole six-monthly period in which they have been made, even although the firm elsewhere may have given exclusive support to the conference lines. We are, &c.

Sir *Henry James,* Q.C., Sir *Farrer Herschell* Q.C., *Crump,* Q.C., and *J. Gorell Barnes* for the plaintiffs.—This is a case in which the plaintiffs are entitled to an interim injunction to restrain the action of the defendants. The facts are not in dispute, and such a combination as has been effected clearly amounts to an illegal conspiracy on the part of the defendants to oust all opposition to the conference lines, and to drive away competition. Such action is in the restraint of trade and against public interest, and therefore against the policy of the law and illegal. It might, in fact, be described as a case of "boycotting," of

(*a*) Reported by F. A. Crailsheim, Esq., Barrister-at-Law.

the worst sort. This is not the case of an individual contracting for exclusive dealing, but a combination of tradesmen to prevent trading with others, and an attempt to create a monopoly. By the rules laid down by the conference the penalty of losing the whole six-monthly rebate is to be incurred by the shipper of a cargo, even of the smallest value, if shipped by a non-conference steamer, and that whether any of the defendants' ships are at the time of the shipment in the port or not. The result of such forfeiture of the whole six-monthly rebate is that the penalty incurred is greatly in excess of the benefit which would have accrued to the defendants if the freight had been earned by them. An action for conspiracy can be founded if a combination is shown to exist either for the purpose of arriving at an unlawful end, or at a lawful end by unlawful means; as soon as there is a combination to arrive at an unlawful end every step taken with a view to arriving at such end becomes itself unlawful:

Reg v. *Parnell*, 14 Cox C. C. 508.

The combination here consists of certain carriers who have powerful means at their disposal of carrying on trade, in respect of which there is competition. That competition they are anxious to drive away, for they can afford to make the rebate when they have obtained the exclusive control of the market, unhampered by opposition. Such a combination for the purpose of creating a monopoly is clearly illegal. It is unlawful by molestation to endeavour to deter or influence any person in the employment of his industry, talent, or capital in any lawful manner:

Reg v. *Druitt*, 10 Cox, C. C. 592.

The court will interfere where there is a combination to prevent an individual from carrying on his trade, or to render it more difficult for him to carry on his trade:

Gregory v. *The Duke of Brunswick*, 6 M. & G. 205.

In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act if done separately by each individual without any agreement among themselves would not have been illegal:

Reg v. *Mawbey*, 6 Term Rep. 619, 636.

A combination of this sort is illegal as tending directly to impede and interfere with the free course of trade (*Hilton* v. *Eckersley*, 6 E. & B. 47), and therefore the court ought to grant the injunction prayed for.

Horace Davey, Q.C., *Finlay*, Q.C., and *Pollard*, for the defendants.—This is not a case in which the court will grant an interim injunction. The alleged cause of action is a complete novelty. There is no precedent in which an injunction has been granted to restrain a conspiracy, which is an offence indictable at common law, nor is there any evidence of malice, which is of the essence of an action of this description. It is for the plaintiffs to show that there was a malicious intention on the part of the defendants of damaging the plaintiffs in their trade. The combination complained of was created in 1879, but the plaintiff company only came into existence in 1883, and the terms of the circulars applied, not to the plaintiffs' vessels only, but to all non-conference steamers. Counsel for the plaintiffs have confounded the result of the combination with its object. The intention of the defendants was, not to injure the plaintiffs's trade, but to increase their own; the result might prove injurious to the plaintiffs, but nevertheless the object of the defendants was to benefit themselves and perfectly legal:

Wickens v. *Evans*, 3 Y. & J. 318.

This case does not come within the principle laid down by Lord Mansfield, C J. in *Rex* v. *Eccles* (1 Leach C. C. 274), where the alleged conspiracy seems to have been directed against an individual; and, moreover, that case is overruled by *Reg.* v. *Rowlands* (17 Q. B. 671; 5 Cox C. C. 437), where Erle, J. laid down what seems to be a true and accurate statement of the law at the present time: "The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand. But I consider the law to be clear so far only as while the purpose of the combination is to obtain a benefit for the parties who combine—a benefit which by law they can claim. I make that remark because a combination for the purpose of injuring another is a combination of a different nature directed personally against the person to be injured; and the law, allowing them to combine for the purpose of obtaining a lawful benefit to themselves, gives no sanction to combinations which have for their immediate purpose the hurt of another." An interim injunction ought not to be granted in a case where all the facts are not fully before the court, where the cause of action, if any, is extremely doubtful and entirely novel, and where the damages are not even alleged to be irreparable. If at the trial a good cause of action is found to exist, damages will be recovered by the plaintiffs, and it will then be in the power of the court also to grant an injunction. It has always been the practice in the Chancery Courts to refuse to grant injunctions to restrain criminal offences even if injurious to property:

Clark v. *Freeman*, 11 Beav. 112;
Prudential Assurance Company v. *Knott*, 31 L. T. Rep.N. S. 866; L. Rep. 10 Ch. 142;
Fisher v. *Apollinaris Company*, 32 L. T. Rep. N.S. 628; L. Rep. 10 Ch. 297.

Since the Judicature Act there have been cases in which, after trial and where the legal right has been established, the Court of Chancery has granted an injunction to restrain the publication of a libel injurious to trade, and where the injury was clearly irreparable; but there are no cases in which this has been done upon an interlocutory application:

Thomas v. *Williams*, 43 L. T. Rep. N. S. 91; 14 Ch. Div. 864.

This court has power to issue an injunction to restrain a defendant from publishing of the plaintiff, to the injury of his trade, matter which a jury have found to be libellous (*Saxby* v. *Easterbrook*, 3 C. P. Div. 339), but not before a good cause of action has been established. Moreover, before granting an injunction, the court must consider the balance of convenience and inconvenience, which in the present instance is vastly in favour of the defendants. In fact, to grant this injunction would be going far beyond anything ever yet done by the courts upon an interlocutory proceeding. The forfeiture of the six-monthly rebate, consequent upon an infraction of the rules of the conference, is not in the nature of

a penalty, as has been contended by the other side. If the defendants secure the whole of the trade, they can afford to make a partial return to the shippers, otherwise not. That is a perfectly legitimate mode of securing to themselves the freights. They lose the right to the return unless they conform to the rules of the conference. The particular reason why the contract is made in that form is that there is a brisk season and a dull season in the Chinese shipping trade, and the defendants' vessels run all the year round for goods and passengers, whereas the plaintiffs are primarily an Australian line, and run to China only during the tea season when trade is brisk. They also cited

Rex v. *Turner*, 13 East, 228;
Gregory v. *Duke of Brunswick*, 6 M. & G. 205; 3 C. B. Rep. 481;
Reg. v. *Druitt*, 10 Cox C. C. 592.

Sir *Henry James*, Q.C. in reply.—If the combination is illegal and in restraint of trade, that is sufficient evidence of malice. Lord Mansfield, C.J. lays down that the offence of conspiracy does not consist in doing the acts by which the mischief is effected, but in conspiring with a view to effect the intended mischief by any means. The illegal combination is the gist of the offence:

Rex v. *Eccles*, 1 Leach C. C. 274.

Cur. adv. vult.

Lord Coleridge, C.J., after mentioning that Fry, L.J. concurred in the judgment he was about to deliver, stated the facts of the case as alleged by the plaintiffs, and continued substantially as follows:—The plaintiffs contend that this is a conspiracy to exclude their ships from the China market, and that it is against public policy, inasmuch as it is an undue interference with trade. Assuming that the plaintiffs could establish what they allege to be their case, and that there was a conspiracy against them on the part of the defendants—for such it would be, and it is certainly conceivable that such a conspiracy as this might be proved in point of fact—I entertain no doubt that, if the combination could be made out to be not a mere honest endeavour to support the defendants' trade, but really a device to ruin the plaintiffs trade, an indictment for conspiracy and therefore an action would lie, and it would come within the principle laid down by Lord Mansfield in *Rex* v. *Eccles* (1 Leach C. C. 274). That case is as good law now as when Lord Mansfield decided it, though one illustration which he gave in it is no doubt open to argument, and has been unfavourably commented upon. Still it is good law in principle. This case seems also to be within the principle of conspiracy given by Tindal, C.J. in *O'Connell* v. *The Queen* (11 Cl. & F. 155.) If the law has been correctly laid down by Lord Fitzgerald in *Reg.* v. *Parnell* (14 Cox C. C. 508), and I do not mean to express any doubt whatever upon the point, an indictment would lie in a case of a conspiracy to "boycott" a person, and therefore an action may lie here. I find it difficult to distinguish the facts in this case, if true, from the general outline of the facts in the case before Lord Fitzgerald. It is to be observed also that if the plaintiffs succeed in this action the damages may be exemplary, and such as may severely tax the resources of the conference owners.

But then, admitting for the purposes of this application the truth of all the facts as alleged by the plaintiffs, there arises the question as to whether the present case is one for an interlocutory or interim injunction. Fry, L.J., whose experience in this class of cases is far greater than my own, agrees with me that this is not a case for issuing an interlocutory injunction, because, although the cause of action is conceivably within the limits of legal idea, yet it is, in point of fact, a very difficult case for the plaintiffs to establish. The defendants, while admitting the issue of the circular, by their affidavits put a totally different complexion on the case, and advance one which is at least plausible and one which they may induce a jury to believe. They say that the forfeiture of the rebate by shippers who do not deal exclusively with the conference steamers is not an exaggerated penalty; it is not more than they have a perfect right to do, and give out that they will do, in the fair protection of their trade. It will be for a jury to decide which of the two contentions has been made out in fact; it is a matter entirely for proof by evidence and by examination of witnesses. Therefore, the matter being very doubtful, it would be a strong thing for this court to anticipate the decision of so doubtful a matter by issuing an interim injunction. Again, the fact that if the plaintiffs are right in their contention, full compensation is capable of being made to them in damages, is almost in itself a sufficient reason for not granting the injunction. If they succeed I have no doubt they will and ought to get very substantial damages. I understand that that is of itself a reason for not issuing an injunction prior to the trial of the action.

Further, it does not appear to me that the plaintiffs will suffer anything in the nature of irreparable injury. They may suffer; it may be that they will have a difficulty in carrying on their China trade, but such damage differs from injury called irreparable, for which compensation in damages would be no redresss. It is in cases of irreparable injury that an interim injunction issues. But the injury here is obviously not of that character. There are also other circumstances in this case which appear to me to disentitle the plaintiffs to the interim injunction for which they ask; for instance, the state of things complained of existed since 1879, whereas the plaintiff company was not incorporated till 1883. To use an analogy derived from another branch of the law, the plaintiffs came to the nuisance. Again, the plaintiffs are primarily an Australian company, and there has also been delay in making this application. The plaintiffs have not put forward any grounds upon which the courts have granted an injunction before the trial of the action. It is admitted, also, that this is a novel application, and the absence of anything like authority makes us consider this case far too doubtful to justify us in issuing the interim injunction asked for.

Application dismissed with costs.

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

Solicitors for the defendants, *Freshfields* and *Williams.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Aug. 8, 1884; *May* 2 *and* 4, 1885.

(Before Sir JAMES HANNEN assisted by TRINITY MASTERS.)

THE STORMCOCK. (a)

Collision—Tug and tow—Joint tortfeasors—Measure of damages.

The schooner J. M. S. having come into collision with a tug and her tow, a damage action in rem was instituted by the owners of the schooner against the tug to recover all the damages occasioned by the collision. Subsequently to the collision the plaintiffs received from the owners of the tow a sum of money, described in an agreement entered into between these parties "as an advance on account of the damages to be recovered from the owners of the tug." By the agreement it was agreed that the owners of the tow should give the plaintiffs all information and assistance necessary to bring the action to a successful issue; that if the schooner and the tug should both be held to blame, the plaintiffs should repay any sum by which the money already paid exceeded the moiety of damages recoverable against the tug; and that, as a basis of the arrangement, it was understood that the schooner should be found blameless for the collision.

The Court, having found the tug alone to blame, held that the above payment was not such a payment by the tow in satisfaction of the damages occasioned by the collision as amounted to a settlement in discharge of the action, and was consequently no bar to the action, and that, notwithstanding the advance paid by the tow, the plaintiffs were entitled to recover from the defendants all the damages occasioned by the collision.

It is not the duty of those in charge of a tow which is being towed with a long scope of hawser by night at sea to direct the movements of the tug—the circumstances being different to towing by day in a river.

THIS was a collision action *in rem* instituted by the owners of the schooner *J. M. Stevens* against the steamtug *Stormcock* in respect of a double collision between herself and the *Stormcock* and between herself and the ship *Earl of Beaconsfield*, which was in tow of the *Stormcock*.

The collision occurred in the Firth of Clyde on the 6th March 1884.

The facts alleged on behalf of the plaintiffs were as follows:—The *J. M. Stevens*, a schooner of 141 tons net, was on March 6, 1884, at about 4 a.m., in the Firth of Clyde, on a voyage from Ardrossan to Dublin, laden with a cargo of coal. There was a light breeze from about S.W. by S. The weather was fine, and the *J. M. Stevens* was proceeding under all sail close-hauled on the port tack, heading about W. by N. Her side lights were duly exhibited and burning brightly, and a good look-out was being kept. In these circumstances the masthead and towing lights of a steam-tug, which proved to be the *Stormcock* towing the dismasted iron ship *Earl of Beaconsfield*, was seen from four to five points on the port bow of the *J. M. Stevens*, and from two to three miles distant. The *J. M. Stevens* was kept on her course. Shortly afterwards the green light of the *Stormcock* came into sight, and the tug and her tow approached the *J. M. Stevens* on her port bow until they caused danger of collision. The *Stormcock* was loudly hailed to keep clear, but she came on at a considerable speed and with her stem struck the bowsprit and port bow of the *J. M. Stevens* and carried away the bowsprit, and almost immediately afterwards the *Earl of Beaconsfield* with her stem struck the *J. M. Stevens* on the port quarter. The *J. M. Stevens* shortly afterwards sank.

The facts alleged on behalf of the defendants were as follows:—The *Stormcock*, a steam-tug of 134 tons net, was on March 6, 1884, towing the ship *Earl of Beaconsfield*, from Waterford towards Glasgow. Shortly before 4.45 a.m., the *Stormcock* and her tow were in the Firth of Clyde, between Pladda and Holy Islands, proceeding at about the rate of eight knots an hour, and steering N.N.E. The tug had her regulation lights duly exhibited, and a good look-out was being kept on board of her. The *Earl of Beaconsfield* had her regulation lights burning brightly, and she was towing astern of the *Stormcock*, with a scope of about 120 fathoms of hawser. In these circumstances the red light of the *J. M. Stevens* came suddenly into view about 250 yards off, and about three points on the starboard bow of the *Stormcock*, whereupon the helm of the *Stormcock* was put hard-a-port, her engines were stopped, and the *Earl of Beaconsfield* was loudly hailed to port her helm. The engines of the *Stormcock* were then reversed full speed astern, and her helm steadied and starboarded, and she was brought into a position to have passed clear under the stern of the *J. M. Stevens*. If the *Earl of Beaconsfield* had duly ported her helm upon being hailed, both vessels would have gone clear, but the *Earl of Beaconsfield* improperly neglected to port her helm, and forging ahead caused danger of collision with the *Stormcock*, and the *Stormcock* was in consequence compelled to set on her engines full speed ahead, thereby throwing herself across the bows of the *J. M. Stevens*, carrying away the jibboom and bowsprit of that vessel.

The defendants, in their defence, further alleged as follows:

5. The defendants admit their liability for the collision between the *Stormcock* and the *J. M. Stevens*, but they say that the sinking and loss of the *J. M. Stevens* and everything on board of her was not occasioned thereby, but was caused solely by the collision between the *Earl of Beaconsfield* and the *J. M. Stevens*, and that such last-mentioned collision was wholly caused, or was contributed to by the negligence of the *Earl of Beaconsfield* and those on board of her.

7. Alternatively the defendants say that if the loss of the *J. M. Stevens* and everything on board of her was caused or contributed to by the negligence of those on board the *Stormcock* (which is not admitted), the owners of the *Earl of Beaconsfield* have paid to the plaintiffs, or have agreed to pay to the plaintiffs, certain sums of money in respect of the damages sustained by the plaintiffs in the said collision and claimed by them in this action, and that the plaintiffs have accepted the same in full satisfaction and discharge of the trespasses complained of and the damages claimed in this action.

8. The defendants further say that by the agreement under which the owners of the *Earl of Beaconsfield* have paid or have agreed to pay to the plaintiffs the said sum of money as agreed, it was, after the said collision and before this action was brought, agreed between the plaintiffs and the owners of the *Earl of Beaconsfield*,

(a) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs. Barristers-at-Law.

that the plaintiffs should instruct Messrs. Thomas Cooper and Co., who were and now are acting as solicitors to the owners of the *Earl of Beaconsfield* and their underwriters in respect of the matters arising out of the said collision, to bring an action in the plaintiffs' names against the *Stormcock*, and that the plaintiffs should give them all information and assistance which they might require to bring the said action to a successful issue, and that the plaintiffs should not be liable for any costs whatever, and that any amount recovered from the *Stormcock* beyond the sum of money paid or to be paid under the said agreement to the plaintiffs should be paid over to the plaintiffs, and that if the *J. M. Stevens* and the *Stormcock* should both be found to blame for the collision the plaintiffs should repay any sum by which the sum of money paid to them under the said agreement exceeds the moiety of their damages recoverable against the *Stormcock*. The defendants say that in pursuance of the said agreement this action was brought by the said Messrs. Thomas Cooper and Co. in the names of the plaintiffs, but on behalf of the owners of the *Earl of Beaconsfield*, and to enable the said owners of the *Earl of Beaconsfield* to recover from the defendants the sum so paid or to be paid to the plaintiffs.

The plaintiffs, by their reply, joined issue and alleged alternatively as to paragraph 8 of the statement of claim that it was bad in law and showed no answer to the action.

The agreement referred to in the statement of defence was contained in a receipt and a memorandum, which were as follows:

Received of Messrs. Thomas Cooper and Co. the sum of six hundred and fifty pounds as an advance on account of the damages to be recovered from the owner of the tug *Stormcock* by the owners of the schooner *J. M. Stevens*, and of her cargo and freight, and her master and crew's effects, in respect of the loss of the said schooner, her cargo and freight, and master and crew's effects, by collision with the *Stormcock*. It is agreed that the said parties will instruct Messrs. Thomas Cooper and Co. to bring an action in their name against the *Stormcock* and her owners, and will give them all information and assistance which they may require to bring the action to a successful issue, but they are not to be liable for any costs whatever. Any amount recovered from the *Stormcock* beyond the sum of 650*l.* to be paid over to the owners of the *J. M. Stevens*. If both the *J. M. Stevens* and *Stormcock* are found to blame for the collision, the owners of the *J. M. Stevens*, her cargo and freight and master and crew, are to repay any sum by which the above 650*l.* exceeds the moiety of their damages recoverable against the *Stormcock*.

If the action against the *Stormcock* fails for any cause but default on the part of the *J. M. Stevens*, the owner of the *Earl of Beaconsfield* to pay any further sum to which the damage sustained by the loss of the *J. M. Stevens*, her cargo, freight, and master and crew's effects, may amount assessed in the usual way in such cases in the Court of Session or by the sheriff, with interest from the collision at 4 per cent. per annum. If the action against the *Stormcock* succeeds, the owners of the *J. M. Stevens* to pay a sum not exceeding ten pounds in full for all extra costs between solicitor and client. It is understood as a basis of the arrangement that the *J. M. Stevens* will prove that she had her lights burning and kept her course before the collision until it was inevitable. The Scotch costs to be paid by the *Earl of Beaconsfield*, R. and S. Neill (Scotch solicitors acting on behalf of the owners of the *J. M. Stevens*) to be allowed usual agency on the action here if successful. In case the *Stormcock* or her owners be freed from liability and should take any proceedings against the *J. M. Stevens* or her owners for damages, the owners of the *Earl of Beaconsfield* indemnify the *J. M. Stevens* and her owners against all damages and costs under such action, provided the *J. M. Stevens* had her lights up and kept her course.

The witnesses called on behalf of the plaintiffs alleged that the *Stormcock* with her stem and starboard bow struck the *J. M. Stevens* on her port bow close to the stem, carrying away the forecastle head; that the *Earl of Beaconsfield* then struck the *J. M. Stevens* on the port quarter within 20 feet of her stern; and that the *J. M. Stevens* sank head foremost owing to the blow given by the *Stormcock*.

The witnesses called on behalf of the defendants alleged that the *Stormcock* struck the *J. M. Stevens* a slanting blow with her starboard bow on her jibboom and bowsprit, and that the *Earl of Beaconsfield* struck the *J. M. Stevens* on the port quarter stem on. The mate of the *Stormcock* stated that after the collision he went in a boat to the *J. M. Stevens* and found a large hole in her port quarter.

Sir *W. Phillimore* (with him *Bucknill*) for the plaintiffs.—On the evidence it is submitted that the sinking of the *J. M. Stevens* was solely due to the collision with the *Stormcock*. In order that the defendants should escape liability they must prove either that the death-blow was not directly given by the *Stormcock*, or indirectly caused by the negligence of those in charge of the *Stormcock*. The agreement between the owners of the *Earl of Beaconsfield* and the owners of the *J. M. Stevens* is no bar to this action, it being conditional upon the *J. M. Stevens* being found blameless for the collision. Moreover, the 650*l.* is stated to be an advance, and is therefore not a payment in accord and satisfaction of the plaintiffs' claim.

Cohen, Q.C. and *Aspinall* for the defendants.—It is admitted that, if the *Stormcock* sank the *J. M. Stevens*, the owners of the *Stormcock* are liable for the damages suffered by the plaintiffs in excess of the 650*l.* already paid by the owners of the *Earl of Beaconsfield*, but for no more. Had the *Earl of Beaconsfield* been keeping a proper look-out, she would have ported before the collision, and not have caused the *Stormcock* to go across the bows of the *J. M. Stevens*. Even assuming the *Stormcock* to be in fault, the *Earl of Beaconsfield* is also in fault, and was actually the cause of the sinking of the *J. M. Stevens*. If so, the tug and tow are joint tort-feasors. The plaintiffs are seeking in this action to recover all the damages occasioned by the collision, irrespective of the fact that they have been paid 650*l.* This action is therefore brought for the benefit of the *Earl of Beaconsfield*, a joint tort-feasor with the *Stormcock*, between whom there can be no contribution:

Merryweather v. *Nixon*, 8 T. R. 186;
Addison on Torts, p. 85.

Although the 650*l.* is stated to be an advance, it is believed that the damages sustained by the plaintiffs do not exceed that sum. If so, it is a payment in full satisfaction of the plaintiffs claim, who therefore can have no right of action against the *Stormcock*. The tug is the servant of the tow, and inasmuch as the plaintiffs have received satisfaction from the tow, they cannot recover against the servant:

Brinsmead v. *Harrison*, L. Rep. 7 C. P. 547; 27 L. T. Rep. N. S. 99;
Wright v. *The London General Omnibus Company*, 2 Q. B. Div. 271; 36 L. T. Rep. N. S. 590;
Thurman v. *Wild*, 11 Ad & Ell. 453;
Priestly v. *Ferney*, 3 H. of L. 957.

Sir *W. Phillimore* in reply.

Sir JAMES HANNEN.—In this case the steam-tug *Stormcock* had in tow a large vessel, the *Earl of Beaconsfield*, when the *Stormcock* and the *Earl of*

Beaconsfield both came into collision with the schooner *J. M. Stevens*. The *Stormcock* was towing the *Earl of Beaconsfield* with a scope of 120 to 150 fathoms of hawser. It has scarcely been argued that the *J. M. Stevens* was to blame, although the witnesses of the *Stormcock* did feebly put forward a suggestion that the reason why they did not see the *J. M. Stevens* was that she had no lights. It has, however, been shown that the *J. M. Stevens* had lights, and I think no blame can be imputed to her. I think, however, that there was a bad look-out on the *Stormcock*, and I think that the collision between the tug and the *J. M. Stevens* arose from that bad look-out. I am advised that the blow which the *Stormcock* delivered to the *J. M. Stevens* was in all probability sufficient to have caused the schooner to sink, even if she had not come into collision with the *Earl of Beaconsfield*. The evidence points to this, not merely that the bowsprit of the *J. M. Stevens* was torn away by the tug, but that her whole forecastle was torn away. Such a blow would be calculated to be a blow sufficient to sink the vessel. Be that as it may, we are all clearly of opinion that the subsequent collision between the *Earl of Beaconsfield* and the *J. M. Stevens* was brought about solely by the negligence of those on board the *Stormcock*. The collision occurred at night at sea, and I am advised by the Trinity Brethren that that creates a wholly different state of affairs to ordinary towing by day in a river where those on the tow are able to direct the movements of the tug. That is very different from the present circumstances. A tug which is towing at night with 120 fathoms of hawser is not capable of being directed by those on the tow with that speed and rapidity which is possible in a river. It is the view of my assessors that it is not to be expected under the circumstances that the tow could control the movements of the tug so as to prevent a collision of this kind. The tow would have a right to suppose that the tug which was so far in advance would take the necessary precautions to avoid collision with an approaching vessel. Therefore there was no negligence on the part of those on board the *Earl of Beaconsfield* in not giving directions to the tug to take a different course to that which she adopted. I should observe that the allegations of negligence on the part of the *Earl of Beaconsfield*, put forward by the *Stormcock*, have fluctuated very much on the pleadings and evidence. It was suggested at first, in the statement before the Receiver of Wreck, that the collision arose from the *Earl of Beaconsfield* not having ported in time. There is, however, no evidence which satisfies me that she did not port when called upon to do so. I have already dealt with the other suggestion, that if those on the tug were in fault in not seeing the *J. M. Stevens*, those on the tow were equally in fault. I therefore come to the conclusion that the *Stormcock* was to blame.

That conclusion gives rise to the consideration of the defence put forward by the owners of the *Stormcock*. As to the liability of the tow, it seems to have been admitted by both the learned counsel that the tow was responsible for the negligence of the tug. I confess I have been somewhat astonished to find to what extent that principle has been carried by my learned predecessors. But for these decisions, apparently based, according to Dr. Lushington, on considerations of expediency, that there should not be a divided command, I myself should have been inclined to think that the decisions of the American courts establish a rule more in conformity with my own ideas of justice; that is, that the particular circumstances should be looked at in each case to see whether the tug or the tow, or both, are liable. But I accept the decisions of Dr. Lushington treating the tug as the agent or servant of the tow. However, although that has been held, it has also been held that the tug and tow are not so identified with one another that the tow cannot recover against the tug that which the tow has been obliged to pay as compensation for the negligence committed by the tug. Taking the view that I do of the facts of this case, it would follow that the *Earl of Beaconsfield* would have been entitled to recover as against the tug for the damage which was done. In addition to the above facts which I have found, an agreement was entered into between the owners of the *Earl of Beaconsfield* and the owners of the *J. M. Stevens*, the effect of which was that the solicitors for the *Earl of Beaconsfield* had the control of the proceedings in the action brought by the *J. M. Stevens* against the *Stormcock* for the purpose of establishing that which has now been established, viz., that the *Stormcock* was to blame for the collision. In so doing there was nothing remarkable. The owners of the *Earl of Beaconsfield* had a direct interest in the action, and therefore said to the owners of the *J. M. Stevens*, "To you it does not matter whether we are to blame or the tug, because you will recover either against us or the tug; therefore let us have the control of the proceedings." In that I see nothing objectionable. The question is whether something more was not done. It is said that the owners of the *Earl of Beaconsfield* have discharged the liability of the *Stormcock*, and that, therefore, no right of action remains on the part of the *J. M. Stevens* against anybody. When, however, the documents constituting the agreement come to be examined, I am of opinion that they do not amount to that. The agreement runs thus: [The learned President then read the agreement.] It was contended that the words "650*l.* as an advance" show that this was to be considered as an absolute payment; but on consideration I am of opinion that it was only a provisional payment, as though the parties had said, "We must have some security." That might have been done by depositing a sum of money in a bank, but I find a passage in the agreement which seems to me to clearly establish that this was not a payment out and out. It is this: "It is understood as a basis of the arrangement that the *J. M. Stevens* will prove that she had her lights burning and kept her course." Here is a distinct statement that this is a payment on the assumption that the *J. M. Stevens* will be able to prove that she was not to blame. If it had been established that the *J. M. Stevens* was to blame, this money would have been recoverable back. That being so, I come to the conclusion that this was not a satisfaction of the claim of the *J. M. Stevens*, and that therefore it does not stand in the way of the *J. M. Stevens* recovering in this action. This arrangement could undoubtedly have been carried out by some other means; because, if the money had been paid by the owners

of the *Earl of Beaconsfield* under compulsion of law to the owners of the *J. M. Stevens*, they would upon the facts have been entitled to recover those damages over against the *Stormcock*, inasmuch as the necessity for paying the money had been occasioned by the *Stormcock's* negligence. For these reasons I am of opinion that the *Stormcock* is alone to blame, and that the defence has not been made out.

Solicitors for the plaintiffs, *Farlow* and *Jackson*.

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

Tuesday, May 19, 1885.

(Before Sir JAMES HANNEN.)

THE CARDIFF STEAMSHIP COMPANY *v.* JOHN BARWICK AND OTHERS.

THE RAISBY. (*a*)

Salvage—Ship and cargo—Liability of owners—Average bond—Costs—Higher scale—R. S. C. Order LXV., rr. 9, 10.

Where salvage services are rendered to ship, freight, and cargo, the shipowners are not personally liable for the services to the cargo.

Where salvage services are rendered to ship, freight, and cargo, there is no duty on the owners of the salved ship before delivering the cargo to take a bond from the consignees thereof securing payment by the consignees to the salvors of salvage due in respect of the cargo.

Salvage services were rendered by the steamship G. to the steamship R. and her cargo under the following written agreement signed by both the masters: "At my request, the captain of the steamship G. will tow my ship, the steamship R., to St. Nazaire, that being the nearest port for repairs. The matter of compensation to be left to arbitrators at home, to be appointed by the respective owners." The R. was towed to St. Nazaire, and thence proceeded to Dunkirk, where her cargo was delivered to French consignees. A salvage action in rem was commenced in England against ship, freight, and cargo, but the plaintiffs not being able to procure the appearance of the cargo owners, salvage was awarded in respect of ship and freight only. In a salvage action in personam against the owners of the R. to recover salvage for the services rendered to the cargo:

Held, that the defendants were not liable under the agreement, and that there was no liability on shipowners to pay salvage for services to cargo.

Costs on the higher scale will only be allowed under exceptional circumstances, and there were no such circumstances in this case.

THIS was a salvage action *in personam* instituted by the owners, master, and crew of the British steamship *Gironde* against the owners of the steamship *Raisby* to recover salvage for services rendered to the cargo laden on board the *Raisby*, or, in the alternative, for damages for breach of duty.

The particulars of the services were as follows:—The steamship *Gironde*, of 461 tons net, was on Sept. 3, 1883, about twelve miles north of the Chaussée de Sein Light, bound on a voyage from Cardiff to Bordeaux. In these circumstances the steamship *Raisby* was sighted flying a signal of distress. The *Gironde* bore down upon the *Raisby*, when the following written agreement was entered into between the two masters: "At my request the captain of the steamship *Gironde*, of Cardiff, will tow my ship, the steamship *Raisby*, of London, to St. Nazaire, that being the nearest port for repairs. The matter of compensation to be left to arbitrators at home to be appointed by the respective owners. Signed in duplicate by both masters." The *Raisby* was a steamship of 1502 tons net, bound on a voyage from Bombay to Dunkirk, and laden with a cargo of about 3650 tons of grain and seed. The position of the *Raisby* was perilous. Her holds were flooded, there was water in the engine-room, which had put out the fires, some of her sails had been carried away, and there was a current setting her in shore. At 2.30 p.m. the *Gironde* began to tow, and after considerable difficulty and danger the *Raisby* was safely brought to an anchorage off St. Nazaire at 7.30 a.m. on Sept. 5.

The statement of claim, so far as is material, was as follows:

5. The *Raisby* was partially repaired at St. Nazaire, and with her cargo on board was subsequently towed to Dunkirk, her port of discharge, and her cargo was then duly delivered by the defendants to the consignees thereof, from whom, and each of whom, the defendants took and received a bond or agreement, whereby the said consignees undertook to pay to the defendants the proportion due in respect of the said cargo of any sum or sums paid by or recovered against the defendants for and in respect of the said services, and generally for and in respect of general average and salvage.

6. In the alternative, the plaintiffs allege that the said cargo was taken to Dunkirk and delivered as aforesaid, and that it was the duty of the defendants to the plaintiffs, before and at the time of delivering the said cargo to the consignees thereof, to obtain and take from the said consignees, and each of them, a bond or agreement securing the payment by the said consignees and each of them, of any sum or sums due from them, and each of them and paid or recovered in respect of the said services, and generally for and in respect of general average and salvage upon the said cargo; and the plaintiffs allege that the defendants failed to perform the said duty, and to obtain and take the said bond or agreement, and thereby have prevented the plaintiffs from recovering against the said cargo the salvage due to them in respect of the said cargo.

11. The said agreement to tow the *Raisby* was an agreement to render salvage services for reward to the said ship and her cargo, and was entered into by the master of the *Raisby* as agent for the defendants.

The defence, so far as is material, was as follows:

4. As to paragraph five of the statement of claim, the defendants say that, before delivery of the cargo at Dunkirk, the consignees thereof agreed to pay to the defendants such amount as might be adjudged by the laws in force in France (of which country the consignees of the said cargo were subjects and in which country they were residing) to be payable by the said owners in respect of any general average contribution due by them as such owners.

5. The defendants deny that there was any duty from them to the plaintiffs to obtain and take from the consignees of the said cargo a bond or agreement securing the payment by them of any sum or sums of money in respect of general average and salvage upon the said cargo as alleged. The defendants also deny that they have, by the alleged breach of duty or otherwise, prevented the plaintiffs from recovering against the said cargo such salvage (if any) as is due to the plaintiffs in respect of the said cargo.

9. The defendants deny that the master of the *Raisby* was their agent to render them liable in this action, and they deny that there is anything due from them to the plaintiffs in respect of the said services.

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

At the hearing it appeared that on the 4th Oct. 1883 the plaintiffs commenced an action *in rem* in England against ship, freight, and cargo, but in consequence of the plaintiffs being unable to procure the arrest of the cargo or the appearance of the cargo owners, the proceedings against the cargo were abandoned. In that action the plaintiffs recovered 4000*l.* as salvage in respect of the services rendered to the ship and freight. On Dec. 28, 1883, the plaintiffs commenced an action in the Tribunal de Commerce at Dunkirk for salvage to cargo against the consignees of the cargo, in which it was decided that no action would lie, because the proceedings had not been taken against the owners of ship and cargo conjointly, and because the master was not a party to the proceedings. The plaintiffs put in the defendants' log, and called evidence in support of their statement of claim.

The defendants called M. Dumont, a French advocate, who stated that the plaintiffs might have arrested the ship, freight, and cargo at Dunkirk or St. Nazaire, and retained the cargo until bail was given, or a court of competent jurisdiction had adjudicated upon the claim. A. M. Allibert proved that he, as representing the *Raisby*, drew up an average bond at Dunkirk in the usual French form providing that the adjustment should be in conformity with the law and jurisprudence of the Tribunal de Commerce at Dunkirk.

Sir *Walter Phillimore* and *J. P. Aspinall* for the plaintiffs.—The defendants are liable under the agreement. Apart from the agreement there is a primary liability on the shipowner to pay salvage for services to the cargo. The effect of the decision in *Anderson* v. *The Ocean Steamship Company* (52 L. T. Rep. N. S. 441; 5 Asp. Mar. Law Cas. 401; 10 App. Cas. 107) is that a master may contract when ship and cargo are in peril so as to bind the cargo and the shipowner, but he so contracts as agent for the shipowner, and *quâ* third parties, the shipowner is primarily liable. No injustice is done to the shipowner by so deciding, since he has a remedy over against the cargo for any salvage he may have to pay in respect of the cargo. In *Akerblom* v. *Price* (7 Q. B. Div. 129; 44 L. T. Rep. N. S. 837; 4 Asp. Mar. Law Cas. 441) salvage in respect of cargo was primarily paid by the shipowner, who in that action sought to recover over against the cargo owner. The authority of the master as agent for the shipowner is sufficiently wide to enable him to enter into an agreement, express or implied, rendering the shipowner liable for salvage in respect of the whole adventure:

The Medina, 2 P. Div. 5; 3 Asp. Mar. Law Cas. 305; 35 L. T. Rep. N. S. 779;
The Alfred, 50 L. T. Rep. N. S. 511; 5 Asp. Mar. Law Cas. 214;
The Vandyck, 5 Asp. Mar. Law Cas. 17; 47 L. T. Rep. N. S. 694.

The words of the agreement are sufficient to impose this liability on the shipowner, and in construing the agreement it is to be remembered that the services to the cargo were beneficial to the shipowner, and it is to be presumed that this was present to the mind of the master on entering into the agreement. It is further contended that the defendants are liable in tort, because, owing to breach of duty on their part, we have been unable to proceed *in rem* against the cargo. The shipowner having possession of the cargo, he had no right to part with it without securing to the plaintiffs the means of recovering salvage in respect of it:

Crooks v. *Allan*, 5 Q. B. Div. 38; 4 Asp. Mar. Law Cas. 216; 41 L. T. Rep. N. S. 800.

Webster, Q.C. and *Myburgh*, Q.C. (with them *Bucknill*) for the defendants.—The master has no authority to bind the owner for salvage to cargo. The fact that there is no trace of any such authority or of such primary liability on the shipowner in the books, is in itself strong evidence of the correctness of the defendants' contention. Salvors have both a possessory and a maritime lien in respect of the *res* salved. Their remedy is, therefore, against the *res* or its owner. In *Anderson* v. *The Ocean Steamship Company* and *Akerblom* v. *Price* the question was not whether the shipowner was bound to pay salvage in respect of cargo, but whether, having done so, he could recover it in general average against the cargo owner. The decisions of Dr. Lushington in *The Mary Pleasants* (1 Swa. 224) and in *The Pyrenee* (Br. & L. 189) distinctly lay it down that ship and cargo must each pay its own share of salvage, and that neither can be made liable for the salvage due from the other. Assuming the master to have the necessary authority to bind the shipowner, he has not done so by this agreement. There is no mention in it of cargo. The only agreement is, that the compensation is to be left to arbitrators. There is no authority for saying that a shipowner is bound to take an average bond to protect salvors. Average bonds are taken for the protection of the shipowner, to secure proper payments as between himself and the cargo owners. The case of *Crooks* v. *Allan* is not in point. In that case the shipowner was held liable to cargo owners for omitting to take the necessary steps to secure payment of general average. There the cargo owner's only remedy lay in the shipowner procuring an adjustment of general average. In the present case the salvors have a possessory and a maritime lien, two most effective remedies. Moreover, it has been proved that the defendants did in fact take an average bond in the French form, and have, according to the decision in *Simonds* v. *White* (2 B. & C. 805), done all that is required of them.

Sir *W. Phillimore* in reply.—The cases of *The Mary Pleasants* and *The Pyrenee* only decide that the ship itself is not liable for salvage to the cargo. The plaintiffs are, however, not seeking to recover *in rem* against the *Raisby*, but personally against her owners. In the case of a canal boat carrying goods in inland waters, if she were to break down, and her owners or master were to employ persons to rescue the cargo, and provide another boat to carry it on, it is clear that the owners of the boat would have to pay all the cost of the rescue and of the forwarding, and equally clear that the master of the canal boat would have authority to enter into the necessary contract, it being one of the incidents of his employment. In the present case, the engagement of a vessel to render salvage services to ship and cargo is one of the ordinary incidents of the employment of the master of a seagoing vessel.

Cur. adv. vult.

May 19.—Sir James Hannen.—The facts of this case are as follows: The defendants' steamship *Raisby*, on a voyage from Bombay to Dunkirk, when about twelve miles from the Chaussée de Sein Light being disabled, gave signals for assistance. The plaintiffs' steamship *Gironde* went to her assistance, and the following document was signed by the two captains: "At my request the captain of the steamship *Gironde*, of Cardiff, will tow my ship the steamship *Raisby*, of London, to St. Nazaire, that being the nearest port for repairs; the matter of compensation to be left to arbitrators at home to be appointed by the respective owners." The *Gironde* thereupon towed the *Raisby* to St. Nazaire, where she was sufficiently repaired to proceed to Dunkirk, her port of destination. The cargo was delivered to the several French consignees at Dunkirk. After some ineffectual attempts to arrange a reference the plaintiffs commenced an action in this division for salvage against the ship, freight, and cargo, but being unable to procure the appearance of the owners of the cargo in those proceedings they were abandoned so far as it related to the cargo and its owners, and the action was continued against the ship and freight and its owners alone. In that action a sum of 4000*l.* was recovered for salvage of ship and freight on an estimated value of 35,000*l.* While this action was proceeding the plaintiffs commenced an action in the French Tribunal de Commerce, at Dunkirk, for salvage of the cargo, in which they failed, and they now proceed in this action against the owners of the *Raisby* personally to recover from them remuneration for the salvage of the cargo. The question is whether this action can be maintained. It is clear that no primary liability rests upon the ship or its owners to pay for the salvage of the cargo. It is laid down in Abbot on Shipping, tit. "Salvage" 6: "With respect to the parties liable to pay salvage and the interest in respect of which it is payable, the rule is that the property actually benefited is alone chargeable with the salvage recovered." In *The Pyrenee* it was explicitly decided that the ship is not liable for the salvage of cargo, and *The Mary Pleasants* (1 Swa. 224) is to the same effect. But it is contended for the plaintiffs that in this case the defendants are liable by virtue of the alleged agreement entered into between the two captains. The so-called agreement, however, does not purport to extend the liability of the shipowners, or indeed to fix any liability on anyone except in so far as such liability may be created by the acknowledgment it contains that the captain of the *Raisby* had requested the captain of the *Gironde* to tow his ship to St. Nazaire. This part of the document in no way alters the position of the parties from what it would have been if the captain of the *Raisby* had simply accepted the services of the *Gironde*, in which case it has not been contended that a claim could have been maintained against the ship or its owners for salvage of the cargo, The only agreement contained in the document is that "the matter of compensation" (without reference to the persons or property to bear it) "is to be left to arbitrators at home." This, however, was valueless as an agreement. It could not have been pleaded as any answer to an action for salvage brought in the ordinary way in the Admiralty Division, and if effect could have been given to it at all it would only have been by bringing an action upon it for not submitting to arbitration. And this action is not of that nature. It appears to me, therefore, that the plaintiffs altogether fail to show any liability on the part of the defendants to pay for the salvage of the cargo, and I should not have thought it necessary to say more, but that it has been argued that there are cases which, though they do not expressly decide that the shipowner is liable in the first instance for the salvage of the cargo, yet they imply such a liability. The most important of these cases is the recent one in the House of Lords of *Anderson* v. *Ocean Steamship Company* (*ubi sup.*). There Lord Blackburn, delivering the judgment of the House, held that where the owners of a salved vessel had entered into a binding agreement with the salvors, and had paid a particular sum for salvage of ship and cargo, they might recover such portion of it as a jury might think reasonable from the owners of cargo as general average. Their Lordships did not decide that, apart from agreement, the owners of the ship would have been liable to pay for the salvage of the cargo. The principle upon which the decision proceeded is explained in the passage cited at p. 114 of 10 App. Cas. from *Kemp* v. *Halliday*. That principle is, that money actually and necessarily expended for the preservation of ship and cargo is as much a voluntary sacrifice for the common benefit as the sacrifice of a mast or anchor would have been. Here the defendants have not paid anything in respect of the salvage of cargo, nor have they entered into any agreement to pay it. The liability both as to the parties responsible and the amount is left at large to be determined in due course of law, and that is, as it appears to me, that the plaintiffs must seek their remedy for salvage of cargo, as distinct from ship, from those who have had the benefit of that salvage.

Another ground of complaint is thus alleged in the statement of claim: that it was the duty of the defendants to the plaintiffs, before delivering the cargo, to obtain from the consignees of the cargo a bond or agreement securing the payment to the consignees of any sum due from them, and paid or recovered in respect of the plaintiffs' services, and that the defendants have failed to perform this duty, and thereby have prevented the plaintiffs from recovering against the cargo the salvage due in respect of it. But there was no duty towards the plaintiffs to obtain such a bond. If indeed the defendants were liable in this action, and could have obtained such a bond as the plaintiffs allege it was the defendants' duty to take, it was imprudent of them, in their own interest, not to do so, but the plaintiffs have no right of action against the defendants because they did not do something for their own security. But, as a matter of fact, the defendants did take an average agreement in the French form, which stipulates that the adjustment shall be "in conformity with the law and with the jurisprudence of the Tribunal of Commerce at Dunkirk," and it has not been shown that they could have obtained any other. The allegation in the statement of claim that the plaintiffs have been prevented by the defendants from recovering against the cargo the salvage due in respect of it is wholly unsupported. It has been proved by M. Dumont, a French advocate, that the plaintiffs might have asserted their lien on the cargo by arresting it either at

St. Nazaire or at Dunkirk, and the plaintiffs were expressly warned by the defendants' agent that if they did not arrest the cargo they would lose their lien, and that the responsibility would rest with them. Instead of doing this the plaintiffs instituted a suit for salvage before the Tribunal of Commerce against the owners of the cargo, in which they failed. I of course abstain from criticising the judgment of the French court, but M. Dumont was of opinion that it would have been reversed on appeal. I observe, however, that one of the grounds of the decision was that "the cargo had been delivered to the claimers thereof without the captain of the *Gironde* having taken any steps to make valid or protect the rights which he now claims to have over the cargo;" from which it would seem that, if the plaintiffs have lost their remedy against the cargo owners in France, it is by their own default. For these reasons I am of opinion that the plaintiffs have failed to establish their claim, and that the action must be dismissed with costs.

Myburgh, Q.C., for the defendants, asked for costs on the higher scale. According to Order LXV., r. 9, costs on the higher scale may be allowed "on special grounds arising out of the nature and importance or the difficulty or urgency of the case."

THE PRESIDENT.—I see no special grounds in this case for allowing costs on the higher scale. I have before pointed out it was only in exceptional cases that costs on the higher scale ought to be allowed. Provision has been made by rule 10, Order LXV., for the taxing officer to allow such costs on the higher scale in respect of particular matters as he may think fit. I see no reason for allowing all the costs to be taxed on the higher scale, and therefore I must refuse the application.

Solicitors for the plaintiffs, *Fielder* and *Sumner*, for *F. de Courcy Hamilton*, Cardiff.

Solicitors for the defendants, *Botterill* and *Roche*.

June 11 *and* 15, 1885.

(Before BUTT, J.)

THE CHUSAN. (*a*)

Collision—Trawlers' lights—Regulations for Preventing Collisions at Sea 1884, *art.* 10.

Art. 10 (*a*) *of the Regulations for Preventing Collisions at Sea* 1884, *requiring all fishing vessels of twenty tons net and upwards, "when under way," to carry the ordinary lights of a vessel under way, unless required by other regulations to carry the lights therein prescribed, is applicable to trawlers whilst engaged in trawling and in motion.*

Where a steamship having come into collision with a trawler, which, in violation of the Regulations for Preventing Collisions at Sea, was carrying a white masthead light in addition to side lights, and it appeared that those on board the steamship had not seen the white light, the Court refused to hold the trawler to blame for the breach of the regulations, on the ground that it could not possibly have contributed to the collision.

THIS was a damage action *in rem*, instituted by the owner of the fishing smack *I. C. U.* against the steamship *Chusan* to recover damages occasioned by a collision with the *Chusan*.

The collision occurred in the English Channel on Dec. 24, 1884. The whole of the crew of the *I. C. U.* were drowned.

The plaintiffs, by their statement of claim, alleged as follows:—On Dec. 24, 1884, the cutter-rigged smack *I. C. U.*, of fifty tons register, was in the English Channel on a fishing voyage, manned by a crew of four hands all told. About 2.15 a.m. the *I. C. U.* was between the Start Point and Portland Bill, Berry Head, bearing about N.W., distant about twenty miles. The weather was squally, the wind E.N.E., the tide ebb, and the *I. C. U.* was proceeding on the starboard tack at an unknown rate of speed. Her regulation lights were duly exhibited and a good look-out was being kept. In these circumstances those on board her sighted the *Chusan*. The *I. C. U.* kept her course and burnt flares over her quarter, but the *Chusan* ran into her, and with her stem struck the port bow of the *I. C. U.*, cutting her down and sinking her, and the whole of the crew of the *I. C. U.* were drowned.

The defendants, by their defence, denied that the *Chusan* had come into collision with the *I. C. U.*, but admitted that she had been in collision with a vessel name unknown, and alleged that, if such vessel was the *I. C. U.*, the collision was solely caused by the negligent navigation of the *I. C. U.*

The statement of facts pleaded by the defendants was as follows:—On Dec. 24, 1884, shortly before 2.30 a.m., the *Chusan*, a steamship of 2651 tons, bound from India to London, was in the English Channel off Lyme Bay. The *Chusan* was steering E. by S., and proceeding at the rate of about ten knots. Her regulation lights were duly exhibited and a good look-out was being kept. At such time several bright lights of vessels were seen ahead and on the port bow. The course of the *Chusan* was altered under a port helm in order to pass clear to the southward of such lights. The *Chusan* proceeded under her port helm for a short time, when the red light of a vessel was seen about two points on the starboard bow, at a distance of about a quarter of a mile. The helm of the *Chusan* was immediately put hard-a-port and her engines were stopped. The vessel then showed a white light over her port quarter, but the stem of the *Chusan* almost immediately struck her on her port side, and she sank in a short time, all hands being lost.

The defendants charged the smack with not keeping her course, and with not having her side lights properly burning and exhibited in accordance with the Regulations for Preventing Collisions at Sea.

At the hearing the witnesses called on behalf of the plaintiff were the plaintiff himself, a surveyor, the master of a fishing smack belonging to the same fleet as the *I. C. U.*, and the look-out on board the *Chusan*.

The plaintiff and the surveyor proved that the *I. C. U.* carried proper lights, that the *I. C. U.* had not been seen since the 24th Dec., and that the plaintiff had received from the Receiver of Wreck a stern board belonging to her boat, bearing the name *I. C. U.*, and that no other smack belonging to the fleet had been lost at that time. The master of the smack *Pioneer* proved that he

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

had sailed on the voyage in question in company with the *I. C. U.*, that during the night of the 23rd Dec. the *I. C. U.* had been fishing with her trawl down, that he saw the *Chusan* go in the direction of the *I. C. U.*, that he then lost sight of the *I. C. U.*, and never saw her again, that about five minutes before the collision the *I. C. U.* was exhibiting a white light at her masthead, that she was then evidently hauling up her trawl, and that he saw no other lights on her except the bright light. The look-out from the *Chusan* proved that he reported a red light on the starboard bow distant about two ship's lengths, that the *Chusan* came into collision with the vessel exhibiting the red light, and that he believed it to be a fishing smack.

At the close of the plaintiffs' evidence it was submitted by counsel for the defendants that there was no case made out, first, because there was no proof of the identity of the *I. C. U.* with the vessel with which the *Chusan* had come into collision; and secondly, because there was no evidence of negligence on the part of the *Chusan*.

BUTT, J. held that there was evidence of identity and of negligence.

The defendants did not call any witnesses.

Bucknill (with him *Nelson*) for the plaintiffs.—It being proved that the *Chusan* ran down a smack on the morning of the 24th Dec., and sank her, all hands being drowned, and that the *I. C. U.* was in the immediate neighbourhood, and was sunk with all hands, the conclusion is that she was sunk by the *Chusan*. The evidence being that the look-out on the *Chusan*, going ten knots, reported a red light on the starboard bow, distant a quarter of a mile at the outside, it was the duty of the *Chusan* to have immediately reversed her engines. All she did was to port her helm and stop her engines. She is therefore to blame for a breach of art. 18 of the Regulations for Preventing Collisions at Sea.

Hall, Q.C. (with him Sir *Walter Phillimore* and *Baden-Powell*) for the defendants.—The onus is on the plaintiffs to prove conclusively that the *Chusan* came into collision with the smack. The evidence on this point is merely problematical. There is also an absence of affirmative evidence fixing the *Chusan* with negligence. Assuming there to have been negligence on the part of the *Chusan*, the smack is also to blame for infringing the regulations by carrying an improper light.

BUTT, J.—I am now prepared to give my opinion upon all but the question as to whether the smack is to blame for not exhibiting proper lights, or what is the same thing, for exhibiting improper lights. In my view of this case there is no doubt upon the evidence that the *Chusan* sank the smack *I. C. U.* All hands on the *I. C. U.* having perished, it is, of course, extremely difficult to establish a case of negligence against the steamer, but a plaintiff is bound to establish his case, and the question therefore arises whether, in the state of the evidence, I can find negligence against the steamer. Now, it is difficult to say what lights this smack, the *I. C. U.*, carried at different times in the course of the night, and until I have heard an argument upon the point I am not prepared to decide what lights a smack with her trawl down ought to carry. But the plaintiffs have called one of the crew of the steamer, and he has said that, being the look-out man on the starboard bow of the *Chusan*, he saw, and saw for the first time, at a distance of two ship's lengths, a red light on board the smack the *Chusan* ran down. The plaintiffs having, under the peculiar circumstances of the case, been forced to call a witness from the other ship, I do not hold that they are bound to take everything that this witness says as true, and I am not inclined so to take it. I notice that in the preliminary act and in the pleadings it is stated that the red light of the smack run down by the *Chusan* was seen by those on board the *Chusan* at a quarter of a mile distant. If the defendants had wanted to discount this statement, although it is not always allowed to parties to depart from their preliminary act, they should have called evidence. The whole of their officers and crew were, I presume, available, but they have chosen to let the matter stand upon the plaintiffs' evidence, and upon their pleadings. In that state of things, acting under the advice of the Elder Brethren, I have no hesitation in saying that the steamer saw, as she has pleaded, the smack's red light at about a quarter of a mile distant. If she had no time to clear the smack under a port helm, it was her manifest duty, under the rules, not only to stop, but to reverse her engines. She takes a half measure, she stops, but she does not reverse—that is the story told on her pleadings. I think that was wrong, and therefore I hold her to blame—the question whether the smack is also to blame depends upon the question of lights. That is a matter which I will not decide until I have heard further argument of counsel upon it.

June 15.—The question as to whether the smack was carrying the lights required by the regulations now came on for argument.

Sir *Walter Phillimore* (with him *Hall*, Q.C, and *Baden-Powell*) for the defendants.—The master of the *Pioneer* has said that the smack was exhibiting a masthead light five minutes before the collision, and that he never saw her exhibiting any other lights. The look-out on the *Chusan*, although keeping a vigilant look-out, only sees the red light when distant two ship's lengths. If the masthead light was being carried five minutes before the collision, the presumption is that it was being carried immediately before the collision. A trawler, whether engaged in fishing or not, has no right to be exhibiting a white light. This collision having happened in Dec. 1884, art. 10 of the Regulations for Preventing Collisions at Sea 1884 is applicable. By art. 10 (*a*): "All fishing vessels and fishing boats of twenty tons net registered tonnage or upwards when under way, and when not required by the following regulations in this article to carry and show the lights therein named, shall carry and show the same lights as other vessels under way." As none of the subsequent regulations provide for trawlers, the result is that they are bound to show the same lights as a vessel under way. If so, the *I. C. U.* was wrong in exhibiting a white light:

The Dunelm, 5 Asp. Mar. Law Cas. 304; 51 L. T. Rep. N. S. 214; 7 P. Div. 164.

The fact also that the red light was never seen by the master of the *Pioneer*, and only seen by the look-out on the *Chusan* at a short distance, proves that the red light was only put up at the last minute, and not in proper time. Vessels are entitled to have the assistance of side lights for

a distance of two miles, and the *I. C. U.* has therefore infringed the regulations in this respect.

Bucknill (with him *Nelson*) for the plaintiffs.—It is submitted that art. 10 (*a*) of the Regulations for Preventing Collisions at Sea is not applicable to trawlers. If so, trawlers are entitled to exhibit the white masthead light required by the old regulations. No mention is made of trawlers in this regulation, and it is therefore to be assumed that they were not meant to be touched by this article. It speaks of "all fishing vessels . . . . when under way." The words, "when under way," negative the idea of the article applying to trawlers with their trawls down engaged in fishing. The evidence of the master of the *Pioneer* that he only saw a masthead light is not conclusive of there being no red light exhibited. He had no reason to give particular notice to what lights the *I. C. U.* was showing. The onus is upon the defendants to substantiate the charge that the smack was carrying improper lights, and this they have failed to do. Assuming the smack to have been improperly exhibiting a white light, it is a breach of the regulations which could not possibly have contributed to the collision, because it was never seen by those on the *Chusan*.

BUTT, J.—In this case I have already decided that there was negligence on the part of the *Chusan*, and the question now remaining is, whether there was contributory negligence on the part of the smack. The first matter which it is material to consider is, what lights these smacks, when trawling, are bound to carry under the regulations. This is by no means the first case in which we have had considerable difficulty in deciding what lights these vessels are bound to carry. I confess it is a matter of some astonishment to me that, after so much discussion in this court, in the Court of Appeal, and in the public press on this question, with reference to the case of *The Dunelm* (*ubi sup.*), the new regulations should have been published without some more specific and distinct provision as to what lights trawlers should carry. However, I can only deal with such materials as the Legislature has provided, and, after carefully listening to the arguments of counsel, I have come to the conclusion that under the Regulations of 1844 these vessels, when trawling—*i.e.*, when moving through the water with their trawls down—are bound to carry the side lights that ordinary sailing vessels carry. I think that not only the *I. C. U.*, but all these fishing smacks on this occasion with white lights were infringing the statutory regulations, and though I do not say that it is free from doubt I so hold. What is to be the result of this infringement on the part of the *I. C. U.*? Although she may have infringed the regulations at an earlier period, it is plain that she was carrying her coloured lights at the time of the collision, and we have the very best evidence of that because the red light was seen by those on board the *Chusan*. The defendants not only plead that they saw it, but the look-out man from the *Chusan* says he saw the red light of the *I. C. U.* before the collision. But it is suggested that it was exhibited only at a distance of two or three ship's lengths; that is, when the smack was close to the steamer. Now I think that the presence of the light before the collision affords a presumption on which the court may act, that it had been there at an earlier time, unless that presumption is rebutted by some satisfactory evidence to the contrary. It was competent for the owners of the *Chusan* to have called the officers and crew who were on deck to have said that the light was not there until they got within a certain distance. The defendants have not called either officers or men. The plaintiffs, in the difficulty in which they were placed owing to the crew of the smack being drowned, were forced to call the look-out man on the *Chusan*, who says he saw the red light on the starboard bow, but only at the distance of two ship's lengths. Is that evidence on which I ought to act? I do not think it is. I should have thought that the crew of the smack being drowned, the owners of the *Chusan* would have been desirous of offering all the evidence in their power in explanation of this most unhappy occurrence. They have elected to do otherwise.

Now, with regard to the witness from the *Chusan*, in the first place he is contradicted by the preliminary act and the defence, in which it was stated that the red light was seen a quarter of a mile off. Whatever may have been the case with reference to the red light, it is proved to my satisfaction that the smack's white light was exhibited some time before the collision, and yet the look-out man on the *Chusan* never saw it. If he did not see the white light when he ought to have seen it, it is too much to ask me to accept his story as to the red light. I am satisfied, so far as that man is concerned, that he was not keeping a good look-out, and, as his is the only evidence with which I have been favoured, I am not prepared to decide upon it that the red light was only put up at the last moment. Against the considerations to which I have given expression there is the evidence of the master of the *Pioneer*, who says that within five minutes of the collision he saw the white light of the *I. C. U.* and saw no side lights. Having regard to that evidence, I am asked to say the red light was not there. The steamer was going about ten knots. She would, therefore, be certainly no further than a mile from the smack when the smack passed the *Pioneer*, which is the time to which the master of the *Brilliant* refers. If the red light was not visible then, the *I. C. U.* was in default, because it ought to have been visible when the *Chusan* was two miles distant. The contention, therefore, is that the red light was exhibited too late. But in answer to that it is to be remembered that the master of the *Pioneer* had no reason to give special notice to the *I. C. U.* or to the lights she was carrying. All he seems to recollect is that he saw the white light. It would be excessively dangerous to trust to such evidence. It is not at all impossible that the *I. C. U.* may have placed her coloured lights in position as soon as she got her trawl up, and it is very possible she may have left the white light up, in which case the evidence of the master of the *Pioneer* would be reconciled with the fact that the red light was visible before the steamer saw it. It may be said that it would be an infringement of the regulations to have the white light up if the side lights are exhibited. It is true that it would be, but in this case it could not possibly have contributed to the collision, because those on board the steamer never saw the white light. On the whole, I do not think there is evidence to rebut the presump-

tion that the red light was up at an earlier time than the look-out man on the *Chusan* saw it. That being so, I do not think the charge of negligence against the smack is made out, and I pronounce the *Chusan* alone to blame.

Solicitors for the plaintiff, *Lowless* and *Co.*

Solicitors for the defendants, *Freshfields* and *Williams.*

Tuesday, June 16, 1885.

(Before BUTT, J.)

THE WHICKHAM. (*a*)

Practice—Interrogatories—Deposit—Security for costs—Co-ownership action—Order XXXI., r. 26.

Where in a co-ownership action, brought by a managing owner against his co-owners for an account to recover a balance, the plaintiff sought to interrogate the defendants, who were numerous, and to be dispensed from making the usual deposit, the defendants contending that a deposit ought to be made in respect of each defendant interrogated, the Court ordered a deposit of 5*l., and* 10*s. for each additional folio over five and no more.*

THIS was a motion by the plaintiff in a co-ownership action for an order that security for the costs of delivering interrogatories by the plaintiff to the defendants might be dispensed with.

The action was brought by the plaintiff as late managing owner of the steamship *Whickham* to recover from the defendants, his co-owners, the sum of 5500*l.* for moneys due for disbursements made and liabilities contracted on behalf of such co-owners, and upon an account stated.

The plaintiff was owner of five sixty-fourths shares in the *Whickham*, and proposed delivering interrogatories to the defendants, thirty-four in number, as to the terms of management under which he had been appointed managing owner.

In support of the motion an affidavit was filed, of which the following is material:

3. Particulars have been delivered by the defendants who are defending this action, from which it appears that there are thirty-four co-owners defending this action.

4. All the said defendants are represented by one firm of solicitors.

6. The plaintiff is advised to deliver interrogatories to each of the defendants defending this action. Such interrogatories have been settled by counsel, and are twenty-nine folios long. There is only one set of interrogatories for all such defendants.

7. The amount of deposit to be made under Order XXXI., r. 26, in respect of one such set of interrogatories administered to one person would be 17*l.*, and when administered to thirty-four persons it would be 608*l.*

8. Plaintiff is advised by counsel that discovery by interrogatories from each of the defending defendants is essential to his case. Owing to the defendants withholding payment of the whole of the plaintiff's claim, the plaintiff is somewhat embarrassed momentarily, and he is wholly unable to deposit such an amount as 608*l.*

In an affidavit filed on behalf of the defendants, it was alleged that the expense of obtaining answers to the interrogatories would be considerable, owing to the defendants being resident in different parts of the country, and owing to several of them living at a distance from the residence or office of a commissioner. It was also alleged that some of the defendants were old ladies, who would probably require the personal attendance of their own solicitor.

J. P. Aspinall, for the plaintiff, in support of the motion.—Having regard to the particular circumstances of this case, the plaintiff is asking to be allowed to deliver interrogatories without making the usual deposit of 5*l.* referred to in Order XXXI., r. 26. The defendants contend that, as interrogatories are being delivered to thirty-four defendants, a deposit of 5*l.* is to be made in respect of each defendant. The result of this contention would be that the plaintiff would have to deposit between 600*l.* and 700*l.* in order to interrogate the defendants. The rule speaks only of 5*l.*, and of 10*s.* for every additional folio over five. The interrogatories, though administered to thirty-four different defendants, are all the same, and the defendants are all represented by the same solicitor.

Bucknill for the defendants.—The words of the rule point to a deposit of 5*l.* in respect of each set of interrogatories. [BUTT, J.—What power have I to order more than a deposit of 5*l.* and so much per folio. The rule speaks of that and no more. The deposit is after all only a test of *bona fides.*] In the present case the defendants are resident in different parts of the country, and separate expenses will be incurred in respect of each defendant. The defendants rely upon the following decisions:

Aste v. *Stumore*, 49 L. T. Rep. N. S. 742; 13 Q. B. Div. 326; 5 Asp. Mar. Law Cas. 175;
Jubb v. *Bibbs*, W. N. Dec. 8, 1883, p. 208;
Smith v. *Reed*, W. N. Dec. 1, 1883, p. 196.

BUTT, J.—My view is that the right order is to order the plaintiff to pay into court 5*l.*, and 10*s.* for every folio in excess of five. In so ordering I do not wish to be thought to disagree with anything Field, J. has said; but, in the exercise of my discretion, I think that is the proper order.

The following order was accordingly drawn up:

"The judge, having heard counsel on both sides, directed that the plaintiff do pay into court, as security for the costs of the interrogatries to be delivered by him, the sum of 5*l.*, together with 10*s.* for every additional folio exceeding five of such interrogatories, and that the costs of this motion be costs in the action." (*a*)

Solicitors for the plaintiff, *Thomas Cooper* and *Co.*

Solicitors for the defendants, *Maples, Teesdale,* and *Co.*

June 24 *and July* 1, 1885.

(Before BUTT, J.)

THE RAINBOW. (*b*)

Wages action—Master—Managing owner—Lien for wages—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 187—*Merchant Seamen Act* 1880 (43 *&* 44 *Vict. c.* 16), *s.* 4.

A master who, after receiving a portion of his wages from the managing owners, elects to allow

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

(*a*) The defendants gave notice of appeal against this order, and, as the construction of the rule was considered doubtful and the decisions were conflicting, the plaintiff, by agreement with the defendants, paid 150*l.* into court as security, whereupon the defendants abandoned their appeal.

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

the balance to remain in their hands at interest, by so doing loses his lien, and cannot recover the balance in rem, but if he has had no opportunity of receiving his wages, or has been refused payment of them on demand, the mere fact of his allowing them to remain in the managing owners' hands after they become due will not deprive him of his remedy.

Where shipowners, in answer to a claim for wages, plead an agreement between the managing owners and the plaintiff that the plaintiff shall, instead of receiving his wages, allow it to remain in the hands of the managing owners, and has thereby foregone his right against the ship, the onus is upon the defendants to clearly prove that there was an express arrangement to that effect, before the court will deprive the plaintiff of his right.

Under the provisions of sect. 187 *of the Merchant Shipping Act* 1854, *and sect.* 4 *of the Merchant Seamen Act* 1880, *as to the nonpayment of wages the right to recover ten days' double pay and wages to the time of final settlement is not enforceable where there is a bonâ fide question as to liability.*

THIS was an action *in rem* against the barque *Rainbow*, instituted by her late master, Thomas Laughorne, to recover wages and disbursements.

By the statement of claim it was alleged that the plaintiff served as master during four voyages until April 12, 1885, when he was wrongfully dismissed. He claimed 264*l.* 5*s.* 7*d.*, ten days' double pay, wages to date of final settlement or judgment, and interest on the amount recovered to writ.

The particulars of the plaintiff's claim were as follows:

	£.	s.	d.
Balance of settled accounts of first voyage, Feb. 4, 1881, to July 5, 1882	100	0	0
Interest thereon to date of writ	14	2	9
Balance of settled accounts of second voyage	170	13	5
Interest thereon to date of writ	10	16	9
Wages and disbursements on fourth voyage ending April 12, 1885	34	7	8
	330	0	7
Less cash received on fourth voyage	65	15	0
	£264	5	7

At the time of the plaintiff's engagement the ship was owned by Messrs. Fry and Co., and by Messrs. ROSS and Co., in which firm Alexander Cassels was a partner. Messrs. Fry's shares were mortgaged to Mr. Cassels. On the completion of the third voyage the ship was taken possession of by Messrs. Ross and Co., and Mr. Cassels the mortgagee, who appeared and defended the action.

The defence, so far as is material, was as follows:

3. The defendants deny that they dismissed the plaintiff. The plaintiff on or about April 12th, 1885, himself terminated his employment by issuing his writ in this action. Alternatively the defendants say that they were justified in dismissing the plaintiff without notice, or payment in lieu of notice, by the plaintiff's said acts, and that if they dismissed him the alleged dismissal (which the defendants do not admit) was not wrongful as alleged.

5. The defendants, in respect of the first and second voyages mentioned in the particulars, say that the accounts of the said voyages respectively were duly settled on the conclusion of each voyage, and the *Rainbow* and the owners of the *Rainbow* were discharged from any claim of the plaintiff in respect thereof, and that nothing remains due to the plaintiff in respect thereof, either for principal or interest. The sums of 100*l.* and 170*l.* 13*s.* 5*d.* which the plaintiff now claims are respectively sums which the plaintiff, instead of receiving the same in cash upon the settlement of the voyage accounts, on the conclusion of the said respective voyages, from Messrs. F. G. Fry and Co., the then managing owners of the *Rainbow*, who had in their hands the funds wherewith to pay the same to the plaintiff, and debited the owners of the *Rainbow* with such payment, preferred and elected by private arrangement with the said Messrs. F. G. Fry and Co., to lend to them personally on their account, by leaving or placing the same in their hands at interest, the transaction in each case being wholly one between the plaintiff and the said Messrs. F. G. Fry and Co., who acted therein for themselves only and not for or on account of the ship or with the knowledge or authority of their co-owners. The said F. G. Fry and Co. had no authority to borrow or retain any portion of the said moneys for the purposes of the *Rainbow*, and they were not in fact borrowed, retained, or used for any such purposes. The said voyage accounts were settled between the said F. G. Fry and Co. and the co-owners upon the basis and the faith of the said moneys having been duly paid and all claims of the plaintiff duly discharged. The defendants submit that under the said circumstances the plaintiff is not entitled to maintain this action in respect of any part of the said moneys.

As to the wages due at the end of the second voyage, the plaintiff stated that before he left for the third voyage he had sent in his account to Messrs. Fry and Co., the managing owners; that these accounts had been returned to him, with a request that he would look over them and see whether he agreed with the corrections; that before he had actually settled or agreed to these accounts, but when the balance due to him had been ascertained within a small amount, he had asked one of the managing owners, who was then at Newport waiting for the ship to sail, to pay him the balance due in respect of the first and second voyages; that the managing owner had gone away without complying with that request; and that he, the master, had had no further opportunity of asking for or recovering his wages before he left England on the third voyage. In Jan. 1884, during the third voyage, the plaintiff wrote to Messrs. Fry, inclosing them the account which they had sent him relating to the second voyage, and stating that he found it correct, and requesting that they would send a credit note to his sister, and allow her to draw upon them for any small sums she might require.

Upon the plaintiff's return to England at the end of the third voyage, he found that the defendants had become managing owners, who thereupon settled up and paid his account for the third voyage. The plaintiff thereupon applied to Messrs. Fry for payment of the balance due in respect of the first and second voyages, and in a letter written to Messrs. Fry whilst he was in command of the ship at Glasgow, being then bound for Cardiff, he requested Messrs. Fry to pay him the balance for the second voyage on his arrival at Cardiff, and stating that, as he was required to give them one month's notice for the 100*l.*, he thereby did so, and requested payment of the 100*l.* one month after date.

The defendants called Messrs. Fry and their manager, who having proved a request by the master for Messrs. Fry to retain the 100*l.* at interest (which was admitted by the master), and that the master might have had the 100*l.* at the end of the first voyage, and the 170*l.* 13*s.* 5d. at the end of the second voyage if he had insisted upon it, further alleged that at the end of the

second voyage nothing passed between the master and themselves with respect to the balance then due to the master, or that the accounts were returned to him as alleged, and that he had stated to Mr. Fry that he wished the balance to be dealt with as before. Mr. Fry's books showed that the master had been credited in his private account with the balance due to him on the second voyage under the date of the day before the ship left Cardiff on the third voyage, and that the owners of the ship had been debited with the amount of these wages, and that the account against the owners including these wages had been balanced at the end of the next succeeding June. Mr. Fry, however, stated that the master had not in fact been credited with these wages until after he, Mr. Fry, had received the master's letter of June 1884, and he admitted that no definite arrangement had been come to with respect to what was to be done with the balance due on the second voyage, beyond the master requesting him to deal with it as he had done before. According to Messrs. Fry's books, the balance of 170*l.* 13*s.* 5*d.* had been dealt with as the 100*l.* One question between the parties was whether the balance of 170*l.* 13*s.* 5*d.* had been definitely agreed prior to the ship leaving Newport on the third voyage. The plaintiff's evidence with respect to what passed between him and Mr. Fry at Newport as to the balance of wages due on the second voyage was very clear, whilst the evidence of Mr. Fry was doubtful.

The plaintiff was about to proceed on a fifth voyage, but failing to receive the balance due on the first and second voyages, he threatened to proceed against the ship, and was thereupon removed from command, and Messrs. Fry and Co. having become bankrupt, he instituted the present action.

J. P. Aspinall for the plaintiff.—Having regard to the evidence of the plaintiff that he elected to allow the 100*l.* to remain in the hands of Messrs. Fry, I cannot contend that the plaintiff can recover that sum in this action. With regard to the fourth voyage, the amount due to the plaintiff was 34*l.* 7*s* 8*d.*, but he admits having received 65*l.* 15*s.* The substantial question, therefore, is with regard to the balance of 170*l.* 13*s.* 5*d.* due on the second voyage. This question turns upon the credibility of the evidence, and it is submitted that the court should require very strong proof of the alleged arrangement between the plaintiff and Messrs. Fry before deciding against the plaintiff on this item. The fact that the plaintiff was paid in full in respect of the third voyage by the new managing owners is no proof that he thereby waived his right *in rem* in respect of the previous voyage. He was content to get his money from whom he could, and it is not enough for the defendants to say that his dealings with Messrs. Fry were such as to point to an understanding that the 170*l.* 13*s.* 5*d.* should be dealt with as the 100*l.* on the previous voyage. They must go further, and prove an express arrangement in order to oust the plaintiff from his remedy against the ship.

Sir *Walter Phillimore* (with him *W. R. Kennedy*) for the defendants.—The election of the plaintiff to allow the 100*l.* to remain in Messrs. Fry's hands is an answer to his claim for that amount. It is submitted that, notwithstanding the conflict of evidence, the court should come to the conclusion that the same arrangement was made with regard to the 170*l.* 13*s.* 5*d.*, which also remained in Messrs. Fry's hands. The fact that the plaintiff received payment of the money due on the third voyage from new managing owners would show that he looked to Messrs. Fry for the balance on the previous voyages. The fact that Messrs. Fry treated the 170*l.* 13*s.* 5*d.* as they treated the 100*l.* is strong evidence that they did so with the plaintiff's authority. The letter written from East London asking Messrs. Fry to send a credit note to his sister, and to honour her drafts, shows he looked to Messrs. Fry and not to the ship.

J. P. Aspinall in reply.

BUTT, J.—This is a claim against the owners of the barque *Rainbow* for the wages and disbursements of the plaintiff, who was for several voyages master of the vessel. The voyages have been called the first, second, third, and fourth voyages, and the only question which it is necessary to decide has arisen in respect of the second voyage. At the end of the first voyage, after some payments in cash to the plaintiff by Messrs. Fry, who were the managing owners, there was a balance remaining due of 100*l.* That sum was left in Messrs. Fry's hands, the master not choosing to receive it in cash. The balance of the second voyage also remained in Messrs. Fry's hands, who some considerable time afterwards failed. The question is, who is to suffer by their failure, the master or the principals, the owners of the *Rainbow*. With regard to the balance of 100*l.* due on the first voyage, that remained in the hands of Messrs. Fry, with the express assent of the plaintiff, and at his request. A document was given him which would seem to point to that having been the understanding, but it is not necessary to interpret it, because the master has very fairly said in his evidence that he might have had the money if he had chosen on the settlement of accounts, but he preferred to leave it at interest in the hands of Messrs. Fry. That is conclusive against his right to recover it *in rem*. His lien was gone, and therefore he cannot succeed on that item of his claim.

Now we come to the balance of the second voyage. Here again the money remained in Messrs. Fry's hands, and the question is, who is to suffer by Messrs. Fry's failure. Now first of all, it is to be remembered that Messrs. Fry were the agents of the shipowner, and not the agents of the master. For their default, therefore, *primâ facie* their principals, and not the servant of those principals, should and ought to suffer. But the defendants have taken upon themselves the burden of showing that, whereas that would be the rule under ordinary circumstances, with regard to this particular voyage there was an express agreement that the money should remain in the hands of Messrs, Fry, as the bankers of the plaintiff; for that is what the contention comes to. The defendants rely not only on the evidence they have given in support of that allegation, but also on what happened on the previous voyage. They say that that is some evidence of the terms on which the money remained in Messrs. Fry's hands. That I do not deny. But the question really is this: Does the evidence satisfy me that there was a distinct arrangement between the plaintiff and

Messrs. Fry that this sum should remain, whether at interest or not, in Messrs. Fry's hands? I confess I have some difficulty in arriving at a conclusion on the point. But I do feel that where an owner, who has employed an agent to pay his servant, sets up an express agreement between the servant and the agent that the servant shall forego his rights against his master, it ought to be proved most clearly. In the present case I am by no means satisfied that that arrangement was entered into. The account was not finally closed when this alleged agreement was supposed to have been entered into. This appears not only from the evidence of the plaintiff but also from the correspondence which passed between him and Messrs. Fry. I do not agree that, if he asked for his money in February and could not then get it from Messrs. Fry, he has concluded himself from asking it from the owners by his letter of June from East London. Upon the whole, the conclusion I come to is, that the accounts not being finally settled there is not sufficient evidence of an express arrangement. I must therefore pronounce for the claim of the master on the second voyage.

J. P. Aspinall.—The plaintiff also claims ten days' double pay, wages to date of final settlement, and interest on the amount recovered. By sect. 187 of the Merchant Shipping Act 1854, where a master or owner refuses to pay "without sufficient cause," he shall pay to the seaman a sum not exceeding ten days' double pay. In *The Princess Alice* (Lush. 190) it was decided that that section was applicable to a master. By sect. 4 sub-sect. (4) of the Merchant Seamen Act 1880 it is provided that in the event of the wages not being paid, "unless the delay is due to the act or default of the seamen, or to any reasonable dispute as to liability," the seaman's wages shall be payable until the time of final settlement.

BUTT, J.—I think in this case there was "sufficient cause," and "a reasonable dispute as to liability." It never could have been meant that, where there was a *bonâ fide* question as to liability, shipowners should be visited with the penalties prescribed by those statutes. My judgment, therefore, is for 170*l.* 13*s.* 5*d.*, less 31*l.* 7*s.* 4*d.*, with interest on that sum from the date of writ, and costs.

Solicitors for the plaintiff, *Ingledew, Ince,* and *Colt.*

Solicitors for the defendants, *Gregory, Rowcliffes,* and *Co.*

Thursday, July 16, 1885.

(Before Sir JAMES HANNEN.)

BURT AND OTHERS *v.* LIVINGSTONE; THE SOLWAY. (*a*)

Evidence—Carriage of goods—Breach of contract—Letter written by master.

In an action for damage to cargo caused by the vessel running aground, a letter written by the master to his owners, stating the circumstances under which the vessel went ashore, is admissible as evidence against the defendants.

THIS was an action instituted by goods owners against the owners of the steamship *Solway* for non-delivery of cargo.

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

The goods were shipped at Archangel, on board the *Solway,* for carriage to London. During the voyage, the *Solway* ran aground in the White Sea, and was totally lost with the cargo on board.

The plaintiffs charged the defendants with negligence. The defendants admitted that the goods were not delivered, but said that the goods were lost by excepted perils contained in the bill of lading.

R. T. Reid, Q.C. (with him *Barnes*), in opening the plaintiff's case, proposed to put in evidence a letter written by the master of the *Solway* to his owners, stating the circumstances under which the *Solway* went ashore, and giving his opinion as to the cause of the casualty.

Sir *Walter Phillimore* (with him *Green*), for the defendants, objected to the admission of such evidence. Statements made before the Receiver of Wreck, though made pursuant to Act of Parliament, are not admissible as evidence against the shipowners:

Nothard v. *Pepper,* 17 C. B. N. S. 39; 10 L. T. Rep. N. S. 782; 2 Mar. Law Cas. O. S. 52;
The Little Lizzie, L. Rep. 3 Ad. & Ec. 56; 3 Mar. Law Cas. O. S. 494; 23 L. T. Rep. N. S. 84.

A fortiori, a voluntary letter written by the master cannot be used against his owners. There is no duty on the master to write such a letter, and hence it cannot be said to be the admission of an agent made in the ordinary course of his duty.

Reid, Q.C., *contra.*—The cases of *Nothard* v. *Pepper* (*ubi sup.*) and *The Lizzie* (*ubi sup.*) are not in point because there the admissions were made in obedience to an Act of Parliament, and not by a servant to his employer in the ordinary course of his business. In *The Manchester* (1 W. Rob. 62) the admission of the master was held to be admissible in plea; if so, a letter describing the facts of the disaster is admissible. It is a master's duty to report to his owners the incidents of a casualty like the present.

Sir *Walter Phillimore* in reply.

Sir JAMES HANNEN.—I am of opinion that this letter is admissible in evidence. The case of *Nothard* v. *Pepper* (*ubi sup.*) at first somewhat troubled me; but, as Mr. Reid had pointed out, the admission was not made by a servant to his employer, but to a person in authority by virtue of an Act of Parliament. The present case seems to me to fall within a leading principle of the law of evidence. It is clear that a ship's log is admissible in evidence by the other side against the owners. The letter in this case comes within the same rule. It is part of the captain's duty to report to his owners all the circumstances incidental to the navigation of the vessel. There is no difference whether he puts these statements into the log, or sends them by letter. I therefore admit the letter, but with this reservation, that the statements as to what the captain did or saw, or what orders he gave, are only admissible, and not his opinion as to the cause of the casualty.

Solicitors for the plaintiffs, *Waltons, Bubb,* and *Johnson.*

Solicitors for the defendants, *Turnbull, Tilly,* and *Mousir.*

July 21 *and Aug.* 4, 1885.

(Before Sir JAMES HANNEN and BUTT, J.)

THE NUMIDA.

THE COLLINGROVE. (*a*)

Practice—Costs—Damages—Action in rem—Arrest of ship—Commission on bail—Discontinuance of action.

A successful defendant in an action in rem, where the action is decided in his favour or discontinued, cannot recover as costs the commission paid by him for bail to release his ship from arrest, though he may in some instances, where the arrest is made malâ fide or with gross negligence, recover it as damages.

THESE were two summonses raising the same question in two different actions, viz., a damage action, *The Numida*, and a salvage action, *The Collingrove*.

The Numida was a collision action *in rem*, instituted by the owners of the steamship *Messina*, in which the plaintiffs claimed 20,000*l*. The *Numida* was arrested and the defendants having put in bail the plaintiffs on the day following discontinued the action. Thereupon the defendants took out a summons for an order that the plaintiffs should pay the costs of procuring bail. This summons was adjourned into court.

The Collingrove was a salvage action instituted by the owners, master, and crew of the steamship *Colstrup*, in which the plaintiffs claimed 1500*l*. The services were rendered necessary by damage occasioned to the *Collingrove* in consequence of a collision with the *Colstrup*, and consisted in towing the *Collingrove* a short distance into Falmouth. The *Collingrove* was arrested, and bail given for her release. The *Colstrup* having been found alone to blame for the collision, the salvage action was discontinued. Thereupon the owners of the *Collingrove* took out a summons, asking that the salvors should be ordered to pay the costs of procuring bail given for the release of the *Collingrove*. This summons was adjourned into court, and ordered to be heard with the summons in *The Numida* before the President and Butt, J.

Hall, Q.C., for the owners of the *Colstrup*, against the summons.—Commission on bail has never been regarded as costs, and therefore cannot be recovered as such. Assuming it to be recoverable as damages, it is only recoverable as such where the arrest is made *malâ fide*, or with *crassa negligentia*:

The Evangelismos, Swa. 378;
The Orion, Swa. 378, n.;
The Volant, Br. & L. 321;
The British Commerce, 9 P. Div. 128; 5 Asp. Mar. Law Cas. 335; 51 L. T. Rep. N. S. 604.

Dr. *Stubbs* for the owners of the *Messina* followed.

Baden-Powell, for the owners of the *Collingrove* in support of the summons.—It is submitted that commission on bail is in the nature of costs. Even if not, the vessel was arrested in an excessive sum, and therefore the commission on bail is recoverable as damages.

J. P. Aspinall, for the owners of the *Numida* in support of the summons.—Had the vessel remained under arrest, the plaintiff would have had to pay the marshal's possession fees. The giving of bail was therefore beneficial to the plaintiffs. The commission was reasonably and properly incurred; it is therefore costs in the action, which the plaintiffs must pay. The cases cited only refer to damages, and not to costs. The actual cost of filing and stamping the bail bond and other expenses connected with the bond are always allowed as costs, and have been allowed in this very case. Commission on bail is an expense just as necessary as and similar in principle to the above-mentioned expenses. Such commission has been recognised as a necessary expense in those cases where the court has condemned plaintiffs in the costs of procuring excessive bail required by them:

The George Gordon, 5 Asp. Mar. Law Cas. 216; 9 P. Div. 46; 50 L. T. Rep. N.S. 371.

[Sir JAMES HANNEN.—Parties procure the release of their ship in order that she may earn freight. Does not that show the cost of commission on bail, or anything that you pay in respect of bail, is a loss to you, or a substitute for a loss of freight, which you would incur if the ship remained under arrest, and that therefore it is in the nature of damages rather than costs?] If that be so, a successful defendant ought never to be entitled to any costs of filing bail bond, &c.; yet those costs are allowed.

Cur. adv. vult.

Aug. 4.—Sir JAMES HANNEN.—In the case of *The Numida*, which was argued before Butt, J. and myself on a summons adjourned into court, the question raised was whether, when a ship has been arrested and held to bail, and the proceedings against her have been discontinued before the hearing, the owners are entitled to compensation for the loss occasioned to them by being obliged to pay commission in order to procure bail for their ship. It was contended for the shipowner that this commission must be regarded as costs in the proceedings, in which the giving of bail was an ordinary step. We are, however, of opinion that this contention cannot be supported. It was not suggested that these expenses ever had been treated as costs since the time when the practice of obtaining bail on payment of a commission arose, and we should not be justified in creating a new head of costs. We think, however, that in some circumstances the commission paid for obtaining bail would be recoverable as damages. This commission is the cost which the owner incurs to obtain the release of his ship and to avert the damage he would sustain by the continued detention of his vessel.

It appears to us, therefore, that this commission might be recovered as damages in those cases and in like circumstances in which damages could be recovered for the wrongful arrest of the vessel. It has always been the practice in the Court of Admiralty for the judge to award these damages to the defendant, where upon the trial the facts have shown that he was entitled to them, without putting him to the necessity of bringing a fresh action for them: (*The Evangelismos*, Swa. 378.) It appears to us that, where the suit is discontinued, the same power nevertheless belongs to the court in fitting cases to award damages to the defendant whose ship has been improperly arrested, upon the facts being brought to the knowledge of the court by affi-

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

davit. We do not, however, consider that the bare fact of the proceedings being discontinued entitles the defendant to damages. It is necessary for him to show that the arrest of the ship was malicious, or the result of gross negligence. This had not been shown in this case, and we therefore dismiss the summons with costs. In the case of *The Collingrove*, where the same point was raised, the result will follow.

Solicitors for the owners of the *Numida*, *Stokes, Saunders*, and *Stokes*.

Solicitors for the owners of the *Messina*, *Waddilove* and *Nutt*.

Solicitors for the owners of the *Collingrove*, *Ingledew*, *Ince*, and *Colt*.

Solicitors for the owners of the *Colstrup Downing*, *Holman*, and *Co*.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, March 5, 1885.

Before Brett, M.R., Baggallay and Lindley, L.JJ.)

The Beeswing. (*a*)

ON APPEAL FROM BUTT, J.

Wages and disbursements—Master—Action in rem — Maritime lien — Charter-party — Admiralty Court Act 1861 (24 *Vict. c.* 10), *s.* 10.

Where a ship is chartered under a charter providing that the master shall be appointed by the charterers, that the owners are to provide and pay for all provisions and wages of captain and crew, and for the necessary equipment and efficient working of the ship, that the captain is to be dismissed by the owners if he fails to give satisfaction, and that the charterers shall provide and pay for all coals, pilotages, port charges, &c., the master is the servant of the shipowners, and hence he has a right in rem for his wages and such disbursements as are necessary for the navigation of the ship, and which the charterers had not by the provisions of the charter-party undertaken to pay; and semble, per Brett, M.R., if the charterers had refused to make these disbursements, and without them the ship could not be navigated, the master would be entitled to charge them against the shipowners.

Quœre, Has a master under sect. 10 *of the Admiralty Court Act* 1861 *a maritime lien for his wages and disbursements?* (*b*)

Semble, where a master is the servant of the charterers and not of the shipowners, he has no right against the owners in respect of wages and disbursements.

This was an action *in rem* for wakes and disbursements, instituted by the master of the steamship *Beeswing* against the owners thereof.

The plaintiff was on the 31st Jan. 1884 appointed by the Anglo-African Steamship Company Limited, who had chartered the vessel under a time charter, master of the steamship *Beeswing*.

This appointment was subject to the approval of the shipowners, who before the plaintiff's appointment had an interview with him, and, after getting a reference from him, consented to his being appointed.

The agreement under which the plaintiff served was contained in a letter sent by the company to the plaintiff, and was as follows:

> We hereby appoint you master of the steamship *Beeswing* at a salary of 30*l.* per calendar month, in consideration of your taking the ship across the various bars, excepting Lagos, and we agree to pay you 5*l.* per cent. on the net profits of the voyage on the usual conditions, that is, if you give us entire satisfaction on completion of same. Your appointment as master dates from to-day.

The plaintiff thereupon took command of the vessel, and whilst in command he made disbursements and incurred board expenses, and also incurred liabilities on bills of exchange drawn by him in respect of necessaries supplied to the ship and which were still unpaid and owing.

The plaintiff claimed 688*l.* 3*s.* 5*d.*, being a balance of wages and the disbursements above mentioned.

The particulars of the disbursements consisted of liabilities incurred to various merchants in Africa in respect of various disbursements and payments made by or at the request of the plaintiff in respect of crew's wages, boat hire, provisions, &c.

At Sierra Leone Messrs. Pickering and Berthond made disbursements amounting to 437*l.* 2*s.* 8*d.* in respect of stores and provisions, washing bill, cash advanced to plaintiff for crew's wages, commission on advances, coals, clearing vessel, and pilotage outwards. Of this 437*l.* 2*s.* 8*d.*, 212*l.* 4*s.* 8*d.* was in respect of stores and provisions, washing bill, cash advanced to plaintiff for crew's wages and commission on advances, the remaining 224*l.* 18*s.* being in respect of coals, clearing vessel, and pilotage outwards.

