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REPORTS

OF CASES RELATING TO

MARITIME LAW;

CONTAINING ALL THE

DECISIONS OF THE COURTS OF LAW AND EQUITY

IN

The United Kingdom,

AND SELECTIONS FROM THE MORE IMPORTANT DECISIONS

IN

The Colonies and the United States.

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Page 68, in head note, after "for the days" insert "beyond what was."
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4. *Bill of Lading — Indorsee.* — The contract between the indorsee of a bill of lading and the shipowner is contained in the bill of lading. (Ct. of App.) *Leduc and Co.* v. *Ward* ..... *page* 290

5. *Bill of lading—Indorsee—Marks on cargo—Estoppel.*—Where a memorandum on a bill of lading provides that if quality marks are used (on bales of jute) they are to be of the same size as the leading marks, and contiguous thereto, and if such quality marks are inserted in the shipping notes, and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and "the ship shall be responsible for the correct delivery of the goods," and the mate, by mistake, inserts wrong quality marks in the shipping notes, and the master copies such quality marks into the bill of lading, the shipowner incurs no liability to an indorsee who, without notice of the error, receives the goods actually shipped, because the memorandum does not apply to anything but correct quality marks as existing on the bales themselves, and because the shipowners are not estopped by the representation as to quality in the bill of lading. (Ct. of App.) *Cox, Patterson, and Co.* v. *Bruce and Co.* 152

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7. *Bill of lading—Policy of insurance—Perils of the seas.*—The words "perils of the seas" have the same meaning in a policy of insurance and in a bill of lading. (H. of L.) *The Xantho* 207

8. *Carrying capacity—Guarantee—Dead weight—Admissibility of evidence—Practice.*—Where a charter-party, which provided that the ship should load a cargo of sleepers and timber, and therewith proceed to Smyrna, contained the words "owners guarantee ship to carry at least about 90,000 cubic feet, or 1500 tons dead weight," but in fact the ship was able to load only 65,000 cubic feet, equal to 1120 tons dead weight of the cargo specified in the charter-party the court held in an action by the charterer against the shipowner that there was no guarantee that the ship would carry the named quantity of the cargo mentioned in the charter-party, *i.e.*, sleepers and timber, and that evidence was admissible to show that she would carry such quantity of dead-weight ordinary cargo. (Q. B. Div.) *Carnegie* v. *Connor and Co.* 447

9. *Delivery of cargo—Bill of lading—Named consignee—German law.*—Where by a bill of lading goods are to be delivered to a named consignee or his assigns, and it is not assigned, the master is not justified either by English or German law in delivering to the consignee without his producing the bill of lading, and if he does so, and the consignee has no right to the possession of the goods, the shipowner is liable to the shipper for damages for wrongful delivery. (Adm. Div.) *The Stettin* ..... *page* 395

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13. *Demurrage—Bill of lading—Charter-party—Consignees—Freight.*—Consignees under a bill of lading making the goods deliverable to them "paying freight and all other conditions as per charter-party," are not liable to pay demurrage stipulated for by the charter-party and incurred at the port of loading, though they have taken delivery of the goods, providing they are, and are known to the shipowners to be, acting as agents, and have refused to accept delivery on the terms of the bill of lading, and have repudiated all liability for demurrage before accepting delivery. (Q. B. Div.) *Steamship County of Lancaster* v. *Sharpe and Co.* 448

14. *Demurrage—Charter-party—Ship to proceed to Odessa, or so near thereto as she might safely get—Commencement of running days.*—Where by the terms of a charter-party a ship was to proceed to Odessa, or so near thereto as she might safely get, and deliver her cargo alongside any safe wharf, store, craft, steamer, depôt, ship, or arsenal, as ordered by the receiver, the time for unloading to commence from the time she was ready and intimation thereof has been given in writing, and after her arrival in the harbour, she being ready to discharge was ordered by the receiver to a quay which was the usual place for the discharge of the cargo in question, but she had to wait her turn before she could get along-

side the quay to discharge, it was held, that the lay days commenced to run from the time when she was ready to discharge, and that the consignees were liable for the delay during the time she was waiting for her turn. (Adm. Div.) *The Carisbrook* .....*page* 507

15. *Demurrage—Charter-party—Weather permitting—Loading.*—Where by a charter-party shipments are to be made "weather permitting," this means "sea weather" permitting. The weather which interferes to save demurrage in such a case must be weather which if there were cargo ready to load would be an obstacle to the loading of the vessel. Where thunderstorms, rains, and floods caused a delay in bringing the cargo from a distance to the port of loading, this is not such weather as brings the case within the charter-party, so as to save demurrage. (Q. B. Div.) *Stephens* v. *Harris and Co.* 192

16. *Demurrage — Exception — Strike — Cholera—Cessation of work.*—In a charter-party, containing the usual provision for payment of demurrage, with the exception "no demurrage to be paid the vessel in case of any hands 'striking work' which may hinder the loading of vessel," the word "strike" is to be understood in its ordinary meaning, that is, as a strike of workmen against their employers in the ordinary sense of the word. Abandonment of the work by the workmen through fear of cholera, which had broken out in the district, is not a "strike" within the meaning of "hands striking work." (Q. B. Div.) *Stephens* v. *Harris and Co.* 192

17. *Demurrage—Lay days—Commencement of—Ship to proceed to Odessa or so near thereto as she might safely get.*—Where by the terms of a charter-party a ship was to proceed to Odessa or so near thereunto as she might safely get, and there load, and on her arrival in the Odessa outer harbour she could not get alongside a quay loading berth for some days in consequence of the docks being full, and it was only possible to load her alongside a quay berth, it was held that the lay days commenced to run as soon as the ship had arrived in the outer harbour as near as she could safely get to a quay loading berth. (Q. B. Div.) *Re an Arbitration between Pyman Brothers and Dreyfus Brothers* 444

18. *Demurrage—Lay days—Stevedores' strike.*—The contract by the freighter to pay demurrage to the shipowner, if the ship is not unloaded at the expiration of a fixed number of lay days, is an absolute one, subject to the shipowner doing nothing to prevent the unloading; and, consequently, where the ship is being unloaded by the joint act of the shipowners and freighters, and under a contract between the shipowners and stevedores the latter employ the necessary dock labourers, and delay in unloading is caused by a strike of the labourers employed on behalf of the shipowners and freighter, the freighter is not relieved from his liability to pay demurrage, as the shipowners have no control over the labourers. (Ct. of App.) *Budgett and Co.* v. *Binnington and Co.* 592

19. *Excepted perils—Bill of lading—British ship—Lex loci contractus—Law of the flag.*—Where goods shipped by a foreigner at a foreign port were to be carried thence to a British port in a British ship, under a bill of lading exempting the shipowner from liability for loss or damage caused by negligent navigation, and according to the *lex loci contractus* such stipulation was void, the court held that the shipowner was entitled to the benefit of such stipulation, as, from the special provisions of the contract, it appeared that the parties were contracting with a view to the law of England. (Ct. of App.) *Re The Missouri Steamship Company Limited; Monroe's claim*.....*page* 423

20. *Excepted perils—Bill of lading—Charter-party—All other conditions, &c.—Negligence of master and crew.*—The plaintiffs, the indorsees of a bill of lading, sued the defendants for damages for loss of goods shipped on board the defendants' vessel. The goods were shipped by the charterer, and the charter-party contained the following exceptions in print: "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 nature and kind soever, during the said voyage," and in writing at the end: "Negligence clause as per Baltic Bill of Lading 1885." The clause in the Baltic Bill of Lading 1885 excepted "Strandings, collisions, and all losses, even when occasioned by the negligence, default, or error of judgment of the pilot, master, mariners, or other servants of the shipowner." The bill of lading provided that the goods were to be delivered, "the act of God, &c., excepted, unto order or to assigns, they paying freight for the said coals, and all other conditions as per charter-party with average accustomed." Held, that the reference to the charter-party did not extend the exceptions contained in the bill of lading, and that, as the goods were lost through the negligence of the master of the vessel, the plaintiffs were entitled to judgment. (Huddleston, B.) *Serraino and Sons* v. *Campbell* 526

21. *Excepted perils—Bill of lading—Charter-party—"All other conditions, &c."—Incorporation.*—Where a bill of lading contains certain excepted perils, and after them the words "paying freight for the said coals and all other conditions as per charter-party," the latter words do not incorporate the excepted perils in the charter-party, but they only refer to the conditions in the charter-party *ejusdem generis* with the payment of freight. (Huddleston, B.; since affirmed on appeal.) *Serraino and Sons* v. *Campbell* 526

22. *Excepted perils—Bill of lading—Jettisoned deck cargo—Shipowner's risk.*—Where cargo is carried on deck at the shipowner's risk in violation of the contract contained in the bills of lading which contain an exception relieving the shipowner from liability for goods jettisoned, the shipowner is liable to the indorsees for the jettison, notwithstanding the fact that it is carried on deck in accordance with the practice of the port of loading and with the knowledge and acquiescence of the shipper. (H. of L.) *Royal Exchange Shipping Company* v. *Dixon* 92

23. *Excepted perils—Bill of lading—Negligence—Navigation.*—The exceptions in a bill of lading of "negligence or default of the pilot, master, mariners, engineers or other persons in the service of the ship, whether in navigating the ship or otherwise," are an absolute exception from liability for damage caused, whether in negligently navigating the ship or in negligently bringing about any other losses from which the shipowner has exempted himself in the bill of lading. (Q. B. Div.) *Norman* v. *Binnington* 528

24. *Excepted perils—Charter-party — Engineers—Negligence — Navigation.* — A provision in a charter-party exempting the owners from liability for loss of or damage to cargo caused by the "act, neglect, or default of the master or crew in the navigation of the said vessel in the ordinary course of the voyage" does not relieve

them from liability for damage to cargo caused by the joint negligence of one of their crew and shore engineers employed by them to repair the ship's engines, whereby water gets to the cargo when the ship is moored in dock at her port of destination and after part of her cargo has been discharged. (Ct. of App.) *The Accomac... page* 579

25. *Excepted perils—Charter-party—Neaps, and stoppage of navigation—Delay in loading.*—Where it was agreed by charter-party that the charterer should not be liable for delay in loading caused by neaps and stoppage of navigation, and the lay days were exceeded in consequence of the lighters which were bringing the cargo (one of salt) down the rivers Weaver and Mersey to Birkenhead, the place of loading, being delayed by neaps of exceptional lowness at the junction of the Mersey and Weaver, and it was proved that it is the invariable practice for all salt intended for foreign exportation to be brought to Birkenhead from the Weaver by water; that there are no storehouses for salt at Birkenhead; and that it is never kept there to await the arrival of vessels, the charterer was held to be relieved from liability under the above exceptions, upon the ground that they must be taken to apply to bringing the cargo to Birkenhead for loading purposes. (Charles, J.) *The Sailing Ship Atherton Company Limited* v. *Falk*..... 287

26. *Excepted perils—Charter-party—Negligence—Sea-water—Voyage—Unseaworthiness.*—Where by the terms of a charter-party a ship described as being at A. is to proceed to B. and there load a cargo for delivery at C., the shipowner not to be liable (*inter alia*) for the negligence of the master or crew, or other servants, "during the said voyage," and after part of the cargo has been taken on board at B., and before the ship has started, such cargo is damaged by water which gets into the hold through a valve in the engine-room being left open by the negligence of one of the engineers, such damage is caused by the above excepted peril "during the said voyage," nor is the ship to be deemed to be unseaworthy, and therefore the shipowner is not liable. (Adm. Div.) *The Carron Park* 543

27. *Excepted perils—Negligence of pilots, master, and mariners—Bill of lading—Stowage of goods—Voyage.*—The exceptions in a bill of lading of "negligence or default of the pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise," apply to damage done to goods whilst being stowed and before the voyage has commenced. (Q. B. Div.) *Norman* v. *Binnington and Co.* 528

28. *Excepted perils—Collisions—Dangers and accidents of the seas—Loss of cargo—Bill of lading—Charter-party.*—Where goods carried under a charter-party, providing that the shipowner is not to be liable for "dangers and accidents of the seas, rivers, and navigation," are damaged through collision with another ship, the shipowner is not liable if the collision was due solely to the negligence of the other ship. (Ct. of App.) *Sailing Ship Garston Company Limited* v. *Hickie, Borman, and Co.* 71

29. *Excepted perils—Collision—Loss of cargo—Bill of lading.*—Loss of or damage to cargo by collision happening without any negligence on the part of the carrying ship, is loss or damage by perils of the seas within the meaning of those words in a bill of lading. (H. of L.) *The Xantho*..... 207

30. *Excepted perils—Dangers and accidents of the seas—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 is caused by a "danger or accident of the seas" within the meaning of a charter-party and bill of lading. (H. of L. reversing Ct. of App.) *Pandorf* v. *Hamilton, Frazer, and Co.* ..... *page* 212

31. *Excepted perils—Loss of cargo—Bill of lading—Collision—Onus of proof—Practice.*—*Quære*, whether, where a shipowner is sued for loss of cargo carried by him under a bill of lading containing the exception perils of the sea, and the plaintiff proves non-delivery and the shipowner loss by collision, the onus of showing negligence is thrown upon the plaintiff, or whether the defendant must show that the collision occurred without any negligence on his part. (H. of L.) *The Xantho*..... 207

32. *Excepted perils—Transshipment—Bills of lading—Loss of cargo.*—Where a vessel laden with cargo discontinues her voyage, and the cargo is transshipped by the shipowner into other bottoms for the purpose of earning the freight due under the original contract of carriage—but without the assent of the cargo-owners, although they were within reach of communication—the shipowner cannot, in an action by the cargo-owner for non-delivery, protect himself from liability by exceptions in the bills of lading given by the masters of the ships into which the goods have been transhipped, if such exceptions were not contained in the original charter-party and bill of lading. (Adm.) *The Bernina* 112

33. *Freight—Advance of—Charter-party—Insurance.*—Where a cargo is shipped under a charter-party containing the clause "one third freight, if required, to be advanced less three per cent. for interest and insurance, and the vessel is wrecked and the cargo lost, the charterers are liable to pay the advanced freight, although the shipowners do not ask for payment until after the loss. (Charles, J.; since reversed on appeal, see vol. vii.) *Smith, Hill, and Co.* v. *Pyman, Bell, and Co.* 565

34. *Freight—Advance of—Loss of cargo—Measure of damages—Charter-party.*—Where goods bought on terms including cost freight and insurance are shipped by the vendors on the defendant's ship under a charter-party stipulating for the payment of freight in advance, and the goods are lost by the defendant's negligence, the vendees having paid the vendors for the goods a sum which included the advanced freight and having received in exchange the bills of lading and a policy on the advanced freight, are entitled in an action against the shipowners for non-delivery, the damages being considered with reference to the value of the goods at their port of destination, to recover as part of their damages the advanced freight as being part of the price of the goods, and consequently the insurer who has paid to the cargo owner the amount of such advanced freight is entitled to sue for it in the plaintiff's name unless debarred by agreement. (Denman, J.) *Dufourcet and Co.* v. *Bishop and others* 109

35. *Limitation of liability—Collision—Transshipment—Subsequent loss of cargo.*—When, in consequence of a collision, cargo is transshipped and lost by the negligence of the master and crew of the then carrying ship, the decree in a limitation action, limiting the liability of the owner of the original ship in respect of the loss or damage caused by the improper navigation of his ship on

the occasion of the collision, does not protect him from liability for the subsequent loss of the cargo, and the cargo-owners, notwithstanding such decree, are entitled to sue him for the loss. (Adm.) *The Bernina*.....*page* 112

36. *Parties—Right to sue—Loss of cargo—Bill of lading—Indorsee.*—Where plaintiffs in an action for loss of cargo by collision prove that the cargo was shipped to their order, and that the bill of lading is indorsed to a bank to secure advances, they retain sufficient interest in the cargo to entitle them to sue. (Priv. Co.) *The Glamorganshire*..... 344

CATTLEMEN.

See *Salvage*, No. 12.

CESSER CLAUSE.

See *Charter-party*, Nos. 2, 3.

CHARTER PARTY.

1. *Construction—Cancellation clause—Custom of port—Ready to receive cargo.*—Where by a charter-party made and signed in London it was provided that the charterers should have the option of cancelling the charter if the ship was not "ready to receive cargo" at a foreign port by a certain date the question whether the ship was ready to receive cargo within the charter-party is not affected by a custom of the port of loading by which vessels are not to be considered ready to receive cargo till moored alongside the quay, but must be determined by the fact whether the ship is or is not in the port in readiness to go to a loading berth before the named date. (Charles, J.) *Hick* v. *Tweedy and Co*..... 599

2. *Construction—Cesser clause—Colliery guarantee—Demurrage.*—It was agreed by charter-party between the plaintiffs, the owners of a steamship, and the defendants, the charterers, that the ship should proceed to C. and there "load in the usual and customary manner a cargo of coals," and proceed to T. "The vessel to be loaded as customary, but subject in all respects to the colliery guarantee, in 108 colliery working hours." The cargo was to be unloaded at a specified rate per day, "or charterers to pay demurrage at the rate of 30s. per hour." The master was to sign "clean bills of lading without alteration as presented by charterers." "The charterers' liability under this charter-party to cease on the cargo being loaded and the advance freight paid, the owners having a lien on the cargo for the balance of the freight and demurrage." By a colliery guarantee, the proprietors of a colliery undertook to load the ship for the defendants in 108 hours. "Demurrage, if any, to be at the rate of 20s. per hour." The vessel was not loaded in 108 colliery working hours. In an action brought by the plaintiffs against the defendants for damages for demurrage, or in the alternative for detaining the vessel an unreasonable time at the port of loading: Held, that the defendants were not liable, as the "cesser clause" in the charter-party covered the claim made by the plaintiffs. (Cave, J.) *Restitution Steamship Company* v. *Sir John Pirie and Co*..... 428

3. *Construction — Cesser clause — Demurrage.*—A "cesser clause" in a charter-party applies not merely to liability for demurrage, but to liability incurred through detention in the nature of demurrage. (Cave, J.) *Restitution Steamship Company* v. *Sir John Pirie and Co*..... 428

4. *Demurrage — Colliery guarantee — Charterers' liability—Right of action.—Semble*, that the owners of a ship have no right of action against the charterers under a colliery guarantee whereby colliery proprietors contract with the charterers to load the ship in a specified time and fail to do so, unless the guarantee is incorporated with the charter-party; but that the right of action under such guarantee, if the shipowners have any such right at all, would be against the colliery proprietors. (Cave, J.) *Restitution Steamship Company* v. *Sir John Pirie and Co.* ... *page* 428

5. *Disbursements — Coals — Charterers and shipowners' liability.* — By a charter-party between the charterers and the owners of a steamer, it was provided that the owners should maintain her in a thoroughly efficient state; that the charterers should provide and pay for all coals and fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever not appertaining to the working or efficiency of the steamer; and that if in consequence of the deficiency of men or stores, collision, want of repairs, breakdown, and other causes, she put into any port other than that to which she was bound, the port charges, pilotages, and other expenses at such port should be borne by the owners. The steamer put into a port to which she was not bound, for the alleged purpose of repairing the condenser, which was leaking. In consequence of such deviation the master had to buy extra coals, and now sought to make the shipowners liable for them. Held, that, assuming the deviation was caused by the breakdown of the condenser, the price of the coals was not "port charges, pilotages, and other expenses," and that therefore the shipowners were not liable. (Adm. Div.) *The Durham City*..... 411

6. *Principal and agent—Liability of.*—1. A charter-party signed by persons in their own names without qualification renders them personally liable as principals unless there is something in the body of the contract inconsistent with their personal responsibility, and this is so even though they may have in fact signed as agents for other persons. (Charles, J.) *Hick* v. *Tweedy and Co.* 599

See *Carriage of Goods*, Nos. 1, 6, 8, 11, 12, 13, 14, 15, 16, 17, 20, 21, 24 to 30, 34—*Collision*, Nos. 16, 32—*County Courts Admiralty Jurisdiction*, No. 7—*Marine Insurance*, No. 10—*Shipowners*, No. 7—*Wages*, No. 1.

CHIEF CLERK'S CERTIFICATE.

See *Sale of Goods*.

CLEAN BILL OF LADING.

See *Carriage of Goods*, No. 2.

CLOSE-HAULED SHIP.

See *Collision*, Nos. 85 to 88.

COALS.

See *Charter-party*, No. 5.

COLLIERY GUARANTEE.

See *Charter-party*, Nos. 2, 4—*County Courts Admiralty Jurisdiction*, No. 1.

COLLISION.

1. *Arbitration—Mutual Collision Club—Estoppel*—A. and B. were members of a Smack-owners' Mutual Collision Club. By art. 52 of its articles of association the club was liable only up to 30*l*. By art. 56 it was provided that "in the event of a collision occurring between two

vessels insured in this company, or their respective trawling gear, and damages being caused thereby to either or both of the said vessels or their gear, the owners of such vessel shall immediately submit a statement of the whole circumstances of the collision, and the directors, after receiving such statement, shall have power to arbitrate on the matter, and their decision in the matter shall be final and conclusive." A. gave notice to the club that the trawl warp of his fishing smack had been cut by B.'s fishing smack drawing her trawl across A.'s trawl. A.'s master was subsequently taken by A.'s agent to a meeting of the directors, and there examined as to the alleged collision, and his evidence was reduced into writing by the secretary. The secretary then gave notice to B. of A.'s claim, and thereupon B.'s mate attended a meeting of the directors and gave evidence, the effect of which was that the damage had not been done by his ship or trawl gear. His evidence was also reduced into writing. At a subsequent meeting of the directors B.'s master was examined, the written statements of the two other witnesses were then read over, and the directors then passed a resolution that B.'s trawl had not been in collision with A.'s. The plaintiff was not present when either of the defendant's witnesses were examined, nor when his claim was adjudicated upon, and had no notice that the meetings were to take place. A. having sued B. *in rem* in the County Court, B. alleged that the decision of the directors was final. Held, that the plaintiff had never submitted his claim against B. to the directors; that there had been no proper hearing of the case by the directors, and that the alleged arbitration was no defence to the action. (Adm. Div.) *The Warwick* .....*page* 545

2. *Barge in dock—No one in charge—Negligence.*—Whilst a barge was by night lying astern of a steamship in a dock the latter moved her propeller and cut a hole in the barge. It appeared that there was no one on board the barge at the time of the accident. In a collision action: Held, that, although the steamer was to blame, the barge was also to blame for not having anyone on board of her, as, had there been, the collision might have been avoided, and in any event the barge might have been beached before she sank, and therefore the plaintiffs could only recover half the damages. (Adm. Ct.) *The Scotia* 541

3. *Compulsory pilotage—Danube Navigation Rules—Liability of shipowners.*—The provisions of arts. 85, 89, and 92 of the regulations for the navigation of the Lower Danube, making the employment of pilots by steamers compulsory but confining their duties to pointing out the local peculiarities of the river and leaving the responsibility of the navigation with the master, do not relieve shipowners from liability for damage solely caused by the negligent navigation of the pilot. (Adm.) *The Agnes Otto* 119

4. *Compulsory pilotage — Havre — Foreign law.*—Although the employment of a pilot by a vessel entering the port of Havre is, by French law, compulsory, such pilot does not as of right, as is the case in England, supersede the master and take charge of the ship, but, according to French decisions, the master remains in charge, the pilot being merely his adviser; hence, though the master may allow such pilot to take charge in fact, the owners are not exempted from liability for damage done to another ship by the negligence of the pilot. (Ct. of App. affirming Adm. Div.) *The Augusta* 58, 161

5. *Compulsory pilotage—Tyne Pilotage Order Confirmation Act*, 1865.—The Tyne Pilotage Order Confirmation Act 1865 (28 & 29 Vict. c. 44) was meant to be a complete code for regulating pilotage in the River Tyne, and was intended to supersede the pilotage provisions in the Act 41 Geo. 3, c. lxxxvi., and therefore sect. 16 of the schedule of the Tyne Pilotage Order Confirmation Act 1865 exempts all vessels, whether British or foreign, from compulsory pilotage in the port of Newcastle-upon-Tyne. (Ct. of App. affirming Adm.) *The Johann Sverdrup*... *page* 16, 73

6. *Compulsory pilotage—Vessel at anchor—Burden of proof.*—Where the plaintiffs in a collision action show that their vessel was at anchor exhibiting a proper light, and was struck and damaged by another ship, they make a *primâ facie* case of negligence against the defendants, the owners of the ship in motion, and the burden of proof upon the defendants, to rebut the presumption of liability, is not discharged by merely proving that their ship was in charge of a pilot by compulsion of law without proving that the cause of the collision was solely the fault of the pilot. (Ct. of App.) *The Indus*..... 105

7. *Costs—Admission of liability—Both ships to blame.*—In a collision case where both ships are to blame, the plaintiff is entitled to his costs if in his statement of claim he admits that he is to blame. (Adm. Ct.) *The General Gordon* 533

8. *Costs—Compulsory pilotage—Pleadings.*—Where in a collision action the plaintiffs, upon the defendants pleading compulsory pilotage, discontinue the action, they must, in the absence of special circumstances, pay all the costs. (Adm.) *The J. H. Henkes*..... 121

9. *Costs—Counter-claim — Compulsory pilotage.*—In a collision action, where the defendants' vessel, although solely to blame on the merits, is relieved from liability on the ground of compulsory pilotage, a counter-claim will be dismissed with costs. (Adm. Div.) *The Ruby* 577

10. *Costs—County Court.*—Where successful plaintiffs in a collision action in the High Court recovered less than 300*l.* they were allowed no costs, although they claimed more than the County Court limit. (Adm. Div.) *The Herald* 542

11. *Costs—Inevitable accident.*—In cases of collision caused by inevitable accident, costs, as a general rule, will follow the event, notwithstanding the former practice in the Admiralty Court to make no order as to costs in such cases. (Ct. of App.) *The Monkseaton* 383

12. *Costs—Inevitable accident.*—As a general rule a defendant relying upon and succeeding upon the defence of inevitable accident in a case of collision is entitled to his costs, but there may be exceptions to this rule as where, in addition to such defence, the defendant alleges facts inconsistent therewith and fails to establish their truth. (Ct. of App.) *The Batavier*..... 500

13. *Costs—Inevitable accident—Pleadings.*—Where the plaintiffs in a collision action admit in their reply that the collision was not occasioned by the defendants' negligence, and offer to consent to a decree of inevitable accident, the defendants, in the absence of special circumstances, are entitled to judgment with costs. (Adm.) *The Naples* ... 30

14. *Costs—Joint defendants—Judgment against one.*—Where the owners of a barge in tow of a tug having been damaged by collision with a steamship, instituted an action against the owners of both tug and steamer to recover damages, and the steamer, which alleged that the collision was due to the negligence of the tug, was found alone

to blame, the Court ordered the owners of the steamer to pay the costs of the plaintiffs and of the successful defendants. (Adm. Div.) *The River Lagan* .....*page* 281

15. *Costs—Joint defendants—Judgment against one.*—Where the owners of a pier, which had been damaged by the steamship *V.* colliding with it, sued jointly the owners of the *V.* and the owners of the steamship *A.* for the damage, alleging that the damage was due to the negligence of the *V.*, or alternatively that the *V.* was forced to come into contact with the pier by reason of the negligent navigation of the *A.*, and each defendant by his defence alleged that the damage was due to the negligence of the other steamer, the Court having found that the *A.* was to blame, ordered her owners to pay the costs of the plaintiffs, and of the owners of the *V.* (Hawkins, J.) *Green and Burleigh* v. *Goodyear and the General Steam Navigation Company*... 281 n.

16. *Damages — Consequential loss of earnings — Chartered voyage—Demurrage.*—Where a ship is damaged by collision while prosecuting a voyage in the course of which she has secured an engagement for a new voyage, and in consequence of such damage is unable to fulfil the engagement, her owners are entitled to recover from the wrongdoer the fair and ordinary earnings which she might have earned on the new voyage, less any earning she in fact made during the whole or any period of the time she would have been engaged in the new voyage if the accident had not happened, the loss of such earnings being the direct and natural consequence of the collision, but they are not entitled in addition thereto to demurrage during the time the ship is under repair. (Ct. of App. and H. of L.) *The Argentino*... 348, 433

17. *Damages—Demurrage—Evidence.*—To entitle a shipowner to recover demurrage he must show actual loss resulting from the detention of his ship, and give reasonable proof of its amount. (Priv. Co.) *The City of Peking* 572

18. *Damages—Demurrage—Substitution of another vessel—Wages and maintenance.*—Where successful plaintiffs in a collision action claimed demurrage during the time their vessel was under repairs, and it appeared that the plaintiffs substituted another of their ships to do the work of the damaged ship, the expenses and loss incidental to this substitution being allowed against the defendants, and the plaintiffs failed to show that they had sustained any pecuniary loss by the detention of their ship, it was held that they were not entitled to recover demurrage; but that, if they could show an actual out-of-pocket expense usually included in the term demurrage, such as wages and maintenance of crew, they would be entitled to recover such sums. (Priv. Co.) *The City of Peking*..... 572

19. *Damages—Loss subsequent to Collision—Mistake without negligence.*—In an action for damages by collision, a claim for consequential loss, caused by a mistake of the master of the injured vessel after the collision, is recoverable from the wrongdoer in the absence of negligence or want of ordinary skill on the part of the master, provided such mistake was one which might reasonably have been made in consequence of the damaged condition of the vessel. (Ct. of App.) *The City of Lincoln* 475

20. *Damages—Loss subsequent to collision—Mistake—Without negligence.*—A collision between the Swedish barque A. and the steamship C., about 6 p.m. on the 7th Nov., about twelve miles N. of the Hinder Lightship, was solely caused by the negligent navigation of the steamship. In consequence of the collision the barque's starboard quarter was cut off, and her steering compass, log glass, and gear for rudder and wheel were lost. The steering compass having been replaced by a spare compass and tackles having been rigged on to the rudder, the master of the A., with a view to saving the vessel, sailed up the Thames, but between three and four p.m. next day the A. went ashore in consequence of her master mistaking the Tongue Lightship for the Kentish Knock. The owners of the barque (*inter alia*) claimed for the loss occasioned by the stranding. Held, that the stranding was due to the master of the barque being deprived by the collision of the ordinary means of navigation, and that in the circumstances the owners of the steamship were liable. (Ct. of App.) *The City of Lincoln*.....*page* 475

21. *Damages—Measure of—Registrar and merchants—Improper abandonment—Cost of raising.*—Where, in a collision action for which the defendants were held to blame, the court found that after the collision the plaintiff's vessel had been improperly abandoned, and it appeared that in consequence thereof she sank and was afterwards raised by the plaintiffs, whereas she might have been beached, the Court directed the registrar in assessing the damages, that, as the only ascertainable extra cost arising from the abandonment was the cost of raising, he was to disallow that amount. (Adm. Div.) *The Hansa*..... 268

22. *Damages—Registrar and merchants—Practice—Evidence.*—On a reference in a collision action the registrar and merchants are not bound by uncontradicted evidence as to the amount of damage done, but are entitled to use their own judgment and experience, and find in accordance therewith. (Adm.) *The Bernina* 65

23. *Damages—Registrar and merchants—Practice—Insolvency of claimant—Shipwright.*—Where in the registrar's report in a collision action it appears that the claimant claims (*inter alia*) as part of his damages the cost of repairing his ship, but has not paid the shipwright, and has since the repairs were effected become insolvent, and the registrar allows such item, the court has no power to do anything to ensure the money being paid over by the claimant to the shipwright, and will not retain the money in the registry until the claimant has given satisfactory evidence that he has paid the shipwright. (Adm. Div.). *The Endeavour* 511

24. *Damages—Restitutio in integrum—Classification.*—A successful plaintiff in a collision action is entitled to have his ship put into the same condition in which it was previous to the collision at the cost of the wrong-doer, irrespective of the fact that some of the of the repairs necessitated by the collision would shortly have been necessary to enable the ship to pass her classification survey, and in estimating the amount of the wrong-doer's liability no deduction can be made on this account, unless it be shown that any part of the work done was for the classification rather than arising out of the collision. (Adm.) *The Bernina* 65

25. *Fog—Altering helm.*—Where those in charge of a steamship in a dense fog heard a steam-whistle about three and a half points on their starboard bow, distant about half a mile, and starboarded, the Court held that in the circumstances it was a proper manœuvre. (Ct. of App. and H. of L.) *The Vindomora* 438, 569

26. *Fog—Altering helm.* Although where two

vessels are approaching one another in a fog without sufficient indication to justify them in acting with their helm, neither vessel ought to alter her course, yet there is no hard-and-fast rule that a vessel hearing only a single whistle is never justified in manœuvring, and must be held to blame if she does so, but each case must be determined according to its own circumstances. (Ct. of App. and H. of L.) *The Vindomara*...*page* 438, 569

27. *Fog—Altering helm.*—Where those in charge of a steamship in a dense fog hear the whistle of another steamship on either bow, but not so broad that they may reasonably infer that she will clear their vessel, they ought not to manœuvre with the helm before seeing the other vessel. (Adm. Div.) *The Resolution*..... 363

28. *Humber and Ouse navigation—Keel—Dredging up.*—A keel with her mast lowered may drive up the river Ouse on a flood tide in any part of a river lashed to another keel, but it is her duty in such circumstances to go up dredging with her anchor down, in order that she may thereby have the means in an emergency of bringing herself up if necessary; and whilst two keels may drive up lashed together, there is no less duty imposed on them to dredge. (Adm.) *The Ralph Creyke* ... 19

29. *Humber and Ouse Navigation—Keel—Dredging-up—Navigable channel.*—In the absence of any rule of the road, regulation, or custom, there is no duty on the part of a keel or barge drifting up river to keep out of the deep water navigation and navigate in the shallow water, even though by remaining in the deep water she obstructs the passage of steamships which can only navigate in the deep water. (Adm.) *The Ralph Creyke* ... 19

30. *Humber and Ouse Navigation—Steamer—Smelling the ground—Speed.*—Where a steamer is navigating a reach in which there is a risk of her smelling the ground, it is her duty to be under such control by occasionally stopping her engines or otherwise, that she may be able to avoid collision with other craft in case she does smell the ground and fails to answer her helm. (Adm.) *The Ralph Creyke* 19

31. *Humber Navigation—Vessel at anchor—Lights.*—Art. 2 of the rules for the navigation of the river Humber requiring that vessels having two or more masts when at anchor shall exhibit two white lights, one near the bow the other near the stern, the latter of which shall be exhibited "at double the height of the bow light" does not require that the stern light shall be precisely double the height of the other; and therefore, where the lights were exhibited ten and twenty-five feet respectively from the deck, it was held that there was no breach of the regulation. (Adm. Ct.) *The Magneta* 531

32. *Liability in rem—Tug towing under charter—Tug owners not personally liable.*—A ship is not liable to be proceeded against *in rem* for damages unless her owners at the time of the accident are personally liable, and could be proceeded against *in personam* for the damage. Hence, where a tug company contract to tow upon terms exempting them from liability for damage caused be negligence, and they engage by charter a tug belonging to a third person to perform the towage, and the tug is by the charter placed under the charge of a servant of the company by whose negligence damage is done to a tow, the tug company by reason of the contract not being liable, and the owner of the tug not being personally liable, there is no liability *in rem* on the part of the tug for the damage done. (Adm. Div.) *The Tasmania*..... 305

33. *Look-out—Fishing smack—Number of hands on deck.*—It is the duty of a sailing smack during the day to have more than one hand on deck, and where a collision occurs between her and another smack, the primary cause of which is the wrongful manœuvre of the other smack, she will also be held to blame if it appears that had she had two hands on deck they might have taken means to have obviated the other's wrongful manœuvre. (Adm. Ct.) *The General Gordon*.....*page* 533

34. *Loss of life—Action in personam—Both ships to blame—Contributory negligence—Identification with carrying ship—Lord Campbell's Act.*—Where passengers and seamen off duty are killed in a collision between two ships, both of which are to blame, the deceased are not identified with their carrying ship so as to be deemed to be guilty of contributory negligence, and their personal representatives are entitled under Lord Campbell's Act to maintain actions against the owners of the non-carrying ship. (H. of L. affirming Ct. of App.) *The Bernina* 75, 257

35. *Loss of life—Action for—Lord Campbell's Act—Both ships to blame—Measure of damages.*—Sect. 25, sub-sect. 9, of the Judicature Act 1873, providing that "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," has no application to actions under Lord Campbell's Act instituted to recover damages for loss of life occasioned by a collision between two ships for which both are to blame, and hence successful plaintiffs in such cases are entitled to recover full damages, and are not limited by the Admiralty Court rule as to the division of damages to recovering only a moiety. (Ct. of App.) *The Bernina* 75

36. *Loss of life—Lord Campbell's Act—Judgment by default—Writ of inquiry—Practice.*—Where, in an action for loss of life by collision under Lord Campbell's Act instituted in the Admiralty Division the defendant makes default in pleading, the plaintiffs are entitled, under Order XXVII., r. 4, to enter interlocutory judgment, and to have the damages assessed and apportioned by a jury, and a writ of inquiry will be issued accordingly. (Adm. Div.) *The Orwell* 309

37. *Mersey Navigation Rules—Breach—Effect of—Lights.*—The steamship *H.* at night ran into the barque *E.* at anchor in the river Mersey. By Order in Council of the 5th Jan. 1881, made under the powers of the Merchant Shipping Act 1862, every vessel when at anchor in the river Mersey shall carry two white lights, the after light being carried double the height of the foremost light. The *E.* exhibited two anchor lights, both of which were about twenty feet above the deck. It was admitted by the defendants that they only saw the after light. Held, that the *H.* was to blame for a bad look-out, and the *E.* to blame for a breach of the regulation, it not being shown that in the circumstances of the case the breach could not have contributed to the collision. (Adm. Div.) *The Hermod* 509

38. *Mersey Navigation Rules—Stern light.*—The proper place to carry the stern light prescribed by art. 5 of the Mersey Rules is from the centre of the taffrail, so that it is a foot or eighteen inches below it. (Adm.) *The Fire Queen* 146

39. *Practice—Both ships to blame—Agreement to discontinue.*—The owners of a ship, and the

owners of the cargo on board it, respectively instituted actions *in rem* against another ship for damage by collision. In the ship action the parties signed a consent to "this action being discontinued on the ground of inevitable accident," and the registrar made an order for discontinuance accordingly. In the cargo action both ships were found to be in fault, and the defendants obtained a decree limiting their liability. The plaintiffs in the ship action thereupon obtained an order from the court to rescind the order for discontinuance, and made a claim in the limitation action against the fund in court. Held (affirming the judgment of the court below), that they were entitled to do so, the agreement and consent order amounting only to a discontinuance, and not to a release of all rights. (H. of L.) *The Kronprinz; The Ardandhu* .....*page* 124

40. *Practice—Double litigation—Lis alibi pendens —English and foreign courts — Bail.* — The owners of the British ship *R.* and the owners of her cargo sued the German steamship *R.* in the German Consular Court at Constantinople for damages for injury to the cargo caused by collision between the two vessels. An order was made therein for the arrest of the *R.*, or for bail, subject to the plaintiffs giving security for a certain sum. The action was proceeded with, but the plaintiffs never gave the required security, and consequently the *R.* was never arrested. The *R.* left Constantinople during the pendency of the action and came to England, where she was arrested in the present action *in rem* instituted by the owners of cargo in respect of the same cause of action. Previously to the institution of the present action the defendants had given bail in the action at Constantinople, to which port the *R.* was a constant trader, although the plaintiffs in that action had never given the required security. The limit of the defendants' liability in the German Consular Court was the value of the *R.*, a sum considerably less than the limit of their liability in this country. Upon motion by the defendants to release the *R.* without giving bail, or to stay the action: Held (affirming Butt, J.), that bail having been given without the plaintiffs having deposited the required security, was given voluntarily and not under compulsion, and that the plaintiffs were not proceeding vexatiously in instituting a second action in this country, and that the ship ought not to be released. (Ct. of App.) *The Reinbeck* 366

41. *Practice—Authority of master—Right to sue—Foreign port—Cargo.—Semble*, that the master of a ship carrying cargo, where his ship and cargo have been damaged by collision in or near a foreign port, has authority to institute an action *in rem* in the foreign port against the offending ship on behalf of both ship and cargo, and the owners of the cargo cannot, so long as that suit is pending in their names, be allowed to deny his authority. (Adm. Div.) *The Reinbeck* 366

42. *Practice—Interrogatories—Preliminary Act—Crew drowned.*—In a collision action, where the plaintiffs' vessel was lost with all her crew who could give evidence as to the collision, the Court allowed the plaintiffs, before filing their statement of claim, to administer interrogatories to the defendants as to the circumstances of the collision, including information given in the preliminary act. (Adm. Ct.) *The Isle of Cyprus*..... 534

43. *Practice—Laches—Delay—Trial.*—In a collision action *in rem* the plaintiffs are not limited to any specified time during which they must institute their action, but where there has been a long lapse of time between the collision and the institution of the action, and the defendants seek to have the action dismissed on the ground of laches and delay, the question for the court in each case is whether it is inequitable to allow the action to proceed, and in determining this question the court will consider the opportunities the plaintiffs have had of arresting the defendants' ship, the availability of the defendants' witnesses, and all other circumstances affecting the possibility of securing a fair trial; and should the action be allowed to proceed, every reasonable presumption will be made at the hearing in favour of the defendants. (Adm. Div.) *The Kong Magnus*...*page* 583

44. *Practice—Laches—Delay—Trial.*—A collision having occurred between the British ship *M.* and the Norwegian steamship *K. M.* in 1878, the owners of the *M.* in 1889 instituted the present action *in rem*. The *K. M.* was owned by a limited company in which there had been changes of interest since the collision. Between the dates of the collision and action the *K. M.* had been thirty-five times in English ports, and twelve times in Scotch ports. Some of the crew of the *K. M.* were not available to give evidence. The defendants asked the court to refuse to entertain the action on the ground of laches and delay in its institution. Held, that, although the plaintiffs had had several opportunities of arresting the *K. M.*, the circumstances were not such as to make it inequitable for the action to proceed, but that in trying the case the court would make every reasonable presumption in favour of the defendants. (Adm. Div.) *The Kong Magnus* ... 583

45. *Practice — Nautical assessors — Evidence of nautical matters—Screw alley.*—In Admiralty actions, where the court is assisted by nautical assessors, evidence as to matters of nautical skill and knowledge is not admissible, and hence, where in a damage to cargo action the judge found, on the advice of his assessors, that all screw alleys, however well made, may emit smells which may damage sensitive cargo stowed in the vicinity, the Court of Appeal, being assisted by assessors, refused to allow the appellants, the shipowners, at the hearing of the appeal, to call evidence to show that the particular screw alley did not emit a smell, on the ground that it was a question of nautical skill about which evidence could not be given. (Ct. of App.) *The Assyrian* 525

46. *Practice—Nautical assessors — Reasons — Appeal.*—Where in a collision action the nautical assessors sitting in the Admiralty Division reduce their reasons into writing, parties appealing from the decision are not entitled to see these reasons or have copies of them for the purposes of the appeal. (Ct. of App.) *The Banshee* 130

47. *Practice—Preliminary act—R. S. C., Order XIX., r.* 28.—The principle of filing a preliminary act, under Order XIX., r. 28, applies to every division of the High Court, and is not confined exclusively to actions in the Admiralty Division. (Q. B. Div.) *Secretary of State for India* v. *Hewitt and Co. Limited* 384

48. *Practice — Preliminary act — Queen's Bench Division.*— Where owners of cargo laden on a barge sued the owners of a vessel in the Queen's Bench Division for damage to the cargo caused by a collision between the barge and defendant's vessel, the court ordered the plaintiff to file a preliminary act. (Q. B. Div.) *Secretary of State for India* v. *Hewitt and Co. Limited* 384

49. *Practice — Preliminary act — Queen's Bench Division.*—Where the owner of a barge sued the owners of a tug in the Queen's Bench Division

for damage to the barge and her cargo caused by the tug towing her into collision with another vessel, the Court refused to order the plaintiffs to file a preliminary act. (Q. B. Div.) *Armstrong and Co.* v. *Gaselee and others* .....*page* 353

50. *Practice—Sale of ship—Damages.*—Where the plaintiffs in a collision action *in rem* applied to the court to order a sale of their ship so as to bind the defendants on the question of damages hereafter, the Court refused the application. (Adm. Div.) *The Wexford* 244

51. *Regulations for Preventing Collisions at Sea—Breach.*—An infringement of the Regulations for Preventing Collisions at Sea, which by no possibility could have anything to do with the collision, will not render a ship liable. (Priv. Co.) *The Glamorganshire* 344

52. *Regulations for Preventing Collisions at Sea—Breach, effect of—Onus of proof.*—In a collision action where either party has infringed the Regulations for Preventing Collisions at Sea, he is deemed to be in fault unless he can establish that the infringement could not possibly have caused or contributed to the collision; and it is the duty of the judge to determine upon the evidence whether or not the party committing the breach has satisfied the burden of proof that the breach could not possibly have occasioned or contributed to the collision. (Ct. of App.) *The Duke of Buccleugh* 471

53. *Regulations for Preventing Collisions at Sea, art.* 3.—*Breach—Effect of.*—The steamship *A.* collided with the sailing ship *B.*, striking her on the port bow with her stem. The red light of the sailing ship was obscured by the foresail to a vessel substantially right ahead. The steamship approached the sailing ship on a bearing never less than one point to two and a half points on the port bow, and the red light of the sailing ship was in fact always open to the steamship. Held, that, on the proper construction of sect. 17 of the Merchant Shipping Act 1873, although the sailing ship had infringed the regulations as to lights, the court was bound to consider the evidence as to whether such infringement could in fact have contributed to the collision, and that, as in the circumstances the infringement could not possibly have contributed to the collision, the owners of the sailing ship were not to blame. (Ct. of App.) *The Duke of Buccleugh* 471

54. *Regulations for Preventing Collisions at Sea—Breach of—Merchant Shipping Act* 1873.—Where those in charge of a ship, although exercising reasonable care, do not in fact know, and have not the means of knowing, that they are infringing one of the Regulations for Preventing Collisions at Sea, the ship will not be held in fault under sect. 17 of the Merchant Shipping Act 1873 (36 & 37 Vict. c. 85. (H. of L.) *The Theodore H. Rand* 122

55. *Regulations for Preventing Collisions at Sea—Breach—Necessity.*—Where one of the Regulations for Preventing Collisions at Sea has been infringed by a vessel, the fact that the infringement is comparatively venial, and that the reckless navigation of the other vessel is the principal and primary cause of the collision, does not justify the court in absolving the vessel guilty of infringement from blame unless necessity for such infringement is established. (Priv. Co.) *The Aratoon Apcar*..... 491

56. *Regulations for Preventing Collisions at Sea—Breach—Practice—Evidence—Onus of proof*—In considering whether a breach of the Regulations for Preventing Collisions could possibly have contributed to a collision, the court must take into consideration the whole of the evidence, even where there is a conflict, subject to the qualification that the onus of proof lies on those infringeing the Regulations; and if upon such evidence the court comes to the conclusion that the breach could not possibly have contributed to the collision, the ship committing it is not to be deemed to blame in respect thereof. (Adm. Div.) *The Hermod* .....*page* 509

57. *Regulations for Preventing Collisions at Sea, art.* 16—*Crossing ships—Narrow channel—Cardiff drain.*—Art. 16 of the Regulations for Preventing Collisions at Sea, directing that if two steamships are crossing so as to involve risk of collision the ship which has the other on her starboard side shall keep out of the way of the other, applies in a narrow channel where it is the duty of steamships to keep to that side of mid-channel which lies on their starboard side; and hence, where a steamship going up Cardiff Drain sees a vessel on her starboard side coming down the channel from the Roath Basin, it is her duty to keep out of the way of the other, and the duty of the latter under art. 22 to keep her course; and if the latter, instead of doing so, ports to get on to the starboard side of the channel, she is to blame for breach of art. 22 of the Regulations. (Ct. of App.) *The Leverington* 7

58. *Regulations for Preventing Collisions at Sea, art.* 10—*Fishing vessel—Trawl gear fast—Signal—Foghorn.*—When a fishing vessel becomes stationary in consequence of her gear getting fast to a rock or other obstruction, it is her duty, under art. 10 (d) of the Regulations for Preventing Collisions, to make the fog signal for a vessel at anchor, even though there be no fog, and if she fails to do so she is guilty of a breach of the Regulions. (Adm. Div.) *The Warwick* 545

59. *Regulations for Preventing Collisions at Sea, art.* 10—*Fishing vessel—Trawler—Lights—Sailing ship—Duty to keep clear.*—Where a steam trawler with her trawl down is going so slowly that there would be difficulty in getting out of the way of other vessels, it is her duty to carry the extraordinary lights prescribed by the schedule, Part I. of the Order in Council, dated the 30th Dec. 1884, and made in pursuance of the Merchant Shipping Act Amendment Act 1862, and not the ordinary lights of a steamship under way; and if she is carrying the former lights she is relieved from the duty prescribed by art. 17 of the Regulations for Preventing Collisions, of getting out of the way of sailing ships. (Adm. Div.) *The Tweedsdale* 430

60. *Regulations for Preventing Collisions at Sea, art.* 18—*Duty to stop and reverse—Speed—Onus of proof.*—When two steamships are approaching so as to involve risk of collision, and it is the duty of one to keep out of the way, and of the other to keep her course, the latter is bound to comply with art. 18 of the Regulations, as to slackening her speed or stopping and reversing if necessary; and if she does not do so the onus lies upon her to show that to continue her speed was in fact the best and most seamanlike manœuvre under the circumstances. (H. of L.) *The Memnon* ... 488

61. *Regulations for Preventing Collision at Sea, art.* 18—*Duty to stop and reverse—Risk of collision.*—The steamship *M.* sighted the masthead and green light of the steamship *S.*, distant about three miles, and bearing about two and a half points on the port bow. When the *S.* got within three ship's lengths of the *M.*, still showing her masthead and green lights at a bearing of four points on the port bow, she suddenly starboarded, and, although

the *M.* immediately stopped her engines, a collision occurred. The Court, having held that the *S.* was to blame, further found that the respective courses of the vessels were such that had the *S.* kept her course and not starboarded she would have passed one and a half ship's lengths astern of the *M.*, and that the best and most seamanlike manœuvre for the *M.* was to continue her speed as she did, but that there was in fact risk of collision before the *S* starboarded, and that the *M.* was to blame for breach of art. 18 in not stopping sooner. (Ct. of App.) *The Memnon* .....*page* 317

62. *Regulations for Preventing Collisions at Sea, art.* 18—*Duty to stop and reverse—Risk of collision.*—Where two steamships are approaching so as to involve risk of collision, and it is the duty of one to keep out of the way and of the other to keep her course, the latter is bound to comply with art. 18 of the Regulations as to slackening her speed or stopping and reversing, notwithstanding the fact that by continuing her speed may be the best and most seamanlike manœuvre for the purpose of avoiding a collision. (Ct. of App.) *The Memnon*..... 317

63. *Regulations for Preventing Collisions at Sea, art.* 18—*Risk of Collision.*—Semble, that if it is shown by a ship not complying with art. 18 of the Regulations that, taking into consideration all the circumstances of the case, compliance with the regulation would have increased the risk, such non-compliance will not cause the ship to be held in fault. (H. of L.) *The Memnon*... 488

64. *Regulations for Preventing Collisions at Sea, art.* 18—*Fog—Duty to stop and reverse.*—If a steamship is approaching another in a dense fog, without the means of ascertaining, except by fog signals, the course which the other is pursuing, unless there are indications to convey to a seaman of reasonable skill that they are in such a position as to pass well clear of each other, it is her duty to stop and reverse, under art. 18 of the Regulations for Preventing Collisions, and (in the absence of other circumstances making it dangerous to do so) she will be held to blame if she does not, and a collision takes place. (H. of L.) *The Ceto* 479

65. *Regulations for Preventing Collisions at Sea, art.* 12 — *Fog — Sailing ship — Tacking — Fog signal.*—Where a sailing vessel is tacking in a fog, she is not relieved during the manœuvre from giving the signals prescribed by art. 12 of the Regulations for Preventing Collisions at Sea, and it is her duty until she gets the wind on to the side other than that on which she has had it to treat herself as still on the tack on which she was when she began to go about and to make the prescribed signal, and only to change that signal when she gets the wind on the other side. (Adm. Div.) *The Constantia* 478

66. *Regulations for Preventing Collisions at Sea, Art.* 13—*Fog—Speed—Stopping.*—If a steamer in a fog cannot reduce her speed sufficiently to comply with art. 13 of the Regulations for Preventing Collisions at Sea, without occasionally stopping her engines, it is the duty of those in charge of her so to stop them. (Adm. Div.) *The Resolution* 363

67. *Regulations for Preventing Collisions at Sea, art.* 18 — *Fog — Speed — Stopping.*—Where an officer in charge of a steamship in a dense fog hears a whistle apparently two to three points on the bow, but cannot be sure of the bearing within a point or two, and does not know the heading of the vessel whistling, it is his duty to diminish the speed of his vessel to the utmost to give him time to ascertain the manœuvres of the other vessel, and for that purpose he must either reduce the speed until the engines are only just moving, or he must stop them, but he need not necessarily continue to keep them stopped, but only sufficiently to diminish his way, and when he is beginning to lose steerage way, then and only then, may put them on again, but as slowly as is possible. (Adm. Div.) *The Rosetta*...*page* 310

68. *Regulations for Preventing Collisions at Sea, art.* 12 — *Fog — Steam-whistle—Lookout.*—The fact of a steam-whistle alleged to have been blown in a fog not being heard by those on an approaching ship is not necessarily proof that there was a bad look-out on the approaching ship, as the direction in which and the distance from which the sound would be heard is uncertain. (Adm. Div.) *The Rosetta*..... 310

69. *Regulations for Preventing Collisions at Sea, art* 22—*Keeping course—Overtaking vessel.*—*Semble*, that a vessel, which is being overtaken by another, is not to blame within art. 22 of the Regulations if she alters her course at such a distance ahead of the overtaking vessel that the latter can, by the exercise of reasonable care, keep out of the way of the former. (Ct. of App.) *The Banshee* 221

70. *Regulations for Preventing Collisions at Sea, art.* 22—*Keeping course—Overtaking vessel.*—*Quære*, what is the duty of a vessel which is being overtaken as to keeping her course when it becomes necessary for her to manœuvre for another vessel. (Ct. of App.) *The Banshee*..... 221

71. *Regulations for Preventing Collisions at Sea, arts.* 22, 23—*Keeping course — Special circumstances.*—Where two ships are approaching one another so as to involve risk of collision, and it is the duty of one to keep her course and of the other to keep out of the way, the officer in charge of the former ought, as soon as it is obvious to him that keeping his course will involve immediate danger, to alter it and to exercise his best judgment to avoid danger; but, in considering his conduct, it must be remembered that if it is the gross negligence of the other vessel which places him in difficult position of having to judge whether, and if so, how, he is to alter his course, great allowances must be made for him. (Ct. of App. and H. of L.) *The Tasmania* ...381, 517

72. *Regulations for Preventing Collisions at Sea, arts.* 22, 23—*Keeping course—Steamer and sailing ship.*—The fact that a steamship is neglecting to keep out of the way of a sailing ship does not make it the duty of the sailing ship to take measures to avoid a collision, except possibly in very exceptional circumstances, because it is possible for a steamship to act for a sailing ship up to almost the last moment, and any action on the part of the sailing ship might be liable to increase risk of collision. (Adm. Div.) *The Highgate* 512

73. *Regulations for Preventing Collisions at Sea, art.* 23—*Keeping course — Departure from—Special circumstances.*—The s.s. *H.* was approaching the sailing ship *S.* for several minutes, with her masthead and red lights open, on the starboard bow of the *S.* The *S.* kept her course till a collision was imminent, and then hard-a-ported, but the *H.* with her port side struck the stem and port bow of the *S.* The *H.* admitted that she was to blame, but contended that the *S.* was also to blame for breach of art. 23 of the Regulations, in not manœuvring for the *H.* after she saw the *H.* persisting in doing nothing to keep out of her way. Held, that the *S.* was not to

blame, as the circumstances were not such as to require the *S.* to alter her course and manœuvre for the *H.* (Adm. Div.) *The Highgate*..... *page* 512

74. *Regulations for Preventing Collisions at Sea, art.* 3—*Lights—Cathead—Obscuration.*—Where in a collision action it is alleged that there has been a breach of the regulations as to lights, the question to be determined is whether there has been a reasonable compliance—a literal compliance is not intended; and hence a vessel whose side lights are obscured by the catheads to the extent of two and a half to three degrees on either bow sufficiently complies with the regulations. (Adm.) *The Fire Queen* 146

75. *Regulations for Preventing Collisions at Sea, art.* 3—*Lights—Place.*—It is not an infringement of art. 3 of the Regulations for Preventing Collisions at sea, to carry side lights in the rigging. P. C.) *The Glamorganshire*..... 344

76. *Regulations for Preventing Collisions at Sea, art.* 5—*Lights—Ship not under command.*—A ship temporarily aground in a fairway is "not under command" within the meaning of the Regulations for Preventing Collisions at Sea, and should therefore in such circumstances exhibit the three lights required by the regulations. (Hanseatic Ct. of App.) *The John Johnasson*... 39 n.

77. *Regulations for Preventing Collisions at Sea, art.* 11—*Lights—Flare-up—Overtaking vessel.*—Where the lights of an overtaking vessel are sighted about two miles off, and a flare-up light is exhibited for a short time from the vessel which is being overtaken, and a collision occurs about ten minutes after the extinction of the flare-up, without any further light being exhibited, art. 11 of the Regulations for Preventing Collisions at Sea is infringed, as it is the duty of a vessel which is being overtaken to exhibit a white or flare-up light at reasonable intervals so long as the other vessel continues to be overtaking. (Adm. Div.) *The Essequibo*..... 276

78. *Regulations for Preventing Collisions at Sea, art.* 11—*Lights—Fixed stern light—Crowded waters.*—In crowded waters, where a vessel is being frequently overtaken by others, she does not contravene the Regulations for Preventing Collisions at Sea by carrying a fixed stern light. (Adm. Ct.) *The Stakesby*..... 532

79. *Regulations for Preventing Collisions at Sea, art.* 11—*Lights—Fixed stern light.—Semble*, a vessel carrying a fixed stern light, the rays of which show within the area of the side-lights, must be held to blame if a collision occurs, unless she can show that the carrying of such a light could not have contributed to the collision. (Adm. Div.) *The Imbro* 392

80. *Regulations for Preventing Collisions at Sea, art.* 11—*Lights—Fixed stern light.—Semble*, it is a breach of the Regulation for Preventing Collisions at Sea to carry any fixed stern light, as the Regulations only contemplate a stern light being shown when there is a vessel overtaking. (Adm. Div.) *The Imbro* 392

81. *Regulations for Preventing Collisions at Sea, art.* 11—*Light—Stern light.*—It is a breach of the Regulations for Preventing Collisions at Sea to carry a fixed stern light, the rays of which show within the area of the side lights. (Adm. Div.) *The Imbro* 392

82. *Regulations for Preventing Collisions at Sea, art.* 11—*Lights—Stern light—Overtaking vessel.*—Where one of two ships is abaft the beam of the other in such a position that the hinder ship cannot see the side lights of the leading ship, and the former is going at a greater speed than the latter, and getting nearer to her, the latter is a "ship which is being overtaken by another" within the meaning of art. 11 of the Regulations for Preventing Collisions at Sea, even though the hinder ship broadens on her quarter; and she is in such circumstances bound to show a stern light in sufficient time to enable the other, by the exercise of reasonable precautions, to avoid risk of collision. (Ct. of App.) *The Main* ..... *page* 37

83. *Regulations for Preventing Collisions at Sea, art.* 11—*Lights—Stern light—Overtaking vessel.*—The range of the stern light prescribed by art. 11 of the Regulations for Preventing Collisions at Sea ought never to overlap that of the side lights, and if it is carried in any way other than is necessary to warn overtaking vessels, it is an infringement of the regulations. (Adm. Div.) *The Palinurus* 271

84. *Regulations for Preventing Collisions at Sea, art.* 11—*Lights—Stern light—Binnacle.*—Although the exhibition of an ordinary binnacle light may in some circumstances be a compliance with art. 11 of the Regulations for Preventing Collisions at Sea, such a light, owing to its peculiar construction and form, is not calculated to give the warning required by the article, and ought not to be used for the purpose. (Adm. Div.) *The Patroclus*..... 285

85. *Regulations for Preventing Collisions at Sea, art.* 14—*Sailing ship—Luffing—Trade winds.*—The custom of sailors to treat sailing ships when in the trades as close-hauled ships when they are sailing a point or two from being as close-hauled as they can lie, does not affect the legal construction of the regulation, and the court will not exonerate vessels so sailing from duties applicable to sailing ships in other latitudes. (Ct. of App.) *The Earl Wemys*..... 407

86. *Regulations for Preventing Collisions at Sea, art.* 14—*Sailing ship—Luffing—Trade winds.*—The sailing ship *E. W.* while sailing free in the trades, saw the red light of the sailing vessel *A.* on her starboard bow. The *A.* was sailing close-hauled (as it is called in the trades), but was in fact not as close to the wind as she could lie. As the vessels approached the *E. W.* ported to keep out of the way of the *A.* At about the same the *A.* not only luffed up as close as she could to the wind, but also went a little farther under a starboard helm, thus counteracting the porting of the *E. W.* and a collision occurred. Held, that the *A.* altered her course in breach of art. 22 of the Regulations for Preventing Collisions, and was to blame for the collision. (Ct. of App.) *The Earl Wemys*..... 407

87. *Regulations for Preventing Collisions at Sea, art.* 14—*Sailing ship—Luffing.—Semble*, a sailing ship is close-hauled within the meaning of art. 14 of the Regulations for Preventing Collisions if she is sailing half a point free of the nearest she can lie to the wind, but not if she is two points off. (Ct. of App.) *The Earl Wemys*..... 407

88. *Regulations for Preventing Collisions at Sea, art.* 14—*Sailing ship—Luffing.*—The decisions holding that a vessel close-hauled, with her yards braced sharp up, may luff close to the wind does not justify a vessel close-hauled, but rather off the wind, in luffing to the extent of 2½ points when approaching a vessel whose duty it is to get out of her way. (Adm. Div.) *The Earl Wemys* 364

89. *Regulations for Preventing Collisions at Sea, art.* 18—*Time of application—Risk.*—The Regulations for Preventing Collisions at Sea only apply at a time when two vessels have approached

so near to one another that, if either of them does anything contrary to the regulations, risk of collision will be involved. (Ct. of App.) *The Banshee* ..... *page* 221

90. *River Navigation—Rounding points—Duty to wait.*—Where two steamships going in opposite directions in the Scheldt sight one another, one above a point and the other below it in the river, and if both keep on they will meet at the point, it is the duty of the steamer navigating against the tide to wait until the other steamer has passed clear. (Adm. Div.) *The Talabot* 602

91. *Tees Conservancy rules—Starboard side of river—Port helm.*—Arts. 17 and 18 of the River Tees Conservancy Bye-laws, providing that ships shall keep "the starboard side of the river so that the port helm may always be applied," and that a "steamship, when approaching another ship on an opposite course or from an opposite direction, shall before approaching within thirty yards slacken her speed, and keep as near as possible to the starboard side of the river," are to be observed even when vessels are approaching one another so as to show each other their green lights, and nothing will excuse the non-observance of these rules but extreme necessity. (Ct. of App.) *The Mary Lohden*..... 262

92. *Thames Conservancy Rules* 1872, *art.* 19—*Anchorage ground—Anchor a-cockbill.*—Where a vessel, intending either to moor at one of the buoys or anchor in the anchorage ground in Gravesend Reach, finds all the buoys occupied, and, on passing the last buoy, gets her anchor a-cockbill for the purpose of bringing herself to anchor on finding a suitable place, and, after she has got a short distance above the buoys, a collision occurs and damage is done by the anchor, such anchor is only a-cockbill during such time as is "absolutely necessary" for bringing her to anchor within the meaning of art. 19 of the Rules and Bye-laws for the Navigation of the River Thames 1872. (Adm. Div.) *The City of Delhi* 269

93. *Thames Conservancy Rules* 1872, *art.* 15—*Anchorage Ground—Gravesend Reach.*—Where a vessel intending either to moor at one of the buoys or anchor in the anchorage ground in Gravesend Reach, moves from buoy to buoy to select one, and, finding them all occupied, anchors a short distance above the last of the buoys, she does not navigate within the anchorage ground in contravention of art. 15 of the Rules and Bye-laws for the Navigation of the River Thames 1872. (Adm. Div.) *The City of Delhi* 269

94. *Thames Conservancy Rules* 1880, *arts.* 6 *and* 7—*Barge dredging with mast down—Vessel under way—Lights.*—A sailing barge at night dredging down the Thames stern first on the ebb tide, with her anchor touching the ground, and her mast lowered, is neither a "sailing vessel under way," nor a vessel at anchor within the meaning of arts. 6 and 7 of the Rules and Bye-laws for the Navigation of the River Thames, and is therefore neither bound to carry side lights nor anchor light, and if she shows a white globe light she does all that prudence requires. (Adm. Div.) *The Indian Chief* 362

95. *Thames Conservancy Rules*, 1872, *art.* 20—*Dumb barges—Anchor—Fog.*—Dumb barges in the Thames do not carry anchors, and have no means of bringing themselves up except by going ashore or fastening on to anything they may come in contact with, and hence a dumb barge starting on her voyage in clear weather and getting into a fog, is not guilty of negligence if she comes into contact with a vessel moored in the river, and if that vessel in breach of the Rules and Bye-laws for the Navigation of the River Thames has her anchor not stock-a-wash, and the barge is thereby injured, the vessel so moored is solely responsible for such damage. (Adm. Div.) *The Rose of England* ..... *page* 304

96. *Thames Conservancy Rules* 1880, *art.* 24—*Crossing ship.*—A steamship ceases to be "crossing from one side of the river towards the other side" within the meaning of art. 24 of the Rules and Bye-laws for the Navigation of the River Thames, when her stem has got so far across that it can go no further, although she is still athwart the stream; but where a vessel is swinging for the purpose of turning in the river with her anchor down but not holding, she is not a crossed ship if she is still moving towards the shore, although she may have got more than athwart, and although her stern may be swinging to the tide. (Ct. of App.) *The River Derwent* 467

97. *Thames Conservancy Rules* 1830, *art.* 24—*Crossing ship.*—The steamship *A.*, having come up the Thames as far as Bugsby's Reach on the flood tide, was about to turn head down, and, having whistled, her helm was ported and anchor let go so that it might dredge, and she began to swing round. Meanwhile the steamship *R. D.*, which had been coming up the river astern of the *A.*, instead of taking any steps to keep out of the way of the *A*, although she saw that the *A.* was doing nothing to keep out of her way in obedience to art. 24 of the Thames Rules and Bye-laws, came on and collided with the *A.* Held, that both vessels were to blame, the *A.*, because being a crossing ship, she neglected to keep out of the way of the *R. D.*, and the *R. D.* because, after she saw that the *A.* was neglecting her duty to keep out of the way, she failed to take any steps in sufficient time to avoid the collision. (Ct. of App.) *The River Derwent* 467

98. *Thames Conservancy Rules* 1880, *arts.* 24, 25—*Crossing ship—Keeping course.*—Where a vessel lying at anchor in the river Thames head to tide gets under way for the purpose of proceeding up or down the river with the tide, and in turning round she has to work across the river, she is a steam-vessel "crossing from one side of the river towards the other side" within the meaning of art. 24 of the Rules and Bye-laws for the Navigation of the River Thames, and it is her duty to keep out of the way of vessels navigating up and down the river, and of the latter to keep their course, under art. 25. (Adm. Div.) *The Schwan*..... 409

99. *Thames Conservancy Rules* 1872, *arts.* 10, 12—*Fog—Anchorage ground.*—Although a vessel may be justified in anchoring in the fairway of the Thames through being overtaken by a dense fog, such a place is not a proper anchorage ground under arts. 10 and 12 of the Thames Rules and Bye-laws 1872, and the duty lies on those in charge of her to move her as soon as they reasonably can, and if a collision occurs whilst she is so anchored, the question will be, whether between the time of her anchoring and the collision the weather was such that she could reasonably have been removed. (Adm. Div.) *The Aguadillana*..... 390

100. *Thames Conservancy Rules—Fog—Steamship under way—Dredging up.*—A steamship bound up the Thames on a flood tide ought not to leave a wharf and get under way in a dense fog, and, *semble*, if a vessel is overtaken by a dense fog in such circumstances, the proper mode for her to

go up is dredging up stern first with her anchor down, so that she can be brought up at any moment. (Adm. Div.) *The Aguadillana* ... *page* 390

101. *Thames Conservancy Rules* 1880, *art.* 21—*Steamer and sailing vessel—Steamer unable to get out of way.*—Where a steamship navigating the River Thames is in such a position, through no fault of those in charge of her, that it is unsafe or impracticable for her to keep out of the way of a sailing vessel, it is the duty of the sailing vessel, under art. 21 of the Rules and Bye-laws for the Navigation of the River Thames, on hearing the steamer's whistle sounded as therein provided, to keep out of the way of the steamer. (Adm. Div.) *The Longnewton* 302

102. *Thames Conservancy Rules*, 1880, *art.* 21—*Steamer and sailing vessel—Steamer unable to get out of the way.*—*Quære*, Is a sailing vessel, on hearing a steamer whistling, as required by art. 21 of the Thames Bye-laws, bound to keep out of the way of the steamer without knowing that it is in fact unsafe or impracticable for the steamer to keep out of her way? (Adm. Div.) *The Longnewton* 302

103. *Tug and tow—Contract—Liability of tow.*—The fact that a tow does not come into contact with, or do damage to, a vessel with which the tug collides will not release the owners of the tow from liability if the damage is occasioned by the negligence of the tow. (Adm. Div.) *The Niobe* 300

104. *Tug and tow—Joint tort feasors—Division of damages.*—In a collision action *in rem*, where a tug and tow are both pronounced to blame for a collision with another vessel, the owner of the latter vessel may enforce the judgment for the whole of his damages against either or both the defendants, and the defendants are not entitled to have the decree so drawn up that half only of the total damages is recoverable from each defendant. (Adm. Div.) *The Thomas Joliffe* 605

105. *Tug and tow—Liability of tow—Hopper barge—Master and servant.*—Where a hopper barge in charge of two men which had no motive power but which was provided with a rudder, was, by the negligence of her tug, towed into collision with another vessel, it was held that the owners of the tow were not liable for the negligence of the tug. (Adm. Div.) *The Quickstep* 603

106. *Tug and tow—Liability of tow—Master and servant.*—Where a tow is liable for the negligence of the tug which causes a collision is a question of fact in each case, and depends upon whether, in the circumstances, those in charge of the tug were so far under the control of the master of the tow as to be the servants of the owner of the tow. (Adm. Div.) *The Quickstep*.. 603

107. *Tug and tow—Night towage—Responsibility of tow.*—It is the duty of those in charge of a tow, which is being towed under an ordinary towage contract by night at sea, to control and superintend the navigation of tug and tow, and her owners are liable for damage occasioned by the negligence of the tug, unless it is the result of a sudden manœuvre which it is impossible for the tow to control. (Adm. Div.) *The Niobe* 300

108. *Tug and tow—Night towage—Responsibility of tow.*—Whilst the ship *N.* was being towed under an ordinary towage contract by night at sea with a long scope of hawser, both she and her tug collided with the sailing ship *V.* The owners of the tug admitted liability. It was proved that there was a bad look-out on the tow, and that if those on board her had seen the approaching vessel and given the tug orders in due time, the collision might have been avoided. Held, that the tug was under the control of the tow, and that the owners of the tow were liable for the damage. (Adm. Div.) *The Niobe* ..... *page* 300

109. *Tyne Navigation Rules, art.* 22—*Vessel crossing river.*—The duty imposed by art. 22 of the Rules for the Navigation of the River Tyne upon vessels crossing the river not to cause obstruction, injury, or damage to other vessels, does not require them in any event to get out of the way of vessels going up or down, and they are at liberty when crossing at a proper time and in a proper manner to do so at such times as may be convenient to themselves, and vessels proceeding up and down must take the ordinary precautions to avoid collision with crossing vessels. (Adm. Div.) *The Thetford* 179

110. *The Navigation Rules, art.* 20—*Vessel entering river—Side of mid-channel.*—A vessel entering the Tyne is bound, under bye-law 20 for the Regulation of the River Tyne, directing that vessels shall be brought into port to the north of mid-channel, to get on to a course to enable her to enter on the north side when at some considerable distance outside the pier-heads; and if she crosses from south to north of mid-channel, when close up to the pier heads, she thereby infringes the bye-law. (Ct. of App.) *The Harvest* 5

111. *Vessel at anchor—Ship colliding—Primâ facie evidence of fault.*—Where a ship is shown to have been properly at anchor with her anchor light burning, and is struck and damaged by another ship, the fact of the collision is *primâ facia* evidence of negligence on the part of the ship in motion, and the onus is upon the latter to prove that the collision was not occasioned by her negligence. (Ct. of App.) *The Annot Lyle*... 50

112. *Vessel at Anchor—Steamship—Primâ facie evidence of fault.*—The fact of a vessel under steam colliding with a ship at her moorings in daylight is *primâ facie* evidence of fault; and her owners cannot escape liability except by proving that a competent officer could not have averted the collision by the exercise of ordinary care and skill. (P. C.) *The City of Peking*..... 396

113. *Vessel at anchor — Steamship — Current—Neglect to let go anchor.*—Where a steamship under way collided with a vessel at her moorings in daylight in consequence of an exceptional current, known to be a possible though improbable occurrence, and it was proved that there was delay in dropping her anchor, and that the other anchor was not in readiness, she was found to have neglected ordinary precautions, and her owners were held liable. (P.C.) *The City of Peking* 396

See *Carriage of goods*, Nos. 3, 28, 29, 35, 36 — *Compulsory pilotage*, No. 2—*County Courts Admiralty Jurisdiction*, Nos. 2, 3—*Damage to Cargo—Marine Insurance*, Nos. 6, 17—*Practice* No. 2.