At Lagos Messrs. Banner Brothers made disbursements amounting to 84*l.* 6*s.* 3*d.* in respect of stores and provisions, commission on advances, and pilotage. Of this 84*l.* 6*s.* 3*d.*, 58*l.* 1*s.* 3*d.* was in respect of stores and provisions and commission on advances, the remaining 30*l.* being in respect of pilotage. At Benin and Brass River Messrs. Stuart and Douglas made disbursements amounting to 16*l.* 1*s.* in respect of stores and provisions only. At Brass River Messrs. John Lander and Co. made disbursements amounting to 46*l.* 13*s.* in respect of coals.

The defendants by their defence alleged that by an agreement between the Anglo-African Steamship Company Limited and the managing owners of the *Beeswing*, of which agreement the plaintiff was well aware and to which he consented, one-half of the plaintiff's wages were to be paid by the company and the remaining half by the defendants. Paragraph 4 of the defence was as follows:

> The disbursements, board expenses, and liabilities mentioned in the statement of claim, were made and incurred by the plaintiff on the account and credit, and for the benefit of the charterers, and as their servant and agent, and not on account of the ship or on the account or credit, or for the benefit of her owners, or as their servant or agent. Such disbursements, board expenses, and liabilities were made and incurred solely in

(*a*) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

(*b*) As to the maritime lien of a master, see Merchant Shipping Act 1854, sect. 191.

respect of matters which the charterers were bound, under the provisions of their charter-party, to supply, and of such provisions the plaintiff had full notice by having in his possession a copy of the charter-party.

The material provisions of the charter-party were as follows:

It is this day mutually agreed between . . . she being then tight, staunch, and strong, and in every way fitted for the service, and being maintained by owners with a full complement of officers, seamen, engineers, and firemen . . . That the owners shall provide and pay for all provisions and wages of the captain, officers, engineers, firemen, and crew; shall pay for the insurance of the vessel, and for all oil, tallow, and waste required for the engine-room, and provide and pay for the necessary equipment for the proper and efficient working of the said steamer. That the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, and all other charges and expenses whatsoever, except those before stated . . . That the captain shall be appointed by the charterers, and to be properly qualified shall follow the instructions of the charterers, who will furnish him from time to time with the necessary sailing directions, and he shall keep a full and correct log, which shall be exhibited to the charterers, or their agents, when required . . . Should the charterers be dissatisfied with the conduct of the captain, or any of his officers or engineers, the owners shall, on being advised of such, fully investigate the matter, and, if necessary, make a change in the appointment. Should the owners be dissatisfied with the captain, the above clause to apply . . . That the owners shall have a lien upon all cargoes and all sub-freights for freight or hire due under this charter, and charterers to have a lien on the ship for all moneys paid in advance and not earned.

At the hearing the plaintiff alleged that, in respect of the 437*l.* 2*s.* 8*d.* due to Messrs. Pickering and Berthond, he drew no bill, but claimed in respect of a personal liability to them. It appeared that in payment of the other advances he drew bills on the charterers in favour of the merchants making the advances. He alleged that he had received no instructions as to the agents who were to be employed at the various ports, but took the ship's business to those persons whom he deemed to be most fitting, being personally acquainted with the agents in the various ports.

It also appeared that the Anglo-African Steamship Company Limited were in liquidation, that the bills drawn by the plaintiff on the company in respect of disbursements had been dishonoured on presentation, that at the time when the bills were drawn and the various disbursements made the plaintiff had no knowledge that the company were in difficulties. The plaintiff denied any knowledge of the alleged agreement by which the owners of the *Beeswing* were liable for only half his wages. He admitted that he took with him on the voyage a copy of the charter-party.

Aug. 9, 1884.—Dr. *Phillimore* (with him *T. Swift*) for the plaintiff.—By virtue of sect. 10 of the Admiralty Court Act 1861 the plaintiff has a remedy *in rem* in respect of his wages and disbursements. The disbursements are all made in respect of matters necessary for the navigation of the ship, and therefore the shipowners are liable for them. The fact that the bills of exchange are drawn upon the charterers does not prevent the plaintiff recovering against the ship if the disbursements were for the owners' use. It has been held that liabilities incurred by the master may be disbursements, although he has not discharged the liabilities:

The Glentanner, Swa. 415;
The Feronia, L. Rep. 2 A. & E. 65; 17 L. T. Rep. N. S. 619; 3 Mar. Law Cas. O. S. 54;
The Limerick, 3 Asp. Mar. Law Cas. 206; 1 P. Div. 411; 34 L. T. Rep. N. S. 708.

Finlay, Q.C. (with him *J. G. Alexander*) for the defendant.—Having regard to the provisions of the charter-party, it is submitted that the plaintiff was not the owners' master, but the charterers. If so, the owners are not liable to him for wages or disbursements. Assuming him to be the owners' captain, special provision is made in the charter-party requiring the charterers to provide certain things, in respect of which the plaintiff is now suing the shipowners. The plaintiff had no authority to bind the shipowners in respect of things which the charterers expressly agreed should be provided and paid for by them.

The Admiralty Court Act 1861, sect. 10, is as follows:

The High Court of Admiralty shall have jurisdiction over any claim by a seaman of any ship for wages earned by him on board the ship, whether the same be due under a special contract or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship. Provided always, that if in any such cause the plaintiff do not recover fifty pounds he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless he shall certify that the cause was a fit one to be tried in the said court.

Butt, J.—This is an action *in rem* for master's wages and disbursements. The total sum claimed is about 688*l.*, of which 107*l.* are wages. The *Beeswing* was let by the present defendants, her owners, to the Anglo-African Steamship Company Limited, and she was let by a time charter, the time being at the rate of 559*l.* 10*s.* per month. The company (the charterers) are in liquidation, and it is their failure that has given rise to the present proceedings, for, I presume, had they continued trading and solvent the questions raised would not have been brought before this court. The charter-party contains several clauses, to the more important of which I will now advert. It is provided that the owners shall provide and pay for all provisions and wages of the captain, officers, engineers, firemen and crew, for the insurance of the vessel, and for all oil, tallow, and waste required in the engine-room, and provide and pay for the necessary equipment for the proper and efficient working of the ship. It is also provided that the charterers shall provide and pay for all coal and fuel, port charges, pilotage, agencies, both at Liverpool and Africa, and all other charges and expenses whatsoever, except those before stated; that the charterers shall accept and pay for all coals then left in the bunkers at current market price. And further on is this clause: "That the owners shall have a lien on all cargoes and all sub-freights for freight or hire due under this charter, and charterers to have a lien on the ship for all moneys paid in advance and not earned." The plaintiff took charge of the ship as master, and navigated her out to the West of Africa, where she traded. He there obtained a cargo and then brought her home.

There is no serious dispute as to the wages due to him, or as to the liability of the ship to pay those wages. The question in this case is with reference to the disbursements. It is impossible now to deal with the various details and figures; they will be for the registrar and merchants. There are two categories under which the disbursements appear to range themselves.

First, what I will call "Disbursements on owners' account," for instance, wages, stores, provisions; and disbursements on what I will call "charterers' account," for example, coals, krooboys' wages and provisions, and other matters which, by the charter, the charterers undertook to pay. The ship having come home, and the company being in liquidation, this suit was instituted under the 10th section of the 24 Vict. c. 10, the Admiralty Court Act of 1861. The defendants have appeared, and they contend, in the first place, that the section of the Act to which I have adverted gives no lien for masters wages and disbursements; or, at all events, for master's disbursements. I do not think that is the right way of putting it. The question is, whether the combined effect of sects. 10 and 35 is not to give a remedy *in rem*, *i.e.*, a remedy against the ship herself for such wages and disbursements. Another contention urged on behalf of the defendants is, that liabilities are not disbursements, or, in other words, that it is wrong to hold the ship liable to debts incurred by the master, but which he has not discharged. Both these questions have long before now been the subject of consideration in this court, and I think counsel on both sides agree that I am precluded from going into the matter. I am bound to hold, in accordance with the decisions, that the defence upon those grounds is not sustainable in this court. Now, a third contention urged on the part of the defendants is this: assuming the other two points to be decided against them, they say that in this case the master is not liable to the different firms from whom he got goods or money for providing what he did provide for the ship. This contention is totally irreconcilable with the broad facts, the admitted facts, because in some instances the master drew bills of exchange upon which he is most clearly liable. Therefore, with reference to those matters it is impossible to say he has not incurred liability. In other instances the master was not quite so clear. How far a master renders himself personally liable by ordering necessaries in a foreign port is a question of some nicety. It must depend to some extent upon the facts of each case, but I shall follow the decisions in the class of cases of which *The Limerick* (*ubi sup.*) in the Court of Appeal is the latest, and hold that the plaintiff did incur liability to Messrs. Pickering and Berthond for such of the goods and moneys as he procured of or through them for the owners' use, and that he is consequently entitled to recover them in this action. As to whether the plaintiff incurred any personal liability for coals, I express no opinion. That may be a matter standing upon a different footing, and it is not necessary, in the view I take, for the determination of this suit. I do not know enough of the facts as to the agency of Pickering and Berthond for the charterers to determine that matter, and I express no opinion on it. I do not think the fact, if it be the fact, that Pickering and Berthond were the charterers' agents would preclude the master from recovering in this action disbursements made on account of the owners, and I so hold. Neither do I think that, in those cases where he drew a bill of exchange upon the charterers, that would prevent his recovering disbursements really made for the owners' use. On the other hand, I am of opinion that the plaintiff had no authority to pledge and did not pledge the credit of his owners for coals, wages, and provisions of krooboys and other expenses appertaining to the charterers; and therefore, the owners of the ship not being liable for these sums, they cannot be recovered in an action *in rem* by the master against the ship. There being no authority for the plaintiff to pledge his owners' credit in respect of those things, I do not think the steps taken by the defendants to enforce their lien for hire under the clause of the charter-party makes any difference. I pronounce that the payment into court is insufficient, and I refer it to the registrar and merchants to inquire into the items, with directions to allow the wages and all proper disbursements, except such as the charterers have undertaken to pay.

From this decision the defendants appealed.

The plaintiff had originally given notice of appeal, which was subsequently withdrawn (cf. *The Beeswing*, 5 Asp. Mar. Law Cas. 335; 51 L. T. Rep. N. S. 833).

March 5, 1885. — *Finlay*, Q.C. (with him *Alexander*) for the appellants.

Sir *Walter Phillimore* (with him *Kennedy*) for the respondents.

The argument was substantially the same as in the court below, the defendants contending that they were liable for neither wages nor disbursements, as the master was not their master, nor appointed by them.

Brett, M.R.—It is unnecessary to consider whether in this case the statute gives a maritime lien on the ship in respect of the master's wages and disbursements. If it had been necessary, I should certainly have required a great deal of argument to convince me after our recent decision in *The Heinrich Bjorn* (5 Asp. Mar. Law Cas. 391; 10 P. Div. 44; 52 L. T. Rep. N. S. 560). The statute gives to the Admiralty Court jurisdiction to try claims for wages and disbursements brought by a master against his owners, and in order to enforce that jurisdiction the court has power to seize the ship of the owners. Now, here the questions are, first, whether the master's wages were due to him from the owners, though this is not the subject-matter of these proceedings; and secondly, whether they were bound to pay him for such disbursements as it was necessary from the circumstances of the case that the captain should make on behalf of the owners, and which his position as captain would give him implied authority to make on their behalf. Nobody could suppose that, if he was not their captain, he could charge his wages against them, because to charge his wages against persons who did not employ him would be absurd. It seems to me equally clear that, merely as captain, he could not enforce his claim to disbursements against the owners, unless it was in respect of disbursements which he, as their captain, had implied authority to make on the owners' behalf. If, therefore, he were the captain of the charterers and not of the owners, I think he could not enter his claim against the owners of the ship in respect of wages or disbursements made by him. But if he was the captain of the owners' it seems to me that he certainly was entitled to sue them for his wages to the Admiralty Court; and if he was their captain, he certainly was entitled by virtue of his position to make disbursements which were neces-

sary for the navigation of the ship. He was at least entitled to make those disbursements against the owners which were not stipulated for in the charter-party, and which it was not known to him were to be paid by the charterers. I doubt very much, however, whether he was entitled to make disbursements on behalf of the owners, which the charterers were bound to make, unless he first went to the charterers or their agents, and found that they absolutely refused to make them. If he had been put in this position, that the charterer's agent at a foreign port had refused to make disbursements which they had undertaken to make, and the ship could not be navigated without those disbursements, I have a strong opinion that in such a case he would be entitled to charge such disbursements against the owners.

Was he, therefore, the captain of the owners? That must depend upon the charter-party. The fact which is against that view is, that he was to be appointed by the charterers. Is this what is called a demise of the ship? To my mind it is certainly not. The command and the possession of the ship were left in the hands of the owners. What the charterers had a right to was a certain space in the ship in which to put their cargo, and they had no control over the crew at all, except that they were to give what are called sailing orders to the captain. Otherwise the vessel was in the possession of the owners, and it must be a strong case indeed where the captain who navigates the ship is not their captain. The captain was to be appointed by the charterers, but the owners were to maintain the crew and the captain, and it follows that they must pay them. There was a stipulation in the charter-party by which, in the event of the charterers being dissatisfied with the conduct of the master, the owners were required to make a full investigation into the matter. Would that stipulation have been necessary if he was the servant of the charterers? It seems to me that this charter-party shows that although the captain was to be nominated by the charterers, he was to be paid by the owners, to be subject to their orders as to navigation, and to be dismissed by them if he was to be dismissed at all. It follows from this that he is the owners' captain. If, then, he is their captain, inasmuch as they were bound to maintain the ship in a manner fitted for service, any necessary disbursements made by him in order to preserve the vessel in that condition—and this, of course, includes the provisions of a proper crew, and the wages of seaman, or repairs to the ship in a foreign port—he, the captain, was bound to pay on behalf of his owners. He is therefore entitled to recover these disbursements from the owners. In my opinion this appeal must be dismissed.

Baggallay, L.J. concurred.

Lindley, L.J.—I am of the same opinion. It seems to me that, though the captain had certain rights as against the charterers, there was no doubt that he was the captain of the owners. It appears to me, therefore, that Butt, J.'s decision was right.

Appeal dismissed.

Plaintiff's solicitor, *J. F. Harrison*, Liverpool.
Defendants' solicitor, *Harper* and *Battcock*.

Friday, June 12, 1885.

(Before Brett, M.R., Baggallay and Bowen, L.JJ.)

Tate and Sons *v.* Hyslop. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance—Concealment—Material fact—Risk in lighters—Agreement as to lighterman's liability.

In marine insurance all facts which a prudent and experienced underwriter would take into consideration in estimating the premium are material, and ought to be disclosed.

The London lightermen have two contracts as to the carriage of goods, the one as common carriers, the other on the terms that they will not be liable for loss unless caused by negligence, and the rate of premiums on goods carried under the latter contract being greater than that under the former.

Held, that the fact of the goods being carried under the latter contract is material, and ought to be disclosed to the underwriters, and its concealment will avoid the policy.

This was an action brought by the plaintiffs, sugar refiners in London, against the defendant, an underwriter at Lloyd's, to recover in respect of the loss of certain sugar which occurred in the Thames while the sugar was being conveyed from the steamer to the plaintiffs' refinery. The sugar was insured in steamer or steamers, "and in boats and lighters while loading and unloading, and until finally delivered at any wharves, docks, landing places, vessels, or refinery at Silvertown, as ordered by the assured." The risks insured included "all risks of transhipment and storage on the route, and of rafts, craft, and lighters in loading and unloading, the transhipment, and particularly of any special lighterage, and while in craft waiting shipment or landing, or delivery to other vessels after arrival, and until delivered at any wharves, docks, landing places, vessels, or elsewhere, as ordered by the assured or their agents, each raft, lighter, or other craft to be considered as separately insured."

The defence, raising the main question upon which the decision of the Court of Appeal turned, was that of concealment of a material fact, namely, the existence of an agreement between the plaintiffs and their lighterman, named Hooper, who did all their lighterage, by which the latter was exempted from liability for any loss in craft except such as might be caused by his own negligence.

At the trial, which took place in London before Manisty, J., it was shown that before April 1882, in cases where underwriters had paid for losses occurring while the goods were in lighters, they had been in the habit of suing the lighterman in the name of the assured, and recovering the amount of the losses so paid. In consequence of this an association of the Thames master lightermen caused a notice to be published in the newspapers stating that they would not take upon themselves the liability of common carriers, but would only be liable for loss of or damage to goods resulting from the negligence or wilful acts of their servants. After this, in policies including risk on lighters, the premium charged was higher where the goods were carried on the

(*a*) Reported by P. B. Hutchins, Esq., Barrister-at-Law.

terms that the lightermen should only be liable for negligence or misconduct than it was where the lightermen were liable as common carriers.

On the 20th May 1882, shortly before the policies sued on were effected, the plaintiff's brokers had written a letter to the plaintiffs respecting another loss which had taken place shortly before that date. Their letter was as follows:

We have sent the papers relating to craft loss to Messrs. Powell and Jupp, average adjusters, to make up a statement. Of course you have seen the notices in the *Times* about lightermen's ability, including a letter to-day. Merchants are now insuring the craft risks excluded by lightermen, which seem to comprise all but negligence, at risks varying from 1*s.* to 2*s.* 6*d.* p.c., depending on the distance allowed in the Thames. The rate seems high; but it is not out of proportion to the risks as explained by lightermen. Have you any instructions to give?

The policies now sued on were effected through the brokers who had written the above letter, without any additional premium for craft risk, and without communicating to the underwriters the terms of the arrangement between the plaintiffs and Hooper. The defendant stated at the trial that he had no knowledge of the existence of this arrangement until some time after the policies had been effected; but it was known to his solicitor, who had conducted an action against Hooper in respect of the previous loss referred to in the broker's letter.

The following are the questions which were left to the jury, and their answers:

(1) Was the fact communicated to the underwriters that by the existing arrangement between Hooper and the plaintiffs Hooper was liable only in case of negligence?—Answer: It was not communicated direct to the underwriters, but it was disclosed to the defendant's solicitors on the 5th Aug.

(2) Was the fact of the plaintiffs having that arrangement with Hooper material to the risk; that is to say, was it a fact which a prudent and experienced underwriter would have taken into consideration in estimating the premium?—Answer: Yes.

(3) If it was material, was it concealed?—Answer: No.

(4) When the insurances were effected on the 21st and 25th July, and on the 5th and 23rd Sept., was it the usual usage for merchants to employ lightermen on the terms of the resolution of the Association of Lightermen in April 1882?—Answer: Yes.

(5) Was that usage generally known?—Yes.

(6) Were the underwriters reasonably justified under the circumstances of the case in assuming without inquiry that there would be recourse against lightermen with the liability of a common carrier?—Answer: No, they were not.

On these findings Manisty, J. gave judgment for the plaintiffs.

The Divisional Court (Day and Smith, JJ.) set aside the judgment, and entered judgment for the defendant.

The plaintiffs appealed.

The appeal was argued by *Webster*, Q.C. and *Reid*, Q.C. (*Hollams* with them) for the plaintiffs; and by *Russell*, Q.C. and *Cohen*, Q.C. (*Barnes* with them) for the defendants.

The following decisions were referred to:

Tennant v. *Henderson*, 1 Dow. 324;
Vallance v. *Dewar*, 1 Camp. 503;
Harrower v. *Hutchinson*, 20 L. T. Rep. N. S. 556; L. Rep. 4 Q. B. 523; reversed in the Exchequer Chamber, 22 L. T. Rep. N. S. 684; 3 Mar. Law Cas. O. S. 434; L. Rep. 5 Q. B. 584;
Ionides v. *Pender*, 2 Asp. Mar. Law Cas. 266; 30 L. T. Rep N. S. 547; L. Rep. 9 Q. B. 531;
Bates v. *Hewitt*, L. Rep. 2 Q. B. 595; 2 Mar. Law Cas. O.S. 432; 15 L. T. Rep. N. S. 366;
Rivaz v. *Gerussi*, 4 Asp. Mar. Law Cas. 377; 44 L. T. Rep. N. S. 79; 6 Q. B. Div. 222.

BRETT, M.R.—In this case the plaintiffs had effected a policy with the defendant and others upon goods on board ships or in boats, craft, and lighters. The policy was to include all risks incidental to navigation, and all risks of rafts, craft, and lighters in loading, unloading, and transhipping, and in particular of any special lighterage, and while in craft waiting transhipment or landing on delivery to other vessels after arrival, and until delivered at any wharves, docks, landing places or elsewhere as ordered by the assured. The goods arrived in the Thames in a ship, and were put on board a lighter which belonged to a man named Hooper, whose business it was to let lighters. He had a running agreement with the plaintiffs, as to the construction of which there has been some contention, but which was one of two things: either an agreement which, as between the plaintiffs and Hooper, obliged the plaintiffs at the risk of becoming liable for breach of contract to allow him to carry all goods which were carried for them in ships and were to be taken to a wharf; or an agreement whereby, whenever Hooper should lighter goods for the plaintiffs, certain conditions were to be part of the contract. In either case it was part of the contract that Hooper should only be liable to the plaintiffs in the case of negligence; that is, that whatever may be the liability of a lighterman under ordinary circumstances the liability here was so limited that Hooper could only be liable if he were guilty of negligence. The loss is admitted, and the defence is that of concealment of a material fact. Concealments are of two kinds, viz., fraudulent concealment and non-disclosure. Here it is charged against the plaintiffs that from ignorance of what was necessary for them to do under the law, or from carelessness, they did not disclose to the underwriters that which they ought to have disclosed. Manisty, J. left to the jury certain questions which they have answered specifically. It was not a general verdict, and upon their answers he directed verdict and judgment to be entered for the plaintiffs. The Divisional Court entered verdict and judgment for the defendant, and the plaintiffs now appeal. The first finding is of no value. The solicitor is not a standing agent for his client to receive mercantile notices in respect of mercantile business. It may be doubted whether there was a disclosure on Aug. 5th, but whether there was or not is immaterial. The substantial arguments before us were these: first, as to whether the jury were justified in answering the second question in the affirmative; and secondly, if so, whether they were justified in answering the fourth and fifth questions in the affirmative; and, thirdly, if so, whether the answers to those questions materially affect the plaintiffs' case. I have come to the conclusion that the jury were justified in answering the second question as they did, and that the direction on that point was right. It is said that the plaintiffs should have disclosed that they had an arrangement with Hooper which minimised his liability in case of loss. The only effect which it was suggested that could have upon the money position of the underwriters is that, assuming a loss for which they would be liable under the policy to pay the plaintiffs, they

would not, by reason of this minimisation of liability have the same valuable recourse over against the lighterman as they otherwise would have in the name of the assured. It is obvious that it could only affect the salvage which the underwriters might have; and if there were nothing else in the case I should have thought that the mere minimisation of the right to salvage would not have been a material fact. But something else has happened, for there is evidence that it had become more or less publicly known that some lightermen, at all events, would not carry goods unless their liability was minimised by arrangement, and therefore it was obvious that two states of things might arise so as to affect the underwriters' right to salvage where there was a loss on board lighters. It is not disputed that upon such a policy as this the underwriters would be liable for loss whether the lighter belonged to the owner of the goods or to another person, or whatever might be the arrangement for lighterage between the lighterman and the person for whom the goods are carried. Therefore it signifies not to whom the lighter belonged, for the underwriters would be equally liable for loss on board the lighters. It was disputed whether, if the lighter belonged to wharfingers, they would have that liability in the absence of a special contract. To my mind they would. If goods are lost in the lighter of a dock company, the company are carriers of goods on the water, and therefore are subject to the full liability unless by arrangement that is restricted. Therefore the underwriters finding that in the one case they would have the advantage of using the name of the assured against the persons who were under full liability, and that in the other case there was that arrangement, came to the conclusion that the two positions were different as to their mercantile interest, and that they ran greater risk of money loss in the one case than in the other. Upon that they came to the conclusion that in the one case they would charge a larger premium, and that where they had full protection they would charge less. Therefore they came to the conclusion that they would have two rates of insurance. They made known that such was their resolution, so as to let people know that if they insured with them they would have to pay different premiums according to the different states of circumstances. There is evidence that this had become known to the plaintiffs, either personally or by their brokers, before they insured. It seems to me that the moment they knew that there were two rates of insurance which would arise in consequence of their taking one position or another with regard to the landing of their goods, it became material to the underwriters to know what was the plaintiffs' intention at the time. Certainly, if the plaintiffs had bound themselves, it became material for the underwriters to know that fact. But if the contract did not bind the plaintiffs to land their goods by Hooper's lighters, yet it seems to me that where there is a difference in the premium known to the plaintiffs, amd where they have the intention at the time when they insure of landing their goods under circumstances which they know would, if disclosed, cause the underwriters to require a larger premium, this is a matter which a prudent and experienced underwriter would take into consideration in estimating the premium, or in considering whether he would take the risk, and is, therefore, a material fact to be made known. Therefore, that question being rightly left to the jury, they were justified in coming to the conclusion to which they came. The authorities show that the materiality is not as to the risk, but whether the fact, if disclosed, would influence the underwriters as to entering upon the insurance or as to the terms upon which they would insure. The case most like this is *Harrower* v. *Hutchinson* (22 L. T. Rep. N. S. 684; 3 Mar. Law Cas. O. S. 434; L. Rep. 5 Q. B. 584). There the vessel and the goods insured were lost in returning from a port which was not known to the underwriters. An underwriter is bound to know the mercantile geography of the countries to which the voyage is insured; that is, he is bound to have the knowledge which underwriters of ordinary skill have. But if there are any circumstances with regard to a port, which, although it exists, is not so well known that all careful underwriters must be taken to know about it, then the case may be brought under the definition which requires the assured to disclose. As a fundamental rule, an assured has to disclose any circumstance which would affect the determination of a prudent and experienced underwriter, which is known to the assured and is not known, and ought not to be known, to the underwriter. In that case it was proved that the port existed, and that it was a more dangerous port than the other. But by reason of it not having been sufficiently frequented it was not to be assumed against any particular underwriter that he was bound to know, and it was proved that the particular underwriter did not know. Therefore that was a case where the assured knew of a larger danger, and the underwriter did not know, and was not bound to know it, and accordingly the court held that the assured ought to have disclosed the fact that he was sending the ship to that port, and that it was a more dangerous port than the other. The difficulty in that case was whether the underwriter ought not to be taken to know the condition of that port; but it was held that, under the particular circumstances of the case, the port being not so largely frequented as to make it known to the generality of careful underwriters, the particular underwriter was not bound to know. Applying that doctrine here, the assured knew that they had made up their minds at the time of the insurance to land the goods by this particular lighterman. That was not disputed. They knew that they had a particular arrangement with him, and that if he did carry their goods he would be only under a limited liability. To my mind it is clear that the particular underwriter did not know of this arrangement. Therefore there is here a matter which the assured knew and the underwriter did not know. Then comes the question whether the underwriter ought to have known. That question presents greater difficulty. The evidence which justifies the second finding is, that there was a diversity of practice, and that some goods are carried by lightermen with full liability and others with limited liability, caused in some causes by agreement and in others by circumstances. If the fourth finding means that the practice is so general that almost every merchant employs a lighterman with limited liability, it seems to me

to destroy and cut away the very ground on which the second finding was based. It leaves only one mode of landing goods. Is it true to say that there is only one mode of landing goods, that is, under limited liability? It seems to me from the evidence on both sides, that it is not true to say that there was a general usage to employ lightermen only under one set of circumstances. The evidence shows nothing which can support and make reasonable the finding of the jury upon the fourth question, and if the fourth falls the fifth also falls. Therefore, so far as my judgment goes, I should say that the case must be decided on the footing that there was no evidence to support the findings on the fourth and fifth questions. Therefore the case rests upon the second finding. But having come to the conclusion that the second finding is right, it seems to me that the facts which support that finding make it impossible that the fourth and fifth can be right. It comes to this, that the fourth and fifth findings are inconsistent with the propriety of the second; so that there is a dilemma that, if findings four and five are right the second is wrong, and if the second is right the others are wrong. I think that the fourth and fifth are wrong, and the second is right. As to the sixth question, it seems to me, first, that it mixes up law and fact; secondly, that it is irrelevant. For these reasons I come to the conclusion that the judgment of the Divisional Court must be affirmed, and that the verdict must be entered for the defendant. I take the third answer to mean "was not disclosed." I do not think the fact was concealed in any other way, for there is no symptom of fraudulent concealment.

Baggallay, L.J.—I am of the same opinion. The ground of my conclusion is, that there was evidence to support the second finding, but there was no evidence to support the third and fourth.

Bowen, L.J.—I am of the same opinion. The first question is as to what is the legal test to be applied to the evidence. It is established law that a person who deals with underwriters must disclose to them all material facts known to himself and not known to them, or, at all events, which they are not bound to know. In order to make that proposition clear, of course it becomes necessary to understand what one means by a material fact. That definition also has been conclusively established by reason and authority. It is the duty of the assured to communicate to the underwriter all facts in his own knowledge which would affect the mind of the underwriter, either as to taking the contract or as to the premium. The question of materiality depends upon the effect which the communication would have upon the underwriter at the time when the policy is made. Therefore, in answering the question whether a fact is material, one may shortly dispose of it by saying that it depends upon whether or no a prudent underwriter would take that fact into consideration in estimating the premium. The rule has been laid down over and over again, and is stated clearly in the case of *Ionides* v. *Pender* (30 L. T. Rep. N. S. 54; 2 Asp. Mar. Law Cas. 266; L. Rep. 9 Q. B. 531).

That being the law, what are the facts to which we have to apply it? The importers of this produce, which is to be landed in the Thames, use lighters for the purpose of discharging the cargoes. Down to the year 1882 no importance seems to have been attached by the underwriters to the way in which importers dealt with lightermen. Owing to a previous litigation, in 1882 the lightermen came together and combined for the purpose of insisting upon being discharged from the liability which is known as that of common carriers. Their combination was known to merchants, and was also known to underwriters, who thought the determination of the lightermen to resist the liability of common carriers was of sufficient gravity to affect the underwriting of policies and the premiums to be charged. As long as it remained uncertain down to the time when the ship arrived whether the cargo would be landed by a lighterman who remained subject to common law liability or by one who took the goods upon the terms of being exempted, then, unless the underwriters made it part of the terms of the bargain between them and the assured, and insisted that the goods should be landed one way or the other, there was nothing which the assured in such a case knew and the underwriters did not know, and therefore there could be nothing which the assured was bound to disclose, the non-disclosure of which was material, because the underwriters would be bound to know the ordinary course of trade. But the moment the merchant makes an arrangement which determines the uncertainty in one direction, and either binds himself by agreement (as seems to have been the case here) with a lighterman that the latter shall carry the goods without being liable to the common law liability, or even supposing the merchant does not bind himself by a binding agreement to employ a lighterman, and that the arrangement in this case falls short of that mutual contract which at first sight I was inclined to think it did, it only amounts to this, that a merchant has made an arrangement which for business purposes practically governs the future, and which at the time when he makes the policy he intends to carry out; then a fact exists which is in the knowledge of the assured and not in the knowledge of the underwriters. Is it then material that such a fact should be disclosed? The evidence here was, that from and after May 1882 premiums were affected by the existence or non-existence of such an arrangement, and if one wishes for a conclusive finding upon the question whether this arrangement and intention on the part of the merchant was material, one finds it in the brokers' letter which gave a conclusive indication to their principals that in their minds, as well as in the minds of the underwriters, such an arrangement should be disclosed. It is impossible under such circumstances, having regard to the true definition of materiality, to doubt that the finding of the jury must stand which says that the fact of the arrangement having been made was material to the risk; *i.e.*, was a fact which a prudent underwriter would have taken into consideration in estimating the premium.

With regard to the question whether the mere existence of facts which would lessen the salvage are facts which should be disclosed I offer no opinion. It seems to me that, although an arrangement lessening salvage is not necessarily material, it may be so, and that the real test is whether the underwriter would

be affected in estimating premium. The arrangement here between the merchants and the lightermen is not a mere lessening of salvage, for the existence of such an arrangement may affect the danger of the goods being lost. I found my judgment upon this: that at the time when the policy was effected there was an existing arrangement between the assured and the lighterman, which was intended by the assured to be acted upon, and the existence of which would materially affect the underwriters in estimating the premium. If that is a true view of the case, the remaining answers to the questions seem to me to be embarrassing. The fourth may be read in two ways. If it is read in one way it will mean that practically there was only one way of landing goods, and that there was a general usage to employ lightermen upon the terms that they should be discharged from common law liability. It seems to me that this is inconsistent with the answer given to the second question, because, assuming that the prevalent usage is to employ lightermen in only one way, and the underwriters know this, to disclose the arrangement would give them no additional information. If that is the true way in which the fourth finding must be read, it seems to me that there is no evidence to support it. I confess that I am inclined to read the fourth answer as intimating an opinion on the part of the jury that there was a general usage not supplanting other usages, but taking its place amongst them as one quite common, and which should be known to all in business, *i.e.*, that lightermen might be employed upon the terms that their common law liability should remain, but that they might equally probably be employed on the terms that they should not be subject to their common law liability. If that is the true meaning, the answer to the fourth question is irrelevant, because what is material is the existence of the prior agreement, and that is the ground upon which there has been concealment. It is within the rights of the merchant to employ a lighterman upon any terms, provided he has not at the time of the policy elected to take a particular course; but, if there is a fixed agreement at the time of the policy, that should be disclosed. If that should be disclosed, how can it be an answer to say that the underwriters should never assume that there would be recourse against the lighterman, or that there was a general usage when the goods did arrive to deal with them in one way or the other? The complaint is not that that recourse has been taken away in the events which happened, but that the underwriters were not told of the special agreement at the time when the policy was made. Therefore, if read in that way it is not an answer to the second finding of the jury. But if it is to be read as meaning that there was only one prevalent way of landing goods, there is no evidence to support it. The same observations apply to the fifth and sixth findings. For these reasons I am of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiffs, *Hollams, Son, and Coward.*

Solicitors for defendants, *Waltons, Bubb, and Johnson.*

July 18 *and* 21, 1885.

(Before Brett, M.R., Baggallay and Fry, L.JJ.)

The Christiansborg. (*a*)

ON APPEAL FROM SIR JAMES HANNEN.

Practice—Stay of proceedings—Actions in rem—Bail—Letter of guarantee—Proceedings in Admiralty Division—Lis alibi pendens—Election.

Where a collision action was instituted in Holland in which the defendants' vessel was released upon a letter of guarantee given between the parties, and the plaintiffs subsequently instituted a second action in this country, and re-arrested the vessel, the Court of Admiralty stayed the second action and released the vessel:

The Court of Appeal (Baggallay and Fry, L.JJ., Brett, M.R. dissentiente) affirmed the order, being of opinion that the letter of guarantee being in principle equivalent to bail, the second proceedings in this country were vexatious, and that having the power to stay them they ought, under the circumstances, to exercise that power.

This was an appeal from a decision of Sir James Hannen on a motion by the defendants in a collision action *in rem*, asking the judge "to direct the steamship *Christiansborg* and her freight to be immediately released on the ground that bail has been given for the ship in the Royal Court of Holland, at Rotterdam, in a suit instituted there, and to dismiss this action."

The collision occurred in the Baltic, on the 20th May 1885, between the foreign steamships the *Christiansborg* and the *Jessica*, the *Jessica* and her cargo being totally lost.

The owners of the *Jessica* and her cargo thereupon instituted an action in the Royal Court of Holland at Rotterdam, on the 15th June 1885, against the steamship *Christiansborg*. She was arrested at Maashuis. Upon the defendants giving a letter of guarantee in the sum of 175,000 gulden, the vessel was released on the 20th June.

On the 9th July an action *in rem* was instituted in England in the Admiralty Division of the High Court of Justice, by the owners of the cargo laden on board the *Jessica*, against the *Christiansborg*, claiming 15,000*l.* damages.

On the 14th July the owners of the *Jessica* and her freight, and her master and crew (proceeding for their effects) instituted an action *in rem* in England in the Admiralty Division of the High Court of Justice against the *Christiansborg*, claiming 15,000*l.* damages. The *Christiansborg* was arrested in these actions.

The plaintiffs proposed consolidating the actions, and offered to accept bail in the sum of 12,000*l.* The defendants thereupon took out a summons in the cargo action, calling on the plaintiffs to show cause why the *Christiansborg* should not be released on the ground that bail had been given in the Dutch action, and why the English action should not be dismissed. The summons came on for hearing before Sir James Hannen on the 14th July, when it appearing probable that the Dutch proceedings had been, or would be, discontinued, the summons was adjourned *sine die* in order to enable the parties to come to terms.

On the 16th July the defendants having reason to believe that the Dutch proceedings were being

(*a*) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

continued, now (July 17) moved the court as above stated, having, on the 16th July, served a notice of motion to the above effect, in the action brought by the owners, master, and crew of the *Jessica*.

According to an affidavit sworn by a Mr. Henry Schmidt, of Hamburg, who acted as representative of the *Jessica* and cargo, it was stated that a Mr. Von Appen, who acted for the same interest to value the *Christiansborg*, had released the steamer on receipt of a letter of guarantee whereby the private underwriters guaranteed up to the amount of 175,000 gulden for compensation which the *Christiansborg* might have to pay. Mr. Schmidt stated that he disapproved of this letter, and offered to deliver it up to the underwriters, who, however, held to it.

Paragraphs 5 and 6 of the affidavit were as follows:

5. I say that no bail has been given in Holland. The only security that has been given is the said letter of guarantee, which I am ready to deliver up at once.

7. Since the *Christiansborg* was released in Holland I have been informed, and believe, that there are great difficulties in the way of prosecuting a suit in Holland on the subject of such a collision as this.

The letter of guarantee was as follows:

The Private Underwriters, Holman's Canal, Copenhagen, June 17, 1885.—We, the undersigned, the private underwriters in Copenhagen, hereby guarantee to the parties interested in the steamer *Jessica*, of Hamburg, and her cargo, up to the amount of 175,000 gulden, for the compensation which the steamer *Christiansborg* may eventually have to pay by legal decision in Holland. —(Signed) The Private Underwriters, pp. Ed. Hordt and Son, Carl. Will.

July 17.—The motion came on for hearing before the President, Sir James Hannen.

Myburgh, Q.C. (with him *Nelson*), for the defendants, in support of the motion.

Sir *Walter Phillimore* (with him *Stubbs*), for the plaintiffs, *contra*.

The plaintiffs offered to abandon the proceedings in Holland, and pay the costs incidental thereto. This offer the defendants refused to accept.

Sir James Hannen.—I am of opinion that this question comes on before me in precisely the same manner as it did on summons in chambers, because the only direction I gave was that it should be adjourned *sine die*—in the expectation, indeed, that some arrangement had been or would be come to between the parties, which appears not to be the case. I am now called upon to state the principle on which such a question as this should be determined. I am of opinion that where the suit has been brought in one court, as to which it is not shown that it would not do justice, it is *primâ facie* oppressive to institute another suit in any other court, and the only difference between the case of the one suit being in an English court and the other in a foreign court is, that it is highly probable that the English court will come to the conclusion more easily that full justice would not be done in the other court if the circumstances were brought to its knowledge leading to that conclusion. In this particular case no facts are brought to my knowledge to show that the Dutch court would not do full justice, and as full justice between these two foreigners as the English court. It is simply stated that when the steps which had been taken in Holland came to the knowledge of some one in this country that he objected, although the plaintiffs' agent in Holland was perfectly satisfied. It is true Mr. Schmidt says that there are great difficulties in proceeding with the suit in Holland, but he does not state what they are. That statement is contradicted, and I see no reason to entertain any doubt whatever that the proceedings can be taken with as reasonable certainty of justice being done in Holland as here.

Now let me consider what are the facts, and to what conclusion they should lead me. That there is a *lis alibi pendens* is perfectly clear. I do not of course think that that in itself precludes the plaintiffs from taking action here, if they show good reason for so doing; but, as I have already intimated, I do not think they have shown any good reason. The Dutch suit is pending. It is true that the plaintiffs have expressed a willingness to abandon that suit, but the Dutch court is seised of this litigation, and without its consent (and I suppose it would be governed by similar considerations to those which I have expressed), and until it has dismissed the suit, and says it cannot entertain it, it is a *lis alibi pendens*. The plaintiffs in Holland exercised a plain right in holding the vessel to bail there. Security was given which satisfied the agents of the plaintiffs in Holland, and thereupon the vessel was released. Now what is the meaning of that release? It plainly must mean—everybody must understand it to mean—that the vessel was to go on her course and be useful to her owners and earn freight, and not merely that, she was to have liberty to sail about in Dutch waters. But the theory that is set up by the plaintiffs is, that though they have got a security, which I suppose is a security according to Dutch law, and which satisfied their agent there, they are at liberty wherever they find this vessel to arrest her over again, and so defeat the very object of the security which had been obtained in Holland. It appears to me, therefore, that justice requires—and none of the authorities which have been cited prevent me doing what I think justice requires—that the suit which has been instituted here should be stayed, and that the vessel should be released. This order is applicable to both actions.

From this decision the plaintiffs appealed.

July 18.—Sir *Walter Phillimore* (with him *Stubbs*), for the plaintiffs, in support of the appeal. —The decision of the learned President is wrong, being in direct opposition to the law as laid down by this court in the cases of

McHenry v. *Lewis*, 22 Ch. Div. 397; 47 L. T. Rep. N. S. 549;

The Peruvian Guano Company v. *Bockwoldt*, 5 Asp. Mar. Law Cas. 29; 48 L. T. Rep. N. S. 7; 23 Ch. Div. 225.

According to the law there laid down, where the same plaintiff sues the same defendant in respect of the same cause of action in this country and in a foreign court where the remedy and procedure are different, there is no presumption that the multiplicity of actions is vexatious, and a special case must be made out to induce the court to interfere. The onus therefore is upon the defendants to show that the institution of the action here is vexatious. This they have not done, and the court therefore should not exercise

its jurisdiction to restrain the plaintiffs continuing their action in this country. Moreover the court will only interfere where a very strong case is made out, and in *The Peruvian Guano Company* v. *Bockwoldt*, where the circumstances were analogous to the present, the court even refused to make the plaintiffs elect. The old practice of the Courts of Chancery was to put the plaintiff to his election, and not to stay the proceedings. The decisions of Sir Robert Phillimore in

The Catterina Chiazzare, 34 L. T. Rep. N. S. 588; 1 P. Div. 368; 3 Asp. Mar. Law Cas. 170;
The Mali Ivo, 20 L. T. Rep. N. S. 681; L. Rep. 2 A. & E. 356; 3 Mar. Law Cas. O. S. 241;
The Peshawur, 48 L.T. Rep. N.S. 795; 8 P. Div. 32; 5 Asp. Mar. Cas. 89.

are conflicting, and if conflicting with the decision of this court in *McHenry* v. *Lewis* (*ubi sup.*) they are of no avail to the defendants. It may be said that in this case, the actions being both *in rem*, the remedy and procedure are the same in both countries, and therefore, on the authority of *McHenry* v. *Lewis* (*ubi sup.*), the court should interfere. But assuming the procedure to be the same, then no bail bond was given to the Dutch court as our Court of Admiralty requires, and the plaintiffs would have no effective means of enforcing their remedy, assuming the Dutch court to decide the case in their favour. If, therefore, the procedure in the Dutch court is similar to ours, it would be a denial of justice to compel the plaintiffs to proceed in a court where they will have no effective remedy. If, however, the procedure and remedy in Holland are different from ours, then, according to the decision of this court, there is no vexation, and the court should not interfere.

Myburgh, Q.C. (with him *Nelson*) for the respondents.—According to the decision of *McHenry* v. *Lewis* (*ubi sup.*), if the court sees that the circumstances of the case are as vexatious as in a case where a plaintiff sues the same defendant in two courts in this country, then it will interfere to prevent the defendant being vexatiously harassed. In such a case it has jurisdiction either to stay the proceedings or to put the plaintiff to his election. It is not shown that the Dutch court would not do full justice between the parties; and, moreover, both actions being Admiralty actions *in rem*, it is submitted that the remedy and procedure in both courts are substantially the same, and that therefore, on the authority of *McHenry* v. *Lewis*, the second action is vexatious and should be stayed. There is no distinction in principle between a letter of guarantee given between the parties and a bail bond given to the court. The giving of bail is the substitution of the bail for the *res*, and means the release of the ship from all liabilities in respect of the collision. Her subsequent arrest was therefore against good faith, and to meet the ends of justice, which none of the authorities prevent, the second action should be stayed. The decisions of the Admiralty Court on this point are in favour of the defendants' contention, and are capable of being supported consistently with the decision of this court.

Sir *Walter Phillimore* in reply.

Cur. adv. vult.

July 21.—Brett, M.R.—In this case a suit was instituted in an Admiralty Court in Holland, against a ship in respect of a collision, and in that suit the parties, unless the proceedings in the Admiralty Court in Holland differ from those in the Admiralty Division here, have done that which is absolutely contrary to the practice of the court. Instead of taking a bail bond to the court, they have taken a guarantee as between themselves. The plaintiffs in Holland have now instituted an action in the Admiralty Division here against the same ship for the same collision. A motion was made in the English action to stay the proceedings here upon the ground that there was an action pending in Holland between the same parties for the same cause of action. The plaintiffs in this court offered to elect at once to abandon the proceedings in Holland and to proceed only here. They offered to cancel the bond or guarantee, to give it back, and to pay all the costs of the Dutch proceedings; but Sir James Hannen declined to allow them to elect, and stayed the proceedings here absolutely, so that the plaintiffs could never proceed in this country. The question is, was the learned President right in so doing? Now this was a collision between two foreign ships on the high seas, and the defendants' ship has come into an English port, and has been seized by the Admiralty Division here. There is no doubt, in my mind, that the court here has full jurisdiction to try the case. The question therefore must be, where a plaintiff has brought an action in a court in this country which has jurisdiction, whether the court will prevent him from going on with that suit.

Now what are the rules which have been laid down with regard to this? and laid down, in my opinion, with perfect correctness, and in a manner binding on this court. There is the case of *McHenry* v. *Lewis* (22 Ch. Div. 397; 47 L. T. Rep. N. S. 549), decided in 1882. In that case it was argued that the mere fact of proceedings being pending in a foreign court was sufficient of itself to cause a court here, in which an action between the same parties and for the same cause of action was pending, to stay proceedings here. Indeed, it was argued that the court here would not have jurisdiction. The late Master of the Rolls gave a most important judgment, which I should have thought would have settled the law. He said: "That question is, whether or not, when an action is brought by a man in this country against a defendant, and the same plaintiff brings an action in a foreign country against the same defendant for the same cause of action, this court has jurisdiction in a proper case to stay the action in this country on the ground that the defendant is doubly vexed by reason of the action being brought also in the foreign country." Then he deals with the case of *Cox* v. *Mitchell* (7 C. B. N. S. 55) in a way which is binding on us, and then he proceeds to say: "If the true view of the judgment is that *primâ facie* a man is not doubly vexed when the action is brought in the two countries, but that you want a special case to show that he is doubly vexed, then there is no conflict of opinion." That is, in other words, to say that, where the two actions are in two different countries, and that is all which can be alleged, *primâ facie* there is no vexation at all, and the court ought not to interfere. It ought not even to put a party to his election *primâ facie*, but leave him to go on and see in which suit he can get execution first. The learned Master of the

Rolls then said: "As regards the second point, it appears to me that very different considerations arise where both the actions are brought in this country, and where one of them is brought in a foreign country. In this country, where the two actions are by the same man in courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *primâ facie* vexatious to bring two actions where one will do." So that even where it is in courts that have precisely the same procedure, precisely the same remedies in the same country, even there it is only *primâ facie* vexatious; and he adds that "this has been recognised, I believe, for ages by the practice of the old Court of Chancery." Now, what did the old Court of Chancery do, even in the strong case that is there referred to? It put the plaintiff to his election. It did not stay the action without giving him an election, it did not refuse to allow him to elect upon any terms but it put him to his election. That is all the Court of Chancery did. The learned judge says: "But where it is in a foreign country it certainly appears to me that we cannot draw the same inference. Not only is the procedure different, but the remedy is different." I should think the learned judge there meant to say "may be different." Then in another part he shows how it might be different, but it is not worth while to allude to that. We therefore have the late Master of the Rolls drawing a strong distinction between the case of the proceedings being in two countries and in the same country. Where they are in the same country, he only says it is a *primâ facie* case of vexation; and even where it is a case of vexation, he says the Court of Chancery had never done more than put a man to his election. Then Cotton, L.J. says: "The distinction between proceedings where they are both in the same tribunal and when one is in England and the other is abroad, has already been pointed out by the Master of the Rolls, and that may explain why it is of course when both the actions are in England, and not of course when one is in England and the other abroad." Then he lays down the way in which the jurisdiction is to be exercised: "But here under the circumstances of this case ought we to exercise a jurisdiction, which I assume we have, and to make the order? In the first place, it is a jurisdiction which one ought to exercise with extreme caution. Stopping in the middle of a suit a plaintiff from going on when he has a right of action as against the defendant is a jurisdiction which has to be exercised with very considerable caution." Then he goes on to discuss the particular case: "But I cannot say here that we ought to come to the conclusion, which is the principle on which the jurisdiction is to be exercised, that proceeding with these two suits in the two different tribunals is vexatious. It may be harassing no doubt, because it is very harassing to have an action brought against one in any tribunal at all, but that is not enough. It must be vexatiously harassing the defendant on the part of the plaintiff whose action is sought to be stayed." Then Bowen, L.J. says: "I think that *Cox* v. *Mitchell* (*ubi sup.*) decided nothing more, that it simply lays down the proposition that the mere pendency of an action abroad is not a sufficient reason for staying an action at home, although the causes of action and the parties may be the same." And then further on he says: "The fact that no English action has ever yet been stayed on the ground of concurrent litigation in America is a strong argument to prove that such concurrent American litigation is not of itself a sufficient reason why an English action should be stayed." Now he speaks of America as the strongest case he can find because the laws of America are as nearly as possible the same as the laws of England, and are founded upon the same law. Again he says: "It is clear not merely from reason but from the language of Lord Cottenham and Lord Cranworth referred to by Cotton, L.J., that this court could do it if necessary for the purposes of justice, but some special circumstances ought surely to be brought to the attention of the court beyond the mere fact that an action is pending between the same parties on the same subject-matter in America." That seems to me to lay down the law that there is jurisdiction in the court, but that it ought only to be exercised with the greatest caution. Where both actions are in England in the same tribunal—because in England, if one is in one tribunal and another in another, where the proceedings are not identical, or where the remedies are not equally effective, the law would apply which he has laid down with regard to foreign countries—he says the jurisdiction is to be exercised with extreme caution, and where in England it is in an exactly similar tribunal, *primâ facie* it is vexatious, and therefore it would lie upon the party bringing the action to show that it was not. But where the cases are in foreign countries, different countries, *primâ facie* it is not vexatious, and he who says it is is bound to prove clearly to the court that it is, and that the person who is suing here in a court which has ample jurisdiction would have in every respect the same chance in the foreign court which he has here, and that he would have equal facility to enforce his remedy. Then we have the case of *The Peruvian Guano Company* v. *Bockwoldt* (23 Ch. Div. 225; 5 Asp. Mar. Law Cas. 29; 48 L. T. Rep. N. S. 7), in which the motion was that the plaintiff might be ordered to elect, not that the proceedings should be stayed. Indeed, I can find no case in which the court has stayed the second action without giving the plaintiff the right of election. There again the late Master of the Rolls says: "It is very important in these cases that the court should clearly see that in stopping an action it does not do any injustice." I will not read any more of his remarks, because he has already stated his opinion in the other case. Then Lindley, L.J. says: "As I understand it, it comes to this, that where the plaintiff is suing in this country and also abroad in respect of the same matter, and a motion is made to compel the plaintiff to elect, it is not sufficient for the person so moving to point out that there are two proceedings being taken with reference to the same matter; he must go a step further and show there is vexation in point of fact, that is to say, that there is no necessity for harassing the defendant by double litigation." In other words, he must show that there is no necessity. He proceeds: "If in any case it is established that there is nothing except vexatious litigation, there is ample jurisdiction in this court to make the order asked." Then Bowen, L.J. in stronger language says: "How are we to apply that doctrine to concurrent actions in our own and foreign courts?

It seems to me that we have no right moral or legal to take away from a plaintiff any real chance he may have of an advantage. If there is a fair possibility that he may have an advantage by prosecuting a suit in two countries, why should this court interfere and deprive him of it?"

The cases to which I have referred had dealt with cases in the Admiralty Court, as to which I must say that they are not satisfactory. Take the case of *The Peshawur* (8 P. Div. 32; 48 L. T. Rep. N. S. 796; 5 Asp. Mar. Law Cas. 89), which was an action *in personam* arising out of a collision in the Indian Ocean. It there appeared that "a cause of damage *in rem* relating to the same collision had prior to the proceedings in this court been instituted by the owners of the *Peshawur* against the *Glenroy* in a Vice-Admiralty court abroad and was there pending." That is all that was shown to the court and Sir Robert Phillimore upon that only says; "There are two questions raised in this case; first, whether I have the power in my discretion to direct a stay of the proceedings in the action brought in this court, by the owners of the *Glenroy* against the Peninsular and Oriental Steam Navigation Company; and secondly, whether, if I have this power, I ought in the circumstances to exercise it in favour of the defendants in the action here. Now I think I have a discretion as to whether I should stay the proceedings here or allow them to go on, and I shall exercise this discretion in favour of stopping all proceedings in the action in this court until after the suit at Colombo has been heard." He gives no reason. He says: "I shall do it. I have a discretion and I shall do it," and the only facts proved were that there was a suit pending at Colombo. That decision is in the very teeth of the decision in the Court of Appeal. It seems to me, with very great deference to Sir Robert Phillimore, that that case was wrongly decided, and I cannot regard it as an authority. Then there is the case of *The Mali Ivo* (*ubi sup.*), in which Sir Robert Phillimore refused to stay the proceedings. In that case the learned judge made statements, which have been relied upon; he says that he has a discretion, which nobody denies. Then he says: "I am aware that it has been decided by the Court of Common Pleas, in the case of a foreigner against whom an action of contract was pending in his own country at the suit of the plaintiff, and who came over to this country and was sued here by the plaintiff for the same demand, that the pendency of the action in the foreign country was not a sufficient ground for staying the proceedings in the action here, and I have considered that part of the case of *The Bold Buccleugh* (7 Mod. P. C. 223) which refers to this subject:" If we take those words literally, as I am inclined to do, I agree with him. Then he goes on: "I have come to the conclusion that it would be my duty either to suspend proceedings in this court or to put the parties to their election"—If that is to be read together as one thing it gives the parties their election, and if they refuse to exercise it, and to stay proceedings, that, I think, would be right. He continues—"as to which court they would have recourse to, if, indeed, the evidence before me established that there was a *lis alibi pendens* before a tribunal which could afford the plaintiff a complete remedy, whether the proceedings were technically instituted *in rem* or *in personam*." If the meaning of that is to afford as complete a remedy and as easily enforced, as the remedy in this court, and if it means to say that, then it is right, but not otherwise. In *The Catterina Chiazzare* (*ubi sup.*) the facts are thus stated by the judge: "A cross action had been entered on the 23rd Dec. in the High Court of Admiralty of Ireland, on behalf of the *Catterina Chiazzare*, against the *Harriet Williams*, for the damages occasioned by the collision; and subsequently, some time, I think, in the month of February, the owner of the *Harriet Williams*, the plaintiff in the principal cause in the High Court of Admiralty of Ireland, gave notice to the owner of the *Catterina Chiazzare* that no further proceedings would be taken in this suit brought by them against the vessel, and that the plaintiff would be at the costs which at that time had been incurred. Previously to this notice having been given the court in Ireland had already stated that it was not competent to the owner of the *Harriet Williams* to abandon the action until he had first caused the *Catterina Chiazzare* to be released in an action he had commenced against her in this court. Now the objection on protest is to the effect that there is a *lis alibi pendens* between those two vessels in the High Court of Admiralty of Ireland, that an application having been made to the judge in the High Court of Ireland to dismiss the suit on behalf of the original suitor, the owner of the *Harriet Williams*, the court refused to do so. Therefore the state of things is this, that there was a suit instituted in the High Court of Admiralty of Ireland by the same plaintiff who now institutes a suit in this court, there being also a cross suit in Ireland, and the judge having refused to dismiss the plaintiff on his application from the suit, it is contended that it is competent to me to meet the matter by dismissing the proceedings instituted in this court. I am of opinion that I ought not to allow this suit to be proceeded with at present. I think that it has been clearly made out that there is a cause before the High Court of Admiralty of Ireland between the same parties for the same object, and arising out of the same cause of action as the action before me, and that no doubt, apart from technical considerations, it would be a most inconvenient course of proceeding to allow the same case to be heard at the same time in two different courts. What I have to consider is what other courts have decided as to what constitutes a *lis alibi pendens*. On this point I may refer to my decision in another court in *Walsh* v. *Bishop of Lincoln* (L. Rep. 4 A. & E. 242). I think that the plaintiff here has lost his way. I think that he should have applied to the High Court of Admiralty of Ireland to dismiss the suit as he did, and if that was refused, I think he ought to have appealed from that refusal. At all events, in the present state of things, I shall order the *Catterina Chiazzare* to be released, and the proceedings in this court to be stayed." Here again the learned judge seems to have exercised his jurisdiction upon the mere ground that there was a case pending in Ireland. If we take Ireland not to be, for the purpose in question, a foreign country, but assume that the court in Ireland will give the same remedy as the court here, that case is to be supported on the ground that *primâ facie* there was vexation, and that

primâ facie case was not met by any offer of the person suing in the second court. That is the way to uphold that case consistently with the other decisions.

Now, when we come to apply this doctrine to the present case, what have we got? The court is asked to stay the proceedings upon the ground that there are proceedings pending in Holland. Admiralty Courts are, to my mind, municipal courts of the country in which they exist, exercising by consent of all nations the maritime law which is the common law of all nations upon the high seas; but the courts are municipal courts, and the Admiralty Court in Holland is therefore a municipal court of a foreign country. That being so, the case is within the authorities, according to which it is not vexatious to have instituted the suits in both courts, one being a foreign court. But, I think that Admiralty Courts are not within the full authority of that proposition, because the way in which they exercise their jurisdiction in all countries, so far as I know, is by seizing the ship and releasing her on bail being given according to the practice of the court. If, therefore, bail be given in one court, and when another suit is instituted in a second court bail is to be given again, I think that that could not be allowed if the party suing in the second court insisted on preserving the bail in both courts. I think it would be vexatious to call upon the owner of a ship in respect of the same cause of action to give bail in the two courts at the same time. Therefore, where the case is an Admiralty action, and bail has been given in the foreign court, the party who objects to the action proceeding in the second court has satisfied to a certain extent the burden of proof which lies upon him, and has shown that it would be vexatious to allow without terms the matter to go on in the second court. But the English court cannot be satisfied without ample and satisfactory evidence that the course of procedure in the foreign Admiralty Court is in all respects the same as in the English court, and it cannot without ample evidence be satisfied that a person suing in the court abroad will have all the same chances of effective success and all the same facilities as he has in the English court. Therefore, it is only in the case of bail being given that it is oppressive to proceed in the English court at the same time that you are proceeding in a foreign court. Were it not for this question of bail, it seems to me that an English court exercising its jurisdiction, according to the rules laid down, would not interfere at all, and would allow both cases to go on in both courts at the same time, but the fact that bail has been given in both cases would prevent it. It seems to me that the court would not be exercising its jurisdiction with caution, but it would be exercising it with extreme rashness, and great injustice might follow, if upon the mere fact of bail having been given in a foreign court it was to prevent a plaintiff saying he would give up the bail and pay the expenses incurred in the other court, and although he so offers, yet to refuse to allow him to go on in the English court which has jurisdiction to try the case. But the present case is stronger, for either the proceedings in Holland are shown to be different from those in the English Admiralty Court, and the plaintiffs will have no possibility of there obtaining judgment with effect; or, on the other hand, the proceedings in Holland are the same as here. Then it is clear that after the release of the ship upon the guarantee between the parties an English Court of Admiralty would not try the case. A court will not proceed to try a case so as to make itself ridiculous; and inasmuch as in an action *in rem* the mode of enforcing the judgment is by enforcing a bail bond entered into with the court, the court would not proceed to try the case where the ship has gone, where no bail bond has been given to the court, and where there is nothing but a mere guarantee between the parties which is a mere personal contract. The Court of Admiralty could not enforce a guarantee. Supposing the Admiralty Court gave judgment for the plaintiffs, it would be helpless to enforce its judgment, and would be obliged to leave the parties to bring an action in another court. Hence, if the court stops the plaintiff from proceeding here, it deprives him of the right of effective judgment and leaves him to go on in Holland, where the court, if the procedure is the same as here, will not further entertain the litigation, and then the plaintiffs are helpless because they have only obtained a guarantee from the defendants to pay if the Court of Admiralty decides that the defendants' ship was in the wrong. Therefore, if we stop the action here, and the Court of Holland, assuming it to have the same procedure as ours, refuses to try, the guarantee becomes worthless, and the plaintiff will have no remedy in any court. It seems to me to be asking this court to perform an act of absolute injustice. But if the procedure in Holland is different from ours, is it the same thing to have a judgment in Holland which can only be enforced by the guarantee of a third party, which is a matter of contract only? Is that as effective a remedy as a judgment here after bail has been given to the satisfaction of the court. I confess, to my mind, that to refuse to allow the plaintiff to elect and to stay the action, notwithstanding the plaintiffs' offer, is breaking away from the decisions of this court which have laid down a distinct and workable rule, and I fear that this court in so acting would be doing that which may lead to hopeless injustice to the plaintiffs. I there think that this judgment ought to be overruled.

Baggallay, L.J.—I have the misfortune in this case to differ from the Master of the Rolls. I need hardly say I am very reluctant to differ from a judge who has had so great an experience of cases of this kind. I feel the greater anxiety on account of the serious consequences which will result to one side or the other according as this case is decided. With regard to the law, I take it to be established by a series of authorities that where a plaintiff sues the same defendant in respect of the same cause of action in two courts, one in this country and another abroad, that there is a jurisdiction in the court of this country to act in one of three ways: To put the party so suing to his election: or, without allowing him to elect, to stay all proceeding in this country; or to stay all proceedings in the foreign country. As I had occasion to observe in the course of the argument, it is not in fact a stay of proceedings in the foreign court, but it is an injunction upon plaintiff restraining him from prosecuting the proceedings in the foreign country, which, of

course cannot be enforced against him if he is a foreigner, and is neither present in this country, nor has any property here. It is an injunction which may become inoperative, but that is how it may be done.

Now I think the principle of election is very clearly expressed in the case of *McHenry* v. *Lewis* (*ubi sup.*). The marginal note I think correctly represents the effect of the decision. It is this: "Where a plaintiff sues a defendant for the same matter in two courts in this country, such a proceeding is *prima facie* vexatious, and the court will generally, as of course, put the plaintiff to his election and stay one of the suits. And the same principle applies where one of the actions is in the Queen's Court in Scotland or Ireland or any other part of the Queen's dominions." The judgment in that case drew a distinction between two actions being brought in English courts, and the case where one action is brought in a British court, the other in a foreign court. It draws the distinction which I also draw that *primâ facie*, if the actions are in two courts in the British dominions, it is vexatious to sue the same party in two different actions, but not necessarily so where one of the two actions is in a foreign court; we must examine into the circumstances of the case, and see whether, under the circumstances, it is as vexatious as it would be if the same actions had been commenced in two British courts. That I take to be the effect of the decision in *McHenry* v. *Lewis* (*ubi sup.*), and no doubt it should be seen whether the party should be put to his election; but the circumstances of the case must be such that, instead of putting the plaintiff to his election, the court will stay one or other of the two proceedings. Whether you adopt the principle of putting the party to his election, or of staying the proceedings in one or other of the courts, must depend upon the circumstances of the case. Some suggestions were made in the earlier part of the argument here to the effect that no decision had gone so far as to stay proceedings in a foreign court, or until after the party had been put to his election. I ventured to suggest that there were several cases in which that course had not been followed, thus showing an authority for that which was supposed to have no authority for it. It has been decided that before decree you may stay the proceedings of a foreign court, if the foreign court were Scotch, or Irish, or colonial. I think there is a case where the foreign court did stay proceedings without putting the party to his election. Therefore I take it that there is no question that the court can stay the action in the foreign court if the circumstances warrant it. But there is no doubt that, where the court has been in the habit of staying one or other of the proceedings, it has preferred to stay the proceedings in the English court. The principles to which I have just now referred were well recognised principles in the Chancery Courts prior to the Judicature Act, as it appears from one of the cases referred to by the Master of the Rolls. Since the passing of the Judicature Act those general powers are exercised by any branch of the High Court. The principles enunciated in that case are referred to by Jessel, M.R. in these terms: "When an action is brought by a man in this country against a defendant, and the same plaintiff brings an action in a foreign country against the same defendant for the same cause of action, this court has jurisdiction in a proper case to stay the action in this country on the ground that the defendant is doubly vexed by reason of the action being brought also in the foreign country." In the case of *The Mali Ivo* (*ubi sup.*) there had been a collision in foreign waters, and proceedings had been commenced in the Austrian Consular Court of Constantinople, and other proceedings were commenced in the English court. Application was thereupon made to stay the proceedings in the foreign court. After referring to the various authorities which had been quoted in the course of the argument, Sir Robert Phillimore expressed his opinion in these terms: "I have come to the conclusion that it would be my duty either to suspend proceedings in this court, or to put the parties to their election as to which court they would have recourse to, if, indeed, the evidence before me established that there was a *lis alibi pendens* before a tribunal which could afford the plaintiff a complete remedy, whether the proceedings were technically instituted *in rem* or *in personam*. I am also of opinion that the Austrian Consular Court of Constantinople would come within the category of a competent tribunal, inasmuch as by the well-known capitulations, by treaty, sufferance, and usage, the Austrian empire, like other Christian States, has acquired from the Ottoman Porte an exclusive right of jurisdiction to be exercised over its own subjects in suits of this kind within the limits of the Ottoman territory." And having come to the conclusion that the Austrian court was a competent tribunal, he refused the application on the merits of the case, saying, "As a matter of fact I am satisfied that there is no suit pending between the litigants, now before me, on the same subject." And upon that ground he refused the application, but recognised the jurisdiction in holding that it would be his duty either to suspend the proceedings in one court or to put the parties to election. That was an application to suspend the proceedings in the English court. In the case of *The Peruvian Guano Company* v. *Bockwoldt* (*ubi sup.*), in which Jessel, M.R. made a remark to which I have already referred, I have no doubt the Court of Appeal were of opinion that no sufficient case was made out to cause them to make such an order as was prayed. There the application was that the parties might be ordered to elect whether they would proceed with the English or with the French proceedings. That was refused, and I think the grounds of the refusal appear very distinct indeed from the judgment of Lindley, L.J., where he says: "Apart from the fact that the action in France is for six cargoes and the action here is for seven, there are certainly reasons, not frivolous reasons, not harassing reasons, for bringing the action in France. We cannot compel the plaintiff to abandon that action. The fact that the action in France is for six cargoes, and the action here is for seven, prevents us from making the common order to elect between the two actions. If we were to compel the plaintiffs to elect so far as the six cargoes are concerned, we should not attain the result desired; we should not wholly stop one action out of two; both would be going on, namely, one in France for six cargoes and one in England for the seventh." And for that reason

the application was refused. But I think that we have got some other cases which may be a guide, and particularly one referred to by Brett, M.R. I mean *The Catterina Chiazzare* (*ubi sup.*) That case appears to me, if it was rightly decided, to be upon all-fours with the one which we are now called upon to decide. According to the report, the facts are these: [The learned Lord Justice then read the facts of the case and the judgment.] If that was rightly decided, I really am unable to distinguish between the circumstances of that case and the circumstances now under consideration.

In the present case the vessels which came into collision were foreign vessels, owned by foreign owners, and the collision took place in foreign waters. The vessel which did not go to the bottom went afterwards to a port in Holland, where she was arrested by proceedings in an Admiralty Court of competent jurisdiction. Having been so arrested an agreement was come to between the owners or the representatives of the owners of the two vessels for the release of the defendants' vessel upon a guarantee being given, and the vessel was thereupon released. At present I am unable to see the distinction in principle between being held upon bail in the ordinary form, and being released by virtue of an agreement come to between the two owners or their representatives. The vessel then went to sea a free ship, and she might have entered into a charter-party for another voyage. I am not certain whether she did not do so in the present case. Being a free ship she came into an English port, and she may have done that for the very purpose of carrying out the charter-party into which she had entered. If this were merely a case of double proceedings, it might be quite right to put the parties to an election; but what led to this vessel coming to and being arrested in an English port, but the agreement entered into between the representatives of the owners, and in consideration of which she had originally been released? and she might have entered into a contract for the performance of which she was responsible. If this vessel is detained and not allowed to go to sea she would be unable to carry out her contract, and she would be responsible for all that was done by the action of the parties, who could have kept her in the Dutch port, but who allowed her to go to sea upon a guarantee which must be taken to be sufficient. These are the circumstances of the case to which we have to apply the generally recognised rules. There will be vast inconvenience to either party whichever course is adopted. If she is allowed to go to sea it may be that the plaintiffs, owing to the guarantee not covering all the damage sustained, may suffer. On the other hand, the value of the cargo in respect of which she has been arrested is so very large that if she is kept in an English port and not allowed to go to sea the consequences may be, and probably will be, disastrous for her. The difficulties seem to me to be great on both sides, and where the difficulties are so great, I think the parties who have brought the difficulties about by not allowing the case to proceed in the Dutch court are the parties who ought to suffer and not the others. I am sorry, therefore, to dissent from the view of the Master of the Rolls, but it appears to me, forming the best judgment I can upon the circumstances of the case, that the view of Sir James Hannen was right, and that the vessel should be allowed to go to sea at once.

Fry, L J.—I have also arrived at the conclusion that the judgment of the learned President is right. I come to that opinion, as it seems to me, without in any way impugning the principles laid down by this court in either the cases of *McHenry* v. *Lewis* (*ubi sup.*), or *The Peruvian Guano Company* v. *Bockwoldt* (*ubi sup.*). The ground upon which I conclude the learned President is right is this: that in my judgment the institution of the action in the Admiralty Court in this country was against good faith. I come to that conclusion from the evidence of Mr. Schmidt himself, who is prosecuting the present action on behalf of the plaintiffs. He tells us in effect that the ship was arrested in Holland, that a letter of guarantee was given to Mr. Von Appen, whom he describes as acting on behalf of the owners of the *Jessica* and which Mr. Von Appen considered satisfactory, and that he (Mr. Von Appen) released the ship. Now, there are two ways in which that transaction may be viewed. It may be viewed as equivalent to the giving of bail, and I rather understood Sir Walter Phillimore in the first instance to present it to us in that aspect. Let us consider it for one moment as if it were a case in which bail had been given to the Dutch Admiralty Court. What is the effect of giving bail? It appears to me that the bail is the equivalent of the *res*, and that when the bail has been given for the thing it is, if not impossible, highly improbable that another action should be allowed to go on against the *res* in any other place. I cannot help observing that it appears to me, where the matter in controversy is a ship the business of which carries it from jurisdiction to jurisdiction, very different considerations may apply to the existence of a suit in some other jurisdiction to those which apply to an ordinary action *in personam*. I think, therefore, that in the case of bail given, the plaintiff in the foreign action, the first action, has obtained that which is equivalent to the arrest of the *res*.

The same conclusion it appears to me may be arrived at in another way. The result of the giving of the bail is the release of the ship. Now, what is the meaning of releasing a ship under these circumstances? It appears to me that the meaning of it is, that she is released from all rights and claims against her in respect of the collision, which is the cause for which she has been compelled to give the bail. Therefore, without saying it is impossible that a second action should be allowed where such a release has been obtained, I think the existence of such a release is the most cogent circumstance against allowing the prosecution of a second action. That is the view which Sir James Hannen entertains, because he says: "Now what is the meaning of the release? It plainly must mean, everybody would understand it to mean, that the vessel was to go on her course, and be useful to her owners, and earn freight, and not merely that she was to have liberty to sail about in the Dutch waters." If that be, as I think it is, the true meaning of a release obtained by the giving of bail, it seems to me that the subsequent institution of this suit is against good faith. And I cannot help observing the extreme inconveniences which

would, in my judgment, follow if the practice were allowed of instituting proceedings *in rem* in whatever port the ship might happen to arrive. The result would be, or might be, that in the case of a collision a vessel might be arrested afresh in every jurisdiction in which she might appear, and that although bail may have been given in the courts of foreign jurisdiction, so that she would be harrassed from port to port by successive actions of the kind which we have now before us, and the plaintiff might be called upon to elect in all the antecedent litigations. It appears to me that that would result in extreme inconvenience. But it may be contended that the proceeding in the present case is not the giving of bail, but instead of it it is the acceptance of a guarantee given by certain persons and accepted by Mr. Von Appen, who, in consideration of the guarantee so given, released the ship. In that point of view we have before us a private convention, an agreement between the litigant parties, and in consideration of the agreement obtained by the defendants in that litigation the plaintiffs have given a release to the ship as the result of that convention. Now, no doubt one may imagine circumstances of mistake, miscarriage, and many other circumstances which might render such an arrangement inoperative, and it might, under those circumstances, constitute no bar to a future action; but, in the present case, we have no such circumstances. The release, as I say, had been purchased by the giving of that guarantee. It is suggested that that guarantee may be inoperative, but the remarkable circumstance is, that Mr. Schmidt, who is acting on behalf of the owners of the *Jessica* in this country, and was advised no doubt by his solicitor what case he must make out, does not venture to suggest that the guarantee is inoperative or give any reason why he desires to be free from it or repudiate it. Again, it has been suggested that Mr. Von Appen may not have had the authority which justified him in accepting that guarantee and giving the release. The remarkable circumstance again is, that Mr. Schmidt states that Mr. Von Appen acted for the owners of the *Jessica*, and he does not venture to suggest that there was any defect in the authority for him either to accept the guarantee or to give the release. I think therefore that we are bound to consider that there was a transaction, an arrangement, an agreement between the litigant parties by which for valuable consideration the owners of the *Christiansborg* purchased the release of their vessel from the claims of the owners of the *Jessica*. Consequently they having so obtained a release which was intended to be operative, the institution of this action in an English Admiralty Court is against good faith. For these reasons I agree with my brother Baggallay, L.J., and I think this appeal must be dismissed. (*a*)

Sir *Walter Phillimore*.—Would your Lordships, applying the principles acted upon in *Wilson* v. *Church* (12 Ch. Div. 454; 41 L. T. Rep. N. S. 296), order the defendants to give bail under protest, in order that this point may be taken to the House of Lords? The plaintiffs are willing to pay the expenses of the defendants giving bail.

(*a*) Subsequently to this decision the plaintiffs entirely abandoned proceedings in Holland, and instituted fresh actions in this country, which were ultimately settled by the defendant paying the plaintiffs' claims.—Ed.

Brett, M.R.—How can we order that when the court has just decided that the defendants are not called upon to do so?

Solicitors for the plaintiffs, *Stokes, Saunders*, and *Stokes*.

Solicitors for the defendants, *Lowless* and *Co*

Friday, July 3, 1885.

(Before Brett, M.R., Baggallay and Bowen, L.JJ.)

Sailing Ship "Garston" Company *v.* Hickie and Co. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Final sailing from last port—Meaning of "port."

The word "port" in a charter-party means the port as commonly understood by shipowners and merchants, not the port as defined by Acts of Parliament or bye-laws for the purposes of revenue or pilotage.

By a charter-party two-thirds of the freight was payable "ten days after the final sailing of the vessel from her last port."

The ship started on her voyage from Cardiff Docks, and proceeded as far as a spot 300 yards beyond the junction of the artificial channel leading from the docks with the river Taff, where she was damaged by a collision which obliged her to put back for repairs.

After ten days the shipowners sued the charterers for the two-thirds freight.

Held (affirming the judgment of Wills, J.), that the spot where the collision occurred was within the port of Cardiff and therefore the ship had not sailed from the port within the meaning of the charter-party.

This was an appeal by the plaintiffs from the judgment of Wills, J., before whom the case was tried without a jury at Liverpool.

The plaintiffs sought to recover the sum of 1687*l.* 6*s.* 5*d.*, for freight alleged to be payable under a charter-party dated the 27th Oct. 1884, by which the plaintiffs' ship *Garston* was to proceed from Hamburg to Cardiff or Newport, as ordered, and load a cargo of coal, and proceed to Bombay. The freight was to be 18*s.* 6*d.* a ton. The clause in the charter-party relating to payment of freight was as follows:

> The freight to be paid, say two-thirds in cash less 5½ per cent. for interest and insurance, ten days after the final sailing of the vessel from her last port in Great Britain, the charterers holding the policy as collateral security, and the remainder in cash . . . . on the right and true delivery of the cargo.

The ship was ordered to Cardiff and loaded a cargo of 2895 tons of coal in the Bute Docks.

On the 22nd Dec. 1884 she started from the docks for Bombay, and was towed by a steam-tug down the artificial channel leading from the docks, past the pier-head to about 300 yards beyond the junction of the artificial channel with the river Taff. Having proceeded so far, the ship came into collision with a steamer, and was so seriously damaged that she was obliged to put back to Cardiff for repairs.

The writ was issued on the 2nd Jan. 1885, at which date the freight claimed, which was two-

(*a*) Reported by P. B. Hutchins, Esq., Barrister-at-Law

thirds of the whole amount, less 5½ per cent. would be payable if, when the collision occurred on the 22nd Dec. 1884, the ship had finally sailed from her last port in Great Britain within the meaning of the charter-party. This depended on whether the place where the collision occurred was within or without the port. The facts relating to what constitutes the port are sufficiently set out in the judgment.

Wills, J. gave judgment for the defendants, and the plaintiffs appealed,

French, Q.C. and *Synott*, for the plaintiffs in support of the appeal, referred to

Roelandts v. *Harrison*, 9 Ex. 444;
Price v. *Livingstone*, 47 L. T. Rep. N. S. 629; 5 Asp. Mar. Law Cas. 13; 9 Q. B. Div. 679;
Hudson v. *Bilton* 6 E. & B. 565.

Moulton, Q.C. and *Carver*, for the defendants, were not called upon to argue.

Brett, M.R.—I am of opinion that this appeal ought to be dismissed. The question is, whether any freight has become payable to the plaintiffs under this charter-party in the events which have happened. In the first place, it is contended that, because the ship was to sail from Cardiff, therefore, in the clause relating to the payment of freight, the expression "the port" must be construed to mean the town of Cardiff. The words are, "The freight to be paid two-thirds in cash, ten days after the final sailing of the vessel from her last port in Great Britain." It seems to me that we must read the words in their ordinary sense. Now the last port in Great Britain, which the ship was to sail from, was Cardiff. Therefore it must be read thus: "Ten days after the final sailing of the vessel from the port of Cardiff in Great Britain." That is the true meaning of the words. In the case of *Roelandts* v. *Harrison* (9 Ex. 444) it was argued that if the vessel had started from the innermost end of the port, with everything ready for her sailing to sea, and with the intention when she started of not stopping again till she reached her final destination abroad, that was a final sailing from the port within the meaning of similar words in a charter-party. But the court there held that the words, "final sailing from the port of loading," could not mean what it was contended they meant, because the final sailing from the port does not take place at the time when the vessel starts from the innermost end of the port, but when she gets to the outer end of the port. Till then she has not sailed *from* the port, she is sailing *in* the port. Then in *Price* v. *Livingstone* (47 L. T. Rep. N. S. 629; 5 Asp. Mar. Law Cas. 13; 3 Q. B. Div. 679) this question arose: Supposing the vessel to have got outside the port, what is the meaning of the word "finally?" If she is going just outside the port only to drop anchor there, and is not starting on her voyage, or if she is going outside the port with the intention of coming into it again, then she has not "finally" sailed from the port, although she has sailed from it. The vessel must be outside the port, and she must also have "finally" sailed from it. In the present case the question does not depend on the word "finally," but the whole question is, whether the vessel had sailed from the port, that is to say, whether she was outside the port within the meaning of the charter-party. Wills, J. has taken exception to the use of the words "popular" and "commercial," where it has been said that the word "port" is to be understood in its "popular" sense or its "commercial" sense. Possibly those are not the best possible words that could be used; but the question is, whether they are not good working definitions in the sense in which they have been used. But they are not the only words which have been used for the purpose. Some judges have said, "In the business sense of the word," or "in the ordinary sense," or "in the common and ordinary sense." All these phrases mean very much the same thing—namely, that it is not to be the fiscal port. The parties are not contracting with regard to that. The fiscal port, the limits of which are fixed by Act of Parliament, is never, in fact, taken into consideration by shipowners or merchants employing ships. We know also as a fact that the limits of many pilotage authorities extend far beyond anything which would be called in the ordinary sense "the port" of a particular place. For instance, a ship coming into the port of Liverpool is bound to take a Liverpool pilot at Port Lynas, which is not, in any ordinary sense, within the port of Liverpool. Therefore the word "port" in a charter-party does not necessarily mean a pilotage port as defined by statute, or, which is the better word, a pilotage district. Therefore, in trying to define the port with regard to which persons who enter into a charter-party are contracting, one should endeavour to find words which will exclude that which one knows the parties did not intend. They intend the port as commonly understood by all persons who are using it as a port, *i.e.*, for sailing to or from it with cargoes. What shippers of goods, charterers of vessels, and shipowners in their ordinary language mean by a "port" is the port in its ordinary business sense, in its popular sense—*i.e.*, the popular sense of such persons. It is also the port in its commercial sense; for with them business means commercial business.

Therefore, with the greatest deference to Wills, J., it seems to me that all these phrases are equally good, and that they all in substance mean the same thing. He seems to have been inclined to substitute the words "the legal port;" but, with deference to him, in my opinion that would not be correct. The legal port may be fixed by a local Act of Parliament, which is not generally well known. It must mean the port which such persons as I have mentioned would be dealing with, for the purpose of ships going to or from it carrying cargoes. Now, such people go to a port because they want either to load or to unload goods, and everyone who understands ships knows that goods cannot conveniently be loaded or unloaded in a place where the ship herself would be in danger. Therefore all people possessed with common sense, instead of taking their boats on to an open beach where they might be knocked to pieces in a storm, go to what they call a port, which is always a sheltered place. It is a place of safety for the ship and cargo whilst the loading or unloading is taking place. There can never be a port, in the ordinary business sense of the word, unless there is some element of safety in it for the ship and cargo. Now what will constitute a port as regards the loading and unloading of goods, and the safety of the ship during the process? What will

be more certain to be a port, in the sense of all persons concerned in the use of it, than a natural port—that is, a place in which the conformation of the land with regard to the sea is such that, if a ship comes within certain limits, she is in a place of safety for loading and unloading? Such a place is almost certain to be a port in a business sense. It is not quite accurate to say in a natural sense, as independent from the business sense, though the one is almost certain to measure the other. But, if it is apparent that the land is so shaped that there is protected water within a certain space, it is almost certain that there will be the port which is spoken of by business men under a certain name—a place where there is protected water by reason of the natural lie of the land and water. Of course there may be an artificial port, which has the same effect as a natural port, as for instance, at Plymouth, where breakwaters and walls have been built inclosing a part of the sea, which, if those breakwaters and walls had not been built, would be a dangerous and unprotected part of the sea. This makes that inclosed part of the sea protected water; and it is certain that, if the water within the walls was before they were built not within the port, commercial men will very soon afterwards call that water within those walls the port, and deal with it upon the faith that, when a ship is within the walls, she is within the port, and when she is outside the walls she is at sea.

There are also places of comparative safety, where neither the natural configuration of the land with regard to the sea nor the artificial walls make a perfectly safe port, but only a place of comparative safety. In such cases it is not so easy to ascertain what the parties to a charter-party must have meant by "the port," for it is necessary to find out where, in fact, ships are usually loaded and unloaded. The moment it is ascertained that the loading and unloading of ships takes place at a particular spot, it is safe to infer that the parties understood that spot to be within "the port," because, as a general rule, people do not load or unload goods outside a port. They do so sometimes, but very seldom, and only under exceptional circumstances. If, therefore, the place of loading and unloading is ascertained, it may safely be treated as being within the port. It is clear, however, that the port may extend beyond the place of loading and unloading, just as a dock may. The space in the centre of a large dock is seldom used for loading and unloading. Vessels may, but seldom do, load or unload in the middle of the dock. They generally load and unload at the quay, which is at the edge of the dock. Therefore, although the loading and unloading of goods is not always the exact measure of a port, it is a safe rule to say that the loading and unloading takes place within the port. But it may be necessary to ascertain how far the port extends beyond the place of loading and unloading. If the authorities, known in commercial business language as "the port authorities," exercise authority over ships within a certain space of water, and shipowners and shippers who have ships within that space of water submit to the jurisdiction claimed by these authorities, whether according to Act of Parliament or not, that seems to me the strongest possible evidence that the shipowners, the shippers, and the port authorities have all come to the conclusion that they will accept that space of water in which the authority is so exercised and submitted to as "the port" of the place. All these seem to me to be proper tests as to whether a certain space of water is a port within the popular sense, the business sense, the commercial sense, or the ordinary sense—any but a statutory or fiscal sense.

Applying these rules in the ordinary business sense to the present case, we find that the chart shows the conformation of the land with regard to the sea. Whether Penarth Roads are within the port of Cardiff I decline to decide on this occasion, for it is unnecessary; when the question arises it will have to be decided. The present question is, whether the place where this ship was when she ceased to move is within the port or not. Now, that place is to the northward of the headland of the Penarth Docks, and therefore we have only to consider whether the water inside the headland of the Penarth Docks is within the port of Cardiff. To my mind the chart settles that question. Any evidence of individual shipmasters as to what they might consider to be the port would have very little effect on my mind after I had looked at the chart, and I am sure it would not have any effect on the mind of any ordinary man of business. The chart seems to me to be almost conclusive that the water inside the headland of the Penarth Docks is within the port of Cardiff. But, in addition to this, there is the evidence of the plaintiffs' own witnesses, and, to my mind, the bulk of the plaintiffs' evidence has made out the defendants' case. The evidence of the harbour-master seems to me conclusive. He says the Penarth Docks are within the port. Probably he did not mean that the water within the dock gates is within the port, but meant that the entrance to the docks is within the port—that is, that the port extends at least as far as the headland of the Penarth Docks. Also, as I understand his evidence, and it seems to me to be clear, he puts the north limit of the port at the artificial works of the Bute Docks. His intention appears to be to include the Bute Docks and to exclude the Penarth Docks, but he says that the port is the water between the two. That would give the north and south limits of the port; but the water between those north and south limits includes what are called Penarth Flats and Cardiff Flats, and therefore to say that those places, which are left nearly or quite dry at low water, are not within the port would be, to my mind, an outrage on the common sense of anybody who understands what would be the conclusion of those persons who have to do with such a thing as a port. Moreover, the bye-laws, made by persons who were assumed to have the right to deal with the port, provide that certain pilots shall be dealt with as sea pilots, and certain other pilots shall be dealt with as port pilots, and those port pilots are to be the pilots who may act within the port. Then, in order to determine what is the port, the bye-laws define it as all the water from the shore at the north-east side of the new docks away to the eastward towards the East Cardiff buoy, then turning south down to the Monkstone, then turning to the westward and south-west to the Wolves, then turning south to Lavernock point, which was very far below the

Penarth Docks headland. All that is treated as within the port. If it were necessary now to decide what are the exact limits of the port, I should certainly say that this was the strongest evidence that the boundary of the port extends at least as far as that. I observe that, having so defined the port, the bye-laws provide that port pilots may lie for protection under the Sully Island, which is to the westward of Lavernock point, and it may be that that island is also within the port. I will not say at present whether Penarth Docks are within the port; but it seems to me clear (and that is all we have to decide to-day) that the evidence justified Wills, J., who was acting as a judge of fact, in finding as a fact that, within the meaning of all persons who deal with Cardiff as a port, the port of Cardiff covers at least the water to the north of the Penarth headland up to the Bute Docks, and, east and west, the Cardiff Flats and the Penarth Flats. I believe myself (but I do not wish this to be taken as my decision) that the port is much larger. I believe it is at least as large as it is stated to be in the bye-laws to which I have referred. I come, therefore, to the clear conclusion, as the learned judge said he did upon the evidence before him, including the chart, that this vessel was at the time of the collision inside the port of Cardiff in the sense which I have explained; and, if she had not left the port of Cardiff, she had not finally sailed from her last port in Great Britain. For these reasons I am of opinion that the judgment for the defendants is right, and that this appeal ought to be dismissed.

Baggallay, L.J.—I am of the same opinion. The question we have to decide is, whether the ship *Garston* had finally sailed from the port of Cardiff when she reached the spot where the collision took place. Now, as to the meaning of the words "finally sailed" there is very little difference of opinion. The old cases were considered in *Price* v. *Livingstone* (47 L. T. Rep. N. S. 629; 5 Asp. Mar. Law Cas. 13; 9 Q. B. Div. 679), and the judges who decided that case expressed their opinion as to how the words "finally sailed" ought to be interpreted, and there was no substantial difference between those opinions. I think it was most concisely stated by Lindley, L.J., who said: "Final sailing, I apprehend, means getting clear of the port for the purpose of proceeding on the voyage" (6 Q. B. Div. at p. 682). Accepting that as the true interpretation of the words "finally sailed," we have to consider whether the ship *Garston* had, when the collision occurred, finally sailed from the port of Cardiff. As the Master of the Rolls has pointed out, it is not necessary for the purposes of this case to decide what are the exact limits of the port of Cardiff. We have only to decide whether the particular point where the collision took place is within or without the port. I agree with the Master of the Rolls that the point in question is within the limits of the port. In *Roelandts* v. *Harrison* (9 Ex. 444) it was decided that a vessel which had left the dock gates, and had got to a certain point in what was called the artificial ship canal, had not "finally sailed" from the port, and the principle upon which that case was decided goes this length, that so long as a vessel remains within the artificial canal terminated by the pierhead, she has not "finally sailed" from the port. It was not then necessary to decide more than that. But in *Price* v. *Livingstone* (47 L. T. Rep. N. S. 629; 5 Asp. Mar. Law Cas. 13; 9 Q. B. Div. 679) the vessel had cleared from Penarth Docks, and had been towed for seven or eight miles out in the Bristol Channel, about three miles from Lavernock Point. There it was held that she had finally sailed from the port of Cardiff.