COMMISSION.

See *Naval Discipline Act*, Nos. 1, 2, 3—*Shipowners*, No. 5.

COMPANY.

See *Mortgagor and Mortgagee*, No. 7.

COMPULSION OF LAW.

See *Mortgagor and Mortgagee*, Nos. 2, 3.

COMPULSORY PILOTAGE.

1. *British ship—Place north of Boulogne.*—A British ship which is one of a line of vessels

making regular voyages from London to Japan and ports in the East, and back to London, and thence to ports in Europe north of Boulogne, and back to London, is a ship trading to a "place in Europe north of Boulogne" within the meaning of sect. 379 of the Merchant Shipping Act 1854, where she on a return voyage from the East goes to London, discharges her crew and part of her cargo, and then with the remainder of her cargo and a crew of runners, sails for Amsterdam, and she is therefore exempt from compulsory pilotage. (Q.B. Div.) *Courtney* v. *Cole*...*page* 169

2. *Collision—Place north of Boulogne—Repairs—Port of London.*—A vessel trading from Liverpool to Hamburgh, which, in consequence of a collision, puts into the port of London for repairs, and then proceeds on her voyage, is a ship trading to a "place in Europe north of Boulogne," within the meaning of sect. 379 of the Merchant Shipping Act 1854, and is therefore exempt from compulsory pilotage in the London district, and cannot thereby escape liability for a collision. (Adm. Div.) *The Sutherland* 181

3. *Compulsion—Harbour authority—Power to make bye-laws and appoint pilots—Penalties.*—It is competent for a harbour authority, which has power to make bye-laws regulating the navigation of their harbour and to appoint pilots, to make pilotage compulsory by means of such bye-laws, and to impose penalties for disobedience to them. (Ct. of App.) *The Ruby* 577

4. *Compulsion—Penalty—Public local Act—River Dee.*—Where a public local Act, in force before the passing of the Merchant Shipping Act 1854 and regulating a port, imposes a penalty on any unlicensed person taking upon himself to conduct or pilot any ship into or out of a port, pilotage is compulsory. Hence pilotage is compulsory for certain vessels navigating the Dee. (Q.B.Div.) *Jones and another* v. *Bennett*..... 596

5. *Foreign ship—Merchant Shipping Amendment Act* 1889.—The Merchant Shipping Amendment Act 1889 (52 & 53 Vict. c. 68) is retrospective, as it declares what the meaning of the principal Act of 1854 always has been, and by it the word "ship" in part V. of the Act of 1854 (relating to pilotage) includes "foreign ship." (Q.B. Div.) *Jones and another* v. *Bennett*..... 596

6. *Llanelly Harbour—Bye-laws*—Pilotage is compulsory in the harbour of Llanelly by virtue of 6 & 7 Vict. c. lxxxviii. and 21 & 22 Vict. c. lxxii., and the bye-laws made thereunder. (Ct. of App.) *The Ruby* 577

7. *Rates—Right to sue for—Action-at-law.*—Pilotage rates, fixed by bye-laws made by trustees under a local Act and under the Merchant Shipping Act 1854, and duly sanctioned by Her Majesty in Council, may be sued for by a pilot who has rendered service as such. (Q.B. Div.) *Jones and another* v. *Bennett* 596

See *Collision* Nos. 3 to 6, 8, 9—*Damage* No. 2.

CONCEALMENT.

See *Marine Insurance*, Nos. 4, 5.

CONSEQUENTIAL DAMAGE.

See *Collision*, Nos. 16, 19, 20.

CONSERVANCY AUTHORITY.

See *Salvage*, No. 22.

CONSIGNOR AND CONSIGNEE.

See *Carriage of Goods*, Nos. 9, 13, 14.

CONSOLIDATION.

See *Salvage*, No. 20.

CONSPIRACY.

Trade combination—Restraint of trade—Shipowners.—A combination by shipowners which offers advantageous terms to shippers confining their shipments to the combination's ships, and excludes such shippers from the advantages in the event of their making any shipment by an outside ship, not being a combination formed with the view of ruining the trade of other shipowners or from malice or ill-will towards them, but merely to keep the trade in the combination's hands is not in restraint of trade nor unlawful, and therefore an action will not lie against the combination for alleged wrongful conspiracy to prevent other shipowners from carrying on their trade. (Ct. of App.) *Mogul Steamship Company* v. *McGregor, Gow and Co. and others*...*page* 455

CONTRACT.

See *Carriage of Goods*, Nos. 1, 4.

CONTRIBUTION.

See *General Average*, No. 2—*Marine Insurance Association*, Nos. 3, 4, 5—*Mortgagor and Mortgagee*, Nos. 2, 3.

CO-OWNERS.

See *Shipowner*.

COSTS

See *Collision*, Nos. 7 to 15—*County Courts Admiralty Jurisdiction*, No. 4—*Salvage*, No. 20.

COUNTER-CLAIM.

See *Collision*, No. 9.

COUNTY COURTS ADMIRALTY JURISDICTION.

1. "*Agreement relating to hire or use of ship*"—*Colliery guarantee—Demurrage—Jurisdiction.*—A loading agreement between a colliery company and the charterers of a ship, by which the colliery company undertake to load the ship in a certain time, and pay demurrage if that time is exceeded, is not an "agreement made in relation to the use or hire" of a ship within the meaning of sect. 2 of the County Courts Admiralty Jurisdiction Amendment Act 1869, and hence the County Court has no jurisdiction on the Admiralty side to entertain a claim for demurrage against the colliery company. (Adm. Div.) *The Zeus* 312

2. *Collision—Damage—Pile driving machine.*—Damage to a pile driving machine used at a wharf on the bank of the River Thames by contact with the sailing gear of a barge sailing in the river is not "damage by collision" within the meaning of sect. 3, sub-sect. 3 of the County Courts Admiralty Jurisdiction Act 1868, and a County Court has no Admiralty jurisdiction in respect of such damage. (Q. B. Div.) *Robson* v. *The Owner of the Kate* 330

3. *Collision—Fishing smacks — Trawl gear.*—*Semble*, a County Court having Admiralty jurisdiction has jurisdiction, under the County Courts Admiralty Jurisdiction Act 1868, and the County Courts Admiralty Jurisdiction Amendment Act 1868, to entertain a cause of collision between the trawl gear of two fishing smacks. (Adm. Div.) *The Warwick* 545

4. *Practice—Costs—Witnesses.*—A County Court judge cannot lay down a general practice that

only the costs of such witnesses who have been called at the trial shall be allowed, and that if it be desired to have witnesses allowed who have not been called application is to be made to him, such practice being contrary to the provisions of Order L., r. 16, of the County Court Rules. (Adm. Div.) *The Cashmere*... *page* 515

5. *Practice—Interlocutory order—Appeal — Leave.*—Under sect. 26 of the County Courts Admiralty Jurisdiction Act 1868 leave to appeal from an interlocutory order in County Court actions on the Admiralty side must be obtained from the County Court judge, and this enactment is still applicable to such actions, notwithstanding the general provisions of sect. 120 of the County Courts Act 1838, and hence a party cannot appeal from such orders without leave. (Adm. Div.) *The Cashmere*..... 515

6. *Tug and tow—Damage to tow—Subsequent liability—Recovery over—Claim arising out of agreement in relation to use or hire of any ship.*—A tugowner, having been engaged to tow a vessel, contracted with another tugowner to provide a tug, which was guilty of negligence in the course of towage occasioning damage to the tow. The owners of the tow recovered this damage from the tugowner with whom they contracted, and the defendant in that action instituted the present action *in rem* in the County Court under the County Courts Admiralty Jurisdiction Amendment Act 1869, against the owner of the wrong-doing tug to recover back this amount. Held, on appeal, that sect. 2, sub-sect. 1 of the County Courts Admiralty Jurisdiction Amendment Act 1869, giving County Courts with Admiralty jurisdiction power to try "any claim arising out of any agreement made in relation to the use or hire of any ship," covered the present action. (Adm.) *The Isca* 63

7. *Venue—Charter-party—Action by shipowners.*—Shipowners may institute an action *in personam* against charterers for breach of charter-party, under sect. 2 of the County Courts Admiralty Jurisdiction Amendment Act 1869, in the County Court having Admiralty jurisdiction within the jurisdiction of which their vessel is at the commencement of such proceedings. (Adm. Div.) *The County of Durham* 606

8. *Wages — Mate—Articles — Lien.*—The County Court has jurisdiction under sect. 3 of the County Courts Admiralty Jurisdiction Act 1868 to entertain an action *in rem* for wages claimed by a chief mate who, having been paid off on the arrival of the ship in port, remains on board in port to superintend the loading for her outward voyage without signing fresh articles by the direction of the owners. (Q.B. Div.) *Reg.* v. *Judge of City of London Court* 547

See *Collision*, No. 10.

COURT-MARTIAL.

See *Naval Discipline Act*, Nos. 1, 2.

CROSS LIABILITIES.

See *Marine Insurance*, No. 17.

CROWN SUITS ACT 1865.

See *Practice*, Nos. 14, 15.

DAMAGE.

1. *Docking in dock — Harbour master — Foreman docksman — Authority — Negligence.*—The plaintiffs' vessel having fouled her propeller whilst entering the port and harbour of Port Talbot, was, with the permission of the foreman docksman in the absence of the harbour master, placed in the sea lock leading into the dock, for the purpose of being put upon the ground and freeing her propeller. On the water being let out, the vessel took the ground, and sustained damage to her bottom by sitting upon an old sill, which had not been removed when the lock was lengthened. It appeared that the control of the management of the dock was in the hands of the harbour master, who at the time was ill, and that the foreman docksman was acting in his place. It also appeared that the foreman docksman did not know the condition of the bottom of the lock, and had so informed the master of the *Apollo*. In an action by the shipowners against the dock authority: Held (Lord Esher, M.R. *dissentiente*), that the use of the lock for the purpose was an extraordinary use; that the master of the *Apollo* was a bare licensee; and that the foreman docksman had no authority to grant the use of the lock for such purpose so as to render the defendants liable for the damage ensuing. (Ct. of App., affirming Adm. Div.; since reversed by the H. of L.) *The Apollo* ..... *page* 356, 402

2. *Oyster-beds—Grounding — Removal — Compulsory pilot.*—A ship in charge of a compulsory pilot was at high water brought into and anchored by the pilot in a river in which there were oyster-beds, the existence of which was known to the pilot. The place where she was anchored was not the usual and customary place for vessels of her size and draught to anchor in. At low water she grounded, and thereby did damage to an oyster-bed. On notice of the existence of the oyster-bed being given to the master he took all reasonable means to remove his ship as speedily as possible. In an action by the lessee of the oyster-bed against the shipowner and the pilot: Held, that the act of the pilot in anchoring the ship where he did was negligence which made him liable, but that the ship was not liable because on receiving notice of the existence of the oyster-bed, the duty of the master, he having no previous knowledge of the locality, was to take all reasonable measures—not extraordinary measures—to remove his ship, and this he had done. (Adm. Div.) *The Octavia Stella*..... 182

3. *Royal Dockyard—Queen's Harbour Master—Liability—Damage to barge—Respondent superior.*—A barge belonging to the plaintiffs was moored in Chatham Dockyard at a berth pointed out by the foreman, and the barge was there damaged. In an action to recover the amount of the damage from the Port Admiral, the Admiral Superintendent, and the Queen's Harbour Master of Chatham Dockyard, being the officials in charge of the dockyard, the jury found that the berth was unsafe, and gave a verdict for the plaintiffs. Held, on further consideration, that, there being no Act of Parliament and no Order in Council rendering the defendants liable, their liability must be decided on common law principles, and that the doctrine of *respondeat superior* does not apply in such a case, but the doctrine of invitation does apply, and as there was no evidence that the defendants invited the plaintiff to moor the barge where they did, the defendants were not liable, and judgment must be for them. (Ct. of App.) *Wright and Son* v. *Lethbridge and others* 558

4. *Wharfingers—Ship taking the ground—Bed of river—Extraordinary obstruction—Representation—Warning.*—Although it may be the duty of wharfingers in a public river, alongside whose wharf vessels lie to load and discharge, to warn

the masters of such vessels of any unusual or extraordinary obstruction likely to injure them when coming alongside or leaving, it is not their duty to give information as to the condition of the ground alongside the wharf which is produced in the ordinary way by the action of the tide and the user of it by vessels taking the ground. (H. of L., reversing C. A., and restoring Adm. Div.) *The Calliope* .....*page* 359, 440, 555

5. *Wharfingers—Ship taking the ground—Bed of river—Representation.*—Where an agreement is entered into between ship-owners and wharfingers that a ship shall proceed to a wharf in the Thames for the purpose of discharging and loading cargo, and it is known to the parties that she must take the ground when the tide ebbs, there is an implied representation by the wharfingers, even though the bed of the river is not under their control, that they have taken reasonable care to ascertain that the bottom of the river at the wharf is in such a condition as not to injure the ship on her taking the ground; and if by reason of the uneven nature of the bed of the river she is injured, the wharfingers are liable. (Ct. of App. affirming Adm. Div.) *The Moorcock*.....357, 373

See *County Courts Admiralty Jurisdiction* No. 2.

DAMAGE TO CARGO.

Jurisdiction—Collision—Admiralty Court Act 1861.—The jurisdiction conferred by sect. 7 of the Admiralty Court Act 1861 "over any claim for damage done by any ship" does not cover a claim by a cargo owner against the ship carrying the cargo for damage received by the cargo in a collision. (Adm.) *The Victoria*..... 120

See *Carriage of Goods*, Nos. 29, 30—*Collision*, Nos. 48, 49—*Marine Insurance*, No. 6—*Marine Insurance Association*, Nos. 7, 8.

DANUBE REGULATIONS.

See *Collision*, No. 3.

DEADWEIGHT CARGO.

See *Carriage of Goods*, Nos. 8.

DEBENTURE HOLDERS.

See *Mortgagor and Mortgagee*, No. 7.

DECK CARGO.

See *Carriage of Goods*, No. 22.

DEE, RIVER.

See *Compulsory Pilotage*, Nos. 4, 7.

DEFAULT PROCEEDINGS.

See *Necessaries*, No. 2.

DELIVERY OF GOODS.

See *Carriage of Goods*, Nos. 9 to 12—*Stoppage in transitu.*

DEMURRAGE.

See *Carriage of Goods*, Nos. 13 to 18—*Charter-party*, Nos. 2, 3—*Collision*, Nos. 16, 17, 18—*County Courts Admiralty Jurisdiction*, No. 1.

DEVIATION.

See *Charter-party*, No. 5.

DISBURSEMENTS.

See *Charter-party*, No. 5—*Master's Wages and Disbursements.*

DOCK.

See *Damage*, Nos. 1, 3—*Mortgagor and Mortgagee*, No. 3.

DOCK RATES.

Liverpool—Trading outwards—Mersey Docks and Harbour Board.—A vessel sailing from Glasgow partially laden, entering the docks at Liverpool, and taking on board more cargo but not discharging any, and proceeding thence to a foreign port, there discharging and loading a cargo, sailing to Liverpool, entering the docks there, discharging part of her cargo and then returning with the remainder of her cargo or in ballast to Glasgow, is liable to pay to the Mersey Docks and Harbour Board such dock tonnage rates as are payable by a vessel "trading outwards" to the foreign port, and "trading inwards" from the foreign port, and not merely inward rates from Glasgow and inward rates from the foreign port. (H. of L.) *Mersey Docks and Harbour Board* v. *Henderson* .....*page* 338

DOUBLE LITIGATION.

See *Collision*, No. 40.

DOUBLE INSURANCE.

See *Marine Insurance Association*, No. 6.

ESTOPPEL.

See *Carriage of Goods*, Nos. 5, 6—*Collision*, No. 1—*Marine Insurance Association*, No. 6.

EVIDENCE.

See *Carriage of Goods*, Nos. 8, 31—*Collision*, Nos. 17, 22, 56, 111, 112—*Limitation of Liability*, No. 3—*Practice*, Nos. 4, 5, 11.

EXCEPTED PERILS.

See *Carriage of Goods*, Nos. 12, 19 to 32—*General Average*, No. 2—*Salvage*, No. 21.

FISHING VESSEL.

See *Collision*, Nos. 1, 33, 58, 59—*County Courts Admiralty Jurisdiction*, No. 3.

FOG.

See *Collision*, Nos. 25 to 27, 58, 64 to 68, 95, 99, 100.

FOREIGN CORPORATION.

See *Practice*, Nos. 17, 18.

FOREIGN JUDGMENT.

See *Marine Insurance*, No. 2

FOREIGN LAW.

See *Carriage of Goods*, No. 9—*Collision*, Nos. 3, 4.

FOREIGN SHIP.

See *Compulsory Pilotage*, No. 5 — *Mortgagor and Mortgagee*, No. 4—*Necessaries*, No. 1.

FRAUD.

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

FRAUDULENT PREFERENCE.

See *Mortgagor and Mortgagee*, Nos. 1, 5.

FREIGHT.

See *Carriage of Goods*, Nos. 11 to 13, 20, 21, 33, 34 — *Mortgagor and Mortgagee*, Nos. 4, 7—*Ship-owners*, No. 8—*Wages*, No. 1.

GENERAL AVERAGE.

1. *Deck Cargo—Jettison—Custom of Trade—Negligence.*—There are two exceptions to the right to claim general average: First, a wrongdoer through whose default the peril has happened which gives rise to the sacrifice cannot claim; secondly, owners of deck cargo are not entitled to general average except where such cargo is carried on deck in accordance with the custom of the trade, or where the other cargo owners have consented to the carriage of the goods on deck. Owners of jettisoned cargo subject to the above exceptions are entitled to recover for general average, even where the peril which necessitated the jettison has been brought about by the negligence of the master. (Priv. Co.) *Strang, Steel, and Co.* v. *Scott and Co.* ..... *page* 419

2. *Negligence of crew—Excepted perils—Right to contribution.*—hWere general average expenses are incurred by a shipowner in consequence of damage caused to ship and cargo by the negligence of his crew, he is entitled to contribution from the cargo owner, where by the terms of the contract of carriage he is not liable for the negligence of his master and crew. (Adm. Div.) *The Carron Park* 543

3. *Right to—Common danger.—Semble*, that the right to general average arises not as a matter of contract but as a positive right in consequence of a common danger requiring that all should contribute to indemnify for the loss of property which has been sacrificed to save the whole adventure, and this right of contribution is similar to the right upon which claims for salvage services are founded. (Priv. Co.) *Strang, Steel, and Co.* v. *Scott and Co.* 419

See *Marine Insurance*, Nos. 13, 21.

GERMAN LAW.

See *Carriage of Goods*, No. 9.

GOVERNMENT DOCKYARD.

See *Damage*, No. 3.

GOVERNMENT TRANSPORT.

See *Salvage*, No. 13.

GRAIN CARGO.

See *Unseaworthy Ship*.

GUARANTEE.

See *Carriage of Goods*, No. 8.

HARBOUR BOARD.

See *Pilotage*, No. 1.

HARBOUR MASTER.

See *Damage*, Nos. 1, 3.

HARBOURS, DOCKS, AND PIERS CLAUSES ACT, 1847.

See *Mortgagor and Mortgagee*, No. 3.

HUMBER RULES AND REGULATIONS.

See *Collision*, Nos. 28 to 31.

IMPROPER NAVIGATION.

See *Marine Insurance Association*, Nos. 7, 8.

INDORSEE.

See *Carriage of Goods*, Nos. 4, 5, 22, 36.

INEVITABLE ACCIDENT.

See *Collision*, Nos. 11 to 13.

INJUNCTION.

See *Practice*, No. 10.

INSURABLE INTEREST.

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

INTEREST.

See *Practice*, Nos. 8, 9.

INTERLOCUTORY ORDER.

See *County Courts Admiralty Jurisdiction*, No. 5.

INTERROGATORIES.

See *Collision*, No. 42.

JETTISON.

See *Carriage of Goods*, No. 22—*General Average*, No. 1.

JOINT TORT FEASORS.

See *Collision*, Nos. 14, 15, 104.

JUDICATURE ACTS.

See *Practice*, No. 16.

JURISDICTION.

See *County Courts Admiralty Jurisdiction—Damage to Cargo—Practice*, No. 10—*Shipowners*, No. 2.

JURY.

See *Limitation of Liability*, No. 4.

KEEL.

See *Collision*, Nos. 28, 29.

LACHES.

See *Collision*, Nos. 43, 44.

LATENT DEFECT.

See *Salvage*, No. 28.

LAW OF THE FLAG.

See *Carriage of Goods*, No. 19.

LAY DAYS.

See *Carriage of Goods*, Nos. 14, 17, 18, 25.

LEX LOCI CONTRACTUS.

See *Carriage of Goods*, No. 19.

LIEN.

See *County Courts Admiralty Jurisdiction*, No. 8—See *Master's Disbursements*, Nos. 2, 3—*Necessaries*, Nos. 1, 3—*Tug and Tow*, No. 2—*Wages*, Nos. 1, 2.

LIFE SALVAGE.

See *Salvage*, No. 22.

LIGHT DUES.

See *Wages*, No. 2.

LIGHTS.

See *Collision*, Nos. 31, 37, 38, 59, 74 to 84, 94.

LIMITATION OF LIABILITY.

1. *Application of fund—Cargo claimants—Life claimants.*—Where in an action for limitation of liability the plaintiffs' liability is fixed at 15*l*.

per ton in respect of life and cargo claims, and the life claims exceed 7*l.* a ton, and the cargo claims 8*l.* a ton, 7*l.* per ton is to be applied exclusively towards the payment of the life claims, and the balance of such claims and the cargo claims are to rank *pari passu* against the balance of the 15*l.* per ton. (Adm. Div.) *The Victoria* .....*page* 335

2. *Practice—Collision—Re-opening—Admission of both to blame—Decree of the court.*—An action *in rem* by shipowners, for collision between the ships *B.* and *K.* having been settled by a written agreement that both ships were to be deemed to blame, this agreement was filed in the Registry under the provisions of Order LII., r. 23. Other actions having subsequently been instituted by owners of cargo on the *B.* against the K., the owners of the *K.* obtained a decree limiting their liability. In the statement of claim in the limitation action, it was alleged that it had been agreed between the parties to the ship action that both ships should be deemed to blame. This allegation was not denied in the respective defences of the owners of the *B.* and her cargo. At the reference to assess the amount due to the various claimants against the fund paid into court in the limitation action, the owners of cargo on the *B.* claimed to prove for the whole of their loss. The Registrar allowed them a moiety. On appeal: Held, that the cargo owners were not precluded from proving for their whole loss, subject to proof by them that the *K.* was alone to blame, but that the owners of the *B.* were precluded by the agreement, which was equivalent to a decree of the court, from proving for more than a moiety; and further, that the owners of cargo might take an issue to try whether the *K.* was solely or partly to blame for the collision. (Adm. Div.) *The Karo*..... 245

3. *Practice—Evidence—Tonnage—Ship's register.*—In an action for limitation of liability the defendants may, if they have raised the question by their defence, call evidence to show that the ship's tonnage as shown by her register is not correct, and that it has been erroneously computed. (Adm. Div.) *The Recepta*..... 433

4. *Practice—Loss of life—Payment into Court—Assessment of damages—Jury.*—In an action for limitation of liability in respect of a collision for which the plaintiffs had admitted liability, and in which loss of life had ensued, the court granted a decree limiting the plaintiff's liability to 15*l.* per ton, upon payment into court of 8*l.* per ton and security being given for the balance, but refused to stay life actions which had been instituted in the Admiralty Division, the plaintiffs in such actions wishing to have their damages assessed by a jury. (Adm. Div.) *The Nereid*... 411

See *Carriage of Goods*, No. 35.

LIS ALIBI PENDENS.

See *Collision*, No. 40.

LIVERPOOL DOCK RATES.

See *Dock Rates.*

LLANELLY HARBOUR.

See *Compulsory Pilotage*, No. 6.

LOADING AGREEMENT.

See *Charter-party*, No. 2—*County Courts Admiralty Jurisdiction*, No. 1.

LOOK-OUT.

See *Collision*, Nos. 33, 68.

LORD CAIRNS' ACT.

See *Practice*, No. 10.

LORD CAMPBELL'S ACT.

See *Collision*, Nos. 34 to 36.

LOSS OF LIFE.

See *Collision*, Nos. 34 to 36—*Limitation of Liability*, Nos. 1, 4.

LUFFING.

See *Collision*, Nos. 85 to 88.

MAN OF WAR.

See *Salvage*, No. 23.

MANAGING OWNER.

See *Marine Insurence Association*, Nos. 1, 3, 4, 5—*Mortgagor and Mortgagee*, No. 4—*Restraint*, Nos. 1, 2—*Shipowner*, Nos. 3 to 7, 9.

MARINE INSURANCE.

1. *Abandonment—Total loss—Barratry—Salvage—Notice.*—A ship and her freight having been insured (*inter alia*) against barratry of the master, was wrongfully abandoned by him. Salvors took possession of her, and having towed her into port instituted salvage proceedings against her. These proceedings were known to the owners, but they did not appear. The ship and cargo were sold by decree of the Court of Admiralty, and realised less than the salvage award. In an action on the policies: Held, that the assured were entitled to recover, as the sale under the decree of the Admiralty Court constituted an actual total loss, and no notice of abandonment was necessary. (Priv. Co.) *Cossman* v. *West* .....*page* 233

2. *Agent—Breach of warranty of authority—Damages—Measure of—Foreign judgment.*—The plaintiff, who was the holder of a policy of marine insurance effected with a foreign company, claimed for an alleged loss. The company denied liability. The plaintiff sued them in England and obtained judgment by default, but could not enforce it as the company had no assets in this country. The defendants, the company's agents in England, then represented to the plaintiff that they were authorised to settle the claim for 300*l.* The plaintiff accepted this offer, but it turned out that, although the defendants had acted *bonâ fide* in the matter, they had been mistaken as to their authority, and were not in fact authorised to make the settlement. In an action to recover damages for breach of warranty of authority: Held, that the plaintiff was entitled to recover the 300*l.* and the expenses incurred by him in negotiating the settlement, the measure of damages being what he had lost by the loss of the contract which the defendants warranted was to be made; and that the fact that he had recovered a default judgment and still had a remedy on the policy was immaterial, as the default judgment was valueless, and the value of his remedy on the policy could not be ascertained. (Affirmed on appeal, Charles, J.) *Meek* v. *Wendt and Co.* 331

3. "*Cargo*"—*Interpretation.*—The word "cargo" is a word susceptible of different meanings in different contracts, and must be interpreted with reference to the context. (Priv. Co.) *Colonial Insurance Company of New Zealand and others* v. *Adelaide Marine Insurance Company*..... 94

4. *Concealment — Broker—Reinsurance—Principal and agent.*—Where brokers employed to reinsure

a ship received information material to the risk, and without communicating it to the plaintiffs (the original underwriters) telegraphed to their London agents in the plaintiffs' names to effect the insurance, and the London agents through a firm effected a policy of reinsurance, it was held that the policy was effected through the agency of the original brokers and was void on the ground of concealment of material facts, though such facts were not known to the plaintiffs, the London agents, nor the brokers who effected the reinsurance. (Q. B. Div.) *Blackburn, Low, and Co.* v. *Haslam*..... *page* 326

5. *Concealment—Material fact—Broker.*—A policy of marine insurance is not vitiated by the concealment of a material fact by a broker employed by the assured to effect an assurance on the subject matter, if he be not the broker through whom the assurance is ultimately effected. (H. of L.) *Blackburn, Low, and Co.* v. *Vigors*..... 216

6. *Damage to cargo—Collision—Consequential loss—Discharge and reshipment—Causa proxima.*—Where goods, which are insured against (*inter alia*) damage consequent on collision, are necessarily discharged in consequence of the ship carrying them colliding with another ship, and thereby requiring temporary repairs, and then reshipped when such repairs are effected, and carried to their destination, the assured are not entitled to recover for damage occasioned to the goods by their discharge and reshipment, on the ground that the collision is not the proximate cause of such damage. (Ct. of App.) *Pink* v. *Fleming* 554

7. *Damage to deck—Passenger ship — Alteration in construction during repairs—Right of recovery.*—Where a ship fitted with a saloon deck for passengers, but solely used for carrying cargo, is insured under a time policy while so used, and the saloon deck is destroyed by a risk covered by the policy, but instead of being reinstated is converted into cargo carrying space, the cost of conversion and not of reinstatement is all that the shipowners can recover under the policy. (Q. B. Div.) *Bristol Steam Navigation Company, Limited* v. *The Indemnity Mutual Marine Insurance Company* 173

8. *Damage to machinery—Defect—Perils of the seas—Donkey engines.*—Damage to a donkey-engine occasioned whilst, in the ordinary course of navigation, it was being employed in pumping water into the boiler, by water being forced into the air-chamber and splitting it open owing to a screw valve which should have been open being accidentally or negligently closed, is not covered by a policy against "perils of the seas . . . . and all other perils, losses, and misfortunes that have or shall come to the hurt, detriment or damage, of the subject matter of insurance." (H. of L.) *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, and Co.* 200

9. *Insurable interest — Cargo — Payment.*—A man may have an insurable interest in goods for which he has neither paid, nor become liable to pay. (P.C.) *Colonial Insurance Company of New Zealand and others* v. *Adelaide Marine Insurance Company* 94

10. *Insurable interest—Cargo—Purchaser—Right of possession—Charterer.*—Where the charterers of a vessel are also the purchasers of a cargo of wheat to be shipped on board, which is to be at the risk of the purchaser as it is put on board, and the master from time to time receives delivery from the vendors, such delivery vests the right of possession and property in the purchaser, and in the event of loss by perils insured against when only a portion of the cargo is on board the purchaser has an insurable interest in such portion, and the underwriters are liable for the loss. (P.C.) *Colonial Insurance Company of New Zealand and others* v. *Adelaide Marine Insurance Company* ..... *page* 94

11. *Interest—Cash advances—*19 *Geo.* 2, *c.* 37, *s.* 1 —"*Without further proof of interest than the policy.*"—A policy of marine insurance which insures cash advances on a ship is an insurance on ship within 19 Geo. 2, c. 37, s. 1; and such a policy containing the terms "full interest admitted" is void under that statute. (Ct. of App.) *Berridge* v. *The Man On Insurance Company* ... 104

12. *Partial loss — Measure of — Depreciation in value of ship—Cost of repairs.*—A partial loss sustained by a shipowner by a disaster insured against is not to be measured by the depreciation in the value of the vessel thereby occasioned; but where there is such a loss, and the ship is repaired by the owner, he is entitled to recover the sum properly expended in executing the necessary repairs, less the usual allowances. (H. of L.) *The Marine Insurance Company Limited* v. *The China Transpacific Steamship Company Limited* 68

13. *Particular average—Under* 3 *per cent.—How made up — General average.* — A particular average loss under 3 per cent. is not recoverable under a policy of insurance containing the clause, "warranted free from average under 3 per cent., unless general," although there has been at the same time a general average loss which, if added to the particular average loss, would make the loss more than 3 per cent. (Ct. of App.) *Price and Co.* v. *The A* 1 *Ship's Small Damage Insurance Association* 435

14. *Practice—Concealment of material facts—Statement of claim—Striking out—R. S. C., Order XIX., r.* 27.—Where, in an action to avoid a policy of marine insurance, the plaintiff, the underwriter, after alleging (*inter alia*) in the statement of claim charges of concealment and non-communication by the defendant of material facts, stated in his reply that he did "not proceed further in this action with the charges in the statement of claim as to concealment and non-communication by the defendant of material facts," the Court held that these charges were scandalous and embarrassing, and ordered them to be struck out under Order XIX., r. 27. (Ch. Div.) *Brooking* v. *Maudslay* 13

15. *Practice — Court of Equity — Cancellation of policy—Fraud.*—A Court of Equity has no jurisdiction to direct delivery up and cancellation of a policy of insurance and to restrain parties thereto suing thereon merely because the other parties have a good legal defence to any claim thereon, although it may do so where the policy is liable to be completely avoided as on the ground of fraud or misrepresentation. (Ch. Div.) *Brooking* v. *Maudslay* 296

16. *Practice—Suing and labouring clauses—Third parties — Underwriters — R. S. C., Order XVI., r.* 48.—In an action for work and labour done and expenses incurred by the plaintiff at the defendant's request in attempting to save a ship belonging to some of the defendants during the continuance of a policy on the ship, which contained the usual suing and labouring clause, the defendants are not entitled to bring in the underwriters as third parties under Order XVI., r. 48. (Q. B. Div.) *Johnston and others* v. *The Salvage Association and McKiver* 167

17. *Protecting class—Running-down clause—Colli-*

sion—Both ships to blame—Single liability—Cross liability.—The defendants insured their ship in the "protecting class" of the plaintiff association, a limited mutual marine insurance association, to indemnify them against any loss or damage to any other vessel not covered by the usual Lloyd's policy, with the running-down clause attached. The defendant ship came into collision with another ship, and caused and suffered damage; both ships were to blame. The defendants' ship was fully insured by policies in the usual form of Lloyd's policy with the running-down clause attached. It was admitted that the damage suffered by the defendants' ship exceeded that inflicted by her on the other ship, and that the owners of the other ship had paid the defendants a sum equal to the difference between half of the amount of the damage sustained by their ship and half of the damage sustained by the defendants' ship. The plaintiffs brought their action to recover a sum of money in the hands of the defendants, which sum the defendants claimed to be entitled to retain as an indemity in respect of the proportion of the damage to the colliding ship which had been taken into account in adjusting the amount to be paid by the other ship, and which proportional sum was not covered by the ordinary running-down clause in their policies. Held, that the true principle for adjusting the loss from collision in such a case was that of a single liability and not cross-liabilities, and that, as the defendants had not been called upon to contribute anything in respect of the damage done to the other vessel, they were not entitled to call upon the plaintiffs to indemnify them in respect of a loss or damage which they had not sustained. (Ct. of App.) *London Steamship Insurance Association* v. *Grampian Steamship Company* ... *page* 506

18. *Risk — Duration of—Cargo—Transshipment — Lighters.*—A policy of marine insurance on goods on a coasting vessel "at and from Hull to London, including all risk of craft until the goods are discharged and safely landed" does not cover the risk to the goods while waiting on lighters at the port of delivery for transshipment into an export vessel. (Ct. of App.) *Houlder, Bros., and Co.* v. *Merchants Marine Insurance Company Limited*... 12

19. *Total loss—Sale of ship—Salvage.*—To constitute a total loss within the meaning of a policy of marine insurance it is not necessary that a ship should be actually annihilated. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been annihilated. In such a case no distinction can be drawn between a sale upon capture and a sale under the decree of a Court of Admiralty for the expenses of salvage services. (Priv. Co.) *Cossmann* v. *West*..... 233

20. *Warranty—Description of cargo—Iron and steel blooms—Partial loss.*—The following warranty in a policy of marine insurance, "warranted no iron, or ore, or phosphate cargoes exceeding net register tonnage across the Atlantic" includes steel blooms, and hence, where the assured's ship whilst laden with steel blooms exceeding her net registered tonnage suffered a partial loss during a voyage across the Atlantic, the assured was held not to be entitled to recover. (Ct. of App.) *Hart* v. *Standard Marine Insurance Company Limited* 368

21. *Warranty—Free from average under 3 per cent. —Measure of damages.*—A ship insured under a policy containing the warranty "free from average under 3 per cent." went into dock to be cleaned, scraped, and painted; while in dock an injury previously unknown, causing a particular average loss within the policy, was discovered. The cleaning, scraping, and painting went on concurrently with the necessary repairs to the injury, and the ship was in dock eight days, being detained the last five days solely for the purpose of the repairs apart from the cleaning, scraping, and painting. If half the dock dues during the first three days were to be attributed to the repairs, the average loss exceeded 3 per cent. The arbitrator, who stated a special case between the parties, found that, if there was to be an apportionment of these dues, one half should be attributed to the repairs, the other half to the cleaning, scraping, &c. Held, that the measure of the assured's damage was not the depreciation in the value of his ship occasioned by the loss, and therefore was not the actual cost of repairs plus the dock dues for the days beyond what was necessary for cleaning, scraping, &c., but was the sum properly expended in effecting the necessary repairs less the usual allowances, and that such sum was the cost of the repairs plus the whole cost of the dock dues less half the cost of the first three days. (H. of L.) *Marine Insurance Company Limited* v. *China Transpacific Steamship Company Limited* ..... *page* 68

See *Carriage of Goods*, Nos. 7, 33.

MARINE INSURANCE ASSOCIATION.

1. *Calls—Managing owner—Purchaser of shares—Liability.*—The purchaser of shares in a ship, which have been insured in mutual insurance clubs by the managing owner with the authority of the vendor, is not liable in the absence of agreement to contribute to the payment of calls in respect of the insurance. (Adm. Div.) *The Vindobala* 250

2. *Calls—Subsistence of policy.*—By the rules of a marine insurance association, the members insured each other's ships from noon of Feb. 20 in any year, or from the date of entry of a vessel until noon of Feb. 20 in the succeeding year; and the managers were empowered to levy contributions of one-fourth part of the estimated annual premium quarterly in each year, such premiums of insurance to form a fund for the payment of claims; and if any member should refuse to pay his contributions thereto, his respective ship or ships should cease to be insured, and he should thenceforth forfeit all claims in respect of any loss. On the 5th April 1881 a loss incurred in the year 1880-1 upon a ship belonging to the plaintiff and insured in the association, was fixed by an average adjuster at 180*l.* A call of 41*l.* 10*s.*, made on the plaintiff on the 5th May 1881 for the second quarter of 1881-2, was by mutual consent set off against the loss. On the 13th May 1881 the association paid the plaintiff 100*l.* on further account of the loss. On the 23rd June 1881 a call was made on the plaintiff of 52*l.* 16*s.* 8*d.*, and on the 5th July 1881 another call of 31*l.* 4*s.* The plaintiff having tendered the balance due from him, the association refused to accept it, and during the pendency of an action to recover the full amount of the two calls one of the plaintiff's ships insured in the association was wholly lost. Held, on case stated, that as the calls were in respect of matters relating to the 1880-1 policy, and it was not shown that they were in respect of his ship insured as aforesaid, the plaintiff's ship did not cease to be insured, and that he had not forfeited his claim

in respect of the loss. (Q. B. Div.) *Williams* v. *British Marine Mutual Insurance Association Limited* .....*page* 134

3. *Contributions — Members — Managing owner— Owner's liability.* — The managing and part owner of a steamship became a member of a mutual assurance association and took out a policy in his own name in respect of the ship. By the articles of association funds for the purposes of the association were to be "paid to the association by the members thereof." By the policy it was agreed that the members of the association should be liable for all losses and dangers insured against. Certain contributions having in accordance with the articles of association become payable by the managing owner in respect of the ship, and he being bankrupt, the association sued the defendant, a part owner, to recover the contributions. Held, that by the provisions of the articles of association and the policy members only were liable, and the defendant not being a member was not liable. (Ct. of App.) *United Mutual Steamship Assurance Association* v. *Nevill* ..... 226 n.

4. *Contributions — Members—Managing owner— Owner's liability.*—The managing and part owner of a steamship became a member of a mutual insurance association, and took out a policy on behalf of himself and his co-owners in respect of the ship. By the articles of association every person was deemed to be a member "who in his own name, or in his name as agent, insures any ship in pursuance of the regulations of the company," and they also provided that the funds required for the payment of claims should "be raised by contributions from all the members." By the policy it was agreed between the assured and the company, "that without prejudice to the rights and remedies of the company against the said person or persons effecting this insurance, as a member as members of the company, in respect of this insurance, the assured shall pay to the company, in lieu of premiums, all the sums and contributions which the company are entitled to call upon the said person or persons effecting this insurance, as a member or members of the company, to pay to the company in respect of this insurance according to the articles of association of the company, and that the provisions contained in the said articles of association shall be deemed and considered part of this policy, and shall, so far as regards this insurance, be as binding upon the assured as upon the said person or persons effecting this insurance." Certain contributions having, in accordance with the articles of association, become payable by the managing owner in respect of the ship, and the managing owner being bankrupt, the association sued the other owners to recover the contributions: Held, that under the terms of the policy, they were liable, although the policy was effected by the managing owner alone. (Mathew, J.) *Ocean Iron Steamship Insurance Association* v. *Leslie and others* 226

5. *Contributions—Members — Managing owner — Owners liability*—H. & G., the managing owners of a steamship, insured her in a mutual assurance association in their own names, and the policy was expressed to be "as well in his or their own names as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, subject to the provisions hereinafter contained." The consideration stated in the policy was "the contributions to be paid from time to time by the assured for losses and averages on other steamships." Such contributions having become payable, the association sued the part owners other than H. and G. to recover the same. Held, that these part owners were liable, because the policy was made on their behalf, and they "were assured" within the meaning of the policy, and were expressly bound by the consideration clause to pay these contributions. *Quære*, whether they become members of the association. (Ct. of App.) *Great Britain* 100 *A* 1 *Steamship Insurance Association* v. *Wyllie* .....*page* 398

6. *Double insurance—Mortgage—Estoppel.*—By the rules of the defendant Mutual Marine Insurance Society vessels were not to be insured for more than three-quarters of their value; members were forbidden to insure elsewhere any ship or ships insured in the society, under penalty of expulsion and forfeiture of any claim against the society; and in the event of it coming to the knowledge of a member that the ship or shares insured have been mortgaged, he is to give notice thereof to the society, and if he fails to do so he shall forfeit all claim in respect of his insurance during the existence of the mortgage to the extent thereof. P., on behalf of the owner of the ship *B.*, insured her in the defendant society for 600*l.* The *B.* was at the same time, with the knowledge of the defendant society, insured elsewhere for 300*l.*, and 900*l.* was more than three-quarters, but less than the whole of the value of the *B.* During the subsistence of the policy P. was aware that the *B.* was mortgaged, but gave no notice of the mortgage to the society. In an action against the defendant society: Held, that the defendant society, having insured the *B.* with the knowledge that she was insured elsewhere, were estopped from acting on the rule as to double insurance, but that as P. had not given notice of the mortgage its amount must be deducted from the sum payable under the policy by the defendants. (Q.B. Div.) *Jones* v. *Bangor Mutual Shipping Insurance Society Limited.* 450

7. *Improper navigation—Damage to cargo—Dirty ceiling and limber boards.*—Where by the rules of a Mutual Insurance Association members are protected against damage to goods on board when "caused by improper navigation," damage caused to a wheat cargo through the ceiling and limber boards not having been properly cleaned before the wheat was stowed is not caused by "improper navigation." (Ct. of App.) *Canada Shipping Company* v. *British Shipowners' Mutual Protection Association* 422

8. *Improper navigation—Loading port—Damage to goods—Sea water.*—Damage to goods by sea water which leaks in during the voyage owing to the shipowner having neglected to efficiently close a loading port before the completion of the loading, is damage "caused by improper navigation of the ship" within the meaning of the articles of association of a shipowner's Mutual Indemnity Association, although the leakage does not endanger the ship or impede the navigation. (Ct. of App.) *Carmichael and Co.* v. *The Liverpool Sailing Shipowners' Mutual Indemnity Association* 184

MARITIME LIEN.

See *County Courts Admiralty Jurisdiction*, No. 8—*Master's Wages and Disbursements*, Nos. 2, 3—*Necessaries*, No. 1—*Practice*, No. 1—*Tug and Tow*, No. 2.

MARKET PRICE.

See *Carriage of Goods*, Nos. 10, 11.

MASTER AND SERVANT.

See *Collision*, Nos. 105, 106, 107.

MASTER'S WAGES AND DISBURSEMENTS.

1. *Double pay—Wages to date of final settlement—Merchant Seamen (Payment of Wages) Act* 1880.—Sect. 191 of the Merchant Shipping Act 1854, giving a master "the same rights, liens, and remedies for the recovery of his wages" as a seaman has, does not give him the right to double pay under sect. 187 of the Merchant Shipping Act, nor to wages up to the final settlement of his claim under the Merchant Seamen (Payment of Wages) Act 1880, s. 4. (Adm.) *The Arina* .....*page* 141

2. *Maritime lien—Admiralty Court Act* 1861—*Merchant Shipping Act* 1854.—Prior to the Admiralty Court Act 1861 a master had no maritime lien for disbursements, and neither that Act nor the Merchant Shipping Act 1854 can be construed as giving him such lien. (H. of L. reversing Ct. of App.) *The Sara* 163, 413

3. *Maritime lien — Sale of ship — Purchaser—Priorities.*—The master of a ship has a maritime lien for disbursements made on behalf of the ship, and therefore his claim has priority over that of a *bonâ fide* purchaser. (Adm.) *The Ringdove* ... 28

MATES' RECEIPTS.

See *Carriage of Goods*, No. 6—*Stoppage in Transitu*, No. 1.

MATERIAL MEN.

See *Necessaries.*

MEASURE OF DAMAGES.

See *Carriage of Goods*, Nos. 10, 11, 34—*Collision*, Nos. 16 to 24, 35, 50, 104—*Marine Insurance*, Nos. 2, 21—*Practice*, Nos. 8, 9.

MERCHANT SHIPPING ACTS.

See *Collision*, No. 54—*Compulsory Pilotage*, Nos. 5, 7 — *Master's Wages and Disbursements — Salvage*, No. 29—*Unseaworthy Ship*, No. 1—*Wages*, No. 3.

MERSEY.

See *Collision*, Nos. 37, 38.

MERSEY DOCK ACTS CONSOLIDATION ACT 1858.

See *Dock Rates.*

MORTGAGOR AND MORTGAGEE.

1. *Act of Bankruptcy—Further advances—Past debt.*—A mortgagor who conveys all his property with the main object of securing further advances, does not thereby commit an act of bankruptcy, even though the mortgage also secures a past debt due from the mortgagor to the mortgagee. (Adm. Ct.) *The Thames* 536

2. *Contribution from owners—Right to—Compulsion of law—Arrest of ship—Possession.*—The arrest of a ship in an action *in rem* for a claim legally due from the owners of the ship, although there be no maritime lien, is a sufficient compulsion of law to entitle mortgagees of part of the shares in the ship paying off the claim in order to get possession to recover from the owners of the remaining shares the amount so paid. (Ct. of App.) *The Orchis* 501

3. *Contribution from owners—Right to—Arrest of ship—Payment of debt—Dock dues—Wages.*—The owner of 44/64th shares in the steamship O. mortgaged them to the plaintiffs. Subsequently the *O.* was arrested in the Admiralty Court at the suit of her master for disbursements. The mortgagor being insolvent, and the plaintiffs wishing to realise their security, paid the master's claim and the ship was released. The plaintiffs then took possession of the *O.* on behalf of themselves and the other co-owners, and it was thereupon arranged between the plaintiffs and the co-owners that the *O.* should be sold on behalf of all parties and this was eventually done. Whilst the plaintiffs had possession of the *O.* she was lying in Bristol Dock, and they paid the necessary dock dues. In the event of the dock dues not being paid, the *O.* was liable to seizure and sale by the dock authorities under the Bristol Dock Act 1881, and the Harbours, Docks, and Piers Clauses Act 1847. In an action against the co-owners to recover the payments made by the plaintiffs: Held, that, in the circumstances, there was an implied promise in law by the co-owners to pay back the plaintiffs all the money paid by them to release the ship; and that the defendants were also liable to pay their proportion of the dock dues, the payment thereof by the plaintiffs being necessarily made on behalf of all the owners. (Ct. of App.) *The Orchis* ...*page* 501

4. *Foreign ship—Appointment of receiver—Freight—Equitable mortgage.*—In an action *in personam* by a plaintiff claiming to be equitable mortgagee of the foreign ship *F.* and her freight to secure a liability incurred by him in accepting bills of exchange which had been drawn by the managing owner, it appeared that the alleged mortgage was given to the plaintiff by the managing owner; that the plaintiff, when he accepted the bills, thought the managing owner was sole owner, and that it was subsequently sworn on affidavit that the managing owner was only a part owner, but it it did not appear whether the amount of the bills was in fact expended on the purposes of the ship. The *F.* was in an English port under charter to carry cargo to a foreign port, when, on application by the plaintiff, Butt, J. made an order appointing a receiver and authorising him to proceed with the ship to the foreign port and there receive the ship and all the freight due upon the voyage. The defendants appealed. Held, that, even assuming the managing owner to be only a part owner, yet that, as it did not appear that the amount of the bills was not expended solely for the purposes of the ship, the court had authority to appoint a receiver to receive the whole of the freight, and that, in the circumstances, it was expedient that the order should stand. (Ct. of App.) *The Faust* 126

5. *Further advances—Bankruptcy—Receiving order—Priority.*—Where under a mortgage of a ship to secure further advances, an advance is made on the date of a receiving order against the mortgagor, who is subsequently adjudicated bankrupt in respect of acts of bankruptcy committed prior to the execution of the mortgage, the mortgagee is entitled, under sect. 49 of the Bankruptcy Act 1883 as against the trustee in bankruptcy, to recover such advance, where before the date of the receiving order there was an existing contract between mortgagor and mortgagee to make future advances and a positive promise by the mortgagee to make this specific advance. (Adm. Ct.) *The Thames* 536

6. *Possession—Mortgage money not due—Release.*—Where the registered mortgagees of a ship instituted an action *in rem* as mortgagees for

possession, and the ship was arrested therein before the mortgage money became due, and without any default on the part of the mortgagor, the Court, being of opinion upon the facts that the ship was not being dealt with so as to impair the mortgagees' security, ordered her release. (Adm. Div.) *The Blanche* .....*page* 272

7. *Priority—Shipping company—Debenture holders—Freight charged.*—The directors of a shipping company passed a resolution authorising its brokers to hypothecate the freight of two ships during their present voyages, to secure a present advance of sums not exceeding 5000*l*. Shortly afterwards the brokers transferred the freight of one of the ships to H. and Co. to secure an advance of 3000*l*. The transfer was signed by the brokers as managers of the company, who also gave an undertaking to collect the freight as agents for H. and Co. An action having been brought by the debenture-holders of the company for the enforcement of their securities, and the company having gone into liquidation, H. and Co. applied for an order that the liquidator of the company should pay to the applicant out of moneys representing the freight of the ship in question the sum of 3000*l*. Held, that the company had power under its articles of association, and the resolutions passed pursuant thereto, notwithstanding the debenture debt, to specifically charge a particular asset for the purpose of carrying on the company's business; and that, therefore, H. and Co's security was prior to that of the debenture-holders. (Ch. Div.) *Ward* v. *Royal Exchange Shipping Company*..... 239

See *Marine Insurance Association*, No. 6—*Necessaries*, No. 3—*Restraint*, Nos. 4, 5, 6.

MUTUAL MARINE INSURANCE.

See *Marine Insurance Association.*

NARROW CHANNEL.

See *Collision*, Nos. 57.

NAUTICAL ASSESSORS.

See *Collision*, Nos. 45, 46.

NAVAL DISCIPLINE ACT 1866.

1. *Commission — Resignation — Court-martial.*—When a commissioned officer accepts an appointment to serve in one of Her Majesty's ships in commission, and enters upon the performance of his duties, he subjects himself to the provisions of the Navy Discipline Act 1866, and cannot at his own will and pleasure resign his appointment, and may be tried by court-martial for any of the offences specified in the Act. (Q. B. Div.) *Reg.* v. *Cuming* 189

2. *Commission—Resignation—Court-martial.*—The Admiralty refused leave to an officer of one of Her Majesty's ships in commission, to retire from the service, and thereupon the officer, having obtained permission to go on shore when the ship was at Simons Bay in South Africa, wrote a letter to his captain, informing him that he retired from the service, in accordance with the conditions laid down in article 160 of the Admiralty Regulations and returned his commission. The officer then returned to England in a mail steamer, and upon his arrival at Plymouth he was arrested and taken on board the flagship to await his trial by court-martial for desertion. Held, that he had no right to resign without leave, and that he was liable to be tried by court-martial under the Naval Discipline Act, 1866. (Q. B. Div.) *Reg.* v. *Cuming* 189

3. *Commission — Acceptance of — Court-martial.*—*Quære*, whether the mere acceptance of a commission would of itself and under all circumstances suffice to bring an officer within the jurisdiction of a court-martial for refusing to enter upon any particular service. (Q. B. Div.) *Reg.* v. *Cuming* .....*page* 189

4. *Warrant—Arrest—Naval officer.*—A naval officer "subject to the Naval Discipline Act 1866," within the meaning of sect. 51, may arrest an offender against the Act without a warrant. (Q. B. Div.) *Reg.* v. *Cuming* 189

NAVIGABLE CHANNEL.

See *Collision*, No. 29.

NAVIGATION.

See *Carriage of Goods*, Nos. 23 to 25—*Marine Insurance Association*, Nos. 7, 8.

NECESSARIES.

1. *Maritime lien—Foreign ship—English port——Action in rem.*—The statute 3 & 4 Vict. c. 65, s. 6, does not create a maritime lien in respect of necessaries supplied to a foreign ship in an English port, there having been no maritime lien for necessaries before that Act; and, consequently, material men cannot enforce their claims by proceedings *in rem* against a ship in the hands of a subsequent purchaser for value. (H. of L.) *The Heinrich Bjorn* 1

2. *Practice—Default action—Pleadings—Particulars of claim.*—Where the plaintiff in a default action *in rem* for necessaries had complied with all the formalities entitling him to judgment save service of a statement of claim, but it appeared that the writ, though not specially indorsed, contained particulars of the claim, the Court gave judgment for the plaintiff. (Adm. Div.) *The Hulda* 244

3. *Priority of lien—Wages—Mortgage.*—A claim by the plaintiff in an action for necessaries brought under sect. 4 (or, semble, under sect. 5) of the Admiralty Court Act 1861, even though it includes wages paid to the ship's crew at the request of the owner, is not entitled to precedence of a mortgagee's claim. Semble, precedence might have been gained by obtaining prior permission from the court to make the payment. (Adm. Div.) *The Lyons* 199

NEGLIGENCE.

See *Carriage of Goods*, Nos. 23, 24—*Collision*, Nos. 2, 19, 20, 34—*Damage*, No. 1—*General Average*, Nos. 1, 2.

NOTICE OF ABANDONMENT.

See *Marine Insurance*, No. 1.

ONUS OF PROOF.

See *Carriage of Goods*, No. 30—*Collision*, Nos. 6, 52, 56, 60—*Seaman.*

OUSE NAVIGATION.

See *Collision*, Nos. 28 to 30.

OVERTAKING SHIP.

See *Collision*, Nos. 69, 70, 77 to 84.

OYSTER BED.

See *Damage*, No. 2.

PARTIAL LOSS.

See *Marine Insurance*, No. 12.

PARTICULAR AVERAGE.

See *General Average—Marine Insurance*, No. 13.

PARTIES.

See *Carriage of Goods*, No. 36—*Collision*, Nos. 14, 15.

PASSENGER CERTIFICATE.

Passenger steamship—Board of Trade—Pleasure trip.—The respondents were charged that they, being the owners of the British steamship *Era*, did ply on the river O. with certain passengers on board without having one of the duplicates of a certificate issued by the Board of Trade put up in some conspicuous part of the ship so as to be visible to all persons on board the same. More than twelve persons were taken on board the steamer for an excursion from I. down the river to O. to F. and back. No charge was made by the respondents for the use of the steamer, but a gratuity was given to the master and crew. The justices dismissed the case. Held, that the justices were right, as the steamship was not a passenger steamship within the meaning of sects. 303 and 318 of the Merchant Shipping Act 1854. (Q. B. Div.) *Hedges* v. *Hooker*.....*page* 386

PERILS OF THE SEAS.

See *Carriage of Goods*, Nos. 3, 7, 20, 27, 28, 29, 30, 31—*Marine Insurance*, No. 8.

PILOTAGE.

1. *Licence to pilot—Harbour board—Liability.*—A harbour board was empowered by statute to license pilots for the purpose of acting within their district. Pilotage was not compulsory in the district, and the pilot made his own bargain with the shipowner. The harbour master, who who was also a daily licensed pilot, was acting as pilot to a vessel, engaged by the owners themselves, when she was wholly lost, through his negligence and default. Held, that the harbour board were not responsible, as they were only entitled under the statute by which they were constituted to issue licenses, and were not liable for the negligence of those they licensed. (P.C.) *Shaw, Savill, and Albion Company* v. *Timavu Harbour Board* 521

2. *Rate—Gravesend Reach to Northfleet—Order in Council.*—The amount which a pilot is entitled for taking a ship from Gravesend to the outer entrance of the Tilbury Docks, and thence across the tidal basin to the dock gates, is the rate for pilotage from "Gravesend Reach to Northfleet," fixed by Order in Council, May 17, 1882, and the moving of the ship to the dock gates is not within the meaning of the provision in the Order in Council as to "removing a ship or vessel from moorings into a dry or wet dock," so as to entitle him to charge anything beyond the above pilotage rate. (Adm.) *The Clan Grant* 144

See *Collision*, Nos. 3 to 6, 8, 9—*Compulsory Pilotage—Salvage*, Nos. 16, 17.

PLEADINGS.

See *Collision*, Nos. 7, 8, 9, 13—*Limitation of Liability*, No. 3—*Marine Insurance*, No. 14—*Necessaries*, No. 2.

POLICY.

See *Carriage of Goods*, No. 7—*Marine Insurance.*

PRACTICE.

1. *Action in rem—Lien—Secured creditor—Admiralty Court Act* 1861.—The right to sue *in rem* under the Admiralty Court Act 1861, where there is no maritime lien, gives the plaintiff a charge on the *res* from the date of the arrest, and from that time he is a secured creditor in respect of his claim. (Ct. of App.) *The Cella*.....*page* 293

2. *Action in rem—Notice of collision—Dublin Steam Packet Company*, 6 & 7 *Will* 4, c. 100.—The 8th section of 6 & 7 Will. 4 (local and personal), c. 100, which requires notice to be given one calendar month before bringing any "action in any of His Majesty's courts of law" against the city of Dublin Steam Packet Company, does not apply to collision actions *in rem* against the company's vessels, and in such cases no notice is necessary. (Ct. of App.) *The Longford* 371

3. *Appeal — Action in rem — Bail — Stay of execution.*—In an appeal from a decision of the Court of Appeal to the House of Lords in an action *in rem*, in which bail has been given, the Court of Appeal will not stay execution pending the appeal unless special circumstances are shown by affidavit. (Ct. of App.) *The Annot Lyle*..... 50

4. *Appeal — Fresh evidence — Admiralty County Court.*—A judge of the Probate, Divorce, and Admiralty Division sitting alone can entertain an application for leave to adduce fresh evidence at the hearing of an Admiralty County Court appeal. (Adm. Div.) *The Eclipse*..... 409

5. *Appeal—New point—Evidence.*—Where a point which has not been taken in the court below is put forward by an appellant for the first time in a Court of Appeal, that court ought not to decide in his favour on such point unless it is satisfied beyond doubt, (1) that it has before it all the facts bearing upon the new contention as completely as if it had been raised in the court of first instance; (2) that no satisfactory explanation could have been given if it had been so raised. (H. of L.) *The Tasmania*..... 517

6. *Arbitrator—Nomination of arbitrator—Power of Court.*—In the case of an agreement to refer disputes to three arbitrators, one to be nominated by each party, and the third by the two so appointed, the court has no power to make an order calling upon one of the parties, who has been served with notice to appoint and neglects to do so, to appoint an arbitrator within seven days. (Ct. of App.) *Re Smith and Service and Nelson and Sons* 555

7. *Arbitration—Submission—Rule of Court.*—Sect. 1 of the Arbitration Act 1889 is only intended to give to all submissions to arbitration the same effect as, prior to the Act, those submissions had which were made rules of court. (Ct. of App.) *Re Smith and Service and Nelson and Sons* 555

8. *Damages — Interest — Admiralty division.*—Where an action was brought in the Admiralty Division to recover unliquidated damages, which, prior to the Judicature Act could not have been brought in the Admiralty Court, and the defendant made no attempt to have it transferred, the plaintiffs were held to be entitled, in accordance with the practice of the Admiralty Division, to interest on the amount recovered from the date of the loss. (Ct. of App.) *The Gertrude* v. *The Baron Aberdare* 315

9. *Damages—Interest—Admiralty division—Transfer of action.*—Where an action is transferred to the Admiralty Division by consent of the parties for the assessment of damages, the registrar and

merchants are entitled, in accordance with the practice of the Admiralty Division, to give interest in addition to the actual damages, even where such interest would not be given in the division from whence the action is transferred. (Ct. of App.) *The Gertrude* v. *The Baron Aberdare* ..... *page* 315

10. *Jurisdiction—Injunction—Delivery of goods—Lord Cairns' Act.*—In a claim for delivery of goods asking for damages and an injunction the court has no jurisdiction under Lord Cairn's Act to award damages where no wrongful act has been actually committed by the person against whom the injunction is claimed. (Ct. of App.) *Dreyfus and Co.* v. *Peruvian Guano Company* ... 492

11. *Registrar and merchants—Affidavit — Cross-examination.* — At a reference in an Admiralty action, where the plaintiff being resident abroad makes an affidavit in support of his claim, and refuses to attend for cross-examination, it is in the discretion of the registrar to refuse to accept the affidavit until the plaintiff has been cross-examined, and it is further within his discretion to say whether the circumstances are such that the witness should attend in this country for cross-examination, or should be cross-examined abroad on commission. (Adm. Div.) *The Parisian* ... 249

12. *Registrar and merchants — Privy Council—Appeal.*—Where, upon the hearing of an appeal to the Privy Council from a judgment upon the report of the registrar of a Vice-Admiralty Court, the Privy Council is of opinion that the report must be referred back for the finding of other facts and figures, such reference will be to the Registrar of Her Majesty in Ecclesiastical and Maritime Appeals, if convenient and less expensive than a reference back to the Vice-Admiralty Court. (Priv. Co.) *The City of Peking* 572

13. *Registrar and merchants—Report—Objection.*—*Semble*, where an objection to a registrar's report is taken in general terms, as to the whole of an item allowed, it is open to the party objecting so seek to have part of the item disallowed. (Priv. Co.) *The City of Peking* 572

14. *Trial at bar—Crown—Servants of—Attorney-General—Change of venue.*—The Crown is entitled as of right to a trial at bar, in any cause in which it is interested, whether as a party or on behalf of any of its servants, or by reason of its interests being affected, and the Attorney-General, on behalf of the Crown, may obtain such trial at bar upon an *ex parte* application made by him to the court, he stating that the Crown is interested; and, in like manner, he is entitled to an order for a change of venue in any such case on a similar application; and in either case it is open to the other party to apply to set aside the order upon the ground that the Crown is not, in fact, interested, and that the court has been therein misinformed. (Ct. of App.) *Dixon* v. *Farrer, Secretary to the Board of Trade*..... 52

15. *Trial at bar—Detention of ship—Venue—Merchant Shipping Act* 1876—*Crown Suits Act* 1865.—In an action under the 10th section of the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80), s. 10, against the Secretary of the Board of Trade, to recover costs and compensation for the detention of a ship without reasonable and probable cause, the Attorney-General is entitled, on behalf of the Crown, to demand as of right a trial at bar; and he is therefore also entitled under the Crown Suits Act 1865, on stating to the court that he waives his right to a trial at bar, to change the venue to any county in which he elects to have the cause tried. (Ct. of App.) *Dixon* v. *Farrer, Secretary to the Board of Trade* ..... *page* 52

16. *Trial at bar—Judicature Act.*—The Judicature Acts and rules of the Supreme Court have not the effect of abolishing trials at bar. (Ct. of App.) *Dixon* v. *Farrer, Secretary to the Board of Trade* 52

17. *Writ—Action in personam—Foreign corporation—Address.*—A writ *in personam* for service within the jurisdiction must contain the address as well as the name of the defendant, and consequently such a writ issued without any address against a foreign corporation having no place of business in this country is irregular and will be set aside. (Adm. Div.) *The W. A. Scholten*..... 244

18. *Writ—Service—Leave of judge—Foreign corporation—Address.*—*Semble*, that a writ for service in this country upon a foreign corporation having no address here, will not be issued without the leave of the judge, even if it contains the name and foreign address of the corporation. (Adm. Div.) *The W. A. Scholten*.....244

See *Carriage of Goods*, Nos. 8, 31—*Charter-party*, No. 4—*Collision*, Nos. 1, 6 to 15, 22, 23, 36, 39 to 50—*Compulsory Pilotage*, No. 7—*County Courts Admiralty Jurisdiction*, Nos. 4, 5—*Limitation of liability*, Nos. 2, 3, 4—*Marine Insurance*, Nos. 14, 15, 16—*Necessaries*, No. 2—*Sale of Goods*—*Salvage*, Nos. 18 to 21—*Seaman*.

PRELIMINARY ACT.

See *Collision*, Nos. 42, 47 to 49.

PREROGATIVE OF CROWN.

See *Practice*, Nos. 14, 15.

PRINCIPAL AND AGENT.

See *Charter-party*, No. 6—*Damage*, Nos. 1, 3—*Marine Insurance*, Nos. 2, 4, 5—*Shipowners*, Nos. 3, 6, 7—*Stoppage in Transitu*.

PRIORITY OF LIENS.

See *Master's Wages and Disbursements*, No. 3—*Necessaries*, No. 3—*Wages*, No. 2.

PRIVY COUNCIL.

See *Practice*, No. 12—*Salvage*, Nos. 10, 11.

QUEEN'S SHIP.

See *Salvage*, No. 23.

RATS.

See *Carriage of Goods*, No. 30.

RECEIVER.

See *Mortgagor and Mortgagee*, No. 4.

REGISTRAR AND MERCHANTS.

See *Collision*, Nos. 21, 22, 23—*Practice*, Nos. 11, 12, 13.

REGULATIONS FOR PREVENTING COLLISIONS AT SEA.

See *Collision*, Nos. 51 to 89.

RE-INSURANCE.

See *Marine Insurance*, No. 4.

REPRESENTATION.

See *Damage*, Nos. 4, 5—*Marine Insurance*, No. 15.

RESTRAINT.

1. *Managing owner — Agreement – Bail for safe return.*—An agreement between the owners of a ship and two persons appointing them ship's husbands and managers, and empowering them to continue to act as such at all times thereafter for the owners, their executors, administrators, and assigns, and giving them the entire management of the vessel does not prevent a dissentient part owner from instituting an action of restraint upon the ground that he is dissatisfied with the management and obtaining bail from his co-owners in the value of his shares. (Adm.) *The England* ..... *page* 140

2. *Arrest of ship—Duty of managing owner—Costs.*—Where part owners wrongfully institute an action of restraint and arrest the ship therein, it is the duty of the managing owner to take all reasonable steps to minimise the losses and expenses consequent on such arrest, and the arresting owners are not liable for such losses and expenses after a reasonable time has elapsed within which such steps could have been taken. (Adm. Div.) *The Vindobala* 250

3. *Bond for safe return—Duration of—Cancellation—Change of owners.*—Where a bail bond has been given in an action of restraint holding the sureties liable so long as the ship does not safely return to a port within the jurisdiction from as many voyages as she shall sail upon before notice shall have been given to the defendants by the plaintiffs that they withdraw their claim for security, the court will, upon its being shown that the owners on whose behalf the bond was given have ceased to be owners, cancel the bond and release the sureties from liability thereunder upon the ground that it never was intended that they should remain liable for all time whoever might be the owners. (Adm. Div.) *The Vivienne* 178

4. *Mortgagees—Appearance under protest — Bond for safe return—Cancellation.*—Where shipowners, in an action of restraint instituted by mortgagees alleging themselves to be owners, enter an appearance not under protest, and give a bail bond for the safe return of the ship, they are not precluded at the trial from questioning the plaintiffs' title; and if it in fact appear that the plaintiffs are merely mortgagees, the Court will order the bond to be given up and cancelled. (Adm.) *The Keroula* 23

5. *Mortgagees — Possession.* — Where persons hold shares in a ship by way of security for a loan under an agreement, by which it is provided (*inter alia*) that in the event of the owners of the shares failing to meet their acceptances, or to pay interest, the holders of the shares may realise them, calling on the owners of the shares to make good any loss arising therefrom, or paying them any balance left after repaying themselves the loan, they are merely mortgagees of such shares, and do not become owners thereof on the acceptances being dishonoured, and hence they, not having taken possession of the shares, are not entitled to institute an action of restraint against the ship. (Adm.) *The Keroula* 23

6. *Mortgagee—Possession.—Semble*, a mortgagee of shares in a ship, when in possession, may institute an action of restraint. (Adm.) *The Keroula* ... 23

RESTRAINT OF TRADE.

See *Conspiracy*.

RULES OF THE SUPREME COURT.

See *Collision*, No. 47—*Marine Insurance*, Nos. 14, 16—*Practice*, Nos. 7, 16.

RULES AND BYE-LAWS FOR THE NAVIGATION OF THE RIVER THAMES.

See *Collision*, Nos. 92 to 102.

RUNNING DOWN CLAUSE.

See *Marine Insurance*, No. 17.

SAILING SHIP.

See *Collision*, Nos. 85 to 88.

SALE OF GOODS.

Practice — Chief clerk's certificate — Damages.—In an action by plaintiffs claiming as consignees named in a bill of lading delivery of certain cargoes and damages for their detention, the defendants, who claimed the goods under a contract with the consignor, were allowed to receive the cargoes pending the trial. The Court subsequently held that the plaintiffs were entitled to the cargoes, and directed an inquiry to ascertain what damages the plaintiffs had sustained by the defendants' detention, but refused to allow the defendants to be reimbursed certain expenses incurred by them in respect of the cargoes. On appeal the House of Lords varied this judgment by allowing the defendants these expenses, but as no application was made to vary the inquiry it remained undisturbed. The chief clerk by his certificate awarded the plaintiffs damages on the footing of wrongful detention. The defendants applied to have the certificate varied on the ground that the effect of the decision of the House was that there had been no wrongful detention, and that the plaintiffs were entitled to nominal damages only: Held (Bowen, J., *diss.*) that the certificate must have effect given to it as it had not been reversed on appeal, and that therefore the plaintiffs were entitled to damages. (Ct. of App.) *Drefus and Co.* v. *The Peruvian Guano Company* ..... *page* 492

SALE OF SHIP.