Between those two decisions a variety of questions may arise as regards the application of the general principles laid down in them. In the present case, following the course taken by the Master of the Rolls, I look at the chart, and it appears to me to give substantially two equivalents of headlands—namely, an inland water, with the Bute Docks and their dependencies, forming the one margin, and the Penarth Docks, forming the other margin. Between those limits there is a circular space of inland water which, it seems to me, must, according to all ordinary principles, be regarded as the port in its commercial or business sense, not for fiscal purposes, but for all ordinary business purposes. The spot where the collision took place is within the limits of the port so fixed. It is also within the limits of the channel by which a vessel must pass from the Bute Docks down the continuation of the river Taff, and joining that river at the neck which forms the second river running into the Bristol Channel at that point. But the matter does not rest there. Evidence has been given as to the pilotage rules and the limits for pilotage purposes, which are indicated by reference to successive buoys and lights—the East Cardiff buoy, the Monkstone, and the Wolves. Those are the limits of the port for pilotage purposes. It is material to observe that certain restrictions are imposed on persons navigating the channel within those limits. Amongst other things, they are forbidden to cast out any cinders or ballast in a certain portion of this district. These are rules which persons navigating vessels within those limits know that they must obey. At a spot close by that where the collision took place—namely, on the Cardiff flats—there is a very large anchorage for vessels of comparatively small size, and there the restriction as to casting out ballast is strictly enforced. This is a rule which any person arriving at or leaving the port of Cardiff in the ordinary course of navigation is bound to observe; and for all commercial purposes it seems to me that spot must be taken to be within the limits of the port. The port may extend much further, and no doubt for fiscal purposes it does extend very much further. Whether for commercial purposes or business purposes it extends beyond the limits I have referred to it is unnecessary now to decide. It is sufficient to say that the spot where the collision took place is within the port as it is understood for commercial purposes.

Bowen, L.J.—The question to be decided is whether the place where this vessel met with her disaster is within the port of Cardiff, having regard to the document in which the expression "last port," which we have to construe, is used. I will not attempt to give a complete definition of the meaning of the word "port" in a popular, in a commercial, or in any other sense; but I think it is clear that we must construe the word in the sense in which shipowners and charterers would naturally use it in such a document as a

charter-party, unless anything special can be found in the charter-party to indicate that the word is used in a different sense. Therefore we must see what in the ordinary language of business men, who are concerned with the letting of ships and the exportation and importation of cargoes, is the meaning of the word "port." Charterers of ships are concerned, not only with English ports, but also with foreign ports. It is, therefore, obvious that the word "port," as used by them, cannot be treated as a term which is capable of any very rigid definition. If we were dealing only with English ports, we know that an English port is, in theory, created by the Crown. The creation of a port is a part of the prerogative of the Crown, and a port has privileges which arise either from prescription or from grant; and, in order to ascertain the limits of an English port, one would naturally look for evidence, either in some document emanating from the Crown or in some usage or reputation of the place, and would expect to find that there were fixed boundaries. The same kind of definition could not apply to foreign ports, and it is obvious, therefore, that the word "port" is one which has not a fixed sense. If it appeared from a commercial document that certain acts were to be performed within the limits of a borough, one would know that the word "borough" is a term which has a fixed sense; but the word "port" has never been defined in such a fixed sense. There are, however, several matters which must be borne in mind in construing the term "port" for business purposes. In the first place, the limits imposed by the document (if there be one) which created the port would have to be considered. I do not say that this would be necessarily decisive as to the use of the word by business men, for even if the port was created by charter or grant, men of business do not always observe the strict limits of the port as originally defined by the charter or grant. But, at all events, if there was such a document, it would be right to look at it as one of the matters to be attended to. Still more should one attend to the natural configuration of the coast and the character of the ground. That must be very material, because a port is created for the purpose of the exportation and importation of cargoes and for the vessels which carry the cargoes. Another matter which ought to be considered is the authority which is exercised, and the limits within which that authority is exercised, not for fiscal purposes, but for purposes connected with the loading and unloading, the arrival and departure of ships; the mode in which the business of loading and unloading is done, and the general usage of the place. Taking all these things together, it must be ascertained in each particular case in what sense shipowners and charterers would be likely to employ the term "port." In the present case, to assist us in drawing a correct inference as to what are the limits of the port of Cardiff in a business sense, we have the chart which has already been alluded to, we have the history of the artificial cut, and we have the character of the ground on each side of it, and all these, in my opinion, have a very important bearing on the case. We have also the witness whose evidence has already been commented on. The pilotage bye-laws also seem to me to be important as defining the limits of the port for business purposes. I do not think that the local Acts of Parliament relating to the Bute Docks in any way assist the appellants; for they appear to leave the matter doubtful, and do not really decide either way. On the whole case I have formed a very strong opinion that, at all events, north of the Penarth pier is within the port of Cardiff. I do not wish to go further than is necessary for the decision of the present case; but, unless my view should be changed by further argument, I should certainly be inclined to stretch the limits of the port of Cardiff somewhat further; but I reserve to myself the right to consider that question if it shall arise for decision in the future. For these reasons I agree that the judgment should be for the defendants.

Appeal dismissed.

Solicitors for plaintiffs, *Gregory, Rowcliffe*, and *Co.*, for *Hill, Dickenson*, and *Co.*, Liverpool.
Solicitors for defendants, *Trinders* and *Romer*.

Aug. 11 *and Nov.* 4, 1885.

(Before Lord Esher, M.R., Cotton and Lindley, L.JJ.)

The Bellcairn. (*a*)

ON APPEAL FROM BUTT, J.

Collision—Damage to cargo—Judgment by consent—Limitation action—Claimants therein—Registrar.

Where owners of ship and owners of the cargo laden on board of her respectively institute actions against another ship for damage by collision, and in the ship action judgment is, by the consent of the parties, given, dismissing the action, but in the cargo action both ships are held to blame, and subsequently the defendants instituted an action for limitation of liability, the judgment in the ship action cannot be set aside by an order of the registrar in the absence of the plaintiffs in the cargo action, so as to enable the plaintiffs in the ship action to claim in the limitation action.

Semble, the judgment in the ship action could only be set aside by the court itself upon the whole of the facts and the parties affected being brought before it; and quœre whether any such order ought to be made.

This was an appeal from a decision of Butt, J. on a motion in an action for limitation of liability.

A collision having occurred between the steamships *Bellcairn* and *Britannia* on 31st July 1884, a damage action *in rem* was instituted by the owners of the *Britannia* against the *Bellcairn*, in which action the owners of the *Bellcairn* counterclaimed. On the 7th Nov. 1884, when this action came on for trial, it was, by consent between the parties, dismissed, the judge making the following order:—"The judge, by agreement of counsel on both sides, dismissed the action, and the claim and counter-claim, but made no order as to costs."

On the 13th Nov. another action *in rem* was instituted against the *Bellcairn* by the owners of the cargo on board the *Britannia*, in which action

(*a*) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

both ships were held to blame; whereupon the owners of the *Bellcairn* instituted an action for limitation of liability. On the 7th March 1885 the owners of the *Britannia*, by the consent of the owners of the *Bellcairn*, obtained an order from the assistant-registrar setting aside the decree in the original damage action by which that action had been dismissed. The order was as follows:—"Upon consent of both solicitors, it is ordered that the judgment dated the 7th day of November 1884, whereby the plaintiff's action was dismissed, be set aside." On the 25th March an appearance was entered in the limitation action by the owners of the *Britannia*, who claimed to prove against the fund in court for the damages sustained by them in the collision. On the 31st March 1885 the Court pronounced the owners of the *Bellcairn* entitled to limited liability, and referred the claims to the Registrar to report upon.

According to the Registrar's report, the claim of the owners of the *Britannia* was opposed by the owners of the cargo on board the *Britannia* on the following grounds:—"That the effect of the judgment entered on November 7, 1884, was to extinguish the claim of the owners of the *Britannia* for damages against the owners of the *Bellcairn*; that it cannot be revived by the bare consent of the owners of the *Bellcairn*, who have no interest to maintain that judgment, and who gave such consent behind the backs of the owners of the *Britannia's* cargo and other claimants, and to their prejudice and to the prejudice of the judgment the cargo owners have obtained, since the fund in court will not suffice to pay the moiety of the damage they have incurred." The registrar then stated that in his opinion the objection was well founded, and excluded the claim of the owners of the *Britannia*, but found what was due to them in the event of the court holding them entitled to claim. The owners of the cargo laden in the *Britannia* took out a motion to confirm the report, and the owners of the *Britannia* took out a cross-motion to vary the report by allowing their claim.

Aug. 11.—*Finlay*, Q.C. (with him *Stubbs*) for the owners of cargo on the *Britannia*.

Sir *Walter Phillimore* (with him *J. P. Aspinall*) for the owners of the *Britannia*.

Butt, J.—The question for decision arises out of a collision between the *Bellcairn* and the *Britannia*. In the course of the hearing of the action between the ships counsel agreed to a decree by which the claim and counter-claim were dismissed, and that judgment was formally entered. Then by a proceeding which I do not understand the solicitors to the parties in that action took a consent to the registry, and drew up an order setting aside the previous judgment. That order ought never to have been made by the registrar, and no doubt he would not have made it had his attention been directed to the facts of the case. It is clear that if after the decree of Nov. 7 the owners of the *Britannia* had instituted a second action against the *Bellcairn*, the previous decree would have been a legal answer to it. But the owners of the *Bellcairn*, being sued by the owners of cargo laden in the *Britannia*, instituted a limitation action, and obtained the usual decree therein. The cargo owners bring in their claim, and then there comes in a competing claim by the owners of the *Britannia*. After the decree it was not competent for the *Britannia* to bring a fresh action against the *Bellcairn*. The sum paid into court in the limitation action represents the ship; it is its statutory value, the 8*l.* per ton being a statutory appraisement of the ship. This being so, it is impossible for the owners of the *Britannia* to have any valid claim against the money in court, and therefore the contention of the cargo owners is right, and the report of the registrar must be confirmed.

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

Nov. 4.—Sir *Walter Phillimore* (with him *J. P. Aspinall*) for the appellants.—The order setting aside the judgment is a regular order made in the regular way. [Lord Esher, M.R.—Most certainly not. What power has the registrar to set aside the solemn judgment of the court? He is only a servant of the court.] The same thing is constantly done in chambers at common law; even if the registrar's order is irregular, no steps have been taken to set it aside, and therefore, so long as it stands, it cannot be treated as a nullity. There was no reason why a second action should not have been brought by the *Britannia*. At the date of the consent order, the decree in the limitation action had not been made, and therefore the owners of cargo had then no vested rights in the fund in court.

Bucknill, Q.C. (with him *Stubbs*) for the owners of cargo on the *Britannia*.—By sect. 49 of the Judicature Act 1873 no order made by the court by the consent of parties shall be subject to any appeal, except by leave of the court making such order. If leave of the court is required for appealing from such order, what power can the registrar have to set it aside? The facts of the case were not disclosed to the registrar. Had they been he never would have made the order.

Lord Esher, M.R.—It must be clear to everyone that, if the judgment of the court given upon the trial is a valid and standing order, the owners of the *Britannia* can have no valid claim against the owners of the *Bellcairn*. The question is, has that order in any way been set aside? Now, I agree absolutely and entirely with Butt, J. that where upon a trial the court gives a judgment, although it is by consent of the parties, it is nevertheless a solemn judgment, and cannot be set aside by a subsequent agreement between the solicitors and on application made to an officer of the court behind the backs of third parties. It seems to me that at least the only authority which could set aside the first judgment would be the court itself and I think that this consent order is an order really obtained behind the back of the court. But I go further, and am strongly inclined to the opinion that the registrar, even if he had known all the facts, had no jurisdiction or authority to alter the judgment of the court, and I doubt extremely whether the court itself, without any evidence of the consent being a fraudulent consent, or such a fraud as to deceive the court, would have any jurisdiction to set aside the judgment it had already given. At all events, in this case and under the circumstances, I am quite clear that the order obtained from the registrar was absolutely void, and that the original

order stood. There was no colour or pretence for saying that the judgment of the learned judge was wrong, and therefore I think this appeal must be dismissed.

COTTON, L.J.—I am of the same opinion. There is a claim brought by the owners of the *Britannia* against the fund in the limitation action. By consent a judgment was given in the damage action which would be an answer to any subsequent action brought by the *Britannia*. Has that judgment been got rid of? There was an order drawn up by consent of the parties which purported to get rid of it. In my opinion, if the judgment were to be set aside at all it could only be done by an order of the court, made when all the facts were properly before it; and if the court was informed of the pending limitation action, and that the *Britannia* intended to put in a claim, the judge would not, in my opinion, have made an order setting aside the previous judgment, because it would be obvious that the intention was to prejudice the rights of third parties. Therefore, in my opinion, without entering into the question of the power of the court, this consent order does not affect the previous judgment which barred the claim of the *Britannia* against the *Bellcairn*.

LINDLEY, L.J.—I am of the same opinion. I cannot conceive for a moment that the court, knowing the facts, would have made this order. The object was not to benefit the *Bellcairn* but to place the *Britannia* in competition with the owners of cargo. I therefore think this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Botterell* and *Roche*.

Solicitors for the respondents, *Stokes, Saunders*, and *Stokes*.

Monday, Nov. 30, 1885.

(Before Lord ESHER, M.R., COTTON and BOWEN, L.JJ.)

HOUGH AND Co. *v.* HEAD. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance—Time policy—Chartered freight—Loss of hire arising from accidents occurring between certain dates—Accident within prescribed dates, and loss of hire afterwards—Underwriter not liable.

The plaintiffs chartered their vessel for six months from the date when the vessel was put at the charterers' disposal, namely, the 21st March 1881, *with the option to the charterers of continuing the charter for a further period of six months.*

By clause 6 of the charter-party it was provided "that in the event of loss of time by deficiency of men, collision, break-down of engines, and the vessel becomes incapable of steaming or proceeding for more than forty-eight working hours, payment of hire to cease until such time as she is again in an efficient state to resume her voyage. . . . The acts of God, the Queen's enemies, fire, and all and every other dangers and accidents of machinery, or of the seas, rivers, and navigation, of whatever nature and kind, always mutually excepted."

The plaintiffs insured against loss of chartered freight by two policies, one of which, for 1200*l.*, *was underwritten by the defendant as an underwriter for* 150*l.*

The insurance effected was: "At and from and for and during the space of six calendar months from the 15th April to the 14th Oct. 1881, *both days inclusive, for* 1200*l. on chartered freight, to pay only loss of hire not exceeding* 2000*l., which may arise in clause 6 of charter-party for accidents occurring between the 15th April and the 15th Oct., but free of claim arising from deficiency of men."*

During the currency of the policy, viz., on the 27th June 1881, *the vessel, while going through the Straits of Magellan, struck something which injured her bottom, but did not prevent her from proceeding on her voyage, and she arrived at Liverpool on the 18th Nov. During the voyage the charterers had exercised their option of continuing the charter for three months. She was put into dock on the 28th Nov., and on the 30th Nov. the charterers gave notice to the plaintiffs that the hire would cease as per charter-party until the vessel was in a fit state to resume employment. The repairs were completed on the 30th Dec.* 1881.

Held, that the underwriter was not liable for loss of freight, because, although the accident which necessitated the repairs and caused the loss of hire happened within the six months prescribed in the policy, there was no loss of freight within that particular time.

Judgment of Grove, Manisty, and Lopes, JJ. affirmed.

THIS was an appeal by the plaintiffs, who were shipowners, from the judgment of Grove, Manisty, and Lopes, JJ., who held that the defendant, who was an underwriter, was not liable on a policy of insurance in respect of the loss of chartered freight occurring under circumstances which are shortly stated in the head-note to this report, and more fully in the report of the case in the court below (5 Asp. Mar. Law Cas. 447; 52 L. T. Rep. N. S. 861), where the special case is set out.

Pollard, for the plaintiffs, in support of the appeal, used similar arguments to those employed before the Divisional Court.

Barnes, for the defendant, was not called upon.

Lord ESHER, M.R.—The contention on behalf of the plaintiffs is contrary to the whole theory and substance of insurance law. Insurance is a contract of indemnity against loss to the assured, not against accident, but against loss caused by the accident. If the policy is a time policy, the insurance must be against a loss occurring within the time covered by the policy. The loss in respect of which the plaintiffs in the present case seek to recover is a loss of freight, and the question is whether it was a loss occurring within the time covered by the policy. It is clear that the plaintiffs were paid freight for the whole of that time. I am of opinion that this is a perfectly plain case, and that the judgment appealed from is right, and ought to be affirmed.

COTTON, L.J.—I am of the same opinion. The plaintiffs seek to recover on a time policy insuring chartered freight. By the terms of the policy the insurance is against "loss of hire . . . which may arise in clause 6 of the charter-party for accidents occurring between the 15th April and

(*a*) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

the 15th October." Here the loss took place after the expiration of the period covered by the policy.

Bowen, L.J.—I am of the same opinion, and I agree that the case is clear. A policy of marine insurance is a contract of indemnity against the losses specified in the policy, and it is obvious that in the case of a time policy the loss insured against must be a loss occurring within the time covered by the policy. Mr. Pollard says that in the case of a time policy on ship, if an accident takes place on the last day of the period covered by the policy, and the loss is found out when the ship gets into dock after the expiration of the time, the underwriters would be liable, and he contends that on the same principle the defendant is liable here. In the case suggested, however, the insurance is against pecuniary loss arising from damage to the ship, and such a loss occurs the moment the ship is damaged, whereas in the present case no loss within the meaning of the policy occurred until the plaintiffs lost the freight which they would otherwise have earned, and this did not take place until after the expiration of the time covered by the policy. It is clear, therefore, that the loss is not one for which the plaintiffs are entitled to recover.

Appeal dismissed.

Solicitors for plaintiffs, *Lyne* and *Holmann*.

Solicitors for defendant, *Parker, Garrett*, and *Parker*.

Monday, Nov. 30, 1885.

(Before Lord Esher, M.R., Cotton and Bowen, L.JJ.)

Scaramanga and others *v.* Martin Marquand and Co. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party — Negligent navigation by shipowner's servants — Cargo in part salved — Salvage expenses—Payment of salvage expenses by underwriters—Right of owner of cargo to recover amount of expenses against shipowner.

Where, owing to negligent navigation, a ship is cast ashore and her cargo thereby suffers damage and loss, money paid by the underwriters of the cargo to a salvage association, who are employed with the assent of the shipowners, for saving a portion of the cargo, is not a voluntary payment, and is recoverable by the cargo owners from the shipowners, being money paid on behalf of the cargo owners to avert a loss which would have fallen on the shipowners if the portion of the cargo had not been salved and sent on to its destination.

The plaintiffs, under a charter-party, shipped a large quantity of rye on board one of the defendants' ships to be carried from the port of Taganrog to the port of Altona. Owing to the negligent navigation of the defendants' servants, the ship was cast ashore, and a large quantity of the rye was lost, but a considerable quantity was saved by the Salvage Association, who were employed by the underwriters of the cargo with the assent of the defendants. The average statement was prepared, and the sum assessed was agreed to by the plaintiffs, and the Salvage Association were paid by the underwriters the expenses claimed by them.

The plaintiffs brought an action on behalf of the underwriters to recover the amount of the salvage expenses so paid by the underwriters. The plaintiffs recovered a verdict for an amount to be settled out of court.

The question of law involved in the case was reserved for further consideration. The defendants contended that they were not liable, because the plaintiffs themselves had not paid the expenses, and the payment under the circumstances was voluntary.

Held, that the plaintiffs were entitled to recover the amount of the salvage expenses, as, without their being incurred, the remainder of the cargo could not have been sent to its destination, which was for the benefit of the defendants, and that the payment under the circumstances was not voluntary.

Judgment of Huddleston, B. affirmed.

This was an appeal by the defendants from the judgment of Huddleston, B., on further consideration, which is reported 5 Asp. Mar. Law Cas. 401; 52 L. T. Rep. N. S. 764, where the facts are fully stated.

Cohen, Q.C. (*Bucknill*, Q.C. with him) for the defendants.

Barnes, for the plaintiffs, was not called upon to argue.

Lord Esher, M.R.—Mr. Cohen candidly admits that he finds great difficulty in supporting the appellants' case. I am of opinion that the judgment is right, and ought to be affirmed.

Cotton and Bowen, L.JJ. concurred.

Appeal dismissed.

Solicitors for plaintiffs, *Waltons, Bubb*, and *Johnson*.

Solicitors for defendants, *W. A. Crump* and *Son*.

(*a*) Reported by P. B. Hutchins, Esq., Barrister-at-Law.

Nov. 3, 4, *and Dec.* 7, 1885.

(Before Lord Esher, M.R., Cotton and Lindley, L.JJ.)

Stewart and Co. *v.* The Merchants' Marine Insurance Company Limited. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance—Partial loss—Memorandum—Warranty against average under 3 per cent.—Time policy on ship—Separate voyages—Mode of calculating average.

A ship was insured by a time policy, and was warranted free from average under 3 per cent., unless general, or the ship be stranded, sunk, or burnt. During the time covered by the policy the ship made several separate and distinct voyages, and particular average losses were incurred, amounting in the aggregate to more than 3 per cent., though the amount of such losses on each separate voyage was less than 3 per cent.

Held, that in the case of a time policy on ship the amount of the particular average loss must be calculated at the end of each separate and distinct voyage, and the losses incurred on the different voyages cannot be added together, and therefore the underwriters were protected from liability by the warranty.

Judgment of Stephen, J. reversed.

(*a*) Reported by P. B. Hutchins, Esq., Barrister-at-Law.

This was an action brought on a policy of marine insurance to recover a sum of 46*l.* 18*s.* 4*d.* for particular average losses, amounting to 4*l.* 13*s.* 10*d.* per cent. on 1000*l.* the extent of the plaintiff's interest. The policy was a time policy on the steamer *Wyndcliffe*, for twelve calendar months from the 11th Jan. 1882 to the 11th Jan. 1883.

The plaintiffs' claim was disputed on the ground that the defendants were protected from liability by the following memorandum which was contained in the policy:

> The ship and freight shall be and are warranted free from average under three pounds per cent. unless general or the ship be stranded, sunk, or burnt.

The ship went on several separate and distinct voyages during the period covered by the policy, and several separate and distinct particular average losses occurred. The amount of such losses occurring on each separate and distinct voyage was in each case less than 3 per cent., and it was contended on behalf of the defendants that the particular average losses occurring on the different voyages could not be added together for the purpose of estimating their liability.

Stephen, J., before whom the case was tried without a jury, after taking time to consider, overruled this contention, and held that, inasmuch as the aggregate amount of the particular average losses which occurred during the period covered by the policy exceeded 3 per cent., the defendants were not protected by the memorandum, and gave judgment for the plaintiffs for the amount claimed.

From this judgment, the defendants appealed.

Nov. 3 *and* 4, 1885.—*Barnes*, for the defendants, in support of the appeal.—There is no authority for the view adopted by the learned judge, that the plaintiffs are entitled to add together the losses occurring on the separate voyages and claim in respect of the whole amount of such losses, as if they made up one particular average loss. Such a construction of the memorandum is opposed to the object for which it was introduced, which was to protect underwriters from claims in respect of trifling losses. There is no decision in this country directly in point, but the American case of *Brooks* v. *The Oriental Insurance Company* (7 Pickering 259) supports the contention on behalf of the defendants. The decision of the Court of Exchequer in *Blackett* v. *The Royal Exchange Assurance Company* (2 C. & J. 244) and the American case of *Donnell* v. *The Columbian Insurance Company* (2 Sumner, 366) are distinguishable, because both those cases were decided on voyage policies.

Hibery for the plaintiffs.—The principle of the two last-mentioned cases (*Blackett* v. *The Royal Exchange Assurance Company* and *Donnell* v. *The Columbian Insurance Company*) and the grounds of the decisions are applicable to the case of a time policy, as well as to that of a voyage policy, and therefore those cases are authorities in favour of the plaintiffs. The judgment in *Brooks* v. *The Oriental Insurance Company* is inconsistent with the above cases, and ought not to be followed. The following cases were also referred to in the course of the argument:

Lewis v. *Rucker*, 2 Burrow, 1167;
Tudor's Leading Cases, 225 (3rd edit.);
Kidston v. *The Empire Marine Insurance Company*, 2 Asp. Mar. Law Cas. O. S. 400, 468; 15 L. T. Rep. N. S. 12; 16 L. T. Rep. N. S. 119; L. Rep. 1 C. P. 535; L. Rep. 2 C. P. 357;
Lidgett v. *Secretan*, 1 Asp. Mar. Law Cas. 95; 24 L. T. Rep. N. S. 942; L. Rep. 6 C. P. 616;
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; 2 App. Cas. 284; 3 Asp. Mar. Law Cas. 101, 393;
Robertson v. *French*, 4 East, 130;
Stewart v. *Steele*, 5 Scott N. R. 927;
Le Cheminant v. *Pearson*, 4 Taunt. 367;
Livie v. *Jansen*, 12 East, 648.

Barnes replied.

Cur. adv. vult.

Dec. 7.—The judgment of the court was delivered by Lord Esher, M.R., as follows:—The judgment of Stephen, J., from which this appeal is brought, was given on statements in the pleadings. The trial took place without a jury, a circumstance which I regret, considering the nature and importance of the case. The appeal on which we have now to give judgment raises an important question of mercantile law, which has never yet been decided in England. The policy on which the action is brought is a time policy on ship. It is admitted on both sides that there were several separate and distinct voyages, and that there were several separate and distinct average losses. If the average losses were not added together, those occurring on each voyage would be less than 3 per cent.; but if the average losses occurring on all the voyages were all added together they would be more. The policy is carelessly drawn, for the common form in use for policies on goods is applied to the case of a ship, leaving in the policy stipulations which have nothing to do with a ship. The memorandum on which the question to be decided turns is in the following words: "The ship and freight shall be and are warranted free from average under 3 per cent., unless general or the ship be stranded, sunk or burnt." This being a policy on ship, we must strike out the immaterial stipulations, and read it as if those stipulations, which can have no application to a ship were omitted. The question is, whether all the losses occurring during the time covered by the policy are to be added together. As regards policies on goods, which are almost always voyage policies, but which might be made time policies, it has been held in America, by Story, J., in a case to which I will presently refer more fully, that separate average losses, although they are distinct losses, occurring during the continuance of the same policy, are to be added together, and it has been so held in *Blackett* v. *The Royal Exchange Assurance Company* (2 C. & J. 244), in the case of a voyage policy on ship. In America, in the case of a time policy on ship, it has been decided the other way, and once, in a voyage policy on ship and goods, the same way. A time policy cannot now be made in England to cover a longer period than one year. The memorandum as to average was introduced in or about the year 1749, and there was then no limit as to the duration of a time policy; but in 1795, for revenue purposes only, and in a revenue statute (35 Geo. 3, c. 63), it was enacted that no time policy should be made for a longer period than one year, and the law is now the same by 30 & 31 Vict. c. 23, s. 8. If stamps were abolished time policies, as was the case formerly in this country, and as is the case

now in almost all other countries, might be made for more than one year. Now it seems impossible, in the case of a policy on goods, to suppose that it was intended that small average losses should stand over until the end of the time covered by the policy. Where there are several separate and distinct voyages there would very probably be a new captain and a new crew on each voyage, and it would be practically impossible to inquire as to the losses which had occurred; that is to say, it would be impossible for the insurers to make satisfactory inquiries, for they would have no means of checking the losses on the earlier voyages. There is another matter which ought to be noticed. The memorandum as to average losses would cover general average losses, unless such losses were expressly excepted. But general average ought to be adjusted at the end of each voyage, and therefore in the case of a policy on goods it seems difficult to say that it is necessary to wait until the end of the time covered by the policy before adjusting the losses. Therefore, standing by the decisions, and the reasons which I have given, I should say that in such cases the losses must be added together for each voyage, but not those occurring on two separate voyages.

The question then arises whether the same reasons exist in the case of a policy on ship. Many reasons have been given for the introduction of the memorandum. One reason that has been suggested is the difficulty of ascertaining what losses are caused by sea perils, and what are caused by wear and tear. In the case of goods this is not a good reason, as for instance where the goods are perishable, for there the loss always begins by sea perils. The true reason is, that it was found desirable to prevent disputes as to small matters from arising, and therefore the assured and the assurers agreed to take these small average losses out of the policy. If this is so, the reason is equally applicable to ship and to cargo. Then it is said that, if the other reason to which I have referred is taken to be the correct one, it is easy to find out at the end of the voyage what damage has been done to the ship by sea perils; but to my mind this cannot be ascertained in the case of many injuries to a ship. For instance, where a ship is strained in one storm and a new storm occurs, it may be impossible to ascertain whether she was more strained in the second storm. Therefore that is not a good reason. I am of opinion that both as to ship and goods the memorandum arose in order to avoid trifling disputes. In the old times 3 per cent. was a fair sum to cover small losses, for the size and value of ships were then less than they now are. In the present day 3 per cent. on the value of a ship may (as is the case here) cover a large sum, but still 3 per cent. is left as the limit, and we must construe the memorandum as it would have been construed when it was first introduced, although there might then have been a time policy covering a period of fifty years. The first decision in point of date which it is necessary to consider is *Brooks* v. *The Oriental Insurance Company* (7 Pickering, 258), in the year 1828. That was a case of a time policy on ship for twelve months, with a memorandum exempting the assurer from liability for partial losses under 5 per cent. In delivering the judgment of the court, Putnam, J. said (at p. 266): "And we are of opinion as to the second question, that distinct and successive losses are not to be added together in order to make up the 5 per cent.; but that the damage from disasters happening at one time, or in one continued gale or storm, is to be considered by itself. If this were otherwise, the insurers would be called upon to pay for a great many trifling losses which should be borne by the assured as coming within the common wear and tear of the ship." I cannot accede to this reasoning. In one continued storm it may be easy to tell whether the losses are separate and distinct or not, as for instance, where on one day the ship scrapes her keel, and on the second day, during the continuance of the same storm, she loses a mast; these losses would be quite distinct. The other question as to wear and tear I have dealt with already. The next case is *Blackett v. The Royal Exchange Assurance Company* (2 C. & J. 244), in 1832, where Lord Lyndhurst, C.B. delivered the judgment of the Court of Exchequer, which has never been overruled. That was the case of a voyage policy on ship, containing a memorandum similar to that now before us, and the court held that the losses were to be added together, although they were separate and distinct. With the greatest respect, it appears to me that the court there did not enter into the business aspect of the case. The ground which they gave for their decision was, that the memorandum is an exception in favour of the assured, and there is a rule that, where a stipulation occurs in a contract making an exception in favour of one party, the exception is to be construed strictly, which of itself seems hardly sufficient. However, where the question is as to a voyage policy on ships, that decision would be a binding authority. The next case is *Donnell* v. *The Columbian Insurance Company* (2 Sumner, 366), decided in 1836 by Story, J., whose opinion is always entitled to the higest respect. He came to the conclusion, on a voyage policy on ship and goods, containing a memorandum against liability for partial loss on goods, or on the vessel or freight, unless it amounted to 5 per cent. that successive losses on cargo, as well as on ship, must be added together. He applied the rule that an exception must apply to the same subject-matter as that from which it is excepted, and he agreed with the view adopted in *Blackett* v. *The Royal Exchange Assurance Company* (2 C. & J. 244), and differed from the reasoning in *Brooks* v. *The Oriental Insurance Company* (2 Sumner, 366). There are therefore two decisions showing that, in the case of a voyage policy on ship, successive losses are to be added together, and the last decision also shows that the same rule applies to a voyage policy on goods. I think we must adopt this as a correct statement of the law.

In the present case we have to decide the point with regard to a time policy on ship. We have to consider whether, in construing a policy of marine insurance or a charter-party, we ought to apply the same rules of construction as in construing other instruments. These documents are informal and ungrammatical. They contain numerous distinct contracts, and no grammatical construction can be placed on the whole instrument if read together. The practice has been that, whenever a new point arose in such cases, almost all the judges took the opinion of the jury. It is said that this was as to the existence of the custom,

but Lord Mansfield always took the opinion of the jury as to the mode of estimating the amount of the loss. It is said that it would be necessary to call average adjusters to ascertain the practice; but, independently of that, I should ask a jury of merchants how, in their opinion, the loss ought to be dealt with. In the present case, however, we must do without a jury. We cannot construe the policy according to the ordinary rules applicable to the construction of written documents. The proper way to arrive at a conclusion is to apply our knowledge of business to the terms of the policy in order to ascertain the meaning. Taking the fact that this is a time policy, a kind of policy which, but for the fiscal limitation to which I have alluded, might be made to cover a period of more than a year, and which formerly was made to cover longer periods, and taking the fact that such a policy often covers many separate voyages, it is difficult to think that the assured and the assurer could have intended to wait until the end of the period covered by the policy before adjusting the losses in question. The crew and captain might be changed after each voyage. The general average losses must be settled at the end of each voyage. The damage to the ship must be repaired at the end of each voyage. It follows that the end of each voyage is the time at which to consider what is the amount of the losses, and therefore in a time policy each separate and distinct voyage must be considered separately, and the whole must not be treated as one voyage divided into stages. The questions which we have to consider here are discussed in a work of very great authority, Phillips on Insurance. The learned author has not dealt with the exact point which we have now to decide, but he states the general rule thus: "Another question is, whether successive losses can be added together, and a claim made, if the aggregate exceeds the rate of the exception. In regard to the cargo and freight, the practice in adjustments has always been to estimate the rate of the exception upon the aggregate loss of each passage or period during which the risk continues on the same subject;" then, after dealing with the decisions to which I have referred, he continues: "The weight of authority leads to the conclusion that the exception applies to the aggregate of successive losses on the ship in the same manner as on the cargo" (sect. 1780). The use of the words "each passage or period" shows that the author had in his mind the possibility of a time policy on goods, and the rule which he lays down would equally apply to a time policy on ship. We have carefully considered the question raised on this appeal, and the result at which we have arrived, taking the rule of construction to be as I have stated, and not attempting to construe the policy according to the ordinary rules of grammar, is this: that the losses occurring on any one separate and distinct voyage must be added together, but not those occurring on two or more separate and distinct voyages. There may be one case where the whole of a voyage cannot be brought in for the purpose of estimating losses, and that is where the last voyage continues beyond the expiration of the period covered by the policy; there the losses would be added together only up to the end of the time covered by the policy. In the present case, however, the policy contains a stipulation that if the period of twelve months comes to an end during a voyage the ship is to be covered by the policy until the end of that voyage, and therefore no such difficulty could arise. We have all come to the conclusion that all the losses occurring on any one voyage should be added together, but here the losses occurring on any one separate and distinct voyage do not amount to 3 per cent., and therefore the defendants are protected from liability by the memorandum, and the judgment which has been given in favour of the plaintiffs must be reversed. *Appeal allowed.*

Solicitors for plaintiffs, *F. W.* and *H. Hilbery.*
Solicitors for defendants, *Waltons, Bubb* and *Co.*

Thursday, Nov. 12, 1885.

(Before Lord Esher, M.R., Cotton and Lindley, L.JJ.)

The Temple Bar. (*a*)

ON APPEAL FROM BUTT, J.

Action in rem—Master's disbursements—Mode of trial—Jury—R. S. C., Order XXXVI., rr. 4, 6, 7.

Actions in rem are excluded from the operation of Order XXXVI., r. 6, *giving the parties an absolute right to trial with a jury by virtue of the provisions of Order XXXVI., r.* 4, *and hence applications for a trial with a jury in such cases are to be made under Order XXXVI., r.* 7 (*a*), *which gives the judge a discretion as to the mode of trial.* (*b*)

In an action in rem for master's disbursements, set

(*a*) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

(*b*) R. S. C., Order XXXVI., r. 4. The court or a judge may, if it shall appear desirable, direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the principal Act could without any consent of parties have been tried without a jury.

Rule 5. The court or a judge may direct the trial without a jury of any cause, matter, or issue, requiring any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in their or his opinion conveniently be made with a jury.

Rule 6. In any other cause or matter upon the application of any party thereto for a trial with a jury of the cause or matter or any issue of fact, an order shall be made for a trial with a jury.

Rule 7. (*a*) In every cause or matter, unless under the provisions of rule 6 of this Order, a trial with a jury is ordered, or under rule 2 of this Order, either party has signified a desire to have a trial with a jury, the mode of trial shall be by judge without a jury; provided that in any such case the court or a judge may at any time order any cause, matter, or issue to be tried by a judge with a jury, or by a judge sitting with assessors, or by an official referee or special referee with or without assessors. (*b*) The plaintiff in any cause or matter in which he is entitled to a jury, may have the issues tried by a special jury upon giving notice in writing to that effect to the defendant at the time when he gives notice of trial. (*c*) The defendant in any cause or matter in which he is entitled to a jury, may have the issues tried by a special jury, on giving notice in writing to that effect at any time after the close of the pleadings or settlement of the issues, and before notice of trial, or if notice of trial has been given, then not less than six clear days before the day for which notice of trial has been given. (*d*) Provided that a judge may at any time make an order for a special jury upon such terms, if any, as to costs and otherwise as may be just.

down for trial at the assizes, where the judge of the Admiralty Division had in his discretion refused to allow a trial by jury, the Court of Appeal declined to interfere with such discretion.

This was an appeal from a decision of Butt, J. in chambers, refusing the plaintiff's application, in an action *in rem* for disbursements, that the action might be tried by a judge and jury.

The plaintiff was suing *in rem* as late master of the barque *Temple Bar* for disbursements, and claimed 466*l*. By the statement of claim, it was alleged that the plaintiff had drawn a bill for 466*l*. on the owner of the barque in favour of the persons making the disbursements, that the bill had been dishonoured, and that proceedings had been instituted against the master for the recovery of the 466*l*. The venue was laid at Liverpool.

By the defence the allegations in the statement of claim were denied. It was also pleaded that the plaintiff had received 146*l*. from, and given a receipt to, the previous owner in discharge of all his claims against the *Temple Bar*, and that the plaintiff had lost his claim by laches.

Notice of trial by a judge at the ensuing Liverpool Assizes having been given, the plaintiff applied on the 4th Nov. to the Liverpool district registrar for an order that the trial should be by a judge and jury. This application was refused, and on appeal to Butt, J. in chambers he affirmed the decision of the district registrar. The plaintiff now appealed from this decision.

Danckwerts for the plaintiff.—Rule 6 of Order XXXVI. giving an absolute right to trial with a jury is applicable to this case, and hence the decision of Butt, J. was wrong. The facts of this case make it very fitting that it should be tried by a jury. Assuming rule 6 is not applicable, yet according to the decision of the Court of Appeal in *Hunt* v. *Chambers* (46 L. T. Rep. N. S. 399; 20 Ch. Div. 365), the onus of proof is on the party opposing the application for a jury. If, therefore, the right to a jury be in the discretion of the judge, he should in this case have exercised his discretion in favour of the plaintiff.

Pyke, for the defendant, was not called on.

Lord Esher, M.R.—The case, as it seems to me, stands thus: This is an Admiralty action *in rem*, brought in the Admiralty Division, only the venue was laid in Liverpool. If there were no other rules, it seems to me that Order XXXVI., r. 7, would apply; that is to say, it would be tried without a jury, unless application were made to the judge, who, for a sufficient cause, would have ordered it to be tried with a jury. The plaintiff, fearing that his application for a jury might be met with the answer that, having brought an action *in rem*, he was bound by the Admiralty Court procedure, applied under rule 6, so that he should have no discretion, and that he, the plaintiff, might say, "You are absolutely bound to make an order for a jury." If rules 6 and 7 were the only rules affecting the matter, I am inclined to think that that would be so. But, in order to prevent the application of rule 6 in such cases, rule 4 was put in. This, to my mind, is a case coming under rule 4, as this action, being one *in rem* for master's disbursements, was one which would, prior to the Judicature Acts, have been tried in the Admiralty Court without a jury. Therefore rule 6 does not apply. Accordingly, the only application that could have been made in this case for a jury was under rule 7, and in that case the judge has a discretion, and the burden of proof would have been on the plaintiff. In this case I doubt if the burden could have been discharged. If the contention of the appellant were true, either party in every collision case in the Admiralty Court might insist upon the judge trying the case, not by himself and assessors, but by himself and jury. I suppose rule 4 was put in to prevent such a state of things. There is an application which the plaintiff can, if he thinks fit, make even now. He may ask the judge at Liverpool to have the case tried by a judge and jury, if there are any grounds for saying that the assistance of the assessors might be disadvantageous. But I suppose that would be as the judge thinks fit, as it would be an application under rule 7. This appeal must therefore be dismissed.

Cotton, L.J.—I am of the same opinion. It is contended, on behalf of the appellant, that under rule 6 there is an absolute right to have a jury. But in what cases does rule 6 apply? The rule is introduced by these words: "In any other cause or matter," which makes us look at the preceding rules to inquire what the other "causes or matters" are. By rule 5 it is clear that certain common law cases are excluded from the operation of rule 6. By rule 4 we find that causes which would have been tried before the Judicature Act without a jury are excluded from rule 6. It is not for us to say whether the court ought, under rule 4, to have exercised its discretion in allowing or disallowing a jury; but the question is, whether the case is excluded from the operation of rule 6 by the words "in any other cause or matter." The case of *Hunt* v. *Chambers* (*ubi sup.*) was decided on the rules of 1875, and has no application to the case. I think, therefore, this appeal must fail.

Lindley, L.J.—I am of the same opinion. In order to decide this case, it is necessary to read all the rules together, and also to bear in mind the state of things prior to the passing of the rules. Prior to the Judicature Act two kinds of actions existed, those with juries and those without juries. We are now concerned with a class of case in which there was no right to a jury; and the question is, whether the rules have given a right. I think not. In this particular case the parties have no absolute right to a jury, but there was power for the court to direct a trial with a jury. The registrar has held that there was no reason for ordering a jury. With that I agree, and therefore think this appeal must be dismissed.

Appeal dismissed.

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

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

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Aug. 3 *and* 5, 1885.

(Before CHITTY, J.)

Re THE GREAT EASTERN STEAMSHIP COMPANY; CLAIM OF WILLIAMS AND OTHERS. (*a*)

Seamen's wages—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 149, 150, 157, 167, 181, 182, 187—*Merchant Seamen (Payment of Wages and Rating Act)* 1880 (43 *&* 44 *Vict. c.* 16), *s.* 4, *sub-sects.* (1) *and* (4)—*Lien for—Foreign-going ship—Voyage not proceeded upon.*

Seamen engaged by the owners or their agent for a voyage upon a foreign-going ship are entitled to a lien for their wages upon the ship, and the proceeds of sale thereof, although the engagement of the seamen has not been in writing, and although the ship does not proceed upon her voyage.

A master who, though appointed by the owners of the vessel, yet under the terms of the charter-party thereby becomes the charterers' captain, is as between the owners and the seamen the agent of the owners, and hence seamen engaged for a voyage are not bound to look into the title of the master who appoints them to ascertain whether he is the captain of the owners or the charterers.

The words "at the end of his engagement" in the Merchant Seamen Act 1880 (43 *&* 44 *Vict. c.* 16), *s.* 4, *sub-sect.* 1, *mean the time at which his actual service terminates, and include the natural efflux of the agreement as well as the discharge of the seamen in breach of the contract. And therefore, to entitle a seaman to wages to the date of final settlement, it is not necessary that the whole term of his engagement should have expired, but it is sufficient that his actual service on board ship should have ended.*

The time up to which a seaman is entitled in an action to recover his wages under this Act is to date of certificate of chief clerk in Chancery, or report of registrar in Admiralty.

BY a charter-party dated the 31st Oct. 1844 the steamship *Great Eastern* was chartered by the Great Eastern Syndicate Limited from the Great Eastern Steamship Company. It was therein mutually agreed that the said vessel should be

Maintained by charters providing her with full complement of officers, seamen, engineers, and firemen, adapted to a steamer of her class, shall be placed under the direction of the said charterers or merchants, or his or their assigns, to be by him or them employed for the conveyance of lawful merchandise [for a voyage from Milford Haven to New Orleans and back to the United Kingdom.] Owners engage to have screw engines and boilers (now connected therewith) put in condition to proceed to sea with earliest possible despatch. The said steamer is let for the sole use of the said charterers for twelve calendar months, commencing the day the screw engines and boilers are finished repairing and ready for sea, at which day the vessel is to be at the disposal of the charterers at Milford Haven. . . . The captain, although appointed by the owners, shall during the currency of this charter be considered as the servant of the charterers, and be under his or their orders and directions as regards employment, agency, or other arrangements, and shall use all and every despatch possible in prosecuting the voyage, and the crew are to render all customary assistance with the vessel's boats.

(*a*) Reported by G. W. KING, Esq., Barrister-at-Law.

The charterers were also to pay the crew's wages.

The voyage did not take place, and the steamship was commenced to be put in repair in accordance with the terms of the charter-party. Disputes having arisen between the owners and the charterers before the screw engines and boilers were in fact finished repairing, or ready for sea, the charterers never got full possession of the ship under the charter-party.

On the 2nd Dec. 1884 Edwin Billinge was appointed by the Great Eastern Steamship Company to the command of the ship by the following letter:

The Great Eastern Steamship Company Limited, 10, King William-street, London, E.C., 2nd Dec. 1884.—To Captain Edwin Billinge.—Dear Sir,—In appointing you to the command of the steamship *Great Eastern*, I have to inform you that she is now under a time charter, copy of the charter-party you have herewith, to the provisions of which you will please to strictly adhere. You will observe that the charterers pay all expenses of every kind during the continuance of the charter, including your own and the crew's wages due, provision for which you will require to be made. You are to give no orders or instructions whatever which may involve the ship herself in any pecuniary liability except with the special sanction and approval of the owners. . . . . You will now take charge of the ship, and be guided by the instructions of the charterers with a due regard to the interest of the owners.—Yours truly, for the Great Eastern Steamship Company, WILLIAM BAKER, Chairman.

The Great Eastern Syndicate gave the following certificate:

The Great Eastern Syndicate Limited, 18, New Bridge-street, Blackfriars, Dec. 3, 1884.—This is to certify that Capt. S. Billinge has been appointed commander of the *Great Eastern* steamship now lying at Milford Haven, and that he has authority from the directors of this Syndicate Limited to engage such officers and sailors, ship's carpenters and joiners, as he has indented for the engagement of same, being subject to the approval of the board.—HENRY CRUSE, Secretary.—By order of the Board.

In anticipation of the voyage Billinge, after his appointment, engaged certain officers and men to serve on board the vessel.

In addition to Williams the present claimant who was so engaged for the voyage as chief engineer, there were also engaged for the contemplated voyage a boatswain, a boatswain's mate, several able seamen, a butcher, baker, three stewards, ship's cook, and quartermaster. These men served on board the vessel for some weeks, and were discharged by Billinge on the 3rd Feb. 1885, without having been paid their wages up to that date.

It appeared from the evidence that the plaintiffs had no knowledge of the position of the parties, or any reason to believe that they had been engaged on behalf of persons other than the owners.

On the 11th Feb. 1885 Williams, on behalf of himself and the other men mentioned above, the present applicants, who were employed on board the ship, commenced an action *in rem* in the Admiralty Division to enforce their maritime lien for wages against the ship. On the 23rd Feb. 1885 a petition to wind-up the company was presented, and on the 7th March following an order for compulsory winding-up was made. An order for sale of the ship was made on 21st May 1885.

In consequence of the winding-up proceedings, the plaintiffs in the Admiralty action were unable

to go on with their action, and on the 18th June 1885 an order was made on their application staying the proceedings in the Admiralty action, and giving them leave to come in and prove their claim in the winding-up, and in this action, which was an action by the holders of the "A," or first series of mortgage debentures, against the trustees for the debenture-holders, and the company to enforce their security.

The claim, which was by Williams on behalf of himself and the other men above mentioned, now came on to be heard.

Aspinall (*Myburgh*, Q.C. with him) in support of the claim of the seamen.—Seamen hired to fit a ship for sea and go a voyage in her, may sue in the Admiralty for the wages they earn in fitting her out, though she does not proceed upon the voyage, and it makes no difference whether they were hired by the owner or not:

Wells v. *Osman*, 2 Lord Raym. 1044;
Abbott's Law of Merchant Ships and Seamen, edit. 12, p. 471

The charterers were in possession of the ship by the owners' authority, and if so, any engagement by them of seamen gives the seamen a right *in rem* for their wages, and also a right to recover the penalties prescribed by the Legislature for the nonpayment of their wages:

Merchant Shipping Act 1854, ss. 149, 150, 157, 167;
Merchant Seamen (Payment of Wages and Rating) Act 1880, s. 4. (*a*)

Romer, Q.C. and *Chadwyck Healey* for the mortgage debenture-holders.—We have the first charge upon the assets. The seamen have no lien on the ship; the law as to the payment of seamen's wages is not applicable to these men, who were only employed to rig out the ship and were not seamen within the meaning of the statutes which have been referred to. Moreover there has been no signed agreement, as required by sect. 167 of the Act of 1854.

Aspinall in reply.—By the common law rule, articles were not necessary in order to give a right to wages:

Wells v. *Osman* (*ubi sup.*);
Maude & Pollock's Law of Merchant Shipping vol. 1, edit. 4, p. 170.

The signing of articles is a provision required by the Legislature for the protection of seamen, and shipowners are liable to a penalty for failing to comply with these provisions. But the Legislature has never said that the seamen's right to wages is lost if articles are not signed. In effect sect. 167 of the Act of 1854 has been overridden by sect. 4 of the Act of 1880. He referred to sects. 149, 157, 167, 182, and 187 of the Merchant Shipping Act 1854.

CHITTY, J.—This is a claim by seamen on board the *Great Eastern* steamship, and they claim a lien on the ship for wages. Several points have been raised, and the first is whether they were engaged as seamen. There is some suggestion in the affidavits which have been filed in opposition to the claim, to the effect that the claimants were engaged on board the ship simply for the purpose of doing repairs to the rigging, painting, and the like. The claimants, however, swear they were engaged as seamen, but they do not say in terms by whom. However, looking at the evidence as a whole, I am satisfied that they were engaged by Captain Billinge. I have no doubt that they were actually to some extent employed in doing work upon the ship, but after the case of *Wells* v. *Osman* (2 Lord Raym. 1044) it is impossible to doubt that seamen engaged for a voyage may be doing work on the ship before the voyage actually commences, and yet would be entitled, apart from the question I have to decide upon the Merchant Shipping Act 1854, to their wages and their lien. That being so, looking to the character of the claimants, and having regard to the facts that are presented before me with reference to what they did, I am satisfied that they were engaged, in point of fact, as seamen. It is unnecessary to go through the affidavits at any length, but I may refer to the affidavit of Joseph

(*a*) The material sections of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), and of the Merchant Seamen (Payment of Wages and Rating) Act 1880 are the following:

The Merchant Shipping Act 1854.

Sect. 149. The master of every ship, except ships of less than eighty tons registered tonnage, exclusively employed in trading between different ports on the coasts of the United Kingdom, shall enter into an agreement with every seaman whom he carries to sea from any port in the United Kingdom as one of his crew in the manner hereinafter mentioned, and every such agreement shall be in a form sanctioned by the Board of Trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars as terms thereof.

(Here follows a list of the requisite particulars.)

Sect. 150. In the case of all foreign-going ships, in whatever part of Her Majesty's dominions the same are registered, the following rules shall be observed with respect to agreements (that is to say):

(Here follow rules that the agreement is to be signed by each seaman in the presence of a shipping master, to be read over and explained to each seaman, and to be in duplicate.)

Sect. 157. If in any case a master carries any seaman to sea without entering into an agreement with him in the form and manner, and at the place and time hereby in such case required, the master, in the case of a foreign-going ship, and the master or owner in the case of a home-trade ship, shall for each such offence incur a penalty not exceeding five pounds.

Sect. 167. Any seaman who has signed an agreement and is afterwards discharged before the commencement of the voyage, or before one month's wages are earned, without fault on his part justifying such discharge, and without his consent, shall be entitled to receive from the master or owner, in addition to any wages he may have earned, due compensation for the damage thereby caused to him, not exceeding one month's wages, and may, on adducing such evidence, as the court hearing the case deems satisfactory, of his having been so improperly discharged as aforesaid, recover such compensation as if it were wages duly earned.

The Merchant Seamen (*Payment of Wages and Rating*) *Act* 1880.

Sect. 4, sub-sect (1). The owner or master of the ship shall pay to each seaman on account, at the time when he lawfully leaves the ship at the end of his engagement, two pounds, or one-fourth of the balance due to him, whichever is least, and shall pay him the remainder of his wages within two clear days (exclusive of Sunday, fast day in Scotland, or bank holiday) after he so leaves the ship.

Sub-sect. (4). In the event of the seaman's wages, or any part thereof, not being paid or settled as in this section mentioned, then, unless the delay is due to the act or default of the seaman, or to any reasonable dispute as to liability, or to any other cause not being the act or default of the owner or master, the seaman's wages shall continue to run and be payable until the time of the final settlement thereof.

Williams, who was the engineer, which sums up the names of those who are now claiming and the capacities in which they were engaged on board. [His Lordship here read the names and continued:] The butcher of course is necessarily employed on board a ship in the fair sense of the term. Although he is there for the purpose of killing the live animals that may be on board, yet he is a seaman, and can be engaged as a seaman. A large ship going on a distant voyage of this kind does require a butcher. Then there is the chief baker and several stewards, the ship being a very large one and a ship that requires several stewards. I am satisfied that they were engaged as seamen, and I am also satisfied upon the evidence that they were engaged by Captain Billinge. Obviously it would not do for any stranger to enter into any engagement with the seamen for a voyage, but Captain Billinge was appointed by the owners under the charter-party, and although when appointed he becomes the charterers' captain, he was, as between the owner on the one hand and the seamen engaged on the other, not the less on that account the agent of the owners. I think it would be an extravagant thing—it would be indeed an injustice in the highest degree—to hold that the seamen engaged for a voyage were bound to look into the title of the captain and ascertain whether he is the captain of the charterers or the owners, and to go into the disputes which have arisen in this case. This case illustrates the point exceedingly well, because there is a dispute between the charterers and the owner in regard to the charter-party itself. It is quite enough to say that in this case Captain Billinge was held forth by the owners of the ship, who put him in command of the ship, as their agent for the purpose of engaging the seamen. That being so, the question arises which has been argued at the bar, whether the Merchant Shipping Act of 1854 does not render it imperative that the engagement of seamen in a foreign-going ship should be in writing. For the owners it was argued that sects. 149, 150, and 157 taken together showed that the Legislature intended that contracts between masters and shipowners on the one hand and seamen on the other for a foreign voyage should be in writing, and if not in writing, void. As was said by Lord Campbell in the case of *The Liverpool Borough Bank* v. *Turner* (3 L. T. Rep. N. S. 494; 2 De G. F. & J. 502) no general rule can be laid down with regard to the construction of an Act of Parliament as to whether that Act is merely directory or imperative; in other words, taking the case before me, whether the contract is void although there are no words avoiding it, or whether the statute is merely directory. In the case of *The Liverpool Borough Bank* v. *Turner* (*ubi sup.*) the question turned on the same Merchant Shipping Act as regards mortgages. The Court of Appeal held that, although there was no provision rendering a mortgage void not made in accordance with the directions of the Act, and although there had been in the former Acts of Parliament relating to the same subject-matter clauses avoiding the mortgage, yet, taking the Act as a whole, and looking at the provisions carefully, the result was that the Legislature did intend that that part of the Act should be imperative, and consequently an equitable mortgage was avoided. The effect of that decision has since been superseded by sect. 3 of the Merchant Shipping Act 1862. That section, however, gives me some guidance with reference to the question which I have now to determine. As Mr. Aspinall pointed out, the sections to which I have referred do not in terms enact that there shall be an agreement in writing entered into with regard to foreign-going ships with the seamen on the commencement of the engagement or agreement. But when the sections are looked at carefully, the language of the Legislature is directed to the carrying of the seamen to sea. Now, sect. 149, which is general, and relates to all ships except small coasting vessels, enacts that the master "shall enter into an agreement with every seaman whom he carries to sea from any part of the United Kingdom as one of his crew in the manner hereinafter mentioned;" that is the agreement referred to, which is afterwards required to be in a particular form, and in writing before the master carries the seamen to sea. Sect. 150, on which counsel for the shipowners chiefly relied, relates to foreign-going ships, foreign-going ships being those which are described in the definition section to include ships trading between some place in the United Kingdom and some place beyond certain limits, such as the coast of the United Kingdom, the islands of Guernsey and Jersey, and other places, and the continent of Europe between the river Elbe and Brest inclusive. With regard to the *Great Eastern* steamship, and for the purposes of this question, she was clearly a foreign-going ship, for she was going to New Orleans. The section enacts that, "In the case of all foreign-going ships, in whatever parts of Her Majesty's dominions the same are registered, the following rules shall be observed with respect to agreements." The section enacting that that is to be an agreement is sect. 149, and that points definitely to the time at which this agreement must be entered into. Sect. 150 is only a subsidiary section covering part of the same ground as sect. 149, and applying only to what is called in the technical language of the Act "foreign-going ships," and it enacts certain rules with reference to the agreements which sect. 149 requires. I do not read those rules through; they are obviously stipulations in favour of the seamen. That of course is not conclusive on the point, because there may be also stipulations in favour of the shipowners, but they are clearly on the face of them for the benefit of the seamen, and the mischief which this part of the Act is intended to remedy was the risk of the men being carried out to sea by some captain who was minded to take them to a long distance to some foreign country when they really had not come to a definite agreement that they would sail upon such a voyage. Sect. 157 contains a penalty which is not imposed on the seamen, but which is imposed on the master and on the owners. That section is as follows: "If in any case a master carries any seaman to sea" (so again, as in sect. 149, that is the reference to carrying the seamen to sea), "without entering into an agreement with him in the form and manner and at the place and time hereby in such case required, the master in the case of a foreign-going ship, and the master or owner in the case of a home trade ship, shall for each such offence incur a penalty not exceeding five pounds." That is the penalty, not imposed upon the seaman, but, according to the provisions of the Act, imposed

on the master or owner alone. But it applies simply to the case of carrying the seamen to sea. It seems to me that the result of these enactments is, that the Act of Parliament does require that, before the seamen are carried to sea, there should be, in the case of a foreign-going ship, the agreement with the particulars and ceremonies mentioned in sect. 150; but the Act of Parliament does not require that there should be any articles signed between the master and the seaman until the ship is going to sea, that is to say, until she starts on her voyage. In the case before me the ship was never ready for sea. I have already disposed of the point with regard to the engagement of the seamen, on the authority of *Wells* v. *Osman* (*ubi sup.*). I think there is nothing in the statute which avoids the agreement which was come to, as I hold in point of fact, between the master on the one hand and the seamen on the other; and that it was not necessary for the purpose of the question that I have to decide that the agreement should be in writing.

Then there was another point raised. Having decided this matter in favour of the seamen, the question arises whether they are entitled, under the statute of 43 & 44 Vict. c, 16, s. 4, to payment of their wages until the time of the final settlement thereof. They have, according to the evidence, not been paid. The facts are, that the charterers or the shipowners—as far as the seamen's claim is concerned it is immaterial which—were unable to put the ship into the state which was required for the particular voyage to make her seaworthy, and Captain Billinge discharged the seamen. They accepted the discharge, and left the ship; but they have not been paid their wages, and a considerable sum remains due to each of the claimants. Now sect. 4 of 43 & 44 Vict. c. 16, enacts that "in the case of foreign-going ships the owner or master of the ship shall pay to each seaman on account, at the time when he lawfully leaves the ship at the end of his engagement, two pounds," and so on. Sub-sect. 4 of the same section enacts that, "in the event of the seaman's wages, or any part thereof, not being paid or settled as in this section mentioned" (that means as mentioned in sect. 4), "then, unless the delay is due to the act or default of the seaman, or to any reasonable dispute as to the liability, or to any other cause not being the act or default of the owner or master, the seaman's wages shall continue to run, and be payable until the time of the final settlement thereof." The material words are, "not being paid or settled as in this section mentioned." That apparently throws me back on sub-sect. (1), which relates to the end of the engagement. Upon that, as to the meaning of those words, I have heard an argument. Mr. Aspinall has pointed out, and I think rightly, that the corresponding or correlative section in the Act of 1854 was sect. 187, which contains an enactment relating to the period within which wages are to be paid: "The master or owner of every ship shall pay to every seaman his wages within the respective periods following (that is to say), in the case of a home-trade ship within two days after the termination of the agreement, or at the time when such seaman is discharged, whichever first happens." In the case of all other ships, with certain exceptions, it gives certain time after the seaman's discharge. The language of the section is, "After the termination of the agreement, or at the time when such seaman is discharged." That would seem to point to this, that the words "termination of the agreement" mean the natural termination of the agreement by effluxion of time, or the time when the seamen are discharged, which may be in breach of the contract, or may be at the time that corresponds exactly with the time at which the agreement terminates. But that language is not adhered to in sub-sect. (1) of sect. 4. There the words are, "at the end of his engagement." It appears to me that "the end of his engagement" means that time at which his actual service terminates; that is to say, the language is sufficiently elastic to include the natural effluxion of the agreement, and the discharge of the seaman in breach of the contract. I think these words are used advisedly to include both cases. The words "at the end of his engagement" would, according to my view, include such a case as this, namely, the discharge by the captain of the seamen before the time at which, according to the agreement, and without breach of the agreement, he could discharge them, which is the present case. They were discharged, and they accepted their discharge, and having put that construction upon these words "at the end of his engagement," I have already decided that the words "as in this section mentioned," which occur in sect. 4, sub-sect. (4), mean at the termination of the agreement. If the seamen's wages are not then paid certain consequences are to follow. That being so, I have to see whether the shipowners have any ground of defence against the effect of this section by reason of the subsequent words. It is enacted, sect. 4, sub-sect. 4, "unless the delay is due to the act or default of the seamen"—clearly in the case before me the delay was not due to the acts or defaults of the seamen—"or to any reasonable dispute as to liability." There was no dispute as to liability before the claim was raised in the Admiralty action. The dispute as to the liability argued before me has been a question of law chiefly, though to some extent a question of fact. But with regard to the question of fact I hold that there was no reasonable dispute.

In regard to the question of law, that was not raised in substance until the argument in court. I think that, having regard to the nature of the question of law on the statute, the dispute which has arisen, as shown by the argument in court, is not a "reasonable dispute" within the meaning of this section. It is not necessary for me to say that there could not be a reasonable dispute when there was a question of law only, but I must look at the nature of the question of law, and it appears to me that under the circumstances of this case there was no reasonable dispute as to the liability. The next matter mentioned in sub-sect. (4) is, "or to any other cause not being the act or default of the owner or master." Was there any other cause not being the act or default of the owner or master? For the owners it is said that there was no claim made against them, and they had no opportunity of settling the claim. But the answer appears to me to be this. The condition on which this section depends is "the event of the seamen's wages not being paid or settled," and the duty, therefore, of paying or settling the seamen's wages is one which is cast upon the master or the owner. To my mind it cannot be said that

the delay is due to "any other cause not being the act or default of the owner or master. The real cause of all this is, that the master was not provided with funds either by the charterers or by the shipowners. If the master had had money he would undoubtedly have paid them. He may or may not have been personally liable. About that I am not concerned in the present argument. But those who are bound to put him in funds for the wages have not provided the money. Then again was the act or default on the part of the owner or master? There is one other section which was relied on by the owners to which I must refer, and that is sect 167 of the Act of 1854, which seems to me to have little or nothing to do with the point. That section says that seamen who have signed an agreement and are discharged before the voyage are to have compensation. That section does not apply, because here the seamen who are claiming have not signed an agreement. The Acts of 1854 and 1880 are to be read together, and it may or may not be that sect. 167 is superseded by the enactments which are more beneficial to the seamen contained in sect. 4 of the Act of 1880. It is not necessary to decide that, but it is necessary for me to say that sect. 167 does not afford any ground for displacing (even reading the two statutes together) the clear enactment of sect. 4 of the Act of 1880. With regard to the question of the validity of the agreement by reason of there being no signed articles, I may refer to sect. 182: No seaman shall by any agreement forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of this Act, and every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative." Sect. 181 is also material, because it entitles the seaman to wages in a foreign-going ship before the articles are signed. For these reasons I think that the seamen have a valid claim against the ship, and that they are entitled to their wages according to the practice in the Admiralty Division, that is to say, until the time of the certificate.

His Lordship made an order declaring that the applicants were entitled to a lien upon the ship and upon the proceeds of sale thereof for their wages and costs in priority to all other mortgages and charges whatsoever, and that the applicants were at liberty to enforce their lien by sale of the ship in case the sale should not be carried out with due diligence.

Solicitors: *Speechly, Mumford,* and *Landon; Gregory, Rowcliffes,* and *Co*

Dec. 14 *and* 15, 1885.

(Before KAY, J.)

REW *v.* PAYNE, DOUTHWAITE, AND CO. (*a*)

Carriage of goods—Consignment of goods—Repudiation—Bill of lading—Retention of—Bill of exchange—Non-acceptance of—Conversion of goods—Measure of damages—Delay.

Where goods are consigned to a person in this country, and the consignor transmits the shipping documents and a bill of exchange to a creditor other than the consignee, and such creditor hands the shipping documents to the consignee with an intimation that they are at his disposal on his returning the bill of exchange duly accepted, the consignee must either accept the bill of exchange or return the documents, and if he refuses to accept the bill of exchange, but nevertheless takes possession of the goods, professing to retain the bill of lading as security for freight and other charges, the consignor's creditor is entitled to recover from the consignee as damages the value of the cargo less forfeit and interest on such value.

A shipload of timber having been consigned to the defendants, the consignor sent the bill of lading and other shipping documents, and also a bill of exchange, to the plaintiffs, in pursuance of the usual course of business between him and them, to cover certain advances which they from time to time made to him.

The plaintiffs placed the shipping documents and bill of exchange relating to the cargo of timber in the hands of agents, who acted between the plaintiffs and the defendants. The agents at the request of the plaintiffs forwarded the documents to the defendants, in order to have the bill of exchange accepted by them.

Shortly afterwards the defendants informed the agents that the cargo was thoroughly out of condition, and that they could not take it in its then state. The agents replied that, unless the defendants returned the bill of exchange accepted, they ought to send back the shipping documents. This the defendants declined to do, as they had paid part of the freight, and intended to take possession of the cargo. Later on they stated that they had been compelled to remove the cargo under the rules of the dock company, but that, if the agents would repay them the freight and certain charges, and their profits on a portion of the cargo which they had sold, they would return the documents. The agents replied that the matter must be left in the hands of the plaintiffs, the owners of the cargo. The defendants then returned to the agents the bill of exchange unaccepted, but retained the bill of lading as security against freight and charges. They offered to yield up the bill of lading on the freight and charges being refunded. Thereupon the plaintiffs commenced an action against the defendants, asking that they might be ordered to accept and deliver up the bill of exchange; and that it might be declared that, until such acceptance and delivery, the defendants were not entitled to retain the bill of lading. They also asked for an injunction, a receiver, and damages. Owing to delay, caused by the fault of both parties, the action did not come on for hearing until about four years after its commencement.

Held, that the defendants, having refused to accept the bill of exchange, were bound to have returned

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

the shipping documents, which were only at their disposal on the condition that they should so accept the bill; and that they wrongfully took possession of the cargo, and dealt with it as its owners, although they had repudiated the contract, and refused to accept the bill of exchange, availing themselves of the bill of lading, which they had no right whatever to retain or make use of, to get that possession.

Held, therefore, that the plaintiffs were entitled to damages against the defendants; that the proper measure of damages was the value of the cargo after making a deduction for freight; but that none of the other charges claimed by the defendants could be allowed, except outgoings incurred in connection with the sale of part of the cargo.

Held also, that the defendants must pay damages, in the nature of interest, for keeping the plaintiffs out of possession of their goods; that the ordinary measure of such damages would be 5 per cent. on the value of the cargo from the time the defendants wrongfully took possession thereof; but that, having regard to the delay which had occurred in bringing the action on for hearing, attributable no less to the plaintiffs than the defendants, half damages, computed at the rate of 2½ per cent. only, would be awarded.

THE plaintiffs in this action, Quincey Rew and Philip O. K. B. Oliphant, carried on business as merchants in London in copartnership, under the style or firm of Rew, Kington, and Co.

The defendants, Payne, Douthwaite and Co., were timber merchants, carrying on business at Hull.

The plaintiffs' claim was that the defendants might be ordered to accept a certain bill of exchange and to deliver it to them; and that it might be declared that, until such acceptance and delivery, the defendants were not entitled to retain or use a certain bill of lading, or to obtain delivery of or deal with certain goods to which such bill of lading related.

The plaintiffs also asked for an injunction, a receiver and damages.

The material facts of the case sufficiently appear from the head-note and judgment.

W. Pearson, Q.C. and *Stirling*, for the plaintiffs, referred to

Sewell v. *Burdick*, 5 Asp. Mar. Law Cas. 376; 52 L. T. Rep. N. S. 445; 10 App. Cas. 74;
Shepherd v. *Harrison*, 1 Asp. Mar. Law Cas. 66; 24 L. T. Rep. N. S. 857; L. Rep. 5 E. & I. App. 116;
Mirabita v. *The Imperial Ottoman Bank*, 3 Asp. Mar. Law Cas. 591; 38 L. T. Rep. N. S. 597; 3 Ex. Div. 164;
Lempriére v. *Pasley*, 2 T. R. 485;
Somes v. *The British Empire Shipping Company*, 8 H. of L. Cas. 338; 1 Ell. Bl. & Ell. 353;
Merchant Shipping Act 1862 (25 & 26 Vict. c. 63), ss. 66, 75.

Graham Hastings, Q.C. and *Nalder*, for the defendants, referred to

Rodger v. *The Comptoir D'Escompte de Paris*, 21 L. T. Rep. N. S. 33; L. Rep. 2 P. C. 393, 405;
Johnson v. *The Lancashire and Yorkshire Railway Company and the Wigan Waggon Company Limited*, 3 Mar. Law Cas. O. S. 271; 39 L. T. Rep. N. S. 448; 3 C. P. Div. 499;
Mayne on Damages, 4th edit. p. 109.

[KAY, J. referred to *Chinery* v. *Viall*, 5 H. & N. 288.]

Pearson, Q.C., in reply, referred to

Leask v. *Scott Brothers*, 3 Asp. Mar. Law Cas. 469; 36 L. T. Rep. N. S. 784; 2 Q. B. Div. 376;
Hollins v. *Fowler*, 33 L. T. Rep. N. S. 73; L. Rep. 7 E. & I. App. 757, 766.

KAY, J.—The facts of this case are as follows: Mr. August Eklof, a certain vendor of timber in Borga, Finland, consigns a shipload of timber to the defendants, Messrs. Payne, Douthwaite, and Co., of Hull. He does not send to them the bill of lading, but he sends the bill of lading to the plaintiffs, Messrs. Rew, Kington, and Co. The position the plaintiffs occupied was, that they were merchants who had acted as bankers for Eklof, and they had advanced money to Eklof, and there was a sum of 5000*l*., as I gather from the evidence, due from Eklof to them. The usual course of business between them and Eklof seems to have been, that Eklof should send to them shipping documents from time to time to cover, or partially cover, the advances which they allowed him to receive. Accordingly, what Eklof does is this: he, in the first place, writes on the 20th Sept. 1881 to the plaintiffs thus: "Confirming my respects of yesterday, I beg to inclose herewith the following shipping documents, viz.: (1) An indorsed bill of lading, *Penelope*, s.s.; (2) Invoice for Messrs. Payne, Douthwaite, and Co., of Hull, amounting to 1816*l*. 16*s*. 6*d*."—and then mentioning other documents which I need not refer to—"and have now to hand you the following drafts against aforesaid invoice amounts, viz., 1816*l*. 16*s*. 6*d*. to your order upon Payne, Douthwaite, and Co., Hull, payable London"—mentioning other drafts—"with which you will be pleased to do the needful to my credit." Nobody can doubt the meaning of that letter. It was according to the course of dealing between Eklof and Rew and Co. He sent them the shipping documents, the bill of lading, and the invoice, and he sent likewise a bill of exchange, which they were to get the defendants, Payne, Douthwaite, and Co., to accept and place to his credit with them, Rew and Co., that is, against his overdraft. The bill of lading is in the usual form. What happened was this: Rew and Co. placed these documents in the hands of Messrs. M. H. Krook and Co., who seem to have acted as agents in this country between Rew and Co. and Payne, Douthwaite, and Co. Krook and Co. sent these documents to Payne, Douthwaite, and Co. in order to have the bill of exchange accepted. They were sent in a letter dated the 26th Sept. 1881, in which Krook and Co. write to Payne, Douthwaite, and Co. thus: "Referring to our former letter of this date, we now beg to hand you inclosed indorsed bill of lading, policy of insurance, and invoice per *Penelope*, the latter amounting to 1816*l*. 16*s*. 6*d*. At the request of Messrs. Rew, Kington, and Co., of this city, the holders of the bill of lading, we also beg to inclose August Eklof's draft for the above amount to their order. The documents are therefore at your disposal on your returning to us the said draft duly accepted," Thus Payne, Douthwaite, and Co. got these documents upon these conditions, that the documents were at their disposal if they chose to return the draft accepted. Now, what is the law? If Payne, Douthwaite, and Co. did not choose to accept the bill of exchange, then of course they were bound to return the bill of lading and the other shipping documents which

were only at their disposal on the condition that they should accept the bill of exchange. In the case of *Shepherd* v. *Harrison* (24 L. T. Rep. N. S. 857; L. Rep. 5 E. & I. App. 116), in the House of Lords, the matter went a little further, because there, in the letter of advice, sending the shipping documents, the condition was not expressed. The House of Lords, however, held it was clear that, when a bill of exchange and shipping documents were sent in this kind of way, they were sent upon a condition that the bill of exchange should be accepted; that the non-expression of that condition was not material; and that the duty of the parties who received the shipping documents was either to accept the bill of exchange or return the shipping documents. Lord Cairns said: "I hold it to be perfectly clear that when a cargo comes in this way, protected by a bill of lading and a bill of exchange, it is the duty of those to whom the bill of lading and the bill of exchange are transmitted, in a letter, either 'to appropriate or reprobate' entirely and completely then and there. If they accept the cargo and the bill of lading, and accept the bill of exchange drawn against the cargo, the object of those who shipped the goods is obtained. They have got the bill of exchange in return for the cargo; they discount or use it as they think proper; and they are virtually paid for the goods. But if, on the other hand, the persons to whom the bill of lading is sent do not refuse *in toto* the consignment of the goods, but keep the bill of lading, but do not accept the bill of exchange, then the agents for the foreign shippers have neither the goods nor the money to deal with; if they had repudiated the transaction *in toto* the agents of the shippers might have dealt with some other house, and raised money on the goods. I therefore think that when one merchant in this country sends to another, under circumstances like the present, a bill of lading and a bill of exchange, it is not at all necessary for him to say in words: 'We require you to take notice that our object in inclosing these bills of lading and bills of exchange is, that before you use the bills of lading you shall accept the bills of exchange.'" What they did here was this: I have read the letter of the 26th Sept. 1881. On that day the ship arrived at Hull. The defendants telegraphed to Krook and Co. for the charter on the 27th Sept. 1881. On the same day the charter is sent, and they write thus to Krook and Co., who were, as I have said, acting in the matter as the agents of the plaintiffs: "We are in receipt of your two favours of yesterday's date, the one inclosing bill of lading, policy of insurance, and invoice per *Penelope*. We also have copy of translation of shipper's protest, but we still do not see this is our matter at all. We bought a certain quantity of goods c. i. f. and in adopting the charter, of course it is for contract quantity, and this is a matter to be fought out between the shipper and the owner, and we must certainly look to the shipper for our redress. The *Penelope* commenced to discharge yesterday, and we have just been down to look at the cargo, and we are most annoyed to find it thoroughly out of condition, and not at all in accordance with the contract or representation; the boards are very sappy, and many nothing but one mass of black sap from end to end, and the quality of the narrow most inferior; in fact, our "fourths wifsta warfs" are infinitely superior. We therefore request you will come down at once, and we cannot accept the cargo in its present form, and no time must be lost, or the dock company will compel removal." Then they say that they are vexed it has turned out so badly. An answer was telegraphed on the 28th Sept. 1881—"If you send draft accepted to-day will come down to-morrow. Telegraph." The reply from the defendant is: "Steamer discharged to-night; bulk of cargo bad as can be; must have settlement before accepting draft; cargo must be removed at once." They write on the 28th Sept. 1881: "We have your telegram as follows: 'If you send draft accepted to-day, will come down to-morrow; telegraph.' We wired reply." Then they repeat their own telegram. "Many of the narrow widths are almost unmerchantable. Here the goods lie to be seen, and they speak for themselves." Now observe, at this moment the goods were on the wharf; they were not in the possession of the defendants at all. "We must commence to yard cargo to-morrow" (that is, we must remove it from the general wharf to our yard); "we certainly shall decline to receive cargo in its present state, and we think you should have come down at once to arrange a survey." The answer from Krook and Co. is another telegram: "Unless you return bill accepted you must send us back the documents by to-day's post." They reply on the 28th Sept. 1881: "We have your second telegram as follows" (which they quote), 'Unless you return bill accepted you must send us back all the documents by to-day's post.' This we must decline doing"—that is, they will neither accept nor send back the documents—"as we have paid part of the freight, and we request shippers to carry out their part of the contract, when we will do ours. It is no fault of ours this unpleasantness has arisen, and if only shippers would ship what they sell they would have little trouble. Having sold part of the cargo we do not intend to lose our profit, so you had better arrange to settle the matter without further loss of time. We are bound by the new rules of the dock company to commence yarding the cargo to-morrow, and we think you would have saved a lot of time if you had come down to-day." Is not that a clear repudiation? They say that they will not have the cargo; they will not accept the bill of exchange; they will not return the bill of lading; and they mean to take possession of the cargo to-morrow. Without the bill of lading they could not have taken possession of the cargo. The bill of lading was the only document which gave them any power or authority to take possession of the cargo. Their position is this: They say, "You have sent us the bill of lading which we are only to have upon the condition of accepting the bill of exchange; we will not accept the bill of exchange, we repudiate the cargo, we will not have it; but we have paid part of the freight, and we shall take possession of the cargo; we shall keep this bill of exchange, which is not ours, and which we have no right to keep, for the moment in order to enable us to take possession of this cargo, which is also not ours."

Then the correspondence goes on. I do not think it necessary to read all the letters, but there is one which is very material. The defendants write on the 30th Sept. 1881 to Krook and Co.: "The entire cargo is more or less out of condition and inferior, and if you think we shall accept without

a guarantee as to survey you are mistaken, especially as we have heard to-day how a Borga shipper served a Grimsby firm once. We have been compelled to commence to remove the cargo, under the new rules of the dock company, and if you will repay us the freight and yarding charges and our profit on the portion we sold to arrive, we will return you the documents." In reply Krook and Co. on the 1st Oct. 1881 say: "We beg to acknowledge receipt of your favour of yesterday, which we will put before Messrs. Rew, Kington, and Co. on Monday, as they are not in town to-day. We have every wish to act fairly towards you by having the goods surveyed and obtain for you any allowance that you are fairly entitled to, but by taking the law into your own hands you prevent us from doing anything in the matter. We must now leave the case in the hands of Messrs. Rew, Kington, and Co., the owners of the cargo, and we feel sure you will find out that our opinion of the way in which you have treated this matter is correct." On the 3rd Oct. 1881 the defendants write saying: "We are in receipt of your favour of the 1st instant and note contents. We return invoice and bill unaccepted per cargo per s.s. *Penelope*, retaining bill of lading against freight and charges, &c., &c., which we have paid, and we are yarding this cargo for whom it may concern." Then there is some further correspondence, among which is a letter dated the 4th Oct. 1881 from the defendants to the plaintiffs: "In reply to your yesterday's favour we have already returned to Messrs. W. H. Krook and Co. all shipping documents per steamship *Penelope*, excepting the bill of lading, which we hold as security for freight, advance charges, and our loss sustained on the portion of the cargo sold to arrive and rejected by our buyers on account of bad condition and quality. The steamer arrived before the documents, and we paid freight on demand." There is no evidence when that freight was paid, but it seems to me quite immaterial whether they paid the freight before they got the bill of lading, or after they got it. If they paid it before they got the bill of lading, they paid it entirely at their own risk; if they paid afterwards, it is the same matter. The letter continues thus: "And as the goods are not in accordance with the contract in many ways, we have declined to receive them, and we will at once return you the bill of lading on your refunding us the freight charges and our loss of profit as named above. Perhaps you are not aware there is an overcharge." Then they mention an overcharge in the invoice of 11*l.* 3*s.* 10*d.* Then they say: "We offered at the outset to settle by survey, and the award (if any) to be guaranteed by you and paid us on maturity of bill; but, as this was not listened to, we simply refuse the cargo and ask you to remit us the freight, &c., as per statement inclosed, when we will hand you the bill of lading and hold the cargo to your order." The statement inclosed was as follows: "To freight paid, 615*l.* 2*s.* 1*d.*; yarding expenses, 179*l.*; eight days' interest, 13*s.* 5*d.*; bank commission, 1*l.* 10*s.* 9*d.*; loss of profits on 108 standards sold to arrive if goods had come in accordance with the contract, 90*l.* 18*s.* 10*d.*; making a total of 887*l.* 5*s.* 1*d.*" Then the next letter is the last I shall read. The defendants write again to Krook and Co. on the 5th Oct. 1881: "We are in receipt of your yesterday's favour returning us the invoice and draft per *Penelope* and insist we shall accept for a cargo of wood that is inferior, which we shall decline to do unless we have Messrs. Rew, Kington, and Co.'s guarantee there shall be a proper survey held at once by proper competent parties or party as may be agreed upon, and the sum awarded (if any) shall be paid by this firm to us on maturity of bill, as we shall decline to place ourselves in the hands of the shipper without such guarantee, for special reasons which we need not specify; and, further, we have no jurisdiction over him in his own country. Failing the above, we shall hold the cargo against freight, advance charges, &c., until we receive the money as regards the average."

That was the defendants' position. They insist upon retaining the bill of lading, which they received merely upon the condition that they should accept the bill of exchange, although they have not accepted the bill of exchange, and although they have repudiated the contract and say that they will not have the cargo, as they did most emphatically by the letter of the 4th Oct.—"We simply refuse the cargo." They say that they have taken possession of this cargo, and they will hold this cargo against all these charges which they insist on making against the plaintiffs. That is the simple position of the affair. The question is, what are the rights of the parties? The pleadings raise two cases: The plaintiffs ask, first of all, that the defendants may be ordered to accept the bill of exchange for the amount of the invoice, less the clerical error of 11*l.* 3*s.* 11*d.* which had arisen; and, further, "that it might be declared that until such acceptance and delivery of the said draft, or such payment of the said sum, the defendants were not entitled to retain or use the said bill of lading, or to obtain delivery of or deal with the said deals, battens, and goods." Then they ask for an injunction and a receiver and damages. The alternative claimed is based on this statement in paragraph 11 of the statement of claim: "The said vessel *Penelope* arrived at Hull on or about the 26th Sept. 1881, and the defendants, although they had full notice of the plaintiffs' rights, nevertheless wrongfully made use of the said bill of lading to obtain delivery to themselves of the said deals, battens, and wood goods, and they wrongfully and improperly took possession of the said deals, battens, and wood goods, and stacked the same in their yards at Hull, and have dealt therewith as the owners thereof." That is most completely made out by the evidence. It is plain from the letters which I have read that the defendants did wrongfully take possession of the goods, although they had repudiated the contract and refused to accept the bill of exchange, and that they availed themselves of their actual possession of the bill of lading, which they had no right to retain for a moment after they declined to accept the bill of exchange, in order to obtain possession of the goods. They could not obtain possession without the bill of lading, and they availed themselves of the bill of lading to get that possession. Then they informed the plaintiffs that they would retain the cargo until the plaintiffs paid all these charges. It is obvious that they were wrongdoers. They had no right whatever to retain the bill of lading. They had no right to make use of the bill of lading to enable them to obtain possession of the cargo. In one form or another of

action—it is not material to determine which—the plaintiffs, who were the owners of this cargo, as between themselves and the defendants, have a right to recover damages against them for this wrongful dealing of theirs. The sort of ownership which the plaintiffs had is defined in the case of *Sewell* v. *Burdick* (52 L. T. Rep. N. S. 445; 10 App. Cas. 74). It is quite plain that it was an ownership, which, though special for certain purposes—that is to say, would render them liable probably in an action for the freight—still was an action which, as between them and the defendants, entitled them to take possession of the cargo if the bill of exchange was not excepted. The question is, what is the proper measure of damages? I understand, as the case was opened, it was claimed that the plaintiffs should recover the full value of these goods without making any allowance for any of these things, including freight. That did not seem to me to be right, and that kind of claim gave me some little trouble in looking into the cases. My opinion would be, if that claim were persisted in, that that would be putting the right too high, because it seems to me the case comes very near indeed, if not quite within, the authority of *Chinery* v. *Viall* (5 H. & N. 288), to which I have referred. Neither of these parties could ever have obtained possession of these goods without paying the freight, and for the freight of course there was a lien on the goods. Accordingly, to give the plaintiffs the value of the goods, without any allowance at all for the freight, would be giving them a great deal more than in any conceivable circumstances they could otherwise have obtained. That does not seem to be the proper measure of damages. But when the matter was discussed, counsel very properly said that they did not put the plaintiffs' claim so high as that. They did not deny that, in measuring the damages, the freight ought to be allowed, and accordingly it is not necessary for me to consider that matter more particularly. Then the question is, whether any, and if any which, of the other charges should be allowed. [His Lordship went through them, and concluded:] Of all these charges nothing, it seems to me ought to be allowed except the freight, which it is admitted should be allowed, and such actual out-of-pocket outgoings in respect of the sale which was made as upon inquiry may be thought to be proper.

There remain two questions: one is the question whether by way of damages, any allowance in the nature of interest for keeping the plaintiffs out of possession of their goods all this time, should be made. *Primâ facie* it seems to me that there should be some such allowance, not of course of interest, but that damages should be given to the plaintiffs for the long time they have been kept out of the possession of their own goods. The ordinary measure of such damages would be to take the value of the goods, and to allow damages on the footing of 5 per cent. (this being a mercantile transaction) upon the value from the time when the defendants wrongfully took possession of these goods. But then, of course, in estimating that, I must look to the delay that has taken place, and who is to blame for that delay. [His Lordship examined into this and said:] I cannot help seeing there has been a very considerable delay on both sides. Certainly a delay for which the defendants are to blame as much as the plaintiffs. Accordingly, it is a matter which must be taken into consideration by the court in estimating the damages If there were no delay attributable to the plaintiffs, I should think it right to give them damages computed on the footing of 5 per cent. on the value from the time the goods were improperly taken possession of by the defendants; but seeing there has been this delay on both sides, I shall give damages only at half the amount, computed at the rate of 2½ per cent.; that, as nearly as I can judge, will be what is just between the parties. Then there is the question of the costs of this action. It is said the action mainly asks that the defendants may be ordered to accept the bill of exchange. It is impossible for me to make a man accept a bill of exchange, especially when he has always said, from the first, that he would not accept it. To imply a contract to accept a bill of exchange from the wrongful taking possession of the goods, when the defendants have all along said, come what might, they would not accept the bill of exchange, seems to me to be out of the question entirely. But then I cannot see that that claim has added one farthing to the costs of the action. The evidence and the pleadings must have been entirely the same, whether that claim had been answered or not. That evidence has not been very long evidence, and it is evidence which I should have thought the parties might have put in a month or two without the least difficulty. It is altogether irrelevant to the main and important question in this action—namely, the question whether there was a wrongful taking possession of these goods or not, and the question what damages ought to be paid for the wrongful taking possession. Accordingly, as I think that the defendants have been in the wrong from the very first, it seems to me that I cannot make any order about the costs of this action, but that they must pay such costs. I do not think that the doubt that was raised about the freight makes any difference in that respect, although the question between these parties being very small, I should have thought it might have been determined in a much simpler way without the delay which has taken place. There must be an inquiry what was the value of the goods at the time the defendants took possession of them, and upon that 2½ per cent. must be computed from that time, by way of half measure of damages. According to my judgment, the plaintiffs will then be entitled to recover from the defendants that value to which the 2½ per cent. is added as damages from that time, *minus* the freight, and *minus* any proper expenses of the actual sale that took place—I mean out-of-pocket expenses—as to which, unless the parties can agree upon them, there will be an inquiry. I have no doubt, however, that the parties will probably be able to settle that matter between themselves. The out-of-pocket expenses of the actual sale will be paid out of the fund in court. The counter-claim, which was merely formal in order to give effect to the lien, will be dismissed with costs.

Solicitors for the plaintiff, *Barnes* and *Bernard*.

Solicitors for the defendants, *Collyer-Bristowe*, *Withers*, and *Russell*, agents for *Leak*, *Till*, and *Stephenson*, Hull.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 17 *and* 18, 1885.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE MERCHANT PRINCE. (*a*)

Collision—Lights—Flare-up—Regulations for Preventing Collisions at Sea, arts. 2, 11.

The burning of a flare by vessels other than overtaken and fishing vessels is not forbidden by art. 2 *of the Regulations for Preventing Collisions at Sea, though blame may be attributed to a vessel exhibiting a flare if such an exhibition is misleading and contributes to collision.*

THIS was a collision action *in rem* instituted by the owners of the Norwegian ship *Hans Gude* against the steamship *Merchant Prince* to recover damages occasioned by a collision between the two vessels in the Straits of Gibraltar. The defendants counter-claimed.

The facts alleged by the plaintiffs were as follows: About 11.45 p.m. on the 20th April 1885 the *Hans Gude*, a full-rigged ship of 909 tons register, bound on a voyage from Marseilles to Saint Ubes in ballast, was in the Straits of Gibraltar. There was a strong breeze from E.S.E. and the weather was dark but clear. The *Hans Gude* was heading W. by N. and making about eight or nine knots an hour. Her regulation lights were being duly exhibited and were burning brightly, and a good look-out was being kept on board her. In these circumstances the masthead light of a steamer, which proved to be the *Merchant Prince*, was seen about five miles off and about two points on the starboard bow of the *Hans Gude*. The *Hans Gude* was kept on her course. Shortly afterwards the red light of the *Merchant Prince* came into view, on about the same bearing. Those on board the *Hans Gude* kept a careful watch on these lights. The *Merchant Prince* kept on for some time with her red light open on the starboard bow of the *Hans Gude*, and flare lights were accordingly burnt on the *Hans Gude* to attract the attention of those on board the *Merchant Prince*. The *Merchant Prince* then for a short time opened her green light and shut in her red, but again opening her red and shutting in her green light, she came on apparently at full speed, and although a flare light was again burnt on board the *Hans Gude* the *Merchant Prince* came into collision with her, striking with the stem the starboard bow of her *Hans Gude*, and doing so much damage that she sank, her master and seven of the crew being drowned.

The facts alleged on behalf of the defendants were as follows: At about 11.40 p.m. on the 20th April 1885 the steamship *Merchant Prince*, of 1111 tons net register, and bound on a voyage from Penarth to Genoa, was off the Straits of Gibraltar, heading S.E. magnetic, and making about 6 knots an hour. Her regulation lights were duly exhibited and burning brightly, and a good look-out was being kept. In these circumstances those on board the *Merchant Prince* observed a flare-up light, which proved to have been exhibited on board the *Hans Gude*, about one point on the port bow, and distant between one and two miles. No other light being visible from the *Hans Gude*, those on board the *Merchant Prince* concluded that the flare-up was being shown, in accordance with art. 11 of the Regulations for Preventing Collisions at Sea, by a steamer which they were overtaking, and therefore kept on their course. The flare-up light continued to be seen by them at intervals, and at about the same bearing, and, although it was carefully watched, nothing was observed to indicate in any way that it came from any vessel other than a steamer which the *Merchant Prince* was overtaking. But about midnight a very dim green light, belonging to the *Hans Gude*, suddenly came into view a little on the *Merchant Prince's* port bow, and distant about two ship's lengths. The engines of the *Merchant Prince* were immediately stopped and reversed full speed, and her helm put hard-a-port; but the *Hans Gude*, coming on at great speed, with her starboard bow struck the stem of the *Merchant Prince*.

The defendants (*inter alia*) charged the plaintiffs with a breach of art. 2 of the Regulations for Preventing Collisions at Sea in improperly showing a flare-up light.

Regulations for Preventing Collisions at Sea.

Art. 2. The lights mentioned in the following articles, numbered 3, 4, 5, 6, 7, 8, 9, 10, and 11, and no others, shall be carried in all weathers from sunset to sunrise.

Art. 10 (*e*). Fishing vessels and open boats may at any time use a flare-up in addition to the lights which they are by this article required to carry and show. All flare-up lights exhibited by a vessel when trawling, dredging, or fishing with any kind of drag net, shall be shown at the after part of the vessel, excepting that if the vessel is hanging by the stern to her trawl dredge or drag net, they shall be exhibited from the bow.

Art. 11. 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.

Sir *Walter Phillimore* (with him Dr. *Stubbs*) for the plaintiffs.—The evidence establishes that the *Hans Gude* kept her course, and exhibited the lights required by the regulations. The steamer is therefore alone to blame. It is permissible to give warning to the approaching vessel, even though she is not an overtaking vessel, by exhibiting a flare. This is not prohibited by art. 2 of the regulations, which speaks of the lights that are to be "carried," and is therefore confined to fixed and permanent lights, and has no application to a temporary light like a flare:

The Anglo-Indian, 3 Asp. Mar. Law Cas. 1; 33 L. T. Rep. N. S. 233;
Marsden's Law of Collisions at Sea, 2nd ed., p. 316.

It is to be observed that art. 10 (*e*) permits fishing vessels and open boats to use a flare at any time. In an emergency where the circumstances require, it never could have been intended that vessels should not avail themselves of flares to warn approaching vessels, and so prevent collision. In the present case, had there been a good look-out on the steamer, the exhibition of the flares could not have been misleading, and should, by their altering position, have shown that the *Hans Gude* was approaching, and was not being overtaken.

Finlay, Q.C. (with him *Barnes* and *Baden-Powell*) for the defendants.—By art. 2 the lights mentioned in arts. 3, 4, 5, 6, 7, 8, 9, 10, and 11, and "no others" are to be carried. A flare burnt on an approaching ship is not mentioned,

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

and therefore the words "no others" prohibit its use. The regulations specifically state the circumstances under which a flare is to be shown, and to permit it to be within a master's discretion whether it shall be exhibited under other circumstances would in many cases conduce to collision. In the present case the steamer was misled, and was justified in thinking that she was overtaking the *Hans Gude*.

Sir JAMES HANNEN.—The first question I have to determine is one of law, viz., as to the construction of the Regulations for Preventing Collisions at Sea. It is contended on the part of the *Merchant Prince* that the exhibition of a flare light is forbidden by the regulations, except in two cases—one when the vessel is being overtaken, in which case it is shown astern; and the other in the case of fishing vessels. With regard to art. 11, it is to be observed that it says that "a ship which is being overtaken by another shall show from her stern a white light or flare-up light." That does not of itself forbid the use of a flare light in other cases. It is also to be observed that the word which is there used is "show." Now, the rule which is relied on as proving that the flare light is not to be shown unless under the circumstances mentioned, is art. 2, which says: "The lights mentioned in the following articles (3, 4, 5, 6, 7, 8, 9, 10, and 11), and no others, shall be carried from sunset to sunrise." Now, I am of opinion that it does not mean that no other lights shall be shown on any occasion, but that no other lights shall be carried as fixed lights except those mentioned. The difference in the language of the two rules indicates that it was not intended that the same thing should be meant by the words "carried" and "shown." I may state—though, of course, it does not influence my construction of the rule—that the Trinity Brethren consider that it has always been, so far as their experience goes, the construction which has been acted upon by nautical men, and that it has never been construed in practice that the showing of a flare-up light was forbidden if circumstances made its exhibition judicious. Therefore it always becomes a question depending on the circumstances whether or not the showing of a flare-up light is calculated to mislead. Of course if it is, and in consequence of that misleading an accident happens, the blame must be attributed to the vessel exhibiting the flare. That it must depend on the circumstances is further shown by this, that the rules contemplate the use of the flare light for trawling, dredging, and fishing boats; and though it has not been suggested that the *Hans Gude* was in such a position that she could be supposed to be a fishing vessel, it shows that there are circumstances in which it becomes necessary for a vessel which sees a flare-up light to consider whether it is an overtaken vessel or whether it is a fishing vessel.

That leads me to the circumstances of the case. The case on behalf of the *Hans Gude* is that, the wind being E.S.E., she was sailing a W. by N. course, when she sees two points on her starboard bow the white light of a steamer. That steamer, as it turns out, was the *Merchant Prince*, which was coming on a S.W. course, and she alleges that she saw the flare-up light two points on her point bow. It is alleged on behalf of the *Hans Gude* that the captain, who is unfortunately drowned, and therefore cannot give evidence, said that the steamer, the white light of which had been seen before the red light, seemed to be running into them, and that thereupon he gave orders that there should be a flare-up light exhibited. It is said by the defendants that, seeing this flare, they took it to be a steamer going in the same direction as themselves, which they were overtaking, and it may be that when they first saw it they were under that impression. Whether they saw the flares as soon as they ought is another question, and I think there is grave reason for doubt whether they did see them when they were first exhibited by the *Hans Gude*. But while they might for a short time have been under the impression that it was a steamer which they were overtaking, yet, if they had examined the course of the flares, they would have been able to see that it was not a vessel which they were overtaking, but one which was approaching them. The question is, was the steamer justified in persisting, as her case is that she did, in treating the *Hans Gude* as an overtaken vessel. I am advised that it is not improbable that the *Hans Gude* was sailing on a W. by N course. Indeed, in the judgment of the Trinity Masters, a W. by N. course is a course which a vessel might be expected to be sailing when proceeding on the voyage on which she was. I therefore see no reason to doubt the statement of those on the *Hans Gude*, that her course was W. by N. It has been said by the witnesses for the *Merchant Prince* that, thinking it was a steamer proceeding in the same direction as themselves, they expected to see the flares broaden on their bow. But we know as a fact that the vessel was not a steamer going in that direction, but that it was the *Hans Gude* steering W. by N. We must consider what would be the effect of that upon the broadening of the flares. If the *Hans Gude* were proceeding W. by N., then she would not broaden on the port bow of the steamer, but would grow closer and closer. The suggestion that the *Hans Gude* must have altered her course is not supported by evidence, and is not accepted by me. I come to the conclusion, therefore, that, if there had been better judgment exercised by those on board the steamer, it would have been seen that their first impression was an erroneous one, and that they should have taken some precautions to avoid collision in circumstances which they did not at first appreciate. In the captain's letter he says he saw a flare, but "he could not make it out." The only intelligible meaning that can be put upon these words is that he saw the flares, but did not know what they meant. Not knowing what they meant, he ought to have given them a wide berth or slackened his speed, in either of which cases the collision would not have occurred. All the circumstances tend to show that he thought, there being a flare, he had a right to assume, and continued to assume whatever else he saw, that this was a vessel which he was following.

An argument has been founded on the fact that, not only did the man who was sent by the commanding officer go to see that the green light was burning properly, but that others went also. For my part I can see no inconsistency in that. If they had not done this, it would have been argued *ad nauseam* that they had only the evidence of one man to rely on; and now that they have many, it is said that they are wrong, and that we are not to believe them. The truth is that

those on board the *Hans Gude* were in doubt as to whether the other vessel would come into collision with them, and it was in the highest degree natural that they should go and see whether the light was burning brightly or not. I believe this collision has entirely arisen from the first impression, which may have been a natural one, having been adopted that the *Hans Gude* was a vessel which was being overtaken, and then no further thought was given to it, and owing to that assumption the *Merchant Prince* ran into the *Hans Gude*. For these reasons I am of opinion that the *Merchant Prince* is alone to blame.

Solicitors for the plaintiffs, *Stokes, Saunders,* and *Stokes.*

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

June 7 and Aug. 4, 1885.

(Before Sir JAMES HANNEN.)

THE BLENHEIM. (*a*)

Collision—Damage to cargo—Measure of damages—Loss of market—Freight—Lien.

When a cargo has been shipped, and the voyage is delayed by an accident not within the perils excepted in the contract of affreightment, in consequence of which the cargo has to be discharged, the shipowner has a lien on the cargo for the purpose of enabling him to earn his freight, and the cargo owner is not entitled to insist on delivery of the cargo without payment of freight before the completion of the voyage on which the freight is to be earned, but the shipowner may insist upon reshipping the original cargo if it is capable of being carried on.

The steamship K., having just started on a voyage from C. to B. with a cargo of coals, carried under charter for the plaintiffs, came into collision with the B. at the port of loading. The K. put back and discharged her cargo for the purpose of repairs. The coal was found to be damaged, and its owners (the plaintiffs) were advised that it was unfit for reshipment, and that, for the good of all parties interested, it should be sold at C., and not carried on to B. The owners of the K. refused to part with the cargo or to take any other cargo except upon fresh terms as to freight. The plaintiffs made no inquiry as to these terms, and the coals were reshipped and carried on to B., where, being useless for the purposes of the plaintiff's locomotives, for which it had been originally intended, it was used in the plaintiffs' smithies. The owners of the B. having admitted liability, and the damages being referred to the registrar, he reported that in his opinion the shipowner was not entitled to insist upon reshipment of the damaged cargo, and that the plaintiffs' damages were the loss they would have sustained if the coals had been sold at the port of loading.

Held, on objection to the report, that the cargo, though damaged, was capable of being carried on, and that, therefore, the shipowner having a lien upon it for freight to be earned, was entitled to insist upon carrying it on, or to exact fresh terms as to freight for another cargo, and that the damages were the loss to the plaintiffs at B., and not at C.; but that it was the duty of the cargo owner to have inquired what the fresh terms as to freight were, so as to diminish the loss as far as possible, and that in ascertaining this loss the saving which could have been effected by shipping a fresh cargo on new terms must be taken into consideration by the registrar, and that the report must go back to the registrar to ascertain the damages upon this basis.

Held, also, that the fact that the coal was used in the plaintiffs' smithies at B. did not necessarily show that the difference between the value of locomotive and smithy coals was the measure of the plaintiffs' loss, but the actual reduction in its value occasioned by the collision must be ascertained.

THIS was an objection by the plaintiffs in a damage to cargo action to the Assistant Registrar's report.

The action was brought by the plaintiffs, as owners of a cargo of coals on board the steamship *Kairos* against the owners of the steamship *Blenheim* and her freight, to recover damages caused to the cargo by reason of a collision between the *Kairos* and the *Blenheim* on 7th July 1882.

The defendants admitted their liability, and the damages were referred to the registrar and merchants to be by them assessed. The plaintiffs claimed 1742*l.* 7*s.* 3*d.*, and were allowed 643*l.* 12*s.*

The following is the registrar's report:

This was a claim by the Great India Peninsula Railway Company, as owners of a cargo of coals shipped in the steamship *Kairos*, for damage done in a collision between that ship and the steamship *Blenheim* in Penarth Roads on July 7, 1882. In an action by the owners of the *Kairos* the *Blenheim* was found solely to blame, and the claim of the *Kairos* was heard and reported upon in August, 1883. In a separate action by the owners of the cargo of the *Kairos*, the owners of the *Blenheim* admitted liability, but the reference of the cargo claim did not come on for hearing until the 25th July 1884, when it was adjourned for further evidence, and after some fruitless attempts at a settlement, the hearing was concluded on the 2nd inst. The collision happened just after the *Kairos* had come out of Penarth Docks, bound for Bombay with a cargo of coals, for the use of the Great India Peninsula Railway Company. The vessel was so much injured, being cut down to the water's edge, and a hole being made in her hold No. 3, that she had to be redocked for repairs, and all her cargo was taken out; but, on completion of the repairs, it was reshipped and carried to Bombay, where she arrived on Sept. 9, and her cargo was delivered. The plaintiffs' claim was based on the certificates of the surveyors who inspected the coal at Bombay shortly after it had been landed and stacked. It comprised four items:

	£	s.	d.
1. The loss by short delivery of 77 tons in excess of the usual waste, at Rs. 18, or 30*s.* per ton	115	10	0
2. The damage by salt water to the coal in No. 3 hold, 972·64 tons, at Rs. 2, 3*s.* 4*d.* per ton	162	2	3
3. The damage by excessive breakage to the whole cargo delivered, 2881¼ tons, at Rs. 6, or 10*s.* per ton	1440	15	0
4. Survey fees	24		
	£1742	7	0

This estimate of the damage was objected to, and in our opinion justly, as being very excessive. First, the loss on the 77 tons short delivered had been taken at 30*s.* per ton, the supposed market value of the sound coal at Bombay after payment of freight and other charges; but should have been based on the cost price of 10*s.* per ton, no charges being payable on it, and the freight having been already settled by the defendants in the former action. Secondly, as regards the breakage, it was stated in the surveyor's certificates that "the

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

whole of the coal contained an immense amount of very fine coal dust, almost like sand, and a very small proportion of medium and large sized coal, not sufficient to build up the walls of the stack," and the damage so caused by excessive breakage was estimated at Rs. 6, or 10*s.* per ton, the surveyors, it was added, being of opinion that if sold by auction it would show that deficiency on the sound value of similar coals. But first it would appear that the excessive breakage was to some extent at least not attributable to the collision, for in a letter of the 24th July 1882, from Mr. Winston, the plaintiffs' assistant coal inspector, who examined the coal at Cardiff shortly after its discharge, it was stated that sufficient care had not been exercised to prevent breakage, and that therefore there was a large quantity of small coal. Again, we think that the plaintiffs' surveyor used an erroneous test in measuring the plaintiffs' loss by the depreciation of the value of the coal if put up for sale by auction at Bombay. That, no doubt, would have been a proper test if the plaintiffs had been merchants importing the coal for resale, and therefore entitled to claim for loss of profit; but here the coal was for the plaintiffs' own use, and it appeared from the surveyor's 8th answer to the 11th interrogatory, and from the evidence of Mr. Berry, the plaintiffs' accountant, that the broken coal, though "in a great measure unfit and useless for locomotive purposes (for which it was imported), was used by the company in their smithies," for which they import annually about 2000 tons at a cost of only 6*d.* or 1*s.* less per ton than that of their coal for locomotive purposes. But another objection was taken to the claim, which, in our opinion, made it unnecessary to determine the amount of depreciation in the value of the coal at Bombay. From correspondence produced at the reference it appeared that Mr. Thomson, the plaintiffs' inspector at Cardiff, reported that about one-third of the cargo—the coal contained in hold No. 3—had been saturated with salt water, and thereby rendered unfit for reshipment to Bombay, and that the remaining quantity would "have to be hand picked in shipment, as there was a very large percentage of small, and as this would be a very costly process, and the result unsatisfactory," he strongly recommended that, for the good of all parties interested, the whole cargo should be condemned and sold. Such was stated to be the common way of dealing with damaged cargoes of coal at Cardiff, and it was admitted by the plaintiffs that it would have been the best way of dealing with this particular cargo. The reason given by them for not adopting it was that Mr. Stamp, the owner of the *Kairos*, refused to take any other cargo than the cargo actually discharged, except, as he stated in an affidavit, "upon fresh terms as to freight, &c." Upon this it was argued for the plaintiffs that they were bound to reship the same cargo at the risk of having to pay damages to the shipowner. Mr. Stamp, however, was not produced as a witness at the reference, nor did it appear that any attempt had been made by the plaintiffs to ascertain what was meant by "fresh terms as to freight, &c.," nor had they had any communication with Mr. Stamp, except through Messrs. Pirie and Co., who had chartered the ship from the owner and sub-chartered her to the plaintiffs. No authority was cited for the contention that the plaintiffs were bound to reship a damaged cargo at the port of shipment against the advice of their surveyors; nor was it shown on what reasonable grounds the shipowner could have insisted on reloading a damaged and possibly dangerous cargo rather than take a clean cargo of coals, which might have been shipped with probably less delay. It was further stated that, but for the owner's refusal, the sub-charterers, Messrs. Pirie and Co., were willing to ship a fresh cargo, but it did not appear why they should be bound to obtain the shipowner's approval for the shipment of a clean in place of a damaged cargo, or how either party would have been injured by the substitution. We therefore think that the plaintiffs ought to have sold the cargo at Cardiff in accordance with their inspector's advice, and that they are not entitled to recover the depreciation of the market value of the cargo when delivered at Bombay, but only the loss which they would have sustained if the cargo had been sold at Cardiff. From the evidence given at the reference as to the result of sales of similarly damaged cargoes at Cardiff, we gathered that the discharged cargo might have been sold at a loss not exceeding 4*s.* per ton on the cost price of 10*s.* per ton. Assuming, then, that the loss of weight consequent upon discharging the cargo at Cardiff was about 2 per cent., the average estimated loss of weight on delivery of such cargoes at Bombay, or about 60 tons on the whole cargo of 3019, we have allowed 30*l.*, or 10*s.* per ton in respect of that loss. On the remainder of the cargo, consisting of 2959 tons, which, in our opinion, ought to have been sold at Cardiff, we have allowed 600*l.*, being nearly at the rate of 4*s.* per ton. A sum of 12*l.* 6*s.* has been added to the claim as the cost of surveys at Cardiff. The claim having been so largely reduced, I am of opinion that the plaintiffs ought to pay the costs of the reference.

The plaintiffs objected to this report for the following, among other, reasons:

1. They were unable to compel John Pirie and Co. or Messrs. Gordon and Stamp to abandon the above-mentioned charter-parties and bill of lading, or to carry a new cargo of coal under the said charter parties and bill of lading, and were entirely unable to sell the said coal at Cardiff.

2. The evidence produced before the assistant-registrar and merchants proved that the plaintiffs had actually suffered damage to the amount claimed by them on the said items.

3. That, had the plaintiff sold the coals at Cardiff as suggested in the assistant-registrar's report, they would still have been liable to John Pirie and Co. for the freight under the charter-party between themselves and John Pirie and Co., and the bill of lading, for which no allowance is made.

4. That although the plaintiffs used the said coal in their smithies, yet that such coal was not equal to or as valuable as the coal they would otherwise have bought for that purpose, and that the plaintiffs' claim is made up in accordance with the proper measure of damages.

5. The plaintiffs pray that the said report may be reformed, and that the plaintiffs may be declared entitled to the sum of 1644*l.* 5*s.* 3*d.*, with interest and the costs of the reference, and that the court will make such order in the premises as it shall seem just.

The defendants filed an answer to the above objections.

Barnes for the plaintiffs. — The assistant-registrar has not assessed the plaintiffs' damages on a correct basis. He has wrongly assumed that the shipowner could not have insisted on carrying on the damaged cargo to Bombay. The shipowner had a legal right to carry the cargo on. He insisted on exercising this right, and so prevented the plaintiffs selling the cargo at Cardiff:

Notara v. *Henderson*, L. Rep. 7 Q. B. 229; 1 Asp. Mar. Law Cas. 278; 26 L. T. Rep. N. S. 442;
Jones v. *Holme*, L. Rep. 2 Ex. 335; 2 Mar. Law Cas. O. S. 551; 16 L. T. Rep. N. S. 794;
Parson's Law of Shipping, edit. of 1869, pp. 217, 231.

They are therefore entitled to recover the depreciation in the value of the coal if put up for sale at Bombay. The coal, being unfit for locomotive purposes, was used up in the plaintiffs' smithies, although it proved of less value than the coal commonly burnt in the smithies.

Kennedy, Q.C. for the defendants,—The damage was caused by perils not excepted in the contract of carriage, and the shipowner is not entitled to unreasonably insist upon carrying the goods forward:

Notara v. *Henderson*, L. Rep. 5 Q. B. 346; 3 Mar Law Cas. O. S. 419; 22 L. T. Rep. N. S. 577;
Stanton v. *Richardson*, L. Rep. 7 C. P. 421; 1 Asp. Mar. Law Cas. 449; 27 L. T. Rep. N. S. 513;
Jackson v. *Union Marine Insurance Company*, L. Rep. 8 C. P. 572; L. Rep. 10 C. P. 125; 31 L. T Rep. N. S. 789; 2 Asp. Mar. Law Cas. 435;
Maude and Pollock's Law of Merchant Shipping p. 368 n.;
Maclachlan Merchant Shipping, p. 48.

If so, it was the duty of the plaintiffs to have sold the cargo at Cardiff, which might have been done

at a loss of only 4s. per ton. Assuming the shipowner to have the right to retain the cargo, the plaintiffs had no right to allow it to go on without making some inquiry as to what terms the shipowner was willing to accede to in respect of another cargo. It might have been that the shipowner would have taken another cargo at only a small increase of freight, which would have diminished the loss occasioned by carrying the damaged cargo to Bombay.

Barnes, in reply, cited

The General Steam Navigation Company v. *Slipper*, 31 L. J. 185, C. P.; 1 Mar. Law Cas. O. S. 180; 5 L. T. Rep. N. S. 641.

Cur. adv. vult.

Aug. 4.—Sir JAMES HANNEN.—This case arises on the plaintiffs' objections to the assistant registrar to report. The facts are so clearly stated in the report that I need not recapitulate them. I regret that I cannot adopt the view of the registrar and merchants, as it is a very reasonable one, but I do not think it can be supported in law. I have no doubt that it would have been better for the cargo, and that it would not have been any disadvantage to the shipowner if a fresh cargo had been shipped at Cardiff instead of reshipping the damaged cargo, but I am of opinion that the shipowner was entitled to insist on the original cargo being reshipped if it was capable of being carried on, as appears to have been the case. The shipowner has a lien on the cargo for the purpose of enabling him to earn his freight, and the cargo owner is not entitled to insist on delivery of the cargo without payment of freight before the completion of the voyage on which the freight is to be earned.

Mr. Stamp was therefore acting within his legal rights in refusing (if he did refuse) to take any other cargo than that which was actually discharged. It does not appear, however, that Mr. Stamp absolutely refused to take a fresh cargo. He only refused to do so except "on fresh terms as to freight, &c." What these fresh terms were is not shown. It is pointed out by the assistant registrar that it did not appear that the plaintiffs inquired what these terms were, and this no doubt created a difficulty in estimating what the fresh terms as to freight would have been. I agree with the assistant registrar and merchants that it was the duty of the plaintiffs to make inquiry as to these terms in order that they might be able to form a judgment whether the benefit to be derived from shipping a fresh cargo would not more than compensate for the increased freight, and so diminish the loss for whomsoever it might concern. In the absence of any such inquiry, it was to be presumed that the shipowner would not have made use of his position to extort unreasonable terms. Any advance in freight which might have occurred after the signing of the charter-party might therefore have been taken into account in estimating what the loss could have been reduced to, if the plaintiffs had endeavoured, as they ought to have done, to diminish it as much as possible. I am of opinion therefore that the assistant registrar's estimate of the damage is not based on a correct principle, and that it is necessary to ascertain or estimate what would have been the increased freight payable in respect of a fresh cargo before comparing the loss which resulted on the damaged cargo at Bombay with the loss which would have arisen on sale of that cargo at Cardiff, and shipping a fresh one. I am also of opinion that the value of the coal to the plaintiffs at Bombay ought not be estimated at the price the plaintiffs' pay for coal for their smithies merely because they used this coal for smithy purposes, but that the true question is to what extent was the heating power of the coal reduced. Although it was in fact used by the plaintiffs in their smithies, it may have been of less value than that which they were accustomed to buy at 1*s.* or 6*d.* per ton less than that which they paid for coal for locomotive purposes.

Solicitors for the plaintiffs, *Waltons, Bubb*, and *Johnson*.

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

Jan. 27 *and* 28, 1886.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE GODIVA. (*a*)

Collision—Practice—Preliminary Act, art. 9.—"*Distance and bearing of the other vessel when first seen*"—*Amendment.*

Where in a collision action the questions in the Preliminary Act are improperly answered the court will always be disposed to view with suspicion the case of the party so answering, even though it appears to have been accidental, and if it proves to have been intentional the court will then scrutinise the case most closely and approach it with the gravest suspicion.

"*The L. when first seen was at anchor*" *is an improper answer to art.* 9 *of a Preliminary Act inquiring the* "*distance and bearing of the other vessel when seen,*" *and the court at the hearing ordered the party so answering to amend.*

THIS was a collision action *in rem* instituted by the owners of the steamship *Lobelia* against the owners of the steamship *Godiva* to recover damages occasioned by a collision between these vessels on June 22, 1885.

The collision occurred in the river Scheldt at the entrance of Terneuzen Harbour in consequence of the *Godiva* and the *Lobelia* attempting to enter it at the same time. Art. 9 of the defendants' Preliminary Act inquiring the "distance and bearing of the other vessel when first seen" was answered as follows: "The *Lobelia* when first seen was at anchor."

On the case coming on for hearing, *Raikes* (with him Sir *Walter Phillimore*), for the plaintiffs, contended that the question was improperly answered and should be amended.

Bucknill, Q.C. (with him *J. P. Aspinall*), for the defendants, *contra*.

BUTT, J.—I am of opinion that this question is improperly answered, and I shall accede to the plaintiffs' application and order it to be amended. In all cases where I find the questions improperly answered, I am also disposed to view with suspicion the case of the party so answering, even though it appear to be accidental. But if it proves to have been done intentionally and with *malice prepense*, then I am inclined to scrutinise

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs. Barristers-at-Law.

their case most closely and to approach it with the gravest suspicion. (*a*)

The Preliminary Act was accordingly amended as follows: "The *Lobelia*, when first seen, was distant about two miles, nearly ahead but on the port bow withal." In the result the *Lobelia* was found alone to blame.

Solicitors for the plaintiffs, *Waltons, Bubb*, and *Johnson*.

Solicitors for the defendants, *Parker, Garrett*, and *Parker*.

Nov. 4 and 5, 1885.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE CHEERFUL. (*b*)

Salvage—Ineffectual efforts—Ultimate salvage by others—Right to reward.

Where salvors in answer to a request for assistance render services which through no fault of theirs are ineffectual, and leave the vessel in distress in a worse position than the one in which they found her, they are entitled to no reward, even though the vessel be ultimately saved by other salvors.

THIS was a salvage action instituted by the owners, master, and crew of the steamship *City of Hamburg* against the steamship *Cheerful*, her cargo and freight, in respect of services rendered thereto in the English Channel. The defendants counter-claimed for damage occasioned by collision with the *City of Hamburg* during the performance of the alleged service.

According to the evidence of the plaintiffs the particulars of the services were as follows: About 10 p.m. on the 1st Feb. 1885, the *City of Hamburg*, of 1220 tons gross, and laden with a general cargo on a voyage from Rotterdam to Belfast, was proceeding down the English Channel, and was about eight miles S.S.W. of Anvil Point. A fresh gale was blowing from about S.W. accompanied by heavy squalls and rain, and a heavy cross sea was running. About this time the masthead and red lights of the *Cheerful*, a steamer of 1014 tons gross, were sighted distant about three-quarters of a mile. Shortly afterwards she was seen to haul down her masthead light, and to replace it with three red lights. She also commenced burning blue lights and sounded her whistle. The *City of Hamburg* thereupon proceeded towards the *Cheerful*, and on coming up with her it was found that she had lost her propeller. The master of the *Cheerful* asked to be towed to Portland, and after considerable difficulty the *City of Hamburg* was made fast ahead of the *Cheerful*. During the time the hawsers were being made fast, the two vessels had drifted three miles nearer the shore, on to which the wind and sea were setting them fast. About 12.15, Anvil Point then bearing about N. by E half E. and about five miles distant, the *City of Hamburg* commenced towing. About 3 a.m. the Shambles was bearing W.S.W., distant about half a mile, and the wind was about S. blowing a whole gale when the port hawser parted. The engines of the *City of Hamburg* were at once eased, and about a quarter of an hour later the starboard hawser parted. The engines of the *City of Hamburg* were at once stopped, and the broken hawsers were hauled on board. Whilst this was being done both vessels drifted towards the Shambles and Portland Race, as the tide was setting them in that direction. The *Cheerful* then let go her anchor, and was brought up about two and a half miles distant from the Shambles Light, which bore about S.E. by E. half E. About 7.30 a.m. those on board the *Cheerful* requested the *City of Hamburg* to bend a line on to a life buoy and steam across the bows of the *Cheerful*, so that the buoy might be streamed across her bows and be picked up. The *City of Hamburg*, having got upon the starboard bow of the *Cheerful*, and having dropped her buoy, commenced to drift towards the *Cheerful*, when her engines were put full speed ahead, and her helm hard aport. But when just ahead of the *Cheerful* a terrific squall struck her, and drove her athwart the *Cheerful's* bows, and her port quarter fouled the stem of the *Cheerful*, thereby causing damage to both vessels. Efforts were then made to pass a line, but, as the *City of Hamburg* was in great danger herself and could render no further assistance, she bore away for Portland, and there came to anchor. Her master then caused information to be sent to Weymouth of the position in which the *Cheerful* was, and in the course of the day she was towed into Portland Roads in

(*a*) These observations of the learned judge show the importance of a rigid compliance with the requirements of preliminary acts. The rule of court regulating the filing of and other matters incidental to preliminary acts is Order XIX., r. 28. By this rule preliminary acts are to be filed within certain specified times "in actions in any division for damage by collision between vessels, unless the court or a judge shall otherwise order." The object of these documents is well put by Dr. Lushington in the case of *The Vortigern* (Swa 519), where he says: "Preliminary acts were instituted for two reasons: to get a statement from the parties of the circumstances *recenti facto*, and to prevent the defendant from shaping his case to meet the case put forward by the plaintiff." To prevent either party knowing the contents of his opponent's preliminary act, they have to be filed and sealed up before any pleading is delivered, and are not to be opened until ordered by the court or a judge. In order to prevent any evasion of the objects for which these documents were instituted, the court has always set his face most strongly against allowing amendments in a preliminary act after it has been filed: (*The Frankland*, 1 Asp. Mar. Law Cas. 207; L. Rep. 3 Ad. & Ecc. 511.) So careful has the court been to prevent the object of preliminary acts being defeated, that even where the party applying to amend his preliminary act stated upon affidavit prior to the hearing of the action that the mistake was the result of a clerical error, the court refused to allow the amendment; (*The Miranda*, 4 Asp. Mar. Law Cas. 595; 7 P. Div. 185.) In *The Biola* (3 Asp. Mar. Law Cas. 125) an ingenious but unsuccessful attempt was made to evade the object of these documents by delivering prior to the close of the pleadings interrogatories which sought to obtain the information given in the preliminary act. Sir Robert Phillimore, however, without stating any reasons, very properly, as it would seem, ordered these interrogatories to be struck out. But in the subsequent case of *The Radnorshire* (4 Asp. Mar. Law Cas. 338; 5 P. Div. 172) the same learned judge allowed similar interrogatories apparently on the ground that they were neither unreasonable, vexatious, nor scandalous. It is to be noticed that in the report of this latter case it does not appear at what stage of the proceedings these interrogatories were administered. We, however, presume that this decision would not apply to cases where similar interrogatories were administered prior to the delivery of any pleading, as were this allowed a defendant would be in the possession of information which would enable him to shape his case to meet that put forward by the plaintiff, and so one of the principal objects of preliminary acts would be defeated.

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

safety. But for the services of the *City of Hamburg* the *Cheerful* must have driven ashore near St. Alban's Head. Inside the Shambles where the *Cheerful* was towed she was in a place of comparative safety. The *City of Hamburg* in rendering the services consumed ten tons of coal, and sustained considerable damage. She towed the *Cheerful* about sixteen miles.

On behalf of the defendants it was denied that whilst the hawsers were being made fast in the first instance, the vessels drifted nearer to the shore, or that the wind and sea were setting them in that direction. It was alleged that the *Cheerful* lost her propeller about 10.30 p.m. on the 1st Feb. about eight miles from Anvil Point. After the *City of Hamburg* had taken the *Cheerful* in tow the wind and sea gradually increased. The defendants alleged that the collision at the Shambles was due to the negligent navigation of the plaintiffs, and stated that the *City of Hamburg* not only did not render any beneficial services, but that the position in which she left the *Cheerful* was worse than that in which she was when first taken in tow.

The defence, so far as is material, was as follows:

8. The defendants deny that the *City of Hamburg* was ever until the collision in peril, and also deny the allegations that she rescued the *Cheerful* from a position of the greatest danger, and towed her to a place of comparative safety. The *Cheerful*, though deprived of her steam power, and to a considerable degree unmanageable, was in no immediate danger when the *City of Hamburg* first took her in tow, and the defendants deny that but for the services of the *City of Hamburg* the *Cheerful* would have been driven ashore or wrecked.

9. The *City of Hamburg* did not render any beneficial services to the *Cheerful*. The place to which the *Cheerful* was towed, and in which she was left by the *City of Hamburg*, was a worse position than that in which she was when first taken in tow, and the danger of the position in which she was placed by the *City of Hamburg* was greatly aggravated by the damage which was done to the *Cheerful* by the collision with the *City of Hamburg* through the negligence and want of care and skill on the part of those on board the *City of Hamburg*.

10. The defendants say that the plaintiffs are not entitled to award or compensation in respect of damage or detention for repairs caused wholly by the fault of those on the *City of Hamburg*.

11. The defendants submit that in the circumstances herein appearing the plaintiffs are not entitled to any salvage remuneration.

The defendants counter-claimed in respect of the damage occasioned to the *Cheerful* by the collision with the *City of Hamburg*.

The facts upon which the learned judge based his decision are found in the judgment.

The plaintiffs did not establish by their evidence that it was in consequence of the information sent by them to Weymouth of the *Cheerful's* position that she was ultimately saved.

Sir *W. Phillimore* (with him *Bucknill*, Q.C.) for the plaintiffs.—The plaintiffs' services did in fact contribute to the ultimate safety of the *Cheerful*. They were rendered at the express request of the defendants, and should therefore, on the authorities, be rewarded as being in the nature of salvage services;

The Undaunted, Lush. 90; 2 L. T. Rep. N. S. 520;
The Atlas, Lush. 518;
The E. U., 1 Spinks, 63.

In the *Melpomene* (L. Rep. 4 A. & E. 129; 29 L. T. Rep. N. S. 405; 2 Asp. Mar. Law Cas. 122) the court awarded salvage, although the plaintiffs' efforts were unavailing, and the ship was saved by other salvors. The defendants in the present case have failed to establish the plea of negligence.

Myburgh, Q.C. (with him *Kennedy*, Q.C.) for the defendants.—According to the decision of Dr. Lushington in *The India* (1 W. Rob. 406), "Salvage reward is for benefit actually conferred in the preservation of property, not for meritorious exertions alone." In the present case no actual benefit was conferred, and the plaintiff's exertions, instead of being meritorious, were so negligent as to entitle the plaintiffs to succeed on their counter-claim. As a matter of fact the original danger to the *Cheerful* was considerably augumented by the plaintiffs' services.

BUTT, J.—In this case the steamship *Cheerful*, a vessel of 1014 tons gross register, broke down through the loss of her propeller at a distance which, I think, was stated at from seven to ten miles from Anvil Point. The steamer *City of Hamburg*, which is a vessel of somewhat larger tonnage, at once came to her assistance. The accident happened sometime about 10 p.m. on the 1st Feb. whilst the *Cheerful* was on a voyage from London to Liverpool. The weather at the time was not perhaps very bad, but it was bad, and it is alleged on the part of the salvors that if they had not taken the vessel in tow she must have gone on to the coast to the northward, in which case the probability is that every person on board would have been lost, the coast being very dangerous just at that position. The defendants on the other hand by their witnesses say: True the vessel broke down, but there was no immediate danger of our going ashore, and in point of fact, if we had been left by the *City of Hamburg* altogether, it is not likely we should have gone ashore. The *City of Hamburg* on coming up is asked to tow the *Cheerful* into port. She took her in tow for that purpose, and they proceeded together for Portland Roads. But when near the lightship on the Shambles both the hawsers parted, at which time no doubt the position of the vessel was one of considerable danger. The *Cheerful* let go her anchor. The wind at this time seems to have been tending to the southward more and more, and getting more violent. The anchor was let go at about 3 a.m. in the morning. The *City of Hamburg* was at that time in an uninjured condition. She stood by, and some time later on, in consequence of a request from those on the *Cheerful*, she proceeded to steam across her bows from the port side of the *Cheerful*, on which she lay, to her starboard side, with the view of dropping a life buoy and then sweeping a line across the bows of the *Cheerful* with the view of again getting the hawser on board. In the course of that manœuvre she got out of command. It is said that she fell into the trough of the sea, and those on board of her assert that she was struck by a very heavy squall, and so came across the bows of the *Cheerful*, causing damage to both vessels. Somewhere about 9.30 on the same morning a tug called the *Queen* came to the assistance of the *Cheerful*, took her in tow, and with some slight assistance rendered by another tug took her into Falmouth harbour, and there left her in

a position of safety. Some questions of importance have been raised in this case. It is necessary to consider the amount of danger this vessel was in at different periods of the time in question. There is no doubt that when she broke down off Anvil Point there was some risk. The Elder Brethren do not advise me that there was anything like imminent risk of her then going ashore. There is no doubt that, after the hawsers had parted in the neighbourhood of the Shambles, and after the *Cheerful* had let go her anchor and been brought up, she was in a position of very considerable danger. That danger was augmented to no considerable extent by the damage sustained in the collision with the *City of Hamburg*, and the Elder Brethren agree in advising me that the position in which the *Cheerful* was when the *City of Hamburg* left her was one of very considerably greater danger than the position she was in when first taken in tow.

That being so, the question arises as to whether the owners, master, and crew of the *City of Hamburg* are entitled to salvage remuneration. I confess to the greatest possible reluctance in deciding a case of this sort against the salvors, but I feel constrained to abide by what, in my opinion, are the authorities which have been laid down on this subject, and to hold, the language of Dr. Lushington in the case of the *The India* (*ubi sup.*), that "unless the salvors by their services conferred actual benefit on the salved property, they are not entitled to salvage remuneration." It follows from what I have said that no actual benefit was conferred on this vessel by the services rendered by the *City of Hamburg*, because she was left in a position of greater peril than she occupied before. I may say that, in dealing with the question of the relative amount of danger, the Elder Brethren and myself have not left out of our minds the fact that the *Cheerful* was near Portland harbour, where tugs are to be obtained. Then comes the question of the counterclaim. It is said by those who represent the *Cheerful* that the manner in which the *City of Hamburg* was navigated was negligent. I have asked the Elder Brethren their view upon the matter, and although one of them, if not both, are inclined to think that greater care and skill might have been used, and would have avoided the collision, yet, seeing the exigency of the position, and danger in which the *Cheerful* was placed and the condition of the weather, the manœuvre does not constitute negligence. I therefore pronounce that there was no negligence within the legal meaning on the part of the *City of Hamburg*, and I must dismiss the counterclaim. The order is, that both claim and counterclaim are dismissed, and I make no order as to costs.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

May 15 *and* 16, 1885.

(Before BRETT, M.R., BAGGALLAY and BOWEN, L.JJ.)

THE BARROW-IN-FURNESS MUTUAL SHIP INSURANCE COMPANY LIMITED *v.* ASHBURNER. (*a*)

*Marine insurance—Mutual ship insurance company—Unstamped policies—Estoppel—*30 *&* 31 *Vict. c.* 23, *ss.* 7, 9, 13, *and* 14—39 *&* 40 *Vict. c.*6, *s.* 2.

A., prior to 1878, *kept several vessels insured in the B. Mutual Ship Insurance Company, paying the entrance fees and calls thereon, and, after* 1878 *continued to deal with the company in the same way, except that after that date no policies were issued, the practice of the members being that after the expiration of the first time policy no new policy was issued, but instead thereof stamped receipts were given for calls.*

On the 29*th Dec.*, 1880, *and the* 25*th Feb.*, 1881, *the company, with A.'s assent, duly passed resolutions for transferring its business, credit, and effects to a new company on the terms of the new company paying all the debts, liabilities, and obligations subsisting on the* 25*th March* 1880. *The new company was registered on the* 3*rd Feb.* 1882, *the business up to that time being carried on sometimes in the name of the new company and sometimes in the name of the old, the business of the old being purported to be carried on by the new. Both before and after the registration A. continued the same course of business as before, but paid no call after the* 9*th Jan.* 1882, *when he paid a call made on the* 29*th June* 1881 *for losses previous to the* 29*th Dec.* 1880. *In an action by the new company against A. to recover the amount of three calls made on the* 21*st Sept.* 1881 *and on the* 25*th Jan.* 1882 *for losses prior to the* 25*th Feb* 1881, *and on the* 25*th March* 1882 *for losses subsequent thereto:*

Held, that A. was estopped from saying that the contracts, towards the losses on which he was asked to contribute, were invalid by reason of their not being in writing or not being stamped in accordance with the provisions of 30 *and* 31 *Vict. c.* 23, *and that the plaintiff company was entitled to recover the moneys sued for.*

The judgment of Mathew and Day, JJ. (5 *Asp. Mar. Law Cas.* 443; 52 *L. T. Rep. N. S.* 898) *affirmed.*

THIS was an appeal from a judgment of Mathew and Day, JJ., reported 5 Asp. Mar. Law Cas. 443; 25 L. T. Rep. N. S. 898. A special case was stated for the opinion of the court by agreement between the parties in an action brought by the Barrow-in-Furness Mutual Ship Insurance Company Limited against Thomas Ashburner, to recover the sum of 342*l.* 5*s.* 3*d.* for calls, contributions, and interest thereon due from the defendant as a member of the company under the circumstances therein stated, which, so far as material were as follows:—

The Barrow-in-Furness Mutual Ship Insurance Company was completely registered and incorporated under the provisions of the statutes 7 & 8

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

Vict. c. 110 and 10 & 11 Vict. c. 78, in the year 1858, and the defendant was duly admitted a member thereof in June 1863, and subject to the facts hereinafter stated insured, and continued to keep insured, several vessels in the said company, and paid the entrance fees and calls thereon. He was elected treasurer of the company on the 27th Nov. 1878, and continued to act as such until the 29th June 1881.

Up to the year 1879 a policy was issued by the company to the defendant on all ships proposed by him to the company for insurance and accepted, but after that date no policies (with the exception hereinafter stated) were issued by the company mentioned, or any company succeeding it before the commencement of the action. The last policies issued to the defendant (with the exception above-mentioned) were issued on two accepted proposals of the 31st March and the 11th Oct. 1879 respectively. The practice of the other members of the company, and the practice of the defendant after the expiration of the policies mentioned, was that after the expiration of the first time policy no new policy was issued, but instead thereof stamped receipts were given for calls.

On the 29th Dec. 1880, at a special general meeting of the company, summoned for that purpose in accordance with the rules of the company, the following resolutions were reduced to writing, and put to the vote, and carried unanimously:

Resolved that the business, credits, assets, and effects of the company be transferred to a company to be called the Barrow-in-Furness Mutual Ship Insurance Company Limited on the terms of the said intended company paying and discharging all the debts, liabilities, and obligations of the company entered into, and subsisting, and capable of taking effect as at the 25th March last.

Resolving that the Barrow-in-Furness Mutual Ship Insurance Company be and the same is hereby absolutely dissolved.

The defendant was present at the meeting, and took an active part in the discussion of the proposals and voted in favour of the said resolutions. The proposed articles of association, in the form in which they were subsequently registered, were read over at this meeting, and explained to the meeting by the solicitor for the company, and were approved of.

The said resolutions were unanimously confirmed at a subsequent special general meeting held for that purpose on the 25th Feb. 1881. The defendant was not present at that meeting, but he had on the 10th Jan. 1881 given the secretary of the said company a proxy to vote for him at the said meeting.

On the 11th April 1881 the memorandum and articles of association subsequently registered were signed by seven persons who were directors of the old company, and at a meeting of the company held on the 19th April 1881 it was intimated to the members present by the secretary that the company had been registered as a limited company. This was found to be a mistake, but until the mistake was discovered the company acted as if it had been so duly registered.

On the 22nd June 1881 a consent to take the name of a subsisting company was signed by two directors of the old company.

On the 29th June 1881, at what purported to be a meeting of the new company, directors were elected, and the secretary of the old company was elected secretary of the new company. The defendant ceased to be treasurer at this date.

The new company was duly registered on the 3rd Feb. 1882 under the name of the Barrow-in-Furness Mutual Ship Insurance Company Limited, with a memorandum and articles of association.

After the passing of the foregoing resolutions, and until the registration of the new company, business was carried on as before, sometimes in the name of the new company, and sometimes in the name of the old company, but the business of the old company was purported to be carried on by the new company.

The defendant after the passing of the said resolutions, and before the registration of the new company, continued to keep his vessels on the books of the company, as insured, and paid calls upon the said vessels, and intended to remain insured as before, but no policy of insurance was given to the defendant.

On the 6th April 1881 the defendant wrote to the secretary of the company, in reply to an application for calls made up to the 25th March 1881, complaining that six sixty-fourths of a certain ship had not been withdrawn according to notice, giving a list of the share of his vessels insured in the company, and asking for a corrected account. The alterations were made as requested, and some time after the defendant examined the register of insurances.

On the 11th Sept. 1881 the defendant proposed a vessel for insurance, and paid an entrance fee for the same. No policy was then issued for this vessel, but on the 14th July, 1882, the directors of the new company, after a letter from the defendant of the 11th July, 1882, demanding the return of the entrance fee, executed a time policy from the 11th Sept., 1881, to the 11th Sept., 1882, but claimed to retain the same for a lien on it for calls unpaid by the defendant. With the exception of this policy, no policy was issued by the new company to the defendant or to any member before the commencement of the action. No call was ever made on the vessel for which this policy was issued.

After the registration of the new company the defendant continued the same course of business as before, as shown by letters of the 1st and 11th April 1882, giving notice of withdrawal of shares in certain ships.

The defendant having failed to comply with the requests of the company's secretary for the payment of amounts alleged to be due from the defendant to the company, the writ in the action was issued on the 29th July, 1882, the claim of the plaintiff company being for three calls with interest, made respectively on the 21st Sept., 1881, the 25th Jan., 1882, and the 25th March, 1882, amounting in all to 342*l.* 5*s.* 3*d.* These calls were made to meet actual losses which had happened to vessels whose owners had paid the usual entrance fee, and who had made proposals which were duly accepted, but no policy had been issued for any of these vessels.

All the losses which had happened before the 29th Dec. 1880, and all the working expenses up to that date, were, with the exception of a liability of 375*l.*, included in a call made on the 29th June, 1881, which was paid by the defendant on the 9th Jan., 1882.

Between the 29th Dec. 1880 and the 25th Feb.

1881 two vessels were lost, involving a liability of 1330*l.* 10*s.* 0*d.* The defendant's share of this liability, if any, would be one-seventh of that amount. The call of the 25th Jan. 1882 was made to cover this liability.

There were no losses between the 25th Feb. and the 29th June 1881.

The Court of Chancery of the County Palatine of Lancaster, upon the application of the defendant, by orders made on the 30th April, the 18th June, and the 13th Aug. 1883, ordered the defendant's name to be removed from the register of members of the plaintiff company.

It was agreed by the parties that the question of amending the statement of claim by adding the name of the old company as plaintiffs, and all questions of amendment, should be for the court.

The question for the opinion of the court was whether the plaintiffs were entitled to recover the sum of 342*l.* 5*s.* 3*d.* or any and what part thereof.

The Divisional Court gave judgment in favour of the plaintiff company.

The defendant appealed

Bigham, Q.C. and *Neville* for the defendant.—The defendant is not liable to pay any of the sums demanded. The payments to which the defendant is asked to contribute were made on contracts prohibited by statute. By 30 & 31 Vict. c. 23, s. 7, it is enacted that "No contract or agreement for sea insurance (other than such insurance as is referred to in the 55th section of the Merchant Shipping Act 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 abovementioned particulars shall be omitted in any policy, such policy shall be null and void to all intents and purposes. By sect. 9 of the same Act it is further enacted that "No policy shall be pleaded or given in evidence in any court, or admitted in any court to be good or available in law or in equity, unless duly stamped; and it shall not be lawful for the said commissioners or any officer of Inland Revenue to stamp any policy at any time after it is signed or underwritten by any person on any pretence whatever." And further, by sect. 13 of the same Act, a penalty of 100*l.* is imposed on any person becoming an assurer unless the insurance is in writing and duly stamped. By 30 & 40 Vict. c. 6, s. 2, the 16th section of the Stamp Act 1670 is applied to sea policies, and such policies may be stamped after execution on payment of a penalty of 100*l.* In the present case no policies were issued, and the contracts were therefore expressly *malum prohibitum*. [Brett, M.R.—Is not the defendant estopped from setting up any such defence?] Not if the contracts are expressly prohibited by statute. [Brett, M.R.—The statute does not prohibit such contracts, but only attaches certain inconveniences to the making of them in such and such a way.] By this means the Revenue is defrauded, because the policies must be stamped; that is provided for in sects. 13 and 14 of 30 & 31 Vict c. 38. Penalties attach to the making of policies and leaving them unstamped, and therefore such contracts as these are distinctly prohibited, and the statute provides a penalty against anyone acting in contravention of its provisions. Such enactments amount to a prohibition upon contracts made otherwise than in accordance with the statute, and therefore no estoppel can arise:

Re London Marine Insurance Association; J. W. Smith's case, 3 Mar. Law Cas. O. S. 280; 21 L. T. Rep. N. S. 97; L. Rep. 4 Ch. 611.

Henn Collins, Q.C. and *K. Digby* for the plaintiff.—The defendant is estopped from saying that the contracts were invalid. It may be that they are invalid, but the defendant cannot set that up. The statute provides a penalty for making unstamped policies, and that penalty is the only one attaching to the act. The statute does not prohibit the making of such contracts as these so as to make it an offence, and so as to prevent any estoppel being set up against it. If that is the true construction of the statute, the defendant is clearly estopped, inasmuch as his acts have misled the society and every member of it. All societies of this sort are based upon the assumption that all members will contribute their share of the losses incurred. They cited

Edwards v. *Aberayron Mutual Ship Insurance Society*, 3 Asp. Mar. Law Cas. 154; 34 L. T. Rep. N. S. 457; 1 Q. B. Div. 563;
Thacker v. *Hardy*, 39 L. T. Rep. N. S. 595; 4 Q. B. Div. 685.

Bigham, Q.C., in reply, referred to

Bensley v. *Bignold*, 5 B. & Ald. 335

Brett, M.R.—I must first express my pleasure at the ability and tact displayed by counsel in arguing this case, and I must then express my disgust at the defence, which is a disgraceful, but I am glad to say, wholly unsuccessful, attempt to back out of a liability. The defendant was a most active member of two mutual insurance societies, the business of the old company being turned over to the new company by resolutions passed to effect that change, and, though the process was carried out a little irregularly, I think the result was that the old company existed until the new one was registered. At any rate, the defendant was an active member of both companies upon those terms, which are always the terms of societies such as these—namely, that if his vessels were lost the other members of the society should pay his losses, and if other members lost vessels he should contribute to pay theirs. The contracts of insurance in such cases are really made between the members, and the society is only the machinery for collecting and paying the various amounts. This defendant dealt throughout as if he and the other members had validly insured their ships, and withdrew vessels and added vessels just as and when it suited his convenience. When the policies came to be renewed, the practice of this society was to do so by means of an unstamped receipt, and it is said that the defendant did not know what was the course of business in this respect; that is an unsupported assertion, and I am satisfied that he, of all the members of the society, was well acquainted with the custom. Losses occur and a call is made, and I think it is certain that he knew that the call was made in respect of losses occurring under renewal or unstamped policies. What does he do? He writes a letter showing quite plainly that, though on other grounds he objects to the amount, he considers

the call valid and binding on him. Thereupon the losses are assessed and calculated and the amounts apportioned to the various members in proportion to their interests in the society, and these amounts are paid by them. The amounts to be paid by the various members are of course calculated upon the assumption that all will pay, and upon that assumption all the insurances had been entered into; and I think it is plain that the defendant by refusing to contribute his share of the losses had misled the other members, both those who had to pay and those who had to receive, and the society representing the members.

Now such conduct on his part is a clear estoppel upon his now setting up that the calls were invalid on the ground that the contracts were illegal, unless such an estoppel is prevented by something else. If the estoppel set up was against a criminal or prohibited contract, there would of course be no estoppel. It is said that the contracts are prohibited by sects. 13 and 14 of 30 & 31 Vict. c. 23. Those are sections dealing with stamps and requiring stamps to be affixed to certain documents; they assume a contract, and what is aimed at is that, whether these documents are stamped or not, certain advantages shall accrue to the Revenue. It was no offence at common law not to stamp such documents, and therefore the Legislature in requiring a stamp is imposing an obligation upon persons which the common law did not impose upon them; and the Legislature, at the time of imposing the burden, also enacts the penalty for not complying with the terms of the enactment. I am of opinion that the consequence of disobedienee under such circumstances is the consequence enacted, and that that is the only consequence. It is not true to say that a person could be indicted for a breach of this Act of Parliament; the only consequence to him would be that he would be liable to the payment of a penalty. I think that is the construction of those sections, and the latter Act to which we were referred—viz., 39 & 40 Vict. c. 6—is fatal to the idea of a crime in such a case, because that statute authorises the officer of the court to affix a stamp, and, on the payment of a penalty, to make this so-called prohibited thing a valid document. There is nothing in sects. 13 and 14 of 30 & 31 Vict. c. 23 prohibiting such contracts; on the contrary they assume them to be good and valid, and only require a stamp. I think that, whether these policies were valid policies or not, the defendant has estopped himself from saying that the insurances were not valid,

Baggallay, L.J.—I am of the same opinion.

Bowen, L.J.—I agree as to the estoppel. I think that the true construction of the Act is, not that the contract is prohibited or illegal, but that penalties are attached to the making of it in any but a certain way.

Appeal dismissed.

Solicitor for the plaintiff company, *R. B. D. Bradshaw*, Barrow-in-Furness.

Solicitor for the defendant, *J. H. Pinckney*, Barrow-in-Furness.

Thursday, June 4, 1885.

(Before Brett, M.R., Baggallay and Lindley L.JJ.)

Harris and Dixon *v.* Marcus Jacobs and Co. (*a*)

Charter-party—"Ready quay berth as ordered by charterer"—Demurrage.

By a charter-party it was agreed that the plaintiffs' vessel, after loading a cargo, should proceed "to London or Tyne Dock to such ready quay berth as ordered by the charterers." Demurrage at an agreed rate per day, and the captain or owners to have an absolute lien on the cargo for all freight, dead freight, and demurrage.

The vessel was ordered by the charterers to a London dock, but upon her arrival there there was no quay berth ready for her reception, and a delay of one day was thereby caused in discharging her cargo.

Held, that, on the true construction of the charter-party, the charterers were bound to name and provide a ready quay berth, and that for a delay caused by their neglecting to do so the plaintiffs were entitled to a lien on the cargo for demurrage, the damages being sufficiently in the nature of demurrage to come within the demurrage clause in the charter-party.

Judgment of Mathew, J. affirmed.

This was an appeal from a judgment of Mathew, J. sitting at Nisi Prius without a jury.

By a charter-party made on June 21, 1882, between the plaintiffs and E. J. Hough and Co., for the charter by Hough and Co. of the plaintiffs' steamship, the *Wimbledon*, it was agreed that the *Wimbledon* should proceed to Tripoli, and there load a cargo of esparto fibre, and when so loaded should proceed "to London or Tyne Dock to such ready quay berth as ordered by the charterer," "cargo to be delivered as fast as steamer can deliver per working day, weather permitting, Sundays, Bank Holidays, Good Friday, and Christmas Day, and accidents excepted." "Demurrage to be at the rate of 30*l.* per running day." "In no case, unless in berth before noon, shall the lay days count before the day following that on which the vessel is in berth at ports of loading and discharging, ready to load or deliver, and notice thereof given in writing." "The captain or owners having an absolute lien on the cargo for all freight, dead freight, and demurrage in respect thereof."

In the month of July 1883 a cargo of esparto fibre was shipped on board the *Wimbledon* at Tripoli, under a bill of lading, by which the cargo was made deliverable to Hough and Co., or their assigns, they paying freight and performing all other conditions as per charter-party.

The charterers ordered the vessel to Millwall Dock, London, and she arrived in that dock on the evening of the 13th Aug. 1883, but no quay berth was there ready for her, and she was never able to get alongside a quay berth until the 16th Aug.

The consequence of there being no quay berth ready for her reception was that a delay was caused in the discharging of the vessel's cargo, in respect of which delay the plaintiffs claimed a lien upon the cargo for two days' demurrage at 30*l.* per day, according to the charter-party. The plaintiffs, therefore, under the Merchant Shipping

(*a*) Reported by A. A. Hopkins, Esq., Barrister-at-Law.

Amendment Act 1882, put a stop-order on the goods by landing them and placing them with the Millwall Dock Company, subject to the lien for 60*l.* for two days' demurrage.

The defendants had bought the cargo from the charterers, and claimed the delivery of it to them as owners, by virtue of the delivery orders given to them by the charterers, under and by virtue of the bill of lading; but in consequence of the stop order they were obliged to deposit the sum of 60*l.* with the Millwall Dock Company in order to obtain delivery of the cargo.

The defendants disputed the plaintiffs' right to the lien, and gave notice, under the statute, to the dock company to retain the 60*l.* on their behalf.

The plaintiffs thereupon brought the action to establish their right to the lien, and to recover the 60*l.* so deposited by the defendants.

The action was tried before Mathew, J. without a jury, and that learned judge held that, according to the true construction of the charter-party the plaintiffs had a lien for demurrage if the charterers delayed the vessel beyond the time required for discharging her, either by failing to provide her with a quay berth or by delay in discharging. He gave judgment for the plaintiffs for 30*l.*, as it appeared from the evidence that the failure to provide a quay berth had only caused a delay of one day. The plaintiffs agreed to accept that amount.

The defendants appealed.

Gully, Q.C. and *Douglas Walker* for the appellants.—The destination of this vessel was a quay berth. Until she reached that destination the lay days would not begin to run, and therefore demurrage could not begin to be reckoned until the vessel was alongside a quay berth in the Millwall Dock, to which dock she was ordered by the charterers. (*Murphy* v. *Coffin*, 12 Q. B. Div. 87.) (*a*) After that time there was no delay, and therefore there is in this case no claim for demurrage proper, and if there is no claim for demurrage proper the plaintiffs have no lien on the cargo. It may be that the plaintiffs have some remedy against the charterers for delaying the vessel, assuming that the true meaning of the clause in the charter-party is that the charterers are bound to provide a ready quay berth; but that is a remedy against them only, and it is not a claim within the demurrage clause of the charter-party, and does not give them a lien on the cargo. [BRETT, M.R.—Demurrage is a term sufficiently elastic to include such a case as this: *Sanguinetti* v. *Pacific Steam Navigation Company*, 3 Asp. Mar. Law Cas. 300; 35 L. T. Rep. N. S. 658; 2 Q. B. Div. 238.] In that case the lay days had begun to run.

W. Baugh Allen and *J. A. Hamilton* for the plaintiffs.—Under this charter-party the charterers were bound to provide a quay berth ready for the vessel upon her arrival at the dock to which she was ordered. That is the very purpose of inserting the word "ready" in the clause. The delay arose in consequence of the charterers' failure to do what they were bound to do to expedite the vessel's discharge. A delay so caused properly gives rise to a claim for demurrage.

Gully, Q.C. in reply.

BRETT, M.R.—The question in this case must be whether, as between shipowner and charterer, a charterer in the position of this defendant would be liable, and, if so, to what extent. The charter-party is a very difficult one to construe, but assistance may be obtained from a consideration of the question. In whose favour is the clause referred to inserted? The clause is express in its terms—namely, that when the vessel is loaded she is to proceed "to such ready quay berth" as ordered by the charterers. The word "ready" there inserted has, as between shipowners and charterers, a definite and express

(*a*) *Dec.* 13, 1883.

(Before MATHEW and DAY, JJ.)

MURPHY *v.* COFFIN AND CO.

THIS was an action for demurrage tried in the Glamorganshire County Court. The County Court judge gave judgment for the defendants, subject to a case for the opinion of the Queen's Bench Division.

The material facts were as follows:—By a charter-party, dated June 23, 1880, the plaintiff's steamship *Foyle* was to load from the charterers' agents at Cardiff, a cargo of coals, and being so loaded, proceed to Dieppe, and deliver the same alongside consignees' or railway wharf, or into lighters or any vessel or wharf where she may safely deliver as ordered; cargo to be loaded, and discharged in forty-eight running hours; demurrage over and above the lying time at 10*s.* an hour. The ship arrived in the dock at Dieppe about 5 p.m. on July 1, and was ordered by the charterers to discharge at the railway wharf. Owing to all the discharging berths being occupied until 7.30 p.m. on July 2, she was not berthed at the railway wharf until then, and was finally discharged about 4.30 p.m. on July 5.

F. J. Church for the plaintiff.

Horne Payne for the defendants.

MATHEW, J.—It is the ordinary and reasonable rule that the lay days under a charter-party do not begin to run until the vessel has arrived at her place of destination. The charter-party here seems to have been framed in the hope of avoiding the questions which have arisen in numerous cases as to the respective rights and liabilities of shipowners, charterers, and consignees, with respect to the discharge of cargo where the place of destination is a dock. By the terms of the charterer, the vessel, having loaded the cargo, is to "therewith proceed to Dieppe, and deliver the same alongside consignees' or railway wharf or into lighters or any vessel or wharf where she may safely deliver as ordered." The place of destination, therefore, is one of these named places which the charterers may order. On the vessel's arrival at Dieppe, she was ordered to discharge at the railway wharf, but, it being occupied by other vessels, there was no berth then vacant for her, and it was not until she obtained one that she was able to discharge. With all respect to the learned judges who decided the case of *Davies* v. *McVeagh* (4 Asp. Mar. Law Cas. 149; 4 Ex. Div. 265; 41 L. T. Rep. N. S. 308), I think it inconsistent with other cases referred to in argument here to-day. It is to be observed that the attention of the court in that case does not seem to have been called to the fact that under the charter-party the High Level Dock was the place of destination. It seems, on the contrary, to have been assumed that the place of destination was the Wellington Dock. In the case of *Strahan* v. *Gabriel*, which is not reported, but is mentioned in *Nelson* v. *Dahl* (L. Rep. 6 App. Cas. 38; 4 Asp. Mar. Law Cas. 392; 44 L. T. Rep. N. S. 381), the facts were the same as in the present case, with the exception that the charterer had no option as to the place of destination. But the fact that in this case an option is given to the charterer does not, in my view, prevent that case from covering this in principle. Here, I am of opinion that the railway wharf was the only place of destination under the charter-party, and that the lay days did not begin to run until the vessel had secured a berth there. The result, therefore, is that the plaintiff must fail, and that our judgment is for the defendants.

DAY, J. concurred.

Solicitors for the plaintiff, *Ingledew, Ince*, and *Vachell*.
Solicitors for the defendants, *Gregory, Rowcliffe, and Co.*

meaning, and the question is, in whose favour that word is inserted. It seems to me that, if the word "ready" had been omitted, the clause would have been a clause entirely in favour of the charterers, giving them power to order the vessel where they liked, but that when the word "ready" is inserted, the clause is then limited thereby in favour of the shipowner—in this respect, that the vessel is not to be kept waiting the convenience of the charterer; and the meaning of the clause, then, is that the charterer shall have power to order the vessel to such a dock and such a quay berth as shall be most to his benefit, but that he undertakes that a quay berth shall be "ready" for her reception. By this clause, therefore, a charterer does bind himself to name a quay berth ready to receive the vessel so soon as she was ready to proceed there, which in this case would be so soon as she entered the Millwall Docks. If so, then there was in this case a default on the part of the charterer because a quay berth was not thus ready to receive her. What, then, in the nature of things, would be the result of that default to the shipowner? The only result would be that his vessel would be detained, and detained by the default of the charterer. For such a detention the parties to this charter-party have agreed that 30*l.* a day shall be paid to the shipowners. Demurrage is the agreed amount of damage to be paid for the delay of a vessel, caused by a default of the charterer either at the commencement or the end of her voyage. It is true that in this case the damage is not strictly demurrage; but it is in the nature of demurrage, and the demurrage clause in a charter-party is elastic enough, in the ordinary construction of a charter-party, to comprise such a damage as this. Therefore the liability of the defendants is to be measured by the same liability as that of the charterers if they had been defendants, and I think, therefore, that the judgment of Mathew, J. was right, and the appeal must be dismissed.

Baggallay, L.J.—I am of the same opinion. I think the word "ready" is introduced into the charter-party in order to protect the shipowner against the possibility of a dock being named by the charterer and no quay berth being found therein ready to receive the vessel. The clause, therefore, imposes an obligation upon the charterer of finding and naming such quay berth.

Lindley, L.J.—I am of the same opinion. As soon as one is satisfied that the word "ready" is a word inserted for the benefit of the shipowners, it follows that the charterers must provide a quay berth, or pay damages for not doing so. It is now said that those damages are not covered by the demurrage clause; but it was pointed out in *Sanguinetti* v. *Pacific Steam Navigation Company* (*ubi sup.*) that a demurrage clause was elastic enough to meet such a case as this. I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs, *Ingledew, Ince,* and *Colt.*
Solicitors for defendants, *Lyne* and *Holman.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Dec. 1 *and* 19, 1885.

(Before Cave and Wills, JJ.)

The Berwick Harbour Commissioners (apps.) *v.* The Churchwardens and Overseers of the Parish of Tweedmouth (resps.). (*a*)

Poor rate—Rateable value—Docks—Tolls—Harbour due—Tonnage duties—Additional duty on vessels using dock.

The Commissioners of Berwick Harbour were empowered, under 48 *Geo.* 3, *c. ci. and* 25 *&* 26 *Vict. c. xxv., to improve the navigation of the harbour, the soil of which was not vested in them, and to construct quays and landing places which were vested in them. In return, they were entitled to receive certain rates and duties of tonnage from all ships using the harbour, and on all goods shipped from or landed on the quays and landing places. By* 35 *Vict. c. ix., they were empowered to make and maintain a wet dock. The duties on goods substituted by the later Act were practically the same as those given by the Act of* 1862, *with the exception that there was a new clause to the effect that additional dues of* 75 *per cent. above the rates specified were to be payable on the completion of the wet dock on goods (except coal, iron, or lime) loaded or discharged in the dock, or exported or imported in vessels of* 100 *tons or upward. By sect.* 66 *of the later Act, the commissioners were empowered to levy a harbour duty of* 3*s.* 4*d. on every ship entering the harbour. By the* 25*th section of the same Act, for the rates and duties given by the Act of* 1862, *were substituted the tonnage dues on ships entering or leaving the harbour, contained in schedule B. This schedule contained two sets of rates, one for vessels under* 100 *tons, the other for vessels of or above* 100 *tons; it also contained the following new clause: "Additional dues to be payable on completion of wet dock. For every ship or vessel entering the wet dock, over and above the before-mentioned dues, for every ton,* 2*d."*

The commissioners were assessed to a poor rate, for the parish of Tweedmouth, as occupiers of the wet dock, at a gross estimated rental of 1380*l.*, *and a rateable value of* 1180*l. In this estimate both the harbour due and the tonnage duties of the vessels using the dock were included by the assessment committee. The commissioners appealed to quarter sessions, and the Recorder was of opinion that both the harbour due and the tonnage duties ought to be excluded when ascertaining the rateable value of the dock, and amended the rate, altering the assessment to a gross estimated rental of* 636*l. and a rateable value of* 530*l.*

The assessment committee appealed by way of a special case.

Held, on the argument of the case, that the decision of the Recorder was right, and that as the dock was not the sole meritorious cause of the commissioners' right to the dues, the harbour due and the tonnage duties were not to be taken into account in ascertaining the rateable value of the dock, but only the additional 2*d. per ton levied on vessels actually entering and using the dock.*

Reg. *v.* The Dock Company at Kingston-upon-Hull (7 *Q. B.* 2) *distinguished.*

(*a*) Reported by W. P. Eversley, Esq., Barrister-at-Law.

This was a case stated for the opinion of the court by the Recorder of Berwick-upon-Tweed; of which the following are the material parts:—

1. The appellants were the commissioners incorporated by the Berwick-upon-Tweed Harbour Act 1862, "An Act for the preservation and improvement of the Pier and Harbour of Berwick-upon-Tweed," and the respondents were the assessment committee of the Berwick-upon-Tweed Union and the overseers of the poor of the parish of Tweedmouth, in the said county.

2. The appellants were assessed to a rate, dated the 20th Nov. 1884, and made for the relief of the poor of the said parish, as "occupiers of the dock-buildings and plant, Main-street, Tweedmouth," at a gross estimated rental of 1380*l.* and a rateable value of 1150*l.*, and were appealing against such assessment.

3. The Harbour of Berwick-upon-Tweed is a natural tidal harbour, navigable for about a mile upwards from its mouth; and down to the year 1808 it was managed by the mayor, bailiffs, and burgesses of the borough, who, for that purpose, levied certain dues on all shipping entering the harbour. In that year an Act of Parliament was passed (48 Geo. 3, c. ci.), whereby certain commissioners were appointed for rebuilding and maintaining the pier, and for erecting such other works as might seem proper and expedient for the preservation and improvement of the said harbour. A new scale of rates or duties on goods and ballast imported into or exported out of the harbour was substituted for those formerly levied, certain rates or duties of tonnage were imposed, and a due of 3*s.* 4*d.* for every vessel coming into the harbour, which was in substitution for the dues levied before the passing of the said Act. Under this Act the said pier was rebuilt and quays and wharves constructed, and other improvements carried out from the funds at the disposal of the said commissioners.

4. In 1862 a further Act of Parliament was passed, 25 Vict. c. xxv., reconstructing and incorporating the said commissioners, vesting in the new body all the property of the former commissioners, and substituting new rates or duties on goods and ballast imported into or exported from the harbour, and new rates or duties of tonnage, and retaining the before-mentioned due of 3*s.* 4*d.* on all vessels entering the harbour.

5. In 1872 a further Act of Parliament was passed, 35 Vict. c. ix., giving the said commissioners power to construct a wet dock, and other works incidental thereto, and new schedules of rates, or dues on goods and on tonnage were substituted for the former ones. The rates and dues levied under the Act consisted of: (1.) Shore dues on goods imported into or exported from the harbour. (2.) Additional dues to be payable on completion of the wet dock; that is to say, all goods loaded or discharged in the dock, or exported or imported in vessels of a registered tonnage of 100 tons and upwards to be charged 75 per cent. above the ordinary rates. (3.) Ballast dues. (4.) Tonnage dues on ships on entering or leaving the harbour, and a due of 3*s.* 4*d.* on every vessel. (5.) Additional dues to be payable on completion of the wet dock; that is to say, 2*d.* per ton on every ship or vessel entering the wet dock, over and above the ordinary tonnage dues, and a further sum at the rate of one halfpenny per registered ton per week after the first six weeks, in the case of any ship remaining in the dock longer than six weeks, unless wind-bound or detained by stress of weather. (6.) Rates for the use of staiths, cranes, tramways, sheds, and weighing machinery.

6. All money received by the appellants from rates or duties, or other sources of income under their said Acts, was required to be applied in the manner and order following, and not otherwise, namely: First, in paying interest accruing due on money borrowed, and providing the requisite annual instalments or appropriations for payment off of the principal thereof, and in paying annuities granted under the said Act of 1872. Secondly, in paying the current working and establishment expenses of the appellants, and their expenses of maintaining and keeping in repair their works.

7. The appellants, accordingly, constructed a wet dock upon the south side of the river, upon a portion of the foreshore which was purchased from the Crown by them. The said dock was opened by them in 1876. This dock and other works connected therewith, under description of "dock-buildings and plant," were, together with the pier or wharf called Carr Rock, the subject of the rate appealed against.

9. Previously to the year 1808 Carr Rock was a natural rock projecting into the river at high water, at the end of which the river, by its scouring action, excavated a deep hole in which vessels could lie afloat. At some time between 1808 and 1862 works were done upon the said rock for the purpose of rendering it more convenient for use as a wharf, and such works had since been, and were still, maintained and repaired by the appellants, and shore dues had been, and were still, received by them in respect of goods landed and shipped at the said rock.

10. No portion of the bed of the harbour was vested in the said commissioners, and they had no ownership in nor occupation of it.

11. The following figures were agreed upon between the parties as representing, for the purposes of this appeal, the receipts and outgoings of the said commissioners:

Tweed Dock.

Actual Receipts.	£	*s.*	*d.*
1. Dock dues, *i.e.*, the 2*d.* per ton, payable by every ship or vessel entering the wet dock, schedule B.	173	7	6
2. Shore dues, being the dues on all goods landed in the dock, under schedule A., including 75 per cent. additional payable on completion of the dock	621	11	2
Ditto, on goods exported	35	18	1
3. Crane dues, schedule C.	23	11	8
4. Tonnage dues, schedule B., being the tonnage dues on ships entering or leaving the harbour, irrespective of their entering or not entering the dock, but received from vessels which did enter the dock	986	17	9
5. Harbour duty, schedule B., being a duty of 3*s.* 4*d.* payable by every ship or vessel coming into the harbour, irrespective of the dock, but received in respect of vessels which did enter the dock	17	0	0
Actual Outgoings attributable exclusively to the Dock.			
1. Wages of dock attendants and engineer at steam crane, oil for lamps, and other stores	318	3	0
2. Dredging at entrance, average	250	0	0

Note.—No allowance in these figures was made for costs of management, tenants' profits, renewals, or interest on borrowed money.

	£	s.	d.
For renewals, if chargeable, the amount to be taken at	250	0	0
If it was held that the tonnage dues above mentioned ought to have been taken into account in estimating the rateable value of the dock, it was further agreed that there should be further deducted as an annual outgoing against the dock a proportion of the general charges of the harbour, such as clerk and harbour master's salary, lighthouse expenses, steam tug, &c., &c., and allowance for renewals (pier &c.)	350	0	0
Rates included in this sum.			

Note.—It was open to the appellants to contend that in addition to the items above specified, deductions or allowances should be made in respect of interest on borrowed money and tenants' capital and profits.

Carr Rock.

Receipts.

1. Amount actually received for "tonnage dues," schedule B., from vessels moored at this berth	347	5	4
2. Ditto, harbour duty, ditto...	15	10	0
3. Amount received from shore dues on goods landed at this berth, schedule A. ...	230	9	4
Ditto, shipped at ditto	73	3	6

Outgoings.

Repairs	15	0	0
Proportion of general harbour expenses, including rates	80	0	0
Renewals	50	0	0

Note.—No allowance made in these figures for tenants' capital or profits.

12. The appellants, in the years 1874, 1875, and 1876, borrowed from the Public Works Loan Commissioners, upon mortgage upon their said property, the sum of 35,000*l.*, of which sum there was at the date of the appeal, owing to the said commissioners the principal sum of 31,590*l.* 4*s.* 7*d.* and the sum of 240*l.* 12*s.* interest thereon, at the rate of 3½ per cent. per annum.

13. The appellants have borrowed the further sum of 25,000*l.*, which loan is secured by bonds issued by them upon the security of the whole of the property, tolls, and dues of the appellants, and of such last-mentioned sum there is still owing by the appellants the sum of 23,280*l.*, the interest and charges upon which for the year 1885 amount to the sum of 1166*l.* 4*s.*

14. On behalf of the appellants, it was contended: first, that, in order to obtain the rateable value of the property rated, the tonnage dues and harbour duty were not to be taken into consideration, because they were not earned in respect of the said dock or Carr Rock, but were payable by all vessels entering the harbour, whether using the said dock or not, and that, therefore, the sums of 986*l.* 17*s.* 9*d.*, 17*l.*, 347*l.* 5*s.* 4*d.*, and 15*l.* 10*s.* should be omitted from the list of receipts; secondly, that the said commissioners were entitled to deduct from the annual receipts interest on the capital necessary to carry on the business and tenants' profits.

15. On behalf of the respondents it was contended that tonnage dues and harbour duty paid to the appellants upon all vessels which actually used the wet dock or the Carr Rock were to be taken into consideration in ascertaining the said rateable value; that the appellants were restricted under the said Acts in the application of their income, and therefore were not entitled to any deduction from the gross value of their said property in respect of tenants' profits, and that payments of the interest upon moneys borrowed by them were in the nature of payment of rent, and not to be deducted from the gross value, and that the appellants were not overrated.

16. The recorder decided, 1st, That in ascertaining the rateable value of the appellants' said property the tonnage dues and harbour duty received by them as aforesaid, were not to be taken into consideration. 2nd. That the appellants were not entitled to reduction in respect of interest on tenants' capital or tenants' profits. 3rd. That the appellants were overrated; and by his order allowed the appeal and altered the said assessment, in accordance with such decisions, to a gross estimated rental of 636*l.* and a rateable value of 530*l.*

If the court should be of opinion that the said order was correct in point of law, it was to be affirmed. If the court should be of opinion that the said order was not correct in point of law, it was to be quashed.

J. L. Walton (*R. Cunningham Glen* with him) for the assessment committee.—The order of the recorder ought to be quashed, and the original rating of the appellants restored. The charge of 2*d.* per ton on vessels entering the commissioners' dock ought not to be the only basis for rating their premises; the dues levied upon the tonnage of the vessels entering the harbour should also be added, because were it not for this wet dock, where they may easily unload their cargoes, ships would not enter the harbour at all. In 1862 the Carr Rock was turned into a quay, under a private Act of Parliament which vests the property in the new commissioners, and sect. 66 gives them power to take rates and duties on the tonnage, and generally new powers which the old commissioners did not possess. Sect. 25 of that Act substitutes for the rates and duties on goods given by the Act of 1862 the shore dues on goods imported into or exported from the harbour, as set out in schedule A., which contains a new clause to the effect that additional dues are to be payable on the completion of the wet dock, and goods (with certain exceptions) loaded or discharged in the dock, or exported or imported in vessels of a registered tonnage of 100 tons or upwards, are to be charged 75 per cent. above the rates specified. The same section also substituted for the rates and duties under the Act of 1862 the tonnage dues on ships on entering or leaving the harbour, contained in schedule B., which schedule contains a new clause to the effect that additional dues are to be payable on the completion of the wet dock, for every ship or vessel entering the wet dock, over and above the beforementioned dues, for every ton 2*d.* These dues are to be paid on completion of the wet dock, and it has been completed, consequently the tonnage dues and harbour duties on all vessels entering the harbour ought to be taken into account in estimating the rateable value of the dock, because the increase in these dues is to be attributed to the expense incurred by the commissioners in making the wet dock. It was the object of the Legislature to induce the commissioners to make this dock. Next, the whole of the tonnage dues and the duties paid by ships actually entering the wet dock ought to be brought into the account, and not merely the additional 2*d.* per ton:

Reg. v. *Kingston-upon-Hull Dock Company*, 7 Q. B. 2; 14 L. J. 114, M. C.

The present case cannot be distinguished from the *Hull Dock case*, and there the tonnage dues on ships using the dock were taken into account in ascertaining the rateable value of the dock. If the vessels use this wet dock their tonnage dues are earned in respect of it, and are therefore properly rateable. The commissioners may get profits from the use of the dock by increasing the tonnage dues and letting the additional 2*d.* per ton go, and so escape rateability of the dock altogether.

Ridley (*F. D. Blake* with him) for the commissioners.—It was intended by the Legislature in this case that all vessels coming within the mouth of the Berwick Harbour should pay both a harbour duty and a tonnage duty, and when the wet dock was completed and ready for use, the commissioners were empowered to make an additional charge of 2*d.* per ton on every vessel making use of the dock. This additional duty is alone to be taken into account, and not the harbour and tonnage duties, and certainly not the harbour duty of 3*s.* 4*d.* per vessel. The *Hull Dock case* (*ubi sup.*) is distinguishable from the present one. There was no harbour or dock at Hull before those made under statutory sanction, and no additional duty was imposed upon vessels making use of the docks, and certain duties were made payable to the company making the docks, for every ship coming into or going out of the harbour, basin, or docks within the port of Hull. But in the present case there has been an additional duty imposed on vessels using this wet dock, and this additional duty has been rightly taken into consideration. The difference between the two cases is shortly this: in the *Hull Dock case* there were no other dues receivable by the dock owners, except the tonnage dues on ships entering the harbour and port, and if these had been subtracted there would have been nothing left to be taken into consideration; but in the present case that is not so. *The Harbour Commissioners for New Shoreham* v. *The Overseers of Lancing* (L. Rep. 5 Q. B. 489) is in point.

Walton, in reply, cited

Cory v. *Bristow*, 32 L. T. Rep. N. S. 797; L. Rep. 10 C. P. 504.

Cur. adv. vult.

Dec. 19.—Cave, J.—The only point raised for our consideration upon the argument of this appeal was whether, in assessing the Berwick Harbour Commissioners to the poor rate in respect of their dock buildings and plant, both tonnage dues and harbour duty, received by them under the Harbour Act 1872, are to be taken into account. It appears that in the early part of this century the pier, formerly built to shelter the Berwick harbour from storms, had gone to decay whereby the harbour was much exposed to storms, and the navigation thereby was much impeded by sand banks and other obstructions, and in danger of becoming altogether unfit for the purposes of trade. The Legislature thereupon interposed, and by 48 Geo. 3, c. ci., appointed commissioners with power to improve the navigation of the harbour by deepening it and removing obstructions, and to make and erect jetties, capstans, and other engines, and posts for preserving the navigation and rendering it more safe and commodious, and to make quays and docks for the better accommodation of the shipping and the trade of the port. The commissioners were also empowered (sect. 31) to make regulations for the navigation of the harbour and of all vessels resorting thereto, and for the loading and delivering of goods, and for the quays under their authority, and for the laying of goods thereon. For the purpose of providing funds for the undertaking the commissioners were empowered (sect. 33) to demand and collect (*a*) certain rates or duties on goods and on ballast imported into or exported from the harbour, and also (*b*) certain rates or duties of tonnage on ships using the harbour for trading purposes or shelter. By sect. 42 the commissioners were empowered to let these rates and duties, either from year to year or for any term not exceeding seven years. This Act was repealed by the Berwick Harbour Act 1862, and from the recitals contained in the later Act it appears that the commissioners had re-erected the pier and kept it in repair, and had erected a lighthouse and quays, wharves, jetties, and offices, and had provided steam-tugs, buoys, moorings, anchors, and dolphins, and had kept in repair the previously existing quays and wharves, and had removed various sand banks and other obstructions and annoyances to the navigation within the harbour. By sect. 14 the commissioners were empowered to erect all such piers and other works authorised by the repealed Act as had not then been erected, or as the commissioners thereafter might deem it necessary to erect, and to maintain the piers and works already erected or thereafter to be erected. By sect. 49 they were empowered to dig and remove sand, gravel, or clay, in any part of the harbour; and by sect. 50, to dredge any banks, shoals, or channels within the harbour for the better maintaining and improving the navigation thereof, and to remove any other obstructions and impediments. By sect. 66 they were empowered to demand and collect certain rates and duties on goods and on ballast imported into or exported from the harbour, and also certain rates or duties of tonnage, which latter were only one half the amount of those given by the earlier Act, except the harbour duty, which in each case was 3*s.* 4*d.* on every ship coming into the harbour. The soil of the harbour was not vested in the commissioners by either Act. So far the case is comparatively free from difficulty. The commissioners were empowered to improve the navigation of the harbour, the soil of which was not vested in them, and received certain rates and duties of tonnage from all ships using the harbour. They were also empowered to construct quays and landing places, which were vested in them, and received certain rates or duties on all goods shipped from or landed on these quays and landing places. The tonnage rates and duties were granted for, and arose from, the use of the land covered with water which the commissioners did not occupy. The rates and duties on goods were granted for, and arose from, the use of the quays and landing places; and consequently, where the commissioners were the occupiers of the quays and landing places, these rates and duties on goods were in the nature of profits arising from the land so occupied, and were rateable.

We have, however, to deal with the new conditions introduced by the Act of 1872, which, by sect. 4, empowered the commissioners to make and maintain a wet dock, an embankment below

high-water mark, a quay or quays, an entrance into the dock, a gangway, and an access to the quay, and all necessary subsidiary works. They were also empowered (sect. 20) to purchase fisheries in the harbour, with a view to the improvement of the navigation of the harbour or the increase of the accommodation available for vessels frequenting the same. By sect. 25 there were substituted for the duties on goods given by the Act of 1862 the shore dues on goods imported into or exported from the harbour set out in schedule A. which are very much the same as those contained in the Act of 1862, except that schedule A. contains this new clause: "Additional dues to be payable on completion of wet dock. Goods (except coal, iron, or lime) loaded or discharged in the dock, or exported or imported in vessels of a registered tonnage of 100 tons or upwards, to be charged 75 per cent. above the rates specified." Sect. 25 also substituted for the rates and duties of tonnage given by the Act of 1862 the "tonnage dues on ships on entering or leaving the harbour," contained in schedule B. In that schedule there are two sets of rates, one for vessels under, the other for vessels of or above, 100 tons. The rates for vessels under 100 tons are practically the same as those imposed by the Act of 1862. Those for vessels of or above 100 tons are 2*d.* a ton higher than the other rates, but still lower than the rates imposed by the Act of 1808. Schedule B. also contains the following new clause: "Additional dues to be payable on completion of wet dock. For every ship or vessel entering the wet dock, over and above the beforementioned dues for every ton 2*d.*"

Under these circumstances, it was contended that the tonnage dues and harbour duty on all vessels entering the harbour should be taken into account in estimating the rateable value of the dock, because the increase in these dues (which, however, only existed in the case of vessels of or above 100 tons) must be attributed to the expense incurred by the commissioners in making the wet dock. To this, however, it seems to be a sufficient answer that the commissioners were by the Act of 1872 empowered to execute other works in addition to the wet docks, and that these dues were authorised to be taken immediately on the passing of the Act, and before the wet docks were completed or even begun, and might, it would seem, be taken although the wet docks never were made at all. I am therefore of opinion that these rates and duty are unconnected with the wet docks, and cannot be said to have been earned by them. Secondly, it was urged that, assuming the tonnage dues and duty on all ships could not be taken into account, yet at least the whole of the tonnage dues and the duty paid by ships actually entering the wet dock should be brought into the account, and not merely the additional 2*d.* per ton. The word "additional" it was said showed that the totality of the dues in the case of a vessel entering the wet dock must be treated as a single and indivisible payment, and the whole of it must be deemed to be earned by the wet dock. For this position the case of *Reg.* v. *Hull Dock Company* (7 Q. B. 2) was cited. In that case certain dues were given to the dock company in respect of the charges and expenses they had been at in making the docks, and these dues were of the same amount and were equally payable whether the ships entered the docks the property of the company, or merely entered the harbour which was not the property of the company without going into the docks at all. The docks were the sole meritorious cause of the company's right to the dues, and it was held that the dues were not the less earned by the docks where the ship actually entered the docks because the ship must have paid the same amount if it had not entered the docks at all. In the present case the wet dock is not the sole meritorious cause of the commissioners' right to the dues. On the contrary, the commissioners have executed and maintain works in the harbour by which ships using the harbour are directly benefited; and seeing that all ships entering the harbour pay a certain and uniform rate whether they enter the wet dock or not, while those which enter the wet dock pay an additional rate of 2*d.* a ton from which those who do not enter it are free; and seeing that the former rate was always payable even before the wet dock was made, while the additional rate only came into operation when the wet dock was completed, the inference is, in my judgment, irresistible that the additional 2*d.* a ton alone is earned by the wet dock, and that the dues which all vessels pay alike whether they enter the wet dock or not are earned by the works carried out and maintained by the commissioners in the harbour, and cannot be taken into account in rating the docks, because they are not earned by the wet dock, nor is the wet dock in any way the meritorious cause of them. In my judgment the decision of the recorder was correct, and must be affirmed.

Wills, J.—I am of opinion that the recorder was right in excluding from the receipts to be taken into consideration in assessing the commissioners in respect of the docks those portions of the tonnage dues under schedule B. of the Act of 1872 which are not the "additional dues" at the end of that schedule, and also the harbour duties of 3*s.* 4*d.* per vessel. Since the year 1808 harbour duties have been charged under Acts of the years 1808, 1862, and 1872 respectively upon all ships making use of the harbour; but, as the soil of the harbour did not belong to the commissioners, and any accommodation afforded by them through the pier, quays, and wharves which they owned was paid for by the import and export duties (which in the Act of 1872 are called the shore duties), harbour duties were never treated as increasing the value of the occupation of the premises belonging to the commissioners, and therefore were not carried into the rating. This seems to have been a correct practice according to the second branch of the decision in *Reg.* v. *Kingston-upon-Hull Dock Company* (7 Q. B. 2). In 1872 the Act under which dues are now collected was passed. It recited that the commissioners were desirous of undertaking the construction of a wet dock and other works for the improvement of the harbour and the accommodation of vessels resorting thereto, and for facilitating communication with the southern shore of the harbour, on being authorised to do so, and on the maximum rates and duties leviable by them being increased. The Act accordingly empowered them (sect. 4) to make a wet dock, to make an embankment below high-water mark from Berwick Bridge to the landward end of Carr Rock Pier, and certain quays and

wharves, and empowered them to take under schedule A.: 1. Shore duties which (with a few very trivial alterations, and with the introduction of a very few articles not included in the former schedule) were identical with the then existing shore duties. 2. Additional dues to be payable on the completion of the wet dock, and which were payable on goods loaded or discharged in the dock, or on goods exported or imported in vessels of a registered tonnage of 100 tons or upwards. And under schedule B.; 1. Tonnage duties on vessels entering or leaving the harbour and not using the wet dock, which for small vessels were the same as the then existing tonnage duties, but which for vessels of or above 100 tons register were materially higher than those leviable under the Act of 1862. 2. A harbour duty of 3*s.* 4*d.* per vessel, which was the old duty, except that an additional sum was now made chargeable upon vessels remaining in the harbour more than six weeks. 3. Certain dues in certain events upon boats, which were the same as the existing dues. 4. Additional tonnage dues at the rate of 2d. per ton, to be payable on completion of the wet dock, in respect of every vessel entering the wet dock. There were then two classes of tonnage dues; 1. Upon vessels which did not enter the docks, which were substantially and with two very trivial exceptions the same as the old harbour duties. 2. Upon vessels which did enter the docks, the latter being 2*d.* per ton higher than the former. By the preamble of the Act the rate upon a vessel which entered the docks, and which was the aggregate of the harbour duty proper, and the 2*d.* per ton payable on entering the wet dock is treated as one rate, and the additional dues are spoken of as effecting an increase of the maximum rates theretofore chargeable, which were harbour dues simply and not as a new and separate charge.