See *Collision*, No. 50—*Salvage*, No. 22.

SALVAGE.

1. *Agreement—Amount.*—Where the master of the s.s. *P. H.*, which was in a position of serious danger ashore on rocks, entered into a written agreement with the master of the s.s. *F.*, whereby he agreed to pay 200*l.* a day for every day the *F.* stood by and assisted, by towing, to remove the *P. H.*, and "in the event of the *P. H.* being got off or coming off the rocks during the continuance of the agreement" to pay 2000*l.* beyond the daily pay of 200*l.*, and the same day the *P. H.* came off, either owing to the jettison of her cargo or the towing of the *F.*: the Court held that the service was a valuable one, that the agreement was reasonable, and that the salvors were entitled to recover 2200*l.* from the shipowners. (Adm. Div.) *The Prinz Heinrich* ... 273

2. *Agreement—Amount—Compulsion.*—A steamship in the Atlantic fell in with another which had lost her propeller and was leaking. It was agreed in writing between the masters that the owners of the ship in distress should pay the owners of the other 5000*l.* for being towed into Halifax, and if the towage had to be abandoned through stress of weather the salvors were to be paid for service rendered. The master of the vessel in distress had reasonable grounds for believing that, unless he consented to the above terms, the other ship would not assist him. The salvage was successfully accomplished without any special

difficulty or danger. The distance towed was about 350 miles. The value of the salved property was about 23,000*l.* In a salvage action to recover the 5000*l.*, or such sum as the court thought just, the Court held that in the circumstances the agreement was signed under compulsion, that 5000*l.* was exorbitant, and awarded 3000*l.* and costs. (Adm. Div.) *The Mark Lane* .....*page* 540

3. *Agreement—Authority of master.*—An agreement made by the master of a vessel in distress to pay salvors a fixed sum is an agreement made on behalf of, and pledging the credit of, the shipowners, so as to make them liable to the salvors for the whole amount so agreed upon, and not merely for such proportion of such amount as the value of the ship and freight bears to the value of the cargo. (Adm. Div.) *The Prinz Heinrich* ... 273

4. *Agreement — Master—Authority — Liability of shipowners and cargo owners.*—An agreement made by the master of a vessel in distress to pay salvors a fixed sum is an agreement made on behalf of and pledging the credit of the shipowners so as to make them liable to the salvors for the whole amount so agreed upon, and not merely for such proportion of such amount as the value of the ship and freight bears to the value of the cargo. (Adm.) *The Cumbrian* ... 151

5. *Agreement—Named sum—Supervening circumstances—Towage.*—Where the master of a ship has agreed to tow a ship which is in distress to a named port for a fixed sum, such agreement is binding on the parties to it, even though by reason of an increase in the weather the performance of the agreement becomes more onerous than was originally contemplated; but if supervening circumstances are such as to render the performance of the contract nautically impossible, the Court of Admiralty is entitled to treat the agreement as if it had never been made, and, if the vessel is taken to a place of safety, to award to the salvors such salvage as the merits of the case require; and this is so whether the original contract be a towage or salvage agreement. (Ct. of App.) *The Westbourne* 405

6. *Amount—Damage to salvors.*—Where three steamships rendered valuable salvage service to a stranded vessel, and one of them sustained very considerable damage in rendering the services, the court on a value of 3750*l.* awarded 2000*l.* (Adm. Div.) *The Erato* 334

7. *Amount—Principles on which the court acts—Risk to salvors—Risk to salved property.*—The court, in estimating the value of salvage services, takes into consideration the value of the property saved, the risks to which it has been exposed, the perils from which it has been saved, the possibility of other assistance being obtained, the value of the salving ship, the sacrifices and risks incurred by the salvors, and the length of time to which they are exposed to such risks. (Adm.) *The Werra* 115

8. *Appeal—Amount of award—Misapprehension of evidence.*—The barque *S of P.*, having taken up a foul berth in bad weather in the Downs, collided with another barque. The tug *C.* towed her clear after an hour's towing, during which time her anchor and chain were slipped. After she had been got clear the tug continued to tow ahead until another anchor had been brought off from the shore by other salvors, and she was ultimately saved. Her value and that of her cargo and freight amounted in all to 23,000*l.* Butt, J., in a salvage action against the *S. of P.* having awarded 150*l.*, the Court of Appeal held that he had misapprehended the evidence as to the danger from which the *S. of P.* had been saved, and increased the award to 300*l.* (Ct. of App.) *The Star of Persia* .....*page* 220

9. *Appeal—Misapprehension of Evidence—Variation of award.*—The Court of Appeal will, in a salvage action, where it appears that the judge below has misapprehended the evidence, and consequently given a wrong award, increase or diminish the award as the justice of the case may require. (Ct. of App.) *The Star of Persia* 220

10. *Appeal—Privy Council—Alteration of award.*—The Judicial Committee is reluctant to review salvage awards which involve the exercise of the discretion of the judge below, and will not do so unless the amount awarded differs to the extent of one-third from that which the Judicial Committee thinks adequate. (P.C.) *The Thomas Allen*..... 99

11. *Appeal—Privy Council—Reduction of award.*—The screw steamship *T.A.*, of 1701 tons, laden with a cargo of grain, broke her screw shaft on the 3rd Oct. 1885 when in the Gulf Stream, about three hundred miles from Halifax. On the evening of the same day the steamship *A.*, of about 1600 tons, laden with cargo and bound from Philadelphia to Bordeaux, took the T.A. in tow about 8.30 p.m. and brought her safely into Halifax about 3.30 p.m. on Oct. 5. The weather was fine, and the *A.* ran no danger in rendering the services. The *T. A.* was in no immediate danger when picked up. The value of the *T. A.*, her cargo and freight, was 126,775 dollars; the value of the *A.*, her cargo and freight, was 132,500 dollars. The Vice-Admiralty Court of Halifax having awarded 12,000 dollars: Held, on appeal, to be excessive, and reduced to 7500 dollars. (P.C.) *The Thomas Allen*..... 99

12. *Apportionment—Right to share in salvage—Ship's articles—Cattlemen.*—Where a salving ship, trading between England and the United States, carried cattlemen, whose duties were to attend to a cargo of live cattle, they being paid a lump sum for the voyage by the owners of the cattle, the fact that they are on the ship's articles at a nominal rating, in order to satisfy the requirements of the American authorities, does not of itself make them part of the crew, so as to entitle them to share with the ship's crew in the award. (Adm. Div.) *The Coriolanus* 514

13. *Government ship—Transport—Right to reward.*—The owners, master, and crew of a steamship chartered to Government as a transport under the ordinary form of Government charter incorporating the transport regulations (by which it is provided that "when necessary, steam transports will be required to tow other vessels"), are entitled to recover for salvage services rendered to a ship and her freight, even though the services be rendered with the assistance of a naval officer and naval seamen and the salved vessel be laden (*inter alia*) with Government stores. (Adm.) *The Bertie* 26

14. *Incomplete services—Ship ultimately saved—Agreement—Right to reward.*—In a salvage action the plaintiffs were obliged by stress of weather to leave the defendants' vessel in a worse position than that in which they found her. In the statement of claim it was alleged, and admitted in the defence, that there was an agreement between the masters that the salving ship should attempt to tow the defendants' ship to a port of safety. The defendants' ship was ultimately saved by another vessel. Held, that the plaintiffs were not entitled to salvage in the proper sense of the term, but that, as they had

performed the agreement to attempt to save the ship, they were entitled to adequate remuneration for what they had done. (Adm. Div.) *The Benlarig* .....*page* 360

15. *Liability for salvage—Ownership—Beneficial interest.*—The liability for salvage is not confined to those who have the absolute property in the thing saved, but extends to persons having a beneficial interest therein and subject to pecuniary loss if the property were not saved. (Adm. Div.) *Five Steel Barges* 580

16. *Pilotage—Fisherman—Shortness of provisions.*—Where a ship, otherwise uninjured, is short of provisions, and some of her crew are disabled by exposure to bad weather, and her master, being anxious to get to the nearest port, engages out of pilotage waters the services of a fisherman to pilot him to the nearest port, the services of the fisherman are to be rewarded as salvage, and not as mere pilotage. (Adm. Div.) *The Aglaia* 337

17. *Pilotage—Nature of services—Conversion to salvage.*—The services of a pilot on a salved ship are not changed from those of pilot to salvor where his services consist in trifling assistance by helping at the wheel and windlass. (Adm.) *The Monarch* 90

18. *Practice—Action in personam—Transfer of property.*—An action *in personam* for salvage lies against the owners of salved property, although the salved property has been transferred to others before the institution of the suit. (Adm. Div.) *Five Steel Barges* 580

19. *Practice—Compromise — Mistake of fact.*—Where, in a salvage action, the agents of the plaintiffs' solicitor settle the plaintiffs' claim under a mistake of fact, and one of the claimants is present at the compromise, and under a misapprehension of the facts acquiesces therein, such compromise is not binding on him when the true state of affairs is discovered. (Adm.) *The Monarch* 90

20. *Practice—Consolidation—Separate appearances—Tender—Costs.*—Where separate salvage actions against the same ship were consolidated, leave being given to the various plaintiffs to appear separately at the hearing as their interests were conflicting, and the defendants with their defence tendered and paid into court a sum of money as being sufficient to satisfy all claims, but did not apportion it to the separate plaintiffs, the Court having upheld the tender ordered all parties to pay their own costs incurred subsequently to the tender, the defendants paying the costs previous to the tender. (Adm. Div.) *The Lee* 395

21. *Practice—Registrar and Merchants—Bill of lading—Excepted perils.*—In a salvage action against cargo, where the ship and cargo had been wrecked in the Red Sea, it appeared that the cargo was carried under a bill of lading exempting the shipowner from liability for loss caused by negligence of the master and crew. The shipowners claimed salvage for services to the cargo and brought in a claim for demurrage of certain of their ships which had rendered services. The Court referred these matters to the registrar to report how much was due to the salving of the ship and how much to the cargo. (Adm. Div.) *The Cargo ex Ulysses* 354

22. *Priority of liens—Conservancy authority—Raising wreck—Expenses—Life salvage.*—Where a conservancy authority, in pursuance of their powers under an Act of Parliament, raise a sunken ship and sell her to defray the expenses of raising her, their lien upon the ship and its proceeds take priority of any claim to life salvage, and if the proceeds are less than the expenses, there being no property saved against which life salvage can attach, life salvors cannot recover either against the sunken ship or against the owners, notwithstanding the fact that the owners have recovered from the wrongdoers causing the sinking of their ship the amount of the loss that they have sustained. (Adm.) *The Annie* .....*page* 117

23. *Queen's ship—Duties of—Right to salvage.*—Where a British ship is wrecked with cargo in the Red Sea and one of H.M. ships is employed to protect the ship and cargo from plunder by the Arabs, and the commander and crew also assist in saving the cargo by getting it out of the hold and carrying it a considerable distance to lighters, although it may be that the commander and crew are not entitled to salvage in respect of the protection which they give to the ship and cargo by their presence, they are entitled to salvage in respect of anything done outside the ordinary scope of their duties, which would include the placing of sentinels and carrying the cargo. (Adm. Div.) *The Cargo ex Ulysses* 354

24. *Right to retain salved property—Repairs.*—Where salvors have brought a damaged vessel into a position of safety they are bound, on demand by the owners, to deliver up possession of the salved property, and have no right to retain it for the alleged purpose of completing the repairs. (Adm. Div.) *The Pinnas* 313

25. *Right to retain salved property—Possession.*—*Semble*, if the owners of a vessel which is being salved demand possession of her when she is in such a critical position that there may be risk of loss or damage to her unless the salvors are allowed to complete their operations, the salvors may be entitled to retain possession pending their performance. (Adm. Div.) *The Pinnas*... 313

26. *Right to salvage—Purchaser of salved property—Mistake of fact.*—Where a person renders services in the nature of salvage to a vessel which he at the time *bonâ fide* believes to be his own by purchase or otherwise, he is not precluded from recovering salvage reward in respect of such services because it turns out in fact that the vessel was not his property. (Adm. Div.) *The Liffey* 255

27. *Tug and tow—Contract—Conversion into salvage—Right to reward.*—Where the owners of a tug contracted to tow a number of barges at sea for an agreed sum of money, it being part of the contract that, if the barges or any of them broke adrift during the towage, the tug owners were nevertheless to be entitled to the sum, and in consequence of the severity of the weather the voyage was unduly protracted, the barges broke adrift on several occasions, and were picked up again, and men in charge of the barges were saved from possible loss of life, the court awarded salvage on the ground that the services were beyond what was contemplated by the parties when entering into the towage contract. (Adm. Div.) *Five Steel Barges*..... 580

28. *Warranty—Seaworthiness—Bill of lading—Latent defect.*—Although there is an implied warranty in every bill of lading that the carrying ship shall be seaworthy, this warranty may be abrogated or limited by words to that effect; and hence, where a steamship laden with cargo becomes disabled through a latent defect in existence prior to the commencement of the voyage and salvage services are rendered to such steashmip by a vessel belonging to the same owners, the shipowners may recover salvage against the cargo if by the bill of lading the warranty of seaworthiness is abrogated, and the

shipowners are not to be liable for latent defects. (Adm. Div.) *The Laertes*..... *page* 174

29. *Wreck—Stranded vessel—Merchant Shipping Act* 1854, *s.* 450.—The provisions of sect. 450 of the Merchant Shipping Act 1854 requiring a person who finds or takes possession of a wreck to give notice to the receiver, are not applicable to the case of a person who takes possession of a stranded vessel under the belief that he is the purchaser thereof, and in such a case these provisions do not operate to deprive him of his right to recover salvage. (Adm. Div.) *The Liffey* 255

See *Marine Insurance*, Nos. 1, 19.

SCREW ALLEY.

See *Collision*, No. 45.

SEAMAN.

30. *Practice—Board of Trade—Supplying seamen—Licence—Onus of proof.*—On an information charging the defendant under sect. 147 of the Merchant Shipping Act 1854 with supplying a seaman to a merchant ship in the United Kingdom without holding a licence from the Board of Trade for that purpose, the onus is on the defendant, after proof has been given of the supply of the seaman by him, of proving that he held a licence from the Board of Trade. (Q. B. Div.) *Reg. on the prosecution of Turner* v. *Johnston* 14

See *Wages*, No. 3.

SEAMAN'S WAGES.

See *County Courts Admiralty Jurisdiction*, No. 8 —*Wages.*

SEAWORTHINESS.

See *Carriage of Goods*, No. 26—*Salvage*, No. 28.

SHIFTING BOARDS.

See *Unseaworthy Ship*, No. 1.

"SHIP NOT UNDER COMMAND."

See *Collision*, No. 76.

SHIP'S ARTICLES.

See *County Courts Admiralty Jurisdiction*, No. 8 —*Salvage*, No. 12.

SHIPBROKER.

See *Shipowner*, No. 5.

SHIPOWNERS.

1. *Cost of working—Dissentient owners—Proportion of expenses.*—Where a ship is being worked by part of her owners, the remainder being dissentient, and losses result from her employment, such losses are to be borne, not in the proportion which each share of the working owners bears to the whole sixty-four shares, but in the proportion which each share bears to the number of shares held by the persons working the ship. (Adm. Div.) *The Vindobala* 250

2. *Jurisdiction—Registered co-owners—Admiralty Court Act* 1861.—*Quære*, whether sect. 8 of the Admiralty Court Act 1861, giving the Admiralty Court jurisdiction to decide questions between co-owners is not confined to questions between registered co-owners. (Adm.) *The Bonnie Kate* 149

3. *Managing owner — Authority — Agency.* — Per Lord Esher, M.R.: The managing owner of a ship is the agent of each co-owner separately, and each co-owner may retract his authority to the managing owner without consulting the other co-owners. (Ct. of App.) *The Vindobala*...*page* 376

4. *Managing owner—Defalcations — Contributions to make good.*—Where a part owner of a ship pays to the managing owner his contribution due upon the ship's accounts as agreed between the co-owners, the managing owner receives such contribution as agent for all the owners, and in the event of the managing owner misapplying such payment to his own use, and not paying the ship's accounts therewith, the contributing owner is entitled to be credited with the amount so paid, but all the owners, including himself, must make good the defalcations in proportion to their shares. (Adm.) *The Ida* 21

5. *Managing owner—Shipbroker—Remuneration—Commission.*—A shipbroker, who is also managing owner of a ship and receiving a fixed sum as remuneration for his services as such, is not entitled to make an extra profit for himself by commission or brokerage for procuring charters and freights, it being one of the duties of a "managing owner" to procure charters and freights. (Ch. Div.) *Williamson* v. *Hind Brothers* 559

6. *Principal and agent — Managing owner — Authority.*—The mere fact of an agent being bound in honour to complete a contract which he is negotiating for his principal, where he, the agent, is under no legal liability if he refuses to complete, does not prevent the principal withdrawing his authority any time before the agreement is completed. (Ct. of App.) *The Vindobala* 376

7. *Principal and agent — Managing owner — Authority — Charter-party.*— The managing owner of the ship *V.*, with the authority of his co-owners, entered into negotiations abroad with the view of chartering the ship. These negotiations were carried on by an agent abroad. On the 17th July 1884 a form of charter, signed by the managing owner, was offered to the proposed charterers. They objected to certain provisions in it, to which objections the agent, with the managing owner's authority, assented. On the 19th July the charterers signed the charter, having previously introduced into it certain further alterations which had never been suggested to the managing owner's agent. On the same day certain of the co-owners gave notice to the managing owners that they refused to be bound by any charter. The managing owner, considering himself bound in honour to sign the charter-party, signed it on the 22nd July. The execution of the charter-party was prevented by the arrest of the *V.* by the dissentient owners, and damages resulted therefrom. Held (reversing the decision of Butt, J.), in a co-ownership action, that there was no binding contract until the managing owner signed the charter on the 22nd July, and that up to the signing of the same any of the owners could revoke the managing owner's authority, and that, as the dissenting owners had revoked their authority on the 19th July, they were not bound by the charter. (Ct. of App.) *The Vindobala* 250, 376

8. *Purchase of shares during voyage—Right to freight—Deduction of expenses.*—The purchaser of shares in a ship during the progress of a voyage is only entitled to share in the net freight after all the expenses incidental to earning the freight on the voyage in question have been deducted from the gross freight. (Adm. Div.) *The Vindobala* 250

9. *Sale of shares — Managing owner — Authority — Liability in expenses.* — The managing owners of the steamship *B. K.* in 1882 agreed to sell the defendant V. one sixty-fourth share in the *B. K.*, for which he gave them a bill of exchange for 156*l.*, and received from them a receipt for the same as "being one sixty-fourth share in the s.s. *B. K.*" In 1883 the managing owners sent V. 8*l.* in respect of profits on his share, and subsequently sent him a statement of accounts. No bill of sale of the share was ever executed by the managing owners, and it appeared that their shares in the *B. K.* were mortgaged at the time of the sale to V., and that subsequently they never were in a position to redeem them. Certain of the owners having paid losses incidental to the working of the ship, now sued V. as a co-owner for his proportion of the losses. Held, that, notwithstanding the receipt by V. of the 8*l.*, he was not, either in law or equity, a co-owner, that the managing owners had no authority to pledge his credit, and that therefore he was not liable. (Adm.) *The Bonnie Kate* ..... *page* 149

See *Mortgagor and Mortgagee*, Nos. 2, 3.

SHIPPING CASUALTIES INVESTIGATION ACT 1879.

See *Wrecks and Casualties.*

SPEED.

See *Collision*, Nos. 30, 60, 66, 67.

STAY OF EXECUTION.

See *Practice*, No. 3.

STERN LIGHT.

See *Collision*, Nos. 38, 72 to 84.

STEVEDORES.

See *Carriage of goods*, No. 18.

STOPPAGE *IN TRANSITU.*

1. *Bankruptcy—Vendee—Foreign principal—Mate's receipts.*—Where a vendor, having sold goods to a vendee whom he knows to be purchasing for a principal abroad, delivers such goods on board a ship, which he knows to belong to such principal, and having taken mate's receipts for such goods, hands them to the vendee, who is described in the bills of lading as shipper, and to whose order the goods are deliverable, the vendor is not entitled to stop the goods *in transitu* on learning that the vendee has become bankrupt. Cave, J.) *Re Bruno, Silva, and Son; ex parte Francis and Co. Limited* 138

2. *Duration of transit — Carrier—Agency of.*—Where goods have not been delivered to the purchaser, or to any agent of his, for him to hold otherwise than as a carrier, but are still in the hands of the carrier as such, and for the purposes of the transit, then, although such carrier is the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu*, and may be stopped. (P. C.) *Lyons* v. *Hoffnung* 551

3. *Duration of transit—Constructive delivery—Mate's receipts.*—Delivery of goods by a vendor on board a ship named by the purchaser in pursuance of an order to consign them to the ship "to Melbourne loading in the East India Docks," in respect of which goods a receipt given by the mate to the persons delivering the goods is sent to the purchasers, is not constructive delivery to the purchaser, and hence the vendor on hearing of the purchasers insolvency is entitled to exercise the right of stoppage *in transitu*. (Ct. of App. affirming Q. B. Div.) *Bethell and Co.* v. *Clarke and Co.* ..... *page* 346

4. *Duration of transit—Purchaser's agent—Carrier—Shipowner's receipts.*—Where goods have not been delivered to the purchaser or to his agent to hold for him otherwise than as a carrier, the right to stop them *in transitu* under such circumstances is not affected by the facts (1) that the purchaser has handed to the shipping agents the shipowners' receipts for the goods received by him from the vendor, and has received from them in exchange a bill of lading; (2) that the purchaser is himself a passenger by the vessel on board which the goods are shipped as cargo for conveyance to their ultimate destination. (P. C.) *Lyons* v. *Hoffnung* 551

STOWAGE OF GOODS.

See *Carriage of Goods*, No. 27.

STRIKE.

See *Carriage of goods*, Nos. 16, 18.

SUING AND LABOURING CLAUSE.

See *Marine Insurance*, No. 16.

TACK.

See *Collision*, No. 65.

TEES CONSERVANCY RULES.

See *Collision*, No. 91.

THAMES CONSERVANCY.

See *Thames Navigation—Wreck.*

THAMES CONSERVANCY RULES.

See *Collision*, Nos. 92 to 102.

THAMES NAVIGATION.

1. *Barges—Lighters—Competent man.*—To comply with bye-law 16 of the Thames Conservators, requiring all barges, boats, lighters, and other craft to have at least one competent man on board, and such craft when above 50 tons burthen to "have one man in addition on board to assist in the navigation," it is necessary that the "one man in addition" should be competent and skilful. (Q. B. Div.) *Goldsmith and another* v. *Slattery* 561

2. *Towage—Steamer—Watermen and Lightermen's Act* 1859.—It is not a breach of bye-law 59, made under the Watermen and Lightermen's Act 1859, providing that no person in charge of and navigating a steamer on the Thames shall tow more than six craft at a time, to tow more than that number of barges into a dock from the river, where such barges have been collected together for the purpose of being taken into the dock near a dolphin belonging to the dock, and some of them are within the ambit of the dock. (Q. B. Div.) *Rolles* v. *Newell* 563

THIRD PARTY.

See *Marine Insurance*, No. 16.

TILBURY DOCKS.

See *Pilotage*, No. 2.

TOTAL LOSS.

See *Marine Insurance*, Nos. 1, 19.

TRADE WINDS.

See *Collision*, No. 85.

TRANSSHIPMENT.

See *Carriage of Goods*, Nos. 32, 35—*Marine Insurance*, No. 18.

TRAWLERS.

See *Collision*, Nos. 58, 59—*County Courts Admiralty Jurisdiction*, No. 3.

TRIAL AT BAR.

See *Practice*, Nos. 14, 15, 16.

TRINITY MASTERS.

See *Collision*, Nos. 45, 46.

TUG AND TOW.

1. *Duty of tow—Control of navigation.*—As a general rule it is the duty of a tow to give orders to the tug, and if a specific order is given by the tow to the tug, the responsibility for that order will rest with the tow; but there is no obligation on the tow to be constantly giving directions to the tug as to matters which are specially the duty of the tug, and if the latter by reason of local circumstances or knowledge has the means of forming a judgment as to what is to be done, it is her duty to do it without waiting for orders from the tow. (Adm.) *The Isca*.....*page* 63

2. *Maritime lien.*—There is no maritime lien in respect of towage services. (Ch. Div.) *Westrup v. Great Yarmouth Steam Carrying Company Limited* 443

See *Collision*, Nos. 32, 103 to 108—*County Courts Admiralty Jurisdiction*, No. 6—*Salvage*, Nos. 8, 27—*Wages*, No. 2.

TYNE NAVIGATION RULES.

See *Collision*, Nos. 109, 110.

TYNE PILOTAGE ORDER CONFIRMATION ACT 1865.

See *Collision*, No. 5.

UNDERWRITERS.

See *Marine Insurance*,

UNSEAWORTHY SHIP.

1. *Grain cargo—Shifting boards—Merchant Shipping (Carriage of Grain) Act* 1880.—Where a ship has two decks, and carries barley in bulk from a Mediterranean port, the duty imposed by the Merchant Shipping (Carriage of Grain) Act 1880, and the Board of Trade Regulations made thereunder, is to have bulkhead or shifting boards not merely in the 'tween decks, but in the lower hold also. (Adm. Div.) *The Rothbury* 332

2. *Grain cargo—Feeders—Board of Trade Regulations* 1881.—The Board of Trade Regulations 1881, 4 (*b*), requiring feeders to "be fitted to feed the grain carried in the 'tween decks, such feeders to contain not less than 2 per cent. of the compartments they feed," requires the feeders to contain 2 per cent. of the grain in the 'tween decks, and in the holds below the 'tween decks, and is not limited to the grain in the 'tween decks. (Adm. Div.) *The Rothbury*..... 332

See *Carriage of Goods*, No. 26.

VENDOR AND PURCHASER.

See *Sale of Goods—Stoppage in Transitu.*

VENUE.

See *County Courts Admiralty Jurisdiction*, No. 7—*Practice*, Nos. 14, 15.

VOYAGE.

See *Carriage of Goods*, Nos. 26, 27—*Marine Assurance Association*, No. 8.

WAGES.

1. *Lien on freight—Charter—Sub-charter.*—Where a ship is chartered for a round voyage out and home, and sub-chartered for the homeward voyage and earns freight under the sub-charter-party, the freight due to the original charterers under the sub-charter-party is liable to pay seamen's wages earned upon the round voyage, even though only a part of such freight is due to the shipowners under the original charter. (Adm.) *The Andalina* .....*page* 62

2. *Priority of liens—Light dues—Towage.*—A seaman's claim for wages has priority over a claim for payments made for light dues, and for the towage of a sailing vessel from sea to an inland port. (Adm.) *The Andalina* 62

3. *Seamen—Bad provisions—Right to damages—Merchant Shipping Act* 1854, *s.* 223.—In an action brought by seamen for wages and breach of contract, where the plaintiffs proved breaches of contract by the shipowners, whereby the seamen were supplied with provisions defective in quantity and quality, and were exposed to great dangers and hardships, the court awarded the wages as claimed, the maximum compensation of 1*s.* 8*d.* per day under sect. 223 of the Merchant Shipping Act 1854 in respect of the food, and general damages in respect of the hardships suffered by the plaintiffs. (Adm. Div.) *The Justitia* 198

See *Collision*, No. 18—*County Courts Admiralty Jurisdiction*, No. 8 — *Master's wages and disbursements—Necessaries*, No. 3.

WARRANT.

See *Naval discipline Act*, No. 4.

WARRANTY.

See *Damage*, Nos. 1, 4, 5 — *Marine Insurance*, Nos. 2, 20, and 21—*Salvage*, No. 28.

WATERMEN AND LIGHTERMEN'S ACT.

See *Thames Navigation*, No. 2.

WHARFINGER.

See *Damage*, Nos. 4, 5.

WITNESSES.

See *County Courts Admiralty Jurisdiction*, No. 4.

WRECK.

1. *Sunken wreck—Cost of raising—Charges of expenses—Thames Conservancy Act* 1857.—In estimating the charges and expenses of raising wrecks under the Thames Conservancy Act 1857, the Conservators are entitled to take into account the interest on the capital invested in the plant used in raising the wreck in question, repairs to and depreciation in, and insurance on plant; but they are only entitled to make such charges in

each particular case in relation to the amount of plant used therein, and to the time for which it is actually used. (Adm. Div.) *The Harrington*...*page* 282

2. *Sunken wreck—Cost of raising—Charges and expenses—Thames Conservancy Act* 1857.—The "charges and expenses" of raising wrecks to which the Thames Conservators are entitled under the Thames Conservancy Act 1857, must be reasonable charges and expenses. (Adm. Div.) *The Harrington* 282

See *Salvage*, Nos. 22, 29.

WRECK AND CASUALTIES.

Appeal—Certificated officer—Rehearing.—By the provisions of Shipping Casualties Investigations Act 1879 no appeal is given from the refusal of the Board of Trade to order a rehearing of an investigation into the conduct of a certified officer. (Adm.) *The Ida*.....*page* 57

WRIT.

See *Collision*. No. 36—*Practice*, Nos. 17, 18.

REPORTS

OF

All the Cases Argued and Determined by the Superior Courts

RELATING TO

MARITIME LAW.

HOUSE OF LORDS.

Feb. 23, 25, 26, *and April* 5, 1886.

(Before Lords WATSON, BRAMWELL, and FITZGERALD.)

NORTHCOTE *v.* OWNERS OF THE HENRICH BJORN. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Ship—Necessaries supplied to foreign ship—Maritime lien—Action in rem—3 & 4 Vict. c. 65, s. 6.

The statute 3 & 4 Vict. c. 65, s. 6, does not create a maritime lien in respect of necessaries supplied to a foreign ship in an English port, there having been no maritime lien for necessaries before that Act; and, consequently, material men cannot enforce their claims by proceedings in rem against a ship in the hands of a subsequent purchaser for value.

Judgment of the Court of Appeal affirmed.

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Bowen and Fry, L.JJ.), reported in 52 L. T. Rep. N. S. 560; 5 Asp. Mar. Law Cas. 391; and 10 P. Div. 44, reversing a judgment of Sir James Hannen, reported in 5 Asp. Mar. Law Cas. 145; 49 L. T. Rep. N. S. 405; and 8 P. Div. 151.

The appellants were shipbrokers in Liverpool, and the respondents were the owners of the Norwegian vessel, the *Henrich Bjorn*. The appellants claimed the sum of 683*l.* 6*s.* 2*d.*, in respect of necessaries supplied by them to the ship, while lying in the port of Liverpool, at the request of the master, and commenced a proceeding *in rem* against the ship. The defence set up by the respondents was, that since the goods had been supplied the ship had changed owners. The question, therefore, was whether the appellants were entitled to proceed against the ship, or had only a remedy against her former owners. The action was tried before Sir James Hannen, who gave judgment for the appellants for 350*l.*, but his decision was reversed with costs, as above mentioned.

Cohen, Q.C., and *Raikes*, for the appellants, argued that the effect of the statute 3 & 4 Vict. c. 65, s. 6, was to give a maritime lien in respect of necessaries supplied to a foreign ship in an English port. By the civil law there always was a maritime lien for necessaries. The American Courts have also decided in favour of the existence of a maritime lien. For many years past, there has been a uniform practice to that effect: (see *The Anna*, 34 L. T. Rep. N. S. 895; 1 P. Div. 253.) The existence of a jurisdiction in the Admiralty Court is not conclusive as to a maritime lien, for that court might have jurisdiction without a lien. Up to 1840, the Admiralty Court had jurisdiction in a claim for necessaries supplied on the high seas, and there was a lien, and the statute was intended to extend the jurisdiction to cases occurring within the body of a county. If no maritime lien exists in the case of "necessaries," then it must follow that damage and salvage within the body of a county confer no maritime lien, but there is a lien in cases of damage or salvage within the body of a county, and therefore it follows that there must be a lien in a case of necessaries. The civil law gave a maritime lien in certain cases, and the Admiralty Court allowed it as far back as the time of Edward III.; (see Abbott on Shipping, 22th edit., pp. 99, 100.) Then came the statutes 13 Rich. 2, c. 5, and 15 Rich. 2, c. 3, which were passed to restrain the jurisdiction of the Admiralty in the bodies of counties: (see *The Public Opinion*, 2 Hagg. Ad. 398.) The Admiralty Court similarly lost jurisdiction over masters' wages, except on the high seas, while retaining it over seamen's wages, unless earned under a special contract: (see 24 Vict. c. 10, s. 10.) Towage in the body of a county stands on the same footing as salvage: (Abbott, 12th edit., p. 489.) Necessaries supplied in a port were contracted for on land, so the Admiralty Court was deprived of its jurisdiction by the statute of Richard 2, but it retained it jurisdiction as to necessaries supplied on the high seas down to 1840:

Godfrey's case, Latch. 11;
Com. Dig. "Admiralty," E. 10;
Admiralty case, 12 Rep. 79;
Palmer v. *Pope*, Hob. 79, 213;
The Neptune, 3 Knopp. 94, 114;

and since the statute 3 & 4 Vict. c. 65,

The Ocean, 2 Wm. Rob. 368;
The Bold Buccleugh, 3 Wm. Rob. 220; on appeal, 7 Moo. P. C. 267.

Before the Admiralty Court Act of 1861 (24 Vict. c. 10) proceedings *in personam* were never taken in the Admiralty Court for wages, salvage, or necessaries: (see *The Flecha*, 1 Spinks Ecc. & Ad. 438.) *The Waiaga* (Swa. 165) assumes the very point for which we are contending (see also

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

The West Friesland Swa. 454). *The Gustaf* (6 L. T. Rep. N. S. 660; Lush. 508) puts wages and necessaries on the same footing, and there can be no doubt that there is a lien for wages, The dictum cited against us below was not necessary to the decision (see also *The Ella A. Clark*, Br. & Lush. 32; 1 Mar. Law Cas. O. S. 325; 8 L. T. Rep. N. S. 119), since which case the point has been considered as settled. *The India* (32 L. J. 185, Ad. & Ecc.) does not touch the point. *The Pacific* (10 L. T. Rep. N. S. 541: 2 Mar. Law Cas. O. S. 21; Br. & Lush. 243) was relied on below; but though all the dicta cannot be reconciled, the decisions are fairly consistent. See

The Princess Charlotte, 33 L. J. 188, Ad. & Ecc.;
The Two Ellens, 26 L. T. Rep. N. S. 1; 1 Asp. Mar. Law Cas. 208; L. Rep. 4 P. C. 161;
The Jenny Lind, 1 Asp. Mar. Law Cas. 294; 26 L. T. Rep. N. S. 591; L. Rep. 3 A. & E. 529;
The Turliani, 2 Asp. Mar. Law Cas. 603; 32 L. T. Rep. N. S. 841;
The Mary Ann, 13 L. T. Rep. N. S 384; 2 Mar. Law Cas. O. S. 294; L. Rep. 1 A. & E. 8;
The Glentanner, Swa. 415;
The Fairport, 8 P. Div. 48; 5 Asp. Mar. Law Cas. 62; 48 L. T. Rep. N. S. 536;
The Rio Tinto, 9 Asp. Cas. 356; 5 App. Mar. Law Cas. 224; 50 L. T. Rep. N. S. 461;
The Julianna, 2 Dod. 304;
Exton's Marine Dicæology, 373, 377, and the cases there cited;
Abbott, 5th edit. p. 111.

See also

The Volant, 1 Not. Cas. 503;
The Constancia, 4 Not. Cas. 512;
The Benares, 7 Not. Cas. Supp. 50;
The St. Lawrance, 5 P. Div. 250.