If this form of expression were to be taken as conclusive, it would follow that the whole of the larger rate chargeable upon a vessel entering the dock must be treated as one and indivisible, and it would follow, further, that either the whole of it must be included, or, in calculating the earnings of the dock, the whole of it must be rejected as an element in arriving at their rateable value. But I think this would be a pedantic adherence to mere phraseology, and would ignore the facts and the real substance of the enactment. The commissioners do works of two classes—they construct an embankment ending with the landward end of Carr Rock Pier and certain quays, and also a wet dock. By the first of these they improve the facilities for landing goods, and as a compensation they get, in the case of vessels of or above 100 tons, largely increased landing charges in case such vessels use the quays or the Carr Rock Pier without entering the dock. As to these no question arises. As a compensation for constructing the wet docks they get, besides the increased shore duties on all goods in respect of which the docks are used, the additional tonnage duty of 2*d.* per ton on vessels which enter the dock. The substance of this enactment seems to be, that the commissioners get the old tonnage dues which were chargeable before the dock was constructed, and which still attach the moment the vessel crosses the outer boundary of the harbour, and which are therefore irrespective of the use of the dock, and beyond that get a fresh tonnage charge upon every vessel which uses the dock. The result is to show that the charge which in the preamble is called one is in effect two, namely, the old tonnage dues which were strictly harbour dues, and which have never been taken into account in the rating of the commissioners, and the dues for the use of the dock. I see no reason why the portion of the aggregate duty referable to the mere use of the harbour, and which the provisions of the Act make it easy to separate from the total, should assume a different character because the dock (which may or may not be used, and which is of no benefit to the ship making no use of it) is allowed to earn an additional 2*d.* per ton if used. The duty of 3*s.* 4*d.* upon each ship entering the harbour is wholly unaffected by the construction of the dock, and is not increased in the case of a vessel entering the dock, and I think it retains its old character, and has been properly excluded from the calculation by the recorder.

It is said, however, that such a decision conflicts with the case of *Reg.* v. *The Kingston-upon-Hull Dock Company*, cited above. I do not think so. In that case the charge was upon every vessel entering the harbour basin or docks; and it was the same in each of the three cases. The court held that when once a vessel did enter the docks, the rate was earned by the docks, and was therefore to be taken into account in assessing their earnings. It is difficult to see how any other conclusion could be arrived at. It was not possible to dissect the charge and say that a portion was paid as a mere harbour due, inasmuch as the only definite measure of the harbour due afforded by the Act, if subtracted from the total charge would have left nothing as the earnings of the docks. I think, therefore, that as to the dock the learned recorder was right as to both the classes of dues which he excluded. As to the Carr Rock, it seems to me that the facilities which were afforded by the property of the commissioners were paid for by the shore dues. It is not contended that the soil of the bed of the harbour adjoining the Carr Rock where vessels lie alongside it belongs to the commissioners. It is said, however, that it earns the tonnage dues, which are of the character of harbour dues, by having a mooring post to which vessels make fast. I cannot think that this is anything more than a facility for the landing of goods. It would be going a long way to say that it was enough to turn the harbour dues, which would be payable by a vessel whether it made fast to the mooring post or depended upon its own anchor, into the earnings of the pier or landing place; and I think that in respect of the Carr Rock also the decision of the learned recorder was right. The order of the sessions will, therefore, be confirmed with costs.

Appeal dismissed; order of sessions affirmed.

Solicitors for the appellants, *Flux* and *Leadbetter* for *S. Sanderson* and *X. B. Weatherhead*, Berwick-upon-Tweed.

Solicitors for the respondents, *E. Bromley*, for *Willoby* and *Peters*, Berwick-upon-Tweed.

Thursday, Nov. 26, 1885.

(Before MATHEW and SMITH, JJ.)

HALL *v.* BILLINGHAM AND SONS. (*a*)

The Chain Cables and Anchors Act 1874 (37 *&* 38 *Vict. c.* 51), *ss.* 3 *and* 4—*Contract for sale of chain cable—Implied warranty that it has been tested—British and foreign ships.*

By the 3rd section of the Chain Cables and Anchors Act 1874 (37 *&* 38 *Vict. c.* 51) *a maker of or dealer in anchors and chain cables shall not sell or contract to sell, nor shall any person purchase or contract to purchase, for the use of any British ship, any chain cable or any anchor exceeding in weight* 168 *pounds, which has not been previously tested and stamped in accordance with the Chain Cables and Anchors Acts* 1864 *to* 1874, *and any person who acts in contravention of this section shall be deemed to be guilty of a misdemeanour; and by the 4th section every contract for the sale of a chain cable shall, in the absence of an express stipulation to the contrary (proof whereof shall be on the seller), be deemed to imply a warranty that the cable has been before delivery tested and stamped in accordance with the Chain Cables and Anchors Acts* 1864 *to* 1874.

Held, that the 4th section applies to all contracts for the sale of chain cables, and is not confined by the words of the 3rd section to contracts for the sale of chain cables for the use of British ships.

THIS was a rule obtained on behalf of the defendants calling upon the plaintiff to show cause why the verdict given and judgment entered for him at the hearing of the action in the Grimsby County Court should not be set aside and judgment entered for the defendants on the ground that the defendants did not give any implied warranty to the plaintiff that a chain cable purchased by him from the defendants had been tested in accordance with the Chain Cables and Anchors Acts 1864 to 1874.

The action was brought by John Parker Hall against the defendants Jesse Billingham and Sons to recover the price paid by him to them for sixty fathoms of chain cable.

On the 11th Jan. 1884 the plaintiff sent to the defendants a written order for "sixty fathoms tested chain $\frac{7}{8}$ short link."

On the 18th Jan. the defendants forwarded to the plaintiff a chain cable, and also an invoice, one of the items of which was:

60 Fms. short link cable tested, 27cwt. 2qrs. 7lbs., at 10*s.* 11*d.*, 15*l.* 0*s.* 10*d.*

With the invoice was inclosed the following certificate:

Cradley Heath Chain and Anchor Testing Works, near Brierley Hill, 18th Jan. 1884.—We do hereby certify having proved by our machine for Mr. J. P. Hall an iron short link chain $\frac{7}{8}$-inch diameter, 60 fathoms long, to the proof strain of 9 tons 2½cwt. Admiralty strain, and delivered the same to order, weighing 27cwt. 2qrs. 7lbs. Proof mark "B. and S.," No. 1884, stamped on the end link.—THOMAS MELLERSHIP, Superintendent.

The Board of Trade surveyor having refused to pass the chain, the plaintiff brought an action against the defendants to recover its price, at the hearing of which it was admitted that the chain cable was not tested and stamped, except as stated in the above-mentioned certificate, whereupon the learned County Court judge found that the contract between the plaintiff and defendants must, by virtue of the 4th section of the Chain Cables and Anchors Act 1874 (37 & 38 Vict. c. 51) be deemed to imply a warranty on the part of the defendants that the cable had been before delivery tested and stamped in accordance with the Chain Cables and Anchors Acts 1864 to 1874, and gave judgment for the plaintiff.

The defendants then obtained a rule calling upon the plaintiff to show cause why the judgment entered for him should not be set aside and judgment entered for the defendants on the ground that the contract was not within the 4th section of the Chain Cables and Anchors Act, 1874, and must not be deemed to imply the above-mentioned warranty, and this was the rule which now came on for argument.

The statute 27 & 28 Vict. c. 27, entitled "An Act for regulating the proving and sale of chain cables and anchors," provides;

2. The Lords of the Committee of Privy Council appointed for the consideration of matters relating to trade and foreign plantations, hereafter in this Act called the Board of Trade, may from time to time grant to any corporation, public body, or company, person, or persons erecting any proving establishment, apparatus, and machinery suitable for the testing of chain cables or anchors, licence to test chain cables and anchors under this Act, and the board may suspend or revoke any licence so granted if the board shall see occasion; and the expression "tester" in this Act applies to every corporation, public body, or company, person, or persons to whom such licence shall be granted, so long as such licence continues in force: provided that such a licence shall not be granted in any case unless and until the proving establishment, apparatus, and machinery erected have been inspected by an inspector appointed as by this Act provided, and have been certified by him as proper and efficient for their purposes.

11. From and after the 1st July 1865 it shall not be lawful for any maker of or dealer in chain cables or anchors to sell or contract to sell for the use of any vessel any chain cable whatever, or any anchor exceeding in weight one hundred and sixty-eight pounds, unless such chain ceble or anchor shall have been previously tested and duly stamped in accordance with the provisions of this Act; and if any person acts in contravention of this provision, he shall for every such offence, upon a summary conviction for the same before a justice of the peace, or in Scotland before any sheriff, justice, or magistrate, be liable to a penalty not exceeding fifty pounds.

The Chain Cable and Anchor Act 1871 (34 & 35 Vict. c. 101) provides:

3. After the commencement of this Act, the Board of Trade shall not grant originally, or by way of renewal to any corporation, public body, company, person, or persons, except the corporations and public bodies mentioned in the first schedule to this Act, or authorised in that behalf as hereinafter mentioned (*a*), any licence under the principal Act for the testing of chain cables and anchors.

7. After the commencement of this Act, a maker of or dealer in chain cables or anchors shall not sell, consign, or contract to sell or consign, nor shall any person purchase or contract to purchase any chain cable whatever, or any anchor exceeding in weight one hundred and sixty-eight pounds, which has not been previously tested and duly stamped in accordance with the provisions of the principal Act and this Act, unless the same is sold, contracted for, consigned, and purchased as and for old iron.

Every person who acts in contravention of this section shall be liable on summary conviction before two justices of the peace, or in Scotland before any sheriff or sheriff substitute to a penalty not exceeding fifty pounds.

Sect. 9 repealed sect. 11 of the Act of 1864.

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

(*a*) By Order in Council.

The Chain Cable and Anchor Act 1874 (37 & 38 Vict. c. 51) provides:

3. After the commencement of this Act, a maker of or dealer in anchors and chain cables shall not sell or contract to sell nor shall any person purchase or contract to purchase for the use of any British ship, any chain cable or any anchor exceeding in weight one hundred and sixty-eight pounds which has not been previously tested and stamped in accordance with the Chain Cables and Anchors Acts 1864 to 1874. Any person who acts in contravention of this section shall be deemed to be guilty of a misdemeanour.

4. Every contract for the sale of a chain cable shall, in the absence of an express stipulation to the contrary (proof whereof shall lie on the seller), be deemed to imply a warranty that the cable has been before delivery tested and stamped in accordance with the Chain Cables and Anchors Acts 1864 to 1874. In case of dispute, the proof of such testing and stamping shall be on the seller.

J. H. Etherington-Smith, for the plaintiff, showed cause.—This contract is clearly within the 4th section of the Act of 1874, which says that every contract for the sale of a chain cable shall be deemed to imply a warranty that the cable has been before delivery tested and stamped in accordance with the Chain Cables and Anchors Acts 1864 to 1874. [He was stopped by the Court.]

Johnston Watson for the defendants, in support of the rule.—The 4th section of the Act of 1874 must be read with the 3rd section, and applies to British ships only. The provisions of the Acts of 1864 and 1871 applied to all sales of chain cables, and in those Acts there is no mention of implying a warranty that the cable has been tested. It was then considered that the provisions, although sufficiently stringent for foreign ships, were not so for British ships, and consequently by the Act of 1874 it was provided by the 3rd section that to sell an untested cable or anchor for the use of a British ship should be a misdemeanour, and, by the 4th section, that the contract for the sale of a chain cable should be deemed to imply a warranty that it has been previously tested. The 3rd and 4th sections are intended to be read together, and apply only to sales of anchors and chain cables for the use of British ships. [Smith, J.—The Act of 1871 prohibits the sale of any chain cable whatever without testing, and is still unrepealed. If the sale of an untested cable is prohibited under a penalty, why should not the 4th section of the Act of 1874 apply to all sales of chain cables, and imply a warranty in all cases?] It has been the general practice of makers of and dealers in chain cables and anchors since the Act of 1874 to supply chain cables tested in accordance with the Acts to British ships, and privately tested cables to all other ships, and this is a reasonable construction of the words of the Act. Further, the plaintiff has lost the right of relying upon the breach of warranty. The plaintiff is a dealer in chain cables, and this cable was consigned to him and received by him in 1884. He knew that there were two methods of testing chains, viz., the Board of Trade test and the private test, and the certificate forwarded with the invoice informed him that this cable had been privately tested, which was the only test he stipulated for in giving the order. With that knowledge he retained the chain for sixteen months. This conduct therefore amounts to an acceptance of the goods, which precludes him from suing on a breach of warranty.

Mathew, J.—I am of opinion, in this case, that the judgment of the learned County Court judge is right and must be upheld. By the 4th section of the Chain Cables and Anchors Act 1874 it is provided that every contract for the sale of a chain cable shall, in the absence of an express stipulation to the contrary (proof whereof shall lie on the seller), be deemed to imply a warranty that the cable has been before delivery tested and stamped in accordance with the Chain Cables and Anchors Acts 1864 to 1874. Now, in what way are we to construe this section? The language is perfectly plain, and, as far as I see, there is no inconsistency in it—nothing which is at all repugnant to common sense. Following, therefore, the ordinary rules of construction, it is, I think, the clear meaning of the section that every contract for the sale of any chain cable whatever—and therefore this contract for the sale of the chain cable, the price of which the plaintiff is seeking to recover—must be deemed to imply a warranty that it has been tested before delivery in accordance with the Chain Cables and Anchors Acts. We are asked, however, to say that the section does not apply to every contract for the sale of any chain cable whatever, but only to every contract for the sale of a chain cable for the use of a British ship, on the ground that the previous section is so restricted, and that the two sections ought to be read together. I do not at all see the force of this contention. I think, indeed, that the 3rd section throws considerable light on this. It was, in my opinion, so restricted because it imposes a very serious penalty on those supplying British ships with anchors and cables which have not been previously tested; but I do not see any reason why the fourth section, which does not impose any penalty of the kind, should be so restricted, and I think that the intention of the 4th section was to prevent the sale of any chain cables whatever without their having been previously tested. I think, therefore, that the learned County Court judge was right, and that this rule must be discharged with costs.

Smith, J.—I am entirely of the same opinion.

Rule discharged, with costs.

Solicitor for the plaintiff, *John Cotton*, agent for *W. Brown*, Great Grimsby.

Solicitors for the defendants, *Robinson* and *Dees*.

Dec. 8 *and* 9, 1885.

(Before Huddleston, B. and Wills, J.)

Hedges and Son (apps.) *v.* The London and St. Katharine Docks Company (resps.). (*a*)

"Vessel"—Barge solely propelled by oars—The London and St. Katharine Docks Act 1864 (27 *&* 28 *Vict. c. clxxviii.*), *ss.* 100, 101, 102—*The Harbours, Docks, and Piers Clauses Act* 1847 (10 *&* 11 *Vict.* 27)) *ss.* 3 *and* 4.

A barge simply propelled by oars is not a "vessel" within the meaning of section 101 *of the London and St. Katharine Docks Act* 1864, *notwithstanding that the Harbours, Docks, and Piers Clauses Act* 1847 *incorporated therewith, provides that the word "vessel" shall include ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise, and a*

(*a*) Reported by J. Smith Esq., Barrister-at-Law.

barge owner is therefore not liable under that section to a penalty for leaving his barge in the docks without any person on board.

This was a case stated by J. Rowland Phillips, Esq., a stipendiary police magistrate, under the statute 20 & 21 Vict. c. 43, as amended by the Summary Jurisdiction Act (42 & 43 Vict. c. 49), for the purpose of obtaining the opinion of the court on a question of law which arose before him as hereafter stated.

Case.

1. At the Police-court, West Ham-lane, Stratford, in the county of Essex, on the 26th March 1885, a complaint was preferred by George Reader, who was acting as agent of the London and St. Katharine Docks Company, hereinafter called the respondents, against George Hedges and Sons, hereinafter called the appellants, charging them under the London and St. Katharine Dock Company Act 1864 (27 & 28 Vict. c. clxxviii), s. 101, for that a certain vessel, to wit, the barge *Grace*, was on the 12th March 1885 left in the Royal Albert Docks without any person on board, of which vessel the appellants were the owners.

2. The said complaint was on the 30th March 1885 heard by me, when it was proved and I found that at 8 a.m. on the 12th March 1885 the said vessel, to wit, the barge *Grace*, was left in the Royal Albert Docks without any person on board, and that the appellants were the owners of the said vessel, to wit, the barge *Grace*, and that it was simply propelled by oars.

3. It was contended on the part of the respondents under the London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii.), s. 101, and under the Harbours, Docks, and Pier Clauses Act 1847 (10 & 11 Vict. c. 27), s. 3, which is incorporated in the former Act, that the barge *Grace* was a vessel within the meaning of the above-mentioned Acts of Parliament, and that the fact of the vessel, to wit, the barge *Grace*, having been left in the Royal Albert Docks without any person on board rendered the master or owner of the said vessel, to wit, the barge *Grace*, liable to forfeit a sum not exceeding 5*l.*

4. It was contended on the part of the appellants that the barge *Grace* was a barge simply propelled by oars, and it was admitted that at the time of the alleged offence there was no person on board the said barge, and it was contended that the said barge *Grace* was not a vessel within the meaning of the 101st section of the London and St. Katharine Docks Act 1864, and the 3rd section of the Harbours, Docks, and Pier Clauses Act 1847 (10 & 11 Vict. c. 27), and that the appellants as owners of the said barge *Grace* were therefore not liable to the penalties mentioned in the said 101st section of the London and St. Katharine Docks Act 1864.

5. I being of opinion that the barge *Grace* was a vessel within the meaning of the above Acts of Parliament as charged in the summons, convicted the appellants in a penalty of 2*l.*, and ordered them to pay 2*l.* 3*s.* 6*d.* costs.

The question for the opinion of the Court is, whether the barge *Grace* is a vessel within the meaning of both the above-mentioned Acts of Parliament. If so then my conviction was right, but if the barge *Grace* is not a vessel within the meaning of the said Acts, then my conviction was wrong.

The Harbours, Docks, and Pier Clauses Act 1847 (10 & 11 Vict. c. 27), s. 3, is, so far as material, as follows:

3. The following words and expressions in both this and the special Act, and any Act incorporated therewith, shall have the meanings thereby assigned to them, unless there be something in the subject or context repugnant to such construction, that is to say:

The word "vessel" shall include ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise.

The 3rd section of the London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii.) incorporates the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27) with that Act, and the 4th section provides that "the several words and expressions to which by the Acts in whole or in part incorporated with this Act meanings are assigned, have in this Act the same respective meanings, unless excluded by the subject or context."

The 100th, 101st, and 102nd sections of the London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii.), are as follows:

100. The dock master shall have full power and authority to order all ships and vessels entering the docks, basins, locks, cuts, or entrances of the amalgamated company, or any of them, to be dismantled in such manner as he thinks proper and safe for the vessel so entering, and for the prevention of accident or mischief to other ships and vessels, or to lighters, or craft, or to the docks and works; and during the time of every ship's delivery or when discharged her cargo, to have such quantity of ballast on board or deadweight in her hold as he judges requisite; and no ship or vessel shall be allowed to enter the docks, basins, locks, cuts, or entrances, unless she be so dismantled, nor shall any ship or vessel therein be unladen so far as to render her insecure through the want of weight in her hold, or of such quantity of ballast on board as the dock master thinks expedient; and the dock master shall have full power and authority to give directions for topping, bracing, or striking yards, masts, and taking in running bowsprits, and for having substantial hawsers and tow lines and fasts to the dolphin mooring craft, buoys, mooring-posts, or rings, and also to regulate the equipment, rigging, and lading of all ships and vessels in the docks, basins, locks, cuts, or entrances, as he thinks necessary.

101. In case the dock master judges any act or proceeding in the rigging, lading, or equipment of any ship or vessel injurious to the ship or vessel, or to other ships or vessels lying in or entering or departing from the docks, basins, locks, cuts, or entrances, or to the docks and works, he shall give notice to the master of the ship or vessel, or to some other person on board, and appearing to be in charge of the ship or vessel, to discontinue and alter the same, and in case the master shall not, according to the direction, suspend or alter the act or proceeding immediately after notice so given for that purpose, or if any ship or vessel be left in the docks, basins, locks, cuts, or entrances, without any person on board, the master or owner of the ship or vessel shall, for every such offence, forfeit not exceeding five pounds; and the owner of the ship or vessel shall also be answerable for all the damage or injury sustained by any other ships or vessels or by the amalgamated company through neglect thereof.

102. At any time after the expiration of twenty-four hours after the time when any lighter, barge, or like craft, enters any dock, basin, cut, lock, or entrance of the amalgamated company, the dock master or his assistant may, by notice in writing, require the removal of the same out of the docks and works, and the notice may be served by being delivered to the owner, or left for him at his then usual or last known place of abode or business, or by being forwarded by post, directed to him at his then usual or last known place of abode or business, or at his address as appearing on the craft, or if

not appearing thereon, then as appearing by the books of the master, wardens, and commonalty of watermen and lightermen of the River Thames; and if within twelve hours after the delivery or sending of the notice the craft is not removed as thereby required, the owner thereof shall for every such default forfeit not exceeding forty shillings, and a further sum of twenty shillings for every twenty-four hours or less period after the first twenty-four hours during which the delay continues; and at any time after the expiration of twenty-four hours after the delivering or sending of the notice the dock-master or his assistant may remove the craft out of the docks and works and leave the same safely moored, and the owner or master of the craft shall pay to the company the reasonable expense of the removal, and the same may be recovered as damages or a penalty.

Finlay, Q.C. (with him *Cranstoun*) for the appellants.—A barge simply propelled by oars is not a vessel within the meaning of the 101st section of the London and St. Katharine Docks Act 1864, and the magistrate was wrong in convicting the appellants under this section for leaving their barge in the docks without any person on board. It is true that the Company's Act of 1864 incorporates the Harbour Docks and Piers Clauses Act 1847, and that that Act interprets the word "vessel" as including "ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise," but it is contended that the context precludes that meaning from being assigned to the word "vessel" in the 101st section. The 100th section begins by giving the dock master power to dismantle all ships and vessels entering the docks. The word "dismantle" is not applicable to lighters and barges. The object of this "dismantling" is to prevent accidents to "other ships and vessels, or to lighters, or craft, or to the docks and works." Here if the word "vessel" included lighters, the words "or to lighters and craft" would have been necessary, but a distinction is clearly drawn for the purposes of this section between "vessels and lighters." The section then proceeds to make regulations as to ballast, which again do not apply to barges, and the section concludes with giving the dock master authority to give directions for topping, bracing, or striking yards, masts, and taking in running bowsprits, and for having substantial hawsers and towlines, and also to regulate the equipment, rigging, and lading of all ships and vessels in the docks. None of these provisions apply to barges. To this section the 101st section is clearly ancillary, prescribing the course to be taken by the dock master in exercising the authority bestowed by the 100th section. The first provision is that "in case the dock master judges any act or proceeding in the rigging, lading, or equipment of any ship or vessel injurious to the safety of the ship or vessel, or to other ships or vessels" in the docks, he shall give notice to the master or some other person on board, and appearing to be in charge to alter it. Again, the words "rigging, lading, or equipment of a ship or vessel" clearly do not apply to a barge solely propelled by oars. Then follows the provision we are dealing with, that in case the master does not alter the injurious proceeding after notice, and if any ship or vessel be left in the docks without any person on board, that is, to whom notice may be given to alter the proceeding, then the owner shall forfeit a penalty. All these provisions have to do with the dismantling and unlading of vessels, and clearly do not apply to barges. This argument is fortified by the 102nd section, which, ships and vessels having been dealt with in the preceding sections, proceeds to deal with lighters and barges specifically and by name. It provides that after twenty-four hours after the time when any lighter, barge, or like craft enters the docks the dock master may require by notice in writing its removal, and it is to be observed that there is no provision as to serving the notice on the person on board and appearing to be in charge, the statute on the contrary appearing to contemplate it as a probable occurrence that a barge might be left without any person on it, and consequently providing for sending the notice by post to certain addresses mentioned in the section. The section further contemplates that barges may be left without anyone in charge for some time, and gives the dock master power after twelve hours to remove them at the expense of the owner. As this section therefore clearly contemplates barges being left without any person in charge, it is clearly repugnant to it that the word "vessel" in the 101st section, which provides for fining the owner of a vessel left without anyone in charge, should include a barge simply propelled by oars. Further, the Legislature has not usually included barges under the term "ship or vessel:"

The Bilboa, 1 Mar. Law Cas. O. S. 5; 3 L. T. Rep. N. S. 338; Lush. 149;
Everard v. *Kendall*, 3 Mar. Law Cas. O. S. 391; 22 L. T. Rep. N. S. 408; L. Rep. 5 C. P. 428.

In *Everard* v. *Kendall*, Keating, J. says: "It is remarkable that whenever a definition is given in any Act of Parliament of 'ship' or 'vessel' barges have invariably been excluded;" and Montague Smith, J. says: "What, then, is the meaning of 'ship?' It is conceded that in the Court of Admiralty the jurisdiction exercised in respect of collisions is confined to cases of vessels not propelled by oars alone. I can see no intention on the part of the Legislature to alter the jurisdiction of the Court of Admiralty as to the definition of 'ship.' In the 24 Vict. c. 10, the preamble of which declares it to be passed for the purpose of extending the jurisdiction of the Court of Admiralty, 'ship' is defined in sect. 2 to mean 'any description of vessel used in navigation not propelled by oars.'"

Clarke, Q.C. (with him *Grain*), *contra*.—It was the intention of the Legislature that the 101st section should apply to all vessels, including barges, and there is nothing in that section or in the context repugnant to this construction. The Harbours, Docks, and Piers Clauses Act 1847, which is incorporated by this Act, assigns (ss. 3 and 4) a distinct meaning to the word vessel, making it include ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise, and it will require very strong affirmative considerations, which do not exist here, to induce the court to hold that the word "vessel," in the 101st section, has a different meaning from that assigned to it by the interpretation clause. On the contrary, all the arguments of expediency and the proper construction of the sections require that barges should come within the operation of the 101st section. The distinction between the 100th and 101st sections and the 102nd consists only in the two former sections containing provisions applicable to all vessels including barges, whereas the provisions of the 102nd are applicable to lighters and barges only. It is further of the highest importance to the dock

company that the 101st section should be held to apply to barges, since that section has always been applied to them, and without the section it will be difficult for the company to control the large number of barges entering the docks. The 101st section provides against the mischief of vessels being left unattended in the docks, and this mischief is greater in the case of barges than of any other vessels, as they are more likely to be cut adrift by the departure of ships or other barges to which they may be moored. The magistrate was right in deciding that a barge is a vessel within the meaning of the 101st section.

Finlay, Q.C., in reply, was not called upon.

Huddleston, B.—The question we have to decide in this case is whether the barge *Grace* belonging to the appellants, a barge simply propelled by oars, is a "vessel" within the meaning of the 101st section of the London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. lxxviii.), which provides that if any ship or vessel be left in the docks, basins, locks, cuts, or entrances without any person on board, the master or owner of the ship or vessel shall, for every such offence, forfeit not exceeding five pounds. Under this section the appellants have been convicted, but we are of opinion that the magistrate was wrong in so convicting them. The whole question turns on the interpretation we put upon the different sections of the Acts. If it were a mere question of the meaning of the word "vessel" in the Act, we should be bound to say that this barge was a vessel within its meaning, for the 3rd section of the Act incorporates the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), which, by its 3rd section, provides that "the word 'vessel' shall include ship, boat, lighter, and craft of every kind, and whether navigated by steam or otherwise." If, therefore, it were a mere question as to whether a barge were a vessel under this Act, that would be conclusive; but the 4th section of the Act provides that "the several words and expressions to which by the Acts in whole or in part incorporated with this Act meanings are assigned, have in this Act the same respective meaning unless excluded by the subject or context." Now, when we come to look at the 100th and 101st sections of the Act, we think it is clear that the Legislature never contemplated that a barge should be considered a vessel within the meaning of those sections, and I think that to hold that it was a vessel within their meaning would be repugnant to the context and circumstances contemplated by those sections.

Now, in dealing with the 100th and 101st sections, it is obvious at once that they must be taken together, and that it was the intention of the Legislature to give to the dock master certain powers with reference to ships and vessels, and to order alterations which he might judge to be requisite to be made. Notice of these alterations has to be given to some definite person or persons on board, and then to ensure the carrying out of the dock master's orders, a punishment is provided for disregard of them. Then there is also an ancillary provision, that if a ship or vessel be left in the docks without any person on board, the owner shall be liable to a fine in just the same way as if the notice had been given and disregarded. Now, this is not, as Mr. Clarke has endeavoured to put it, a specific enactment that if a vessel is without any person on board the owner is to be liable to a fine, but it is coupled to the previous part of the section by the word "or," that is to say, if there is no one on board on whom a notice can be served then the owner shall be fined. Now, what do the full powers given to the dock master by these sections deal with? He may order all ships or vessels to be dismantled so as to prevent damage to themselves or to other vessels or the docks. The word "dismantled" has to my mind a very clear significance, and then going on through the section we find these words, "during the time of every ship's delivery," "ballast," "topping, bracing or striking yards and masts," "taking in running bowsprits," "substantial hawsers and tow lines," "equipment, rigging and lading." These things are not applicable to barges. Then by the 101st section, if the dock master thinks any act or proceeding in rigging, lading, or equipment of a ship or vessel injurious to its own safety or the safety of the other ships, notice is to be given to the master, or failing the master to some person on board and appearing to be in charge. If there is no one at all on board then the master is fined. It seems to me that this is not a penalty for having no one on board, but a provision ancillary to the other provisions of the section, that if a notice is sent and there is neither the master nor any person in charge on board to serve it upon, then it shall be an offence to have no person on board. Nor do I think that there is any error on the part of the Legislature in omitting lighters and barges from the earlier sections, because when we look at the 102nd section we find that they had before them the difference between barges and other vessels, and made numerous distinctions between the two cases. Under these circumstances, I think it is clear that it was not the intention of the Legislature that a barge of this description should be brought within the operation of this section, and I think that the magistrate was wrong in convicting the appellants. The case of *Everard* v. *Kendall* has been quoted, but I do not think that, turning as it does on the construction of another Act of Parliament, it affects this case. Mr. Clarke has argued that this section has always been acted upon as including barges, and that if we hold that barges are not included within it the company will find a difficulty in dealing with them; but I think that it will be found that the company has ample power to make bye-laws to meet the case, and such a consideration ought not to influence us when upon the whole scope and context it is perfectly clear that it was not the intention of the Legislature that a barge solely propelled by oars should be considered a vessel within the meaning of this 101st section.

Wills, J.—I am of the same opinion. It is impossible to read these three sections together without seeing that they deal with the powers which the dock master is to have with reference to ships and vessels, and with reference to lighters, barges, and like craft, a distinction being made between the two classes, and the provisions relating to ships and vessels applying to ships and vessels, and the other provisions applying to lighters, barges, and the like craft. Where ships and vessels are mentioned, then we find the pro-

visions are applicable to the things which we ordinarily mean when we use those words, namely, large craft with rigging and equipment. Amongst these provisions we find one which says that where it is necessary to discontinue or alter the manner of effecting the dismantling, discharging, lading, or equipment of any vessel, a notice which is clearly to be immediately acted upon is to be given to some person on board, and the intention evidently is that some person must be left on board to receive it, and therefore a penalty is provided if a master leaves his vessel in the docks without some person on board to receive such a notice. With regard, however, to lighters and barges and small craft which have no rigging, and to which there is therefore no necessity to give any notice regulating their dismantling or equipment, we find in the 102nd section a totally different scheme, and if it becomes necessary to remove them, and no one can be found belonging to them to remove them, then notice is to be sent by post or in some other way to the owners, and if they do not appear or send someone within twelve hours, then the dock master may move them at their expense. This interpretation appears to me to be perfectly clear and intelligible, and I think that the language of the sections is perfectly consistent with it. All we have to do is to place the clause of the 101st section, which we are considering—that is, "or if any ship or vessel be left in the docks, &c., without any person on board"—into a parenthesis, and then the whole clause is intelligible. It seems to me that Mr. Finlay has shown that the contrary interpretation is repugnant to the context, which shows that it was not the intention of the Legislature to include barges in the operation of these sections. Mr. Clarke, however, has argued that although barges may not be affected by the parts of the sections dealing with dismantling and equipment, because those things are not applicable to them, yet there is no reason for excluding them from the operating of the other parts which deal with lading and discharging, since barges are particularly liable to be overladen and so sunk, and it is very necessary that the dock master should have authority to prevent this. I do not think that, where a section is dealing so evidently with the lading and discharging of ships, a portion which may possibly apply to both can be taken out and said to apply to barges. Barges too, it is said, may very well come within the clause providing for the prevention of injury to other ships and vessels. I do not think that it is likely that a small barge having no rigging, and out of the way of rigging, was intended to be included in this provision. These are the only two passages where it is suggested that there is any necessity for a wider interpretation of the sections.

I do not, however, think there is any necessity for the construction, because, under the 83rd section of the Harbours, Piers, and Docks Clauses Act 1847, the dock company has, I think, ample powers to make bye-laws to meet the case. Mr. Clarke argues that there is no power under that section to make a bye-law to keep some person on board; but I think that, however that may be, there is ample power to make bye-laws sufficient to prevent the mischief contemplated in these sections. Enactments of this kind are always meant to be construed with reference to the habits of the people engaged, and I do not see that there is any necessity to keep a man on board every lighter at all times. I cannot help thinking that the Legislature would be slow to give such a power directly, because one cannot ignore the common knowledge of mankind, and such a necessity would involve the reconstruction of large numbers of these barges for the purpose of making a cabin for the person on board. On the questions, therefore, submitted to us I think that the sections, if carefully considered, leave no doubt that the appellants' barge is not a vessel within their meaning, and that the conviction is therefore wrong. *Conviction quashed.*

Solicitors: For the appellants, *J. A.* and *A. E. Farnfield*; for the respondent company, *C. O. Humphreys* and *Sons.*

Friday, Dec. 11, 1885.

(Before MATHEW and SMITH, JJ.)

HUTH AND CO. *v.* LAMPORT AND ANOTHER.

GIBBS AND SON *v.* LAMPORT AND ANOTHER. (*a*)

General average—Security for payment—Form of bond—Deposit.

When there has been a general average loss incurred, and the contributions have not been ascertained, the shipowner is not entitled to make delivery of the cargo conditional upon the consignees signing an average bond in the form known as the Liverpool average bond, and making a deposit of 10 per cent. on the estimated value of their goods in the joint names, as provided by the bond, of the defendants and their average adjuster, or in the names of the defendants alone, or in the name of the average adjuster alone. A bond in such a form is unreasonable.

SPECIAL CASE, the material part of which was as follows:—

The plaintiffs were severally consignees of cargo shipped on board the steamship *Thales* at Buenos Ayres for Liverpool. The defendants were agents of the owner of the *Thales*, but for the purposes of the case were to be taken as owners of the ship.

The vessel grounded on her homeward voyage near Bridport, and part of the cargo was jettisoned.

When the vessel arrived at Liverpool the defendants claimed a lien on the residue of the cargo for general average losses and other charges, and refused to deliver the goods to the plaintiffs unless they would sign an average bond in the form known as the Liverpool average bond, and make a deposit of 10 per cent. on the estimated value of their goods, in the joint names, as provided by the bond, of the defendants and their average adjuster, or in the names of the defendants alone, or in the name of the average adjuster alone.

The object of having the deposit in one of these forms was to give the shipowner the power of drawing from time to time for his disbursements.

The plaintiffs, Huth and Co., refused to comply with these conditions, but offered to sign the London form of bond and to pay 10 per cent. on the estimated value of the goods into the joint account either of themselves and the defendants,

(*a*) Reported by H. D. BONSEY, Esq., Barrister-at-Law

or of the nominees of both. The defendants would not accept the London form of bond, and thereupon the plaintiffs paid under protest a deposit of 10 per cent., and the goods were delivered to them.

The actions by Huth and Co. was brought to recover the sum paid under protest, as above mentioned, and damages for the detention of the goods, and it was found in the case that if the defendants were not entitled either to the Liverpool form of bond, or to a deposit in any one of the three ways mentioned, one of which they required, or to have 10 per cent. paid before they delivered the goods, then their refusal to deliver them was unjustifiable.

In the action brought by Gibbs and Son the goods were delivered up on an application made in the second action under Order L., r. 8, on payment into court of 10 per cent. on the value to meet the lien which the defendants claimed in order to assert their right to a deposit on the terms above mentioned.

A bond similar to the London bond has been in use for seventy or eighty years, and the deposit, where any has been required, has always been made in the joint names of the shipowner and consignee. When the voyage ends in Liverpool the practice for about fifteen years has been for the shipowner to tender and for the consignee to sign the Liverpool form of bond, and for a deposit to be made in accordance with it, but the signing of the bond is not in all cases insisted on.

The difference between the London and the Liverpool form of bond lies in the provisions as to deposits, and in the special provisions in the Liverpool form for referring all questions of general average, or other charges arising out of the voyage, to the average adjuster of the shipowner, with a clause as to appeal from his decision. Both bonds contain an agreement that the deposit shall be held as a security for the general average and particular charges, but by the Liverpool bond it is further agreed that the parties in whose names the amount stands may pay thereout such sums as they shall from time to time consider ought to be paid to the owners or master on account of money actually disbursed by them or him, or to enable them or him to pay off and discharge claims which form part of the general average and other expenses.

The question for the opinion of the court was, whether the defendants were liable to the plaintiffs to any and what extent.

Cohen, Q.C. (*Barnes* with him), for the plaintiffs, was stopped.

Finlay, Q.C. (*French*, Q.C. with him) for the defendants.

The following cases were cited:

Simonds v. *White*, 1 B. & C. 805;
Crooks v. *Allan*, 41 L. T. Rep. N. S. 800; 4 Asp. Mar. Law Cas. 216; 5 Q. B. Div. 38;
The Norway, Br. & Lush. 377.

MATHEW, J.—I think our judgments must be for the plaintiffs in each case. The case has not been stated with a view of having the question determined whether, according to the custom of merchants and the law of England, a shipowner is entitled in every case where there is a claim for general average to retain the cargo till payment of the amount has been made. It might be necessary to decide that formally if any such right had been asserted in this case by the owner of the ship. Mr. Finlay referred to the matter, but he did not argue it at any length, and he appeared to me to say that when the time came, and when the proper case arose, he would be prepared to assert that the authorities show that such a right as I have referred to exists. The only cases he was able to call our attention to were the cases of *Simonds* v. *White* and *Crooks* v. *Allan* (*ubi sup.*). It is sufficient to say that neither of those authorities, in my judgment, justifies him in the argument that any such right exists; but in this case it is perfectly clear that no such right was insisted upon. If it had been a question of lien, and if the shipowner had called upon the consignee to deal with his lien, the question of amount would immediately have presented itself, and a more onerous and difficult position for a shipowner to place himself in cannot be imagined. He would be bound to give up the goods upon having a proper tender made to him. In order to enable a proper tender to be made he would be bound to give the necessary information to the consignee; and then he would run very great risk of asking too much or too little, a risk to the other consignees in the one case, and a risk to the particular consignee in the other. But no such position was taken up by the shipowner. (*a*) What the shipowner insisted upon was, upon the bond being in the Liverpool form. He was willing to take security, but he insisted that it should be in the form of what has been called the Liverpool bond.

The question presented to us is whether that bond is such a security as a shipowner might reasonably demand. It appears to me perfectly clear to be unreasonable in two particulars; first, in insisting upon making the average adjuster the arbitrator in the first instance, with a complicated arrangement for appeal from his decision; and secondly, in insisting upon payment over of the deposit money, either to the owner of the ship himself, or to the owner and some average adjuster, so that the money is placed for a time entirely out of the reach of the consignee of the goods; and that money, according to the terms of the bond, may be drawn upon by the owner of the ship, where the money is deposited in his name, or by the owner of the ship and the average adjuster whom he could name, in the event of it being deposited in the names of both of them. That form of average bond is, to my mind, unreasonable. The form of the London bond, which we are told has existed for seventy or eighty years, appears to be a reasonable one; and I should be glad if the result of our decision were to induce the shipowners of Liverpool to have recourse to the greater experience and wisdom of their London brethren, and adopt that form of bond. Our judgment must be for the plaintiffs.

SMITH, J.—I am of the same opinion.

Judgment for the plaintiffs.

(*a*) Mr. Justice Mathew seems to throw some doubt upon the right of the shipowner to exercise a lien upon the cargo for general average, and to retain it until payment of his claim. This expression of opinion is not necessary to the decision, and whatever doubts may have been created by it, they appear to be set at rest in favour of the shipowner by the decision of the Court of Appeal in this case: see *post*; and L. Rep. 61 Q. B. Div. 735.—ED.

Solicitors for the plaintiffs, *Waltons, Bubb,* and *Johnson.*

Solicitors for defendants, *Pritchard* and *Son* for *Thornley* and *Cameron,* Liverpool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Friday, Dec. 4, 1885.

(Before BUTT, J.)

THE HERCULES. (*a*)

Collision—Default action—Sale of foreign ship—Affidavit verifying cause of action—Marshall's report.

The court will not order the sale of a foreign ship in a default action in rem merely on the affidavit to lead the warrant and the report of the marshal alleging that it is desirable the ship should be sold, but it further requires an affidavit verifying the cause of action and stating that no appearance has been entered on behalf of the ship.

THIS was a motion by the plaintiffs in a collision action *in rem* instituted against the owners of the foreign ship *Hercules.* The *Hercules* had been arrested on the 29th Oct. 1885, but no appearance had been entered by the defendants.

The plaintiffs had filed the usual affidavit to lead the warrant of arrest. The marshal had made a report, stating the *Hercules* to be a Norwegian ship of 683 tons net; to have been built in 1841; to be in a very bad state of repair; to be not worth more than 200*l.*; and alleging that it was desirable that she should be immediately sold, in order to prevent further expenses being incurred, and that she was every day deteriorating in value.

Dr. *Stubbs,* for the plaintiff, in support of the motion.—The court should, in the present circumstances, exercise its power of ordering a sale. [BUTT, J.—The only materials before me are the marshal's report and the affidavit to lead the warrant of arrest. Surely you should have an affidavit verifying the cause of action?] There is enough before the court to warrant an order for sale.

BUTT, J.—I will not order the sale of a foreign ship merely on the marshal's report and the affidavit to lead the warrant. That affidavit merely says there has been a collision, and that damage has been occasioned to the plaintiffs. However, in this case, I will accede to the application, subject to the plaintiffs filing in the Registry an affidavit verifying the cause of action, and stating that no appearance has been entered on behalf of the ship.

Solicitors for the plaintiffs, *Stokes, Saunders,* and *Stokes.*

Tuesday, Dec. 15, 1885.

(Before BUTT, J.)

THE COLONSAY. (*a*)

Practice—Necessaries action—Intervention of mortgagees—Sale of ship—Marshal's expenses.

Where mortgagees intervened in a necessaries action which was discontinued by the plaintiff before coming to trial, the Court directed that the marshal's fees occasioned by the sale of the ship, which was ordered on the application of the mortgagees, should be borne by the mortgagees, who had received the proceeds of the sale, and for whose benefit it had been made.

THIS was an appeal from the assistant registrar's report by interveners in a necessaries action *in rem* against the ship *Colonsay.*

The action was instituted by the plaintiff to recover the value of necessaries supplied by him to the *Colonsay,* and the vessel was arrested therein. The owners put in an appearance, but did not give bail or deliver pleadings. Subsequently Messrs. Kelly and Co. intervened as mortgagees, and took possession of the ship under their mortgage. The material-man, alleging that he had a prior claim to the mortgagees, refused to release the vessel. The mortgagees then obtained an order for the sale of the ship, and under this order she was sold. The marshal's fees and expenses amounted to 370*l.* 1*s.* 10*d.*

The vessel was bought by the interveners, agent. Two days prior to the trial, the plaintiff having discontinued his action, judgment, with costs, was, by his consent, entered for the mortgagees. The mortgagees' claim exceeded the proceeds of sale, which were paid out to the mortgagees, less the expenses occasioned by the sale, with the exception of the marshal's possession fee, which the assistant registrar was of opinion should be paid by the plaintiff. The mortgagees now appealed against the decision of the assistant registrar charging them with the costs of the sale.

Bucknill, Q.C. for the mortgagees.—It was the plaintiff, who has failed in his action, and who necessitated the sale of the ship. He should have discontinued his action earlier. As he has been unsuccessful in his claim, he should be ordered to pay the costs of the sale. The sale was for the benefit of all parties, and it is, therefore, unreasonable that the interveners, who have succeeded in establishing their right, should be visited with the costs.

Sir *Walter Phillimore* for the plaintiff.—It was at the instance of the mortgagees that the ship was sold. The continuance of the action by the plaintiff is no reason why the plaintiff should pay the expenses of the sale, as the ship must have been sold in any event. The mortgagees were not forced to apply to have the ship sold. They were people of substance, and could have given bail for the amount of the plaintiff's claim. It cannot be said that the plaintiff improperly continued his action. He required to be satisfied that the mortgagees had a valid title, and, on being so satisfied, he at once discontinued the action.

Bucknill, Q.C. in reply.

BUTT, J.—This is a case in which the plaintiff claimed a sum of money alleged and sworn to be due to him for necessaries supplied to the ship *Colonsay.* There was no denial of this claim, and it must therefore be taken that he had a perfectly good claim against the shipowners and equally against the ship herself, subject, of course, to any prior lien that might be in existence. The defendants, now appearing, have intervened as mortgagees, and they set up their mortgage, which, if valid, takes priority over the claim for necessaries.

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs. Barristers-at-Law.

Inasmuch as the amount of the mortgagees' claim exceeds the value of the ship, their lien completely ousts the lien for necessaries. The ship was arrested by the plaintiff in the necessaries suit, and afterwards the mortgagees having intervened applied for an order for sale. That application was granted, and the ship was sold. Certain expenses were occasioned by that sale, and the question is, whether those expenses are to be paid by the plaintiff or by the mortgagees.

Now, it is perfectly true that a vessel under arrest may be in such a condition that it is desirable for all parties she should be sold, or, as an alternative, she may be bailed. In this case it was perfectly competent for the mortgagees to have bailed this ship. It is not contended that their pecuniary position was such as to preclude their doing so. The assistant registrar has disallowed the mortgagees the marshal's fees and charges, except the possession fees, on the ground that the ship was sold on their application, and apparently for their benefit. I am now asked to say that they, with the proceeds in their pockets, are not to pay the expenses of the sale. It is very true that the material-man has been defeated by the mortgagees, but I cannot think any blame is to be attributed to him for instituting the suit. I think that the mortgagees, acting as reasonable men, should either have given bail or have paid the expenses of the sale themselves. I must therefore decline to accede to this application, and I uphold the assistant registrar's decision.

Solicitors for the plaintiff, *Wynne, Holme,* and *Wynne.*

Solicitors for the interveners, *Phelps, Sidgwick,* and *Biddle.*

Dec. 22, 1885, *and Jan.* 11, 1886.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE HARVEST. (*a*)

Collision—Bye-laws for the Regulation of the Port of Newcastle-upon-Tyne 1884, *art.* 20.

Where a vessel entering the Tyne from the southward, in order to get upon a course to take her up the river on the north side, across from south to north of mid-channel at from two to three cables lengths outside the south pier she thereby infringes Bye-law 20 *for the Regulation of the River Tyne, directing that vessels shall be brought into the port to the north of mid-channel; and she ought, on the proper construction of the bye-law, to have crossed from south to north at some considerable distance outside the pierheads.*

THIS was a collision action *in rem* instituted by the owners, master, and crew of the late steamship *Stainsacre* against the owners of the steamship *Harvest* to recover damages occasioned by a collision between the two vessels on the 30th Nov. 1885. The defendants counter-claimed.

The facts alleged on behalf of the plaintiffs were as follows: Shortly before 11 p.m. on the 30th Nov. 1885 the steamship *Stainsacre,* of 705 tons register, bound on a voyage from Howdon Dock in the Tyne to Copenhagen with a cargo of coals, was proceeding down the Tyne; the weather was fine and clear, but dark, the wind was about W.N.W., and the tide was first quarter ebb. When the *Stainsacre* had passed the Herd Buoy, and was approaching the south pier, she was well over to the south of mid-channel, and was making about five to six knots. Her regulation lights were duly exhibited and burning brightly, and a good look-out was being kept. In these circumstances the red light of a vessel, which afterwards proved to be the steamship *Harvest,* was seen about three points on the starboard bow of the *Stainsacre,* and about one mile distant, but no masthead light was visible. The *Stainsacre was* kept heading E. ½ S. on the course she had been steering to leave the harbour, until she had cleared the end of the south pier, when her helm was put hard-a-port, but shortly afterwards two short blasts of a steam whistle were heard from the *Harvest,* which was then, for the first time, discovered to be a steamship by those on board the *Stainsacre.* Immediately on getting this signal, the helm of the *Stainsacre* was put hard-a-starboard, and two short blasts of her whistle blown, and immediately afterwards, the red light of the *Harvest* alone continuing open, the engines of the *Stainsacre* were put full speed astern and her whistle blown three short blasts. But the *Harvest* came on fast, and with her stern and starboard bow struck the starboard side of the *Stainsacre* a little abaft the fore rigging, doing the *Stainsacre* great damage, in consequence of which she sank in five minutes after the collision.

The plaintiffs charged the defendants (*inter alia*) with breach of arts. 2 and 3 of the Regulations for Preventing Collisions at Sea, and also with improperly approaching the entrance of the Tyne in such a direction that the *Harvest* was g brought into the port to the south of mid-channel, and neglecting to comply with Bye-Law 20 for the Regulation of the Port of Newcastle-upon-Tyne.

The facts alleged on behalf of the defendants were as follows: Shortly before 11 p.m. on the 30th Nov. 1885, the steamship *Harvest,* of 881 tons register, bound on a voyage in ballast from Terneuzen to the Tyne, had arrived off the entrance to the Tyne, and was proceeding to enter the river, having the two leading lights in line on a bearing of W. ¾ N. At such time her regulation masthead and side lights were duly exhibited and burning brightly, and a good look-out was being kept on board of her. In these circumstances those on board the *Harvest* observed the masthead and port lights of a steamer, which proved to be the *Stainsacre,* leaving the river very nearly ahead, and a little on the port bow withal, and distant about one mile. The helm of the *Harvest* was ported a little, and the *Stainsacre* brought about a point on the port bow of the *Harvest,* and the vessels were in a position to pass port side to port side. As the *Stainsacre* approached she appeared to be steering so as to pass in too close proximity to the *Harvest,* and the helm of the *Harvest* was ported a little more, when suddenly the *Stainsacre* shut in her red light and opened her green. The helm of the *Harvest* was thereupon put hard-a-port and one short blast blown on her steam whistle, and immediately afterwards, as the *Stainsacre* was seen to be steering across the bows of the *Harvest,* rendering a collision imminent, the engines of the *Harvest* were stopped and reversed full speed astern, and three short blasts blown on her steam whistle; but the *Stainsacre* came on at a high rate of speed, and, before the *Harvest* could gather stern

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

way, the *Stainsacre*, with her starbourd side about amidship, struck the stem of the *Harvest*. It was also alleged by the defendants that just before the collision, and when the vessels were about a quarter of a mile apart, some sudden gusts of wind or other unavoidable circumstance extinguished the masthead light of the *Harvest*, which had up to that time been burning brightly.

Bye-law 20 for the Regulation of the Port of Newcastle-upon-Tyne is as follows:

Every steam or other vessel (whether towing any other vessel or not, or being towed) shall, unless prevented by stress of weather, be brought into the port to the north of mid-channel, and be taken out of the port to the south of mid-channel.

Sir *Walter Phillimore* (with him *Gorell Barnes*) for the plaintiffs.—The defendants are to blame for not complying with the regulations as to lights. The absence of the masthead light misled the plaintiffs, and contributed to the collision. The defendants have also infringed art. 20 of the Tyne rules in coming into the harbour as they did.

F. W. Raikes (with him *Stokes*) for the defendants.—The extinguishing of the light was due to circumstances beyond the control of the defendants, and occurred when the vessels were so close that it could not have misled the plaintiffs. The *Harvest* was being brought into the harbour to the north of mid-channel, and was therefore complying with the Tyne rules. Moreover, the bye-laws have no application, as the collision occurred outside the piers.

Sir *W. Phillimore* in reply.

BUTT, J.—There is no difference of opinion at all between the view which the Elder Brethren have taken of this matter and my own. The collision, which occurred between two steamships, the one leaving and the other entering the Tyne, took place on the night of the 30th Nov., somewhere about 11 p.m. The Tyne Commissioners have by authority issued certain regulations for governing and directing the navigation of their port, and the regulation which is most material to the present case is No. 20. The preceding rule directs vessels to keep on their own starboard side of mid-channel in navigating narrow waters, and to pass port side to port side. Rule 20 is in these words: "Every steam or other vessel (whether towing any other vessel or not, or being towed) shall, unless prevented by stress of weather, be brought into the port to the north of mid-channel, and be taken out of the port to the south of mid-channel." Now, my understanding of that rule is that a vessel about to enter the Tyne, coming from the southward, is not to cross from the south to the north side close up to the pierheads. She is to get on a course that will take her up the river at some considerable distance outside the piers. The reason for such a regulation is obvious. It appears to me, and in this the Elder Brethren agree, that the main cause of this collision—I do not say the approximate or the only cause—was the fact, which I find to be a fact, that the steamer *Harvest*, instead of keeping out to sea till she had passed the line of the mid-channel course out of the river, crossed the line too near in towards the pierheads, and so brought about a position of danger, which, with the other circumstances under consideration, really caused this collision. The collision seems to have happened some two or two and a half cables lengths outside the pierheads, and not more. The wreck lay in a position described in the notice which has been issued warning captains of ships of its position, and that position is decidedly to the south of mid-channel. But it is said that, though that is or was the position of the wreck, it was not the place of collision, because, the tide being as it was, carried the vessel down, and that that accounts for her lying so far to the south. When we come to examine the evidence we find that all the witnesses on behalf of the *Stainsacre* say the collision occurred to the south of mid-channel, and all the witnesses called on behalf of the *Harvest* say that is not the case, and that it occurred to the north of mid-channel.

There being this conflict, I have to decide what is the real truth of the matter. What occurred to me during the hearing of the evidence, and what occurs to me now, is that I cannot accept the story told by the captain of the *Harvest* as a true story. I cannot accept his evidence as to the speed of his vessel, and especially that part of it in which he says that his vessel actually had stern way on her at the time of the collision. I believe that is wholly contrary to the fact, and therefore I am not predisposed to accept his evidence as to the position in regard to mid-channel, in which he says this collision occurred. In the course of his cross-examination, he was asked by Sir Walter Phillimore to take the position in which he says his vessel was at a certain point on the coast, and lay the course he steered from that point. He did so, and the chart which he has marked shows that he was up within some three, or three and a half at most, cables lengths of the entrance of the harbour at the time his course intersected the line of leading lights; whereas his case is that he had got on the line some mile and a half or two miles outside, and was complying with, and not infringing, rule 20. I am perfectly aware that it is hard to judge a man too severely by evidence of that sort; but, allowing him a good deal of latitude, it appears to us that he must have been, on his own showing, a great deal nearer the mouth of the harbour than he admits when he began to alter his course. That points to the conclusion that he infringed rule 20, and I cannot help thinking that the position of the wreck leads to the same conclusion. We then have the evidence of the pilot Blair, called by the owners of the *Harvest*, and not by the plaintiffs, who say in terms: "If the *Harvest* had come in to the north side of the river there never would have been any collision." What is that but equivalent to saying that one cause, at all events, of the collision was the *Harvest* not coming in to the north side, and that is not obeying rule 20. We think, therefore, it is clear that the *Harvest* was entering the harbour in defiance of the rule.

The next point is as to the absence of the *Harvest's* masthead light. That light was, undoubtedly, out before the collision; and, having regard to the evidence as a whole, I have no doubt that it was out sooner than the defendant's witnesses would have us believe. We think it clear that, when the *Harvest* was something like a mile from the *Stainsacre*, her masthead light had gone out. That being so, it was gross carelessness on the part of those in charge of that vessel, entering

such a river as the Tyne, to have allowed it to remain out until the time of the collision. I have not forgotten that there was some independent evidence called to prove that the masthead light had gone out only shortly before the collision, and also to prove that the *Harvest* was a considerable distance outside the harbour when she shaped her course up the river. I have given all the attention to that evidence which I think it deserves, and I have come to the conclusion that it is not altogether trustworthy. It occurred to me, early in the course of this case, to ask myself, Supposing this masthead light was out, and the red light of the *Harvest* alone visible to those on board the *Stainsacre*, when they came within some such distance as a mile, would it have made any difference? I put the question to the captain of the *Stainsacre*, and he, in entire conformity with his statement before the Receiver of Wrecks, said: "I took that vessel, seeing a red light only, for a sailing vessel. I ported to go under her stern, and I should have passed well under her stern if she had been a sailing vessel coming, as I had reason to believe she was. Had I known it to be a steamer, I should have at once eased my engines, and there would have been no collision." I think that is consistent with the facts, and I have no doubt it is the real truth of the matter. I think not only was the masthead light out, and negligently allowed to remain out for a considerable time, but I think that it was a circumstance materially contributing to the collision, and that for that also the *Harvest* is to blame. There is another part of this case which has to be considered, and it is this: I refer to the starboarding of the *Stainsacre*. That was an extraordinary manœuvre, having regard to the position in which these vessels were. She says she starboarded because she heard the *Harvest* blow two blasts of her whistle, which meant that she was directing her course to port. It is very difficult to believe that the *Stainsacre* would ever have starboarded at all unless she had heard these two blasts. There is no other reason why she should have done it. The witnesses from the *Harvest* have sworn that they only gave one blast, and as a matter of fact, we know that the *Harvest* was porting. Therefore it seems to me extremely difficult to suppose that they should have made a signal that they were starboarding. It is a conflict out of which I do not see my way clearly. It has occurred to me as possible that, either from some choking in the pipe or some similar defect, what was intended as one blast may have sounded as two. I do not know that that is a theory which ought to be accepted as the true explanation of this case, but I have no doubt that the master and those on board the *Stainsacre* acted under the impression that two blasts were given. Under all the circumstances of the case I have come to the conclusion that the real cause of the collision was the *Harvest* crossing the entrance of the port in violation of rule 20, and that the absence of her masthead light was also a cause conducing to the collision. I do not think, under the circumstances, that blame can be imputed to the master of the *Stainsacre* for starboarding, and we are all very clearly of opinion that, as soon as the danger was apparent, he acted by starboarding, by giving signals, and by stopping and reversing. Under these circumstances I pronounce the *Harvest* alone to blame.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

Solicitors for the defendants, *Turnbull, Tilly,* and *Mousir.*

Jan. 16 *and* 19, 1886.

(Before Sir JAMES HANNEN.)

THE TURGOT. (*a*)

Wages and disbursements — Master — Charter-party—Costs—Ten days' double pay—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 187.

Where a ship was chartered under a charter providing that the captain should be appointed and dismissed by the charterers, that the shipowners were to provide and pay for all provisions and wages of the captain and crew, and for the necessary equipment for the efficient working of the ship, and that the charterers should pay for all the coals, port charges, and other expenses, except those above stated, and the captain instituted an action in rem against the owners of the ship claiming in respect of disbursements, consisting of provisions and coals, in respect of which latter item he had given a draft on the shipowners, which draft had been dishonoured, the Court held that the master, having notice of the charter-party, was agent for both the owners and the charterers in respect of the liabilities of each, as determined by the charter, and that therefore the owners were liable in respect of the provisions, but not in respect of the coals.

Where, in an action for master's wages, it appears that, at the institution of the suit, accounts are outstanding between the owners and the plaintiff, and that the same have not been taken or settled, and that within two days of the institution of the suit the wages are paid, the owners have not refused to pay "without sufficient cause" within the meaning of sect. 187 *of the Merchant Shipping Act* 1854, *and therefore the plaintiff is not entitled to recover ten days' double pay.*

THIS was an action *in rem* for wages and disbursements instituted by the master of the steamship *Turgot* against the owners thereof, in which the vessel was arrested in the sum of 1500*l.*

The plaintiff was appointed master by the charterer, Henry Robertson, with the approval of the shipowners, and commanded the said steamship from the 5th April 1884 to May 25, 1885.

The plaintiff, by his statement of claim, alleged that, whilst master, necessaries were supplied to the *Turgot* by Messrs. Tramontana, of Palermo, upon his order to enable the vessel to perform her voyage, and that Messrs. Tramontana had recovered judgment against him for the cost of such necesaries, viz., 24*l.* 4*s.* 4*d.*, together with 6*l.* 10*s.* for costs. It was also alleged that necessaries had been supplied to the said ship by E. T. Aguis and Co., of Malta, upon the plaintiff's order to enable the *Turgot* to perform her voyage, and that the plaintiff had been sued for the cost of such necessaries, viz., 187*l.* 14*s.*, and was liable to pay the same. The plaintiff also claimed wages and ten days' double pay.

The defendants had to put in bail amounting to 1500*l.*

The defence, so far as is material, was as follows:—

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs. Barristers-at-Law.

1. The defendants admit that the plaintiff served as master of the *Turgot* for the period in the statement of claim mentioned, but they say that during the whole of the said period the said steamship was chartered to one Robertson, and that by the terms of the charter-party or charter-parties (which terms were well known to the plaintiff) the charterers were to provide and pay for all coal and fuel for the steam engines, port charges, and expenses whatsoever, except certain expenses not material to this action, and the master, officers, and crew were to be appointed by and to follow the instructions of the charterers, and the master was, in fact, appointed by the said charterers, and was, as he well knew, in fact, the servant of, and in all matters connected with the said ship during the said period acted as and was the agent of the charterers and not of the defendants.

2. The defendants deny that necessaries were supplied to the *Turgot* by Messrs. Tramontana or E. T. Aguis and Co., as alleged in the statement of claim, and say that if any goods were supplied on the order of the plaintiff, as alleged (which the defendants deny), the plaintiff was in giving such order or in taking delivery of the said goods, acting, as he well knew, and as was well known to the persons supplying the said goods, as agents for the charterers of the said ship, and not on behalf of or with the authority of the defendants. If the plaintiff has been sued for the said goods, as alleged (which the defendants do not admit), the defendants say that the plaintiff was not liable in respect of the same, and if he has suffered judgment against himself in respect thereof such judgment or judgments were suffered by the laches and want of proper defence on the part of the plaintiff.

3. As to the plaintiff's claim for wages, the defendants say that since action it has been duly satisfied and discharged by payment.

4. As to the plaintiff's claim for disbursements, the defendants deny that the plaintiff ever made any disbursements or incurred any expenses or liabilities for the said ship, or that the same remain due and unpaid to him as alleged. If any disbursements were made, or expenses or liability incurred (which is denied), the same were not made and incurred by the plaintiff as agent for, or on behalf of, or by the authority of the defendants, but as agent for the charterers, as hereinbefore alleged. The defendants further say that if the plaintiff did make any such disbursements, or incur any such expenses or liabilities, the said charterers have satisfied and discharged the claim of the plaintiff in respect thereof by payment or in account.

The plaintiff, by his reply, said as follows:

1. The plaintiff admits that since the commencement of this action the defendants have paid to him the balance of his wages and disbursements actually out of pocket, but the defendants have not paid to him his ten days' double pay to which he was entitled, nor anything for his detention, and have not paid or indemnified him against the claims still being pressed against him, and for which he is liable as master of the *Turgot*.

2. As to the residue of the defence the plaintiff joins issue.

The particulars of the plaintiff's claim were as follows: Tramontana's claim and taxed costs, amounting to 30*l.* 14*s.* 4*d.*; costs of plaintiff's solicitors in Tramontana's action, not yet delivered; E. T. Aguis and Co.'s claim, amounting to 187*l.* 14*s.*; costs of plaintiff's solicitors in E. T. Aguis and Co.'s action, not yet taxed; ten days' double pay; and legal charges outside the above actions incurred by the plaintiff in consequence of the defendants' conduct. In addition to the above items, the plaintiff originally claimed a sum of 1002*l.* 3*s.* in respect of alleged necessaries supplied by Messrs. Laming and Co., but this item was subsequently withdrawn.

The material provisions of the charter-party were as follows:

It is this day mutually agreed . . . that the owners shall provide and pay for all provisions and wages of the captain, officers, engineers, firemen, and crew, shall pay for the insurance of the vessel (if any), and for all oil, tallow, and waste required for the engine-room, and provide and pay for the necessary equipment for the proper and efficient working of the said steamer. That the charterer shall provide and pay for all the coals and fuel for the steam engines, port charges, and expenses whatsoever, except those before stated. That the charterers shall accept and pay for all coal now in ship's bunkers, and the owners shall, on expiry of the charter-party, pay for all coal then left in the bunkers, both at current market prices. . . . That the captain, officers, and crew shall be appointed by and shall follow the instructions of the charterer, who will furnish him from time to time with sailing directions. That the captain shall use all and every dispatch in prosecuting the voyage, and shall render all customary assistance with the ship's crew and boats, and should the owners be dissatisfied with the conduct of the captain, or any of the officers, or engineers, the charterer shall, on being advised of such, fully investigate the matter, and if necessary make a change in the appointments.

At the trial it appeared that the charterer, Mr. Henry Robinson had appointed the master; that the master had knowledge of the provisions of the charter-party; that Messrs. Tramontana's claim was in respect of provisions, boat hire, and pilotage inwards and outwards; and that E. T. Aguis and Co.'s claim was in respect of coals and provisions supplied at Malta, and of 6*l.* advanced to the captain. With regard to this claim, it appeared that in consequence of a statement made by E. T. Aguis and Co.'s clerk to the master, that they had received instructions from Messrs. Laws, Surtees, and Co., the owners of the *Turgot*, that the master was to draw upon the owners. The master accordingly drew a draft for 187*l.* 4*s.* upon the owners, and handed it to E. T. Aguis. It, however, appeared that in fact the Messrs. Laws, Surtees, and Co. had given no such instructions, and they had accordingly refused to meet the draft. The plaintiff attempted to prove that the supply of coals at Malta was chargeable to the ship, on the ground that it was necessary to bring the ship home in consequence of the charterer having failed to supply the goods, and it being necessary in the owner's interest that the ship should return. In this they failed, it being shown that the coals were supplied on the charterer's order.

J. P. Aspinall (with him *Bigham*, Q.C.) for the defendants.—The matters in respect of which the plaintiff is claiming were, by the provisions of the charter-party to be supplied by the charterer. Therefore, on the authority of *The Beeswing* (53 L. T. Rep. N. S. 554; 5 Asp. Mar. Law Cas. 484), the plaintiff should look to the charterer and not to the owners for payment. He clearly had no authority to pledge the owners' credit in respect of coal. It is also submitted that he is not entitled to recover the costs incurred by him in defending the actions brought against him. He clearly ought never to have defended them except with the sanction of the present defendants.

Gorell Barnes for the plaintiff.—The master is entitled to recover such disbursements as by the provisions of the charter-party the owners were bound to provide. With regard to the coals, reliance is placed upon the judgment of the Master of the Rolls in *The Beeswing* (*ubi sup.*), where he says that if the charterers' agents abroad refused to make disbursements which they had undertaken to make, and the ship could not be navigated without such disbursements, the master would be entitled to charge such disbursements against the owners. The facts in the

present case, therefore, entitle the master to claim in respect of the coals.

Cur. adv. vult.

Jan. 19.—Sir JAMES HANNEN.—This is an action by the captain against the owners of the *Turgot* for necessaries supplied at Palermo, for which the captain has made himself liable, and in respect of which judgment has been recovered against him. He also claims for necessaries supplied at Malta, and for wages. The defendants deny their liability on the ground that the plaintiff, in incurring these liabilities, acted as agent for the charterer, and not for the owners; and, as to the wages, they say they have been paid. By the terms of the charter-party the owners were to provide and pay for provisions and wages, the charterer to provide and pay for coals and other expenses. The captain was to be appointed by and follow the instructions of the charterer, and if the owners were dissatisfied with the captain the charterer was to investigate the facts, and, if necessary, make a change. He was, in fact, appointed by the charterer, and furnished with a copy of the charter-party. I have been referred to the case of *The Beeswing* (*ubi sup.*), in which the facts were very similar to the present, except that there the captain was to be discharged by the charterers. In this case the captain, knowing the terms of the charter-party, was the agent of the owners in providing those necessaries which, by the terms of the charter, were to be paid for by the owners; and was the agent of the charterers in providing those necessaries for which they were to be responsible. At Malta the captain ordered coals to the amount of 150*l.* 10*s.*, provisions amounting to 18*l.* 13*s.* 2*d.*, and obtained an advance of 6*l.* to himself. After the coals and provisions were supplied the captain proposed to pay by drawing on the charterer, but the merchant supplying the goods refused to take this mode of payment, alleging that he had instructions from the owners that the captain might draw a bill on them. Believing this statement, which was, in fact, not correct, the captain drew on the owners for the coals and provisions, and it is in respect of his liability on this bill that he now claims against the owners. I, however, am of opinion that the captain is not entitled to recover in respect of the coals, as, by the terms of the charter-party, he had no authority to pledge the credit of his owners for them.

It was argued by the plaintiff's counsel that, on the authority of *The Beeswing* (*ubi sup.*), he had an implied authority to pledge the credit of the owners as agent *ex necessitate*, in order to enable the ship to sail. The facts do not support his argument. The owners had no interest in the immediate departure of the ship from Malta, as the charterers were bound to pay for the hire of the vessel during its detention, and even if it had not been so the plaintiff ought to have communicated by telegram with the owners before pledging their credit for disbursements, which he knew they were not bound to make. On the other hand I am of opinion that the captain had implied authority on the owners' behalf to make disbursements for provisions which they were bound by the charter-party to supply, and I think he is entitled to enforce his claim against them to that extent. On the same principle I think he was entitled to pledge the owners' credit at Palermo, and he therefore can recover the amount of his claim in respect of the necessaries supplied there. With regard to the costs incurred by the plaintiff in defending the actions brought against him, I think he cannot recover them. He was, undoubtedly, liable in those actions, and he should not have defended except at the request of the defendants in this action. I am further of opinion that the plaintiff is not entitled to recover ten days' double pay, as the small balance of wages due was not delayed without sufficient cause, and as it was only found to be due on a final settlement of involved accounts, and was, in fact, paid within a few days of the action being brought. In the result I find he is entitled to recover the 6*l.* advanced at Malta, and the 18*l.* 13*s.* 4*d.* in respect of provisions supplied there, and also 24*l.* 4*s.* 2*d.* recovered by Messrs. Tramontana in respect of necessaries supplied at Palermo, making in all 48*l.* 17*s.* 6*d.*, which I decree due with costs.

Bigham, Q.C.—It is submitted that, as the plaintiff has recovered less than 50*l.*, the action should not have been instituted in the High Court. Moreover, the court should not forget that the defendants had to put in bail for 1500*l.*, which was most unreasonable, and therefore the plaintiff should be condemned for arresting the ship in such an amount.

Barnes contra.

Sir JAMES HANNEN.—The captain was placed in a very difficult position between the owners and the persons making the disbursements, and I think this case was a proper one to be investigated here. I therefore adhere to my decision as to costs.

Solicitors for the plaintiff, *Lowless* and *Co.*

Solicitors for the defendants, *Lyne* and *Holman.*

Jan. 12 *and* 19, 1886.

(Before Sir JAMES HANNEN.)

THE DORA TULLY. (*a*)

Disbursements—Master—Managing owner—Ship's stores.

A master on his appointment agreed with the managing owner that he, the master, should find the provisions for the officers and crew at a certain rate per day. The master subsequently agreed with the managing owner, who was also a ship's store dealer, that the managing owner should supply the provisions and should charge them against moneys of the master which he held in his hands. The managing owner, however, debited his co-owners with the costs of the provisions, and fraudulently applied the master's money to his own purposes.

Held, in an action in rem against the owners by the master to recover wages and disbursements, that the master was entitled to credit for such an amount in the settlement of his accounts with the owners, the fraudulent application of his money by the managing owner being a wrong done to the co-owners for which he was not responsible.

THIS was a motion by the defendants in an action *in rem* for master's wages and disbursements,

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL Esqrs., Barristers-at-Law.

asking that the registrar's report therein might be varied by directing that the plaintiff should not be entitled to recover against the defendants a sum of 316*l.* 17*s.* 6*d.*, which has been allowed by the registrar.

The action was instituted by Robert Young, late master of the s.s. *Dora Tully*, *in rem* against her owners to recover wages and disbursements. His claim, which amounted to 1584*l.* 5*s.* 1½*d.*, was referred to the registrar and merchants, who allowed him 552*l.* 5*s.* 9*d.* At the reference it appeared that, at the time he was appointed master, it was agreed between himself and one C. Tully, the managing owner of the ship, that he, the master, should victual the officers and crew at a stipulated rate per day, and that these provisions were supplied by Tully. It also appeared that at this time Mr. C. Tully held in his hands a sum of 316*l.* 17*s.* 6*d.* belonging to the master, and that it was agreed between them that this sum of money should be applied in paying the master's victualling account. Mr. Tully, who was a ship's store dealer, accordingly supplied provisions to the ship, most of which were supplied from his own stores. He having become involved in pecuniary difficulties, instead of applying the plaintiff's money in payment of these provisions, debited the cost of such provisions to his co-owners, who in fact paid for them, and he applied the plaintiff's money to his own purposes. It further appeared that, notwithstanding the arrangement that the master should supply provisions, the owners had in some instances supplied and paid for them themselves. In respect of such items the plaintiff, in his claim, gave the owners credit, and deducted the same accordingly. Among other items claimed were the victualling bill and the above-mentioned 316*l.* 17*s.* 6*d.*, which was claimed in the following form:

C. Tully and Co., for provisions, 316*l.* 17*s.* 6*d.*

The registrar, being of opinion that the victualling bill included all amounts paid for provisions, struck out the 316*l.* 17*s.* 6*d.*, but subsequently acceded to the plaintiff's application that he (the registrar) should strike out of the credit account (containing the deductions before referred to) as many items as would balance the 316*l.* 17*s.* 6*d.*

The registrar's report with regard to this item of 316*l.* 17*s.* 6*d.* was as follows:

In explanation of the concluding item of the schedule No. 2, I have further to report that it appears by the evidence of the plaintiff that, at the time he was appointed master of this ship, he agreed with Mr. C. Tully, the managing owner that he, the plaintiff, should find provisions for the officers and crew during the voyage at a certain rate per diem. At such time Mr. C. Tully held in his hands a sum of 316*l.* 17*s.* 6*d.* belonging to the plaintiff, or was indebted to him to that amount for money received on his account, and it was further agreed that all provisions supplied to the ship by Mr. Tully, or paid for by him as managing owner, should be charged against such private moneys until the amount should be exhausted. It further appears that, whilst the ship was absent on the voyage in question, Mr. C. Tully became involved in financial difficulties, and, instead of debiting the plaintiff's private moneys with the costs of the provisions supplied to the ship, and which, to a large extent were supplied from his own stores, he paid for them out of moneys belonging to the ship, and debited them accordingly in his accounts with his co-owners. In so doing Mr. Tully violated his agreement with the plaintiff, and acted unjustifiably by his co-owners. In my opinion it was a fraudulent application of his co-owners' money, to which the plaintiff was no party and for which he must not be held responsible and that the plaintiff is only bound to give credit for the amount of any provisions so paid for out of the ship's moneys as exceeds the sum he had left in Mr. Tully's hands for the purpose before stated.

J. P. Aspinall for the defendants.—As regards this 316*l.* 17*s.* 6*d.*, Tully was the agent of the master only and not of his co-owners. If so, the default of Tully is to be visited on the master and not on the co-owners. Although Tully was managing owner, yet, for the purposes of this transaction, he was merely a marine-store dealer employed by the master to provide the provisions. The fact that the master was by his agreement to supply the provisions, shows that, for this purpose, Tully was acting only in his capacity of marine-store dealer, and therefore had no authority to pledge the credit of his co-owners:

The Rainbow, 53 L. T. Rep. N. S. 91; 5 Asp. Mar. Law Cas. 479.

A further proof of this is that Tully held this money as security for provisions to be supplied in the future, and therefore this money was in no way held on behalf of the co-owners.

Sir *Walter Phillimore* (with him Dr. *Raikes*) for the master, *contra*.—The registrar is right in treating this money as having been held by Tully in his capacity of managing owner, and therefore as agent for the co-owners. It is true that Tully has been guilty of a fraud against his co-owners, but for this the master should not be held liable.

Aspinall in reply.

Sir JAMES HANNEN.—This was a suit for wages and disbursements, the registrar finding 552*l.* 5*s.* 9*d.* to be still due to the plaintiff. The plaintiff, being captain of the vessel *Dora Tully*, was by agreement bound to provide provisions for the officers and crew. He was to be paid a stipulated sum for so doing. Tully, the managing owner of the vessel, held, at the time of the captain's appointment, 316*l.* 17*s.* 6*d.* of the captain's money in his hands, and it was agreed between the captain and Tully that he was to deduct from the amount of 316*l.* 17*s.* 6*d.* the price of provisions which should be supplied by Tully to the vessel. The captain was primarily liable. Certain provisions were supplied by Tully himself out of his own stores, he being a provision dealer; as to other provisions, the captain obtained them abroad and drew on Tully for their amount; but Tully, instead of treating the price of these provisions so supplied by him, and the other provisions with respect to which the captain drew on him, as discharged by the money in his hands belonging to the captain, made default in so applying these moneys in his hands, and in his account with his co-owners treated the provisions as having been paid for out of the ship's money.

Now the question arises upon whom the loss is to fall by reason of that misconduct on the part of Tully, and the registrar has found, with the assistance of the merchants, that the loss must fall on the co-owners and not on the plaintiff, and I am of opinion that that view is the correct one. As to the provisions supplied by Tully himself, it appears to be entirely free from the possibility of a doubt. Tully is dealing with his own provisions, and when he supplied them he was of course bound by his agreement with the captain that these goods should be treated as paid for out of the moneys in his hands. Though the facts are somewhat different with regard to the provision

for which the captain drew upon Tully, yet it appears to me the result must be the same. The captain, when he drew on Tully, drew upon the assumption, which he had a right to hold, that Tully would pay for those goods, and they were to be treated as agreed for out of the moneys which Tully held of his at the time; and if Tully did not do that which it was his duty towards his co-owner to do, namely, to treat these goods as paid for out of the 316*l.* 17*s.* 6*d.*, it was a wrong done to his co-owners, for which the captain is not responsible, and he has only done what he had a right to do by virtue of his arrangements with the co-owners, and therefore I must hold that the report of the registrar is correct, and the appeal must be dismissed with costs.

Solicitors for the plaintiff, *Botterell* and *Roche*.
Solicitors for the defendants, *Ingledew*, *Ince*, and *Colt*.

Feb. 5 *and* 10, 1886.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE ST. AUDRIES. (*a*)

Collision — Cardiff Drain — Crossing ships — Docking signal—Regulations for Preventing Collisions at Sea, arts. 16 *and* 23.

Where a steamship, in charge of a pilot, bound for Penarth Dock, and carrying the usual docking signal of two bright lights aft, saw, when crossing Cardiff East Flat, the red and masthead lights of a steamship coming down Cardiff Drain, bearing on her starboard bow and distant from three to four cables length; but the pilot in charge took no steps to get out of the way of the other vessel until a collision was inevitable, because he was of opinion that, as he was bound for dock, he was entitled to hold on, the Court held that his vessel was to blame for breach of art. 16 *of the Regulations for Preventing Collisions, there being no "special circumstances" warranting a departure from the regulations.*

THIS was a collision action *in rem* instituted by the owners of the steamship *Saltwick* against the owners of the steamship *St. Audries* to recover damages occasioned by a collision between those two vessels on the 20th May 1885. The defendants counter-claimed.

The facts alleged on behalf of the plaintiffs were as follows: Shortly before 11.35 p.m. on the 20th May 1885 the steamship *Saltwick*, of 1703 tons gross, laden with a cargo of coals and bound on a voyage from Cardiff to Port Said, was, in charge of a duly licensed pilot, proceeding down the Cardiff Drain. She was keeping on the west side of mid-channel, and was making about two or three knots an hour, with her engines going dead slow. The weather was fine and clear, the tide was about high water, and the wind was blowing a moderate breeze from the S.W. The regulation masthead and side lights were duly exhibited on board the *Saltwick* and burning brightly, and a good look-out was being kept on board. In these circumstances those on board the *Saltwick* observed the masthead and green lights of a steamship, which proved to be the *St. Audries*, about one to two points before the port beam and distant about one to one and a half miles, and shortly afterwards they observed that she also carried two bright lights aft. The *Saltwick* continued slowly on her course down Cardiff Drain, and, as she approached the *St. Audries*, it was seen that she was attempting to cross the bows of the *Saltwick*, thereby causing risk of collision. Thereupon the engines of the *Saltwick* were reversed full speed astern and three short blasts were blown with her whistle; but the *St. Audries* still came on, and with her starboard bow struck the stem of the *Saltwick*, doing her great damage. The plaintiffs (*inter alia*) charged the defendants with breach of art. 16 of the Regulations for Preventing Collisions at Sea.

The facts alleged on behalf of the defendants were as follows: Shortly before 11.35 p.m. on the 20th May 1885, the screw steamship *St. Audries*, of 500 tons net, bound from Newport to Penarth Dock in ballast, was, in charge of a pilot, crossing Cardiff East Flat about the cross-channel. The *St. Audries* was heading about W., and was making from one to two knots. Her regulation side and masthead lights were duly exhibited and burning brightly, and the usual docking signal of two bright lights was hoisted aft, and a good look-out was being kept. In these circumstances the masthead and red lights of the *Saltwick* were seen in the Cardiff Drain about five points on the starboard bow, and distant about three to four cables. The Penarth Dock head signal for the *St. Audries* to enter not being up, the engines of the *St. Audries* had been stopped, and she was forging slowly ahead, and when the *Saltwick* was seen to be coming down the Drain, crossing the course of the *St. Audries*, the engines of the *St. Audries* were reversed full speed astern, in order to allow the *Saltwick* to pass ahead, and the whistle was sounded three blasts. But the *Saltwick* sounded two blasts on her whistle, and came towards the *St. Audries* as if under a starboard helm, and caused danger of collision. The whistle of the *St. Audries* was again sounded three blasts, and the *Saltwick* was loudly hailed, but the *Saltwick* with her stem struck the *St Audries* a heavy blow on her starboard bow and did her great damage.

The pilot in charge of the *St. Audries*, in cross-examination, admitted that he had held on until the last minute, alleging that, as he was bound for the dock, he conceived he was not bound to give way to the traffic coming down Cardiff Drain.

The Regulations for Preventing Collisions at Sea:

Art. 16. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other.

Art. 23. In obeying and construing these rules, due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Myburgh, Q.C. (with him *Gorell Barnes*) for the plaintiffs.—The *St. Audries* is to blame for breach of art. 16 of the Regulations for Preventing Collisions. The pilot in charge of the *St. Audries* has admitted that, although he had the *Saltwick* on his starboard side, he took no steps to keep out of her way until a collision was practically inevitable. It cannot be said that in this case

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

there were any special circumstances rendering a departure from art. 16 necessary.

C. Hall, Q.C (with him *Baden Powell*) for the defendants.—The *St. Audries* being bound for dock, it is unreasonable that she should have to give way to all the traffic coming down the Drain, and so lose her chance of docking. She carried the usual docking signal, which made it apparent to those on the *Saltwick* what her destination was. If therefore the *St. Audries* did fail to take steps to keep clear of the *Saltwick*, there were special circumstances warranting her conduct. The *Saltwick* is to blame for breach of art. 18 in not stopping and reversing sooner. Those on board the *Saltwick* say the *St. Audries* was neglecting her duty, and yet held on, and therefore, on the authority of *The Beryl* (51 L. T. Rep. N. S. 554: 5 Asp. Mar. Law Cas. 321; 9 P. Div. 137) they are to blame.

Myburgh, Q.C. in reply.

Sir JAMES HANNEN.—I am of opinion that both these vessels are to blame. With regard to the *St. Audries*, it is plain that she was being navigated by her pilot under a false conception of his rights and duties. He thought, because he was going into the dock, he was exempted from art. 16 of the regulations, and that it was not his duty to keep out of the way of the *Saltwick*, although she was on his starboard hand. It is very evident that he acted upon that assumption, for he says that, even after he had stopped his engines he thought he had enough way on to cross the bows of the *Saltwick*. It is plain that she had been going at a very considerable speed from the distance she travelled after her engines had been stopped; and I have no doubt but that the pilot was hurrying to get into dock, and, in order to do so, was insisting upon what I have already described as a total misconception of what his rights and duties were.

But, on the other hand, it appears to me that the *Saltwick* is also to blame. Some observations have been made as to the state of discipline on board this ship when she left port, and it may be that some laxity in this respect did exist, and that, in consequence, the *St. Audries* was not seen quite so soon as she might have been. But, be that as it may, I am not going to rest my decision upon it. The facts are that she was going down the Drain, as she had a right to do, and, so long as she was entitled to expect that the other would get out of her way, no blame can be imputed to her for continuing on. But there comes a time when a vessel, even though she is *primâ facie* entitled to hold on, is bound to take steps with regard to contingencies which may arise through the wrongful act of the other vessel. In this particular case, if those on board the *Saltwick* had seen—and I think that they ought to have seen—that the *St. Audries* was persisting in her intention of crossing their bows, they ought to have stopped and reversed sooner than they did, and, if so, the collision would have been avoided. There is also the further charge made against the *Saltwick* that she starboarded. I am sorry to say that I have come to the conclusion that the charge has been made out, notwithstanding the plaintiffs' evidence. Not only is it spoken to by those on board the *St. Audries*, but there is the evidence of those on the dockhead, also the evidence as to the two blasts, and also the evidence of the witness who says that he rowed past the buoy to the eastward of it, and that the collision took place to the eastward of where he was. For these reasons I have come to the conclusion that the *Saltwick* did starboard her helm, and I also find that she was out of the gut at the time of the collision. The result is that both vessels are to blame.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co*

Solicitors for the defendants, *Ingledew, Ince*, and *Colt*.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, Nov 3, 1885.

(Before Lord ESHER, M.R., COTTON and LINDLEY, L.JJ.)

NIELSEN AMD CO. *v.* WAIT, JAMES, AND CO. (*a*)

Charty-party—Lay days—Demurrage—"Running days"—Custom to lighten vessel at entrance to port.

By a charter-party it was agreed that the plaintiffs' steamship should proceed to Cronstadt, and there load a full cargo of wheat or other grain, and therewith proceed to London, or to a good and safe port in the Bristol Channel as ordered, "or so near thereto as she may safely get at all times of tide, and always afloat, and deliver the same on being paid freight." "Eight running days, Sundays excepted, to be allowed the merchants, if the ship be not sooner despatched, for loading and discharging the steamer, and ten days on demurrage if required over and above the laying days, at 25l. per day." The steamer occupied six days at Cronstadt in loading a cargo of 4325 quarters of wheat, and was ordered to Gloucester for discharge. She arrived at Sharpness Dock, in the Bristol Channel, on the 13th Nov. Sharpness Dock is within the port of Gloucester, and about seventeen miles from the basin, which is within the city of Gloucester, where grain cargoes are usually discharged if the burthen of the ship will admit, the access to the City Basin being attained by a ship canal. The steamer was ready to commence her discharge on the 13th Nov., but could not get nearer to Gloucester than Sharpness until part of her cargo was discharged. On the 14th and 15th the defendants took delivery of 1585 quarters at Sharpness, and then required the master to take the steamer through the canal to the basin to complete the discharge. The master proceeded under protest, and arrived in the basin on the 17th. On the 18th the discharge was completed, and the vessel returned to Sharpness and arrived there on the 19th.

In an action for demurrage a custom of the port of Gloucester was proved to the following effect—that the customary place for discharging grain cargoes was at the basin within the city, that when vessels with grain cargoes destined for Gloucester were of too heavy a burthen to go up the canal they were lightened at Sharpness; that

(*a*) Reported by A. A. HOPKINS, Esq., Barrister-at-Law.

during the discharge at Sharpness of so much of the cargo as was necessary to enable the vessel to proceed by the canal to the basin the lay days counted, but the time occupied by going up the canal to the basin and by returning to Sharpness was not counted:

Held, that the custom was reasonable, and that it was not inconsistent with the express terms of the charter-party as to "running days," and that therefore the time occupied by the vessel in going from Sharpness to the basin and in returning ought to be excluded from the lay days.

Judgment of Pollock, B. affirmed.

Brown *v.* Johnson (10 *M. & W.* 331) *discussed.*

This was an appeal from a judgment of Pollock, B. sitting at Nisi Prius.

The plaintiffs, as owners of the steamship *St. Hilda*, claimed against the defendants, as consignees of a grain cargo carried from Cronstadt to the port of Gloucester, a balance for freight and demurrage. In the result, however, the only question which remained between the parties was as to the number of lay days which were to be allowed to the defendants for discharging at the port of Gloucester. As to this the plaintiffs claimed four days demurrage beyond the lay days. The defendants admitted only one day, in respect of which they tendered before action, and paid into court, the amount claimed for that one day.

The steamship *St. Hilda*, a vessel of 495 tons net register, was by a charter-party made in London on Oct. 7, 1882, chartered by the plaintiffs to Messrs. Scaramanga and Co., a firm of London merchants. The charter-party provided that the steamer should proceed to Cronstadt, or so near thereto as she might safely get, and there load, always afloat, a full cargo of wheat or other grain, and therewith proceed to London, or to a good and safe port on the east coast of Ireland, or in the English or Bristol Channel, or on the continent between Hamburg and Havre inclusive, or to Glasgow, or to a port on the east coast of Ireland, or to Limerick, as ordered on signing bill of lading, or at Elsinore or Falmouth for ports west of Falmouth, "or so near thereto as she may safely get at all times of tide and always afloat, and deliver the same on being paid freight."

The charter-party, after naming the freights payable at the different ports, continued as follows:

The freight to be paid on loading and right delivery of the cargo in cash; eight running days, Sundays excepted, are to be allowed the said merchants, if the ship be not sooner despatched, for loading and discharging the said steamer, and ten days on demurrage if required over and above the said laying days, at 25*l.* sterling per day. If not ordered on signing bill of lading, steamer to proceed to Elsinore, and if no orders there within twelve hours of arrival lay days to count until ordered to port of discharge, or to Falmouth for final orders as above, which are to be given within twelve hours of arrival or lay days to count, but if she calls at Falmouth 10*l.* to be paid for doing so.