Re Rio Grande do Sul S.S. Co. (36 L. T. Rep. N. S. 603; 3 Asp. Mar. Law Cas. 424; 5 Ch. Div. 282), citing *The Feronia* (17 L. T. Rep. N. S. 619; 3 Mar. Law Cas. O. S. 54; L. Rep. 2 A. & E. 65), bears out the practice of the Admiralty Court in the case of a lien for disbursements. There was prior to the Admiralty Court Act 1861 no proceeding *in rem* in the Admiralty Court unless there was a maritime lien; and in this case of the supply of necessaries to a foreign ship in an English port the decisions have been uniform for twenty-five years, though there are dicta to the contrary.

Sir *R. Webster*, Q.C. and *Pyke* for the respondents were requested to confine their arguments to the points: (1) Whether the Admiralty Court recognised a maritime lien for necessaries before the Act of 1840? (2) Whether the authorities, or the course of mercantile practice, were such as to preclude the House from putting its own construction on the Act? There has not been a uniform course of practice or decision since 1861, as alleged on the other side. Many of the cases cited were only questions of priorities among various claimants. The civil law did not confer a maritime lien for necessaries before the Act of 1840: (see Emerigon, Contrats à la Grosse, c. 12, s. 1, and Voet.) If there were a lien for necessaries supplied on the high seas there would be no need for bottomry: (see *Hussey* v. *Christie*, 9 East, 426.) There is no case of a maritime lien for necessaries before 1840, and the argument of the appellants is based on a misunderstanding of the proceedings *in rem*. The difference between proceedings *in rem* and *in personam* is only in the service of the writ to compel the owner to come into court. The dictum in *The Bold Buccleugh* (*ubi sup.*) cannot be supported. See

The Neptune (*ubi sup*);
The Zodiac, 1 Hagg. Ad. 320;
The Vrow Mina, 1 Dod. 234.

These cases show that there is no maritime lien for necessaries except in cases of bottomry:

The Vibilia, 1 Wm. Rob. 1;
The Parlement Belge, 4 Asp. Mar. Law Cas. 234; 42 L. T. Rep. N. S. 273; 5 P. Div. 197.

The authorities show that there was no such lien as is claimed before 1840, and the Act of that year did not create it. Prior to that Act some proceedings *in rem* were independent of maritime liens, viz., actions of possession and restraint.

Raikes was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgments.

April 5.—Their Lordships gave judgment as follows:

Lord WATSON.—My Lords: This appeal is taken in an Admiralty suit, at the instance of the appellants, for recovery of moneys said to have been advanced by them in March 1882, for equipping and supplying with necessary stores the Norwegian ship *Henrich Bjorn* which was then lying in the port of Liverpool. The action is *in rem*, that being, as I understand the term, a proceeding directed against a ship or other chattel, in which the plaintiff seeks either to have the *res* adjudged to him in property or possession, or to have it sold under the authority of the court, and the proceeds, or part thereof, adjudged to him in satisfaction of his pecuniary claims. The remedy is obviously an appropriate one in the case of a plaintiff who has a right of property or other real interest in the ship, or a claim of debt secured by a lien which the law recognises. We have been informed that under the recent practice of the Admiralty Court the remedy is also given to creditors of the shipowner for maritime debts which are not secured by lien; and in that case the attachment of the ship by process of the court, has the effect of giving the creditor a legal *nexus* over the proprietary interest of his debtor as from the date of the attachment. The position of a creditor who has a proper maritime lien differs from that of a creditor in an unsecured claim in this respect—that the former, unless he has forfeited the right by his own *laches*, can proceed against the ship notwithstanding any change in her ownership, whereas the latter cannot have an action *in rem* unless at the time of its institution the *res* is the property of his debtor. In the present case there was a change in the ownership of the *Henrich Bjorn* between March 1882 and the time when this suit was instituted. Accordingly it is not matter of dispute that the action must be dismissed, if the appellants have not a maritime lien for the amount of their advances, which attached to and followed the ship, from and after the time when these advances were made.

Before the year 1840 the Court of Admiralty never possessed, although it did occasionally, when not prohibited, exercise jurisdiction in the case of maritime claims arising within the body of a county. In that year an Act was passed (3 & 4 Vict. c. 65) for the purpose, as expressed in the title and preamble, of improving the practice and extending the jurisdiction of the High Court of Admiralty. Sect. 6 enacts that in future that

court 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 the services were rendered or damage received or necessaries furnished in respect of which such claim is made." By sect. 23 it is provided that nothing contained in the Act shall be deemed to preclude Her Majesty's Courts of Law and Equity from continuing to exercise the jurisdiction which they previously had over the several matters and causes of action therein mentioned. I do not think it necessary to refer to authorities for the purpose of establishing that by the law of England persons who equip or provide necessaries to a ship in an English port have no preference over other creditors, and have no lien upon the ship itself for recovery of their demands. The law upon that point is clear. But the appellants rely upon the provisions of sect. 6 of the Act of 1840 as evidencing the intention of the Legislature not merely to give the Court of Admiralty jurisdiction to entertain claims for necessaries supplied to a foreign ship within the body of a county, but also to create a new incident of the claimant's right when he elects to sue in that court. It seems to be the necessary result of the appellants' contention that the claimant, who is an unsecured creditor, without any preference, when he seeks to enforce his claim elsewhere, becomes by virtue of the Act a creditor preferably secured when he brings an action in the Court of Admiralty. The whole provisions of 3 & 4 Vict. c. 65, appear to me to relate to the remedies and not to the rights of suitors. Sect. 6 merely confers "jurisdiction" to decide certain claims which the Court of Admiralty had previously no power to entertain. That enactment enables every person having a claim of the nature of one or other of those specified in sect. 6 to bring an action for its recovery in the Admiralty Court, but it cannot, in my opinion, have the effect of altering the nature and legal incidents of the claim. It may be that, at the time when the Act of 1840 was passed, it was not the practice of the Admiralty Court to sustain an action *in rem*, except at the instance of a plaintiff who had either a real right in, or a proper lien over, the vessel against which it was directed. The authorities cited at the bar appeared to me to bear out that proposition; but assuming it to be well founded, I do not see how it can affect the present question, because it is admitted that the court entertained actions *in personam* as well as *in rem*, and could, therefore, give an appropriate remedy in the case of a personal claim to which no maritime lien was attached. It was argued for the appellants that inasmuch as, in sect. 6, claims for necessaries supplied are enumerated in connection with claims for salvage, and for damages arising from collision (which have been held to involve a maritime lien), it must be inferred that the Legislature meant that a right of lien should be also recognised in the case of a claim for necessaries. In my opinion, it is impossible to derive that inference from the terms of the clause except by assuming, as Dr. Lushington seems to have done, in the case of *The Flecha* (1 Spinks, Eccl. & Ad. 438), that the main object of the Act was to assimilate the law of England to "the general law of the maritime States of Europe." As I have already indicated, that appears to me to be an assumption inconsistent alike with the title and preamble of the Act and with the character of its provisions. Many foreign States, whose systems of jurisprudence are based on the civil law, admit a maritime lien for necessaries, but the ground upon which the courts of England have declined to recognise such a lien is not, in my opinion, that it is opposed to some rule or principle peculiar to English law, but that it is contrary to the general principles of the law merchant. The law of Scotland is to a great extent founded upon the civil law, yet in the case of *Wood* v. *Hamilton* (3 Paton, Sc. App. Ca. 148), the Court of Session held that no hypothec existed for repairs or furnishings in a home port, being of opinion that the question ought to be determined, not according to the civil law, but, as in England, upon general principles of commercial law, and the judgment was, on appeal, affirmed by this House. To my mind it is scarcely conceivable that the Legislature, if it had been their intention to assimilate our commercial law to that of the foreign States referred to by Dr. Lushington in the case of *The Flecha*, should have endeavoured to effect that object by confining the assimilation to suits instituted in the English Court of Admiralty.

It was further argued that your Lordships are precluded from deciding that sect. 6 does not create any maritime lien in the case of claims for necessaries, by an authoritative course of decisions and practice to the contrary in the courts below. I do not think it necessary to refer in detail to the authorities bearing upon this point, which were carefully reviewed by Fry, L.J. in delivering the judgment of the Court of Appeal. The case of *The Flecha*, which was decided by Dr. Lushington in 1854, does not seem to me to be a direct authority in support of the appellants' argument. It was, no doubt, an action *in rem* for necessaries; but the owner, on whose credit the furnishings were made, appeared and put in bail, and the report of the case does not indicate that any question was raised in regard to lien. In the case of *The West Friesland* in 1859 (Swa. 454), and of *The Ella A. Clark*, in 1863 (Br. & L. 82), the same learned judge did decide in terms that, in virtue of sect. 6 of the Act of 1840, the plaintiffs, who sued in respect of necessaries supplied to a foreign ship in a home port, had a maritime lien, and were consequently entitled to proceed *in rem*, although the ship had been transferred *in bonâ fide* to a new owner. His judgment in *The West Friesland* was recalled, on appeal, by the Privy Council, who disposed of the case on other grounds, and carefully avoided any expression of opinion upon the law which had been laid down in the court below. So far, therefore, as regards judicial decision the argument of the appellants appears to me to rest upon the judgment of Dr. Lushington in the case of *The Ella A. Clark*. No one has done more to impair the authority of his decisions in *The West Friesland* and *The Ella A. Clark* than Dr. Lushington himself by his clear statement of the law in other cases. The principle of these decisions has never been confirmed or approved by any Court

of Appeal. They were referred to by the Privy Council in *The Two Ellens* (26 L. T. Rep. N. S. 1; 1 Asp. Mar. Law Cas. 208; L. Rep. 4 P. C. 161), and *The Rio Tinto* (50 L. T. Rep. N. S. 461; 5 Asp. Mar. Law Cas. 224; 9 App. Ca. 356); but the language used in the former of these cases by Mellish, L.J., and in the latter by Sir James Hannen, appears to me to be as much calculated to suggest doubt as to imply approval. In these circumstances I have come to the same conclusion as the Court of Appeal. I do not think that there is any decision of such authority, or that any such case of *communis error* has been made out, as would justify your Lordships in refusing to give effect to the provisions of sect. 6 of the Act of 1840, according to their just construction. I am, therefore, of opinion that the order of the Court of Appeal must be affirmed, and I move accordingly, and that the respondents do have the costs of this appeal.

Lord BRAMWELL.—My Lords: The question is whether the appellants have a maritime lien on the *Henrich Bjorn*—that is, a right to have satisfaction from the ship of a claim arising when the ownership of the vessel was as to five-sixths different from what it was when the suit now before us was instituted. The claim is for necessaries or money advanced to purchase necessaries for the outfit of the ship, a foreign ship lying at Liverpool. I will assume there was such supply or loans. Now, it is admitted on all sides and is certain that no such lien existed before 3 & 4 Vict. c. 65, s. 6, and also certain that if it now exists, it was given by that statute. But it is also certain that it is not thereby expressly given. For the words of the section are, "the High Court of Admiralty shall have jurisdiction to decide all claims and demands for" certain specified matters, including "necessaries supplied to any foreign ship, and to enforce payment thereof, whether it may have been within the body of a county or upon the high seas when the necessaries were supplied." Not a word about a lien; jurisdiction alone is given. So that if a lien is given, it is by implication only. Now, I think that where the Legislature in its laws, or parties in their agreements, might expressly state a particular intention and have not, that intention ought not to be implied, and the law or agreement dealt with as if the intention were expressed, without the most cogent considerations, amounting almost to a necessity. I am of opinion that they do not exist as to this statute. Let us examine the grounds on which it is contended they do. In the first place it is said that the object of the Legislature was to assimilate the law of England to the law of other European countries, that other European countries gave such a lien, and that, therefore it ought to be implied that this statute gives it. But we shall see presently that this assimilation would make the law of Engiand different to those of Scotland and Ireland, and, as my noble and learned friend who has just addressed your Lordships has said, it would make the rights different as administered in a court of common law from what they are in the Admiralty Court. Then it is said that our law gave such a lien where the supply was at sea, and that it follows that when the statute gives jurisdiction for necessaries supplied within the body of a county, the lien is given. As to this, there is a failure to show that our law did give such a lien for necessaries supplied on the high seas. Lord Tenterden's opinion is to the contrary, so is *The Neptune*, reported in 3 Knapp, 94. Further, 3 & 4 Vict. c. 65, is a law relating to the English Court of Admiralty only. It does not affect Ireland or Scotland. And if construing it as the appellants require would make our law in England like that of foreign nations, it would make it unlike that of Ireland, and as I am informed by Lord Watson, unlike that of Scotland. The truth is that the Legislature, or draftsman of the Act, was not thinking of a maritime lien, and if it has been given it has been so unintentionally. But then it was said that jurisdiction is given in cases of salvage and collision, and that as to them a maritime lien existed when the salvage or collision arose on the high seas, and that it could not be intended that there should not be a similar law if they arose within the body of a county, that, therefore, the words of the statute by implication gave such lien in those cases, and are therefore sufficient to give it in the case of necessaries. Now it may be admitted that it would be strange that if a collision occurred a little below the Nore, there should be a maritime lien, while if it were just above there should not be. How that may be I do not say; but, assuming there would be a maritime lien in case of a collision within a county, and that it might be in a sense said to be given by the statute, it by no means follows that one is given in the cases of towage or necessaries. It may well be that salvage and collision within counties are put on the same plight and condition as on the high seas, without the consequence as to necessaries contended for. Jurisdiction is by the section given in cases of towage, and it cannot be pretended that there was any maritime lien as to that when it occurs on the high seas. It was, indeed, said it was a sort of salvage, but it certainly is not. And the Admiralty, I take it, would have, under the statute, jurisdiction in a case of towage where the ship had been let and the owner was not liable. I do not see, therefore, any reason for implying that which, if intended, might have been expressly stated. But there are many reasons to the contrary besides the general one against needless implication. The law would, as I have said, be made different to the law of Ireland and Scotland.

Further, when the Legislature meant to give a lien, it knew how to do so, and did it in express terms, as in the case of master's wages, 7 & 8 Vict. c. 112, the Merchant Shipping Act, 1854, sect. 191. Then it is not given, as it might have been, for necessaries supplied in cases where jurisdiction is given by 24 Vict. c. 10, s. 5. Further, if giving the Admiralty jurisdiction would give a maritime lien, the effect of 24 Vict. c. 10, would be to give a maritime lien for the rent of a house. The statute gave, as it says, jurisdiction, and jurisdiction only; a jurisdiction over matters arising within the body of a county as to which there was jurisdiction before if they arose on the high seas; a jurisdiction to decide all such claims and demands, and enforce payment thereof. Jurisdiction as to towage was not created by the statute. It existed before with no maritime lien (Williams and Bruce, 152.) But the decisions must be examined. I cannot help thinking that the confusion which exists in them is attributable to a notion that Admiralty juris-

diction only existed where there was a maritime lien, so that to give jurisdiction was to give a lien. That the law was so was stoutly contended before us; but ultimately and most properly that was given up on the strength of authorities showing beyond doubt that Admiralty jurisdiction exists and always existed where there was no such lien. Proceedings might be *in personam* without the *res* being affected. And when they were *in rem*, though a security might be obtained for the payment of what was recovered, it might well be that there was no lien. With respect to the decisions of Dr. Lushington, I shall content myself with saying, with a most affectionate respect for his memory, that they neutralise each other—that, if anything, they are more against than in favour of the lien claimed, especially his decision and reasons for it in *The Alexander* (1 W. Rob. 288, 346). And here I may observe that I agree in the remarks of Fry, L.J., that the jurisdiction given was not "an old one revived," for it was prohibited because it did not exist rightfully. In *The Bold Buccleugh* (7 Moo. P. C. 267), it was assumed that a maritime lien existed in cases of collision within the body of a county, which could only be because it was given by 3 & 4 Vict. c. 65. But two remarks are to be made on that case—one, that it was assumed without discussion; the other, that even if it was given it was in cases of collision. As I have said, it does not follow that it was so in case of necessaries. But then there is the opinion of Mellish, L.J., in the *Two Ellens* (*ubi sup.*), in which he says, "Their Lordships are of opinion that the case of necessaries may be supported on the ground that, though the words are hardly sufficient to create a maritime lien, yet it appears designed to enlarge the jurisdiction the Admiralty already had in matters forming the subject of a maritime lien." The following remarks arise on this. It is *obiter*; that does not show a remark is valueless, but it certainly shows it is not so valuable as a specific decision on a question directly raised. If the question had been raised there, I do not think Mellish, L.J. would have said, as he did, "that it was a matter forming the subject of a maritime lien." Further, the expression is, "their Lordships are of opinion that the decision may be supported." I am not sure that means more than "possibly may be." The case of *The Rio Tinto* (*ubi sup.*), is in point, and the reasoning there may be entirely adopted. It convincingly decides that there is no maritime lien for necessaries as in the present case is contended for. I have reason for saying that this opinion I am now expressing is not opposed to that of the President of the Probate and Admiralty Division. On these grounds and authorities, I am of opinion no maritime lien existed in this case, and that the judgment should be affirmed.

Lord FITZGERALD.—My Lords: I had the honour of being one of the tribunal which decided the appeal in the case of *The Rio Tinto* (50 L. T. Rep. N. S. 461; 5 Asp. Mar. Law Cas. 224; 9 App. Cas. 356), and I then formed an opinion on the question whether sect. 6 of the 3 & 4 Vict. c. 69, created a maritime lien for "necessaries supplied to a foreign ship," which I have not had since any reason to change. The Judicial Committee had, in that case, to consider this very question. This decision was unanimous, and the reasons for it, as delivered by Sir James Hannen met with the entire approval of the Lords present. It is a case in point, though it does not decide the very same question as that now before us, but I agree with Lord Bramwell that the reasoning there used may be entirely adopted. The conclusion which I had reached in the case of *The Rio Tinto* is in precise accordance with the decision which has just been announced, and with the clear and exhaustive judgment of the Court of Appeal as delivered by Fry, L.J. The course of this cause has been very singular. The plaintiffs, in their statement of claim, do not allege or set up any maritime lien, and the defence was substantially a denial that, save as to a small sum paid into court, any necessaries had been supplied by the plaintiffs. It came before Sir James Hannen for trial, but the allegation of a maritime lien does not appear to have been raised, nor was his attention at all directed to it. The parties then went before the Court of Appeal, and it was in the argument there that maritime lien was for the first time suggested. I entirely concur with my noble and learned friends, and have nothing to add to their reasons. I desire to point out that the two main propositions on which Mr. Cohen rested the appellant's case—viz., (1) that at the time when *The Bold Buccleugh* (7 Moo. P. C. 267) was decided there was no proceeding *in rem* in the Admiralty Court save where there was a maritime lien; and (2) that there was no procedure in that court to found jurisdiction except where there was a maritime lien—were not shown to be well founded. It must now be taken as established that prior to 1840 the Court of Admiralty did exercise a jurisdiction *in rem* for the purpose of enforcing a claim against the owner, though there was no maritime lien, and also *in personam* in proper cases.

Order appealed from affirmed; and appeal dismissed with costs.

Solicitors: for the appellants, *Hollams, Son and Coward*; for respondents, *Irvine* and *Hodges*.

Supreme Court of Judicature

COURT OF APPEAL.

Thursday, June 3, 1886.

(Before the LORD CHANCELLOR (Herschell), Lord ESHER, M.R., and FRY, L.J.)

THE HARVEST. (*a*)

ON APPEAL FROM BUTT, J.

Collision—Bye-laws for the Regulation of the River Tyne 1884, *art.* 30.

A vessel entering the Tyne is bound, under bye-law 20 for the Regulation of the River Tyne, directing that vessels shall be brought into port to the north of mid-channel, to get on to a course to enable her to enter on the north side when at some considerable distance outside the pier-heads; and if she crosses from south to north of mid-channel, when close up to the pier-heads, she thereby infringes the bye-law.

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

This was an appeal by the defendants in a collision action from a decision of Butt, J., finding the defendants' steamship *Harvest* solely to blame for a collision with the plaintiffs' steamship *Stainsacre*.

The collision occurred on the 30th Nov. 1885, and, according to the finding of the court below, some two or two and a half cables' lengths outside the pier-heads of the river Tyne, and to the south of mid-channel.

The *Stainsacre* was bound from the Howdon Dock in the Tyne to Copenhagen. The *Harvest* was bound from Terneuzen to the Tyne.

The plaintiffs charged the defendants *inter alia* with improperly approaching the entrance of the river in such a direction that the *Harvest* was being brought into the port to the south of mid-channel, in contravention of bye-law 20 for the Regulation of the Port of Newcastle-upon-Tyne, which 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 port to the north of mid-channel, and be taken out of the port to the south of mid-channel.

The further facts of the case fully appear in the report of the trial below: (11 P. Div. 14; 5 Asp. Mar. Law Cas. 546; 54 L. T. Rep. N. S. 274.)

Hall, Q.C. and Dr. *Raikes* for the appellants.

Sir *Walter Phillimore*, Q.C. and *G. Barnes* for the respondents.

The Lord Chancellor (Herschell).—This is an appeal from the judgment of Butt, J., in which he found the *Harvest* alone to blame for a collision which took place between the steamships *Harvest* and *Stainsacre*, near the mouth of the river Tyne. I think that the case really depends on the view to be taken of the facts, although some argument has been addressed to us on the construction of bye-laws which have been made by the Tyne Commissioners for the navigation of the river. The 20th of these bye-laws is the bye-law which regulates the course the *Harvest* was bound to take in entering the Tyne. It provides that "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." I understood it to be suggested that that bye-law only applied when a vessel was entering or being taken out of the port across an imaginary line drawn between the two pier-heads. But it is quite manifest that, when read in connection with the 19th rule, that that cannot be the meaning, because the 19th rule regulates the navigation up to this imaginary line, and therefore it is obvious rule 20 applies to something outside this line. I think rule 20 is to regulate the mode in which vessels are to be brought to or taken from the place where rule 19 ceases to operate. I therefore think that the true construction of the rule is that put upon it by Butt, J., that in bringing your ship into the river you shall not begin to make the river too near, but you shall keep sufficiently far out before you cross, so as to leave sufficient fairway for vessels that are coming out. That appears to me to be the common sense of the rule, and therefore a vessel is not "brought into the port to the north of mid-channel" if she begins to shape her course and make for the river too near to the pier, by shaving it too fine to leave sufficient room for a vessel coming out on the north side of the channel.

Now, the question arises, did the *Harvest* so navigate as to violate or comply with this rule? The learned judge below came to the conclusion that she was being navigated in violation of the rule. We see no reason to differ from the conclusion at which he arrived. We think that she came too near to the pier-head, and cut it too fine. That is shown by the position of the wreck, and by other facts, which we think are the correct facts in the case. Therefore we think the *Harvest* was wrong in violating the rule. [His Lordship then, on the facts, found the *Harvest* further to blame for not exhibiting a masthead light, and exonerated the *Stainsacre* for starboarding shortly before the collision.] I therefore think the starboarding of the *Stainsacre* is to be excused, and that the *Harvest* is to blame for two acts of negligence, both of which contributed to the collision. I am therefore of opinion that the judgment of the court below must be affirmed.

Lord Esher, M.R.—There is a question in this case as to the construction of the rule relating to vessels going in and out of this port. By the very wording of the rule it is meant to apply to something outside what is called the port. It seems to me, having regard to its nautical language, that it is not applicable to anything which is to be done inside the port, but to something which is to be done when you are navigating a ship into or out of the port. That intention is clear when you contrast it with rule 19. Taking it to apply to the outside of the port, how does it act practically? Why, in this way, that a ship coming in from the south must not make for the point where she is to bring the two leading lights in line too close to the pier-heads so as not to leave room for ships coming out. She must keep a reasonable distance outside before she turns to go up the river, so as to leave a fair course for outcoming ships. That being the construction of the rule, the question is, whether, upon the evidence in this case, the *Harvest* did not go unreasonably close to the south pier-head so as not to leave enough room for outcoming vessels. Considering the place where the wreck was, and knowing the circumstances of the case, the learned judge below believed the evidence of the captain of the *Stainsacre*. It seems to me that the *Harvest* did come in too close to the south pier-head. Our assessors have no doubt from the position of the wreck, and from the evidence that the *Harvest* came in, not as her captain stated and falsely stated, a mile from the pier-head when she struck the line of lights, but that she came in much closer and struck the line of lights at about a quarter of a mile off. The learned judge thought so, so did the Trinity Masters, and so do our assessors. Therefore, it is obvious that she broke the rule. And what else did she do that was negligence? [His Lordship then dealt with the facts, and found the *Harvest* further to blame for not exhibiting a proper masthead light, and excused the *Stainsacre* from starboarding.]

Fry, L.J. concurred.

Appeal dismissed, with costs.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

Solicitors for the defendants, *Turnbull, Tilly,* and *Mousir.*

Friday, June 4, 1886.

(Before the Lord Chancellor (Herschell), Lord Esher, M.R., and Fry, L J., assisted by Nautical Assessors.)

The Leverington. (*a*)

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

Collision — Narrow channel — Cardiff Drain— Regulations for Preventing Collisions at Sea, arts. 16, 21, 22.

Art. 16 *of the Regulations for Preventing Collisions at Sea, directing that if two steamships are crossing so as to involve risk of collision the ship which has the other on her starboard side shall keep out of the way of the other, applies in a narrow channel where it is the duty of steamships to keep to that side of mid-channel which lies on their starboard side, and hence, where a steamship going up Cardiff Drain sees a vessel on her starboard side coming down the channel from the Roath Basin, it is her duty to keep out of the way of the other, and the duty of the latter under art.* 22, *to keep her course, and if the latter, instead of doing so, ports to get on to the starboard side of the channel, she is to blame for breach of art.* 22 *of the Regulations.*

This was an appeal by the plaintiffs in a collision action *in rem* from a decision of Butt, J. finding their steamship the *Rapid* solely to blame for a collision with the defendants' steamship the *Leverington.*

The collision occurred about 12.30 p.m. on the 3rd Sept. 1885 in Cardiff Drain.

The facts alleged on behalf of the plaintiffs were as follows:— Shortly after noon on the 3rd Sept. the *Rapid,* a steamship of 581 tons gross, laden with a cargo of coals from Cardiff Dock to St. Nazaire, was in the Roath outer lock, having just hauled out of the East Bute Dock. As she was leaving the lock with her engines going easy ahead, a steamship, which proved to be the *Leverington,* was seen coming up the drain at the distance of about 500 yards from her, and bearing about three points on her port bow. The whistle of the *Rapid* was sounded one blast, and her helm was ported in order to proceed down the starboard side of the drain. The *Leverington* approached and altered her course as if under a starboard helm, and caused danger of collision. The whistle of the *Rapid* was blown one blast, and her engines were stopped and then reversed full speed astern, and her helm was put to starboard to cant her head to starboard under sternway; but the *Leverington* came on with increased speed, and with her stem struck the port side of the *Rapid,* doing her considerable damage. The plaintiffs (*inter alia*) charged the defendants with breach of articles 16 and 21 of the Regulations for Preventing Collisions at Sea.

The facts alleged by the defendants were as follows:—Shortly before 12.30 p.m. on the 3rd Sept. the *Leverington,* a steamship of 679 tons register, laden with a cargo of iron ore on a voyage from Porman to Cardiff, was proceeding on a proper course slowly up the Cardiff Drain for the East Bute Docks. When the *Leverington* had nearly reached a point where the channel to Roath Basin diverges, and while she was proceeding with her engines stopped at a speed of about a knot an hour, the *Rapid* was seen in the entrance to Roath Basin, about 300 yards distant, and bearing about three or four points on the starboard bow of the *Leverington.* As soon as the *Rapid* was seen the engines of the *Leverington* were set on slowly ahead, and the *Rapid* was waved to go astern of the *Leverington.* At this time the *Rapid* was in a position, if she had kept on her course, to have passed all clear under the stern of the *Leverington.* But almost immediately after the engines of the *Leverington* had moved ahead, the *Rapid* was seen to alter her course as if under a port helm, and to be attempting to cross the bows of the *Leverington.* The engines of the *Leverington* were at once reversed full speed astern, but the *Rapid* came on and with her port bow struck the stem of the *Leverington.* The defendants (*inter alia*) charged the *Rapid* with neglecting to keep her course and pass under the stern of the *Leverington,* and also with improperly leaving the entrance of the Roath Basin without waiting for the *Leverington* to pass clear.

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. 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.

Sir *Walter Phillimore* (with him *Baden-Powell*) for the appellants, the owners of the *Rapid.*—The decision of Butt, J. is wrong. The *Leverington* is solely to blame for the collision. It was the duty of the *Rapid,* under art. 21 of the Regulations for Preventing Collisions at Sea, to keep to that side of the channel which lay on her starboard side. In order to do so it was necessary to port her helm and cross the bows of the *Leverington.* Not only did the *Leverington* know that it was the *Rapid's* duty to get on to the starboard side of the channel, but it must also have been evident from her manœuvres that she was in fact about to get to the proper side of the channel. The *Leverington,* however, held on, and took no steps whatever to keep clear of the *Rapid,* although under art. 16 of the Regulations it was her duty to do so. The duty cast upon the *Leverington* by art. 22 to keep her course was, under the peculiar circumstances of the case, complied with.

Kennedy, Q.C. and *Barnes* for the owners of the *Leverington.*—Butt, J. was right in finding the *Rapid* solely to blame. Assuming this place to be a narrow channel, nevertheless art. 16 of the Regulations was applicable. The *Leverington* had the *Rapid* on her starboard side. It was therefore her duty to keep out of the way of the *Rapid.* By continuing her course at the speed she was going she would have passed clear of the *Rapid,* had the *Rapid* continued her course as she was

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

bound under art. 22 to do. The *Rapid*, instead of keeping her course, actually ported her helm, and threw herself across the bows of the *Leverington*. If it was her duty to go down on that side of the channel which lay on her starboard side, she should before doing so have waited till the *Leverington* had passed clear. The *Leverington* is therefore to blame for breach of art. 22.

The Lord Chancellor (Herschell).—This is an appeal from a judgment of Butt, J., in which he decided that the steamship *Rapid* was solely to blame for a collision between her and the steamship *Leverington*. At the time of the collision the *Rapid* was coming out of the Roath Basin at Cardiff, bound to sea, and the *Leverington* was on way to the East Bute Dock. There is a channel about 150 yards wide, which is the common entrance to the Roath Basin and to the East Bute Dock. Then there is a bifurcation, dividing the channel into two parts, one leading to the Roath Basin, the other to the East Bute Dock. The collision occurred at or about this bifurcation, where the two channels join. It is said, on behalf of the *Rapid*, that she was coming into a narrow channel, and that therefore it was her duty, under art. 21 of the Regulations for Preventing Collisions at Sea, to get on to her starboard side of the channel. No doubt this was a "narrow channel" within the meaning of the rule. It is not suggested that the *Leverington* was not on her proper side of the channel. Now, in these circumstances, the *Rapid* undoubtedly ported immediately before the collision, and we are told by our nautical assessors that, but for that porting, the *Leverington* might have continued her course with safety, and no collision would have occurred. In other words, if the *Rapid* had kept her course, and had not ported, the *Leverington*, by continuing her course, would have passed clear of the *Rapid*. Now, it appears to all of us that, under the circumstances I have described, art. 16 of the Regulations was applicable to this case. Although this is a narrow channel, yet, in the absence of special rules, the crossing rule must apply. Of course, there may be rivers where there are special rules, and there those rules must be obeyed. But where no special rules are in operation, then we can see no reason why the crossing rule should not apply, even though the channel be a narrow one. If so, and these two ships being in fact crossing ships, it was the duty of the *Leverington*, which had the *Rapid* on her starboard side, to keep out of the way of the *Rapid*. The manœuvre she executed of keeping her course and going on full speed would have complied with art. 16, but for the fact that the *Rapid* disobeyed art. 22, which provides that, where one ship is to keep out of the way, the other shall keep her course. The *Rapid* did not keep her course, and we are advised that if she had the collision would not have occurred. The result follows, that the *Rapid* is to blame; that the *Leverington* is not to blame; and that the learned judge was right in his decision. This appeal must be dismissed with costs.

Lord Esher, M.R.—These two ships were in a narrow channel, so that under fitting and proper circumstances the narrow channel rule would apply. The question is whether, under the circumstances, the crossing rule did not apply. Now, it cannot be said that the crossing rule does not apply to a narrow channel. If one ship is going across a river which is a narrow channel and another is going up or down, the crossing rule would apply. Where a narrow channel is joined by another narrow channel, there comes a point where it will be most likely that the crossing rule will apply, even though each vessel is going a determined course. Take, for instance, the junction of the Thames and the Medway. If one vessel is coming down the Thames, and another out of the Medway, they must be crossing ships, and there is no reason why the crossing rule should not apply. When two ships come to this corner at Cardiff, the place is determined at which they must be crossing ships if one is going up one channel and the other down the other channel. They then must be crossing ships, and there the crossing rule applies. This decision is important and useful, because, in cases of ships meeting in future at this point, it determines which of them is to wait and which is to go on. By the crossing rule the *Leverington* was bound to keep out of the way of the *Rapid*, and therefore, if the *Rapid* had kept her course, and there had been a collision, the *Leverington* would have been in the wrong. If she could not have crossed the *Rapid's* course in time, she was bound to stop. But then the *Rapid* was bound to keep her course, and had no right either to port or starboard. She, in fact, ported, and therefore broke art. 22. She must, therefore, be held to blame, for her porting certainly contributed to the collision. If, without her porting, there would equally have been a collision, I should have thought the *Leverington* was also in fault. But we are advised that, if the *Rapid* had not ported, there would have been no collision. Therefore the *Leverington* was justified in going on, because, by so doing, she would have kept out of the way of the *Rapid* if the *Rapid* had obeyed the rule and kept her course. The collision, therefore, was solely due to the wrongful porting of the *Rapid*.

Fry, L.J.—I am of the same opinion, and can see no reason why the crossing rule should not apply in a narrow channel. It seems to me that we should be unwise to give a narrow construction to this crossing rule, and that it is desirable to give it a wide and general application. I therefore can see no reason for differing from the learned judge who tried the case.

Appeal dismissed, with costs.

Solicitors for the plaintiff, *Ingledew, Ince*, and *Colt*.

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

June 7 *and* 8, 1886.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

The Xantho. (*a*)

ON APPEAL FROM THE CHANCERY DIVISION.

Carriage of goods—Bill of lading—Perils of the sea—Collision—Negligence—Onus of proof.

A collision is not necessarily a peril of the sea within the meaning of those words in a bill of lading.

In an action against a shipowner for loss of goods

(*a*) Reported by J. P. Aspinall and Butler Aspinall Esqrs. Barristers-at-Law.

carried under a bill of lading containing the exception "dangers and accidents of the seas," the defendants do not, by merely proving that the loss has been occasioned by a collision, show a peril of the sea so as to shift the onus on to the plaintiffs of proving that the collision was occasioned by the defendants' negligence, the onus being upon them to bring themselves within the excepted perils; and, if they fail to do so, the plaintiffs are entitled to judgment.

The judgment in Woodley *v.* Michell (5 *Asp. Mar. Law Cas.* 71; 43 *L. T. Rep. N. S.* 599; 11 *Q. B. Div.* 47) *discussed.*

This was an action by owners of cargo for breach of contract of carriage against the owners of the carrying ship.

The plaintiffs claimed damages for loss of cargo shipped on board the defendants' steamship *Xantho* under a bill of lading containing the following excepted perils: "The act of God, the Queen's enemies, fire, machinery, boilers, steam, and all and every other dangers and accidents of the seas, rivers, and steam navigation of whatever nature and kind soever." They also alleged that the loss of the goods was occasioned by the collision between the *Xantho* and another steamship, the *Voluta*, and that such collision was brought about by the defendants' negligent navigation of the *Xantho*.

The defendants, by their defence, alleged that the loss was occasioned by the excepted perils, and further stated that the non-delivery was due to a collision between the *Xantho* and the *Voluta*, which was solely occasioned by the negligence of the *Voluta*.

Feb. 25.—The case came on for trial before the President, assisted by Trinity Masters.