In accordance with this charter-party, the *St. Hilda* proceeded to Cronstadt, and there loaded a cargo of 4325 quarters of wheat in bulk. A bill of lading in respect of this cargo was signed by the master and delivered to Scaramanga and Co., which provided for the delivery of the cargo to them or their assigns "on paying freight for the said goods and all other conditions as per charter-party." There was indorsed on the charter-party, "six running days, Sundays excepted, expended in loading the cargo;" and further, "Capt. Robinson is hereby directed to proceed with steamship *St. Hilda* and her present cargo to Gloucester, Bristol Channel, for discharge."

The steamer arrived at Sharpness Dock in the Bristol Channel, at 11 o'clock a.m. on the 13th Nov. 1882. Sharpness Dock is within the port of Gloucester, and about seventeen miles from the basin, which is within the city of Gloucester, where grain cargoes are usually discharged if the burthen of the ship will admit, the access from Sharpness Dock to the City Basin being attained by the Berkeley ship canal.

On the 13th Nov. 1882 the steamer was cleared at the Custom-house, and lay at Sharpness ready to commence the discharge and delivery of the cargo to the defendants, who were the holders of the bill of lading, but she could not get nearer to Gloucester than Sharpness unless a considerable portion of her cargo were first discharged at Sharpness. The defendants on the 14th and 15th Nov. discharged and took delivery into lighters of 1585 quarters, and then required the master to take the steamer through the canal to a discharging berth within the basin at Gloucester, and adjoining the defendants' warehouse. On the 16th the captain proceeded under protest for the basin, and arrived on the 17th. On the 18th the residue of the cargo, 2740 quarters, was discharged by the defendants, and on the same day she commenced her return to Sharpness, where she arrived on the afternoon of the 19th Nov.

The plaintiffs claimed to reckon six days for detention at the port of discharge, making two lay day and four on demurrage, and for this they claimed to be allowed not only for the two days occupied in unloading at Sharpness and the one day unloading at Gloucester Basin, but also for the two days occupied in proceeding from Sharpness to the basin, and the one day occupied in returning.

The defendants, on the other hand, contended that the two days occupied in going from Sharpness to the basin and the one day occupied in returning ought to be excluded, and they allowed only for the two days occupied in discharging at Sharpness and the one day at Gloucester Basin, which, with the six days occupied by the loading at Cronstadt, would leave only one day on demurrage, for which they had paid the amount claimed into court.

The case came on for trial at the Summer Assizes 1884, at Gloucester, before Pollock, B. and a special jury, when the above facts were admitted, and no evidence was called on behalf of the plaintiffs. Two witnesses, corn merchants, of long experience at Gloucester, were called on behalf of the defendants to prove the custom of the port of Gloucester with respect to the delivery of grain cargoes out of ships of too large a burthen to come up the canal without some portion of their cargo being discharged at the entrance. The custom as stated by them was as follows: That the customary place for discharging grain cargoes has always been at the basin within the city, and that they had never known a vessel refuse to go there; that when vessels with grain cargoes destined for Gloucester were of too heavy a burthen to come up the canal they were lightened at Sharpness; that during the discharge at Sharpness of so

much of the cargo as it was necessary to discharge in order to enable the vessel to proceed by the canal to Gloucester Basin the lay days counted, but that the time occupied by coming up the canal to discharge at Gloucester Basin and by returning to Sharpness was not counted. They cited individual cases in which the question had arisen between a shipowner and the consignee, and in which after some dispute the shipowner had given way and accepted an amount of demurrage based on this custom. This evidence was not disputed by the plaintiff's counsel, and the learned judge found the custom proved. It was agreed that the jury should be discharged, and that the learned judge alone should deal with the case.

Pollock, B. held the custom reasonable, and that it was not inconsistent with the terms of the charter-party, and that therefore the plaintiffs were entitled only to the one day's demurrage, which had been paid into court. He therefore gave a verdict and judgment for the defendants.

The plaintiffs appealed.

John Edge and *Meek* for the plaintiffs.—The plaintiffs are entitled to count as days on demurrage the days occupied by the vessel in going up the canal from Sharpness to Gloucester Basin, and in returning to Sharpness. Any custom to the contrary is unreasonable: the vessel's discharge is begun at Sharpness, and at that time lay days begin to count. Any custom which breaks the lay days and sends the vessel at the expense of the shipowner to another place of discharge is an unreasonable custom. But, even if the custom is not unreasonable it cannot prevail in this case, because it contradicts the express terms of the charter-party. The charter-party provides for "eight running days, Sundays excepted, to be allowed for loading and discharging." The phrase "running days" means "days running" or consecutive days:

Brown v. *Johnson*, 10 M. & W. 331.

[Lord Esher, M.R.—How can that be so when the eight running days cover both loading and discharging? They cannot be consecutive.] Of course the voyage must intervene, but the days of loading or discharging in port must be consecutive. Moving the vessel from Sharpness to Gloucester Basin is only moving in port, Sharpness being part of the port of Gloucester. Any time occupied by the merchants in having the vessel moved in port for their own convenience would always count as lay days. [Lord Esher, M.R.—That might be true in the absence of any custom, but here is a custom dealing with that point, and you have to make out that it contradicts the charter-party.] Of course the basis of the argument is that "running days" in the charter-party means consecutive days, and, if that is so, the custom is clearly inconsistent with the charter-party. [Cotton, L.J.—But if for "running" in the charter-party "consecutive" is read the clause becomes insensible, because it is impossible that all the eight days can be consecutive.] The Irish cases, *Caffarini* v. *Walker* (Ir. Rep. 9 C. L. 431) and *McIntosh* v. *Sinclair* (Ir. Rep. 11 C. L. 456), which were cited by Pollock, B. in his judgment, were inconsistent with his decision.

H. Mathews, Q.C. and *A. T. Lawrence*, for the defendants, were not called on to argue.

Lord Esher, M.R.—After hearing all that can possibly be said in this case from the counsel for the plaintiffs, I think the point has been threshed out, and we are in a position to give judgment without calling on the counsel for the defendants. The question which arises is whether the shipowner in this case is entitled to charge the charterers or the consignees of the cargo—it matters not which—for two days during which the vessel was proceeding from Sharpness along the canal to the basin of the harbour within the city of Gloucester, and also for one day during which the vessel was returning between those places. By the terms of the charter-party, the vessel was to load in a foreign port, and, being loaded with a grain cargo, was to proceed at the choice of the charterer to a good and safe port on the east coast of England, to London, or to a port in the English Channel, or in the Bristol Channel. Until, therefore, the charterer had exercised his choice, and had ordered the vessel to her destination, it would not be known to what port she was to proceed. The vessel was ordered to Gloucester, which is undoubtedly a Bristol Channel port, being upon a navigable river which flows down to the Bristol Channel. Now, when in a charter-party, as in this one, a large choice of ports is given, to any one of which the vessel may be ordered to proceed, no one can tell the exact circumstances in which the vessel may be placed until it is known to what port she will be ordered; because the general rule governing the delivery of cargoes is that the vessel must proceed to the port to which she is ordered, and must there deliver at that port her cargo, according to the usual course of delivery at that port of such a cargo as she carries. The exact circumstances, therefore, in which the vessel may be placed will vary in various ports. Her owners cannot deliver her cargo at any place in the port as they may think fit, neither can the charterers order her to any place in the port to which they may think fit; her owners in this particular may not gratify their own whim and pleasure, nor are they bound by the whim and pleasure of the charterers, but they are bound and entitled to deliver the cargo at the port in one part of the port—namely, at that place in the port where such cargoes are usually delivered. Now, that being the general rule, I have no doubt that, if it were shown that at a particular port the usual mode of unloading a particular cargo was to unload one-half or any proportion at one place in the port, and to unload the remainder at another place in the port, then the usual place of delivery of that cargo in that port would be at both those places. The shipowner would be bound and entitled to deliver the cargo in that way, unless some other stipulation had been made between him and the charterer as to the mode of unloading the ship.

Now I come to the clause as to lay days, which is a very common clause in charter-parties—a clause as common as charter-parties themselves. Some stipulation has to be made about the time to be occupied in loading and unloading the cargo; that time is fixed either expressly or impliedly—it may be fixed expressly by the parties, or fixed impliedly as a reasonable time by law. If it is fixed by the parties, they do it in this way: they allow a certain number of days during which the vessel is to be at the disposal of the charterers to load and unload her, and during which he is not

to be called on to pay for the use of the ship; those days are the lay days. A lay days clause, therefore, is always a stipulation in the charter-party in favour of the charterer. Upon that stipulation a further stipulation is commonly engrafted dealing with demurrage days. Those are days beyond the lay days, during which the charter-party provides that the charterer shall pay a fixed sum for the use of the ship, if he keeps her doing nothing for the purpose of loading or unloading her for a certain number of days after the lay days are over. That stipulation is also in favour of the charterer, because, instead of being involved in any dispute about the amount he has to pay for keeping the vessel idle, the sum to be paid per day during the demurrage days is fixed by the charter-party. If the charterer keeps the vessel idle beyond the demurrage days, the amount to be paid is a question of damages, and he does not know what he will have to pay until the amount has been settled by a tribunal or by agreement. In this case we have to deal with lay days. Lay days are described in charter-parties in various different ways, and may be stipulated for and calculated in various different manners. They may be, and sometimes are, described as days of so many working hours; then the number of days is fixed, and the number of hours per day during which the work is to proceed is also fixed. They may be described as so many "working days." In that case they will depend in some degree upon the port in which the vessel may be at her loading and discharge. "Working days" are not the same in every port in England even, and "working days" in foreign ports differ from working days in English ports. By custom, if not by law, English working days do not include Sundays, and in some foreign ports working days may include Sundays. Again, in some foreign ports, working days may not include saints' days, while such days would be working days in England. If by the custom of any particular port certain days in the year are holidays, so that by the custom no work is done in that port on those days, then the term "working days" in the charter-party does not at that port include those days. In an English port "working days" do not include Sundays and Christmas Days and some other days well known as holidays. "Working days," then, in a charter-party means days on which, at the port according to the custom of the port, work is done in loading and unloading ships, and in no case at an English port do they include Sundays. Merchants and shipowners have thought that there was something unsatisfactory in the use of the term "working days," and that lay days ought to be counted irrespective of the customs of different nations and different ports, and that the charterer must take the risk of whether or not work is done on Sundays and holidays at the various ports in which the chartered vessel may be. They have, therefore, introduced a new term into charter-parties—namely, "running days." That phrase is used to distinguish the days from working days. If "days" are spoken of in a charter-party, they are distinguished from "working days," because, *primâ facie*, "days" means all day and every day, and includes Sundays and holidays; but it is possible that disputes might arise about the meaning of the term "days" in such a connection, and it is to obviate any such difficulty that this term "running days" has been issued. That is a nautical term, and it can be at once seen what it means. What is the run of a ship? It is a phrase well known. One speaks of the number of days it will take a ship to "run" from the Indies to England, and "running days" are those days on which a ship is running. What are those? Why, all day and every day, day and night. That is as plain as possible the meaning of the term. "Running days" are those days during which, if the vessel were at sea, she would be running on her voyage—that is, every day and all day. In the case of *Brown* v. *Johnson* (*ubi sup.*) Lord Abinger pointed out that, in point of truth, "days" and "running days" mean the same thing; because, if so many days for loading and unloading a vessel are spoken of in a charter-party, they include not only working days, but every day, including Sundays and holidays, and consequently it comes to pass that "days" and "running days" really mean the same thing.

Having come to the conclusion, it now remains to consider in what manner the lay days—not "running days"—are to be calculated. They must begin as soon as the ship is at her berth in the usual place of delivery, and must go on from then consecutively. They must go on consecutively, not because the charter-party in terms says so, but because it is to be taken as a necessary implication that the parties intend that, as soon as the vessel begins to unload, the unloading is to proceed uninterruptedly upon consecutive days, neither party at his option taking a holiday. If the phrase "working days" is used, that consecutiveness is spoilt, for the reason which I have already explained. "Running days" means, as I have said, the same thing as days, and, when the lay days are provided for as "running days," the work must go on from day to day, every day being counted. Now, a charter-party might provide that the lay days should be so many "running days" except Sundays, in which case the meaning would be that every day was to be counted except Sundays, those days being taken out by the express exception contained in the charter-party. Now comes the question, Is the term "running days" in a charter-party contradicted by proof of a custom existing at a particular port that at that port certain intermediate days—such as Sundays, for instance—are to be taken out? It does not seem to me that there is any contradiction. It is only an explanation of how at that port the "running days" are to be calculated; they are not to be, as they ordinarily would be, consecutive, if the custom is to the contrary. I cannot see that such a custom contradicts any express or implied stipulation in the charter-party, and if it does not do so then the custom may be proved. In this case I think it cannot be denied that the custom was proved. The learned judge heard the evidence of two witnesses upon it, was satisfied with that evidence, and found that the custom was proved. That custom was, after all, a custom of a very limited kind, and was this: that when a vessel arrives at the port of Gloucester with a grain cargo (the custom does not apply to all cargoes), and is so heavily laden that she cannot get up the canal from Sharpness to the basin of Gloucester within the city, the shipowner has the right to call upon the charterer to be present at Sharpness to take

delivery, not of all the cargo, but of so much thereof as will so lighten the vessel that she shall be able to pass up the canal to Gloucester Basin; the time occupied in unloading thus much of the cargo at Sharpness counting as part of the lay days. The vessel then passes up the canal and delivers the remainder of her cargo in the basin and returns to Sheerness, the time occupied in going and returning not being counted as part of the lay days. I think the custom assumes that Sharpness is within the port of Gloucester, because, if that were not so, by what right would the shipowner include the time occupied in unloading at Sharpness in the lay days? And for all the purposes of this case I treat Sharpness as being within the port of Gloucester. Then, what does the custom come to? It only comes to this: that at the port of Gloucester there are two usual places of discharge for grain cargo—the one at Sharpness, where the ship discharges enough to enable her to pass up the canal; and the other at the basin at Gloucester, where the discharge is completed. If there was no custom, the lay days would of course begin at the beginning of the delivery at Sharpness, and would, if "days" or "running days" were provided for, go on consecutively from day to day. But the custom adds this term: that for the time occupied by the traversing of the canal—which is, be it remembered, a removal of the vessel within the limits of the port—lay days are not to be counted, and that out of the "running days" such an intermediate time is to be deducted. I cannot see that such a custom contradicts anything contained in the charter-party, and, so far from being an unreasonable custom, it seems to me to be a most reasonable one, and one calculated to do accurate justice between shipowner and charterer, having regard to the circumstances of the port. I think, therefore, that the judgment of the learned Baron was right, and that this appeal must be dismissed. I think the judgment of Lord Abinger in *Brown* v. *Johnson* (*ubi sup.*) is an express authority that such a custom as this is admissible, and that, if proved to exist in fact, it modifies the charter-party.

Cotton, L.J.—I am of the same opinion. A custom was found by the learned judge to have been proved to this effect: that when vessels with grain cargoes come to discharge at the port of Gloucester, but are too heavily laden to go up the canal, they discharge at Sharpness so much of their cargo as is necessary to lighten them to enable them to go up the canal; that the days occupied in this discharge are counted among the lay days provided for by the charter-party, but that the lay days are interrupted while the vessel is going up the canal, and begin again when she arrives at the usual place of discharge in the basin of Gloucester. That was the custom found by the learned judge, and, although the evidence of the witnesses who proved the custom has been criticised, I see nothing which would justify us in saying that the learned judge was wrong in finding the custom to be that which he has stated. That seems to me a reasonable custom, and a custom which takes into account the interests both of the shipowner and of the charterer, and provides reasonably for each of those interests. The main point argued was, that this custom is inconsistent with the express terms of this charter-party, and of course that objection, if it could be made out, would be fatal. A custom when proved only modifies that which, in the absence of any custom, would be the consequence of the contract between the parties. It modifies their legal rights under the instrument, there being no express provision in the instrument with reference to the matter; but where the instrument itself deals with the subject-matter of the custom in a way contrary to the custom, then the rights of the parties are determined by the instrument. Now, it is said that this charter-party provides eight running days for loading and unloading the cargo, that running days mean consecutive days, and that therefore the custom which breaks into the consecutive days is inconsistent with the express provisions of the charter-party. I think the fallacy of that argument is this: that "running days" means consecutive days. It may be true that, in the absence of any custom, running days would be consecutive days, but that is not conclusive. What we have to consider is whether the phrase "running days" is an express stipulation that the days shall be consecutive. I think it is not. I think the phrase "eight running days" will not, in the ordinary use of the English language, bear that meaning: "eight days running" might have done so, but I think "eight running days" has a different meaning. It may be that the consequence of using the term "running days" will, in the absence of custom, be that the days will be consecutive; but nothing has been quoted to show us that "running days" must necessarily mean "consecutive" days. I think the language used by Lord Abinger in *Brown* v. *Johnson* (*ubi sup.*) is quite contrary to the appellants' contention. He says: "With respect to the days, I think the word 'days' and 'running days' mean the same thing—namely, consecutive days—unless there be some particular custom." But he cannot mean that it is the same as if "consecutive days" had been expressly stipulated for, because, if "running" was the same as "consecutive," no custom could interfere to make the days not consecutive. I think, therefore, that there is nothing in the express terms of this contract to prevent the custom from being introduced and proved, and, as it was introduced and proved, in my opinion the judgment of the learned judge was quite right. I am of opinion that the days spent in going up the canal and returning are not to be included in counting the lay days allowed for the discharge of the cargo. I am therefore of opinion that the appeal must be dismissed.

Lindley, L.J.—I am of the same opinion. I think, upon the evidence, the custom was proved. The main point argued was that, taking the custom as proved, it was inconsistent with the terms of this charter-party, and cannot affect the question now in dispute between these parties. To reduce the argument of the appellants to the smallest possible compass, it is this: that "running days" in this charter-party means and ought to be read as "consecutive days." Let me say, in the first place, that if the word "consecutive" is substituted for the word "running," the clause becomes wholly insensible, because it would follow that the time spent in loading, unloading, and in calling for orders at Elsinore, is all to be spent upon consecutive days. That is wholly impossible, and therefore the one word cannot, at any rate, be substituted for the other. Then it is

urged that "running days" have been held to mean consecutive days. How does the custom bear upon that proposition? The custom is that the time which is necessarily consumed in going up the canal from Sharpness to Gloucester and in returning is not treated as part of the time for unloading. During that time the cargo is certainly not physically being discharged, and the custom of the port says that that time is not to be reckoned as part of the time allowed for the discharge. By the charter-party a fixed number of days are allowed for loading and for discharge. Looked at in that way, it appears to me that the custom is in strict conformity with the terms of the charter-party, and in no way inconsistent with it. I need not say anything more about the authorities. I think it is plain that "running days" means all days and every day, whether they are working days at the particular port or not. I think, therefore, that the judgment of the learned Baron was right, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs, *Turnbull, Tilly,* and *Mousir,* for *Turnbull* and *Tilly,* West Hartlepool.

Solicitors for defendants, *Edward Doyle* and *Sons,* for *Taynton* and *Sons,* Gloucester.

Tuesday, Dec. 16, 1884.

(Before BRETT, M.R., COTTON, and LINDLEY, L.JJ.)

GARDNER AND SON *v.* TRECHMANN. (*a*)

Charter-party—Bill of lading—Incorporation of charter-party into bill of lading—Freight—Lien.

The plaintiffs were the consignees of certain goods shipped on board a chartered vessel under a bill of lading whereby freight was payable at the rate of 22s. 6d. per ton, and whereby it was provided that extra expenses should be borne by the receivers, and "other conditions as per charter-party." By the charter-party it was provided that freight should be payable at the rate of 31s. 3d. per ton, and that a shipowner should have an absolute lien on the cargo, for freight, dead freight, &c. A further clause provided that the captain was to "sign bills of lading at any rate of freight, but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance." At the port of discharge the defendant, the shipowner, claimed and compelled payment from the plaintiffs, who were not the charterers, of freight at the rate provided for by the charter-party. The plaintiffs sued to recover back the difference between the charter-party and bill of lading freights.

Held, that the conditions as to payment of freight contained in the charter-party were not incorporated in the bill of lading; that no right of lien existed for the freight mentioned in the charter-party; and that upon payment of the freight mentioned in the bill of lading the plaintiffs were entitled to delivery of the goods.

Judgment of Baggallay, L.J. reversed.

THIS was an appeal from a judgment of Baggallay, L.J., at the trial at Liverpool.

The plaintiffs were timber merchants at Bootle, and the defendant was the owner of the British steamship *Amanda.*

By a bill of lading, dated Aug. 13, 1883, about 750 tons of boxwood were shipped on board the *Amanda,* at Taganrog, and were made deliverable to the plaintiffs. The bill of lading was signed by the captain of the *Amanda,* and contained (*inter alia*) the following clauses:

Freight for the said goods payable on delivery at the rate of twenty-two shillings and sixpence (22*s.* 6*d.*) per ton of 2240lbs. delivered, immediately in cash, without discount, with average accustomed.

All extra expenses in discharging to be borne by the receivers, and other conditions as per charter-party dated the 23rd July 1883.

The charter-party thus referred to in the bill of lading had been made upon the date mentioned between the defendant and Messrs. Berthold Smith and Co., of Taganrog. By the terms of the charter-party the *Amanda* was to proceed to a safe port in the Sea of Azof, and there load a full and complete cargo, &c., and then proceed to a safe port in the United Kingdom, on being paid freight at the rate of 1*l.* 11*s.* 3d. per ton. The charter-party also contained the following clauses:

The freighters' liability on this charter to cease when the cargo is shipped (provided the same is worth the freight, dead freight, and demurrage on arrival at port of discharge), the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average.

It is further agreed the captain to sign bills of lading as presented and at any rate of freight, but should the total freight as per bills of lading be under the amount estimated to be earned by this charter, the captain to demand payment of any difference in advance; on the other hand, any difference in excess of chartered freight to be deducted by charterers' agents at port of discharge.

Upon the arrival of the *Amanda,* at Liverpool, the port of discharge, the defendant claimed payment of freight at the rate mentioned in the charter-party, but the plaintiffs disputed that claim, and contended that the proper rate of freight payable was the rate mentioned in the bill of lading. The defendant detained a portion of the cargo to enforce payment of the freight at the rate mentioned in the charter-party, and in order to obtain delivery the plaintiffs were obliged to pay a sum of about 99*l.* in excess of the freight due under the bill of lading, which sum of 99*l.* the plaintiffs now sought to recover back in this action.

Baggallay, L.J. at the trial gave judgment in favour of the defendant.

The plaintiffs appealed.

Barnes for the plaintiffs.—The plaintiffs are entitled to delivery upon payment of the freight at the rate mentioned in the bill of lading. The clause in the bill of lading, which incorporated the conditions of the charter-party, must be strictly construed, and must not be read so as to override the express conditions of the bill of lading. Baggallay, L.J. relied upon *Gray* v. *Carr* (25 L. T. Rep. N. S. 215; 1 Asp. Mar. Law Cas. 115; L. Rep. 6 Q. B. 522), but that case does not govern this case. The last authority on the point is the case of *Gullichsen* v. *Stewart* (50 L. T. Rep. N S. 47; 5 Asp. Mar. Law Cas. 200; 13 Q. B. Div. 317), which shows that, where a charter-party and bill of lading differ, the bill of lading must prevail. He also cited

Porteus v. *Watney,* 4 Asp. Mar. Law Cas. 34 39 L. T. Rep. N. S. 195; 3 Q. B. Div. 227, 534.

(*a*) Reported by A. A. HOPKINS Esq., Barrister-at-Law.

French, for the defendant.—The clause in the bill of lading which incorporates the charter-party does so wholly, except so far as the clause itself creates any exception. The courts have never cut down an agreement of this nature. *Gullichsen Stewart* (*ubi sup.*) only decided that the consignees of the cargo were not protected by the charter-party. [Lindley, L J. referred to *Fry* v. *Chartered Mercantile Bank of India* (14 L. T. Rep. N. S. 709; 2 Mar. Law Cas. O. S. 346; L. Rep. 1 C. P. 689). Does not that case show that such a general reference as this to the charter-party incorporates only such of its conditions as are consistent with the bill of lading?] No case has so held at present.

Barnes was not called on to reply.

Brett, M.R.—In this case the plaintiffs have shipped goods to be carried to England, and the shipowner has assumed to hold them in respect of an alleged lien for freight, the freight alleged to be payable to the shipowner being the difference between the freight payable under the bill of lading and that payable according to the charter-party. The shipowner's claim is not only for the whole freight under the bill of lading, but for that and as much more as will make up the amount to the amount of freight mentioned in the charter-party. Now I am of opinion that the charter-party gave the shipowner no lien for this difference of freight; the charter-party itself dealt with this very point. The excess of the amount estimated to be earned by the charter-party over the freight payable under the bills of lading was to be paid immediately before the ship sailed, it was to be demanded by the captain; the shipowner had therefore no right of lien for that excess even against the charterer. But assuming that this right of lien ever did exist in the shipowner, it now exists no longer; it has been ousted by the fact that his captain has signed this bill of lading. There have been many cases as to what is incorporated into a bill of lading by these words of general reference to a charter-party—"other conditions as per charter-party."

I think the cases come to this: that these words bring into the bill of lading all those stipulations and clauses of the charter-party which are applicable to the contract contained in the bill of lading, and none others; further, no stipulation contained in the charter-party can be brought in by these words so as to alter the express stipulations contained in the bill of lading, so that where the bill of lading contains specific stipulations these cannot be altered by these words of general reference to a charter-party which may contain inconsistent conditions. In this bill of lading there is an express and specific stipulation with regard to the payment of freight, viz., that the goods shall be delivered on the payment of a specified amount of freight, which amount has been fixed without reference to any other amount of freight, The effect of the shipowner's contention in this case would be to alter that specific stipulation by these general words of reference to the charter-party in which another amount of freight is mentioned. What these words of general reference to the charter-party do is to bring into the bill of lading all those clauses and conditions of the charter-party which are not specifically dealt with by the bill of lading itself; as for instance, a lien for demurrage, but not a lien for freight payable under the charter-party. These cases are difficult to decide, and I can well understand how the Lord Justice came to a decision in favour of the defendant; but, after hearing full argument, I feel constrained to differ from him.

Cotton, L.J.—I am of the same opinion. The question turns upon the construction of two documents, the charter-party and the bill of lading, and we have to consider for what amount of freight the plaintiffs were liable under these two documents. Now the higher rate of freight is given by the charter-party, but in that document express power is given to the captain to sign bills of lading at a lower rate, and he did sign this bill of lading under that power. One of the very purposes of the bill of lading is to settle the amount of freight, and to hold that by these words of reference to the charter-party, "other conditions as per charter-party," a lien is given to the shipowner for the amount of freight stipulated for under the charter-party would, as a mere matter of construction of these two documents, be to alter their plain meaning. These words seem to me to provide in effect that the charter-party shall govern the contract except as to the specific provisions contained in the bill of lading, as to which the bill of lading is of itself a sufficient and effectual contract. This construction saves and takes in most of the clauses of the charter-party, but it does not take in what is here contended for, namely, a lien for the freight mentioned in the charter-party; that would be to alter the very point upon which the bill of lading is itself express. I think, therefore, that the decision of the learned judge cannot be supported, and that this appeal must be allowed.

Lindley, L.J.—I am of the same opinion. The whole difficulty has arisen from the captain having neglected to enforce on behalf of the shipowner the clauses of the charter-party as to demanding payment in advance of the difference between the freight due under the bills of lading and the freight estimated to be earned by the charter-party; and the shipowner now seeks to throw upon the owners of the cargo that difference, which they ought to have obtained from the charterers before the vessel sailed at all. The bill of lading is the contract for the conveyance of the goods, and the holder of that document is entitled to have the goods delivered to him upon payment of the specified freight. Here it is contended that he is not entitled to delivery except upon payment of the freight specified in the charter-party, and that that is so by reason of the general words in the bill of lading which incorporate the charter-party. But is the term in the charter-party as to freight consistent with the bill of lading? Certainly I am of opinion that it is not. I cannot see how the two clauses can stand together, and I think it is tolerably plain that only those conditions of the charter-party are incorporated with the bill of lading which are consistent with the contract contained in the bill of lading. I think judgment must be entered for the plaintiffs with costs.

Judgment for plaintiffs.

Solicitors for plaintiffs, *Field, Roscoe*, and *Co.*, for *Bateson* and *Co.*, Liverpool.

Solicitors for defendants, *Turnbull, Tilly*, and *Mousir*, for *Turnbull* and *Tilly*, West Hartlepool.

Jan. 18 *and* 19, 1886.

(Before Lord Esher, M.R., Lindley, and Lopes, L.JJ., assisted by Nautical Assessors.)

The Ebor. (*a*)

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

Collision—Dense fog—Moderate speed—Regulations for Preventing Collisions at Sea, arts. 13, 18.

Where those in charge of a steamship in a dense fog hear a whistle ahead, it becomes their duty to act sooner with their engines than if the whistle is heard on either bow; and in such a case they ought to act on the probability that the whistle belongs to a vessel approaching them, and that therefore risk of collision may be involved.

The Dordogne (51 *L. T. Rep. N. S.* 650; 5 *Asp. Mar. Law Cas.* 328; 10 *P. Div.* 6) explained.

This was an appeal by the plaintiffs from a decision of Sir James Hannen in a collision action *in rem* instituted by the owners of the steamship *Telesilla* against the owners of the steamship *Ebor*. The defendants counter-claimed.

The facts alleged on behalf of the plaintiffs were as follows: Shortly before 4.25 a.m. on the 29th Jan. 1885, the *Telesilla*, a steamship of 795 tons net, manned by a crew of seventeen hands all told, and laden with a cargo of coal, whilst on a voyage from the Tyne to London, was in the North Sea off Cromer. At such time the wind was a light breeze from the S.W., the weather was foggy and thick in patches, the tide was about one hour's ebb, running about one knot, and the *Telesilla* was steering S. by E. ½ E. magnetic, making about three knots through the water, with her engines going slow. Her proper regulation lights were duly exhibited and burning brightly. A good look-out was being kept on board of her, and her steam whistle was being sounded at frequent intervals. At such time those on board the *Telesilla* heard the dull and faint whistle of a steamship, apparently about two points on the port bow, and she was kept on her course, and, the whistle of the *Telesilla* having been sounded in reply, the steamship's whistle was again heard, apparently nearer; whereupon the engines of the *Telesilla* were stopped and her whistle was again blown; but soon afterwards, and when the speed of the *Telesilla* was reduced so that she was only just moving through the water, the masthead and green lights of a steamship, which proved to be the *Ebor*, came in sight about two points on the port bow of the *Telesilla*, and about two ships' lengths off, and, although the engines of the *Telesilla* were at once reversed full speed astern, and three blasts blown on her steam whistle and her helm starboarded, the *Ebor*, which was going at a high rate of speed, with her starboard bow struck the stem of the *Telesilla* doing her great damage.

The defendants admitted that they had been guilty of negligence contributing to the collision, but alleged that the plaintiffs were also guilty of negligence. The facts alleged on behalf of the defendants were as follows: Shortly before 4.25 a.m. on the 29th Jan. 1885, the *Ebor*, a steamship of 449 tons, manned by a crew of fifteen hands all told, was off Cromer in the course of a voyage from Calais to the Tyne in ballast. The tide was ebb, and there was a thick fog. The *Ebor* was heading N.N.W., and going half speed at about the rate of three and a half knots. Her regulation masthead and side lights were duly exhibited, burning brightly, and her fog signal was being duly sounded. At such time several whistles were heard from ahead, and on each bow, and the lights of a steamer were seen on the port bow all clear. In these circumstances the white light, and immediately afterwards the red light, of the *Telesilla* were seen at a distance of about two hundred yards, about two points on the starboard bow. Her whistle was heard, and in a short time her hull was seen close to the *Ebor*, approaching at considerable speed. When the light of the *Telesilla* was seen, the engines of the *Ebor* were stopped and reversed full speed, and her helm was put hard-a-port; but the *Telesilla* struck the starboard bow of the *Ebor* with her stem, and did her considerable damage. The defendants (*inter alia*) charged the plaintiffs with breach of arts. 13 and 18 or the Regulations for Preventing Collisions at Sea, which are as follows:

Art. 13. Every ship, whether a sailing ship or a steamship, shall in a fog, mist, or falling snow go at a moderate speed.

Art. 18. Every steamship when approaching another ship, so as to involve risk of collision, shall slacken her speed, or stop and reverse if necessary.

April 30, 1885.—The case came on for hearing before the President (Sir James Hannen), assisted by Trinity Masters.

Sir *Walter Phillimore* and *J. P. Aspinall* for the plaintiffs.

Charles Hall, Q.C. and *Baden-Powell* for the defendants.

Sir James Hannen.—These cases give rise to great difficulty, and I certainly think that this one particularly illustrates that fact; but, having given the best consideration to the case that I can, having consulted the Trinity Brethren, I come, on the whole, to the conclusion that both these vessels are to blame. Certainly it cannot be laid down, as was indicated by the Master of the Rolls in the case of *The Dordogne* (51 L. T. Rep. N. S. 650; 5 Asp. Mar. Law Cas. 328; 10 P. Div. 6) that there is any rule of law that a vessel, when she hears the whistle of another steamer in a fog, is bound to come to a standstill. It must depend upon the circumstances of the case. Of course there is a good deal of deception about the direction in which the sound is heard, or the direction in which it seems to be heard from; but if a man believes that the sound comes from a place well away on either side, it would give rise to different steps to what it would if he believes that he hears the sound right ahead. In this case the sound of the whistle which was heard on board the *Telesilla* was heard practically ahead very slightly on the port bow. I have asked those who assist me to put themselves in the position of those on board the *Telesilla*, and to say what should have been done different to what was done, and the answer that I receive is that, in the circumstances which existed, they ought to have stopped when they heard the first whistle until they had time to discover by the sound of the whistle whether the vessel was approaching, or what it was doing. Instead of doing that they

(*a*) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law

continued at the pace at which they had previously been going, and what is the result? Shortly afterwards—say, a minute—they find themselves in such close proximity to another vessel, that then it becomes, as they allege, practically impossible to avoid a collision. This state of facts which the plaintiffs put forward shows that where the whistle of a steamer is heard practically ahead, that it is not right to wait till another whistle is heard, but immediate steps must be taken to ascertain in what direction the other vessel may be going. As I have hitherto had occasion to say, they must put themselves, as it were, *en rapport* with each other. They must put themselves in such a position that each may be able to deliberately form a judgment as to what distance the other vessel is off, and in what direction she is going. If the vessels continue going as they are until another whistle is heard, it may be through the negligence of the other vessel that they are brought into such close proximity that it may be impossible to avoid collision. I do not think that when officers in command of ships are dealing with fogs, they should say "We expect everything to be done that ought to be done on the other side." It has been pointed out that precautionary steps are to be taken at a time when the vessels are approaching so as to involve risk of collision. That risk may arise from ignorance or even negligence on the other side.

It is to be further observed, with regard to the *Telesilla's* case, that it was originally put forward in a very different manner to that in which it has been attempted to be proved. It was represented that there were three points of time, at two of which a change was made in the manœuvring of the *Telesilla*. It is said in the Preliminary Act that the *Ebor's* whistle was heard, and, when her whistle indicated that she was approaching, that then the engines of the *Telesilla* were stopped, and that, when the *Ebor* again whistled and came into view, the engines of the *Telesilla* were reversed. In the pleadings it is said that the whistle, having been heard for the first time, was again heard, apparently nearer, whereupon the engines of the *Telesilla* were stopped, and her whistle was again blown; but soon afterwards, and when the speed of the *Telesilla* was reduced so that she was just moving through the water, the masthead and green lights of a steamer, which proved to be the *Ebor*, came in sight about two points on the port bow. That statement of facts emphatically marks a decided interval between the stopping and the reversing; but the evidence which has been given satisfies me that there was practically but one operation of stopping and reversing. The man scarcely had his hand on the lever to accomplish one order before he had to effect the other operation. Everything leads to the conclusion that these two orders, viz., "Stop" and "Reverse full speed," were uttered as rapidly as they could be after each other. This shows the very short space of time which, by not stopping sooner, the *Telesilla* had left herself to perform any needful manœuvre when it was found that there was danger. There is no doubt that the position of the *Telesilla* was a difficult one. In justice to her, I should say that the Elder Brethren are of opinion that, in no other respect but in that which I have indicated, was there any want of proper care shown on her part. It is, however, our opinion that, though she may have been only a little in fault, yet she was in fault, and therefore there will be a decree of both these vessels to blame.

From this decision the plaintiffs appealed.

Jan. 18, 1886.—The appeal came on for hearing before the Court of Appeal, assisted by Nautical Assessors.

Sir *Walter Phillimore* and *J. P. Aspinall*, for the plaintiffs, in support of the appeal.—The *Telesilla* has been improperly held to blame because those in charge of her did not act with the engines on hearing the first whistle. It is admitted that she was then going at a moderate speed, and that, when it became known to her that the *Ebor* was approaching so as to involve risk of collision, her engines were immediately reversed. It has never been laid down that a vessel, on hearing a first whistle, is to at once take all way off her. If she is going at a moderate speed she is entitled to hold on until she hears a second whistle, and then act as circumstances may require. In *The Dordogne* (51 L. T. Rep. N. S. 650; 5 Asp. Mar. Law Cas. 328; 10 P. Div. 6) the Master of the Rolls said that, on hearing the first whistle, the vessel should reduce her speed, and that, when the other vessel came substantially near, then all way should be taken off. It is true that Sir James Hannen has found that the first whistle was heard practically ahead, but all the plaintiff's witnesses describe it as being dull and faint, indicating that it was some considerable distance off. If so, the circumstances were not such as to lead a reasonable and prudent officer to suppose that there was then risk of collision; and, if so, the *Telesilla* did not infringe art. 18 of the regulations in not acting on hearing the first whistle.

C. Hall, Q.C. (with him *Baden-Powell*) for the respondents, was not called upon.

Lord Esher, M.R.—I think the judgment of the learned judge was right, and for the reasons he gave. Much has been said about the case of *The Dordogne* (*ubi sup.*) and the construction of art. 13 of the Regulations for Preventing Collisions. The article is, "Every ship, whether a sailing ship or steamship, shall in a fog, mist, or falling snow go at a moderate speed." In *The Dordogne* (*ubi sup.*) the question was raised as to the construction of that article—whether "moderate" was to be an absolute term, or whether it was meant to be a term relative to the circumstances. It was there urged in argument that "moderate" meant an absolute rate of speed without any relation to the circumstances; and what the court endeavoured to state, and held, was, that "moderate" really meant moderate according to circumstances, so that what is moderate under one set of circumstances is not moderate in another. That was the real effect of the judgment, which did not attempt to say that, if two vessels were within a mile of each other in a fog, their speed was to be a certain specified speed. I recollect in *The Dordogne* (*ubi sup.*) trying to illustrate my meaning. For instance, if a ship were going up or down a narrow river in a thick fog, so that those in charge could not see ahead, under those circumstances, where the chances are a hundred to one that they would meet another ship exactly opposite to them, whether there was a whistle or no, moderate speed might

in that case consist in being absolutely stopped in the water. At all events, it might be her duty to have only just enough way on to keep steerage way. Another case would be where the ship is in the open sea, but in the track of vessels; then, if she is in a thick fog, and knows that in all probability there will be ships meeting her, although it is not the same as if she were in a narrow river, yet she ought to go very slow. Again, if she is in the open sea and not in the track of vessels, then, until she hears a whistle, she has no reason to suppose that any ship is near. But if she hears a whistle the circumstances are different. Here, again, we must consider the direction of the whistle. If she hears a whistle astern of her, there is, of course, then no reason why she should stop. By so doing she would probably be run into by the vessel behind her. If the vessel were on either beam it would be very nearly the same thing. But when you come to a whistle on the bow you come to a different state of things. If a whistle is heard on the bow, it is absurd to say that an experienced officer cannot tell something as to the distance of the vessel sounding the whistle. Suppose you hear a whistle, say, about two miles off, and broad on your bow, there is then no necessity to stop your ship, perhaps hardly any necessity to moderate her speed. But if the ship is really close to you—I do not mean within a ship's length—and on your bow, then you ought to bring your ship to a moderate speed within the meaning of the rule. If you find the vessel is ahead of you, then it becomes necessary to take extreme precautions, because you know that every moment is bringing the ships nearer together, and that there will be danger. When the whistle is ahead of you, you ought, to my mind, to act much sooner than if the whistle is anywhere else. But, supposing it is ahead, then comes the question whether you have a right to wait till there is a second whistle. If the whistle is ahead, I should say you ought hardly to wait at all; but if it is on the bow, and seems to be at a considerable distance, you may wait till there is a second whistle. If the second whistle, under these circumstances, is nearer than the first, your duty is clear—you ought to stop, and keep your vessel in hand.

In the present case, where was the first whistle that was heard? There seems to be a dispute whether there were three whistles or two. One of the witnesses says there were only two whistles—others say there were three whistles. It is also said that there was one whistle, and then an interval between the second and third. But there is one witness who says that he heard three whistles, and that there came one, and then the other two within a second of each other, and that, within a second of these two whistles, the ship was in sight. If so, that was equivalent to two. If there were really an interval between the second and third, the question will depend on the second, and whether the ship acted properly on hearing the second. I, however, take it that the evidence comes to this—that there were in substance two whistles. Now, what ought this ship to have done on hearing the first whistle? It was as nearly as possible ahead of her. It has been described as being "dull." Was that really so? That partly depends upon how far the ship was. If she was within what any reasonable person would call a near distance, then I shall not adopt the epithet "dull." I shall take it to be an ordinary whistle. As far as I can make out, the ships certainly were not more than a mile from each other—I should think within a mile. What, then, was the duty of the officer in charge of the *Telesilla?* It was to go at a moderate speed. What was a moderate speed? He was going over the ground from three to three and a half knots. That was a moderate speed before he heard any whistle; but was it so after he heard the whistle? It seems to me, then, that moderate speed was to go nearly as slow as he could, consistently with keeping his vessel under command. I do not think he was then obliged to stop his engines; but ought he to have gone on at the pace he was going? He could have gone at some pace between that and stopping his engines. But, instead of doing that, he kept on the same speed till the vessels were close together. Therefore, the question before the learned judge was this: Was the *Telesilla* going at a moderate speed between the first and second whistle, having regard to the fact that the first whistle was sounded ahead, and that the officer in command could not say in what direction the other vessel was going? What should an officer in a fog do when he cannot tell whether a vessel is coming towards him or not? He certainly ought to act on the possibility that she is coming towards him. That is a rule I do not hesitate to lay down in those circumstances. With a whistle right ahead of you in a fog, so that you cannot see the ship whistling until she is close on you, you ought to act on the possibility—nay, on the probability—that she is coming towards you. If she is coming towards you, to my mind it follows, as a matter of course, that your speed ought to be almost as slow as it can be. If it is not, you have not gone at a moderate speed within the meaning of art. 13, and then, by reason of your breaking that article, the consequence is that you also break art. 18. You may, of course, break art. 18 without breaking art. 13, for that is only applicable to fog, mist, or falling snow. In this case, the learned judge was advised that, with the whistle ahead, and at a distance certainly not more than a mile, the *Telesilla* ought to have stopped till she had time to discover what the other vessel was doing. The meaning of that is not that the officer in command ought to have actually stopped the engines, but that he ought to have stopped the way of the ship, and make her go slower, until a second whistle should tell him whether the other vessel was coming towards him or going away from him. Had there been a second whistle which showed that the other vessel was going away, he might instantly have gone on; but if the second whistle showed that the vessel was approaching him, he would have to act again, because, although he had brought his engines to slow, yet, on finding that the other vessel was coming closer to him, he ought to stop his engines and probably reverse. Those on the *Telesilla* ought to have been in such a position that, when the second whistle was heard, they could have stopped and reversed their engines, and sent their ship back almost instantly. Unfortunately they did not do so. It has been said over and over again by this court that vessels in a fog must be held very strictly to the rule, and also that the rules are not made to prevent collisions only, but to prevent risk of collision. The learned judge has taken that view, and, to my

mind, he was right in so doing. I wish I could express myself so clearly with regard to my decision that the utmost hypercriticism could not hereafter question what I say now. I will therefore say again that this was a case in which the vessel whistling was as nearly as possible right ahead, and at such a distance that it must have been apparent to those on the *Telesilla* that, if the vessel was coming towards them, it must very soon produce a position of great danger; that therefore the officer in charge ought to have acted on the probability that the vessel was coming towards him; that therefore he ought to have acted at once and without delay; and that, because he did not act sooner than he did, he broke the rules. I therefore think that the judgment of the President was right, and I would only add that our assessors agree with the opinion of the Trinity Masters below.

Lindley, L.J.—I am of the same opinion, that the conclusion arrived at by the learned judge in this case was right, though I think, as he did, that the decision bears somewhat hardly on the *Telesilla*. The collision took place in a fog off Cromer, and, up to that time, the *Telesilla* was going at what there is no reason to suppose was other than a moderate speed. She was going easy, and I understand there was no other method of going slower, except perhaps by stopping the engines from time to time. I will assume that to be so. The *Telesilla* hears a whistle, which is a little on the port bow, but practically ahead. Now comes the question, What ought she to have done? In point of fact, we know she did nothing until she heard the second whistle, which was much plainer and clearer than the first, and which showed that the other vessel was approaching nearer. Directly after that they see the vessel, and there is a collision. I must say I agree with the learned President when he says: "The state of facts which the plaintiffs put forward show that immediate steps should have been taken, by waiting for a repetition of the whistle, to ascertain the distance of the other vessel and the direction she was taking. As I have had occasion to say, they should, as it were, put themselves *en rapport* with each other. Instead of that they still continue to go on, at the same speed, until another sound is heard, and then the ships are brought into such close proximity that it is impossible to avoid a collision." It is very difficult to lay down a general rule in these cases. But, looking at the facts of this case, and the speed at which the *Telesilla* was going, it is obvious that something more might have been done to ascertain the movements of the other vessel. It seems to me that she was in fault, and did break art. 18. I am therefore of opinion that the decision is right, and that this appeal should be dismissed.

Lopes, L.J.—It appears to me that the decision in *The Dordogne* (*ubi sup.*) lays down no invariable rule as to what a vessel must do in a fog after she hears a whistle. Each case must depend on its own particular circumstances. The "moderate speed" spoken of in art. 13 must be taken to be a relative term. Thus, there may be circumstances where it would be prudent to stop, and even to reverse. In the present case the whistle was heard almost directly ahead. When it was heard, the *Telesilla* was going about three and a half knots, and continued on at that speed. The learned President has found that the *Telesilla* should have gone slower than that, until she discovered or had reason to know what the other vessel was doing, and from what quarter she was coming. The only question that this court has to consider is, whether that is an unreasonable conclusion to arrive at. Unless it is, it ought not to be reversed. I am of opinion that it is a reasonable conclusion, and that therefore this appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitors for the defendants, *Ingledew, Ince*, and *Colt*.

Tuesday, March 2, 1886.

(Before Lord Esher, M.R., Lindley and Lopes, L.JJ.)

Thorman *v.* Burt, Boulton, and Co. (*a*)

ON APPEAL FROM THE QUEEN'S BENCH DIVISION.

Carriage of goods—Action for freight—Counter-claim for short delivery—Bill of lading—Signature of master's agent—Liability of owner—Estoppel—Bills of Lading Act 18 *&* 19 *Vict. c.* 111), *ss.* 1, 3.

To an action for freight by a shipowner against the indorsees of the bill of lading, the defendants counter-claimed in respect of short delivery. All the goods that were actually put on board had been delivered to them; but the bill of lading acknowledged the receipt of a larger quantity. All the goods mentioned in the bill of lading had been floated alongside the ships in rafts, and mate's receipts given for them; but some of them were lost before they were shipped. The bill of lading was signed, "By authority of the captain, Wilh. Ganswindt as agent." Ganswindt was the ship's broker at the shipping port.

Held, that, apart from the Bills of Lading Act, a bill of lading is not conclusive against a shipowner, and he is not liable in respect of any goods not actually shipped; and that, in the present case, he was not liable under that Act, as the bill of lading was not signed by or for him.

Grant *v.* Norway (10 *C. B.* 665; 16 *L. T. Rep. O. S.* 504) *and* Jessel *v.* Bath (*L. Rep.* 2 *Ex.* 267) *followed.*

By a contract between Schoenberg and Domansky, of Dantzic, and Burt, Boulton, and Haywood, of London, the former sold to the latter 800 to 1000 loads of sleeper blocks deliverable to ships at Dantzic, according to the custom of the port, payment by buyer's acceptance in exchange for shipping documents. The custom of the port of Dantzic in loading timber cargoes is as follows: The shipper counts the number of pieces in each raft, and they are then floated down to the ship, and again counted by the mate or someone on behalf of the ship, and a mate's receipt given for them, which receipt is handed over to the ship when bills of lading are signed. In the present case 7497 pieces were delivered in rafts alongside the s.s. *Meredith*, belonging to the plaintiff, and a mate's receipt given for that number. This receipt was taken to the office of Ganswindt, the shipping broker, and the bill of lading was made out for the

(*a*) Reported by A. H. Bittleston, Esq., Barrister-at-Law.

quantity named in the receipt, and was signed by the shipping broker. The bill of lading commenced as follows: "I, Fletcher, master of the steamship called *Meredith*, which is now loading in Dantzic, to sail for London, where the discharge is to take place, certify that I have received from Messrs. Schoenberg and Domansky in the hold of my said ship, 7497 pieces," &c., and was signed, "By authority of the captain, Wilh. Ganswindt as agent." The number of pieces actually shipped on board and delivered to the defendants, who were the indorsees of the bill of lading, was 216 short of the 7497 pieces, such 216 pieces being lost in some way from the rafts when alongside the ship.

This action was brought for freight and dock dues, but the only question in dispute was, whether there had been a short delivery for which the defendants could counter-claim. The action was tried before Grove, J., who held that the counter-claim was not maintainable.

The defendants now appealed.

Bigham, Q.C. and *Armytage* for the defendants.—By the Bills of Lading Act, the bill of lading is conclusive evidence that the goods therein represented to be shipped have been shipped, as against the master or other person signing. Here the signature is by the ship's agent and binds the shipowner. [Lord ESHER, M.R.—You will find *Jessel* v. *Bath* (L. Rep. 2 Ex. 267) a distinct authority to the contrary.] Even if the person signing has only authority to bind the owner in respect of goods actually shipped, delivery of the goods to the servants of the shipowner alongside the vessel is equivalent to delivery on board:

British Columbia Sawmill Company v. *Nettleship*, 3 Mar. Law Cas. O. S. 65; L. Rep. 3 C. P. 499; 18 L. T. Rep. N. S. 291.

They also cited

Fragano v. *Long*, 4. B. & C. 219;
Re Bahia and San Francisco Railway Company, L. Rep. 3 Q. B. 584; 18 L. T. Rep. N. S. 467;
Howard v. *Tucker*, 1 B. & Ad. 712.

Cohen, Q.C. (with him (*J. Edge*) for the plaintiff.—The Bills of Lading Act only makes the person actually signing the bill of lading liable:

Brown v. *Powell Duffryn Coal Company*, L. Rep. 10 C. P. 562; 2 Asp. Mar. Law Cas. 578; 32 L. T. Rep. N. S. 621.

In the present case the bill of lading is not signed by the plaintiff; and the person who actually signed, signed for the master, and not for the shipowner. [He was stopped by the Court.]

Lord ESHER, M.R.—This is an action by a shipowner for freight and dock dues. The defendants are the assignees of the bill of lading, to whom it must be taken that the property in the goods mentioned in the bill of lading has passed; and they have set up a counter-claim against the shipowner for not delivering all the goods specified in the bill of lading. The question is, whether that counter-claim is maintainable. Before the Bills of Lading Act, if any injury was done to the goods, so as to affect the rights of the person to whom, by the indorsement of the bill of lading, the property had passed, he could sue in respect of such injury. If the goods were misdelivered or any other form of conversion had taken place, he could bring an action of trespass; that was by reason of his ownership of the goods. But he could not maintain an action upon the contract contained in the bill of lading. The question here is, not whether the defendants can maintain an action as owners of the goods, but whether they can sue for a breach of the contract contained in the bill of lading. By the Bills of Lading Act, sect. 1: "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or 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 had been made with himself." The contract contained in the bill of lading refers to all goods put on board the ship. It does not bind the owner of the ship as to more goods than those put on board. If the bill of lading signed by the master contains more goods than those actually put on board, the signature is beyond the master's authority; therefore, as far as this 1st section goes, the contract is only binding as to the goods actually put on board. But then it is said that the 3rd section of the Act gives the defendants a larger remedy. By that section, "Every bill of lading, in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment, as against the master or other person signing the same, notwithstanding that such goods, or some part thereof, may not have been so shipped, unless," &c. Now I agree that the words "the person signing the same" do not necessarily mean the person who actually signs. If, for instance, a clerk in the shipowner's office signs *per pro.*, the owner might be the person signing within the section. Or, if the captain had the gout and was thereby prevented from signing himself, and a servant signed for him, the captain would be the person signing. But in the present case, the signature was not that of a mere clerk or servant but of an agent; and he was the agent of the master, not of the shipowner. Therefore, as the shipowner did not sign the bill of lading in the present case, he incurs no liability under the 3rd section. I have already said that the 1st section does not help the defendants, as under that they can only sue in respect of the goods actually put on board. A number of cases seem to me to have really decided what we are deciding in the present case.

LINDLEY, L.J.—If this counter-claim is based upon the Bills of Lading Act, I am of opinion that it is not maintainable. The bill of lading is signed as follows: "By authority of the captain, Wilh. Ganswindt, as agent." That is clearly not the signature of the shipowner, who is the person against whom this counter-claim is made. Therefore, the argument based upon the 3rd section of the Bills of Lading Act falls to the ground. The 1st section merely gives the indorsee of the bill of lading the right to sue upon the contract contained in it. Then, if we look outside the Act the case of *Grant* v. *Norway* (10 C. B. 665; 16 L. T. Rep. O. S. 504) settles the point. The question to be decided was an extremely difficult one before that case; but that case settled it, and, as far as I am aware, has always been acted on. The marginal note is: "The master of a ship

signing a bill of lading for goods which have never been shipped is not to be considered as the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed." Then Mr. Armytage argues that there is a distinction between that case and this because all the goods mentioned in the bill of lading were floated alongside the ship in the present case, and were therefore in the custody of the ship. But that difference seems to me not to be material with reference to the question that we have to decide here. The decision of Grove J. was right, and this appeal must be dismissed.

LOPES, L.J.—The defendants in this action, who are indorsees for value of the bill of lading, seek to recover, by way of counter-claim, from the plaintiff, who is the shipowner, the difference in value between the goods delivered, which are all that were actually put on board, and the larger quantity of goods mentioned as being shipped in the bill of lading. It is perfectly clear that before the Bills of Lading Act such an action was not maintainable. Nor is it maintainable since that Act, and the case of *Jessel* v. *Bath* (L. Rep. 2 Ex. 267) seems to me to be a direct authority to that effect. That decides that the owner or charterer of a vessel is not bound by the signature of his agent to a bill of lading for a greater quantity than was actually shipped. The decision of the learned judge was therefore right, and this appeal will be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *H. C. Cooke* and *Co.*, agents for *H. A. Adamson*, North Shields.

Solicitors for the defendants, *Wild, Browne,* and *Wild.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Monday, March 15, 1886.

(Before KAY, J.)

CAIRD *v.* MOSS. (*a*)

Estoppel—Judgment—Res judicata—Shipbuilding contract—Action for rectification of—Agreement already executed under judgment of Palatine Court.

A judgment of the court deciding on the construction of an agreement that the plaintiffs are not entitled to priority over the defendants constitutes no bar, by reason of its being res judicata, to a subsequent action by the plaintiffs claiming rectification of the agreement so as to give them that priority.

The plaintiffs, shipbuilders, who had not been fully paid the price of a ship built by them for one B., entered into an agreement with B. and the defendants, who held a charge upon the ship in respect of a loan to B., whereby it was agreed to sell the ship to J. R., the plaintiffs holding the purchase money and distributing it amongst B., the defendants, and themselves, in accordance with the terms of the agreement. The plaintiffs having paid themselves the balance of the purchase money due to them from B. in priority to the claim of the defendants, the defendants instituted an action against the present plaintiffs, claiming that the trusts of the agreement should be carried out. In that action it was held that the present plaintiffs' claim was not entitled to priority over the defendants' claim, and that the plaintiffs were not entitled to pay themselves the balance of the original purchase money. In the present action to rectify the agreement by inserting such words as would provide for payment to the plaintiffs of the balance of the purchase money in priority to any other payment:

Held, that the previous judgment was no bar, in the sense of being res judicata, to the claim in the present action.

THE plaintiffs, Caird and Purdie, were shipbuilders, carrying on business at Barrow-in-Furness.

The defendants, Moss and Co., were shipbrokers, carrying on business in Liverpool and London.

On the 21st July 1880 the plaintiffs entered into a contract with William Batten to build for him a steamship, afterwards called the *Espana*, for the sum of 14,600*l.*, which was subsequently increased by reason of certain extras to 15,600*l.*

In Aug. 1880 Batten gave a charge upon his interest under the contract to the defendants, who, on the 21st Sept. 1880, gave notice thereof to the plaintiffs.

In Feb. 1881 Batten sold his interest in the vessel to José Reyes. Batten being unable to pay the sum of 6460*l.*, the balance of the purchase money due from him to the plaintiffs, an agreement, dated the 15th March 1881, was entered into between the plaintiffs, Batten, and the defendants. By that agreement, after reciting, among other things, that Batten had paid to the plaintiffs 9140*l.* on account of the 15,600*l.* due in respect of the purchase money for the vessel, leaving a balance of 6460*l.* due to the plaintiffs, it was agreed that the plaintiffs should despatch the vessel to Manilla, to José Reyes; that on payment of 10,276*l.* the balance due from José Reyes to Batten (which payment Batten thereby authorised), the plaintiffs were to give up possession to José Reyes; in default of payment of the 10,276*l.*, the plaintiffs were to be at liberty to sell the vessel. The 4th clause provided for the distribution of the purchase money, and was in the following terms:

4. The said Caird and Purdie shall hold the purchase money for the said vessel, whether received from the said José Reyes or any other purchaser, upon trust first, to recoup themselves all costs, charges, and expenses, of what nature or kind soever, in any way connected with the said vessel on and from the 7th day of March instant, being three days after her trial trip, including in such costs any expenses incurred in pursuance of clause 1, after giving credit for any freight, and including in such costs Mr. Caird's expenses of his present journey to London, and the legal expenses of the preparation of this agreement, and including the sum of 162*l.* 14*s.* 6*d.*, part of the disbursements by H. E. Moss and Co. in respect of the present intended voyage of the steamer, which sum Caird and Purdie are to pay to them in exchange for proper vouchers for that amount; second, to pay to the said H. E. Moss and Co. the sum of 1427*l.* 5*s.* 6*d.* now due to them by the said William Batten; and third, to pay over the balance, if any, to the said William Batten.

The agreement then provided for the collection and distribution by the plaintiffs of the insurance money in the event of the steamer being lost.

The vessel was ultimately sold by the plaintiffs to José Reyes, in July 1881, for 9200*l.*

On the 20th Oct. 1881 the defendants com-

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

menced an action against the plaintiffs in the Palatine Court of Lancaster, charging them with wilful default in selling the vessel for a less sum than 10,276*l.*, and claiming that the plaintiffs should make good the loss thereby incurred, and that an account should be taken of the amount received by the plaintiffs in respect of the purchase money, and that the trusts of the agreement of the 15th March 1881 should be carried into execution. Before the trial of the action the charges of wilful default were withdrawn.

By an order in that action, dated the 24th March 1882, the plaintiffs were ordered to deliver the account asked for by the statement of claim, and an account of the costs charges, and expenses mentioned in the 4th clause of the agreement of the 15th March 1881.

The plaintiffs, in rendering such account, included as a payment the sum of 6460*l.*, which was subsequently disallowed by the registrar.

The plaintiffs appealed to the Vice-Chancellor, who upheld the registrar's decision.

The plaintiffs thereupon paid the 1427*l.* 5*s.* 6*d.*, due to the defendants on their security, into court, which was subsequently received by the defendants. The plaintiffs appealed to the Court of Appeal, but the appeal was dismissed with costs on the ground that the 6460*l.* was not a cost, charge, or expense, within the meaning of the 4th clause of the agreement of the 15th March 1881.

The plaintiffs thereupon brought the present action for rectification of the agreement of the 15th March 1881, by inserting in the 4th clause thereof after the word "first" the words "to retain the said principal sum of 6460*l.* and then," or by inserting such other words as would provide for the payment to the plaintiffs of the purchase or insurance moneys of the principal sum of 6460*l.* in priority to any other payment thereout; and that such consequential rectification as might be necessary or expedient might be made; and that it might be declared that under the circumstances the sum of 1427*l.* 5*s.* 6*d.* belonged to the plaintiffs, and that the defendants might be ordered to repay the same to the plaintiffs.

The defendants, by the 9th paragraph of their statement of defence, pleaded that, if every allegation of fact contained in the statement of claim were true, the plaintiffs would not be entitled to any part of the relief claimed by the statement of claim, the trust of the agreement of the 15th March 1881 having been executed, and the amount claimed by the plaintiffs paid under the judgment of the Palatine Court; and the defendants submitted that the point of law should be disposed of before the trial of the action.

The point of law was accordingly argued separately, pursuant to Order XXV., r. 2.

Graham Hastings, Q.C. and *S. Hall*, for the plaintiffs, referred to

Houstoun v. *Marquis of Sligo*, 52 L. T. Rep. N. S. 96; 29 Ch. Div. 448.

[They were stopped by the Court.]

W. F. Robinson, Q.C. and *R. Neville*, for the defendants.—The plaintiffs are estopped by the judgment of the Palatine Court from bringing this action for rectification of the agreement. With regard to the claim for the repayment of the 1427*l.* 5*s.* 6*d.* paid by the plaintiffs to the defendants under the judgment of the Palatine Court, the plaintiffs can have no right to recover it. It has been laid down that where a defendant, having a right to resist the claim of a plaintiff, does not do so, but allows the plaintiff to recover money under legal process, he is estopped from recovering it back again:

Marriot v. *Hampton*, 2 Sim. L. C. 421; 7 T. R. 269.

They also referred to

Mostyn v. *West Mostyn Coal and Iron Company*, 34 L. T. Rep. N. S. 325; 1 C. P. Div. 145; and *Hirschfield* v. *London, Brighton, and South Coast Railway Company*, 35 L. T. Rep. N. S. 473; 2 Q. B. Div. 1.

No reply was called for.

KAY, J.—In this case a preliminary point of law has been raised under these circumstances. It seems that the plaintiffs are shipbuilders, and agreed with one William Batten to build a ship for him upon certain terms. When the ship was finished, he not being able to make the payments which he was bound to make under the agreement, the ship was sent to sea under another contract between the parties, which is set out in the 8th paragraph of the statement of claim. Under that contract the builders were still to have the management of, and practically the dominion over, the ship. They were to be at liberty to sell her, and were to hold the purchase money upon trust, first, to recoup themselves all costs, charges, and expenses, of what nature or kind soever, in any way connected with the vessel; secondly, to pay to Moss and Co., who are defendants in this action, and who were the mortgagees, the sum of 1427*l.* due to them from Batten, Batten having mortgaged whatever interest he had in the ship to them; and thirdly, to pay over the balance to Batten. It appears that an action was brought in the Palatine Court on the 20th Oct. 1881, by the mortgagees, Moss and Co., against the builders, Caird and Purdie, claiming that the trusts of that agreement should be carried into execution. Practically the claim was larger at first, but it was ultimately reduced to that. Of course that involved a question of construction of the agreement, and as a matter of construction this question was raised: "Whether, under that agreement, Caird and Purdie were to be at liberty to pay to themselves the balance of the money owing to them by Batten, before they handed over the 1400*l.* odd to Moss and Co., and of course before they handed over the balance of the purchase money to Batten?" The plaintiffs contended that, according to the construction of the agreement, that was the obvious meaning. There was a great deal to be said for that argument. However, it was decided by the registrar, in taking the accounts, that that was not the true construction of the agreement, and that they were bound to hand over the 1400*l.* to Moss and Co. without paying themselves the balance of what was due to them.

Upon the matter being taken to the Vice-Chancellor of the County Palatine, he decided the same; and then, on appeal to the Court of Appeal, the Court of Appeal decided the same way according to the construction of that agreement. Whether there was a mistake or not in the agreement they did not say, and of course they could not say, because that point was not raised in any way in the pleadings. What they did decide was that that was the true construction of the agree-

ment, and that they were bound to hand the money over. Now, observe, that was an action simply for carrying out the trusts of that agreement. There was no claim in any way, either by way of defence or counter-claim, that the agreement was not, if that was the true meaning of it, in the form in which it should have been, and that it ought to be rectified. That point was not raised either by way of defence, if it could be a defence, or by way of counter-claim in the action. Fourteen days after the Court of Appeal had decided, upon the true construction of the agreement, that the 1400*l.* was payable to Moss and Co. before payment of the balance of the purchase moneys of the ship to Caird and Purdie, this action was begun, stating on the face of the pleadings all these proceedings in the Palatine Court, and asking for the rectification of the agreement by inserting the words "to retain the said principal sum of 6460*l.*," which was the balance due as purchase money of the ship from Batten to Caird and Purdie. The point which has now to be decided is thus raised in the defence (paragraph 9): "The defendants further say that, if every allegation of fact contained in the statement of claim were true, the plaintiffs would not be entitled to any part of the relief claimed by the statement of claim, the trusts of the said agreement of the 15th March 1881 having been executed, and the amount claimed by the plaintiffs paid under a judgment of the Palatine Court, and the defendants submit that this point of law should be disposed of before the trial of the action." What is the point of law? It is stated first of all that the point of law is that this was *res judicata* in the Palatine Court; but in the Palatine Court, as I have already mentioned, the question whether the agreement was an agreement which ought to be rectified, and could be rectified, was not raised in any shape or way. How can that be *res judicata?* I will take from the well-known notes to the *Duchess of Kingston's case* (2 Sm. L. C. 832) a passage from Vinnius, which has been adopted by English courts, first of all in the judgment of Knight-Bruce, V.C., in *Barrs* v. *Jackson* (1 Y. & C. C. C. 585; on App. 1 Phil. 582), and then by Lord Westbury, in the case of *Hunter* v. *Stewart* (1 De G. F. & J. 168). The extract is in these words: "Vinnius in a note to the 13th title of the 4th Book of the Institutes, upon the words 'per exceptionem rei judicatæ,' says, 'Quæ ita agenti obstat si eadem quæstio inter eosdem revocetur, id est, si omnia sint eadem idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum.'" Take one of these, *idem jus*. Did the question of rectification arise before the Vice-Chancellor of the County Palatine? In no kind of way. It was not even touched. Therefore it seems to me quite idle to say that this is a case of *res judicata*. If I were so to hold, I should be holding, in fact, that a point which never was raised in any way in the Palatine Court, which could not be raised according to the pleadings as they were before the Vice-Chancellor of the Palatine Court, was decided by him in his judgment in that action. It is manifest that so stated, the proposition fails at once. There, is nothing like *res judicata*.

Upon what ground can I stop this action for rectification of the agreement upon the submission of the defendant? Of course, upon such a submission, I must assume that the action is well founded, and that there is a case for rectification. Upon what ground, unless the judgment of the Palatine Court amounts to a judgment on this point, can I stop this action? It is said that the money, having been paid over under the judgment of the Palatine Court, cannot be recovered. Of course it cannot be recovered on any of the grounds on which it was paid over; that is clear enough. But suppose there be another and a paramount ground, which was not before the court at all, and could not be before the court in that action, why should not it be recovered on that ground in a separate action which that action does not in any way interfere with? The claim is an equity pure and simple. The courts of common law had no power to rectify instruments, as we know, and this peculiar jurisdiction is, I believe, one of those which by the Judicature Act 1873 is reserved to the Chancery Division of the High Court of Justice. Therefore it is a case that might be met by an allegation of laches or anything of that kind. But in this pleading I have nothing of that kind before me. The defence does not say that there is any kind of laches, and really what I have said almost disposes of that. Of course I do not mean to prejudice any defence that can be raised at the trial of this action, but what the plaintiffs in this action, being the defendants in the action in the Palatine Court, did was this: They had a very strong belief that, according to the true construction of the agreement as it stood, they were right. I cannot say that that belief was entirely groundless. It seems to me a matter which might very plausibly be argued. They were so confident of their view upon the agreement as it stood that they chose to carry that case to the Court of Appeal, and not until the Court of Appeal had decided against them did they raise the alternative case of rectification of the agreement. I am very confident that they could not raise that in any way except by a counter-claim, or a separate action. Two cases have been cited in which, under the old practice in the courts of common law, a plea which raised the question that the deed or instrument was in an improper form, and that it ought to be rectified, seems to have been allowed to defeat the action where it was plain that there was a case for rectification, although the court could not in the action then before them decree any rectification. I do not know, I am sure, how often the courts of common law may have taken that course, or whether I rightly apprehend what those two decisions were. But whether that be so or not, it is perfectly familiar to everybody who has practised in the Court of Chancery that the Court of Chancery never has given, and never will give, relief on the ground that a man has a right to rectification, unless that is raised in the nature of a cross-action by the person who claims it. I defy anyone to produce any instance in which relief has been given on the ground that a man has a right to have the instrument rectified, unless there is a proceeding in the nature of an action claiming that rectification. Therefore it seems to me plain that this relief could not have been given in the Palatine Court unless there had been a cross-action, either by way of counter-claim or by a substantial action brought by the defendants, the present plaintiffs,

for rectification of the instrument. That was not done. I will not say one way or the other—because I do not think that point is properly before me now—whether the parties were guilty of such laches in not doing that as will defeat them at the trial of this action. That is a point that arises in this action, and does not arise upon this preliminary point of law. The preliminary point of law really is, whether an action of this kind can be brought or not after that judgment; and the question in point of fact is, whether that judgment did amount to an adjudication of the question raised in this action. In my opinion it clearly did not. I therefore decide the point of law in favour of the plaintiffs. There will be a declaration that the judgment of the Palatine Court is no bar to this action.

Solicitors for the plaintiffs, *Chester, Mayhew, Broome* and *Griffithes*, agents for *John Poole*, Ulverston.

Solicitors for the defendants, *Wynne, Holme*, and *Wynne*, agents for *H. Forshaw*, and *Hawkins*, Liverpool.

QUEEN'S BENCH DIVISION.

Dec. 19 *and* 21, 1885.

(Before LOPES, L.J.)

PANDORF AND CO. *v.* HAMILTON FRASER AND CO. (*a*)

Charter-party—Bill of lading—Excepted perils—"All and every dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever"—Damage by sea-water let in by rats—All reasonable precaution taken to keep down rats.

A cargo of rice shipped under a charter-party and bills of lading, excepting "the act of God and all and every other dangers and accidents of the seas, rivers, and steam navigation of whatever nature and kind soever," was damaged by sea-water entering through a pipe which had been gnawed through by rats. All reasonable precautions had been taken by the shipowner to keep down the rats.

Held, on further consideration, that the damage was "a danger or accident of the seas" within the meaning of the charter-party and bills of lading.

FURTHER CONSIDERATION.

This was an action brought by the plaintiffs, as shippers of a cargo of rice, against the defendants as shipowners to recover 1008*l.* 1*s.* 8*d.* as damages for injury to the rice on a voyage from Akyab to Liverpool.

The rice was shipped under a charter-party, by which the defendant agreed with the plaintiffs that their ship should proceed to Akyab and there load a cargo of rice for Liverpool, the act of God, &c., and all and every other dangers and accidents of the seas, rivers, and steam navigation of whatever nature and kind soever, and errors of navigation during the voyage, excepted, and under bills of ladings which excepted "all and every dangers and accidents of the seas, rivers, and navigation of whatever nature and kind."

The defendants in their statement of defence alleged that the damage for which the plaintiffs were seeking to recover was caused by reason of the perils excepted in the charter-party and bills of lading under which the cargo was shipped, and they also alleged that the damage occurred from inherent vice in the said rice, and from the improper condition in which it was shipped, and they denied an allegation made by the plaintiffs in their statement of claim that the vessel was unseaworthy at the commencement of the voyage.

At the trial before Lopes, J., at Liverpool, it was agreed that the rice was damaged to the amount which the plaintiffs sought to recover during the voyage from Akyab to Liverpool by sea water passing through a hole in a pipe connected with the bath-room in the vessel, which pipe had been eaten through by rats. It was also agreed that all reasonable precautions had been taken to keep down the rats on the voyage to Akyab. The inherent vice in the rice relied upon by the defendants was the shipping the cargo at Akyab with rats in the bags, or bringing the rats on board in the lighters with the rice, and upon this point the learned judge left to the jury the following questions: "Were the rats that caused the damage brought on board by the shippers in the course of shipping the rice? And, did those on board take reasonable precautions to prevent the rats coming on board during the shipping of the cargo?" The jury answered the first question in the negative, and the second in the affirmative, and thereupon the learned judge reserved the case for further consideration.

Cohen, Q.C. and *Joseph Walton* for the plaintiffs.—The damage to the cargo being caused by rats was not due to the "act of God" or to any of the "dangers and accidents of the seas, rivers, and navigation" excepted by the charter-party and bills of lading, and the shipowners are therefore liable to make it good, their liability not being expressly limited by contract. Damage caused by rats is not the "act of God" (*Dale* v. *Hall*, 1 Wils. 281), nor a "danger and accident of the seas, rivers, and navigation:"

Laveroni v. *Drury*, 8 Ex. 166; 22 L. J. 2, Ex.

In *Kay* v. *Wheeler* (16 L. T. Rep. N. S. 66; 2 Mar. Law Cas. O. S. 466; L. Rep. 2 C. P. 302) goods were shipped under a bill of lading containing the usual exceptions of "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what kind and nature soever," and the goods having been injured during the voyage by rats, it was held, although the shipowner had taken all possible precaution to prevent it, that the cause of injury did not come within the exception, and that the shipowner was liable. In *The Chasca* (32 L. T. Rep. N. S. 838; 2 Asp. Mar. Law Cas. 600; L. Rep. 4 A. & E. 446), again, it was held that the exceptions in the bill of lading did not operate to protect the shipowners from liability for damage done to the cargo by sea water let into the hold in consequence of the barratrous act of the crew in boring holes in the ship during her voyage for the purpose of scuttling her. That case, it is submitted, is analogous to the present. In *Woodley and Co.* v. *Michell and Co.* (48 L. T. Rep. N. S. 599; 5 Asp. Mar. Law Cas. 71; 11 Q. B. Div. 47) it was decided that a collision between two vessels brought about by the negligence of either of them without the waves or wind or difficulty of navigation contributing to the accident, is not a peril of the sea

(*a*) Reported by JOSEPH SMITH Esq., Barrister-at-Law.

within the meaning of the exception in a bill of lading. In Story on Bailments, sect. 512*a*, also, it is said that, "the phrase 'perils of the sea' must 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." On the authorities cited the damage done to the plaintiff's goods was not due to any of the perils excepted, and the plaintiffs are therefore entitled to succeed. They also cited

The Glenfruin, 52 L. T. Rep. N. S. 769; 5 Asp. Mar. Law Cas. 413; 10 P. Div. 103.

Bigham, Q.C. and Barnes for the defendants.—The damage being caused by an inroad of sea water without any negligence on the part of the shipowners, is a peril of the sea within the meaning of the exception in the charter-party and bill of lading. *Dale* v. *Hall* (*ubi sup.*) and *Laveroni* v. *Drury* (*ubi sup.*) are distinguishable. It could not be contended that if a swordfish had made a hole in the ship and let in the water which caused the damage, the damage would not have been a peril of the sea within the exception, and negligence on the part of the shipowners having been distinctly negatived, no distinction can be drawn between that case and the present. If there had been negligence on the part of any person, then the accident would have at once been taken out of the exception, but negligence being absent it clearly comes within it. This is the only effect which can be given to the case of *Woodley and Co.* v. *Michell and Co.* (*ubi sup.*) taken in combination with *Buller* v. *Fisher* (3 Esp. 67), where it was held that where there is an exception in a charter-party of "perils of the sea" a loss from the ships running foul of one another by misfortune is within the exception, and is a loss by perils of the sea. They also cited

Pickering v. *Barclay*, 2 Roll. Abr. 248;
Siordet v. *Hall and others*, 4 Bing. 607;
Devaux v. *P'Anson*, 5 Bing. N. C. 519;
Bishop and another v. *Pentland*, 7 B. & C. 219: 1 M. & R. 49;
De Rothschild v. *The Royal Mail Steam Packet Company*, 7 Ex. 734;
Davidson and others v. *Burnand*, 3 Mar. Law Cas. O. S. 207; 19 L. T. Rep. N. S. 782; L. Rep. 4 C. P. 117;
Abbott on Shipping, 12th edit., p. 329.

Joseph Walton in reply.

Cur. adv. vult.

Dec. 21, 1885.—The following written judgment was delivered by

LOPES, L.J.—This was an action brought by the plaintiffs, the shippers of certain rice, against the defendants, the shipowners, to recover 1008*l.* 1*s.* 8*d.*, damages for injury to the rice on a voyage from Akyab to Liverpool. It was agreed that the sum of 1008*l.* 1*s.* 8*d.* was the amount recoverable, if the defendants are liable. The defendants in their statement of defence alleged that the damage complained of occurred by reason of perils excepted in the bills of lading. The excepted perils in the bills of lading were "all and every dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever." The defendants also alleged that the goods were delivered under a charter-party, and that the damage complained of occurred by reason of perils excepted in such charter-party. The excepted perils in the charter-party were "the act of God and all and every other dangers and accidents of the seas, rivers, and steam navigation, of whatever nature and kind soever, and errors of navigation during the voyage." The defendants also alleged that the damage occurred from inherent vice in the rice, and from the improper condition in which it was shipped. They also denied an allegation made by the plaintiffs in their statement of claim, that the vessel was at the commencement of the voyage unseaworthy. At the trial before me at Liverpool there was no dispute about the cause of damage to the cargo; and in the course of the trial it was agreed that the damage was caused during the voyage by sea water passing through a hole in the pipe connected with the bath-room in the vessel, such pipe having been eaten through by rats. It was also agreed that all reasonable precautions had been taken to keep down the rats on the voyage to Akyab. The inherent vice relied on by the defendants was the shipping the cargo at Akyab with rats in the bags, or bringing the rats on board in the lighters with the rice. To dispose of this point I left to the jury the following questions: "Were the rats that caused the damage brought on board by the shippers in the course of shipping the rice? And, did those on board take reasonable precautions to prevent the rats coming on board during the shipping of the cargo?" The jury answered the first question in the negative, and the second in the affirmative. These answers disposed of the alleged inherent vice in the cargo upon which the defendants relied.

It may be convenient here to deal with the contention of the plaintiffs that the ship was unseaworthy at the commencement of the voyage by reason of a rat or some rats being on board. Mr. Cohen contended that the presence of a rat or some rats constituted a latent defect, and made the ship unseaworthy. It is clear from the findings of the jury, and the admission, that there was no excess of rats. If the presence of a rat or some few rats on board a wheat or rice carrying ship makes her unseaworthy, very few such vessels, if any, would be seaworthy; for, I presume, few, if any, are absolutely free from rats. I think this point is untenable. The *immediate* cause of damage in this case was the incursion of salt water through the hole in the pipe eaten through by the rats. The *effective* cause of damage was the rat or rats. Question, is damage so caused a "danger or accident of the seas" within the meaning of the bills of lading and charter-party? The point is novel and important, and has been very ably argued. A carrier by sea is, like a common carrier, apart from express contract absolutely responsible for the goods intrusted to him, and insures them against all contingencies, excepting only the act of God and the enemies of the Queen. It was at first contended that what happened here exonerated the defendants, as amounting to damage resulting from acts of God. This point was subsequently abandoned; nor, indeed, could it be maintained in the face of the decision of *Dale* v. *Hall* (1 Wils. 281), which appears to decide that the action of rats is not one of those natural causes which may be acts of God. Moreover, it is not pleaded in this case that the damage resulted from the act of God. "Dangers

or accidents of the seas" are practically equivalent to the more popular term "perils of the seas." In a seaworthy ship damage to goods caused by the action of the sea during transit, not attributable to the fault of anybody, is in my opinion a "danger or accident of the seas" intended to come within the exception, and exonerating the shipowner. It is clear the action of the sea itself is one of the causes contemplated. Losses by perils which have no special connection with the sea or the navigation, though they may occur during the voyage, do not fall within this exception. For instance, damage by rats eating the cargo (*Kay* v. *Wheeler*, 16 L. T. Rep. N. S. 66; 2 Mar. Law Cas. O. S. 466; L. Rep. 2 C. P. 302; *Laveroni* v. *Drury* (8 Ex. 166; 22 L. J. 2 Ex.); or by cockroaches eating the goods in the ship (*The Miletus*, Parsons on Shipping, vol. 1 p. 258, n.) (*a*); or by an accidental fire in the hold (*The Hong Kong and Shanghai Banking Corporation* v. *Barker*, 7 Bombay High Court Reports, O. C. J. 186, 203 (*b*); Parsons on Shipping, vol. 1, 256). The reason is obvious; these are all losses which are in no sense attributable to any action of the sea, but which might occur anywhere. The cause of loss must be such that ordinary exertions of human skill and prudence—such exertions as might be reasonably expected from careful and prudent men—will not avail to guard against it. A stranding due to unskilful navigation is not within the exception. Where water got into a ship through a hole wrongfully bored in her by some of the crew and damaged the cargo, the exception "dangers of the sea" in a bill of lading was held not to protect: (*The Chasca*, 32 L. T. Rep. N. S. 838; 2 Asp. Mar. L C. 600; L. Rep. 4 A. & E. 446.) The learned judge (Sir R. Phillimore) there held that, in construing exceptions in a bill of lading, the real and not the proximate cause of loss, as in the case of marine insurance, was to be regarded. It was also held that losses occasioned by negligence not being within the exception "perils of the sea" *à fortiori* barratry would not be. Where a ship was sunk, and the goods lost owing to a collision with another ship, and there was no fault on the part of either ship, the loss was held to be a peril of the sea: (*Buller* v. *Fisher*, 3 Esp. 67.) The case, however, which has gone furthest is *Woodley and Co.* v. *Michell and Co.* (48 L. T. Rep. N. S. 599; 5 Asp. Mar. Law Cas. 71; 11 Q. B. Div. 47). There, there had been a collision, and it was held that, if there had been negligence in navigating either of the ships the owner of the carrying ship was not protected. Brett, L.J. said, "What I think it is necessary in this case to say (and I repeat it without any doubt) is, that, although a collision when brought about without any negligence of either vessel is, or may be, a peril of the sea, a collision brought about by the negligence of either of the vessels, so that without that negligence it would not have happened, is not a peril of the sea within the terms of that exception in a bill of lading."

It seems, therefore, that directly the real or effective cause of the loss is some act of man, the loss cannot be ascribed to "dangers or accidents of the sea." These authorities support the definition which I have given; nor do the plaintiffs seek to impugn it, so far as it goes; but they contend that a further term must be added, *e.g.*, that the effective cause must not only be something beyond human control, but something peculiar to navigation. They say, in fact, the rats here are the effective cause, and rats are not peculiar to navigation. In Story on Bailments, sect. 512*a*, there is the following passage, which seems to be in point; "The phrase 'perils of the sea,' whether understood in its most limited sense, as importing a loss by natural accidents 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 such 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." The point raised here is, that though the loss is proximately and directly from dangers which are peculiarly incidents of the sea, yet another cause has co-operated without which the mischief would not have happened. In *Laveroni* v. *Drury* (8 Ex. 166; 22 L. J. 2, Ex.) what has happened in this case evidently occurred to the mind of Pollock, C.B. Rats had eaten the cargo; and it was held that the loss was not by a "peril of the sea." There was no incursion of sea water; nor was there anything to connect the damage peculiarly or at all with the sea or navigation. Pollock, C.B. in his judgment says: "If, indeed, the rats had made a hole in the ship, through which water came in and damaged the cargo, that might very likely be a case of sea damage." This was an *obiter dictum*, and not necessary for the decision. I think a loss arising from some inevitable accident at sea whereby sea water enters the ship and damages goods, is a "danger or accident of the seas" within the exception. It seems to me that, where the effective cause is beyond human control, and in consequence salt water enters, which damages goods, it is an "accident of the sea" within the meaning of the contract of affreightment, and the true intention of the parties. Here, it is sea damage occurring at sea,

(*a*) The note is as follows: In *The Miletus*, U.S.C.C., New York, 1866, Nelson, J., Cockroaches ate the labels pasted on the outside of the mats which inclosed chests of tea. This "embarrassed the assortment and delivery of the boxes to the consignees, and depreciated the market value of the same" Held that the vessel was liable. Nelson, J. said: "We also concur in the opinion that the rule must be regarded as settled in this court, that damages occasioned by vermin on board a ship to the cargo in the course of the voyage is not the result of a peril of the sea, or of one of the dangers or accidents of navigation with the exception in the bill of lading."

(*b*) In this case goods shipped under a bill of lading exempting the shipowner from liability from loss occasioned by the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation of whatsoever nature and kind were lawfully landed on the custom-house premises at Bombay, and there accidentally burned. In an action against the shipowner to recover damages for the non delivery of the goods, Westropp, C.J. said on appeal: "It has been contended for the plaintiffs that the scope of the exception must be controlled by the word 'other' preceding the words 'dangers and accidents of the seas, rivers, and navigation, of whatever nature or kind soever,' but we cannot accede to that argument. Fire, no doubt, may occur at sea as well as on shore, but it never has been regarded as a peril, danger or accident of the sea within the meaning of those terms as known to mercantile usage or the law."

and nobody's fault. I think the defendants have brought themselves within the exception. Suppose this pipe had burst from frost or from some cause which human care and foresight could not have prevented, and goods damaged by entry of salt water, could it be successfully contended that the shipowners were not protected? I think not. I see no distinction between that case and the one now under discussion. There will be judgment for the defendants with costs.

Judgment for the defendants.

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

Solicitors for the defendants, *W. Crump* and *Son.*

Monday, Feb. 22, 1886.

(Before Lord COLERIDGE, C.J. and HAWKINS, J.)

LEDUC AND CO. *v.* WARD AND OTHERS. (*a*)

Practice—Non-joinder of defendants—Discretion of court or judge—Carriage of goods—Shipowners—Rules of Supreme Court 1883, *Order XVI., r.* 11.

Upon an application under Order XVI., r. 11, *by the defendant or defendants on the record, that other defendants be added, the court or judge may exercise a discretion, and the order will not be made unless it is shown that the non-joinder complained of will prejudice the parties to the action, or that "the presence before the court of additional parties is necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter."*

THIS was an appeal from the refusal of Field, J. at chambers to make an order, upon the application of the defendants on the record, that three more persons should be added as defendants to the action. The action was brought to recover damages alleged to have been sustained by the plaintiffs in respect of a cargo shipped by them on the defendants' vessel *Austria*, the owners of which vessel consisted of all the defendants who had been made parties to the action, and also of three other persons whom the plaintiffs had not joined. As appeared by an affidavit made by the solicitor to the defendants, these three persons were, at the time when the cause of action arose, interested in the said vessel equally with the persons whom the plaintiffs had chosen to join as defendants, and it was also stated that it would be cheaper and more convenient if the remaining part-owners were joined as parties to the action. A summons had been taken out for an order that these three persons be added as defendants under Order XVI., r. 11, but Field, J. at chambers had refused to make the order. From such refusal the defendants now appealed.

John Edge, for the defendants, moved by way of appeal from the decision of the judge at chambers.—This action is brought upon a contract made jointly by all the co-owners of the vessel on which the goods in question were shipped, and, before the Judicature Act 1873, a plea in abatement would have lain. It being no longer competent to defendants to plead in abatement, their only remedy for non-joinder of parties by the plaintiff now is to go before the judge at chambers under Order XVI., r. 11, under which this application is made. Order XVI., r. 11, provides that "the court or a judge may, at any stage of the proceedings, either upon or without the application of either party, and upon such terms as may appear to the court or a judge to be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added." It is submitted that, this being an action upon a joint contract, all the co-owners of the vessel are parties who ought to have been joined, and the order for their joinder ought to be made:

Kendall v. *Hamilton*, 41 L. T. Rep. N. S. 418; 4 App. Cas. 504.

Lord Cairns, in his judgment in that case, says: "I cannot think that the Judicature Acts have changed what was formerly a joint right of action into a right of bringing several and separate actions; and although the form of objecting by means of a plea in abatement to the non-joinder of a defendant, who ought to be included in the action, is abolished, yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed." In this case all the co-owners were partners *quâ* this joint contract, and they are therefore all proper and necessary parties to be joined, and before the Judicature Acts a plea in abatement would therefore have succeeded. If the present defendants are held liable, they will be entitled to contribution from their co-contractors, and in such an event, if the order asked for is refused, they will have to bring another separate action against these persons, and it is obvious that such a course would be expensive and inconvenient. [HAWKINS, J.—Lord Penzance, in his judgment in the same case, says that "since the Judicature Act no such thing as a plea in abatement is possible. The non-joinder of any party under any circumstances has ceased to be an answer, objection, or defence to the action. In such a case the action goes on, and the court or a judge may, on such terms as appear to be just, order that the name or names of any party or parties, either plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added: (Judicature Act 1875, Order XVI., r. 13.) Now, these provisions appear to me to have entirely altered the rights of joint contractors in respect of procedure. They have no longer any absolute right to insist that they should be sued together or not at all." Lord COLERIDGE, C.J.—Yes, and this dictum has the advantage of agreeing with the statute, which the counter-dictum by Lord Cairns does not.] It is submitted that the order ought to be made.

J. Gorell Barnes, for the plaintiffs, showed cause, and submitted that it was clear from the language of rule 11, Order XVI., that the order

(*a*) Reported by F. A. CRAILSHEIM, Esq., Barrister-at-Law,

asked for was entirely a matter of discretion, and that such discretion had been properly exercised by the learned judge at chambers.

John Edge, in reply.

Lord COLERIDGE, C.J.—This is an application by the defendants who have been made parties to the action, to add three more persons as defendants, on the ground that they are co-owners with the applicants in the vessel in respect of which the action is brought. The learned judge at chambers refused to make the order. The ground of the application appears to be that the defendants have an absolute right of having these co-defendants added. It is necessary first of all to ascertain whether the court may exercise any discretion in an application of this nature. If the court has a discretion, it is quite plain that it ought to sustain the decision of my brother Field. If there be a discretion, there is no doubt that the learned judge at chambers has properly exercised such discretion. But, as the question has been raised whether there is or is not such a discretion, it will be necessary for us to decide that point. I say that we clearly have such a discretion. The rule (Order XVI., r. 11) says that "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties." Non-joinder is added in the Act of 1883. Order XVI., r. 13, of the Judicature Act of 1875 dealt with misjoinder only; therefore it has now been enacted by the Legislature that non joinder is no longer to be a cause of nonsuit. The rule goes on to say that "the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may" [reads the rule]. Now, if any words could have been selected clearly to show that there is a discretion, it seems to me that those used in this rule most adequately express such intention. Not only is the word "may," and not "must," used, but the whole tenour of the section is clearly to that effect. Now, then, the question for us to decide is whether those words give the court a discretion in respect of the amendment of pleadings by reason of the misjoinder or non-joinder of parties. As I understand Mr. Edge to say, we have no such discretion, and in the present state of the law there is a right in a defendant to compel the addition of others. It certainly would seem very inexpedient that such should be the law, because there may be the best reasons why a plaintiff should not wish to add certain persons as defendants; they may be men of straw or persons against whom it would be very difficult for him to prove his case; and yet the contention is, that, notwithstanding any such difficulty, the defendant has a right to compel the addition. That, in face of the enactment, which seems carefully to give a discretion, must be determined by the particular facts of every case. If a case were presented in which the defendants on the record were prejudiced by the non-addition of certain persons as defendants, or if it were shown that the omission placed them in a disadvantageous position, I can well understand that in such a case a judge ought, in the exercise of his judicial discretion, to order the plaintiff to make the addition, because it would "enable the court effectually and completely to adjudicate upon and settle the questions involved in the cause or matter." But no steps have been taken by the defendants here to show any such necessity or expediency; it is put upon the inherent and absolute right of the defendants.

We have been pressed by the authority of the case of *Kendall* v. *Hamilton*, which was decided in the House of Lords, and is reported in 4 App. Cas. 504. In the first place I may say that that case decided nothing about defendants. It was a case in which an action was brought and judgment recovered against two persons who had borrowed money from the plaintiffs. The debt was in the nature of a partnership debt due from the two defendants and a third person (the respondent) jointly; but at the time the plaintiffs brought the action they were not aware that the debt had been contracted by the third person jointly with the defendants. The defendants did not plead in abatement, and judgment was recovered against them; but, by reason of the insolvency of the defendants, the judgment remained unsatisfied. The plaintiffs afterwards discovered the interest of the third person, and brought an action against him for the debt, but it was held that the judgment recoverable against the defendants constituted a bar to another action brought by the same plaintiffs against the third person. To that, as far as I can see, Lord Cairns limits his judgment, and he says: "I cannot think that the Judicature Acts have changed what was formerly a joint right of action into a right of bringing several and separate actions. And although the form of objecting, by means of a plea in abatement, to the non-joinder of a defendant who ought to be included in the action is abolished, yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principle on which a plea in abatement would have succeeded or failed." Then I find that, when Lord Penzance comes to deal with the matter, he lays down an opinion strongly against the present contention and greatly in favour of the view I am insisting upon. He says: "The Judicature Act abolished all the old forms of action; it abolished all the old technical forms of procedure, and established a new procedure for the enforcement indiscriminately of both legal and equitable rights, which is independent of all the old rules of law on that subject. Particularly it did away with all objections and defences arising out of the misjoinder or non-joinder of parties, either plaintiff or defendant. Since that Act no such thing as a plea in abatement is possible. The non-joinder of any party under any circumstances has ceased to be an answer, objection, or defence to the action. In such a case the action goes on, and 'the court or a judge may, on such terms as appear to be just, order that the name of any party who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action, shall be added.'" Now that is the rule upon which Lord Penzance delivered that judgment, and Lord Cairns says nothing in contradiction to it. Lord Blackburn undoubtedly does say: "I cannot agree in what seems to be the opinion of the noble and learned lord on my left (Lord Penzance) that the Judicature Act has taken away the right of the joint contractor to have the other joint contractors joined as defendants, or

made it a mere matter of discretion in the court to permit it. With great deference I think that the right remains, though the mode of enforcing it is changed." That is a dictum delivered in the year 1879.

In the case of *Julius* v. *The Bishop of Oxford* (42 L. T. Rep. N. S. 546; 5 App. Cas. 214) the House of Lords elaborately went into all the authorities, and decided that "may" did not mean "must." It was there held that the words in a statute "it shall be lawful" of themselves merely made that legal and possible which there would otherwise be no right or authority to do, and that their natural meaning was enabling and permissive only. So the word "may" is a word ordinarily importing discretion, whereas the word "must" imports a duty. The court or a judge may, upon such terms as may appear to be just, order the names of any parties improperly joined to be struck out, or that the names of any parties who ought to have been joined, or whose presence before the court may be necessary in order to enable it effectually and completely to adjudicate upon and settle all the questions involved, be added. It appears that Lord Blackburn considered that a rule couched in such language conferred a right to have parties added as defendants, and that to such right there was no discretion; but I think he was probably speaking with reference to the old plea in abatement, and that he had not the words of the rule before him. At any rate, I do not agree with what he says as to that. I think that a rule which enacts in terms that the non-joinder of parties will not defeat the plaintiff's action, clearly abolishes the effect of the old plea in abatement, and to my mind it is quite plain that what is intended is that the plaintiff has a right to add parties as defendants, but that the defendant has no corresponding right unless he can show that not doing so will prevent the court from effectually doing justice. That such will be the case here is not contended. With great deference to the dictum of Lord Blackburn in the case of *Kendall* v. *Hamilton*, which was delivered in the year 1879, I am clearly of opinion that the court or a judge has a discretion in this matter, and this application must therefore be refused.

Hawkins, J.—I am of the same opinion, and I also think that the addition of defendants is to be ordered by the judge in the exercise of his discretion only; and, as Mr. Edge has failed to satisfy me that this a case in which such discretion ought to be exercised in favour of his clients, I think that this application must be refused.

Solicitors for the plaintiffs, *Waltons, Bubb,* and *Johnson.*

Solicitors for the defendants, *W. A. Crump* and *Son.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Feb. 9 *and* 16, 1886.

(Before Sir James Hannen.)

THE ARDANDHU. (*a*)

Limitation of liability—Collision—Discontinuance of action—Consent order—R. S. C., Order LII., r. 23.

The discontinuance of a collision action between shipowners by the plaintiffs does not preclude them from claiming against and sharing with the cargo owners in the amount paid into court under sect. 54 *of the Merchant Shipping Act Amendment Act* 1862, *in a limitation action instituted by the defendants in consequence of a judgment obtained against them by the cargo owners in respect of the same collision where the order for discontinuance is set aside by the judge before the claim in the limitation action is made.*

This was a motion by the owners of cargo lately laden on board the steamship *Kronprinz* on objection to the registrar's report in an action brought by the owners of the steamship *Ardandhu* to limit their liability. The collision out of which the present action arose occurred on March 1, 1883 between the steamships *Ardandhu* and *Kronprinz.* Thereupon actions *in rem* were respectively instituted against the *Ardandhu* by the owners of the *Kronprinz* and by the owners of the cargo laden on board the *Kronprinz.* The ship action was discontinued on May 2, 1883. The cargo action was tried on Dec. 18, 1884, when both ships were found to blame. On Jan. 29, 1885, the owners of the *Ardandhu* instituted an action to limit their liability. In that action the registrar made the following report:

Whereas, on the 1st March 1883, a collision occurred off Cape St. Vincent between the steamships *Kronprinz* and *Ardandhu,* which collision this court in a certain cause of damage (1883, Fo. 249) pronounced to have been occasioned by the fault or default of the masters and crews of both the said ships, and whereas, on the 24th March 1885 the court did by its decree or order in this action pronounce the owners of the *Ardandhu* to be entitled to limited liability for damages arising therefrom according to the provisions of the Merchant Shipping Acts in that behalf; and whereas a sum of 9917*l.* 7*s.* 5*d.* was afterwards paid into court by the owners of the *Ardandhu,* being the amount of their statutory liability aforesaid, inclusive of interest; and whereas all claims filed or to be filed upon such fund were referred to the registrar, assisted by merchants, to report upon, and the time allowed for filing claims has expired. Now, I do hereby report that I have, with the assistance of Messrs. Sidney Young and Neville Lubbock, of London, merchants, carefully examined the claims filed in this action, together with all accounts and vouchers and the papers and proceedings produced and brought in; and having on the 30th and 31st Oct. 1885, and 11th Jan. 1886 heard counsel and solicitor thereon, I find that claims for loss or damage to ships, goods, merchandise, and other things have been proved to the extent shown in the schedule hereto annexed. A question, however, has arisen as to the right, under the circumstances hereafter stated, of the owners of the *Kronprinz* to prove against the fund in court in respect of the damages they sustained by the loss of their ship. The collision occurred on the 1st March 1883. On the 6th of March in that year an action for damage by that collision (Fo. 120) was brought in this division by the owners of the *Kronprinz* against the owners of the *Ardandhu* for whom an appearance was duly entered on

(*a*) Reported by J. P. Aspinall and Butler Aspinall, Esqrs. Barristers-at-Law.

the 19th March. On the 2nd May following a consent order was entered in these words: "Upon consent of both solicitors, it is ordered that this action be discontinued without costs, on the ground of inevitable accident." After an interval of two years and upwards, namely, on the 30th June 1885, this order was rescinded by Mr. Justice Butt on the application of the plaintiffs, the defendants not objecting. In the meanwhile, on the 25th June 1883 an action for damage arising from the same collision (Fo. 249) was brought in this division by the owners of the cargo of the *Kronprinz* against the owners of the *Ardandhu*, and after various proceedings this action was tried on the 18th Dec. 1884, when the president found both vessels to blame, and pronounced for a moiety of the damages sustained by the plaintiffs. Shortly afterwards on the 20th Jan. 1885, the owners of the *Ardandhu* commenced this action (1885, Fo. 41) for the purpose of limiting their liability for all damages occasioned by the collision in question; and the usual decree having been made, the various claims were filed, and amongst them a claim on behalf of the owners of the *Kronprinz* for the loss of their ship. This claim has been contested on the ground that the owners of the *Kronprinz* have debarred themselves from recovering against the *Ardandhu* by having discontinued their original action, and by consenting to the terms of the consent order made therein on the 2nd May 1883, as before stated. It is contended that this claim comes within the principle of the decision of this court, confirmed, on appeal, in the recent case of *The Bellcairn* (53 L. T. Rep. N. S. 186). I am of opinion, however, that there is an essential difference between the two cases. In the case of *The Bellcairn*, an action by the owners of the *Britannia* against the owners of the *Bellcairn* had, after trial in court, been dismissed, and when subsequently the owners of the *Britannia* claimed to prove for their damages against the fund in court in the action brought by the owners of the *Bellcairn* to limit their liability, the court held that such claim had been properly disallowed by the registrar at the reference, and that the owners of the *Britannia* were not entitled to share in that fund. In this case, on the contrary, the original action on behalf of the owners of the *Kronprinz* was not dismissed, but was simply discontinued before the delivery of any statement of defence, and I am unable to see that the plaintiffs' right to commence another action for the same cause, which would otherwise be unquestionable, can be affected by the introduction into the before-mentioned order of court of the words, "by reason of inevitable accident." These words may have been so introduced as a *quasi* reason for the defendants consenting to waive costs. It appears to me that the objection raised by the owners of cargo to the participation of the owners to the *Kronprinz* in the fund in court is not well founded, and I have accordingly allowed the claim of the latter.

The agreement upon which the consent order was made was as follows: "We, Lowless and Co., solicitors for the defendants, hereby consent to this action being discontinued, on the ground of inevitable accident." This agreement was filed in the registry on May 2, 1883.

Sir *Walter Phillimore* (with him *Stubbs*) for the owners of the cargo on the *Kronprinz*.—By Order LII., r. 23 (*a*), any agreement in writing in Admiralty actions may be filed, and shall "thereupon become an order of court, and have the same effect as if such order had been made by the judge in person." In the present case the agreement was filed in the registry, and therefore had the same effect as the decree dismissing the action in the case of *The Bellcairn* (10 P. Div. 161; 5 Asp. Mar. Law Cas. 503; 53 L. T. Rep. N. S 686). If so, the owners of the *Kronprinz* are precluded from claiming against the funds in court. The effect of the discontinuance order was to put an end to the action, and it cannot be revived by a subsequent order. It is also to be observed that at the time Butt, J. rescinded the order, the decision in the *Bellcairn* (*ubi sup.*) had not been given.

Barnes, for the owners of the *Kronprinz*, *contra*.—In the present case the consent order was properly set aside by the order of the judge, and therefore cannot now bar the claim of the shipowners, as it is not now in force. In *The Bellcairn* (*ubi sup.*) the matter was *res judicata*, having been disposed of in open court, and the decree therein was never set aside. This agreement was never meant to be such an agreement as is contemplated by Order LII., r. 23, but was simply meant to be the basis of the consent order which the registrar made. Although it may be true that the agreement was filed, it was done so by inadvertence, and it never was in the contemplation of the parties that it should have the effect referred to in Order LII., r. 23.

Sir *Walter Phillimore* in reply.

Cur. adv. vult.

Feb. 16.—Sir JAMES HANNEN.—This was a suit for the limitation of the liability of the owners of the vessel *Ardandhu*. A collision having taken place between her and the steamer *Kronprinz*, both vessels were pronounced to blame. The owners of the *Kronprinz* now seek to prove against the fund in court. It was contended on behalf of the owners of the cargo laden on board the *Kronprinz* that the owners of the ship are not entitled to any share in the fund because they had discontinued the action they had commenced against the *Ardandhu*. It is, however, clear that the mere discontinuance of an action does not prevent the plaintiff from substantiating his claim in other proceedings, as by proof in bankruptcy, or, as in this case, by proof against the fund in court. But it is contended that in this case the particular terms of the order to discontinue, bar the right of the owners of the *Kronprinz* to prove. The order is in these terms: "Upon consent of both solicitors it is ordered that this action be discontinued without costs, on the ground of inevitable accident." This order was made on the consent of the defendants, which was as follows: "We, Lowless and Co., solicitors for the defendants, hereby consent to this action being discontinued, on the ground of inevitable accident." This order was subsequently rescinded by Butt, J., on June 30, 1885. It is argued on behalf of the owners of cargo that this case is governed by the decision in *The Bellcairn* (*ubi sup.*). I, however, am of opinion that there is a material distinction between the two cases. In *The Bellcairn* (*ubi sup.*) there was a decree of the court, which could only be set aside by the court, and not by the consent of the parties. Here there was no decree negativing the plaintiffs' claim, but only a discontinuance of the then existing proceedings. The plaintiffs would have been entitled to discontinue, as a matter of course, on payment of costs. All that they needed the consent of the defendants for was to avoid the payment of costs. This the defendants gave, and added their reason for so doing, viz., that they considered that the collision arose from inevitable accident. Mr. Justice Butt has rescinded this order, and it is

(*a*) Any agreement in writing between the solicitors in Admiralty actions, dated and signed by the solicitors of both parties, may, if the Admiralty register think it reasonable and such as the judge would under the circumstances allow, be filed, and shall thereupon become an order of court, and have the same effect as f such order had been made by the judge in person.

not in existence, and cannot affect the case, whatever effect it had while in force.

But it is further argued that apart from the order to discontinue, there was a pre-existing agreement between the parties, which, being filed, would have the effect of barring the plaintiff's claim. I am of opinion, however, that there was no such agreement as is contemplated by Order LII., r. 23. It was not treated in the registry as such an agreement, but simply as a consent to the order. I am therefore of opinion that there is nothing in the circumstances of the case which precludes the owners of the *Kronprinz* from establishing their claim against the fund in court. I may further add that the judgment and observations of the Lords Justices in *The Bellcairn* (*ubi sup.*) proceeded upon the ground that the matter had passed into *res judicata*. The result, therefore, is that the motion is dismissed. As the owners of the *Kronprinz* have raised this objection, and have failed, they must pay the costs.

Solicitors for the owners of cargo on the *Kronprinz*, *Stokes*, *Saunders*, and *Stokes*.

Solicitors for the owners of the *Kronprinz*, *W. A. Crump* and *Son*.

Wednesday, Feb. 24, 1886.

(Before Sir JAMES HANNEN assisted by TRINITY MASTERS.)

THE OAKFIELD. (*a*)

Collision—Compulsory pilotage—Fog—Negligence of master—Liability of owners.

Although the pilot in charge of a ship by compulsion of law is under ordinary circumstances solely responsible for getting the ship under way, yet, if the weather is so bad by reason of fog or other circumstances as to make navigation manifestly perilous and to give rise to a plain prospect of danger, it is the duty of the master to interfere, and he is to blame if he permits his vessel to get under way in such circumstances.

Where a pilot in charge of a vessel by compulsion of law gives at the suggestion of the master an improper order which brings about a collision, such interference by the master does not transfer the responsibility of the pilot to the master so as to deprive the shipowners of the defence of compulsory pilotage to an action to recover the damages occasioned by the collision.

The Lochlibo (3 *W. Rob.* 310) *followed and explained.*

THIS was a collision action *in rem*, instituted by the owners of the ship *Duchess of Albany* against the owners of the steamship *Oakfield*, to recover damages occasioned by a collision between the two vessels on the 27th Jan. 1886.

The facts alleged on behalf of the plaintiffs were as follows:—

On the 27th Jan. 1886 the *Duchess of Albany*, an iron ship of 1746 tons register, manned by a crew of thirty-one hands, was lying ready for sea at anchor in the river Mersey, nearly abreast of the Huskisson Dock and a little to the westward of mid-river. She was in the charge of a duly licensed pilot. The port anchor was down and 30 fathoms of chain out; the weather was foggy, and her chain had been shortened in so as to be ready to proceed to sea as soon as the fog lifted; the bell on board was rung regularly and frequently, and a good look-out was kept. In these circumstances, at about 2.20 p.m. on that day, the wind being about E.S.E. blowing a moderate breeze, the weather hazy and the tide flood, running about three knots an hour, those on board the *Duchess of Albany* observed the steamship *Oakfield*, distant about a quarter of a mile and about three or four points on the port bow, heading to the eastward, with her engines apparently stopped. Shortly afterwards it was noticed that she was coming ahead at full speed, under a starboard helm, with the apparent intention of crossing the bows of the *Duchess of Albany*. Those on board the latter vessel continued to hail her and kept ringing their bell continuously, but she continued to come ahead until with her starboard side she struck the bowsprit and jibboom of the *Duchess of Albany*, doing her considerable damage. The plaintiffs, in addition to charging the defendants with not navigating the *Oakfield* so as to keep her out of the way of the *Duchess of Albany*, with improperly starboarding, and with keeping their engines full speed ahead, made the following charge:

The *Oakfield* had been at anchor in safety within the river shortly before the collision took place, and those on board her acted imprudently and improperly in leaving her anchorage and in proceeding up the river, having regard to the state of the weather.

The facts alleged on behalf of the defendants were as follows:—

On Jan. 27 the steamship *Oakfield*, of 1123 tons register, arrived in the river Mersey on a voyage from Tripoli to Birkenhead, in charge of a duly licensed pilot by compulsion of law. The pilot and captain were on the bridge, an A.B. at the wheel, and the chief officer and boatswain on the look-out on the forecastle. The weather was thick and hazy and the tide flood running about two knots an hour. In these circumstances, as the *Oakfield* was proceeding up the river with the pilot in charge, her engines working slow and her steam-whistle being continuously sounded, those on board of her observed a vessel, which proved to be the *Duchess of Albany*, about 300 yards distant, a little on the port bow of the *Oakfield*, heading about N.E. The helm of the *Oakfield* was starboarded, and almost immediately afterwards put hard-a-starboard, and the engines full speed ahead, to clear the *Duchess of Albany*. The head of the *Oakfield* paid off under the starboard helm, but not sufficiently to clear the *Duchess of Albany*, and when the bridge of the *Oakfield* was about level with the stem of the *Duchess of Albany*, the helm was put hard-a-port and the engines stopped to throw the *Oakfield's* quarter clear, but the two vessels came into collision, the bowsprit of the *Duchess of Albany* striking the *Oakfield* about the starboard main rigging.

Paragraphs 5 and 6 of the defence were as follows:

5. There is no negligence or improper conduct or want of care, skill, or seamanship on the part of the master, officers, or crew of the *Oakfield*.

6. The *Oakfield* was by compulsion of law in charge of a duly licensed pilot, and the said collision was caused solely by the act or default of the said pilot.

The pilot in charge of the *Oakfield* was subpœnaed by the defendants to produce his licence, and was identified as the pilot in charge by the master of the *Oakfield*. The pilot was then called

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

by the plaintiffs and said in examination in chief that immediately on seeing the *Duchess of Albany* he gave the order hard-a-port and full speed astern; that the captain thereupon said to him, "What are you doing that for? You will be right into her. Let her go and starboard and you will clear her;" that his previous order was not carried out, and that there would have been no collision had his first order been obeyed. In cross-examination he said that he in fact had given the orders starboard and hard-a-starboard in consequence of the suggestion of the captain, he considering that the master had taken charge of the vessel. It also appeared that in consequence of the fog the *Oakfield* had anchored off the Bar Lightship and in the Crosby Channel, and that on the fog lifting a little the vessel proceeded up the river, the orders to get the vessel under way being given by the pilot.

Hall, Q.C. (with him *Carver*), for the plaintiffs, contended that, having regard to the nature of the defence, the onus lay upon the defendants to establish their defence.

Sir *Walter Phillimore* (with him *Pickford*) for the defendants.—The defendants are not to be called upon to give proof of a negative character excluding the mere possibility of contributory fault on the part of their servants. On the authority of the *Clyde Navigation Company* v. *Barclay* (36 L. T. Rep. N. S. 379; 1 App. Cas. 790; 3 Asp. Mar. Law Cas. 390) they are only bound to show that the pilot's fault was sufficient to cause the collision and to rebut any evidence against their servants of contributory negligence. In the circumstances of this case no blame can be attributed to the master and crew. It has been said that the weather was so bad as to make it negligence on the part of the master to have allowed the vessel to get under way. But that is a question entirely for the pilot, and the whole responsibility of determining whether the vessel should be got under way rests with the pilot:

The Lochlibo, 3 W. Rob. 310;
The Peerless, Lush. 30;
The City of Cambridge, 2 Asp. Mar. Law Cas. 239; 30 L. T. Rep. N. S. 439; L. Rep. 5 P. C. 451.

Even assuming the master to have suggested an improper manœuvre, the pilot is not relieved from responsibility. This point has already been decided in *The Lochlibo* (*ubi sup.*) by Dr. Lushington, where he considered it a "most dangerous doctrine" to hold that suggestions from the master imposed the pilot's responsibility on him.

C. Hall Q.C. (with him *Carver*) for the plaintiffs.—The fact of a compulsory pilot being on board does not relieve a master from responsibility for not interfering to prevent obvious danger to the vessel:

The Girolamo, 3 Hagg. 169;
The Borussia, Swa. 94.

In this case the master was wrong to allow his vessel to be navigated up the Mersey in a thick fog on a flood tide. On the question of starboarding, it it is submitted that the conduct of the master amounted to an interference with the duties of the pilot, and was more than a mere suggestion. He practically countermanded the pilot's order and really took the ship out of his hands. Had it not been for the interference of the master no collision would have occurred.

Sir JAMES HANNEN.—That this collision occurred from the fault of someone on board the *Oakfield* is unquestionable. The principal question in the case is, whether the blame is attributable to the pilot or to the master or crew. The first point to consider is, whether there was anything in the state of the weather which made it an act of negligence for that vessel to be under way. I stated in the course of the argument that I was under the impression that in foggy weather it might be blameworthy on the part of a captain to allow his vessel to get under way. I am still disposed to think that there might be such an amount of fog as would make it culpable on the part of a master to allow his vessel to be in motion at all. I think, if there were such a state of obscurity owing to fog as would give rise to a plain prospect of danger, the master could not in those circumstances throw the whole responsibility on the pilot if he ordered the vessel to get under way. But in this case it is said that the circumstances did not give rise to such a plain prospect of danger, for although the weather was admittedly foggy, yet vessels might be seen at a very considerable distance; the evidence is, from 300 yards to half a mile. If vessels could be seen at such a distance as that, then it is a question for the pilot to determine whether it was wise to weigh anchor, and the master would be relieved from responsibility. The pilot knows all the local dangers, and knows as it were by instinct where he may go and where he may not go. It is therefore obvious that the master would leave it to the pilot to judge whether it would be safe to proceed in such a state of weather. I think therefore there was nothing in the state of the weather which made it negligent on the part of the master to allow his vessel to get under way. But I am advised that, as a matter of fact, having regard to the state of the weather and the fact that the tide was flood, it was a very imprudent thing to have that vessel under way. That, however, does not concern the master. It must be entirely a matter for the pilot to judge what would be the effect of the flood tide.

The next question is, whether there was any defect in the *Oakfield's* look-out. The pilot says he never heard the *Duchess of Albany* reported at all; but the evidence of the other witnesses from the *Oakfield* satisfies me that the other vessel was seen and reported. Whether she was reported before or after she was seen from the bridge of the *Oakfield*, I do not think important on the assumption I take, that it was only a question of seconds which took place first. It may be that those on the bridge did see the vessel a few seconds before the look-out, but I come to the conclusion that there was no want of care in the look-out. The next question is, whether the *Oakfield* was wrong in attempting to cross the bows of the *Duchess of Albany*. We are of opinion that she was clearly wrong in that manœuvre. The remaining question is, whether blame is to be attributed to the master or to the pilot. I think, after one has heard the examination and cross-examination of the pilot, it must appear pretty plain how this collision occurred. The evidence of the witnesses from the *Oakfield* shows that on the *Duchess of Albany* being reported, it seems clear that there was some doubt in the minds of both captain and pilot as to whether the *Duchess of Albany* was under way

or not. The pilot in his evidence said he first gave the order to port, and he went so far as to say that he thought the helmsman had begun to get the wheel over. In this, however, he has been contradicted, and I doubt whether that order was ever given. Then came the order to starboard, and up to that time it is clear that the pilot had been giving the orders. There is a conflict as to how this order to starboard came to be given, but the pilot admits that the words proceeded from his lips. To excuse himself he says he was merely carrying out the captain's order, and that it was not his order at all. I cannot accept that explanation. I feel convinced that the true solution of the case is, that when the *Duchess of Albany* was first seen there was a doubt as to whether she was or was not at anchor, that the captain very likely did strongly express an opinion that it would be safe and proper to starboard and go across her bows, that the pilot adopted that view and gave the order which brought about the collision.

There remains only this to consider, whether the interference of the master relieves the pilot from responsibility. I am of opinion that it does not. It has been pointed out by Dr. Lushington in the case of *The Lochlibo* (3 W. R. 310), that a suggestion made to the pilot by the master does not transfer the responsibility from him to the master. Though it would be the duty of the master to make suggestions to the pilot from time to time, it rests with the pilot to form his own opinion as to the value of the suggestion. It is only when the captain actually gives an order contrary to the pilot that he takes the responsibility for the manœuvre on himself. It is clear that this relation between the master and pilot was understood, for, if the pilot had felt that the matter was taken out of his hands, he would have left it to the master to have given the order. I think that in this case the entire responsibility rests with the pilot, though I believe that it was in consequence of his having unwisely listened to the master that the collision occurred. The defendants are therefore entitled to judgment with costs.

Solicitors for the plaintiffs, *Simpson* and *North*, Liverpool.

Solicitors for the defendants, *Bateson*, *Bright*, and *Warr*, Liverpool.

Tuesday, March 2, 1886.

(Before BUTT, J.)

THE BERNINA. (*a*)

Collision—Loss of life—Action in personam—Both ships to blame—Contributory negligence—Measure of damages—Lord Campbell's Act 1846 (*9 & 10 Vict. c.* 93)—*Judicature Act* 1873 (*36 & 37 Vict. c.* 66), *s.* 25, *sub-sect.* 9.

Where passengers are killed in a collision between two ships for which both are to blame, the deceased are so identified with their carrying ship as to be deemed to be guilty of contributory negligence, and hence their personal representatives suing the owners of the non-carrying ship under Lord Campbell's Act can recover nothing.

Thorogood *v.* Bryan (8 *C. B.* 115) *followed.*

The Admiralty Court had no jurisdiction prior to the Judicature Act 1873 *to entertain claims for loss of life, and there was consequently no rule in the Admiralty Court as to the division of damages in cases of loss of life, and as sect.* 25, *sub-sect.* 9. *of the Judicature Act* 1873 *has made no alteration in the principles of law as to the division of damages, passengers killed in a collision between two ships can recover nothing where both ships are to blame.*

THESE were three actions *in personam* brought under the provisions of Lord Campbell's Act by the personal representatives of three deceased persons, whose deaths had been occasioned by a collision between the two steamships, the *Bernina* and the *Bushire*, on Sept. 28, 1884.

The three deceased persons were respectively the second officer on the *Bushire*, the first engineer on the *Bushire*, and a passenger on board the *Bushire*.

The facts were by agreement between the parties set out in a special case, which was as follows:—

1. The first of these actions is an action *in personam* brought by Elizabeth Helené Armstrong, as administratrix of the estate and effects of her husband, John Hutchinson Armstrong, deceased, against James Mills and others, the owners of the steamship *Bernina*, to recover on her own behalf and on the behalf of her children damages alleged to have been sustained by them by reason of the death of the said John Hutchinson Armstrong.

2. The second action is brought *in personam* by the plaintiff Catherine Owen, as administratrix of the estate and effects of her husband Thomas Timothy Owen, deceased, against the said defendants, to recover on her own behalf damages alleged to have been sustained by her by reason of the death of the said Thomas Timothy Owen.

3. The third action is brought *in personam* by the plaintiff Habiba Harone Toeg, as administratrix of the estate and effects of her son Moses Aaron Toeg, deceased, against the same defendants, to recover on her own behalf damages alleged to have been sustained by her by reason of the death of the said Moses Aaron Toeg.

4. The owners of the said steamship have appeared, and are defendants in all of the said actions.

5. A collision occurred on the 28th Sept. 1884, between the British screw steamship *Bernina*, belonging to the defendants, and manned and navigated by their servants the master and crew thereof, and the British screw steamship *Bushire*, of 1011 tons register, belonging to the Persian Gulf Steamship Company Limited, and manned and navigated by their servants the master and crew thereof. The result of such collision was that the *Bushire* sank, and fifteen persons on board of her at the time of the said collision were drowned.

6. It is admitted that the said collision was caused by the fault or default of the master and crew of the steamship *Bushire*, and by the fault or default of the master and crew of the steamship *Bernina*.

7. At the time of the said collision the said John Hutchinson Armstrong was one of the crew of the said steamship *Bushire*, and was serving on board the said steamship *Bushire* as first

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

engineer under duly signed articles, and was by reason of the said collision drowned.

8. The said John Hutchinson Armstrong was at the time of the collision off duty, and had nothing to do with the negligent or careless navigation of the *Bushire*, which partly caused the said collision as aforesaid.

9. At the time of the said collision the said Thomas Timothy Owen was one of the crew of the said steamship *Bushire*, and was serving on board the said steamship as second officer under duly signed articles, and was by reason of the said collision drowned.

10. The said Thomas Timothy Owen was at the time of the said collision in charge of the said steamship *Bushire*, and was directly responsible for the negligent or careless navigation of the *Bushire*, which partly caused the said collision as aforesaid.

11. At the time of the said collision the said Moses Aaron Toeg was being carried on the said steamship *Bushire* as a passenger from London to Bushire in the Persian Gulf. He had paid his passage money for the voyage, and was by reason of the said collision drowned.

12. The said Moses Aaron Toeg had nothing to do with the negligent or careless navigation of the *Bushire*, which partly caused the said collision as aforesaid.

13. All of these actions were commenced within twelve calendar months of the date of the death of the said John Hutchinson Armstrong, the said Thomas Timothy Owen, and Moses Aaron Toeg.

14. The court is to be at liberty to draw inferences of fact.

15. The questions for the opinion of the court are as follows:—1. Are the defendants liable for the damages (if any) sustained by the first-named plaintiff and her said children by reason of the death of her husband, the said John Hutchinson Armstrong, in the said collision? 2. If the defendants are liable, are they liable to pay the whole of such damages (when ascertained) to the plaintiffs, or only a moiety of the same? 3. Are the defendants liable for the damages (if any) sustained by the plaintiff in the second action by reason of the death of Thomas Timothy Owen. 4. If the defendants are liable, are they liable to pay the whole of such damages (when ascertained), or only a moiety of the same? 5. Are the defendants liable for the damages (if any) sustained by the plaintiff in the third action by reason of the death of her son, the said Moses Aaron Toeg, in the collision? 6. If the defendants are liable, are they liable to pay the whole of such damages (when ascertained), or only a moiety of the same?

If the plaintiffs, or either of them are entitled to recover against the defendants, judgment is to be entered up accordingly with costs, and there is to be a reference to the registrar and merchants to assess the damages in accordance with the judgment of the court.

If the defendants are not liable to the plaintiffs, or either of them, then judgment is to be entered accordingly for the defendants, with costs.

The following Acts of Parliament were referred to in the course of the argument:—

The preamble and sect. 2 of Lord Campbell's Act:

Whereas no action at law is now maintainable against a person who, by his wrongful act, neglect or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him: Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that whensoever the death of a person shall be caused by the wrongful act, neglect, or default, and the wrongful act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

2. And be it enacted that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may award such damages as they think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the beforementioned parties in such shares as the jury by their verdict shall find and direct.

Sect. 25, sub-sect. 9, of the Judicature Act 1873:

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.

Bucknill, Q.C. (with him *Nelson*) for the plaintiffs.—Even assuming the plaintiffs to be deemed to be guilty of contributory negligence on the authority of *Thorogood* v. *Bryan* (8 C. B. 115; 18 L. J. 336, C. P.), yet the plaintiffs are entitled to half damages under the provisions of the Judicature Act 1873, s. 25, sub-sect. 9. By that section the Admiralty Court rule as to the division of damages where both ships are to blame is made applicable to "any cause or proceeding for damages arising out of a collision between two ships." This is a "cause or proceeding for damages arising out of a collision between two ships," and therefore the section applies. By Order XIX., r. 28, Preliminary Acts are to be filed "in actions for damage by collision between vessels," which are words very similar to those used in sect. 25, sub-sect. 9. In the case of *Webster* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* (5 Asp. Mar. Law Cas. 256, n.; L. Rep. W. N. Jan. 5, 1884), which was an action in the Queen's Bench Division under Lord Campbell's Act arising out of a collision between ships, your Lordship sitting in judges' chambers, ordered a Preliminary Act to be filed. It is submitted that if Order XIX., r. 28, applies to actions under Lord Campbell's Act, this section of the Judicature Act is equally applicable. The Merchant Shipping Act 1854 has limited shipowners' liability to 15*l.* per ton for loss of life, and were the plaintiffs to claim in an action limiting the defendants' liability they would be entitled to half their damages. If so, how can it be said that they are not entitled to recover in this action? It is, however, submitted that the plaintiffs are entitled to recover full damages, and are not precluded from recovering damages

by reason of the decision of *Thorogood* v. *Bryan* (8 C. B. 115; 18 L. J. 336, C. P.). That decision has been questioned in several subsequent decisions, and also by many eminent text writers:

Rigby v. *Hewitt*, 5 Ex. 240;
Quarman v. *Burnett*, 6 M. & W. 499;
Smith's Leading Cases, 8th edit. 316;
Addison on Torts, 4th edit. 388.

In the Scotch case of *Adams* v. *The Glasgow and South-Western Railway Company* (3 Scotch Sess. Cas. 4th series, p. 215), the principle acted upon in *Thorogood* v. *Bryan* (*ubi sup.*) was condemned. Again, in the case of *The Milan* (Lush. 388; 5 L. T. Rep. N. S. 590), Dr. Lushington refused to be bound by *Thorogood* v. *Bryan* (*ubi sup.*) as being contrary to *Hay* v. *Le Neve* (2 Shaw Sc. App. 505). The American courts have also dissented from this principle:

Shearman and Redfield on Negligence, sect. 46, 3rd edit. 56;
Chapman v. *Newhaven Railway Company*, 19 N. Y. 341;
Webster v. *Hudson River Railway Company*, 38 N. Y. 260;
Colegrove v. *New Haven Railway Company*, 20 N. Y. 492.

Sir *Walter Phillimore* and *Barnes*, for the defendants, *contra*.—The present case cannot fall within sect. 25, sub-sect. 9, of the Judicature Act 1873, because prior to the Judicature Act the Admiralty Court never entertained actions under Lord Campbell's Act. If so, there could have been no "rules hitherto in force in the Court of Admiralty" in such a "cause or proceeding." It is to be noticed that the word used is "rules," and not rule or principle, showing that the half-measure of damages was only to be applied to certain well-known cases such as damage to ship or cargo. [BUTT, J. referred to the cases of *The Sylph*, 3 Mar. Law Cas. O. S. 37; 17 L. T. Rep. N. S. 519; L. Rep. 2 Ad. & Ecc. 24; and *The Beta*, 20 L. T. Rep. N. S. 988; 2 P. C. 447.] Those were actions *in rem* over which the court had jurisdiction, whereas the present action is *in personam* and could not have been instituted *in rem*:

The Vera Cruz, 5 Asp. Mar. Law Cas. 386; 10 App. Cas. 59; 52 L. T. Rep. N. S. 474.

Were the court to decide in favour of the plaintiff's contention, the decision would hold good in actions tried in the Queen's Bench Division before a judge and jury. If so, the amount of damages awarded by the jury would in all cases similar to the present have to be divided. The creation of such an anomaly is a strong argument in favour of holding that the Legislature never intended the section to apply to actions under Lord Campbell's Act. The decision in *Thorogood* v. *Bryan* (*ubi sup.*) is the law of the land, and has never been expressly overruled. Though it is true that some judges have expressed dissatisfaction with it, yet in many cases it has been expressly aproved of:

Armstrong v. *Lancashire and Yorkshire Railway Company*, L. Rep. 10 Ex. 47; 33 L. T. Rep. N. S. 228; 44 L. J. 89, Ex.;
Waite v. *North-Eastern Railway Company*, E. B. & E. 719;
Spaight v. *Tedcastle*, 44 L. T. Rep. N. S. 589; 4 Asp. Mar. Law Cas. 406; L. Rep. 6 App. Cas. 217.

Although *Thorogood* v. *Bryan* (*ubi sup.*) has been disapproved of in the New York courts, yet in other States, for example, Massachusetts and Ohio, the principle has been followed:

Smith v. *Smith*, 2 Pick. 621;
Cleveland Railway Company v. *Terry*, 8 Ohio St 570;
Puterbaugh v. *Reasor*, 9 Ohio St. 484.

Bucknill, Q.C., in reply, cited

The Chartered Mercantile Bank of India, London, and China v. *Netherlands India Steam Navigation Company*, 48 L. T. Rep. N. S. 546; 5 Asp. Mar. Law Cas. 65; 10 Q. B. Div. 521.

BUTT, J.—The English decisions which have been referred to make it perfectly clear what the law is. If it had not been so, I should have taken time to consider my judgment. If I had to decide for the first time the question discussed in *Thorogood* v. *Bryan* (*ubi sup.*) I should have hesitated long before I arrived at the conclusion at which the learned judges in that case arrived, especially having regard to the opinions expressed both in text-books and by learned judges in Scotland, and in some States of America which are strongly antagonistic to the doctrine laid down in that case. But, as Lord Blackburn has said in the case of *Spaight* v. *Tedcastle* (*ubi sup.*), the decision in *Thorogood* v. *Bryan* (*ubi sup.*) has never been overruled in this country, and having regard to the practice—I think I may say the universal practice—by which judges decline to overrule the decisions of courts of co-ordinate jurisdiction, I do not consider myself authorised to ignore that case.

Therefore, however reluctantly, I must give effect to it, and I must decide that in each and all of the three cases embraced by the special case the doctrine laid down in *Thorogood Bryan* (*ubi sup.*) would bar the plaintiffs of their remedy unless sect. 25, sub-sect. 9, of the Judicature Act 1873 entitles them to half damages. It is said by Mr. Bucknill that that section enables the court to give the plaintiffs at least half of the damages they have sustained by reason of the collision. That 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." It is said that this is a case arising out of a collision between two ships, and that therefore the section to which I have referred relates to it. I think, if there were nothing else in the section, that would be a sound argument. But, taking a broad view on the whole of the section, I do not think this case is within it. I do not think the Legislature contemplated such a case as this when this section was enacted. By express words it only applies to cases where the rules in force in the Admiralty Court were at variance with the rules in the courts of common law. Now an action under Lord Campbell's Act is a totally distinct action from any action that was ever entertained by the Admiralty Court. It is different in its very nature, and it is certain the Admiralty Court never did entertain such a suit. Therefore there was no rule in the Admiralty Court as to the measure of damages, or as to the mode in which damages should be assessed in such a case. If there was no rule in the Admiralty Court, there was no rule at variance with the courts of common law. Therefore there being no variance, it appears to me that by the very words of the section it does not apply to this case. Therefore, much as I regret it, I am

forced to say, on the authority of *Thorogood* v. *Bryan* (*ubi sup.*) and some subsequent cases, that the plaintiffs are precluded from recovering in this action, and that their case is not rendered better by the Judicature Act of 1873. I therefore give judgment for the defendants with costs.

Solicitors for the plaintiffs, *Lowless* and *Co.*

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

March 16 *and* 17, 1886.

(Before BUTT, J.)

THE UNDAUNTED. (*a*)

Towage contract—Breach of—Implied warranty—Efficiency of tug—Notice restricting liability.

In a towage contract there is an implied undertaking on the part of the tugowners to supply an efficient tug with sufficient equipments, including a proper supply of coal; and hence, a term in the contract by which the tugowners are exempted from liability for loss or damage occasioned by the negligence of their servants is no defence to an action for damages occasioned to the owners of the tow in consequence of the towage being discontinued owing to the tug having started with an insufficient supply of coals.

Where in the course of towage the tug, owing to her having started with an insufficient supply of coal, is obliged to cast off to go to the nearest port to ship more coal, and then returns and completes the towage, the tugowners are entitled to be paid the price agreed upon in the towage contract if the owners of the tow do not prove any damage to have been occasioned to them by the temporary discontinuance of the towage.

THIS was an action *in personam* for towage services rendered by the tug *Knight Commander* to the American ship *Undaunted*. The defendants counter-claimed for demurrage occasioned by the towage being temporarily discontinued. The plaintiffs, the owners of the tug, claimed 110*l.* under an agreement by which the *Undaunted* was to be towed from Havre to Cardiff for the sum of 110*l.*, including the use of hawser.

According to the evidence of the plaintiffs, the facts were as follows:—In April 1884 an agreement was made by correspondence between the plaintiffs and the defendants, by which the plaintiffs were to provide a tug to tow the defendants' ship *Undaunted* from Havre to Cardiff for 110*l.*, including use of hawser. In one of the plaintiffs' letters forming the contract were these words, "Towage conditions as per inclosed card," by which card the tugowners were exempted from any liability for any damage caused by the negligence of their servants, or by the perils of seas, rivers, or navigation. In another letter of the plaintiffs were these words, "Our quotation covers, as usual, one daylight tide only for docking at Cardiff." The tug *Undaunted* then proceeded to Havre, which she left with the tow about noon on the 26th April with 90 tons of coal on board, her full complement being 120 tons. During the towage she met with severe weather and encountered a strong head wind. At about 3.30 p.m. on the 28th April, when the vessels were off Trevose Head, the master of the *Knight Commander* finding that his coal had burnt more quickly than he had reason to expect, cast off for a time and proceeded to Swansea for additional coal, and then returned to the *Undaunted* and took her in tow again after an absence of about 27 hours. The vessels arrived at Cardiff on the morning of the 30th, when it was found impossible to take the *Undaunted* into dock owing to the docks being full at the time. The *Undaunted* was not able to be docked till the 3rd May, and it was alleged by the plaintiffs that, owing to the number of vessels in dock, the *Undaunted* could not have been docked before even if she had been continuously towed. The *Undaunted* was towed for 68 hours in all, the average time for the towage being from 56 to 57 hours. The plaintiffs also alleged that when the *Knight Commander* commenced towing she was fully and properly supplied and equipped, and that the insufficiency of coal was due to its fast consumption and the unusual severity of the weather, which the plaintiffs had no reason to expect.

In cross-examination the master admitted that when he cast off, which was within 53 hours of leaving Havre, he had only 15 tons of coal on board.

The defendants, by their defence, alleged that the weather during the towage was fine and moderate, that the plaintiffs had not performed the towage agreed for, that the plaintiffs had not performed the towage within the agreed time, and that in consequence thereof the *Undaunted* could not be docked till noon on the 3rd May. The defendants counter-claimed four days' demurrage, occasioned by the *Undaunted* not arriving at Cardiff in time to dock by the evening tide of the 29th.

F. W. Raikes for the plaintiffs.—The towage contract has been performed, and therefore the plaintiffs are entitled to recover. No misconduct or breach of duty can be imputed to the plaintiffs. Under ordinary circumstances the coal supply would have been sufficient, and its failure was entirely due to circumstances which the plaintiffs were not bound to foresee, viz., immoderate weather and defect in the coal. Even assuming the tug to have started with an insufficient supply of coal, that is due to negligence on the part of the master, for which the plaintiffs, by the terms of the contract, are not responsible:

The United Service, 5 Asp. Mar. Law Cas. 170: 9 P. Div. 3; 49 L. T. Rep. N. S. 701.

In that case the negligence of the master was analogous to the negligence complained of in the present case, inasmuch as it caused the tug to be of insufficient power for the service. [BUTT, J.—How do you meet the decision in *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. 516)? The tug, if insufficiently supplied with coal, is deficient in equipment when she commences the towage. I think tugs, when they enter upon the performance of a towage contract, should be abundantly supplied with coal.] However that may be, the towage was completed, and therefore, on the authority of *The Lady Flora Hastings* (3 Hagg. 118), the plaintiffs are entitled to recover.

Praed (with him *Gorell Barnes*) for the defendants.—In *The Lady Flora Hastings* (*ubi sup.*) the breakdown of the tug was due to accidental

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

circumstances, whereas, in the present case, the insufficiency of coals was due to the negligence of the master. The clause in the contract exempting the plaintiffs from liability is only applicable to loss or damage incurred during the towage, and not to the negligence of the plaintiffs in providing an inefficient tug. The parties contemplated that the towage should be continuous, and in some circumstances its temporary discontinuance might cause serious danger to the tow. It is proved that, in the present case, the defendants were, in consequence of the delay, unable to have their vessel docked as soon as they otherwise would have done. There has, therefore, been a breach of the contract, occasioning loss to the defendants.

F. W. Raikes in reply.

BUTT, J.—This is an action arising out of a towage contract to tow the ship *Undaunted* from Havre to Cardiff. The tug was not at Havre at the time when the contract was entered into, but in pursuance of the contract she proceeded to Havre, and there took the *Undaunted* in tow on the 26th April 1884. When off Trevose Head, which is some 70 miles from Cardiff, it was found there were only 15 tons of coal remaining on board the tug. Her master did that which was probably prudent and right under the circumstances. With the approval, so far as I can gather, of the master of the tow, he cast off and went to Swansea to procure a fresh supply of coal. The *Undaunted* in the meantime was put under canvas, and is said to have beat to the northward, but probably she did not materially alter her position before the tug came back on the following day. Arguments have been directed as to the quantity of coal the tug had on board at the time she left Havre, and on the evidence I come to the conclusion that she was not properly or adequately supplied. It is a matter of very great importance that steam-tug owners should not be released from the obligation which is incumbent upon them to provide adequately and properly equipped tugs, because the consequences of having to cast a vessel off in the middle of the towage may be of the very gravest kind. It may involve not only serious danger to property, but also to life. If a tug were to cast a ship off in a gale of wind and on a lee shore in order to go and procure coal, the consequences would be serious. Therefore I am not disposed to diminish the responsibility of the tugowners in that respect.

With regard to the circumstances of this case, I have no doubt that the weather was worse than the captain of the tug anticipated before he started on the voyage. I am not prepared to say that it was worse than he had reason to expect, but at the same time I have no doubt that the weather was bad, and that when the tug cast off they had been practically making no way at all. It is said that, assuming the coal on board on starting from Havre to have been inadequate, it is not a matter for which the tugowners are responsible, for by the terms of the card, which is said to have been incorporated in the contract, they are not responsible for the negligent acts of the master. I do not think, however, that that can avail the plaintiffs in this case, because there is an implied undertaking on the part of tugowners to supply an efficient tug, including sufficient equipments and a proper supply of coal, and if the tug was—as I find it was—deficient in this respect, it is a matter for which the tugowners are liable, notwithstanding the exceptions in the card.

The question is, did the tug perform the contract? If it were established that any serious damage had resulted to this ship from the tug leaving her I should hold the plaintiffs liable, but I do not think any damage has been proved. The suggested damage is, that the *Undaunted* did not arrive at Cardiff in time to dock on the evening tide of the 29th April. The defendants plead as a part of the contract that the tug was "to tow the *Undaunted* from Havre to Cardiff docks, and dock her on or before Tuesday, the 29th April," but this is nothing like the real contract, which was merely to tow the *Undaunted* to Cardiff docks, the towage beginning on the 26th or 27th. Now, having regard to the evidence of the collector of Penarth dock (called on behalf of the defendants), who says that the average towage voyage from Havre to Cardiff is from fifty-seven to sixty hours, it is clear that, if the towage had commenced on the 27th, these vessels, even if they had gone as fast as they ordinarily do, would not have reached Cardiff by the evening of the 29th. Therefore, assuming the tug to have had a sufficient supply of coals, is it shown that the vessels would have arrived at Cardiff in time to allow the *Undaunted* to have docked on the evening of the 29th? I do not think anything of the sort is shown. The captain of the tug has said that for some time before they cast off they had only been able to make three knots an hour, and that when they cast off there was such a strong head wind that they were practically making no way at all. That being so, it is clear that, even if the tug had not cast off, and had had a sufficient quantity of coal, the *Undaunted* could not have got to Cardiff in time for the evening tide. It is in evidence that if she had not arrived by that time she could not have been docked sooner than she was, on the 3rd May, as the docks were full up until then. But even if she had got into dock earlier there is no evidence that she would have been any better off, or that her owner would thereby have derived any benefit. There is no evidence of any contract or charter-party, or that any cargo was waiting for her. On the whole, the conclusion to which I have come is, though I do not think the tug was so well equipped as she should have been at the outset, that, as the defendants have failed to prove any damage, my judgment must be for the plaintiffs. The towage having been resumed, and the defendants having accepted that subsequent towage, the contract was performed, and therefore the price must be paid. I therefore pronounce for the plaintiffs for the sum sued for.

Solicitors for the plaintiffs, *Crowther* and *Miller*, Liverpool.

Solicitors for the defendants, *Ingledew*, *Ince*, and *Colt*.

Tuesday, March 30, 1886.

(Before BUTT, J.)

THE BELLCAIRN. (*a*)

Practice—Institution of legal proceedings—Principal and agent—Managing owner and co-owners—Costs—Limitation of liability.

Where a shipowner applied to the court to set aside an order condemning him in the costs of unsuccessful legal proceedings taken in his behalf by the managing owner, on the ground that the proceedings had been instituted without his knowledge, consent, or ratification, and that the first intimation he had of the proceeding, was a notice received by him about a month previous to the present application condemning him in the costs of such proceedings, the Court refused to grant the application, as it did not appear that the applicant, though he had no knowledge of the institution of, was not aware of the pendency of the proceedings, and because he had not at once applied to the court on becoming aware of the proceedings, instead of delaying to take any steps for over a month.

THIS was a motion in a limitation of liability action to set aside certain orders of court therein made against one George Butt Craig, one of the owners of the British steamship *Britannia*.

The action had been instituted by the owners of the *Bellcairn* to limit their liability in respect of a collision between the *Bellcairn* and the *Britannia* on the 31st July 1884.

The owners of the *Britannia* had brought an action *in rem* against the owners of the *Bellcairn* to recover damages for the collision. That action was dismissed at the trial by the consent of the parties. Subsequently the owners of cargo on board the *Britannia* brought an action *in rem* against the *Bellcairn*, in which action both ships were held to blame. Thereupon, the owners of the *Bellcairn* having instituted an action to limit their liability, the owners of the *Britannia*, on the 25th March 1885, unsuccessfully sought to claim against the fund in that action: (*The Bellcairn*, 10 P. Div. 161; 5 Asp. Mar. Law Cas. 503; 53 L. T. Rep. N. S. 186).

The following affidavit by the applicant was filed in support of the motion:—

1. I am the registered owner of one sixty-fourth share in the late British steamship *Britannia*, which, on or about the 31st day of July 1884, was sunk in the English Channel by collision with the steamship *Bellcairn*, and was totally lost.

2. I am informed and believe that an action for damage by the said collision was brought in this division of the High Court of Justice in the name of the owners of the *Britannia*, against the owners of the *Bellcairn*, in which the latter also counter-claimed for the damage they had sustained, and that at the trial of the said action, on Nov. 7, 1884, the claim and counter-claim were dismissed by consent of both sides; and that in an action brought subsequently by the owners of the cargo on the *Britannia* against the *Bellcairn*, the court pronounced for a moiety of the damages sustained by the plaintiffs, and that the owners of the *Bellcairn* paid into court the amount of their statutory liability of 8*l*. per ton.

3. In the month of Feb. 1886 it came to my knowledge that the managing owners of the *Britannia*, Messrs. Ward and Hobzapfel, had taken proceedings to set aside the judgment of Nov. 7, 1884, and had claimed in the name of the owners of the *Britannia* to prove against the fund in court for the damages sustained in the collision, and that such claim had been successfully resisted by the owners of the cargo on the *Britannia*, who had obtained a judgment against the owners of the *Britannia* for their costs thereby incurred amounting to 86*l*. or thereabouts.

4. The said Ward and Hobzapfel have left this country in order, as I am informed and believe, to escape their liabilities, and are now abroad.

5. The said legal proceedings to set aside the said judgment and to claim against the fund in court were taken by the said Messrs. Ward and Hobzapfel entirely without the knowledge, sanction, or ratification, express or implied, of me this deponent, or, as I am informed and believe, of any of the co-owners of the said *Britannia*, nor have I, or to my knowledge and belief have my co-owners, at any time given to the said Ward and Hobzapfel or either of them any general authority to take such proceedings as they or he might think fit or be advised to recover the loss sustained by the owners of the *Britannia*, and the first intimation that I had of the said proceedings was in Feb. 1886, when I received a circular from a Mr. Schnitger, acting on behalf of the said Ward and Hobzapfel, informing me of the proceedings and of the liability incurred for costs, and requesting me to consent to pay a proportion of the same.

6. By my instructions my solicitors, Messrs. Dodds and Co., of Stockton-on-Tees, and their agents in London, gave written notice to Messrs. Stokes, Saunders, and Stokes, of 21, Great St. Helens, in the city of London, the solicitors for the said cargo-owners, that the said proceedings were the sole act of the said Messrs. Ward and Hobzapfel, that they were taken without the knowledge or sanction of me and of my co-owners, and were altogether *ultra vires*, and that I repudiated all liability in respect of the same, but nevertheless I am informed and believe that the said Messrs. Stokes, Saunders, and Stokes have, since the receipt of such notice, issued execution against me for 86*l*. or thereabouts, the whole amount of their said costs.

7. Under these circumstances I am advised and believe that the said Messrs. Ward and Hobzapfel had no authority to bind me to the payment of any part of the costs of the said legal proceedings and that I am entitled to have all proceedings under the said judgment obtained by the said cargo-owners stayed against me.

The terms of the motion were as follows:

Take notice that this honourable court will be moved on Tuesday, the 30th day of March 1886 instant, by counsel on behalf of George Butt Craig, one of the owners of the steamship *Britannia*, for an order that the name of the said George Butt Craig shall be struck out of the proceedings in this action, on the ground that the said name has been used as, or included amongst, the parties to this action without his authority, knowledge, or consent, and that the judgments or orders of the 11th day of Aug. 1885, and the 4th and 7th days of Nov. 1885 in this action, in so far as they condemn the said George Butt Craig in costs or otherwise affect him, may be set aside, and that the execution issued on the said judgments or orders, so far as they affect the said George Butt Craig, may be also set aside, and that all other proceedings in this action purporting to be by or against the said George Butt Craig may be set aside and dismissed, and that the cost of this application and all other costs occasioned to the said George Butt Craig by reason of his having been improperly joined as a party to these proceedings, be paid either by the owners of the cargo of the *Britannia*, or by the parties improperly joining him.

J. P. Aspinall in support of the motion.—The managing owner had no authority to claim in this action. If so, the costs incidental to those proceedings were incurred without authority, and my client is not liable to pay them. [BUTT, J.—Why, if he knew of these proceedings in February, did he not at once come to the court instead of waiting until now?] There has been no unreasonable delay. It is submitted that on the affidavit it is clear that the claim was instituted and carried on without my client's knowledge. It also appears that the managing owner had no general authority to take legal proceedings.

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

Finlay, Q.C. (with him Dr *Stubbs*) for the owners of cargo on the *Britannia*.—The case of *Mudrig* v. *Newman* (1 C. M. & R. 402) is in point, and fixes a litigant with costs, although the solicitor has instituted the proceedings without his authority or knowledge. [BUTT, J.—That was prior to judgment, and therefore no liability had been imposed. I think it would have been different if judgment had been given. You surely do not contend that, where a solicitor uses another man's name without his authority or knowledge to carry on an action, he is to pay the costs if the proceedings are unsuccessful?] The decision certainly seems to go as far as that. It no doubt is a hardship, as Parke, B. says, but there is a remedy against the solicitor. It is also submitted that, apart from authority, the affidavit is not sufficient. It does not show that Mr. Craig had no knowledge of the continuance of the proceedings, or what was the authority given to the managing owner to institute the original proceedings. Had the present proceedings proved successful, Mr. Craig would have reaped the benefit, and he should therefore bear the burden of their want of success.

Sir *Walter Phillimore* for the owners of the *Britannia*,

J. P. Aspinall, in reply, cited

Collins v. *Johnson*, 24 L. J. 231, C. P.

BUTT, J.—Before acceding to such an application as the present, where the applicant alleges that he was innocently and unwittingly made a party to proceedings of which he knew nothing, I ought to be satisfied that he really and truly not only was ignorant that proceedings had been instituted, but also that they were going on. I am not satisfied that that was so in this case. In the first place, before the present proceedings had been taken, an action had been instituted in the applicant's name in respect of the damages occasioned by the collision. I gather from the affidavit that he was aware of these proceedings, and that he authorised them. He, however, has not told us what authority he gave to the managing owner to take those proceedings, and I cannot help thinking that, if that authority had been produced, we should have seen that it extended to the legal proceedings now under discussion. It is also to be noticed that the affidavit abstains from stating that the applicant had no knowledge at all, in any shape or form, of the institution or the continuance of these proceedings. It seems to me to be a very carefully prepared affidavit, but it does not at all satisfy me that this gentleman may not have had some knowledge of what was going on. Then there is another matter, which to my mind is fatal. I refer to the delay in bringing the matter before the court, which is, I think, inexcusable. Taking the allegations most favourable to himself, he had information of these proceedings in February, and yet he lies by till now, and takes no steps to prevent these proceedings going on, whereas I think he ought to have come to the court at once. For these reasons I am of opinion that this application must be dismissed with costs.

Solicitors for Mr. Butt Craig, *Bower*, *Cotton*, and *Bower*.

Solicitors for the owners of cargo on the *Britannia*, *Stokes*, *Saunders*, and *Stokes*.

Solicitors for the owners of the *Britannia*, *Botterell* and *Roche*.

Tuesday, April 6, 1886.

(Before BUTT, J.)

THE ZOE. (*a*)

Limitation of liability—Collision—Loss of cargo—Admiralty stores—Prerogative of Crown—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *ss.* 4, 504, 514—*Admiralty Suits Act* 1868 (31 & 32 *Vict. c.* 78), *s.* 3.

Assuming that the Crown is not bound by the Merchant Shipping Acts, it may nevertheless under the provisions of the Admiralty Suits Act 1868, *claim against the fund in a limitation of liability action in respect of the loss of Admiralty stores by collision.*

Quære: Can the Crown, where a shipowner limits his liability, enforce any claim beyond the amount limited by the Merchant Shipping Acts?

In a limitation of liability action a claim may be brought in upon terms after the time fixed by the decree for bringing in claims has expired, provided the claimant has not been guilty of laches disentitling him to the indulgence.

THIS was a motion by the Crown in a limitation of liability action institution by the owners of the steamship *Zoe* for leave to come in and claim therein.

The action was instituted in respect of damages arising out of a collision between the *Zoe* and the Norwegian barque *Dannebrog* on 10th Feb. 1885, whereby both vessels, together with their cargoes, were lost. Amongst other goods on board the *Zoe* at the time of the collision were stores belonging to the Admiralty. The *Zoe* was found solely to blame for the collision. The present action was instituted on the 10th June 1885, and on the 21st July 1885 the plaintiffs obtained the usual decree limiting their liability, and directing all claims to be lodged in court on or before the 21st Oct. 1885. No claim was lodged in respect of the Admiralty stores within the time fixed by the decree. In an affidavit filed on behalf of the Crown, it is alleged that the Crown had been informed by the Admiralty shipping agents that legal proceedings had been dropped, that relying upon such information no steps had been taken to enforce the claim in respect of the Admiralty stores, and that it was only after the 21st Oct. 1885, viz., on the 19th March 1886, that they become aware of the real position of affairs. It appeared that the reference had been held, but that no money had been paid out of court.

In these circumstances notice of motion was given in the following form:

Take notice that this honourable court will be moved on Tuesday, the 6th day of April next, by Her Majesty's Attorney-General of counsel on behalf of the commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, that the said commissioners may be at liberty to come in and enter their claim in respect of loss or damage to goods and stores of the Crown caused by the improper navigation of the steam-vessel *Zoe*, on the occasion of the collision between that vessel and the barque or vessel *Dannebrog*, on the 10th Feb. 1885, notwithstanding that the time mentioned in the decree dated the 21st July 1885 has elapsed.

The following Acts of Parliament were referred to, and are material to the decision:—

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

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

Sect. 514. In cases where any liability has been or is alleged to have been incurred by any owner in respect of loss of life, personal injury, or loss of, or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, then . . . . it shall be lawful in England or Ireland for the High Court of Chancery, and in Scotland for the Court of Session, and in any British possession for any competent court, to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability subject as aforesaid, and for the distribution of such amount rateably amongst the several claimants, with power for any such court to stop all actions and suits pending in any other court in relation to the same subject-matter, and any proceeding entertained by such Court of Chancery or Court of Session or other competent court may be conducted in such manner and subject to such regulations as to making any persons interested parties to the same, and so to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of costs, as the court thinks just.

The Admiralty Suits Acts 1868 (31 & 32 Vict. c. 78).

Sect. 3. The Admiralty may institute any action, suit, or proceeding concerning naval or victualling stores, or other Her Majesty's stores, goods, or chattels under the charge or control of the Admiralty, or any stores, goods, or chattels sold or contracted to be delivered to or by the Admiralty for the use or on account of Her Majesty, or the price to be paid for the same, or any loss or injury of or to any such stores, goods, or chattels as aforesaid . . . . in like manner and form (as nearly as may be) as if the question in dispute were one between subject and subject.

The *Attorney-General* (Sir Charles Russell) and *Staveley Hill*, Q.C. (with them *A. T. Lawrence*) in support of the motion.—The Crown, although not bound by the Merchant Shipping Acts, wishes to avail itself of the provisions relating to actions for limitation of liability. The mere fact of its not being bound by an Act of Parliament does not prevent it availing itself of the rights and remedies given by the Act. While it is true that the time for lodging claims has elapsed, it is nevertheless submitted that, in the circumstances of this case, the Crown should be allowed to come in and claim, subject to terms. The fund has not yet been distributed, and, as in bankruptcy and the administration of estates claims can be brought in so long as there is even a portion of the fund left, the present claim should by analogy be allowed. In the case of *Angell* v. *Haddon* (1 Madd. 529) a creditor was allowed to prove his debt, though the fund had been apportioned amongst the creditors and transferred to the Accountant-General. Here there have been no laches. The Crown was justified, on the information given it, in acting as it did.

Sir *Walter Phillimore* (with him Dr. *Stubbs*) for various claimants, *contra*—The crown is not bound by the Merchant Shipping Acts. By sect. 514 of the Merchant Shipping Act 1854 the fund in a limitation action is appropriated to the claimants under the Act. As the Crown is not one of those claimants, and therefore a stranger to that fund, it ought not to be allowed to claim against it to the prejudice of other persons. That section gives the court power to stay all other actions, and, as one of the prerogatives of the Crown is to have process out of any court it pleases, the provisions of that section clearly make it inapplicable to the Crown. [BUTT, J.—It seems to me immaterial whether the Crown is bound or not, if it may avail itself of the rights and remedies given by the statute.] This fund was reserved by Act of Parliament for our claims, and therefore the Crown cannot to our prejudice rank against it. The Crown, not being bound by the Act, has other remedies. [BUTT, J.—I doubt if a shipowner's limit of liability is greater than 8*l.* per ton, even as against the Crown.] If the Crown is not bound, then its right to full damages cannot be curtailed by the Act:

Chitty on Prerogative, 383:

Ex parte Postmaster-General, 10 Ch. Div. 595.

Assuming the Crown to be entitled to claim in a limitation action, there is in this case evidence of such gross laches that, on the authority of *Hall* v. *Falconer* (11 Jnr. N. S. 151), the claim should not have been allowed, especially as the fund has been apportioned amongst the various claimants. The Crown was wrong to have relied upon information given by other persons, and ought to have informed itself of the real facts of the case.

Gorell Barnes (with him *Hannen*) for the owners of the *Zoe*.—The limit of the liability of the owners of the *Zoe*, even to the Crown, is fixed by the Merchant Shipping Acts, and hence the Crown has no right except against the fund in court. The Crown is bound by statutes that are for the public good; (Chitty on Prerogative, p. 333.) [BUTT, J.—All statutes presumably are for the public good.] The Acts allowing limitation of liability in their preambles describe their provisions as being for the public good and for the encouragement of commerce. The Crown can always take the benefit of an Act of Parliament, even though it is not named; (Coke's Reports, part vii., p. 32.)

Staveley Hill in reply.—The Admiralty Suits Act 1868 (31 & 32 Vict. c. 78), s. 3, gives the Crown the right to institute an action, suit, or "proceeding" in respect of naval stores, as if the question in dispute were one between subject and subject. That being so, this is a "proceeding" within the meaning of that section, and therefore the Crown has a right to claim against the fund.

BUTT, J.—While I have some doubt whether the Crown is not bound in a limitation action to come in and take *pro ratâ* with the other claimants against the fund, it is not necessary to decide that point now. For, assuming it is not bound, it appears to me to be quite clear that it may elect to come in and share rateably in the fund if it so pleases. It does not at all follow that because the Crown is not bound by the Act it may not come in and claim its *pro ratâ* share of the fund, just as it may, though not bound by the Bankruptcy Act, claim a dividend. I should have been quite prepared to say that it might do that even apart from the provisions of the Admiralty Suits Act. It seems to me, however, that that Act of Parliament gives express power to the Crown to take such proceedings as these. That, therefore, settles the first point. Then it is said that the Crown has been guilty of such laches as to forfeit its right to put in a claim. There is no doubt that laches may deprive a claimant of the indulgence of being allowed to come in and claim after the proper time has expired. A case has been cited in which that course was followed, but it was a very different case to the present. I

appears to me that, as the fund is still in court, if the claimant were a subject and not the Crown, it would under the circumstances be simply shocking to refuse to allow him to come in; and that being so, I do not mean to refuse this application of the Crown. While, however, I do not think there has been laches disentitling the Crown to come in and claim, I think there has been remissness on the part of the authorities, and therefore I am going to grant this application upon terms. I grant it upon this condition that the Crown pays all the costs occasioned by the claim not having been lodged within the proper time.

Solicitors for the Crown, *Hare* and *Co.*

Solicitors for the other claimants, *Stokes*, *Saunders*, and *Stokes*.

Solicitors for the owners of the *Zoe*, *Pritchard* and *Sons*.

Thursday, April 8, 1886.

(Before BUTT, J.)

THE CREADON. (*a*)

Limitation of liability—Collision with two ships—Amount of liability—Separate acts of negligence—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 506.

Where a ship comes into collision with two vessels one after the other, there being a short interval between the two collisions, the shipowner will be entitled to limit his liability to 8*l. per ton (there being no loss of life) if the first collision is the substantial and efficacious cause of the second, and there is no separate act of negligence on the part of those in charge of the plaintiffs' ship in respect of the second collision.*

THIS was an action of limitation of liability instituted on behalf of the owners of the steamship *Creadon* against the owners of the sailing ship *Garston* and against the owners of the sailing ship *Asia* in respect of collisions between the *Creadon* and the *Garston* and *Asia* on the 22nd Dec. 1884.

On the 22nd Dec. 1884 the *Creadon*, whilst on a voyage from Portsmouth to Roath Basin, Cardiff, came into collision first with the *Garston* and then with the *Asia*. In damage actions instituted by the owners of the *Garston* and the *Asia* against the *Creadon*, the owners of the *Creadon* admitted liability, and now sought to limit the amount of their liability in respect of both collisions to 8*l.* per ton on the registered tonnage of the *Creadon*, alleging that the collisions happened at one and the same time and occasion.

The defendants delivered separate defences denying that the collisions happened at one and the same time and occasion, and alleging that they occurred on distinct occasions and were caused by separate and distant acts of negligence on the part of those in charge of the *Creadon*.

The evidence on behalf of the plaintiffs was as follows: The collision happened about 10.15 p.m. in Cardiff Drain close to the pierhead, the first collision being with the *Garston* about a ship's length below the pierhead, the second collision being with the *Asia* about a ship's length inside the pierhead. The time between the two collisions was from one to two minutes, and the second collision was the inevitable result of the first.

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

The defendants' witnesses alleged that the two collisions took place at a distance of about a quarter of a mile from each other, and the interval between the two was from ten to fifteen minutes. They also alleged that the second collision was the result of a separate act of negligence on the part of the *Creadon* from that which caused the first collision, viz., attempting to cross the bows of the *Asia* under a port helm.

The findings on the facts are fully stated in the judgment.

The following Acts of Parliament were cited, and are material to the decision:—

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

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 thing whatsoever on board any other ship or boat; be answerable in damages. . . . in respect of loss or damage to ships, goods, &c., to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage.

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

Sect. 506. The owner of every seagoing ship or share therein shall be liable in respect of every such loss of life, personal injury, loss of or damage to goods as aforesaid arising on distinct occasions to the same extent as if no other loss, injury, or damage had arisen.

Kennedy, Q.C. and *Gorell Barnes* for the plaintiffs.—The plaintiffs are entitled to limit their liability as for one collision. Sect. 506 of the Merchant Shipping Act 1854 speaks of the loss or damage happening on "distinct occasions." In the present case the collisions happened on practically one and the same occasion. [BUTT, J.—That section does not mention ships.] Still, the principle is the same. In the present case one act of negligence caused both collisions, and the second collision was the inevitable result of the first. The court has made the same decree in previous cases:

The Rajah, 1 Asp. Mar. Law Cas. 403; L. Rep. 3 A. & E. 539; 27 L. T. Rep. N. S. 102;
The Douglas, *Shipping Gazette*, July 27, 1882.

J. P. Aspinall for the owners of the *Garston*.—The onus is on the plaintiffs to establish not only that the two collisions did not happen on separate and distinct occasions, but also to show that the *Creadon* could not by any reasonable precautions have avoided the second collision. This they have failed to do; it being established beyond all doubt that there was a considerable distance and interval of time between the two collisions.

Sir *Walter Phillimore* (with him *Pyke*) for the owners of the *Asia*.—The case of *The Rajah* (*ubi sup.*) is distinguishable. In that case the *Rajah* ran into the ship *William Davie* and her tug at one and the same time. The collisions were therefore not on "distinct occasions." [BUTT, J.—Yes; that was a somewhat different case. There there were two collisions on one and the same occasion; here you say the collisions occurred on distinct occasions.] Yes, and therefore, while the Legislature may have intended to allow shipowners to limit their liability as for one collision where the two collisions occurred at practically one and the same time, it was never

intended to be so where the two collisions happened on totally distinct occasions. Here not only was there a considerable interval of time and space between the two collisions, but it is submitted that on the evidence the plaintiffs were guilty of a separate act of negligence in respect of the second collision.

Kennedy, Q.C. in reply.

BUTT, J.—This is a case in which the owners of the steamship *Creadon* seek to limit their liability in respect of collisions between their vessel and two sailing ships, the *Asia* and the *Garston*, on the 22nd Dec. 1884. The collision occurred between 9 and 10 p.m., in Cardiff Drain. Two damage suits, one by the owners of the *Asia*, the other by the owners of the *Garston*, were instituted against the *Creadon*. In both of those suits the present plaintiffs admitted liability, and they now seek to limit the amount of that liability to 8*l*. per ton pursuant to the provisions of the Merchant Shipping Acts. The question is, were the two collisions the result of one act of negligence, or was the second collision occasioned by a distinct act of negligence on the part of the *Creadon*? In the former case the plaintiffs would be entitled to the relief asked for; in the latter they would not. This turns upon a question of fact, and there is unfortunately a considerable conflict of evidence as to what the real facts are. The view I have taken of the evidence—and I find that the Elder Brethren have come to the same conclusion—is, that the plaintiffs' witnesses have really and substantially told a true story when they represent the collisions as occurring very nearly at the same spot and within a very short time of each other. The evidence of one of their witnesses called Brown is to my mind well worthy of credit, and he not only says that the two collisions occurred within a very short distance of each other, but also that the second collision was inevitable after the first occurred. On the other hand I do not consider the defendants' evidence to be at all satisfactory. I do not believe that ten or fifteen minutes elapsed between the two collisions, or that they happened at any great distance apart. The story told by the pilot of the *Asia* that she altered some seven points under her port helm is one which I do not believe. On the whole, therefore, the conclusion to which I have come is that the collisions were so close together that the first was the substantial and efficacious cause of the second, and that there was no separate act of negligence on the part of those in charge of the *Creadon* in respect of the second collision. The result, therefore, is that the plaintiffs have a decree in the terms prayed for.

Solicitors for the owners of the *Creadon*, *Thomas Cooper* and *Co.*

Solicitors for the owners of the *Garston*, *Gregory*, *Rowcliffes*, and *Co.*

Solicitors for the owners of the *Asia*, *Pritchard* and *Sons*.

HOUSE OF LORDS.

Feb. 1, 2, 4, *and March* 8, 1886.

(Before the LORD CHANCELLOR (Halsbury), and Lords BLACKBURN, WATSON, BRAMWELL and FITZGERALD.)

SEATH AND CO. *v.* MOORE. (*a*)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Law of Scotland—Sale of goods—Delivery of ship's engine—Mercantile Law Amendment (Scotland) Act 1856 (19 *&* 20 *Vict. c.* 60), *sect.* 1—*Bankruptcy of vendor.*

By the law of Scotland the effect of the appropriation and acceptance of a specific chattel by the contracting parties is to perfect the contract of sale, and to give the purchaser a right to demand delivery, but the property in the chattel does not pass to him until he has obtained delivery under the contract; and sect. 1 *of the Mercantile Law Amendment (Scotland) Act* 1856 (19 *&* 20 *Vict. c.* 60) *imposes no limitation upon the right of the vendor's creditors to attach goods in his custody until the contract of sale has been so perfected.*

C. and Son, a firm of engineers, undertook by different contracts to supply and fit up engines in various ships which were being built by the appellants, who were shipbuilders, and advances were made by the appellants as the work progressed. An agreement was subsequently entered into between the parties by which it was stipulated that on payment being made on account of any contract, "the portions of the subjects thereof, so far as constructed, and all materials laid down" in C. and Son's yard "for the purpose of constructing the same, shall become and be held as the absolute property of" the appellants, "subject only to the lien of C. and Son" for the "payment of the price, or any balance thereof that may remain due." At the date of this agreement C. and Son were insolvent to the knowledge of the appellants, and the only considerable contracts they had on hand were the contracts with the appellants, which it was then known would result in a loss. It was important to the appellants that the contracts should be completed, and they continued to make advances to C. and Son until the most important contract was completed. After that C. and Son became bankrupt.

Held (affirming the judgment of the court below), that there had been no sale of any specific goods to the appellants within the meaning of sect. 1 *of the Mercantile Law Amendment (Scotland) Act* 1856, *nor delivery of possession, and that the appellants were not entitled, as against the trustee in C. and Son's bankruptcy, to take possession of the materials to be used in carrying out their contracts, which were in C. and Son's yard at the date of their bankruptcy.*

Simson *v.* Duncanson (*Mor. Dict.* 14,204) *discussed.*

THIS was an appeal from a decision of the Second Division of the Court of Session in Scotland (Lords Young, Craighill, and Rutherfurd-Clark) affirming a judgment of the Lord Ordinary (Lord Adam). The case is reported in 12 Ct. Sess. Cas. 4th series 260, and in 22 Scot. Law Rep. 192.

The facts of the case appear shortly from the

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

head-note above, and in the judgments of their Lordships.

H. Davey, Q.C., *C. S. Dickson* and *Greig* (both of the Scotch Bar) appeared for the appellants, and admitted that their case must fail unless it could be brought within sect. 1 of the Mercantile Law Amendment (Scotland) Act 1856, which protects the rights of purchasers who have had goods appropriated to them, but have not taken delivery before the bankruptcy. The object of the Act, as stated in the preamble, was to assimilate Scotch and English law, and the evidence shows the terms on which the two firms dealt with each other, which, it is submitted, brings the case within the section. In addition to the authorities referred to in the judgments, they cited

McBain v. *Wallace*, 6 App. Cas. 588; 45 L. T. Rep. N. S. 261.

C. Russell, Q.C., *R. Vary Campbell* (of the Scotch Bar) and *McClymont*, for the respondent, supported the judgment of the court below.

At the conclusion of the arguments their Lordships took time to consider their judgment.

March 8.—Their Lordships gave judgment as follows:—

Lord BLACKBURN.—My Lords: The pursuers Seath and Co. are shipbuilders, carrying on business at Glasgow and Rutherglen on the Clyde. The defender Moore is the trustee of the estate of A. Campbell and Son, who were sequestrated on the 12th May 1883. A. Campbell and Son up to the date of their sequestration carried on also at Rutherglen the business of engineers. Seath and Co. were not themselves engineers, and when either in order to complete a ship of their own, or in order to fulfil a contract which they had entered into with a third party, they required to have machinery made, they were in the habit of employing A. Campbell and Son to supply it. There does not appear, at least in any of the transactions now in question, to have been any privity of contract between A. Campbell and Son and the third parties with whom Seath and Co. had contracts. When it was known to both sides that Seath and Co. wanted the machinery to implement a contract with another, that would be important in considering what agreement should be made between Seath and Co. and A. Campbell and Son. But when the agreements were made they were between Seath and Co. and A. Campbell and Son. In no one of the five contracts now before the House were Seath and Co. to do any work to the machinery in A. Campbell and Son's yard. Their part was to pay money, and so far as concerned fitting the machinery into the ships, to have the ships ready at the required time. Seath and Co. advanced money in respect of the work in progress, and A. Campbell and Son did much work on machinery. On the sequestration the trustee took possession of a large number of articles which (if A. Campbell and Son had continued *sui juris*, and both parties carried out what they contemplated doing, Seath and Co. making the further payments they were to make, and A. Campbell and Son finishing the further work they were to execute) would have been delivered on the ships, and then ceased to be in any respect the property of A. Campbell and Son. The pursuers Seath and Co. claimed a right to have these articles delivered to them.

I think there is a separate question as to each article, that being what on the proof appears to have been the contract as respects that article, and also how far what was to be done to that article had been carried. As the transactions all took place in Scotland, the effect of the contracts and the acting of the parties (when it is ascertained what they were) on the rights of Seath and Co. and A. Campbell and Son in respect of any particular article must depend on the Scottish law. If a firm of shipbuilders and a firm of engineers had carried on business on the Tyne instead of on the Clyde, and entered into precisely similar arrangements, and done exactly similar things, so that the proof was exactly the same, I think the questions, what was the contract, and how far they had acted with respect to any particular article, would be identical with those in the present case. But what the effect would be on the rights of the two firms as to the property in that article would be a question of English law. The law of England does not differ from the civil law, and those laws founded on it, including the Scottish law, as to what is sufficient to pass the property in a movable chattel. A contract for a valuable consideration, by which it is agreed that the property in a specific ascertained article shall pass from one to another, is effectual according to the law of England to change the property. It may be that the party who has sold the article is entitled to retain possession till the price is paid, if that was by the contract to precede delivery, but still the property is changed. It is essential that the articles should be specific and ascertained in a manner binding on both parties, for unless that be so, it cannot be construed as a contract to pass the property in that article. And in general, if there are things remaining to be done by the seller to the article before it is in the state in which it is to be finally delivered to the purchaser, the contract will not be construed to be one to pass the property till those things are done. But it is competent to parties to agree for valuable consideration that a specific article shall be sold and become the property of the purchaser as soon as it has attained a certain stage, though if it is part of the bargain that more work shall be done on the article after it has reached that stage, it affords a strong *primâ facie* presumption against its being the intention of the parties that the property shall then pass. I do not examine the various English authorities cited during the argument. It is, I think, a question of the construction of the contract in each case at what stage the property shall pass, and a question of fact in each case whether that stage has been reached. As I understand the civil law, the property is not transferred without delivery, and consequently, unless there was an actual—or perhaps a constructive—delivery, the property remained the property of the seller, and his creditors might seize it. But though this was so, yet when things had gone so far as that, according to the true construction of the contract in each case there was *perfecta emptio*, there was a *jus ad rem* transferred to the purchaser, though as between the purchaser and the creditors of the vendor a complete property remained in the vendor; there was a property, though not a complete one, transferred to the purchaser, such that the risk of loss and the chance of gain were both trans-

ferred to the purchaser, so that the property remaining in the vendor was as between him and the purchaser not a complete property. The Scottish law, as I understand it, followed the civil law; though there was a perfect sale transferring the risk of loss and the chance of gain, and giving the purchaser an interest in the thing so as to enable him as against the vendor to enforce delivery, yet, unless there was a delivery, actual or perhaps conventional, the creditors of the vendor might seize the thing. An alteration was made in the law in this respect by the Mercantile Law Amendment Act 1856, "Where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditors of such seller after the date of such sale to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or other in his right from enforcing delivery of the same." I do not think this enactment has the effect of saying that the property shall pass, but when a sale has proceeded so far that the purchaser has a right to enforce the delivery, it renders the distinction between the right of the purchaser and that of one to whom under the law of England the property had passed merely a nominal distinction not affecting the substantial rights. The Lord Ordinary in this case having heard all the proof has come to the conclusion that the pursuers have failed as to all the articles; he therefore assoilzied the defender. As to some, by a minute agreed to by the parties they have been given up, and so far there has been an alteration made in his interlocutor. There is no appeal as to that alteration, and we need not inquire what were the motives which led the parties to agree to that minute. Subject to that alteration the interlocutor of the Lord Ordinary is adhered to. And it is against that interlocutor that this appeal is brought. I have come to the conclusion that the interlocutor is right, and that the appeal should be dismissed with costs.

I agree with the Lord Ordinary that no custom of trade is proved which could effect the construction of the five contracts. The first of the contracts, that of the 2nd Sept., was to furnish and to fit up in a vessel to be built by the pursuers an engine and boilers for a lump sum of 1800*l.*, and I am not sure how far the Lord Ordinary when he says that "the contract was not a contract of sale *habile* to convey a *jus ad rem*," means to express an opinion that because the contract was to complete and deliver the engine and boilers on board the vessel of the pursuers, and then to fit them up there, which fitting up I think would be aptly described as work and labour, the furnishing of the boilers and engine could not under any circumstances be a sale of them. I should pause before I agreed to that, but I think it quite sufficient to say that *primâ facie* there was no sale at least till the boilers and engine were so far completed as to be fit for delivery on the vessel, where they were to be fitted up by A. Campbell and Son, and that there is nothing in the contract to indicate any intention that they should be held as sold at any earlier stage, whilst the fact that there was to be one lump price for the whole engine, boilers, and fitting up is strongly against that construction. The second contract, that relating to the *Brighton*, does contain a stipulation that "the first parties shall pay to the second parties the sum of 6300*l.* for the said engines, boilers, machinery, and appurtenances, and that by four equal instalments, as follows, viz., "the first when cylinders, sole-plates, and condensers are cast; the second when the machinery is tooled and boilers ready for riveting; the third when the engine, boilers, and machinery are all ready alongside for lifting on board; and the fourth when all completed and tried to the satisfaction of the owners and ready for delivery." I do not think it necessary to inquire whether, if the question had arisen as to the rights of the pursuers after the first three instalments had been earned and paid, this would or would not be sufficient to establish that the engines and boilers so far completed were then sold; for as I understand the case the boilers and engines were before the sequestration, as far as completed, completely delivered, and all that the defender seized were some loose articles in the yard of the sequestrated trader, which probably were intended to be part of the boilers and engines but never had become so. The third contract does stipulate for a payment of one-third of the price "when the boiler is on board," but it never reached the state when it could be put on board. The fourth contract contains no stipulation as to an instalment at all. I agree with the Lord Ordinary that if the reasoning as to the first contract is right it applies also to these contracts. The fifth and last contract—that relating to the *Bonnie Princess*—was rather peculiar. The Liverpool and Welsh Coast Company had agreed to pay Seath and Co. 1500*l.* after "receiving a report by two competent engineers stating that the machinery is working satisfactorily." The agreement between Seath and Co. and A. Campbell and Son was: "First, that the second party," A. Campbell and Son "shall execute the work, and undertake and implement the whole obligations undertaken by and imposed upon the first party," T. B. Seath and Co., "by the said agreement in all respects, excepting only the requisite alterations to the bunkers and others coming within the shipbuilders' department (which the first party shall execute at their own expense), and the first party shall be entitled to enforce implement of the said agreement against the said second party. Second, that the second party shall receive payment of the whole sum stipulated to be paid by the company under said agreement on the conditions therein stated but the first party shall have a lien thereon for any sum which may be due by the second party to them. Third, that the second party shall free and relieve the first party of all claims which may arise or be made against them by the said company in respect of alleged breach of the said agreement, as well as of the original contract, so far as the same has been or may be occasioned by their default." The articles in question never were put on board the steamer, and still less were the conditions on which alone the Liverpool and Llandudno Company were to pay the 1500*l.* fulfilled. It seems impossible to construe this contract as amounting to a sale of any of the articles under this contract. I am much inclined to think that where a contract made in Scotland was such, and had been so far executed, that if a

precisely similar contract made and so far executed between two firms on the Tyne would have been construed to amount to a sale passing the property, that contract in Scotland ought to be construed as giving a *jus ad rem* against that article. Perhaps that may not be always so. But I am of opinion that if the whole of these transactions had been English there would not in respect of any one of the articles have been established a contract such as under the circumstances to pass the property. As for the agreement of the 1st Dec. 1882, I think it is not an agreement for a sale at all, but an attempt to bargain for a pledge or security. A pledge or security without delivery of possession is, I think, not good. And though in England a bill of sale under seal having that effect may be made, this is not a bill of sale.

Lord WATSON.—My Lords: The respondent Alexander Moore is trustee for the creditors of A. Campbell, junior, who carried on business as a manufacturing engineer in Glasgow, under the firm name of A. Campbell and Son, until his estates were sequestrated on the 12th May 1883. For many years prior to his sequestration the bankrupt was largely employed by the appellants, who are shipbuilders at Glasgow and Rutherglen, to make and fit up engines and machinery in vessels constructed by them either under contract or on speculation, and that employment constituted the main part of the bankrupt's trade, his other business consisting chiefly of job-work and repairs. At the date of his sequestration the bankrupt was in course of executing five different contracts with the appellants—the first of these, dated Sept. 1881, for furnishing tandem machinery to the *Elms*; the second, dated March 1882, for supplying and fitting engines for the *Brighton*; the third, dated Aug. 1882, for constructing and fitting a new boiler on board the *Satanella*; the fourth, dated Sept. 1882, for making and fitting two tandem-engines on board a barge belonging to the Trinity Board; and the fifth, for removing her boilers from the steamer *Bonnie Princess*, and replacing them with two upright boilers, and making certain alterations in the details of her machinery and engines. Of these five vessels, one only, the *Elms*, was built by the appellants on their own account, whilst the *Brighton*, the *Satanella*, and the Trinity barge were built for customers. The *Bonnie Princess* had been delivered to the purchaser with her hull and engines completed, but she did not attain the guaranteed speed, and was returned to the appellants in order that her machinery, which had been supplied by the bankrupt, should be altered and repaired. The bankrupt on the 1st Dec. 1882 undertook to make these alterations and repairs "to the satisfaction of an engineer to be appointed by the shipowners." In the contract for the *Brighton's* engines it was expressly stipulated that the price (6300*l.*) was to be payable to the bankrupt by four equal instalments at specified stages, but none of the other four contracts contained a written stipulation to the effect that any part of the price was to be paid before his contract obligations had been fully performed by the bankrupt. It is a fact established by the evidence that the appellants through the whole course of their dealings with the bankrupt were in use to make advances to him from time to time to account of the contract price, even in cases where there was no stipulation as to instalments. These advances were not made in virtue of any legal obligation, and their amount was determined by the appellants with reference to their general knowledge of the progress which the bankrupt had made towards completion of the contract work, or in the preparation of materials for it, and without inspection or express acceptance of any part of the work as conform to contract. In the month of Nov. 1882 the bankrupt became seriously embarrassed for want of ready money. The contracts which he had then on hand related to the first four of the vessels already mentioned, and he was aware, and informed the appellants, that he would be obliged to stop his works and suspend payment unless he received pecuniary assistance from them. The appellants agreed verbally to make him advances from time to time to account of the contract prices (the amount of such advances being left to their discretion) in respect of his granting to them a letter of agreement or obligation, which bears date the 1st Dec. 1882. The only consideration expressed in that writing is, that he had entered into contracts with the appellants "in some cases without certain stipulations being expressed with reference thereto." The first article of the writing provides that the appellants shall at all times have free access to the bankrupt's premises for the purpose of inspection, and that the "whole work and material of any such contract shall be subject to the approval of the said T. B. Seath and Co., or of their representatives." The second article is to the effect that on a payment being made on account of any contract, "the portions of the subject thereof, so far as constructed, and all materials laid down for the purpose of constructing the same, should become and be held as being the absolute property of the said T. B. Seath and Co." subject only to the bankrupt's lien for so much of the price as might be unpaid. By the third article the appellants are empowered, upon the insolvency of the bankrupt, or his failure to proceed with due diligence in the execution of the work, not only to take possession of the completed work, and "all materials laid down or obtained for the construction thereof," but to enter, if they shall think proper, into possession of his premises and use his plant, tools, and machinery for the completion of the work. By the fourth article the bankrupt undertakes the risk of all contract work until completed and delivered, and also undertakes to effect adequate insurances against loss by fire in the name of the appellants. These conditions are declared to be applicable to all contracts or agreements then current, or which might thereafter be made between the parties. The only contract subsequently made was that relating to alterations and repairs in the machinery of the *Bonnie Princess*. At the date of the sequestration none of the five contracts in question had been completed, and no machinery had been placed on board ship except in the case of the *Brighton*. The fittings of her engines was nearly completed, but certain parts of the machinery, some of them unfinished, had not been put on board or fitted. The trustee took possession, for behoof of the general body of creditors, of the uncompleted work and materials which he found on the bankrupt's premises, which had either been used or were intended to be used in the execution of

these contracts. The appellants on the 30th June 1883 instituted the action in which this appeal is taken, concluding for delivery to them of the whole of such work and materials. The articles claimed, which I shall afterwards have to refer to more particularly, are enumerated in the conclusions of the summons, and also in certain inventories, and they are generally described in the summons as being "connected with the fulfilment" of one or other of the five contracts already referred to. The Lord Ordinary (Adam) rejected the appellants' claim, and by interlocutor dated the 8th April 1884 assoilzied the respondent, with expenses. The appellants reclaimed to the Second Division of the Court, but before judgment the parties lodged a joint minute setting forth that the respondent Moore consented to its being found and declared that, as in a question with him or the bankrupt, the appellants were entitled to possession of the last three items of the first inventory, and also of the articles forming branch 2 of the third, and branch 2 of the fifth inventory. By interlocutor dated the 9th Dec. 1884 their Lordships found and declared in terms of the minute, and to that extent altered the judgment of the Lord Ordinary, but *quoad ultra* refused the reclaiming note, adhered to the interlocutor reclaimed against, and found the respondent entitled to additional expenses.