The plaintiffs put in the bill of lading, and proved that the property had passed to them, and that the defendants had failed to deliver. The defendants called no evidence. It was admitted by the plaintiffs that the loss of the goods was occasioned by a collision. In these circumstances, the President gave judgment for the plaintiffs.

June 7.—From that decision the defendants now appealed.

Sir *Walter Phillimore*, Q.C. and *J. P. Aspinall* for the defendants.—A collision is a peril of the sea, and as it is admitted that the loss of the goods was occasioned by a collision, the defendants are protected by the exceptions in the bill of lading. It is further contended that, even if all collisions are not necessarily perils of the sea, all collisions are, *primâ facie*, perils of the sea, and, as soon as the defendant proves a collision, he is entitled to succeed, unless the plaintiff proves that the collision was due to causes which, on the existing authorities, prevent the defendant from taking advantage of it as a peril of the sea:

Lloyd v. *The General Iron Screw Colliery Company*, 33 L. J. 269, Ex.; 10 L. T. Rep. N. S. 586; 2 Mar. Law Cas. O. S. 32;

Grill v. *The General Iron Screw Colliery Company*, L. Rep. 3 C. P. 476; 2 Mar. Law Cas. O. S. 362; 18 L. T. Rep. N. S. 362;

Woodley v. *Michell*, 11 Q. B. Div. 47; 5 Asp. Mar. Law Cas. 71; 48 L. T. Rep. N. S. 599.

[Bowen, L.J. referred to *Taylor* v. *Liverpool and Great Western Steam Company*, L. Rep. 9 Q. B. 546; 30 L. T. Rep. N. S. 714; 2 Asp. Mar. Law Cas. 275.] In that case the excepted peril "theft" was held to apply to thieves external to the ship, and therefore it was for the defendants to bring their case within "theft," as so limited in meaning. In the present case, the plaintiffs' position is that anything external to the ship happening on the high seas is a peril of the sea, and that in that sense a collision is a peril of the sea:

Pickering v. *Barclay*, Style, 132; 2 Roll. Ab. pl. 11, 248.

Where a ship strikes on a rock, an iceberg, or a floating log, she encounters a peril of the sea. If, therefore, she strikes a congeries of floating logs, which constitute a ship, that is equally a peril of the sea. In the cases of *The Norway* (Br. & L. 404) and *The Helene* (Br. & L. 429) it was held, under very similar circumstances, that the onus of proof was upon the plaintiff to show that the loss was caused by negligence.

Myburgh, Q.C. and *Hollams* (with them Sir *C. Russell*, A.-G.) for the respondents.—A collision is not necessarily a peril of the sea. The case of *Woodley* v. *Michell* (*ubi sup.*), and many earlier authorities, show that there are many classes of collisions which are not perils of the seas. It is further contended that the onus is upon the defendants to prove that the collision was so occasioned as to be a peril of the sea. In this case they have given no evidence as to the circumstances of the collision, and, the natural and reasonable inference being that it was occasioned by negligence, the defendants cannot protect themselves under any of the excepted perils. In the case of *The Helene* (*ubi sup.*) the perils relied upon by the defendants were expressly named in the bill of lading, and, on it being proved that the damage was caused thereby, the defendants made out a *primâ facie* case. Here, however, the word collision does not occur in the bill of lading, and it is only upon the supposition that a collision is a peril of the sea that the defendants can rely upon the above decisions.

Sir *Walter Phillimore*, in reply, cited *Hayn* v. *Culliford* (4 Asp. Mar. Law Cas. 128; 4 C. P. Div. 182; 40 L. T. Rep. N. S. 536), and referred to the old form of pleadings prior to the Judicature Act.

Lord Esher, M.R.—In this case the plaintiffs are shippers of goods, and they have brought an action upon a bill of lading against the owners of the ship carrying the goods for non-delivery of the goods. At the trial the bill of lading was put in, and in it we find certain excepted perils. The case was run extremely fine by both sides, for all that appeared in evidence was an admission—it does not appear by which side—that there had been a collision between the defendants' ship and another vessel. The question is, whether upon this evidence the finding of the learned judge without a jury is correct, by which he held that the plaintiffs were entitled to recover. From that judgment the defendants now appeal, and they say that they ought to succeed because the plaintiffs did not show that this was a collision which was caused by the negligence of the defendants. Now, let us see how the matter stands. The contract, no doubt, is that the shipowner binds himself absolutely to deliver the goods in the same condition in which they were receive

unless he is prevented by one of the excepted perils. The plaintiff, in suing upon such a contract, is obliged to say that that was the contract, and in pleading he does aver, and must aver, that the loss was not occasioned by any perils of the seas. I think that, in pleading, the plaintiff always avers that to put himself within the terms of the contract. But it is immediately apparent that the plaintiffs' allegation is a negative allegation. It is a negation of circumstances as to something which has happened on board the ship, and as to circumstances which are solely within the knowledge of the defendants. In my opinion, it has long been the usual and proper course for the plaintiff simply to put in the bill of lading and to prove that the ship has arrived, but that his goods have not been delivered. If the ship has arrived and his goods have not been delivered, it seems to me that, by putting in the bill of lading, he has shown a state of circumstances which the shipowner is called upon to answer. *Primâ facie*, the non-delivery of the goods is negligence on the part of the shipowner, and, unless there were special circumstances to prevent him delivering, there must be negligence on his part. Therefore I say that the burden of proof which the plaintiff has taken upon himself in the pleadings is satisfied by showing that the ship has arrived, and that the goods have not been delivered. In these circumstances, it devolves upon the shipowner to show the reason why he has not delivered the goods, and, if he can, to show that the non-delivery was caused by one of the perils excepted in the bill of lading. If he shows that the goods were lost or injured by one of the perils which are specifically mentioned in the bill of lading, he has *primâ facie* brought his case within the exceptions.

Now, in construing a policy of insurance, it is the *causa proxima* of the loss which is looked at; but in the case of a bill of lading that is not so, for there you look to what is the real moving cause of the loss. Therefore, though the shipowner may have brought himself within the terms of one of the exceptions, if the plaintiff can show that that which is stated to be the cause of the loss was not the real moving cause, but that something else which is not excepted was the real cause of the loss, then there is no defence; and therefore it has been held that if the real moving cause is the defendant's negligence, the loss is not caused by any of the excepted perils, because the negligence of the defendant is not one of the excepted perils. It is on that ground that the defendant fails, and not on any supposed reason that he cannot take advantage of his own negligence. The moment it is shown that the real moving cause of the loss was the shipowner's negligence, then that is a loss by a cause which is not within the excepted perils. Now, suppose that the real moving cause of the loss is not one of the excepted perils, but is the result of the negligence of someone other than the defendant, does the same reasoning apply? You are to take the real moving cause of the loss. If you are to accept the reasoning in the first case, you must accept it in this also. There is no exception in the bill of lading of a loss caused by the negligence of anyone other than the defendant. For that reason we held in the case of *Woodley* v. *Michell* (*ubi sup.*) that if the cause of the loss was the negligence of either of two colliding vessels without the winds or the waves, or any extraordinary difficulty of navigation contributing to the collision, such a loss, the cause of which is negligence, is not a loss occasioned by any of the excepted perils. We held, therefore, that a loss the immediate cause of which is a collision, but the real cause of which is the negligence, of either ship, is not a loss caused by any of the excepted perils. It is caused by negligence, and that is not an excepted peril. It is not necessary to say whether any collision caused in any other way is within the excepted perils or not. If a collision was causen without any negligence on either ship, merely by the action of a storm or violent sea, or an unknown current—if the collision is the result of that which everybody would take to be a peril of the sea, why, then, the mere fact of the collision intervening would not alter the case, and the loss would be by a peril of the sea. There are also collisions occasioned by negligence and the action of the sea, about which I decline to have anything to say. I therefore hold that there are three classes of collisions in which the loss cannot be said to be the result of an excepted peril, viz., where there has been negligence on the part of the carrying ship; where the collision has solely been the result of negligence of another vessel; and where the collision has been the result of the joint negligence of both vessels.

That being so, what follows? Why, that collision is not one of the perils excepted in terms. The only way in which you can get the loss by collision covered by the perils is to show that a peril excepted and not the collision was the real cause of the loss. Now, in this case, the plaintiff shows that his goods were shipped under a bill of lading. It is shown that the vessel carrying the goods sank. But you have something more than the mere non-arrival of the ship, which is evidence that she has foundered at sea; for you have it that there was a collision which was the immediate cause of the loss. Now, it is consistent that a collision is not one of the perils excepted. But is a collision even *primâ facie* a peril of the sea? Is it more usual for a collision to be caused by the action of the wind and seas in an abnormal state than by the negligence of man? Certainly not. No one can doubt that the very great majority of collisions are occasioned by negligence. Now, we are asked to say that the mere fact of proving a collision is *primâ facie* bringing the defendant within the perils of the seas. But, in my view, that is not enough. Therefore it seems to me that here the plaintiff made a *primâ facie* case, and that the defendants gave no answer at all which could absolve them from their liability under the bill of lading. The appellants have cited several cases in support of their contention. But in all those cases it will be found that there was evidence that the loss was occasioned by one of the perils expressly excepted. Of course, if the shipowner can show that the immediate cause of the loss was one of the excepted perils, that is a *primâ facie* case on the part of the shipowner, and throws on the plaintiff the burden of proof that the real cause of the loss was the negligence of someone, and not the peril which it is said was the cause. That was the case in *The Helene* (*ubi sup.*). It was proved there that the immediate cause of the

loss was leakage, and by the bill of lading the shipowner was liable for loss caused by leakage. There the shipowner was *primâ facie* brought within the exception, and the court held that the burden of proof was on the plaintiff to show that the leakage was caused by negligence. In *The Norway* (Br. & L. 404) the loss was caused by the master jettisoning the cargo. The Privy Council were of opinion that the burden was upon the goods owner to prove that the stranding which necessitated the jettison was occasioned by the shipowner's negligence. The case of *Taylor* v. *The Liverpool and Great Western Steam Company (ubi sup.)* seems to be an authority in support of my proposition. Lush, L.J. there seems to put the very point with which we are now dealing. He says: "The remaining question is, Is it for the defendants or the plaintiffs to show that the loss is within one of the exceptions of the bill of lading—on whom does the onus lie? I think it is for the defendants to bring the case within the exception." I think, therefore, that in this instance the defendants have run their case too fine in merely showing that there had been a collision which is not an excepted peril, and which is as likely to have been occasioned by negligence as by the action of the wind or waves. I think that, whether the decision in *Woodley* v. *Michell* (*ubi sup.*) be good law or not, and even if the House of Lords differ from it, the defendants will be unable to succeed. For these reasons, I think this appeal must be dismissed with costs.

Bowen, L.J.—I am of the same opinion. This is an action by a cargo owner against a shipowner. The shipowner having promised to deliver the goods excuses himself by saying that the non-delivery was occasioned by an excepted peril. The bill of lading excuses the shipowner in the case of acts of God, the Queen's enemies, and all and every other accident of the sea, rivers, and navigation whatsoever. In the case of *Taylor* v. *Liverpool and Great Western Steam Company* (*ubi sup.*) it was decided that it lay on the shipowner to bring the loss within one of the exceptions, and, though under the old forms of pleading prior to the Judicature Act it was proper for the plaintiffs to set out the bill of lading, and to negative that the loss or damage was occasioned by this, that, or the other peril, yet that does not affect the law as to burden of proof. Sir Walter Phillimore, on behalf of the shipowner, says that the plaintiff has at the trial, through the mouth of his counsel, admitted enough to shift the onus of proof. He says he has admitted that the loss was occasioned by a collision, and upon that he puts his argument in two ways: First of all, he says that the plaintiff, in admitting a collision, admits a peril of the sea, because all collisions are perils of the seas. In the second place, he says that, even if collision does not necessarily amount to a peril of the sea, yet, when unexplained, it is *primâ facie* a peril of the sea, and therefore throws the onus on the plaintiff of showing that in the particular instance the collision was not a peril of the sea—an onus which he says the plaintiff has in the present instance failed to discharge. In the first place, he is right in saying that a collision is necessarily a peril of the sea? We must be careful to distinguish the meaning to be attached to words like "perils of the sea" when we are dealing with contracts of carriage between shipowners and shippers, and when we are dealing with policies of insurance between underwriters and shipowners. Confining ourselves for a moment to the case of contracts of carriage between shipowners and cargo owners, can it be said that a collision is a peril of the sea within the meaning of a bill of lading? Now, a collision may be caused in different ways. There may be a collision caused by negligence on either ship, or by joint negligence, and the sea may have no part to play in the misfortune, and the action of the wind and waves may not be the cause of the loss. We have already precluded ourselves from saying that a collision caused by negligence is a peril of the sea, because in the case of *Woodley* v. *Michell* (*ubi sup.*) this court held that, where there is no possibility of the accident having arisen from the action of the wind or waves, and where the cause of the collision is negligence, that is not a peril of the sea. That was one instance in which a collision was not a peril of the sea. After that case it is impossible for us to accept Sir Walter Phillimore's contention that a collision is necessarily a peril of the sea.

His second contention is, that a collision until explained implies a peril of the sea. But does that in itself throw the onus of proof on the plaintiff of showing that the collision is not a peril of the sea? It is perfectly well known in the conduct of cases at Nisi Prius what is meant by shifting the onus of proof. From time to time the onus of proof shifts according to the evidence given, and when you ask yourself upon whom the onus of proof rests, you, in other words, ask yourself who will lose the case, according to law, if no more evidence is given. Sir Walter Phillimore asks us to hold that, as soon as the Attorney-General admitted that this loss was caused by collision, he had admitted enough to shift the burden of proof on to his own shoulders from the shoulders of the shipowner, where it previously rested. Now, in my view, in order to bring the case within the exceptions, the burden of proof, in the first instance, rests upon the shipowner; and how has that burden been shifted? Now, collision is a general term, and we are asked, without being allowed to look into the particular circumstances of this particular collision, to infer that it is more probable than not that it has incurred in such a way as will make it a peril of the sea. But there may be many cases where the collision has been occasioned by joint negligence, or by the negligence of either ship; and the decision in *Woodley* v. *Michell* tells us that that is not a peril of the sea. Then there may be cases of collision in which there is negligence on the part of either or both ships, and a contribution to the misfortune by the action of the wind and waves. That class of case I now decline to discuss. The authorities have not finally exhausted the inquiry whether such a collision would be a peril of the sea. Lastly, there may be a collision which is solely caused by the action of the wind and waves. It may be a rare case, but it is a conceivable case. In all probability, though I am deciding nothing more than is required for this case, it would in most cases be a loss caused by a peril of the sea. What are we to say when we are simply told that a collision has occurred?

Why are we to infer that it is a peril of the sea, and that it was occasioned by the action of the wind and waves in such a manner as to bring it within the exception clause? It seems to me that neither as a matter of law or of common sense ought we to draw that inference. The answer of all common-sense people would be, "Tell me more of the circumstances." With regard to what has been said about the cases of *The Helene* (*ubi sup.*) and *The Norway* (*ubi sup.*) I have nothing to add. I think the case of *Woodley* v. *Michell* (*ubi sup.*) was rightly decided. It seems to me to decide nothing more than what it is said to decide in the head-note, and does not go to the length which Sir Walter Phillimore sought to carry it. For these reasons I think the appeal must fail.

Fry, L.J. concurred.

On the application of the appellants' counsel, who stated that his clients intended going to the House of Lords, execution as to damages was stayed upon bail being renewed; but the costs were directed to be taxed and paid, upon the plaintiffs' solicitors giving an undertaking to pay them back on the decision being reversed.

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

Solicitors for the defendants, *Lowless* and *Co.*

May 11 *and June* 11, 1886.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

Houlder Brothers and Co. *v.* The Merchants Marine Insurance Company Limited. (*a*)

Marine insurance—Risk of craft till goods landed —Transhipment.

By a policy of marine insurance goods were insured on board a coasting vessel "at and from Hull to London, including all risk of craft, until the goods are discharged and safely landed."

Held, that this policy did not cover the risk to the goods while waiting on lighters at the port of delivery for transhipment into an export vessel.

Judgment of Field, J. affirmed.

The action was brought, upon a policy of marine insurance underwritten by the defendants, by the plaintiffs, who were the shippers of a cargo of iron rails from Hull to London.

The goods were shipped at Hull on board the steamer *Kirkstall,* and, by the terms of the policy, were insured "at and from Hull to London, including all risk of craft, until the goods are discharged and safely landed."

When the *Kirkstall* arrived in London the goods were discharged into lighters with the intention, not of landing them, but of loading them into another vessel for exportation to Sydney. Before they were so loaded, and while they were in the lighters, some of the lighters were sunk by a gale, and some of the goods were lost.

The action, which was for salvage and average expenses, was tried before Field, J. without a jury. At the trial the plaintiffs proved that rails which are consigned by coasting vessels to London are most commonly transhipped into export vessels at London without being landed.

Field, J. gave judgment in favour of the defendants.

The plaintiffs appealed.

R. T. Reid, Q.C. and *Hollams* for the plaintiffs.—It was shown at the trial that practically all rails sent coastwise to London were for export, and were reshipped at London without being landed. The export ship was therefore the destination of the goods in the contemplation of both parties to the policy of insurance. If that was so, then there has in this case been no deviation, because there was no unreasonable delay, and no time was lost in bringing the voyage to an end.

Cohen, Q.C. and *Barnes* for the defendants.—The word "landed" must be construed in its ordinary meaning, unless some custom of the port of delivery requiring another meaning to be put upon it is proved. The plaintiffs certainly did show that most rails sent coastwise to London were for export, and were at London transhipped without being landed; but that is far from showing a custom of the port of London, which requires the plain word "landed" in the policy to be enlarged beyond its natural meaning. It is easy to suggest many instances in which the risk of transhipment would be greater than the risk of landing, and nothing has been shown in this case which compels the underwriters to take the larger risk.

R. T. Reid, Q.C. in reply.

Cur. adv. vult.

June 11.—The judgment of the court was read by

Bowen, L.J.—This is an action by the shipper of a cargo of iron rails against the underwriters of a policy on the goods from Hull to London, including all risk of craft. The ship arrived safely in the port of London, but the rails, instead of being landed, were placed in lighters for transhipment in dock to an export vessel, and during the process of transhipment in dock, which process was lengthened by reason of the export ship not being ready to receive the rails, a portion was lost by the swamping of the lighters. Field, J. held that the underwriters were discharged, because the accident happened after the expiration of a reasonable and ordinary period from the time at which the goods had been placed on the lighters for transhipment. Against this judgment the plaintiffs have appealed. The question whether a reasonable time had elapsed after the discharge into lighters for transhipment does not arise in its simple sense if the risks covered by the policy did not include the risk of waiting in lighters for transhipment into an export vessel; and our opinion is, that such was in fact the case, and that these goods, though lost upon the lighters, were not lost by any of the perils during the continuance of any of the risks covered by the policy. The policy in question includes all risk of craft until the said goods or merchandise be discharged and "safely landed." The risk insured against is the risk of the transit upon the lighters, which have, in the ordinary course of business, to convey the goods to the shore. The nature of this risk can be perfectly appreciated and estimated by the parties to the contract. Landing goods means putting them upon the land, or upon that which by custom of the port is its equivalent. In the

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

present case, instead of placing the goods upon lighters to carry them to the shore, the goods were placed upon lighters which were to take them to an export vessel, and there to load them as soon as she was ready to receive them. Such transhipment, however usual in the trade, is not the same thing as landing the goods directly and immediately upon the quay. A lighter which has to land its cargo has only to make for the quay, and to wait its turn in accordance with the usages of the port. A lighter which is intended to tranship the goods to another ship may have to wait for its arrival and till it is ready to take the cargo, and may thus be subject to additional risks of exposure to the weather, and of collision with other vessels or barges in the dock. In the smaller London docks lighters may be comparatively safe, but in the larger docks they are often swamped by the wind and by the waters, and yet might be obliged to wait days or possibly weeks for the arrival of the export vessel to which the goods were consigned. Cargo discharged upon lighters for transhipment to an export vessel is accordingly exposed to a peril which is not the same as that which it encounters if discharged upon lighters to take it to the shore at once. It is perfectly true that, by taking delivery short of the shore, the consignee determines the risk insured. But this is not because in such a case the risk is terminated by an actual landing, but because the consignee waives the landing and himself terminates the risk instead by taking delivery short of the land. Nobody, in commercial or business language, can say that goods are landed which are transhipped without landing, or that goods which are placed in lighters for transhipment are placed in lighters to be landed.

It was no doubt proved conclusively at the trial that steel rails which are consigned by coasting vessels to London are most commonly transhipped into export vessels at London without being landed; and underwriters must no doubt be taken to be familiar with the ordinary incidents of the trade and of the transit of the goods insured. But this falls short of proving that by any custom transhipment is equivalent to landing. We were told that it is unusual in such cases to make the policy in any other form than that in which it was made. If this be true, it only follows that it is usual in these cases not to insure the risk which has really to be run. Policies which provide for transhipment are perfectly familiar to all commercial lawyers, and if those who consign steel rails to London are in the habit of transacting their business by means of policies which do not contain the appropriate and proper clause, the shippers, if a loss happens outside the risk against which they are insured, must take the consequences of not having protected themselves by the proper contract of insurance. The goods here have been lost, but by an accident not covered by the policy; and on this ground we can only come to the conclusion that the plaintiffs' appeal fails, and that the action must be dismissed, with costs.

Appeal dismissed.

Solicitors for plaintiffs, *Hollams, Son,* and *Coward.*

Solicitors for defendants, *Waltons, Bubb,* and *Johnson.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, July 15, 1886.

(Before Kay, J.)

Brooking v. Maudslay. (a)

Practice — Marine insurance — Pleading — Embarrassing and scandalous matter—Striking out —Rules of Court 1883—*Order XIX., r.* 27.

In an action respecting a policy of marine insurance, the plaintiff, the underwriter, by his statement of claim alleged that the risk was of a special and dangerous character, as the defendants well knew; that they failed to communicate such fact to the plaintiff; that the ship was unseaworthy when she commenced her voyage; and that the defendants knew of, but concealed, the fact of her being unseaworthy.

The defendants admitted that the ship was unseaworthy, but stated that the unseaworthiness was solely owing to her being overladen, and was not known to them. They wholly denied the allegations of concealment and non-communication of facts.

The plaintiff in his reply joined issue generally, but stated that he did "not proceed further in this action with the charges in the statement of claim as to concealment and non-communication by the defendants of material facts."

Held, that Order XIX., r. 27, *applied; that the allegations in the statement of claim were clearly unnecessary, because the plaintiff subsequently stated that he did not intend to ask any relief grounded on concealment or non-communication; and that they were consequently scandalous and embarrassing, and must be struck out.*

This action was brought by an underwriter, suing on behalf of himself and other underwriters, in respect of a certain policy of marine insurance for 40,000*l.* effected by the defendants, a firm of engineers, upon certain machinery and goods which were shipped by them on board the steamship *Elephant* for conveyance from London to Portsmouth.

The plaintiff, by his statement of claim, alleged that the risk was of a special and dangerous character, as the defendants well knew; that they failed to communicate such fact to the plaintiff that the ship was unseaworthy when she commenced her voyage; and that the defendants knew of, but concealed, the fact of her being unseaworthy.

The plaintiff claimed a declaration that the policy was not binding on him and the other underwriters, and that they were discharged from liability thereunder. He also claimed an injunction to restrain proceedings by the defendants on the policy.

The defendants, by their statement of defence, admitted that the ship was unseaworthy, but stated that the unseaworthiness was solely owing to her being overladen, and was not known to them. They wholly denied the allegations of concealment and non-communication of facts. They further alleged that the overloading did not in fact take place until after the slip for the policy of insurance was initialed, so that the question of overloading did not arise until after

(a) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

the contract was entered into, and concealment was out of the question, inasmuch as the unseaworthiness did not exist at the time when the slip was initialed.

The plaintiff delivered a reply, in which he joined issue generally, but stated that he did "not proceed further in this action with the charges in the statement of claim as to concealment and non-communication by the defendants of material facts."

The defendants objected to this pleading, and moved the court that this part of the reply should be struck out on the ground that it was embarrassing; or, in the alternative, that the allegations in the statement of claim imputing to the defendants concealment and non-communication of material facts should be struck out as being unnecessary and therefore scandalous.

The motion now came on for hearing.

Sir *Richard E. Webster*, Q.C., *E. Widdrington Byrne*, and *R. M. Bray*, for the defendants, in support of the motion, referred to Rules of Court 1883, Order XIX., r. 27.

Graham Hastings, Q.C. and *J. Gorell Barnes*, for the plaintiff, *contrà*.

KAY, J., after stating the pleadings as above set forth, continued as follows:—What does that mean? "I abandon all my claims to relief on the ground of concealment or non-communication of material facts." Then comes this notice of motion naturally enough, on the ground that either this statement in the reply is embarrassing or the statement of claim ought to have these allegations struck out, because they now are not necessary to any relief which the plaintiff is entitled to, and if not necessary are scandalous statements which affect the honour and character of the defendants or may do so, and that the plaintiff has no right to say, "I will keep these charges in my statement of claim, though I ask no relief in respect of them." I asked during the argument, by way of illustration, in a very short form, this question, May a man in his pleading say "the defendant has acted like a rogue, but I ask no relief on that ground?" That would be an unnecessary statement and scandalous, of course, because it would affect the character of the defendant. It seems to me in this case it is absolutely necessary that the court should say that Order XIX., r. 27, of the Rules of Court applies. That rule provides that: "The court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action; and may in any such case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client." These charges are clearly unnecessary now, because the plaintiff says he is not going to ask any relief grounded on concealment or non-communication. They are scandalous because they are such as any mercantile man would conceive affected his honour and character. I cannot help seeing that these charges, being now unnecessary, are scandalous, and moreover I think they tend to embarrass the fair trial of the action, because if they stand the defendants will be bonnd to bring evidence to support their contradiction of the charges. Therefore I order that the statement of claim be amended by striking out all allegations of concealment or non-communication of material facts by the defendants, and I order that the plaintiff do pay the costs of this application. Both parties will have liberty to make all other necessary amendments, and they may take a week for that purpose.

Solicitors: *Hopgood, Foster*, and *Dowson*; *Waltons, Bubb*, and *Co.*

QUEEN'S BENCH DIVISION.

Tuesday, June 22, 1886.

(Before GROVE and GRANTHAM, JJ.)

Reg. on the prosecution of Turner *v.* JOHNSTON. (*a*)

Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 147—*The Summary Jurisdiction Act* 1879 (42 *&* 43 *Vict. c.* 49), *s.* 39—*Supplying seamen to ships without licence—Evidence—Onus of proof of licence on defendant.*

A defendant having been charged, under the 147*th section of the Merchant Shipping Act* 1854, *with supplying a seaman to a merchant ship in the United Kingdom, he not being a person holding a licence from the Board of Trade for that purpose:*

Held, on a case stated, that proof having been given of the supply of the seaman by the defendant, the onus of proving that he held a licence from the Board of Trade rested with him.

THIS was a case stated by Robert Arthur Valpy Esq., the deputy stipendiary magistrate for the borough of Cardiff, under the statute 20 & 21 Vict. c. 43, for the purpose of obtaining the opinion of the court on questions which arose before him as hereinafter stated.

At a petty sessions holden at the Town Hall, in the borough of Cardiff, on the 2nd March 1881, an information preferred by William Turner, hereinafter called the appellant, against Gustave Johnston, thereinafter called the respondent, under sect. 147, sub-sect. 1 of the Merchant Shipping Act (17 & 18 Vict. c. 104), charging for that he the said Gustave Johnston, not being a person holding a licence from the Board of Trade to engage or supply seamen or apprentices for merchant ships in the United Kingdom, and not being an owner or master or mate of the ship or vessel *Astracana* hereinafter mentioned, or the *bonâ fide* servant in the constant employ of the owner, or a shipping master duly appointed pursuant to the said Act, 17 & 18 Vict. c. 104, did on or about the 27th Feb. then last past engage or supply one John Johnson, a seaman, to be entered on board the British ship or vessel *Astracana*, then being the port of Cardiff, in the county of Glamorgan was heard and determined by the deputy stipendiary magistrate, the said parties respectively being then present, and upon such hearing he dismissed the information.

The appellants being dissatisfied with his determination, as being erroneous in point of law, duly applied for a case setting forth the facts and the grounds of his determination, whereupon he, in compliance with the application, stated the following case:

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

Upon the hearing of the information, it was proved on the part of the appellant, and found as a fact, that the respondent had, on or about the 26th Feb. then last past, engaged or supplied the said John Johnson, a seaman, to be entered on board the British ship or vessel *Astracana*, then being in the port of Cardiff, in the county of Glamorgan, that the respondent was not the owner or master or a mate of the said ship, or a *bonâ fide* servant in the constant employ of the said owner; but I held that it was not proved that the respondent did not, at the time of the commission of the said alleged offence, hold a licence from the Board of Trade to engage or supply seamen or apprentices for merchant ships in the United Kingdom and I therefore dismissed the information.

The only evidence in support of the allegation of the appellant, that the respondent did not hold the licence from the Board of Trade hereinbefore mentioned, was the evidence of the appellant, who is the chief superintendent of the Mercantile Marine Office of the Board of Trade for the Newport, Cardiff, and Penarth district, who produced a written document signed by one of the assistant secretaries to the Board of Trade and bearing the seal of the said board, and who stated that, as far as he personally knew, the respondent had no licence, though he would not state positively the respondent had no licence; and that the said document referred to the respondent.

The following is a copy of such document:

This is to certify that Gustave Johnston, of 216, Bute-road, Cardiff, boarding-house keeper, does not hold, and has not held during the past six months, a licence from the Board of Trade to engage or supply seamen or apprentices for merchant ships in the United Kingdom, under sect. 146 of the Merchant Shipping Act 1854.

It was contended, on the part of the appellant, that the document was made evidence of the fact stated therein under sect. 7 of the statute 17 & 18 Vict. c. 104, and should be received by me as evidence of such fact.

I, however, being of opinion that there was no evidence before me that the respondent was not a licensed person as aforesaid, and that the said document was not legally evidence of such fact, either under sect. 7 of the said statute or otherwise, and that such certificate could not be evidence of any such fact, unless it was expressly made so by the statute itself, gave my determination against the appellant in the manner before stated.

The questions of law arising for the opinion of the court, therefore, are: (1) Whether the document hereinbefore referred to was legal evidence that the respondent did not, at the time of the commission of the said alleged offence, hold a licence from the Board of Trade to engage or supply seamen or apprentices, pursuant to sect. 146 of the statute 17 & 18 Vict. c. 104. (2) Whether the onus of proof that the respondent did not hold such licence was on the appellant.

If the court should be of opinion that my decision was wrong in point of law, then the case is to be remitted to me, the said deputy stipendiary magistrate, with the opinion of the court thereon and with such order as to the court may seem fit.

The 7th section of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) provides:

All documents whatever, purporting to be issued or written by or under the direction of the Board of Trade and purporting either to be sealed with the seal of such board, or to be signed by one of the secretaries or assistant secretaries to such board, shall be received in evidence, and shall be deemed to be issued or written by or under the direction of the said board, without further proof, unless the contrary be shown; and all documents purporting to be certificates issued by the Board of Trade in pursuance of this Act, and to be sealed with the seal of such board, or to be signed by one of the officers of the marine department of such board, shall be received in evidence, and shall be deemed to be such certificates without further proof, unless the contrary be shown.

And the 146th and 147th sections provide:

146. The Board of Trade may grant to such persons as it thinks fit licences to engage or supply seamen or apprentices for merchant ships in the United Kingdom to continue for such periods, to be upon such terms, and to be revocable upon such conditions, as such board thinks proper.

147. The following offences shall be punishable as hereinafter mentioned; (that is to say)

(1) If any person not licensed as aforesaid, other than the owner or master or a mate of the ship, or some person who is *bonâ fide* the servant and in the constant employ of the owner, or a shipping master duly appointed as aforesaid, engages or supplies any seaman or apprentice to be entered on board any ship in the United Kingdom, he shall for each seaman or apprentice so engaged or supplied incur a penalty not exceeding twenty pounds.

Danckwerts for the appellant. — After consideration, the appellant does not rely upon the first question raised, and does not now contend that the document proposed to be offered in evidence is a document or certificate issued by the Board of Trade, in pursuance of the Merchant Shipping Act 1854, within the meaning of the 7th section of that Act. It is, however, submitted that, on the authorities, and on the true construction of the Summary Jurisdiction Acts, the onus was on the defendant, in this case, to prove that he held a licence from the Board of Trade under the 146th section. In *Rex* v. *Turner* (5 M. & S. 206) it was held that, upon a conviction under 5 Anne, c. 14, s. 2, against a carrier for having game in his possession, it is sufficient if in the information and adjudication the qualifications mentioned in 22 & 23 Car 2, c. 25, s. 3 (*a*), be negatived without negativing them in evidence. Lord Ellenborough there said: "The question is upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer, who denies any qualification to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute to which the proof may be applied: and, according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information. If the informer should establish

(*a*) This section provided that all and every person or persons not having lands and tenements or some other estate of inheritance in his own or his wife's right of the clear yearly value of one hundred pounds per annum, or for term of life, or having lease or leases of ninety-nine years, or for any longer term, of the clear yearly value of one hundred and fifty pounds, other than the son and heir of an esquire or other person of higher degree, &c., &c., were prohibited from keeping or using guns, bows, dogs, &c.

the negative of any part of these different qualifications, that would be insufficient, because it would be said, *non liquet*, but that the defendant may be qualified under the other. And does not, then, common sense show that the burden of proof ought to be cast on the person who, by establishing any one of the qualifications, will be well defended? Is not the statute of Anne in effect a prohibition on every person to kill game, unless he brings himself within some one of the qualifications allowed by law; the proof of which is easy on the one side, but almost impossible on the other? I remember the decision of *Rex* v. *Stone* (1 East, 639), and the arguments of the learned judges, who held the necessity of giving negative proof, were undoubtedly urged with great force; but I felt at the time that, if they were right, it would in most cases be impossible to convict at all." [GRANTHAM, J.—Then suppose an information is laid against me for shooting without a licence, I should be convicted if I failed to produce my licence.] That follows directly from the judgment of Lord Ellenborough in *Rex* v. *Turner*, Again, in *The Apothecaries Company* v. *Bentley* (R. & M. 159), there was an averment in a declaration on the 55 Geo. 4, c. 194, that the defendant practised as an apothecary without having obtained such certificate as by the said Act is required, and it was held that the *onus probandi* that the defendant had obtained his certificate lay with him and not with the plaintiffs. Then in *Huggins* v. *Ward* (29 L. T. Rep. N. S. 33; L. Rep. 8 Q. B. 52) it was proved on an information alleging that the defendant had five sheep affected with a contagious disease, and did not give notice to a constable that the appellant had five sheep so affected, and it was held that there was *primâ facie* evidence on which the appellant might be convicted of the offence charged, and it lay on him to show, if he could, that he had given notice to a police constable. Then by 11 & 12 Vict. c. 43, s. 14, it provided that, if the information or complaint in any such case shall negative any exemption, exception, or proviso, or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence, if he would have advantage of the same; and the 39th section of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) has now enacted that in proceedings before courts of summary jurisdiction any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, bye-law, regulation, or other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and, if so specified or negatived, no proof in relation to the matter so specified, or negatived shall be required on the part of the informant or complainant. A similar provision was contained in the Licensing Act 1872 with respect to offences under that Act; and in the case of *Roberts* v. *Humphreys* (29 L. T. Rep. N. S. 387; L. Rep. 8 Q. B. 483), a keeper of licensed premises having been charged with opening his premises for the sale of intoxicating liquors during prohibited hours, and persons having been shown to have been supplied with liquor on his premises during such hours, it was held that the onus showing that the persons came within the exception lay with the defendant. It is submitted that in this case the possession of a Board of Trade licence is an exception, exemption, proviso, excuse, or qualification which need not be negatived by the informant, the onus of showing that he possesses it resting with the defendant, and that the defendant ought therefore to have been convicted.

The respondent did not appear.