The appellants maintained that by the law of Scotland the work executed under each contract, so far as then completed, vested in them, and became their property whenever they made payment of an instalment or an advance to account of the price such as they considered fairly proportionate to its value. That proposition was founded upon the case of *Simson* v. *Duncanson* (Mor. Dict. 14,204). The decision in that case does not, in any view of it, go so far as to support the claim preferred by the appellants to the property of articles, finished or unfinished, merely intended for use in the construction of a vessel, but not yet made part of the thing sold. Nor, in my opinion, can it be held as authority for the general proposition that in the circumstances narrated in the report the property of that part of an unfinished ship which has actually been constructed passes to the purchaser without delivery. The report of the case as collected by Morison, and supplemented by Professor Bell (Commentaries 5th edit., vol. i., p. 157), is exceedingly meagre, and there may have been circumstances before the court sufficient to warrant the inference that delivery had been made, which had not been noticed by the reporter. At the time when *Simson* v. *Duncanson* was decided, and for many years afterwards, the purchaser of a vessel, or of any other corporeal movable, had, before delivery was made to him and its property vested in him, no right to the thing sold as against creditors of the seller who had used diligence, or against the trustee in his sequestration. Until possession was given to the purchaser the trustee had the option either of enforcing the contract against him, or of taking the thing sold, leaving the purchaser to rank for a dividend upon the amount of loss he sustained by non-fulfilment of the contract. By the law of England the appropriation of a specific chattel by the vendor, and the agreement of the vendee to take that specific chattel and pay the stipulated price, have the effect of vesting the property of the chattel in the vendee. In Scotland the effect of such an appropriation and acceptance by the contracting parties is to perfect the contract of sale, and to give the purchaser a personal right to demand delivery of the specific chattel from the seller. When the contract is thus perfected the risk is transferred to the purchaser, according to the maxim of the civil law, *periculum rei venditæ nondum traditæ est emptoris*, but the property of the chattel does not pass to him until he has obtained delivery under the contract. In the year 1856 the Mercantile Law Amendment (Scotland) Act was passed for the purpose of remedying the inconvenience arising from certain differences between the laws of England and the sister country. Sect. 1 of that Act provides that, "where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller, after the date of such sale, to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same, and the right of the purchaser to demand delivery of such goods shall from and after the date of such sale be attachable by or transferable to the creditors of the purchaser." These enactments involve no alteration of the principles previously applicable to the contract of sale itself. Their sole effect is to deprive the creditors of the seller or the trustee in his bankruptcy of the right, which they previously had, to defeat the purchaser's right to demand delivery of the goods sold to him. In construing the first section of the Act it has all along been held, and in my opinion rightly held, in the courts of Scotland that it imposes no limitation upon the right of the seller's creditors or trustee until the contract of sale has been perfected in the sense which I have already indicated—in other words, that goods are not "sold" within the meaning of the section unless the contract has been so far completed as to confer a proper *jus ad rem* upon the purchaser. The appellants maintain that under these provisions of the Mercantile Law Amendment Act they are entitled to demand delivery from the trustees of all the articles enumerated in their summons. In order to establish that right with regard to all or any of the articles in dispute it must be shown that these had before the sequestration been "sold" to them by the bankrupt within the meaning of the Act. The authorities which appear to me to have the most material bearing upon this part of the case are *Woods* v. *Russell* (5 B. & Ald. 942); *Clarke* v. *Spence* (4 Ad. & El. 448); and *Wood* v. *Bell* (5 E. & B. 772; 6 E. & B. 355.) It is true that these are English decisions relating to ships in course of construction, and that in the present case none of the machinery or articles in dispute had been attached to the vessels of which they were severally intended to form part. But I see no reason why the principles applicable to the sale of part of a ship should not equally apply to the sale of part of a marine engine, or other *corpus manufactum*, in course of construction. And so far as I understand the laws of the two countries, the same circumstances and con-

siderations which in England sustain the inference that a chattel has been "sold" to the effect of passing its property to the vendee, will in Scotland generally be sufficient to sustain the inference that it has been "sold" to the effect of transferring the risk to the purchaser, and giving him a *jus ad rem* enforceable against creditors of the seller under the Act of 1856. The English decisions to which I have referred, appear to me to establish the principle that where it appears to be the intention, or in other words the agreement, of the parties to a contract for building a ship, that at a particular stage of its construction the vessel, so far as then finished, shall be appropriated to the contract of sale, the property in the vessel, as soon as it has reached that stage of completion will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will, *accessione*, become his property. It also appears to me to be the result of these decisions that such an intention or agreement ought (in the absence of any circumstances pointing to a different conclusion) to be inferred from a provision in the contract to the effect that an instalment of the price shall be paid at a particular stage, coupled with the fact that the instalment has been duly paid, and that until the vessel reached that stage the execution of the work was regularly inspected by the purchaser or someone on his behalf. I do not think it is indispensable in order to sustain that inference that there shall be a stipulation for payment of an instalment in the original contract, or that the stipulated instalment shall have been actually paid. The absence of these considerations, which are in themselves of great importance, might, in my opinion, be supplied by other circumstances. At all events, whenever during the currency of a contract which contains no such stipulation, the parties in good faith agree that the purchaser shall pay a sum to account of the price, and that the vessel so far as constructed at the date of that payment shall be appropriated to the contract, I see no reason to doubt that the new covenant so made ought to have the same effect as if it had been a term of the original contract. I am, however, of opinion that by the law of England, in order to pass the property as sold, there must always be facts proved or admitted sufficient to warrant the inference that the purchaser has agreed to accept the *corpus* so far as completed as in part implement of the contract of sale.

There is another principle which appears to me to be deducible from these authorities, and to be in itself sound, and that is, that materials provided by the builder, and portions of the fabric, whether wholly or partially finished, although intended to be used in the execution of the contract, cannot be regarded as appropriated to the contract or as "sold" unless they have been affixed to or in a reasonable sense made part of the *corpus*. That appears to me to have been matter of direct decision by the Court of Exchequer Chamber in *Wood* v. *Bell*. In *Woods* v. *Russell* (5 B. & Ald. 942), the property of a rudder and some cordage which the builder had bought for the ship was held to have passed in property to the purchaser as an accessory of the vessel, but that decision was questioned by Jervis, C.J., delivering the judgment of the court in *Wood* v. *Bell*, who stated the real question to be, "what is the ship, not what is meant for the ship," and that only those things can pass with the ship "which have been fitted to the ship, and have once formed part of her, although afterwards removed for convenience." I assent to that rule, which appears to me to be in accordance with the decision of the court of Exchequer in *Tripp* v. *Armitage* (4 M. & W. 687). I shall now advert to the character of the articles claimed by the appellants, as these are enumerated in the summons, and more fully described in the inventories, which I have carefully examined. The result of that examination has been to satisfy me that with the exception of one item (a tandem engine said to be almost complete) in the inventory relating to the *Elms*, two items in that relating to the *Satanella*, three items in that relating to the *Trinity*, and of two items in that relating to the *Bonnie Princess*, all the articles claimed, though meant to be used in the execution of the five contracts current at the date of the sequestration, are mere *disjecta membra* more or less finished, which have never been attached to or become part of any specific *corpus*. It appears to me to be impossible to hold that any of these articles were specially appropriated to the several contracts for which they were provided, or, in other words, that they were "sold" in such sense as to give the appellants a *jus ad rem*, unless your Lordships shall be of opinion that the decisions of the Court of Exchequer in *Tripp* v. *Armitage*, and of the Exchequer Chamber in *Wood* v. *Bell*, are contrary to law. With regard to the excepted items, the descriptions given of them are not so minute as to enable me to determine whether all that is comprehended in each item, and in some instances whether any part of the item, can be reasonably considered as a *corpus*, in the same sense as the framework or hull of a ship in course of construction. Before dealing with the question, whether, assuming them to be of a character which admitted of their being appropriated to the purchasers, these excepted items were actually "sold" to the appellants to the effect of giving them a *jus ad rem*, I think it will be convenient to consider the legal effect of the letter of agreement by the bankrupt dated the 1st Dec. 1882. Although the letter professes to embody certain stipulations which have been omitted in framing his contracts with the appellants, the leading conditions to which the bankrupt thereby submits are, in my opinion entirely collateral to the contract of sale. The plainly expressed purpose of the letter was to vest the appellants with the absolute property, not only in the subject of each contract so far as actually constructed, but in all materials brought to the bankrupt's premises in order to be used in its construction, probably with the view of giving the appellants security for advances made by them to account of price. I need hardly say that by the law of Scotland the property in corporeal movables cannot be passed without delivery of possession, and a stipulation in a contract of sale that the thing sold should become the property of the purchaser without delivery is as invalid against the creditors of the seller as it would be in any other contract. In *Anderson M'Call* (4 Sess. Cas., 3rd Series 771, Lord Neaves said: "The law of Scotland is clear that no property in movables can be passed without

delivery, and that no security can be constituted over movables *retenta possessione*. A written instrument of possession will not pass the property of movables. . . . The fundamental principle is that the right of property in moveables does not pass by consensual contract." The appellants' counsel hardly disputed that such is the law of Scotland, and that there was no delivery to the appellants of any of the articles claimed by them, but they argued that the letter indicated the intention of the parties that upon an advance being made on account of any contract, the articles constructed and provided for its execution should be "sold" under the contract. I am unable to infer that intention from the tenour of the writing. On the contrary, its terms appear to me clearly to indicate that their intention was to give the appellants a right of property in all materials collected, and all parts of machinery finished or unfinished with a view to the contract, as well as the machinery so far as set up and connected, and that quite irrespective of any obligation on the part of the bankrupt to use such materials in the execution of the contract, or of any obligation on the part of the appellants to accept the property to be thus vested in them, or any portion of it, as in implement of the contract.

It was urged for the respondent at your Lordships' bar as well as in the court below, that in the circumstances disclosed in evidence the letter of the 1st Dec. 1882 was void in law, in respect that it conferred upon the appellants an undue preference over the general creditors of the bankrupt. Had the law of Scotland permitted the document to receive effect according to its terms it might have been necessary to decide that point, but if the views which I have expressed in regard to its import and legal effect meet with your Lordships' approval it becomes unnecessary to dispose of it. It only remains for consideration whether the excepted items already referred to, connected with the *Elms*, *Satanella*, Trinity barge, and *Bonnie Princess* contracts were sold to the appellants within the meaning of the Mercantile Law Amendment (Scotland) Act. I assume that each of these items was in reality a specific *corpus* capable of being appropriated to the contract, in part implement of which it had been constructed at the time when an instalment or advance to account of the contract price was actually paid. In the case of each of these contracts one or more of such payments had been made before the date of the sequestration, and although they were not originally stipulated, I should nevertheless be of opinion that the appellants had acquired a personal right to insist on delivery if it appeared that either at the time when such payments were made in respect of a particular contract, or at the time when they were appropriated by mutual consent to that contract, the parties intended and agreed that the contract work so far as then completed and existing *in forma specifica* should be "sold" to the purchaser. But in order to constitute an agreement to that effect it must appear that the purchaser consented to accept the subject in the same condition in which it then was as part of the completed subject, which was to be subsequently delivered to him by the seller under the contract of sale. I have come to the conclusion that the appellant's claim to the excepted items must fail, because I cannot find in the case of any one of them the least trace of an agreement or of an intention on their part to accept it as in implement of the contract of sale. Had they inspected the work and material as the purchasers had done in *Clarke* v. *Spence* and *Wood* v. *Bell*, there would have been room for the inference that they had accepted as in terms of the contract the work so far as completed and inspected, and that the bankrupt had no longer the right to alter or reconstruct any part of it, thereby necessitating a second inspection. Mr. Seath, one of the partners of the appellant company, was from time to time in the bankrupt's premises, and had a general knowledge of the progress made in the work of each contract and in preparing materials for its execution, but it is not pretended that there was inspection either by him or any other person representing the appellants. There is in fact not a single circumstance, either admitted or established in evidence, sufficient to support the inference that they meant to accept or did accept the work executed as in implement *pro tanto* of the contract, whilst there are many circumstances which lead to an opposite conclusion. I am accordingly of opinion that the interlocutors appealed from ought to be affirmed and the appeal dismissed with costs.

Lord BRAMWELL.—My Lords: I agree in the conclusions of my noble and learned friends, and in the reasons which have led them to those conclusions. All I wish to say is that our opinions do not in any way impugn the principle of *Woods* v. *Russell* except as to the chattels there mentioned—the rudder, and I think some rope; and I may repeat what Mellish, L.J. said, that I should be very sorry if anything we said did so or seemed to do so. Nor do our opinions in any way impugn the reasons given in that case for that decision. I also agree that the same reasoning would apply to any other chattel as to which the parties should agree that the property should pass while the chattel was in an incomplete state.

Lord FITZGERALD and Lord HALSBURY (who had resigned the office of Lord Chancellor, before judgment was given) concurred.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Holmes, Greig*, and *Greig*, for *J. Young Guthrie*, Edinburgh.

Solicitors for the respondent, *Morten, Cutler*, and *Co.*, for *Maitland* and *Lyon*, Edinburgh.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Feb. 3, 1886.

Before Lord Esher, M.R., Lindley and Lopes, L.JJ.)

Huth and Co. *v.* Lamport and another.

Gibbs and Son *v.* Lamport and another. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

General average—Security for payment—Form of bond—Deposit.

When there has been a general average loss incurred, and the contributions have not been ascertained, the shipowner is not entitled to make delivery of the cargo conditional upon the consignees signing an average bond in the form known as the Liverpool average bond, and making a deposit of 10 *per cent. on the estimated value of their goods in the joint names, as provided by the bond, of the defendants and their average adjuster, or in the names of the defendants alone, or in the name of the average adjuster alone. A bond in such a form is unreasonable.*

Semble, the above decision does not interfere with the right of the master to retain the goods until payment of general average or to require security in a reasonable form.

Judgment of Mathew and Smith, JJ. affirmed.

This was an appeal by the defendants from the judgment of Mathew and Smith, JJ., reported 54 L. T. Rep. N. S. 334; 5 Asp. Mar. Law Cas. 543; 16 Q. B. Div. 442, where the facts are fully stated.

Finlay, Q.C. and *W. R. Kennedy*, Q.C. (*Box* with them) for the defendants.—It is clear the defendants, as shipowners, had a lien on the cargo for the amount of general average contribution payable by the plaintiffs. The terms on which such lien was to be given up were matter of arrangement between the parties, and the defendants were entitled to insist on any security which they might think necessary; the question of reasonableness does not arise. The bond referred to in the special case has long been in use at the port of Liverpool, and its terms are reasonable. They cited

Simonds v. *White*, 1 B. & C. 805;
Crooks v. *Allan*, 41 L. T. Rep. N. S. 800; 4 Asp. Mar. Law Cas. 216; 5 Q. B. Div. 38;
The Norway, Br. & Lush. 377.

Cohen, Q.C. (*Warr* and *Barnes* with him), for the plaintiffs, was stopped by the Court.

Lord Esher, M.R.—I am of opinion that the decision of the court below ought to be affirmed. The defendants' ship arrived at Liverpool, after a voyage, during which a general average loss had occurred. It is clear that the plaintiffs, as owners of part of the cargo, were liable to contribute to this general average loss, and it is equally clear that the defendants, as shipowners, had a lien on the cargo to secure payment of the general average contributions, and were entitled to refuse to deliver goods to a consignee of the cargo until they were paid; they were not bound to accept security, but were entitled to demand immediate payment. It follows therefore that each consignee must pay the amount demanded by the shipowner for general average, or must at his own risk tender what he believes to be his proper proportion. The master will not have a right to insist upon payment of an arbitrary sum without furnishing the necessary account or particulars, so as to enable the owner of the goods to ascertain how the amount became due. If the master were to refuse to furnish such particulars, the case would come within the rule laid down by Dr. Lushington in *The Norway* (Br. & Lush. 377), and the consignee would not be prejudiced by not having made a sufficient tender. But if the master gives all proper information and demands payment the owner of cargo cannot insist upon paying the amount into a bank in the name of persons other than the shipowner, but must either pay the amount demanded, or tender such an amount as he believes to be reasonable. If, however, the shipowner were to let it be known that, whatever might be the amount tendered by the consignees, nothing but a particular security would be accepted, then the question would arise whether the security demanded was reasonable. If a deposit of 10 per cent. on the value of the goods were demanded, this as a general rule would be wholly unreasonable.

We must consider whether in the present case the demand is unreasonable, having regard to the other conditions. The bond requires that the deposit shall be made in the joint names of the defendants and their average adjuster, and the use of the word "their" clearly points to an average adjuster appointed by the defendants. Then the shipowner is to have power to draw upon the deposit from time to time for his disbursements and this would include all disbursements and payments which in the result the shipowner would have to pay for himself. Let us apply this provision to the case of salvage. The ship is in distress, and is succoured by salvors; the master makes a compromise with them for the payment of a large sum, and it may turn out upon the final settlement that a large part of the salvage will fall on the shipowner; yet by the terms of the bond the master is to be at liberty to take the whole amount of the salvage out of the deposit, and the only security which the cargo owner would have for the repayment of what ought to be returned would be the credit of the shipowner. This, in my opinion, is wholly unreasonable. If the shipowner requires the consignee of the goods to enter into a bond in particular terms, the question arises whether the bond is reasonable or unreasonable, and if part of what is insisted upon is unreasonable the whole instrument is unreasonable. That the bond insisted on in the present case is unreasonable is, I think, clear. First, it makes the shipowner's own average adjuster an arbitrator; then there is a particular kind of appeal from the decision of an average adjuster, which prevents the parties from taking the opinion of a legal tribunal; further, the terms of the deposit are unreasonable, inasmuch as the deposit is to be made in the joint names of the representative of the shipowner and the average adjuster. Then the average adjuster of the shipowner is to be the judge, and what purports to be a deposit is to be drawn upon for such disbursements as the average adjuster and the representative of the shipowner, without

(*a*) Reported by P. B. Hutchins, Esq., Barrister-at-Law

the consent of the depositor, think ought to be paid to the shipowner. For these different reasons I have come to the conclusion that the bond is one which the Liverpool shipowners have no right to impose upon the owners of cargo. The case does not enable us to compare this form of bond with the form called the London bond, and I therefore give no opinion as to whether the London bond is reasonable or not.

Lindley, L.J.—I cannot differ from the decision of the court below on this special case. The right of the master to refuse delivery of goods unless he is paid the consignee's share of general average is clear up to a certain point. If the amount due is paid or tendered the master cannot refuse delivery. It is unnecessary in the present case to say whether he can refuse if reasonable security is offered. But if no question of payment or tender is raised, and if he himself requires security, he cannot impose unreasonable terms. The question here is, whether the defendants are entitled to insist upon the consignees doing one of two things, namely, making the deposit as described in the case, or in the alternative signing the Liverpool bond. As to the first alternative, it appears that the object of the deposit is to give the master control of the money for the benefit of the shipowner. I cannot think that this is reasonable. As to the second, I agree with the Master of the Rolls that the bond is not one which can be imposed upon a consignee against his will.

Lopes, L.J.—I quite agree with the decision of the other members of the court. I think the terms of the Liverpool bond are unreasonable for the reasons which have been given by the Master of the Rolls.

Appeal dismissed.

Solicitors for the plaintiffs, *Waltons, Bubb,* and *Johnson.*

Solicitors for the defendants, *Pritchard* and *Son,* for *Thornley* and *Cameron,* Liverpool.

March 17 *and* 18, 1886.

(Before Lord Coleridge, C.J., Lindley and Lopes, L.JJ.)

The Ardandhu. (a)

ON APPEAL FROM SIR JAMES HANNAN.

Collision—Actions by shipowners and cargo owners—Agreement to discontinue—Limitation of liability action—Claimants therein—R. S. C., Order XXVI., r. 1.

Owners of ship and owners of cargo laden on board of her respectively instituted actions in rem against another ship for damage by collision. In the ship action the following agreement was signed by the parties: "We hereby consent to this action being discontinued without costs on the ground of inevitable accident," and the registrar made an order thereon discontinuing the action. In the cargo action both ships were held to blame, and the defendants therein obtained a decree limiting their liability. The plaintiffs in the ship action then obtained an order from the judge rescinding the order of discontinuance, and claimed against the fund in the limitation action.

Held that the agreement and consent order amounted to a mere discontinuance of the action, and not to a release of all rights possessed by the parties thereto against each other, and that therefore the plaintiffs in the ship action were entitled to claim against the fund.

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

This was an appeal from a decision of Sir James Hannen on a motion in an action for limitation of liability.

A collision occurred between the steamships *Ardandhu* and *Kronprinz* on the 1st March 1883, whereby the *Kronprinz* and the cargo laden on board of her were utterly lost.

On 6th March 1883 a damage action *in rem* was instituted by the owners of the *Kronprinz* against the *Ardandhu,* but before any pleadings were delivered this action was discontinued by the consent of the parties thereto. The agreement by which this action was discontinued was in writing, dated the 1st May 1883, and was as follows:

> We, Lowless and Co., for the defendants hereby consent to this action being discontinued without costs, on the ground of inevitable accident.

This agreement was left in the Admiralty Registry, and signed by the assistant registrar, who indorsed upon it the word "fiat." This agreement was embodied in a consent order of court, dated the 2nd May 1883, which was as follows:

> Upon consent of both solicitors it is ordered that this action be discontinued without costs on the ground of inevitable accident.

On the 25th June 1883 another action *in rem* was instituted against the *Ardandhu* by the owners of cargo laden on board the *Kronprinz,* in which action both ships were on the 18th Dec. 1884 held to blame for the collision.

On the 29th June 1885 the owners of the *Ardandhu* instituted an action to limit their liability, and on the 24th March 1885 the Court pronounced the plaintiffs therein entitled to limit their liability, and referred the claims to the registrar to report on.

The owners of the *Kronprinz* then took out a summons to have the consent order of discontinuance rescinded, and on the 30th June 1885 Butt, J. made the following order: "Upon hearing counsel for the plaintiffs and solicitors for the defendants it is ordered that the order of court of the 2nd May 1883 be rescinded, and that the plaintiffs do pay all the costs occasioned by such order having been made." At the reference in the limitation action the owners of the *Kronprinz* brought in a claim amounting to 29,679*l.* From the registrar's report it appeared that the owners of the *Ardandhu* counter-claimed 5148*l.* At the reference the claim of the owners of the *Kronprinz* was opposed by the other claimants, but was admitted by the registrar. In this he was upheld by Sir James Hannen (54 L. T. Rep. N. S. 468), and from that decision the owners of the cargo laden on board the *Kronprinz* now appealed.

Sir *Walter Phillimore* and Dr. *Stubbs,* for the owners of cargo, in support of the appeal.—The owners of the *Kronprinz* are precluded from claiming against the fund in court by reason of the agreement come to between themselves and the owners of the *Ardandhu.* It is submitted that that agreement amounted to more than a mere discontinuance, and was in fact a com-

promise withdrawing all claims which the parties thereto had against each other. From the registrar's report it appears that the owners of the *Ardandhu* had a substantial counter-claim against the *Kronprinz*. That being so, the true meaning of the agreement was to determine the rights of these parties against each other, and therefore they cannot now go back from it so as to injure third parties. The fact that the parties entered into a solemn agreement, that it was filed, and that a consent order was drawn up, shows that something more than a mere discontinuance was meant. It is said that the words "inevitable accident" were inserted to relieve the plaintiffs from payment of costs; but the costs must have been trifling, as no pleadings had been delivered, and it is therefore submitted that, as the plaintiffs were wealthy persons, this could not have been the true reason. Assuming the agreement to have been filed, it then becomes, by reason of Order LII., r. 23, an order of court, and on the authority of *The Bellcairn* (53 L. T. Rep. N. S. 686; 10 P. Div. 161; 5 Asp. Mar. Law Cas. 503) it cannot be set aside so as to affect the rights of third parties.

Gorell Barnes for the respondents, the owners of the *Kronprinz*.—The owners of cargo are seeking to avail themselves of the mistake of my clients in originally thinking the collision was due to inevitable accident, to get an unfair advantage over them. At the time the agreement was entered into the parties thought the collision was an inevitable accident. It has, however, proved otherwise, and therefore my clients are entitled to claim against the fund in court, unless they have done anything to bar that right. All that they have done is to discontinue the original damage action, but they, by discontinuing that action, have not precluded themselves from claiming in other proceedings. By the provisions of Order XXVI., r. 1, it was necessary, in order to avoid payment of costs, to state that the collision was due to inevitable accident. The agreement cannot be construed as a compromise of all rights, as it certainly would be no defence to an action by the owners of the *Ardandhu* against the *Kronprinz*. If there was a mere discontinuance and nothing more, that has been properly set aside by the judge, and there is nothing to preclude us from claiming. *The Bellcairn* (*ubi sup.*) is not in point, as there judgment had been given in open court and never properly set aside.

Sir *Walter Phillimore* in reply.

Cur. adv. vult.

March 18.—Lindley, L.J.—This is an appeal from the decision of the President of the Admiralty Division, and the question raised is, whether a claim can be made against a fund which has been paid into court in a limitation of liability action, and which fund is divisible among those persons who have claims against the ship whose owners brought it in. The difficulty arises in this way. There was a collision between the vessels the *Kronprinz* and the *Ardandhu*. An action was brought by the owners of the *Kronprinz* against the *Ardandhu* in respect of that collision, and after the writ therein had been issued, and before any pleadings were delivered, the solicitors for the owners of the two ships signed a document, which runs thus: "We, Lowless and Co., solicitors for the defendants, hereby consent to this action being discontinued, without costs, on the ground of inevitable accident." That is signed by the solicitors of the plaintiffs and defendants respectively, and is dated the 2nd March 1883. There is written on the margin, "Fiat, J. G. S.," the letters being the initials of the assistant registrar of the Admiralty Court. It appears that on the next day an order was drawn up in these terms: "Upon consent of both solicitors it is ordered that this action be discontinued, without costs, on the ground of inevitable accident." It then appears that nothing was done for two years in that action. Meanwhile an action was brought by the owners of cargo on the *Kronprinz* against the *Ardandhu* on the assumption that the collision was not due to inevitable accident, but to the negligence of those in charge of the *Ardandhu*, and in that action both ships are found to blame. The defendants then instituted an action to limit their liability, and in March 1885 the usual decree was made, and money was brought into court by the owners of the *Ardandhu* to answer the claims which might be made against her. Subsequently to this the order of discontinuance in the ship action was rescinded by Butt, J. The order of Butt, J. runs thus: "Between the owners of the *Kronprinz* and the owners of the *Ardandhu*. Upon hearing counsel for the plaintiffs, and solicitors for the defendants, it is ordered that the order of court of the 2nd May 1883 be rescinded, and that the plaintiffs do pay all the costs occasioned by such order having been made." The order of discontinuance having been got rid of, a claim was made by the owners of the *Kronprinz* against the fund in court. That claim of course comes into competition with the claim of the cargo owners, and the question is, whether the owners of the *Kronprinz* are entitled to claim against the fund. The registrar has admitted them to claim, and his report has been confirmed by the President of the Admiralty Division.

The question turns on the true meaning, I will not say of the order of the 2nd May 1883, but of the agreement upon which the order is based. I think there can be no doubt, after the case of *The Bellcairn* (*ubi sup.*), that if this agreement really amounts to a release of all demands between the owners of the *Kronprinz* and the owners of the *Ardandhu*, arising out of the collision, then the owners of the *Kronprinz* are not at liberty to claim against this fund. I take it to be well settled that, when a person pays into court a sum of money to be distributed under the order of the court amongst persons having claims against the fund, he cannot fabricate something in order to enable other persons to compete with the claimants, and whether the new claim be resuscitated or revived, or created for the first time, appears to me to be utterly immaterial. If therefore the true meaning of the agreement is that the owners of the *Kronprinz* had released the *Ardandhu* from all demands, it appears to me that neither by rescinding the order or agreement, or by any other method, could their claim be resuscitated or revived. Now, what is the construction to be put upon this agreement? I myself have not been able to come to the conclusion that it does in substance amount to a release of all demands. The language of it is confined to this, that the

action be discontinued. But the order of discontinuance has been set aside. It appears to me that the view taken by the President is right. I feel the difficulty created by the use of the words "on the ground of inevitable accident;" but the difficulties on the other side are also considerable, because to hold that this agreement precludes the owners of the *Kronprinz* from claiming against the fund is to force the meaning of the words to an extent I do not think we are justified in doing. I am therefore of opinion that this appeal should be dismissed.

Lopes, L.J.—Our decision in this case appears to me to depend entirely on the nature of the transaction of May 1883. Was it a discontinuance of the then pending action, or was it an agreement to abandon and relinquish all claims? If it was a discontinuance it is clear that the plaintiffs are not precluded from substantiating their claim in other proceedings, and may prove against the fund in court in the present action. I think it is a discontinuance of the then existing proceedings such as was contemplated by Order XXVI., r. 1. The plaintiffs might have discontinued without the defendants' consent if they had been willing to pay the costs, and they obtained that consent in order to avoid the payment of those costs. The defendants, in giving their consent to relinquish costs, added the words with regard to inevitable accident because they considered that that was the cause of the collision, and that was the ground why they ought not to be called upon to pay costs. I do not think that the plaintiffs, when they entered into that arrangement, intended to relinquish any claims they might have arising from action taken by parties other than themselves. I believe all they intended was, that they themselves would not move in the then pending action. The case of *The Bellcairn* (*ubi sup.*) is relied upon, but it is clearly distinguishable. The matter there had become *res judicata*, and it was on that ground that the shipowners' claim was precluded. I think, therefore, that the decision of the learned President was right, and that this appeal should be dismissed.

Lord Coleridge, C.J.—I am not prepared on the question of construction to differ from the opinions of my learned brothers, but I should like to state why I am not satisfied, and why therefore, without dissenting, I do not formally assent to this judgment. If the question were a question of law only there can be no doubt that the law has been pronounced with perfect correctness by my learned brothers. If this was, as Sir James Hannen states, only a discontinuance there could be no question that the owners of the *Kronprinz* have a perfect right to take the proceedings they are now taking, because, to use the words of Sir James Hannen, "it is clear that the mere discontinuance of an action does not preclude the plaintiff from substantiating his claim in other proceedings." That is perfectly clear law, and if that was the proper and adequate meaning of the words of this agreement, and of the order, there would be nothing to dispute about. But I confess that I have considerable difficulty in saying that that construction adequately fulfils the tenour of these two documents. A discontinuance formerly—certainly at common law—was effected by the plaintiff simply discontinuing and paying costs. That was an end of the matter. Now, a plaintiff may discontinue his action with payment of costs if the court agrees to it. But even now, under Order XXVI., r. 1, a plaintiff can of his own will discontinue if he chooses to pay the costs. The construction contended for limits the operation both of the agreement and of the order to the nonpayment of costs. But it is to be remembered that the parties to this action are considerable people. The matter at issue between them was a very large one. At the date of the agreement all that had happened was the issue of the writ. Therefore, had the owners of the *Kronprinz* wished to discontinue their action, all they had to do was to pay the costs and be done with it. The costs could not have been above 30*s.*, and perhaps were less.

That being so, the contention that this was a mere discontinuance does not appear to me to be an adequate account of this solemn agreement. I cannot think it an adequate account of this agreement to say that it was meant to release the plaintiff from the payment of 30*s.*, and still less does it seem to me to be adequate when we remember that in order to escape the payment of this small sum the agreement is indorsed with the fiat of the court, and also made the basis of an order of court. I look at this on the ground of probability. Is it likely that two attorneys would have come to an agreement which is fiatted by the court and fiatted by an order of court to release the plaintiffs from the payment of 30*s.*? That does not appear to me to be an adequate explanation, and the view I would be inclined to take would be, that the words "without costs on the ground of inevitable accident" meant that the parties met together and agreed as between themselves that the two ships should not sue one another, and that the insertion of these words meant "We agree that there was an inevitable accident; you may therefore discontinue this action without costs, but we tell you that we agree between ourselves that the ground on which the action shall not be continued is one that will prevent any action being brought, and as between ourselves we agree we will not sue one another." I admit that it is not so stated, and that the words used are "that this action be discontinued," but I can only say that if the matter were *res integra* I should take a different view to my learned brothers. Therefore, while I do not dissent, I can only say I do not feel satisfied.

Solicitors for the owners of the *Kronprinz*, *W. A. Crump* and *Son*.

Solicitors for the owners of cargo, *Stokes*, *Saunders*, and *Stokes*.

March 1 *and May* 22, 1886.

(Before Lord Esher, M.R., Lindley, and Lopes, L.JJ.)

Blackburn, Low, and Co. *v.* Vigors. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance—Principal and agent—Concealment by agent of material fact from principal—Knowledge of agent—Knowledge of principal.

Where an agent, who is employed to effect an insurance for his principal, deliberately omits to communicate to that principal material facts which in the course of his employment have come to his knowledge, and which it is his duty to disclose to his principal, there is a concealment which will have the effect of vitiating an insurance subsequently effected by such innocent principal through another agent who is unaware of any such concealment of material information.

So held by Lindley and Lopes, L.JJ.; Lord Esher, M.R. dissenting.

Judgment of Day, J. reversed.

The plaintiff, Thomas Low, was an insurance broker and underwriter, carrying on business at Glasgow under the firm of "Blackburn, Low, and Co."

The defendant was an underwriter at Lloyd's and was represented there by a Mr. Whalley.

This action was brought to recover the sum of 50*l.*, the defendant's subscription to a policy of reinsurance for 700*l.*, dated the 2nd May 1884, on the hull and machinery of the ship *State of Florida*, as and from New York to Glasgow, which was subscribed, on the defendant's behalf, at a premium of thirty guineas net per cent., which the underwriters still retained.

The policy was effected through Roxburgh, Currie, and Co., insurance brokers in London.

By his statement of defence the defendant alleged that he was induced to subscribe the policy in question by the wrongful concealment by the plaintiff and his agents of certain facts then known to the plaintiff or his agents and unknown to the defendant, and which were material to the risk.

The concealment relied upon was, that the plaintiff, and those interested in the insurance, and their agents, concealed from the defendant the following facts:

(1.) That the steamship *City of Rome*, which had arrived in Liverpool immediately before the policy in question was effected, had brought news supposed by the plaintiff, and by his agents, and by the owners of the *State of Florida*, to relate to the *State of Florida*, and tending to show that the vessel had been wrecked at sea.

(2.) That the *City of Rome* had received a signal from another vessel to the effect that such other vessel had on board the shipwrecked crew of a vessel, the first name of which was "State."

(3.) That it was currently reported in Liverpool and Glasgow that the *City of Rome* had spoken or received signals from a vessel with the shipwrecked crew of the *State of Florida* on board.

(4.) That the *State of Florida* being long overdue two steamships had immediately before the date of the orders for insurance arrived in the Clyde from New York, having started long after the *State of Florida*, and that inquiries had been made of those on board as to the *State of Florida*, and that those on board could give no information as to the said vessel, and could not explain her non-arrival.

(5.) That the plaintiff, or his agents, had been in communication with the managers of the *State of Florida* in Glasgow as to her non-arrival, and that such managers had informed the plaintiff, or his agents, that they could not account for her non-arrival unless some misfortune had happened to her.

The facts of the case, and the arguments of counsel, sufficiently appear in the judgments.

The action was tried before Day, J. on the 6th July 1885, and his Lordship gave judgment for the plaintiff.

The defendant appealed.

The appeal was heard on the 1st March 1886.

Sir *Richard Webster*, Q.C. and *Gorell Barnes* for the appellant.

The *Attorney-General* (Sir Charles Russell) *Cohen*, Q.C., and *F. W. Hollams*, for the plaintiff.

The following authorities were referred to:

Fitzherbert v. *Mather*, 1 T. R. 12;
Phillips on Insurance, ss. 529, 549, 564;
Arnould on Marine Insurance, 5th edit. p. 564;
2 Duer on Marine Insurance, pp. 415, 416, 422;
Gladstone v. *King*, 1 Man. & S. 35;
Stribley v. *The Imperial Marine Insurance Company*, 3 Asp. Mar. Law Cas. 134; 1 Q. B. Div. 507;
Proudfoot v. *Montefiore*, 16 L. T. Rep. N. S. 585; 2 Mar. Law Cas. O. S. 572; L. Rep. 2 Q. B. 511;
Ruggles v. *General Interest Insurance Company*, 4 Mason, 74;
Stewart v. *Dunlop*, 4 Bro. Par. Cas. 483;
1 Park on Marine Insurances, p. 447;
The General Interest Insurance Company v. *Ruggles*, 12 Wheaton, pp. 408, 410, 411, 412.

Cur. adv. vult.

May 22, 1886.—The following written judgments were delivered:—

Lord Esher, M.R.—The facts of this case necessary to be stated for the elucidation of the question which we have to decide, which facts were admitted or proved at the trial before Day, J., trying the case without a jury, are, that the plaintiff, trading as Blackburn, Low, and Co., carried on business at Glasgow as an underwriter and insurance broker, and that he had insured a ship, called the *State of Florida*, for 1500*l.* from New York to Glasgow. The ship, which was a steamship, left New York on the 11th April, and was due in ordinary course at Glasgow on or about the 24th April. The ship was also underwritten for further amounts by or through Rose, Murison, and Thompson, another firm of insurance brokers and underwriters in Glasgow, who were the usual insurance brokers for the owners of the *State of Florida*. On the 30th April, the ship being four or five days overdue, the plaintiff instructed his usual insurance brokers, Roxburgh, Currie, and Co., of London, to reinsure the ship for him to the extent of 1000*l.* at or not exceeding ten guineas. These brokers answered on the same day that the insurance could not be done under twenty guineas; to which the plaintiff replied, "Which not disposed to pay;" and so by this answer the authority to Roxburgh, Currie, and Co. to insure for the plaintiff was for the time ended. In the meantime, on the 28th April, information, which was admitted at the trial to be material, had been

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

brought to Liverpool by a ship called the *City of Rome*. Before this information was known to anyone in Glasgow, Rose, Murison, and Co., instructed their correspondents in London (Rose, Thompson, Young and Co.) to reinsure in London their existing insurances on the *State of Florida* to the extent of 1500*l*. at fifteen guineas, and some such reinsurances were in consequence effected in London. On the 1st May Mr. Thompson, a member of Rose, Murison, and Thompson, told the plaintiff in Glasgow that his firm had effected some insurances in London, and was thereupon requested by the plaintiff to instruct Rose, Thompson, Young, and Co., of London, to reinsure 1500*l*. for him, the plaintiff. This request was forwarded by Rose, Murison, and Thompson, as from themselves, to Rose Thompson, Young, and Co., at 11.30 on the 1st May in the following terms: "Blackburn Low wish to reduce *Florida* lines; cover to them 1500*l*. at fifteen guineas nett." The answer was that this could not be done under twenty guineas. At 12.30 Mr. Murison, of Rose, Murison, and Thompson, had notice of the rumours which had reached Liverpool. He afterwards telegraphed, no longer in the name of his own firm, but in the name of the plaintiff's firm, to Rose, Thompson, Young, and Co., to offer twenty guineas. The answer came direct to the plaintiff. Further communications passed between the plaintiff and Rose, Thompson, Young, and Co., the rates continually rising. At 4.33 on the 1st May, Rose Thompson, Young and Co. reinsured to 800*l*. for the plaintiff; but at 4.53, when the limit had risen to thirty-five guineas, the plaintiff closed his negotiations through Rose, Thompson, Young, and Co. by a telegram: "Not inclined to extend limit." At this moment, therefore, the plaintiff had no insurance broker instructed to act for him. On the 2nd May the plaintiff sent new instructions to his usual brokers, Roxburgh, Currie, and Co., to reinsure 700*l*. on his behalf, which they effected on the same day at thirty guineas on the "ship lost or not lost," and this was the insurance sued upon in this action.

It was at the trial admitted, on behalf of the plaintiff, that the request to Rose, Murison, and Thompson to instruct Rose, Thompson, Young, and Co. constituted Rose, Murison, and Thompson the plaintiff's agents to effect insurance for him. This authority lasted until the plaintiff was put into direct communication with Rose, Thompson, Young, and Co., when it, of course, ceased. In like manner Rose, Thompson, Young and Co. were agents of the plaintiff to effect insurance for him, until their authority ceased by reason of the plaintiff's refusal at 4.53 on the 1st May to extend the limit given to them. The insurance on which the action was brought was effected through entirely independent agents, Roxburgh, Currie, and Co., instructed after the authority given to others had ceased. But it appears that the information from Liverpool was given to Rose, Murison, and Thompson, whilst by admission they were agents of the plaintiff to effect insurance for him. The ship was in fact lost before the policy sued on was effected. But it was admitted that the plaintiff himself had no knowledge of the information given at Liverpool until after the policy was effected; and it is clear, therefore, that he and the defendant and Roxburgh, Currie, and Co. negotiated and effected the insurance on the *bonâ fide* view by all of them that the ship was no more than an overdue ship. No part of the negotiations with the defendant passed in any way through Rose, Murison, and Thompson. The defendant relies on the want of communication to him of the information obtained by Rose, Murison, and Thompson, of a material fact, which information came to them whilst they were agents of the plaintiff to effect insurance for him; and he insists on the application of a doctrine in the form that "the knowledge of an agent is the knowledge of his principal." The plaintiff insists that the only true doctrine is, that the assured is bound by the knowledge of his agent who effects the insurance for him, or through whom the insurance is effected, as if he, the assured, had himself that knowledge at the time of the insurance; but that he is bound only to this extent, that in case of misconduct of the agent in effecting the insurance, he, the assured, cannot enforce the contract any more than if he himself had been guilty of the same misconduct. The question thus raised is really, what is the true meaning of the phrase, "the knowledge of the agent is the knowledge of the principal?" Those who have used it could not have meant to say that what is known to an agent is necessarily in fact known to his principal; the phrase is only used in cases in which the principal is admitted to be in fact ignorant. The suggested meaning would therefore be an absurd contradiction of the assumption on which it is founded. The phrase is, therefore, figurative. It was used by the first person who used it as a means of expressing tersely the idea which that person intended to convey with regard to the case then before him. It has been used in the same sense by those who have subsequently adopted it in precisely the same, or in similar, circumstances. It is meant to be tersely descriptive rather than strictly accurate. One can only arrive at its more accurate and unfigurative meaning by considering carefully the circumstances with regard to which it has been used by persons whose authority is to bind or guide us. By these observations I wish to guard against a danger which always arises from the use in law of these figures of speech. Their terseness prevents them, as I have said, from expressing accurately the proposition they are used to enunciate. They are generally larger than that proposition. If then the terse expression is afterwards applied as an accurate expression of a legal proposition, it may be, and often is, used so as to embrace a case which, if the limitations of the real proposition are called to mind, is seen at once to be outside the more limited boundaries of the more accurate proposition, though within the larger boundaries of the picturesque phrase. As examples of what I wish to convey, I will deal with some of these oracular phrases. For instance, the following: "A man is taken to intend the natural consequences of what he does." If this were strictly adhered to, ninth-tenths of the cases of manslaughter would be cases of murder; an unskilful doctor would be a murderer; and so one acting in an uncontrollable access of passion. The phrase is, therefore, evidently too large. If literally applied, it would often be wickedly untrue. But as soon as you see that it has been only used as a guide in question of evidence, you

perceive at once that it expresses only a good working rule from which to draw an inference of intention, if no other evidence counteracts the *primâ facie* inference. When used by judges charging a jury, it has always easily been understood in its more limited and accurate sense; when used by judges explaining the process of reasoning by which they have drawn a particular inference of intention, it has been used in the same sense. So the phrase, "A man is to be taken to know that which he wilfully abstains from knowing, or against which he wilfully shuts his eyes." It is a still more inaccurate phrase than the former; yet its meaning is sufficiently obvious. It cannot mean that a man does not know what it states he does know. It means that, if a man asserts that he did not know a certain fact, and evidence is given which shows that he did know it, unless, if such a thing could be, he must have, what is picturesquely called, wilfully shut his eyes against the knowledge, the true inference is that, although he may not have been told the exact circumstances, or may not have seen with his eyes the exact details, he did in truth know the fact with his mind, as much as if he had been told, or had seen every particular of it. Again, "A man who states that which is in fact untrue, reckless whether it is true or false, is to be taken to be malicious." It is a good working rule upon which *primâ facie* to found an inference of malicious intent; but the want of such an intention may be demonstrated by counter evidence, as that the story was carelessly told to amuse, or in order to divert from an apprehended danger or otherwise. One has, therefore, to extract from such phrases the real legal proposition contained in them. In making this search, one must recollect that every general proposition laid down by judges as a principle of law, as distinguished from an enactment by statute, is the statement of some ethical principle of right and wrong applied to circumstances arising in real life, *i.e.*, in the life of social intercourse, or in the life of business. If the suggested principle is not obviously a rule of right and wrong, or if the suggested application cannot be supported by the suggested principle, the proposed application must be wrong or must be supported by some other principle of right and wrong, or cannot be supported at all.

These observations must be brought to bear upon the phrase with which we have to deal in the present case. That it expresses a properly limited proposition of law has been above alleged to be absurd. Let us try it in one or two obvious instances. It cannot mean that the law holds that the principal does in fact know what his agent knows, but what the law at the same time admits that the principal in fact does not know. The law is never founded on absolute nonsense. The law does not hold that for every purpose the principal is to be *deemed to know* whatever becomes known to an agent of his in the course of the agent's employment. A merchant sells goods at sea or in warehouse with a statement, not intended by him to be, or taken by the other party, as a warranty, that the goods are sound. If, when he makes such statement, he knows that it is untrue, he is guilty of fraud. If he does not know or suspect the contrary of what he has stated, but his correspondent, or captain, or warehouseman, does know the contrary, is the merchant guilty of fraud? Certainly not. Is he *deemed to be* guilty of fraud so as that an action could be maintained against him to recover damages for a fraudulent misstatement? Certainly not. The principal does not in fact always know all that his agent knows. If the law held that he was in all cases for all purposes to be deemed to know all that his agent knew, the law would in some cases mark him, with gross injustice, with an unwarranted stigma; the law would countenance a gross violation of a simple rule of right and wrong. The law does not deem that to be which in truth is not. All that the law does is that, in some cases, it regulates the rights and liabilities of a principal by the knowledge of his agents. But then it does so, not by virtue of a proposition that the knowledge of the agent is the knowledge of the principal, but upon another principle. In many kinds of contract, as of purchase and sale, or hiring and letting, if a man, instead of himself negotiating and making the contract, intrusts those acts to an agent, he, the principal, cannot enforce the contract made on his behalf by his agent, if the contract is brought about by conduct of the agent which would invalidate the enforcement of the contract, if the conduct had been pursued by the principal himself, had he himself made the contract. If the agent procures the contract by fraudulent misstatement, or a misstatement, or by a fraudulent concealment, or by a concealment which makes false the statements he has expressly or impliedly made, such contract cannot be enforced by the principal. It is treated as void if sued upon at common law, or it is set aside upon application in equity. But under neither procedure could damages be recovered against the innocent principal upon an allegation of actual fraud by him. It is obvious, then, that the law does not say, in such cases, that the principal does know, or is to be deemed to know, what his agent knows. The principle of law applied to the case is a rule of right and wrong, immediately recognised to be just when it is stated, that "a man cannot, by delegating to an agent to do what he might himself do, obtain greater rights than if he did the thing himself." This rule, and its application, is obvious, and was as well known and applied before as after the phrase now in question was invented, namely, that "what is known to an agent is known to his principal." This phrase, when examined, is seen to contain no principle of law whatever. In insurance law, if a contract of insurance is made directly between an assured and an underwriter, the contract cannot be enforced if in the course of the negotiations the assured has made a misstatement of a material fact, whether he has done so fraudulently or innocently, or if he has concealed a material fact, known to himself and not known to the underwriter, or which the underwriter ought to have known, whether he, the assured, has done so fraudulently or innocently. If then the agent of the assured to make the contract of insurance does that which if the assured himself had done it would have precluded him from insisting on the contract, the application of the principle above enunciated will prevent the principal from, in such case, being able to insist on the contract. The result is not the consequence of the phrase treated as a principle of law, though the phrase, in a certain sense, makes a sufficient picture of

the result. The principle which is applied is one which can only be applied to the conduct of an agent by or through whom the contract is made, although the phrase in its terms would apply to other agents. Apply the phrase to other agents, as if it were a principle of law, and it will be seen to produce as manifest injustice in the case of insurance principals and agents as it has been shown it would produce in other cases. This alleged principle is not the law of England in any case, although in the case of certain agents the principal is held to warrant the honesty of the agent, and is thereby liable in respect of the agent's dishonesty. From these observations the conclusion is, that the phrase in question cannot really be used as a guide to determine the question of the defendant's liability or non-liability in the present action. We must seek elsewhere for the principle which is to govern the case.

We have to see whether any true principle of insurance law will make the defendant liable in the present case. In order to determine this question, we must see what circumstances have been held to prevent the enforcement of a contract of insurance, and what are the principles under which those circumstances have been held to have that effect. Then we shall see whether any of those principles are applicable to the circumstances of the present case. Mr. Arnould says that "the principle is now firmly established, that the misrepresentation from mistake, ignorance, or accident of any material fact, however innocently made, will avoid the policy quite as much as in cases where such misrepresentation arises from a wilful intention to deceive." And in another place: "Concealment in the law of insurance is the suppression of a material fact within the knowledge of either party, which the other has not the means of knowing or is not presumed to know. . . . Whether such suppression of the truth arises from the fraud of the assured (that is, from a wilful intention to deceive for his own benefit), or merely from mistake, negligence, or accident, the consequences will be the same." The substantial truth of these propositions is not disputed by anyone. They are a statement of the circumstances which will prevent the enforcement of the contract; but they do not contain the principle whereby such circumstances produce such an effect. As to this, Mr. Arnould says: "The doctrine of the English courts is, that in the case supposed, although no pretence exists for anything like actual fraud, yet the policy is to be considered void on the ground of constructive or legal fraud." This is directly in contradiction of what has been said in the former part of this judgment. Duer, however, as is well known, does not adopt this principle; but holds that it is a part of the contract that full disclosure shall be made as well as that every representation shall be accurate. But, if this be correct, the contract should never be set aside or treated as void on the ground of concealment; the contract should stand and be treated as broken by the assured. This view would raise new complications which have never yet been urged. Phillips, who is, in my opinion, always the more accurate guide, thus treats the matter of principle: "The effect of a misrepresentation or concealment in discharging the underwriters does not seem to be merely on the ground of fraud, as has been usually laid down by writers on insurance, but also on the *ground of a condition* implied by the fact of entering into the contract, that there is no misrepresentation or concealment. Mr. Duer criticises the phraseology of the books in putting the effect of a misrepresentation or concealment upon the contract entirely upon the ground of fraud. Mr. Arnould adheres to this application of that term for the sake of consistency with the general legal doctrine that what passes between the parties preliminary to a contract is not a part of it, and should not be imported into it. And since a representation through mistake or inadvertence has the same effect in reference to the underwriter as an intentional and literally fraudulent misrepresentation or concealment—namely, it induces him to enter into a contract which he would otherwise have declined, or to take a less premium than he would otherwise have demanded—he deems it to be excusable to apply the term 'fraud," and thus bring the doctrine on this subject nominally within the acknowledged general principle applicable to other contracts. But I cannot think that this anomalous use of the term is justifiable on this ground, since ambiguous phraseology is not to be tolerated in any science, and least of all in that of law, where it can possibly be avoided, as it may easily be in this case by stating the practical doctrine in direct terms, namely, that it is an implied condition of the contract of insurance that it is free from misrepresentation or concealment, whether fraudulent or through mistake." He says lower down: "The forfeiture of the insurance by misrepresentation or concealment is a forfeiture by a breach of a condition of the contract, so it seems to have been considered by Kent, C." This seems to me to be the true doctrine. The freedom from misrepresentation or concealment is a *condition* precedent to the right of the assured to insist on the performance of the contract, so that on a failure of the performance of the condition the assured cannot enforce the contract. I have thought it necessary to bring out this view, because it seems to me that the only persons who can attach a condition to a contract are those who in fact make the contract. Those who have nothing to do with the making of the contract cannot have anything to do with agreeing to a condition which is to affect the attaching of the contract. He who makes the contract agrees to the condition that it shall not be binding on the person whose *alter ego* or representative he is if he has made any misrepresentation, or has been guilty of any concealment. This confines the purview of alleged misrepresentation or concealment to those persons only. It confines the consideration of an agent's conduct to the agent by or through whom the contract is made. Mr. Arnould uses the phrase, "the principle here is that what is known to the agent is impliedly known to the principal." But this is applied to the immediately preceding paragraph, which is, "If, however, the information so communicated by the assured to the underwriter proceeds from an agent of the assured, whose duty it was to give the intelligence, the assured is just as responsible for the truth of the information as he would be for the truth of a positive representation made by himself of the same facts." It seems to me that the phrase "the agent whose

duty it was to give the intelligence" means, in this context, the agent whose duty it was to give the intelligence to the *underwriter; i.e.*, it means the agent who effects or through whom is effected, the contract of insurance. And if so, the phrase as to knowledge is not wanted as a principle; there is another governing principle which suffices. Duer, in his Lecture 13, discusses the cases of *Fitzherbert* v. *Mather* (1 T. R. 12) and *Gladstone* v. *King* (1 Mau. & S. 35), and then states that "to these decisions, if they are to be considered as affirming the rule that the knowledge of an agent not authorised to insure may in some cases be justly imputed to his principal, so that his silence shall have the effect of a concealment avoiding the policy or exonerating the underwriters from the loss, the reasoning and authority of a very eminent judge, distinguished for his accurate and profound knowledge of commercial law"—referring to Story, J.—"are directly and irreconcilably opposed." Duer, in sect. 28 (Lecture 13) gives his own view; but it is based entirely on his view that it is a part of the contract, not by way of condition, but by way of contractual undertaking, that no concealment of any kind shall occur. It will be found that Phillips in his italicised propositions, which are, in my opinion, always nicely accurate, confines himself entirely to the acts or omissions of agents by or through whom the contract is effected (see sect. 543): "A misrepresentation or concealment by the agent for effecting the insurance will defeat it, though not known to the assured." It is clear, I think, that in sect. 549 he prefers the reasoning of Story, J. in *Ruggles* v. *General Interest Insurance Company* (4 Mason, 74) to that of the English judges, as reported in *Fitzherbert* v. *Mather* (*ubi sup.*) and *Gladstone* v. *King* (*ubi sup.*); and I think that the concluding paragraph of that section is rather forced from him by those cases than acquiesced in by his conviction. "I accordingly cannot but conclude," he says, "that a policy made, as the case supposes, under an essential misunderstanding by both of the parties, into which they are purposely and fraudulently led by a third, whether he be agent of one or both, or neither, is void." I do not think that the mind of the writer went with that halting proposition.

But then another rule is suggested in argument, partly countenanced by Arnold and Duer, though they seem to base it on the English cases of *Fitzherbert* v. *Mather* (*ubi sup.*), and *Gladstone* v. *King* (*ubi sup.*) rather than on any process of reasoning, and it seems to be this: "Where any servant or agent of the assured ought by reason of the duty imposed upon him by his position with regard to the assured to make to him a true and immediate communication of a circumstance which, in insurance law, is a material circumstance, and if he, neglecting such duty, either makes a false communication, or fails to make an immediate communication, or any communication at all, to his principal or employer, and, by reason thereof, the principal or employer, the assured, fails to disclose that which, if he had known it, he would have been bound to disclose, the contract of insurance cannot be enforced." This suggested rule would be well founded, if the phrase that the knowledge of the agent is the knowledge of the principal were a legal proposition; but it is not. To support the rule some principle must be vouched. The rule contains two assertions on which it is based: the first, that there are servants and agents of the assured who, by reason of their position as such, are bound to give, not only true but immediate communication of certain facts; the second is, that the underwriter has a right to assume, as the foundation of his contract, that such servants and agents have fulfilled the suggested duty. As to the first, no one doubts but that it is the duty of a servant or agent, as it is of everyone who makes a statement, to make it truthfully; but is it true to say that all servants and agents are, or even that any servant or agent is, bound, *by reason only of his relation as such to his employer*, to make an *immediate* communication of everything that has happened concerning his principal's affairs? I know of no such duty arising from the mere relation of master and servant, or of principal and agent. A manager of a mercantile establishment in a distant country probably makes only periodical reports. There is no apparent necessity for his making more frequent reports. There is no necessary reason why the captain of a ship should *immediately* report every accident to the ship, which accident would usually be already repaired. The law has no right to imply a duty as attached to the relation which does not necessarily follow from the relation. The supposed duty must exist whether the subject-matter is or is not insured, or is or is not to be insured. There is nothing on which to found the suggested implied duty. I feel certain that no such duty does in fact generally exist. As to the second, even supposing that such an implied duty does exist as between master and servant, or principal and agent, is it true to say that underwriters do rely upon an undertaking by the assured that his servants or agents will fulfil their duty? Such a reliance has never yet been proved in fact to be the rule of underwriters and assured. I believe it to be incapable of proof, because it is wholly untrue in fact The underwriter has been taught to rely, and does rely, upon the conduct of those with whom he deals, not upon the conduct of those with whom he has no relation, and of whose existence in many instances he knows and can know nothing. He is entitled to *uberrima fides* from those with whom he deals. But the doctrine of *uberrima fides* is fulfilled completely if those with whom he deals deal with him in accordance with that rule. The suggested doctrine strikes an assured who has complied in every possible sense with that exceptional rule of conduct of *uberrima fides*. A court of law has no right to imply this reliance of an underwriter, unless the implication is a necessary implication. It remains only then to deal with the cited cases, and to deal with them in a court of error, where they are not to be followed or distinguished, but to be considered. And it may be wise to observe that they do not construe a contract or document, so that, whether right or wrong, other contracts and documents have been formed upon them, but lay down, as it is said, principles of law. And further they have never been absolutely acquiesced in, but have been canvassed and criticised from the time they were decided until now. The case of *Fitzherbert* v. *Mather* (*ubi sup.*) is difficult to appreciate, so far as consists in gathering the principle which ought to be extracted from it on which the judges founded their decision. I

confess that the reported judgment of Buller, J. puzzled me for long. I think I now understand it from the gloss put upon the judge's phraseology by Duer in note 11 to Lecture 14. Buller, J., he says, is still more explicit: "Though the plaintiff be innocent, yet if he build his information on that of his agent (which clearly means, if he adopt the information of his agent, and by *submitting it to the underwriters* makes it the foundation of the contract) and his agent be guilty of a misrepresentation, the principal must suffer." The gloss within the brackets, which I think is correct, shows that the case was decided on the view that the assured, who himself made the contract, made a representation which was a misrepresentation into which he, the assured, was led, by adopting and using innocently the misrepresentation of his agent. If this be the true interpretation of the case, it is in no way exceptional, but is within the most ordinary rule of insurance law. The case of *Stewart* v. *Dunlop* (4 Bro. Par. Cas. 483) is founded entirely on an inference of fact, more or less rightly inferred, that the agent who effected the insurance knew the information which had arrived in town. As to the case of *Gladstone* v. *King* (*ubi sup.*), it is one of those cases which is differently explained by everyone who deals with it. Everyone points out that the resulting decision, that the fraud of the master did not avoid the policy, but only exonerated the underwriter from payment of the average loss incurred before the policy, is strange and isolated. Duer doubts whether the letter written by the captain to his owners was not shown by the assured to the underwriters. If it was, it is again a case of innocent misrepresentation by the assured himself. The case is criticised by Phillips in sect. 683. The reasoning of Story, J, in *Ruggles* v. *General Interest Insurance Company* (*ubi sup.*) seems to me to dispose of all that has been supposed to result from the case of *Gladstone* v. *King* (*ubi sup.*). He first gives strong reasons for supposing that the case was in reality decided as upon an innocent misrepresentation. If not, he on p. 78 deals with the suggested reasoning "The principle contended for," he says, "is new. If well founded it must have often occurred. The general silence, therefore, is against it, but not decisive of its merits. Upon what grounds does it stand? Not upon the ground of agency, for the master was not the agent as to the insurance. Not upon the ground of imputed knowledge or fraudulent concealment, for that is excluded by the argument. It must, then, be upon the ground that the act of the master binds the owner, and that an omission of duty to his owner, by which third persons are prejudiced, destroys the rights of his owner, however innocent he may be. There is certainly no public policy or convenience in such a principle. The owner does not guarantee the fidelity of the master to all the world, or to the insurer in particular." In this as matter of truth and real business conduct, I entirely agree. I see no warrant for any other inference. I think it more candid to say at once that, in my opinion, *Gladstone* v. *King* (*ubi sup.*), as reported, and certainly as relied on, is wrong. I do not think that an assured can properly be said to guarantee the fidelity of any of his agents. Certainly I cannot bring my mind to say that the underwriter is to be assumed to rely upon the diligence and accuracy of an agent of the assured, of whose existence, as in this case, he could not have had a suspicion. Even if what is said about a captain or correspondent were true, which I think it is not, the present case goes far beyond; for the defendant, the underwriter, had no reason to suppose that any other agent had been intrusted to insure. I am prepared to decide this case upon the old, simple, recognised, and easily justified rule, that a contract of insurance is rendered abortive by an innocent misrepresentation or concealment of a material fact known to the assured, or to an agent of his by or through whom the contract is made, and which fact the underwriter neither knows nor is bound to know; but is not rendered abortive by the misrepresentation or concealment of any other person or agent, whether innocent or fraudulent. I can find a simple principle to support the first, namely, the principle I have before stated, that a man cannot, by delegating to an agent to do what he might do himself, obtain greater rights than if he did the thing himself; I can find no principle on which to support the contrary of the second. Before closing, however, there remains the case of *Proudfoot* v. *Montefiore* (16 L. T. Rep. N. S. 585; 2 Mar. Law Cas. O. S. 572; L. Rep. 2 Q. B. 511), which, on account of its importance, I reserved for minute consideration, until after I had exhausted principle and all other authorities. It is made in the judgment to depend on the cases of *Fitzherbert* v. *Mather* (*ubi sup.*), and *Gladstone* v. *King* (*ubi sup.*): "Upon the above facts," the judgment says, "the question arises whether the plaintiff, the assured, is so far affected by the knowledge of his agent of the loss of the vessel and damage to the cargo, as that the fraud thus committed on the underwriter through the intention or concealment of the agent, though innocently committed, so far as the plaintiff is concerned, will afford a defence to the underwriter on a claim to enforce the policy. Two cases decided in this court, one in the time of Lord Mansfield, the other in that of Lord Ellenborough, establish the affirmative of this proposition." I have already endeavoured to show that *Fitzherbert* v. *Mather* (*ubi sup.*) does by no means support this proposition. If *Gladstone* v. *King* (*ubi sup.*) does support it, I must say that, as I cannot agree with that case so interpreted, I cannot agree with this case founded on it. The Chief Justice then states that the reasoning of Duer fully establishes that the judgment of Story, J., in *Ruggles* v. *General Interest Insurance Company* (*ubi sup.*) is erroneous. If Mr. Duer's view is right, that there is a contractual undertaking by the assured that every material fact shall be disclosed, it follows, of course, that Story, J. is wrong. But, as I have said, I look in vain in a policy in ordinary form for any such contract. The Chief Justice then lays down the following proposition: "If an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void, on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which

the assured has, or in the ordinary course of business ought to have, knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud and negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact, which ought to have been made known to the underwriter, and through such ignorance fails to disclose it." Now, I will again examine the different parts of this proposition. The duty relied upon, namely, that of communication by an agent or servant, cannot be a duty imposed in a particular case by a specific order of the owner to his servant or agent, for if so, the alleged infirmity in the policy will depend upon whether such order has or has not been given. It must therefore be a duty, if any, held to arise in contemplation of law necessarily by reason of the relation between owner and agent. And, as I have before stated, the alleged duty is useless for the purpose for which it is suggested, unless the duty is a duty to give immediate information. I know of no such implied duty. I know of no agent or servant of a shipowner, still less of an owner of cargo, whose implied duty it is, by any implication which a court is justified in making, to communicate immediate information of every or of any accident happening to the ship or cargo in the course of a voyage. The proposition is again, I venture to say, obviously inaccurate in coupling concealment and misrepresentation, as if the doctrines of insurance law were identical as to both. If the owner makes a misrepresentation, the policy no doubt cannot be enforced, however much the owner may have been misled into making the representation. But, with regard to concealment in the sense of mere non-disclosure, the law is not the same as in the case of misrepresentation. The proposition then states "that the insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has knowledge." This is undoubtedly correct, it being the necessary consequence of the doctrine of *uberrima fides*. But the proposition proceeds, "that the insurer is entitled to assume that the assured will communicate to him every material fact of which the assured ought in the ordinary course of business to have knowledge." This branch assumes that the assured has not the knowledge; the doctrine of *uberrima fides* therefore does not reach it. Why the insurer has a right to assume that the assured will communicate to him what the assured by the hypothesis does not know is a proposition which passes my comprehension. The proposition then lays down "that the insurer has a right to assume that the assured will take the necessary measures, by the employment of competent and honest agents, to obtain all due information." But the proposition, by using the phrase "the necessary measures," assumes that, although the assured has taken every reasonable, or even possible, measures to employ competent and honest agents, he may have failed to succeed, and therefore had failed to take "the necessary measures." And it fails to touch the case of there being, by accident or momentary negligence of the agent, a failure, although the agent is in every sense a competent and honest agent. It seems to me that this whole proposition is a finely written deduction from the case of *Gladstone* v. *King* (*ubi sup.*); but that, as a business or legal proposition, it will not bear close examination. It is further suggested in this case of *Proudfoot* v. *Montefiore* (*ubi sup.*) that the proposition laid down in it rests on a ground of public policy. But in the first place it seems difficult to see how public policy can be affected by any circumstances relating to the power between the parties of enforcing or repudiating a contract of insurance any more than of any other contract. And, secondly, it seems difficult to reconcile the interference of the doctrine of public policy in the case of a contract of insurance on ship or goods lost or not lost, one step beyond affirming that the parties who are allowed by law to enter into this hazardous and well-nigh gambling speculation of whether a loss has or has not already happened must be equally informed or equally ignorant. I am, for all these reasons, of opinion that in this case the plaintiff was entitled to recover, and that the appeal should be dismissed.

Lindley, L.J.—This was an action brought on a policy of insurance on the steamship *Florida* (lost or not lost) subscribed by the defendant, and dated the 2nd May 1884. The claim was for a total loss by perils of the sea; and the material defence was that the defendant was induced to subscribe the policy by the wrongful concealment by the plaintiff and his agents of certain material facts known to the plaintiff or his agents and unknown to the defendant. The case was tried before Day, J. At first there was a jury, but the jury were discharged by consent, the defendant by his counsel electing not to go to the jury on the question whether the plaintiff himself concealed any information known to him; the defendant was content to rest his defence on the undisputed facts, and on the point of law arising from them. Day, J. gave judgment for the plaintiff for the whole sum claimed. The undisputed facts of the case were as follows: The plaintiff was an underwriter and insurance broker at Glasgow, and was underwriter of a policy on the ship. The policy had been effected by the owners of the ship through Rose, Murison, and Thompson, of Glasgow, who were the brokers for effecting insurances upon her. The ship had sailed from New York on the 11th April 1884, and was due at Glasgow on or about the 25th. The ship not having arrived, the plaintiff, desiring to protect himself from loss, endeavoured on the 30th April to effect a reinsurance. He first attempted to do this through Roxburgh, Currie and Co.; but, the terms being too high, no insurance through them was then effected. The next day—viz., on the 1st May—the plaintiff saw Mr. Thompson, a member of the firm of Rose, Murison, and Thompson, and asked him about the ship, and requested him to telegraph to the London agents of his firm—viz., to Rose, Thompson, Young, and Co.—to effect an insurance for 1500*l.* at 15 guineas; and a telegram to this effect was accordingly sent by Rose, Murison, and Thompson, of Glasgow, to Rose, Thompson, Young, and Co., of London, between 11 and 12 o'clock. At 12.30 on the same day, a Mr. Murray gave Murison important information brought to

Glasgow by another ship, and which information was calculated to excite suspicion of the loss of the *Florida* some days previously. It was afterwards proved that this suspicion was well founded, and that the *Florida* had, in fact, been lost some days previously. The information thus communicated by Murray to Murison was communicated to him because Rose, Murison, and Thompson were brokers to the ship, and had, as already stated, effected insurances upon her. The information thus obtained by Murison was never disclosed by him to the plaintiff; and, having regard to what took place at the trial, the plaintiff himself must be assumed to have known nothing whatever about the matter, and to have concealed nothing himself. Shortly after the above interview, Rose, Thompson, Young, and Co., of London, telegraphed to Rose, Murison, and Thompson, of Glasgow, "Twenty guineas paying freely, and market very stiff. Likely to advance before day is out." This telegram was shown to the plaintiff. Rose, Murison, and Thompson then telegraphed back, not in their own names, but in the name of the plaintiff, to Rose, Thompson, Young, and Co., "Pay 20." The plaintiff being thus put in direct communication with Rose, Thompson, Young, and Co., received a telegram back to the effect that nothing could be done for less than 25 guineas; but ultimately the plaintiff effected an insurance through Rose, Thompson, Young, and Co., for 800*l.* at 25 guineas. This, however, is not the policy sued on in this action. On the same 1st May, and after the plaintiff had been put in direct communication with Rose, Thompson, Young, and Co., and had been told by them that nothing could be done for less than 25 guineas, the plaintiff effected another insurance on the *Florida* through Roxburgh, Currie, and Co., for 500*l.* at 25 guineas. This again is not the policy in question in this action. On the next day—viz., the 2nd of May—the plaintiff, through Roxburgh, Currie, and Co., effected a further insurance with the defendant for 700*l.* at 30 guineas; and this is the policy on which this action is brought. The defendant resists payment on the ground that he was not informed of the facts which had been communicated to Murison by Murray on the 1st May, and which, it was admitted, were material to the risk. The plaintiff's counsel conceded that, if the plaintiff had himself known of those facts, and had concealed them from the defendant, he would not be liable on the policy. The plaintiff's counsel further conceded that, if the policy in question had been effected through Rose, Murison, and Co., and they had concealed from the defendant the information given by Murray to Murison, the defendant would not be liable to the plaintiff on the policy. But the plaintiff's counsel contended that, as the plaintiff himself acted in good faith, and in ignorance of the facts disclosed to Murison, and did not effect the policy sued on through him, or his firm, but through other agents who knew no more than the plaintiff himself knew, the plaintiff is entitled to recover on the policy. This was the view adopted by the learned judge who tried the action. The defendant, on the other hand, contends that the knowledge acquired by Murison, whilst he was endeavouring to effect an insurance for the plaintiff, must, in point of law, be imputed to them; and that, as between the plaintiff on the one side and the defendant on the other, the plaintiff, rather than the defendant, must suffer from the omission on the part of Murison to communicate what he knew to the plaintiff. In support of this contention certain authorities were referred to which it is necessary to examine. The first is *Fitzherbert* v. *Mather* (1 T. R. 12). That was an action on a marine policy on a cargo of oats (lost or not lost) belonging to the plaintiff. The policy was effected through a person of the name of Fisher. The oats were bought by Bundock, acting for the plaintiff, from a person named Thomas, who shipped them, and who, by Bundock's orders, sent a bill of lading and invoice to Fisher. Thomas also wrote to Fisher, stating that the oats had been shipped, and that the vessel, on board which they were, had sailed. After this letter was written, but before it could have left the town where it was posted, Thomas learned that the vessel was lost. But he said nothing about it, and sent no further letter, and Fisher knew nothing of the loss. He acted *bonâ fide*, and effected the insurance after he had received Thomas' letter above alluded to. It is not stated that this letter was shown to the defendant, although there is some reason for supposing that it was. But, even if it was not, still the information on which Fisher acted was obtained from Thomas, who was directed by Bundock, and it would seem also by the plaintiff, to communicate with Fisher; and Thomas wrote to Fisher expressly that he might insure if he liked. Moreover, the plaintiff himself instructed Fisher to insure as soon as the bills were sent him. The court construed this as meaning as soon as they came from Thomas. The court appear to have come to the conclusion that the plaintiff referred Fisher to Thomas for information, and thereby, in effect, through Thomas supplied Fisher with defective information. The court held that the policy was effected by misrepresentation; that Thomas had been guilty, if not of fraud, at least of great negligence; that the concealment by him from Fisher, and therefore from the underwriter, of the loss of the oats, vitiated the policy, although both the plaintiff and Fisher acted in perfect good faith. It is to be observed that Ashurst, J. decided this case on the ground that Thomas knowledge was to be treated as the knowledge of the plaintiff; but the rest of the court seem to have treated the case as one of direct misrepresentation, though an innocent one so far as the plaintiff and Fisher were concerned. The next case is *Gladstone* v. *King* (1 Mau. & Sel. 35). This was an action on a policy on a ship lost or not lost. The plaintiffs were her owners, and they claimed to recover damages for an injury sustained by the ship by getting on a rock before the policy was effected. The captain of the ship had written to the plaintiffs after the accident, and before the policy was effected; but he had not alluded to the accident, and the plaintiffs knew nothing of it until after the ship arrived home. The court nevertheless decided that the plaintiffs could not recover. The court held that it was the duty of the captain to inform the plaintiffs of the fact that the ship had been on a rock and sustained injury, and that his omission in this respect, by means of which the owners were prevented from disclosing

the accident to the underwriters, operated as an exception of that particular risk out of the policy. Lord Ellenborough, in this case, appears to have been influenced by the consideration of the danger there would be to underwriters if captains were permitted to wink at accidents without hazard to the owners, and so always enable them to throw past losses on insurers. This case certainly went beyond *Fitzherbert* v. *Mather* (*ubi sup.*), for the captain had nothing to do with the insurance, and he was not referred to by the plaintiffs for information. What, however, he knew was treated as impliedly known to the plaintiffs, although he did not tell them what he knew. The next case is *Proudfoot* v. *Montefiore* (16 L.T. Rep. N. S. 585; L. Rep. 2 Q. B. 511). It was an action on an agreement to insure some madder belonging to the plaintiff. Rees was the plaintiff's agent at Smyrna to buy and ship madder for him; and Rees had bought and shipped for the plaintiff a cargo of madder on board a vessel which was lost soon after she sailed. Rees knew of the loss, and might have informed the plaintiff of it by telegram; but he purposely refrained from doing so in order that the plaintiff might be able to insure in ignorance of what had occurred. The plaintiff did, in fact, insure the cargo before he knew of the loss, and the slip was signed by the defendants in ignorance of what had happened. The court decided against the plaintiff, although he personally had acted in good faith, and had concealed nothing within his personal knowledge. The grounds of the decision are given on page 521 as follows: "Notwithstanding the dissent of so eminent a jurist as Story, J., we are of opinion that the cases of *Fitzherbert* v. *Mather* (*ubi sup.*) and *Gladstone* v. *King* (*ubi sup.*) were well decided; and that if an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, and the owner, in the absence of information as to any fact material to be communicated to the underwriter, effected an insurance, such insurance will be void on the ground of concealment or misrepresentation. The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge; and that the latter will take the necessary measures, by the employment of competent and honest agents, to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact, which ought to have been made known to the underwriter, and through such ignorance fails to disclose it. It has been said, indeed, that a party desiring to insure is entitled, on paying a corresponding premium, to insure on the terms of receiving compensation in the event of the subject-matter of the insurance being lost at the time of the insurance, and that he ought not to be deprived of the advantage, which he has paid to secure, by the misconduct of his agent. But to this there are two answers: first, that, as we have already pointed out, the implied condition on which the underwriter undertakes to insure—not only that every material fact which is, but also that every fact which ought to be, in the knowledge of the assured shall be made known to him—is not fulfilled; secondly, as was said by the court in *Fitzherbert* v. *Mather* (*ubi sup.*), where a loss must fall on one or two innocent parties through the fraud or negligence of a third, it ought to be borne by the party by whom the person guilty of the fraud or negligence has been trusted or employed. By thus holding, we shall prevent the tendency to fraudulent concealment on the part of masters of vessels and agents at a distance, in matters on which they ought to communicate information to their principals; as also any tendency on the part of principals to encourage their servants and agents so to act. For these reasons our judgment must be for the defendant."

The last authority which it is necessary to refer to is *Stribley* v. *The Imperial Marine Insurance Company* (3 Asp. Mar. Law Cas. 134; 1 Q. B. Div. 507). It was an action by the owners of a ship for a total loss; and one point raised was whether the fact that the captain had not informed the plaintiff, and that he, therefore, had not informed the defendant of the fact that the vessel had encountered a storm and lost an anchor before the policy was effected, vitiated the policy. It was held that it did not. I understand this decision as, in substance, similar to *Gladstone* v. *King* (*ubi sup.*). The principle on which *Fitzherbert* v. *Mather* (*ubi sup.*) and *Gladstone* v. *King* (*ubi sup.*) are based has been much discussed, and, as stated by the court in *Proudfoot* v. *Montifiore* (*ubi sup.*), Story, J. in *Ruggles* v. *General Interest Insurance Company* (4 Mas. 74) declined to follow it. His view, however, is opposed to that of the Supreme Court of the United States (12 Wheaton 408), and to that of Phillips and Duer (sect. 549), and has not been adopted in this country. It appears to me to be established by the cases to which I have referred that, in order to prevent fraud and wilful ignorance on the part of persons effecting insurances, no policy can be enforced by an assured, who has been deliberately kept in ignorance of material facts by someone whose moral, if not legal, duty it was to inform him of them, and who has been kept in such ignorance purposely in order that he might be able to effect the insurance without disclosing those facts. The person who allows the assured to effect a policy under such circumstances as I am now supposing does not act fairly to the underwriters; and, although such person may owe them no legal duty, the assured cannot, in fairness, hold the underwriters to the contract into which they have, in fact, entered under these circumstances. The assured may himself be perfectly innocent when he effects the insurance; but as soon as he is informed of the facts it ceases to be right on his part to take advantage of the concealment without which that insurance would not have been effected. In other words, the assured cannot take advantage of the ignorance in which he has been improperly kept by one who ought to have told him the truth. If it was the legal duty of the person who has so kept him in ignorance to inform him of the facts concealed, it is, I think, clearly settled that he cannot avail himself of his own personal ignorance of them. But if there is no such legal duty to him, the same consequence appears to me

to follow if there was a moral duty to tell him the truth. He may exclude all legal duty to be informed of what has occurred by giving instructions dispensing with information; and such instructions may be given for reasons which exclude all inference of fraudulent intent on his part. But in such a case it appears to me that he cannot enforce a contract of insurance obtained by such unfair means as those supposed. In my opinion, Duer (2, sect. 647) and Phillips (1, sect. 537) are both right in contending that fraud on the part of the assured is not essential to discharge the underwriters on the ground of misrepresentation or concealment. It is a condition of the contract that there is no misrepresentation or concealment either by the assured or by anyone who ought, as a matter of business and fair dealing, to have stated or disclosed the facts to him or to the underwriter for him. If this view of the law be correct, it follows that the plaintiff cannot recover in this action. The omission of Murison to tell the plaintiff what he knew, and the remarkable course his firm took of discontinuing negotiations themselves, and of putting the plaintiff in direct communication with Rose, Thompson, Young and Co., are only to be explained upon the theory that the plaintiff was purposely kept in ignorance in order that he might insure on more favourable terms than he otherwise might have done. It appears to me to have been clearly Murison's duty to the plaintiff to give him the information he had, so that he might, by disclosing what he knew, and increasing his offer, cover the increased risk. Murison was not a stranger under no obligations to the plaintiff. He was employed by him to effect an insurance, and whilst so employed he acquired important knowledge respecting the ship. I cannot doubt that it was his duty to disclose this to the plaintiff, and not to let him go on to insure in ignorance of what it was of the utmost importance he should know. The plaintiff cannot, in my opinion, obtain any advantage from this breach of duty to himself. As between himself and the defendant, the plaintiff is the person to suffer from the mistaken view his own agents took of their own duty. Their conduct vitiates this policy, although it was not effected through them, nor until after their agency had ceased; for, had it not been for their breach of duty, the policy could never have been effected for the premium which the plaintiff paid. I have not based my judgment on the maxim that the knowledge of an agent is the knowledge of his principal; for, like the Master of the Rolls, I distrust such general expressions, which are quite as likely to mislead as not. But, for the reasons I have stated, the decision of Day, J. was, in my opinion, erroneous, and judgment ought to be entered for the defendant, with costs here and below.

Lopes, L.J.—I have arrived at the same conclusion as Lindley, L.J.; but the case is so important that I wish to give a separate judgment stating my reasons. It is unnecessary to re-state the facts of this case. They have been already fully stated, and are undisputed. I propose shortly to state the conclusion at which I have arrived after much consideration, and my reasons for that conclusion. It is clear law that, if the policy sued on in this action had been effected *through the agents* to whom the material communication was made, and who suppressed it, the assured, though ignorant of the communication, could not have recovered from the underwriters, because there had been a concealment of a material fact by the agent of the assured. The knowledge of the agent in such circumstances would be the knowledge of the principal—a phrase which I understand to mean that the principal is to be as responsible for any knowledge of a material fact acquired by his agent employed to obtain the insurance as if he had acquired it himself. In what does the present case differ from the one above stated, where the law is clear? It differs only in this, that here the policy was effected not through the agent who had acquired and concealed the information in order that his principal might effect an insurance upon favourable terms, but through another agent subsequently employed, who, as well as his principal, was innocent of any previous concealment. The plaintiff's contention is, that it is only the concealment of material facts by the agent who effects the policy that vitiates it, not the concealment by any other agent, and the learned judge in the court below so held. The question raised seems to be whether, if an agent employed to effect an insurance purposely omits to communicate material facts which came to his knowledge during his employment (facts which it was his duty to communicate to his principal), it is a concealment which will avoid an insurance effected by an innocent principal through another agent ignorant of any such concealment. Authority and principal compel me to answer that question in the affirmative. I will first deal with the authorities. The earliest case is *Fitzherbert* v. *Mather* (1 T. R. 12). In that case it seems to have been held that, where the conduct of the assured was wholly free from blame or suspicion, his policy was avoided by the concealment and virtual misrepresentation of an agent who had no authority to procure or direct the insurance. He was the consignor and shipper of the goods insured. The judges thought the letter was a misrepresentation. The court clearly thought that it was the duty of the agent to have given information of the loss. The *concealment of the agent* was the *ground* of the decision. The insured was held to be affected by the concealment of an agent other than an agent employed to obtain an insurance. The next case is *Gladstone* v. *King* (1 Mau. & S. 34). The insurance was on a ship on a specified voyage. It was made after the risks had commenced; but by its term (lost or not lost) it related to their commencement, and covered all prior losses. When the policy was effected, no such loss was known to the owners to have occurred; but a partial loss had in fact occurred which the master had neglected to communicate, although the information might have been given in time to have governed the terms of the insurance. He had in fact written to his owners after the loss had happened, and they were in possession of his letter when they effected the policy, but it contained no mention of the loss, nor does it appear from the report that this letter was shown to the underwriters. In that way representation was made to them founded upon its contents. In respect to them the case was simply that of the concealment of a loss, which was unknown to the assured, but which their agent was *bound to communicate*, and

might have communicated, and it was so treated by all the judges. It was for the recovery of the partial loss that the action was brought; and it was the opinion of the court that the concealment of the master, although not being fraudulent, it did not operate to avoid the policy, yet exonerated the underwriter from the payment of the loss. Lord Ellenborough remarks that unless this rule was adopted, the master would be instructed to remain silent in all similar cases, and they (the underwriters) would incur the certainty of being rendered liable for all antecedent average losses that they could not prove to have been known to the assured. These decisions established that the knowledge of agent, not authorised to insure, may be imputed to his principal, so that his silence shall have the effect of a concealment avoiding the policy and exonerating the underwriters from the loss. They seem to me *à fortiori* cases to the present. The master had nothing to do with the insurance. His knowledge was, however, imputed to the plaintiffs, although he did not communicate to them what he knew. *Proudfoot* v. *Montefiore* (16 L. T. Rep. N. S. 585; 2 Mar. Law Cas. O. S. 572; L. Rep. 2 Q. B. 511) is a comparatively recent case. The plaintiff in Manchester employed an agent at Smyrna, who purchased and shipped for him there a cargo of madder, of which he advised him on the 12th Jan., and forwarded the shipping documents on the 19th. The ship sailed on the 23rd of that month, and went ashore the same day, whereby there was a total loss of the cargo. Next day the agent had intelligence of the loss, and might have telegraphed the casualty to his principal immediately, but refrained on purpose that his principal might insure the cargo. On the 26th, which was the earliest post day for England, he announced the loss to his principal by letter. Meanwhile, before the arrival of that letter, after the loss had been posted in Lloyd's Lists, the principal effected an insurance on the cargo. It was held the policy was void on the ground of concealment of material facts *known to the agent, and therefore known to the principal*. All the cases, both English and American, were reviewed, and the judgment of the court, consisting of Cockburn, C.J., Blackburn and Shee, JJ., was delivered by Cockburn, C.J., and unless that judgment is overruled it is clear that an assured cannot recover on a policy, when he has been designedly kept in ignorance of material facts by somebody whose duty it was to communicate them. The Chief Justice in his judgment says: "There was, therefore, no fraud or undue concealment by the plaintiff" (the assured) "of a material fact within his personal knowledge. On the other hand it is clear that the fact of the loss of the vessel and damage to the cargo might have been communicated to him by Rees by means of the telegraph; but was purposely kept back by the agent for the fraudulent purpose of enabling the plaintiff to insure. We think it clear, looking to the position of Rees as agent to purchase and ship the cargo for the plaintiff, that it was his duty to communicate to his principal the disaster which had happened to the cargo; and looking to the now general use of the electric telegraph in matters of mercantile interest between agents and their employers, we think it was the duty of the agent to communicate with his employers by that speedier means of communication." Further on the Chief Justice says, "that, if an agent, whose duty it is, in the ordinary course of business, to communicate information to his principal as to the state of a ship and cargo, omits to discharge such duty, the owner, in the absence of information as to any fact material to be communicated to the underwriter, effects an insurance, such insurance will be void on the ground of concealment or misrepresentation." Then come these very important words: "The insurer is entitled to assume, as the basis of the contract between him and the assured, that the latter will communicate to him every material fact of which the assured has, or in the ordinary course of business ought to have, knowledge; and that the latter will take the necessary measures by the employment of competent and honest agents to obtain, through the ordinary channels of intelligence in use in the mercantile world, all due information as to the subject-matter of the insurance. This condition is not complied with where, by the fraud or negligence of the agent, the party proposing the insurance is kept in ignorance of a material fact which ought to have been made known to the underwriter, and through such ignorance failed to disclose it." The case we are now considering is a much stronger case than *Proudfoot* v. *Montefiore* (*ubi sup.*), for here the agent, who designedly withheld material information, was at the time employed by the assured to effect an insurance. The case of *Stribley* v. *The Imperial Marine Insurance Company* (3 Asp. Mar. Law Cas. 134; 1 Q. B. Div. 507) does not appear to me to carry the matter beyond the cases already cited.

The authorities therefore support the conclusion at which I have arrived. I fail, however, to see why, in principle, there should be any distinction between the case where the insurance is effected by the agent who obtained the information, and when it is effected by another agent employed about the insurance. In both cases the assured, by a suppression of what ought to have been communicated to him, obtains an insurance which he would not otherwise have got. The underwriters are as much misled in the one case as the other. In both cases there is misconduct on the part of the agent of the assured; in both cases the underwriters are free from blame. It seems to me unjust, and against public policy, that a person, through whose agent's fault the mischief has happened, should profit to the detriment of those who are in no way in fault. On the ground of the implied contract between the parties, I am of opinion that the defendant is entitled to succeed. The concealment by an agent who is bound to give the intelligence violates the undertaking on which the contract is founded, in the same way as a similar concealment by a principal. The underwriter has a right to believe, when he accepts the risk, that he is placed in possession of all the information which the assured himself has, or which it was the duty of any agent of his to communicate. The underwriter does not intend to insure risk concealed by some agent employed to obtain an insurance, who ought to have communicated them to his principal, any more than he does risks concealed by the agent actually effecting the insurance, or concealed by the principal himself. It is admitted that freedom from mis-

representation or concealment is a condition precedent to the right of the assured to insist on the performance of the contract, so that, on a failure of the performance of the condition, the assured cannot enforce the contract. I entirely agree; but it is insisted also that, if the misrepresentation or concealment is by an agent, it does not vitiate the policy when the principal is innocent, unless the agent be the agent employed to effect the insurance. I cannot accede to that. I think there must be a freedom from misrepresentation or concealment, not only so far as the agent by or through whom the policy is effected is concerned, but in respect of any agent employed by the assured to obtain the policy, whose duty it was to communicate material facts to his principal. Any more limited construction, to my mind, would be against public policy, against principle, contrary to authority, and would tend to encourage fraud and collusion in transactions where *uberrima fides* is essential. The appeal, in my opinion, must be allowed.

Solicitors for the appellant, *Waltons, Bubb,* and *Johnson.*

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

END OF VOL. V.