GROVE, J.—I was at first somewhat startled by the proposition advanced by Mr. Danckwerts that it was necessary for the defendant to negative an allegation advanced on behalf of the prosecution, and that, if he failed to do so, he was liable to be convicted; but, upon consideration, I do not think that this case goes to that length. The respondent is charged for that he not being a person holding a licence from the Board of Trade to engage or supply seamen or apprentices for merchant ships in the United Kingdom, and not being an owner or master or mate of the ship or vessel *Astracana*, or the *bonâ fide* servant in the constant employ of the owner or a shipping master duly appointed pursuant to the Merchant Shipping Act 1854, did engage or supply a seaman to be entered on board that ship in the United Kingdom. Then it was proved that he did engage or supply a seaman to be entered on board the ship in the United Kingdom. I think that when this was proved, he was then brought within the purview comprehended by the 39th section of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49), and he could then defend himself by proving any one or other of the exceptions which the section mentions, and I do not think that the appellant was called upon to negative by evidence each one of those exceptions. I am of opinion therefore that the appellant is entitled to succeed, and that the case must be remitted to the stipendiary magistrate with an intimation that the onus of proving that he has a proper licence from the Board of Trade rests with the respondent. We shall not make any order as to costs.

GRANTHAM, J. concurred.

Appeal allowed without costs.

Solicitor for the appellant, *The Solicitor for the Board of Trade.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Feb. 10 *and March* 23, 1886.

(Before Sir JAMES HANNEN and BUTT, J.)

THE JOHANN SVERDRUP. (*a*)

Collision—Compulsory pilotage — River Tyne — Foreign ship—41 *Geo.* 3, *c. lxxxvi.—Merchant Shipping Act* 1862 (25 *& 26 Vict. c.* 63), *s.* 39—*Tyne Pilotage Order Confirmation Act* 1865 (28 *Vict. c.* 44.)

The Tyne Pilotage Order Confirmation Act 1865 (28 *Vict. c.* 44) *was meant to be a complete code for regulating pilotage in the River Tyne, and was intended to supersede the pilotage provisions in the Act* 41 *Geo.* 3, *c. lxxxvi., and*

(*a*) Reported J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

therefore sect. 16 *of the schedule of the Tyne Pilotage Order Confirmation Act* 1865 *exempts all vessels whether British or foreign from compulsory pilotage in the port of Newcastle-upon-Tyne.*

THIS was an appeal by the plaintiffs to the Divisional Court against a decision of the judge of the County Court of Northumberland in a collision action *in rem.*

The collision occurred in the river Tyne on the 12th Oct 1884 between the British Steamship *Rose* and the Norwegian steamship *Johann Sverdrup.*

The action was instituted by the owners of the *Rose* against the owners of the *Johann Sverdrup* and came on for trial at Newcastle on the 23rd Oct. 1885, when the judge found that the collision was caused by the negligence of the *Johann Sverdrup*, but gave judgment for her owners on the ground that at the time of the collision she was in charge of a duly licensed pilot by compulsion of law, and that it was his negligence which solely caused the collision.

The Acts of Parliament which were cited, and are material to the decision, are set out in the judgment with the exception of the following:

Schedule, s. 10 of the Tyne Pilotage Confirmation Act 1865:

The Pilotage district of the Tyne shall, for the purposes of this order, be deemed to include the whole of the river Tyne, and to extend seaward over a radius of seven miles.

Sect. 11. The jurisdiction in pilotage matters within the district aforesaid, now vested in the Trinity House of Newcastle-upon-Tyne, shall be and is hereby transferred to and vested in the hands of the commissioners incorporated by this order.

Sect. 12. All pilots licensed for the Tyne or its entrance by the Trinity House of Newcastle-upon-Tyne at the commencement of this order, shall be entitled to continue to act as such pilots under the commissioners incorporated by this order for one year after the commencement of this order, without further licence or payment in respect of that year, but in all other respects shall become and be subject to the authority of the commissioners and the provisions of this order as if they had been severally licensed under this order.

Sect. 22. Nothing in this order shall exempt the commissioners of the pilotage district aforesaid from the provisions of any general Act of Parliament now in force or hereafter to be passed relating to pilotage, or pilotage dues . . . . or from any future revision and alteration under the authority of Parliament of the pilotage dues authorised by this order, or of the limits of the district defined by this order.

Gorell Barnes, for the plaintiffs, in support of the appeal.—The effect of the Tyne Pilotage Order Confirmation Act 1865 was to supersede all previous statutory provisions relating to pilotage, and therefore to impliedly repeal them. The effect of that Act was to transfer the old jurisdiction of the Trinity House of Newcastle-upon-Tyne to the Pilotage Commissioners, and to lay down a complete code relating to pilotage in the Tyne. The pilot in the present case was acting in obedience to and in compliance with the provisions of that code, and if so was not a compulsory pilot, as sect. 16 is a direct enactment against compulsory pilotage in the port of Newcastle. The abolition of differential dues by sect. 10 of the Harbour and Passing Tolls Act 1861 (24 & 25 Vict. c. 47) was to put foreign ships in the same position as British ships, and as British ships were not subject to compulsory pilotage, the effect was to exempt foreign ships from compulsion. The provisions of the Merchant Shipping Act 1862, s. 39, allowing a pilotage authority by provisional order to exempt vessels from compulsory pilotage, evidently contemplated such an enactment as is contained in sect. 16 of the schedule to the Tyne Pilotage Order Confirmation Act 1865.

Sir *Walter Phillimore* and *H. Boyd* for the respondents.—The effect of the Tyne Pilotage Order Confirmation Act 1865 was to constitute a new pilotage authority, and to make certain new pilotage regulations, but not, in the absence of express words, to repeal the provisions of 41 Geo. 3, c. lxxxvi. If so, pilotage is still compulsory on a foreign ship. Had it been intended to have exercised the power given by sect. 39 of the Merchant Shipping Act 1862, apt and unambiguous words would have been used to have repealed the specific provision contained in sect. 6 of the 41 Geo. 3, c. lxxxvi. In the somewhat analogous case of *The Vesta* (46 L. T. Rep. N. S. 492; 7 P. Div. 240; 4 Asp. Mar. Law Cas. 515) it was held that the operation of sects. 353 and 376 of the Merchant Shipping Act 1854 was not affected by Order in Council of the 8th Feb. 1854, or by the provisions of the Harbours and Passing Tolls Act 1861. The provisions contained in sect. 22 of the schedule to the Tyne Pilotage Order Confirmation Act 1865, and in sect. 353 of the Merchant Shipping Act 1854, point to a retention of the compulsory employment of pilots. The abolition of differential dues is immaterial because in *The Hanna* (15 L. T. Rep. N. S. 334; L. Rep. 1 A. & Ec. 283; 2 Mar. Law Cas. O. S. 434) it was held that, although a pilotage due may be imposed on a foreign ship and not on a British ship, it is nevertheless not a differential due.

G. Barnes in reply.

Cur. adv. vult.

March 23.—BUTT, J. now delivered the judgment of the court.—This is an appeal from a judgment of the County Court judge at Newcastle. The action was brought by the owners of the steamship *Rose* against the foreign steamship *Johann Sverdrup* to recover damages occasioned by a collision between these vessels. The collision occurred in the river Tyne. The learned judge has found that the damage was occasioned by the negligent navigation of the *Johann Sverdrup*; but that the fault was solely attributable to the pilot in charge, and that the employment of such pilot was by law compulsory on her owners, whom he therefore exonerated from liability. Against this decision the plaintiffs have appealed, and the only question with which we have at present to deal is, whether pilotage was compulsory. The *Johann Sverdrup* is a Norwegian vessel. By an act passed in 1801, entitled "An Act for extending and enlarging the powers and increasing the rates and duties of the corporation of the Trinity House of Newcastle-upon-Tyne, and for better regulating the port of Newcastle" (41 Geo. 3, c. lxxxvi.), it is provided in sect. 6: "That the owners or masters of any foreign ships or vessels resorting to or coming into or departing from the said port of Newcastle, or any of the creeks, or members belonging thereto, shall, and they are hereby obliged and required respectively to receive, take on board and employ in the piloting, and conducting such their ships or vessels, such pilots to be licensed as aforesaid; and in case of their

neglect or refusal to receive and employ such pilots as aforesaid, they shall severally nevertheless answer and pay to the said master, pilots, and seamen, the aforesaid pilotage duties, and the same shall be recoverable in the same manner as if such pilots had been actually received and employed; provided always that nothing in this Act contained shall extend or be construed to extend, to oblige or compel the owners or masters of any British ships or other vessels to employ or make use of any pilot or pilots in piloting or conducting such ships or vessels if they shall not respectively be aminded or desirous so to do." A number of sections of different Acts of Parliament were referred to at the bar as bearing upon the question under discussion, but it seems to us that, so far as legislation is concerned, the section of the Act set forth above remained in force from the time of its enactment in 1801 until the passing of the Tyne Pilotage Order Confirmation Act 1865 (28 Vict. c. 44.) It was indeed suggested that the right to impose compulsory pilotage on foreign ships had been discontinued by usage; and the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104). s. 332, was referred to; but it does not appear that any such bye-law as that section contemplated was ever made, neither was there evidence of such usage given, although we gather from an observation of the learned judge of the court below that for some time the provisions of sect. 6 of the Act of 1801 had not been enforced.

Sect. 39 of the Merchant Shipping Act 1862 (25 & 26 Vict. c. 63) provides as follows: "Whereas it is enacted by the principal Act that every pilotage authority shall have power in manner and subject to the conditions therein mentioned to do the following things—that is to say, to exempt the masters of any ships or of any classes of ships from being compelled to employ qualified pilots; to lower and modify the rates and prices or other remuneration to be demanded and received for the time being by pilots licensed by such authority; to make arrangements with any other pilotage authority for altering the limits of their respective districts, and for extending the powers of such other authority and transferring its own powers to such last-mentioned authority: And whereas it is expedient that increased facilities should be given for effecting the objects contemplated by the said recited enactments, and for further amending the law concerning pilotage, and that in so doing means should be afforded for paying due regard to existing interests and to the circumstances of particular cases: Be it enacted that it shall be lawful for the Board of Trade by provisional order to do the following things, that is to say—(1) . . . to transfer the whole or any part of the jurisdiction of the said pilotage authority to a new body corporate or body of persons to be constituted for the purpose by the provisional order so as to represent the interest of the several ports concerned. . . . (4) To exempt the masters and owners of all ships from being obliged to employ pilots in any pilotage district, or in any part of any pilotage district, or from being obliged to pay for pilots when not employing them in any district, or in any part of any pilotage district, and to annex any terms and conditions to such exemptions." Sub-sect. 6 of sect. 40 provides that no such provisional order shall take effect unless and until the same is confirmed by Parliament. In accordance with these enactments a provisional order relating to the pilotage of the river Tyne was made by the Board of Trade, and, having been amended by Parliament, was confirmed by the Tyne Pilotage Order Confirmation Act 1865. Clause 16 of the provisional order provides as follows: "Nothing in this order shall extend to oblige the owner or master of any vessel to employ or make use of any pilot in piloting or conducting such vessel into or out of the said district, or within any part thereof, if he is not desirous so to do, or to pay any pilotage dues when not employing or making use of a pilot." The learned judge of the County Court has held that inasmuch as the obligation to take a pilot was created by the Act of 1801, and not by the provisional order, clause 16 of that order cannot have the effect of exempting foreign ships from compulsory pilotage. We are unable to agree with this view of the matter. The provisional order transferred the jurisdiction in pilotage matters previously vested in the Trinity House of Newcastle-upon-Tyne to a new body, to be called the Tyne Pilotage Commissioners. It provided for the appointment, election, and incorporation of such commissioners. It defined the pilotage district of the Tyne. It provided for the examination and licensing of pilots, and for the levying of pilotage rates. It was, in our opinion, designed as a complete code for regulating pilotage in the river Tyne, and was intended to supersede, and did, in fact, supersede the pilotage provisions of the Act of 1801. Sect. 6 of that Act imposes on foreign ships the employment of "pilots to be licensed as aforesaid," *i.e.*, to be licensed by the Trinity House of Newcastle-upon-Tyne. The provisional order provides for the licensing of pilots by the Tyne Commissioners. The Act of 1801 authorises the Trinity House of Newcastle-upon-Tyne to levy pilotage dues on foreign greater than those on British ships. The provisional order imposes one scale of charges on all vessels alike. Liability to pay pilotage dues, although no pilot has been employed by the master of a vessel, has always been regarded as one of the chief indications of the employment of a pilot being compulsory. Clause 15 of the provisional order directs that the pilotage dues "shall be paid to the commissioners, or to the pilot performing auch pilotage duty, within five days after the performance thereof;" and the provisional order contains no direction analogous to the following words in sect. 6 of the Act of 1801: "And in case of their neglect or refusal to receive and employ such pilots as aforesaid, they shall severally nevertheless answer and pay to the said master, pilots, and seamen, the aforesaid pilotage duties, and the same shall be recoverable in the same manner as if such pilot had been actually received and employed." In other words, no power is conferred on the present commissioners or the pilots to charge pilotage dues where a pilot has not been employed. Again, the only power given to the present pilotage authority—the Tyne Pilotage Commissioners—or to the pilots licensed by them to charge pilotage dues, even when a pilot is employed, is conferred by the provisional order. No such dues can be charged or enforced, save under that order. When therefore clause 16 says, "Nothing in this order shall extend to

oblige the owner or master of any vessel to employ" a pilot, or to pay dues when not employing one, it does exempt all vessels, British and foreign alike, from compulsory pilotage. If it be said that the jurisdiction of the Trinity House of Newcastle-upon-Tyne is now transferred to the Tyne Pilotage Commissioners, and that therefore the power to charge and enforce the pilotage dues mentioned in the Act of 1801 is vested in them, the answer is that such jurisdiction being so transferred to the Tyne Pilotage Commissioners by clause 11 of the provisional order itself, compulsory pilotage is expressly excluded by the words of clause 16. We therefore think the judgment of the County Court judge must be reversed, and judgment entered for the plaintiffs, with costs. *Appeal allowed.*

Solicitors for the plaintiffs. *W. A. Crump* and *Son.*

Solicitors for the defendants, *Gregory, Rowcliffe,* and *Co.*

May 6 and 11, 1886.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE RALPH CREYKE. (*a*)

Collision—Steamship and keel—Duty of keel—Keels lashed together.

Where a steamer is navigating a reach in which there is a risk of her smelling the ground, it is her duty to be under such control by occasionally stopping her engines or otherwise, that she may be able to avoid collision with other craft in case she does smell the ground and fails to answer her helm.

In the absence of any rule of the road, regulation, or custom, there is no duty on the part of a keel or barge drifting up river to keep out of the deep water navigation and navigate in the shallow water, even though by remaining in the deep water she obstructs the passage of steamships which can only navigate in deep water.

A keel with her mast lowered may drive up on a flood tide in any part of a river lashed to another keel, but it is her duty in such circumstances to go up dredging with her anchor down, in order that she may thereby have the means in an emergency of bringing herself up if necessary; and whilst two keels may drive up lashed together there is no less duty imposed on them to dredge.

This was a damage action *in rem* instituted by the owners of the keel *Jane*, of Hull, against the steamship *Ralph Creyke*, to recover damages occasioned by a collision between the keel and the steamship, in the river Ouse, on the 13th Jan. 1886.

The facts alleged by the plaintiffs were as follows:—

Shortly before 12.30 p.m. on the 13th Jan. 1886, the keel *Jane*, of eighty tons burden, laden with a cargo of wheat, was drifting broadside up the river Ouse on the flood tide, on the east side of Goole Reach, lashed alongside another keel, both keels having their masts down. The wind was north, blowing strong, the tide nearly high water, and the weather fine and clear. In these circumstances those on board the said keels observed the *Ralph Creyke* on their starboard bow, distant about half a mile, and coming down the west side of the river with the aid of a tug. As the *Ralph Creyke* and her tug approached they crossed towards the east side of the river, and, instead of passing clear of the *Jane*, the *Ralph Creyke* with her stem struck the starboard side of the *Jane*, and sank her

The facts alleged on behalf of the defendants were as follows:—

Shortly after noon on the 13th Jan. 1886, the *Ralph Creyke* was proceeding at slow speed down the deep-water channel in the river Ouse, laden with a cargo for Antwerp. She had a tug fast ahead to assist in steering her, and there was a man stationed on each side of her to take soundings, as the depths, owing to local circumstances, varied from time to time. In these circumstances, and when the *Ralph Creyke* was a little below Bennett's Jetty, her helm was starboarded to follow the deep-water channel. About this time the keel *Jane*, which had been previously seen shortly after the *Ralph Creyke* left the steamboat dock at Goole, was about half mile distant, lashed to another keel, and was lying athwart the tide. As the vessels approached it was seen that the two keels were drifting up in the deep-water channel, and were likely to come near the course of the *Ralph Creyke*. Her engines were thereupon stopped, her helm was put hard-a-starboard and the tug towed broad off her port bow. Owing to the *Ralph Creyke* smelling the ground, she did not answer her helm, and the engines were thereupon set full speed astern, but the *Jane*, which continued to drift up broadside on, with her starboard side about amidships, came into collision with the stem of the *Ralph Creyke*.

The defendants made the two following charges against the plaintiffs:

6. The *Jane* was improperly allowed, having regard to the dangers of navigation, and the special circumstances of the case, to drift broadside on up the deep-water channel of the river lashed to another keel, and not under any control.

7. Those on board the *Jane* improperly neglected to keep a proper or any look-out, and to take any measures by letting go their anchor or otherwise to avoid the collision.

The further facts are sufficiently stated in the judgment.

The Humber Rules:

Art 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 Ouse, at or below Goole, 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 Aug. 1879, and as varied and amended by an Order in Council made as aforesaid, and dated the 26th day of Aug. 1881, with the exceptions and additions made in the following rules.

Art. 5. In interpreting these rules, the term "dumb-craft" shall include canal boats, mud barges, and other barges, lighters, vessels without masts, and vessels without either deck or masts, sloops and keels, with their masts lowered, and rafts.

T. T. Bucknill, Q.C. and *J. P. Aspinall* for the plaintiffs.—It was the duty of the steamer to have kept out of the way of the keels, and, as she has neglected that duty, she is solely to blame for this collision:

The Owen Wallis, 30 L. T. Rep. N. S. 41; 2 Asp. Mar. Law Cas. 207; L. Rep. 4 A. & E. 175.

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

The keel was perfectly justified in going up on the flood tide lashed to another keel. She was also entitled to navigate in any part of the channel that she pleased. Those on board the steamer were acquainted with the local dangers of the reach, and they ought to have anticipated the possibility of their vessel smelling the ground, and waited till the keels had passed. Instead of that they kept on without even reducing their speed. Even assuming the keels to have been guilty of negligent navigation, yet it cannot be regarded as negligence contributing to the collision, and would not have occasioned a collision but for the steamer's fault:

Davies v. *Mann*, 10 M. & W. 546:
Spaight v. *Tedcastle*, 44 L. T. Rep. N. S. 589; 4 Asp. Mar. Law Cas. 486; L. Rep. 6 H. of L. 217.

Sir *Walter Phillimore*, Q.C. and *H Stokes* for the defendants.—The collision was solely caused by the keels floating up on a flood tide without taking any precautions whatsoever. By arts. 23 and 24 of the Regulations for Preventing Collisions at Sea due regard is to be paid to any special circumstances, and no ship is under any circumstances to neglect proper precautions. Notwithstanding these regulations the keels were allowed to drift broadside on in that part of the channel in which the steamer owing to her draught could alone safely navigate, whereas the keels might have safely drifted up in other parts of the channel. In addition to this the keels neglected to take the ordinary precaution of dredging, and so were without any means either of quickly checking their way or altering their course in case any emergency made it necessary so to manœuvre. The "ordinary practice of seamen" makes it clearly wrong to navigate in this reckless and imprudent way.

J. P. Aspinall in reply.—The Regulations for Preventing Collisions at Sea are not applicable to a keel with her mast lowered. By art. 1 of the Humber Rules all vessels, except "dumb craft," are "to obey the Regulations for Preventing Collisions at Sea." By art. 5 the term "dumb craft" includes among other things "sloops and keels with their masts lowered." That being so, the keel *Jane* was not bound by the Regulations, and was entitled to suppose that the steamer would take due measures to keep out of her way. Notwithstanding this, the defendants are in effect asking the court to hold that it was the duty of the keel to get out of the way of the steamer. Had she done so, those in charge of her would have been departing from the ordinary practice of seamen:

The Owen Wallis (*ubi sup.*);
The Swallow, 36 L. T. Rep. N. S. 231; 3 Asp. Mar. Law Cas. 371.

Cur. adv. vult.

May 11.—Sir JAMES HANNEN.—My decision in this case has been delayed owing to a difference of opinion between my assessors. The facts of the case are these: The keel *Jane* was proceeding up the Goole reach of the river Ouse lashed to another keel called the *Jessie*. They had been dredging up the river with the tide, and as the wind was against them, they had their masts down. When they got into Goole reach, I come to the conclusion that they had not got their anchors down, but were drifting up athwart the river with their sterns slightly angling down the river towards the right bank. Whilst in that position the steamer *Ralph Creyke* was entering the reach at the upper end, and those on board of her saw the position of the two keels. The steamer proceeded down the reach until within a distance of about 130 yards, when her master inquired of the tug which was assisting him on which side of the keels he proposed to go. The tug master stated that he proposed going astern of the keels, that is nearer to the left bank of the river; and at a distance of about 130 yards the helm of the steamer was starboarded for the purpose of enabling her to follow the tug in the direction indicated. In the course of the manœuvre the tug proceeded to tow broad on the port bow of the steamer; but it is said that the steamer did not answer her helm, and the consequence was that, instead of following her tug, she came into contact with the keel *Jane*, which shortly afterwards sank. It is said on behalf of the steamer that the reason she did not answer her helm and follow the tug was because she smelt the ground. The evidence is this: It is said that soundings were being taken on the steamer from time to time, and that whereas her draught was 11ft. 7in. astern, and 11ft. 6in. forward, the soundings taken on both sides recorded a depth 11ft. 6in. On the other hand the tug, whose special business it was to be acquainted with the depths along this reach, had taken some soundings as she went up the river; and it is alleged by those on board her that they found soundings as deep as 13ft., and further that, in coming down the river, when towing the steamer, soundings were taken from time to time, and they were 13ft. until the very last sounding, which was taken immediately before the collision, when the tug was broad on the port bow of the steamer, and tending nearer into the shore, and consequently in shallower water, and then the soundings gave 12ft. 6in. Now, if the soundings had not been taken on both sides of the steamer, it might have been that this discrepancy was accounted for by the steamer being nearer the shore; but, as it is alleged that soundings were taken on both sides of the steamer, that explanation is not sufficient, and the result is that there is a remarkable discrepancy between the soundings of the tug and those of the steamer. I myself am satisfied that the soundings of the tug are correct, because the dock-master says that he knows as a fact that the depth of water at the dock gates at that time was 12ft., and that the depth of the river at the point where the collision took place would be 1ft. more, making 13ft., which exactly accords with the soundings on the tug. Further than that there was an independent witness on board the tug, who says there was depth and space enough on the left bank for the steamer to have passed the keels, if it had not been for some cause such as the alleged smelling of the ground. It was suggested in argument that there might have been what for the purposes of convenience I will call an accidental bank, which may have caused the smelling of the ground; but there is no evidence of that, and I cannot see why it should not have been proved had it been the case.

The evidence, therefore, stands thus, that the depth of water near the steamer was 13ft., and that it was 12ft. 6in. when the tug was broad on the steamer's port bow. I have put to the Trinity Brethren the question whether or not with that depth of water the steamer

might smell the ground, and so become incapable of answering her helm, and they tell me that with some ships under such circumstances it might be so. Upon a matter of that kind, upon which I am quite incapable of forming an opinion myself, I must accept their opinion, and I am going to consider this case on the assumption that the steamer did smell the ground. One of the Trinity Brethren is of opinion that in these circumstances the steamer is not to blame, while the other Trinity Brother is of opinion that she is to blame. The character of the navigation was known to her, and the risk there was of her smelling the ground, and the latter Trinity Brother is of opinion that the steamer ought, by occasionally stopping her engines, to have diminished her way, and been so well under control, as to have been able in the emergency which happened, to have avoided running into the keels with the force which we know she did, cutting into them some three or four feet. I accept the opinion of this Trinity Brother, and come to the conclusion that the steamer was to blame. There remains the question, whether the keel is also to blame. First it is said that it was negligent for her to be lashed to the other keel. Several witnesses were asked whether it was not unusual, and they gave an opinion that it was. But I am of opinion that there was nothing which could be considered negligent on the part of the keel, in being lashed to another. It was stated that they got up faster by this means; and it is to be observed that, when lashed together, they took up no more space in the river than the steamer, and they had just as much right as the steamer to occupy the space of two keels. Further, it was said, that the keels ought not to have been in the deep channel, but in shallow water, because they did not draw so much water as the steamer. But I must entirely repudiate that view. Barges or keels have just as much right to the natural advantages of a swift stream as a steamer, assuming there is no rule of the road or regulation or custom to the contrary. I see no negligence in their navigating in the deep water, and the steamer, seeing they were in the deep water, ought, if there was not room enough in which to pass —which, however, I am of opinion is not proved —to have waited till the keels which were in possession of the reach had passed. But, while I am of opinion that the keels were entitled to proceed up the reach lashed together, it does not follow, that they are entitled to any indulgence when so lashed, beyond the rights of a keel going up alone. I therefore have asked the Trinity Brethren whether the keels were being navigated in a proper manner, and they are of opinion that they were not. They ought to have been proceeding up the reach in the same way as that in which they had been proceeding up the lower parts of the river, viz., by dredging, the effect of which is, that by keeping the anchor on the ground, they practically steer themselves. Further, when dredging, they, by letting the anchor hold, can sooner bring the keel to a standstill. That is what the keel could have done had she been dredging—it is that which I am of opinion the steamer ought to have done by stopping her engines. For these reasons, I am of opinion that both vessels were to blame.

Solicitors: For the plaintiffs, *Pritchard* and *Sons*; for the defendants, *Stokes, Sannders*, and *Stokes*.

Tuesday, April 20, 1886.

(Before BUTT, J.)

THE IDA. (*a*)

Co-ownership action—Managing owner—Principal and agent.

Where a part owner of a ship pays to the managing owner his contribution due upon the ship's accounts as agreed between the co-owner, the managing owner receives such contribution as agent for all the owners, and in the event of the managing owner misapplying such payment to his own use, and not paying the ship's accounts therewith, the contributing owner is entitled to be credited with the amount so paid, but all the owners, including himself, must make good the defalcations in proportion to their shares.

THIS was an objection to a registrar's report, taken on motion to vary the report.

The action was originally brought in the Chancery Division by G. B. Meager, one of the owners of the *Ida*, against W. E. Jones, Thomas Cory, J. Wilson, and W. Pike, as part owners of the *Ida*, to have an account taken of the receipts, payments, credit, and liabilities of or for the *Ida*, from the 25th Jan. 1878 to the 28th Feb. 1880, and of what was due to or from each of the several part owners in respect thereof, and in respect of payments made by any or either of them in discharge of liabilities incurred between the said dates.

After some delay, an order was made, upon the application of the plaintiff, that the action should be transferred to the Admiralty Division, and on the 1st July 1885 the whole matter in dispute was referred to the registrar to report on.

Before the reference was heard the plaintiff filed accounts, showing fully what he alleged were the disbursements and receipts made and received in respect of the ship; the debts owing; distinguishing those incurred before and after the several owners acquired their shares; and the amounts due from and paid by and balance due from each party.

At the reference it appeared that from the time the ship was purchased to March 1879 one John Bowen was the managing owner of the ship, and that in March 1879 Bowen presented a petition in liquidation. The plaintiff Meager thereupon became managing owner, and continued to act in that capacity until the end of 1879. When the plaintiff became managing owner he found that several debts and liabilities incurred in respect of the said ship by Bowen remained unpaid.

Whilst Bowen was still managing owner his accounts to Feb. 1878 had been audited by several of the owners, including the plaintiff and the defendant Jones, and found correct, and showed a balance against the ship of 520*l.* 15*s.* 6*d.*

In consequence of the plaintiff insuring his own share, the owners, other than the plaintiff, had to contribute to a sum of 482*l.* 2*s.* 5*d.*

These accounts showed on the debit side an amount of 171*l.* 17*s.* 5*d.* for repairs done to the ship by the firm of G. B. Meager and Co., of which the plaintiff was a member. This amount was not in fact paid by Bowen to the plaintiff's firm, and still remained owing; and

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

the plaintiff claimed to debit the ship with this amount in the subsequent accounts, and to have a contribution in respect of it from his co-owners.

At the reference it was shown by the defendant Cory that he had paid to Bowen, at the request of the defendant Pike, a sum of 34*l.* 8*s.* 9*d.*, being the proportion of the sum of 520*l.* 15*s.* 6*d.* due from him in respect of his eight sixty-fourth shares of the ship. It was also alleged, on behalf of the defendant Jones, that he had accepted in Bowen's favour and ultimately paid a bill of exchange for 118*l.* 15*s.* 1*d.*, to enable Bowen to pay a further repair account due to G. B. Meager and Co.; and Jones claimed to set this off against the claim made against him. This, however, was not claimed by Jones as a contribution in respect of amounts due for his eight sixty-fourth shares. Neither of these amounts had in fact been paid by Bowen for the ship's debts, but had been appropriated by him to his own use.

G. B. Meager and Co. had drawn upon Bowen for the proportion due to the plaintiff of the 171*l.* 17*s.* 5*d.*, but Bowen had not met the bill.

Among the ship's debts was one of 126*l.* 2*s.* 2*d.*, due to Shepherd, a ship chandler in Swansea, of which 69*l.* 7*s.* 11*d.* had been incurred before, and 56*l.* 14*s.* 3*d.* after the 26th Nov. 1878, when Pike became a part owner. In settlement of this account Shepherd accepted 90*l.*, making an abatement of 36*l.* 2*s.* 2*d.* The whole of this abatement was deducted by the plaintiff in his accounts from that part of Shepherd's bill, amounting to 69*l.* 7*s.* 11*d.*, which had occurred before the 26th Nov. 1878.

It further appeared at the reference that the plaintiff had omitted to give credit for 16*l.* 16*s.* received by him from Bowen's estate.

The shares were held as follows: Meager eight sixty-fourth shares; Jones, eight sixty-fourth shares; Cory, four sixty-fourth shares; Wilson, four sixty-fourth shares from the time of the purchase of the ship, including Bowen's managership; Pike, eight sixty-fourth shares from the 26th Nov. 1878.

The rest of the owners were insolvent, or had disappeared, and the case was dealt with on the basis that the above-named persons only were capable of contributing.

The plaintiff, the defendants Jones, Cory, and Pike appeared at the reference. Wilson did not appear. It was then objected, on behalf of the defendants, that the plaintiff, by signing Bowen's account, must be taken to have admitted that the 171*l.* 17*s.* 5*d.*, had been paid to his firm, and that, even if this were not so, Cory, having paid Bowen 34*l.* 8*s.* 9*d.*, was entitled to have that set off against the amount now claimed against him; and similarly that Jones was entitled to set off the 118*l.* 15*s.* 1*d.* against the claim against him.

The registrar, by his report, refused to entertain the defendants' objections upon the ground that the payment to the managing owner by Cory could not of itself discharge Cory from his liability to Meager and Co., and that there had not been any such delay on their part in enforcing their claim against Bowen as to debar them from recovering the amount from the other owners; and that, further, as against his co-owners, Cory ought, before paying his contribution to the managing owner, to have ascertained, as he might have done, that Messrs. Meager's account had not been paid, and to have taken the precaution of paying it over to them himself, in which case his co-owners would have had no further claim against him; and secondly, upon the ground that the bill, of 118*l.* 15*s.* 1*d.* given by defendant Jones to Bowen was not even, as in Cory's case the payment of a contribution ascertained to be due in respect of his shares, but rather an advance by Jones to Bowen, between whom and Jones there were other business transactions independently of the ship. But the registrar directed, with regard to Shepherd's bill, the deduction should be apportioned between the parts of the account before and after the 26th Nov. 1878, and therefore transferred 16*l.* 4*s.* 9*d.* to the credit of the ship after the defendant Pike became an owner; and found that, as the plaintiff had omitted to credit the dividend of 16*l.* 16*s.*, one-half of that sum should be deducted from the ship's debts incurred before the 26th Nov. 1878, and the other half from the amount of those subsequently incurred. With regard to costs, the registrar reported that "the accounts filed by the plaintiff having been altered only by giving credit for the omitted dividend of 16*l.* 16*s.* from Bowen's estate, and by apportioning the allowance made in Shepherd's account, I am of opinion that the plaintiff is entitled to the costs of the reference."

To this report the defendants gave notice of objection.

The objection was heard on notice of motion; the notice of motion on behalf of the defendants Cory and Pike being, that they would move the court on the facts found in the report to vary the said report, or to refer the same back to the registrar for amendment, upon the ground (1) that the plaintiff, inasmuch as he audited and signed an account with credit items on one side and debit items on the other, was bound by his signature to such audited account to treat every debit in such account (his own 171*l.* 17*s.* 5*d.* included) as having been discharged when he has to deal with a person like the defendant Cory, who has acted on the faith of such account and the plaintiff's signature thereto; (2) that in the alternative, the plaintiff so signing being the cause of the defendant Cory having made a payment of 34*l.* 8*s.* 9*d.*, to Mr. Bowen, the defendant Cory is, as between himself and the plaintiff, entitled to claim to take credit for the payment of the 34*l.* 8*s.* 9*d.*, and that the same should be added to the 98*l.* 15*s.*, for which he is given credit in the schedule to the report; (3) that, after being party to an account sent to the owners, asking for their contribution in cash to the 482*l.* 2*s.* 5*d.*, the plaintiff, as between himself and partners (particularly the defendant Cory, who at once paid his contribution in cash), had no right to accept any mode of payment from the managing owner other than cash, and by taking a bill from Bowen, he thereby relieved the other part owners without regard to the form or wording of the bill; (4) that the plaintiff is bound to pay his proportionate part of the costs of the action and reference.

The notice of motion on behalf of the defendant Jones was similar, under heads (1), (3), and (4), but (2) was that the defendant Jones, having made a payment of 118*l.* 5*s.* 1*d.* to Mr. Bowen, the defendant Jones, as between himself and the

plaintiff, was entitled to claim to take credit for his payment of 118*l.* 15*s.* 1*d.*, and that the same should be added to the 120*l.* for which he is given credit in the schedule to the report.

Warr, for the defendants Cory and Pike, in support of their objections. In face of the account signed by him, the plaintiff cannot be heard to say that the 171*l.* 15*s.* 1*d.* was not paid to him. [BUTT, J.—That account is not conclusive to show payment, and, as payment was not in fact made, it is open to the plaintiff to claim it. Is not your real position that the defendant Cory's position was altered by his payment of his contribution to Bowen, who received it as agent for all the owners?] Yes, that is my contention; the defendant Cory cannot be called upon to pay twice, having really paid his proportion of the debts due under this account and to the agent of the owners, of whom the plaintiff was one. The owners must credit Cory with the money paid by him to Bowen.

Ashton Cross for the defendant Jones.—The payment to Bowen was really on account of the ship, and should be credited to Jones.

J. P. Aspinall for the plaintiff.—Bowen was not agent for all the co-owners to receive contributions so as to bind them. A managing owner may be agent to bind them as regards transactions with third parties, but, so far as each owner is concerned, he is agent for each individual to pay and not to receive. If a co-owner pays the managing owner money, the latter is bound as against his co-owners to see that it is properly applied. The plaintiff has a right, as against each individual owner, to recover the whole of the necessaries supplied to the ship, and no one of the defendants can be heard to say that, his agent having misappropriated the money paid on account of the debt, he is not liable over again. [BUTT, J.—You are asking me in a co-ownership action to enforce payment of a debt for necessaries. How can I do that? If the amount had been paid it might have been different.] I submit it is immaterial whether the amount is paid or not; in this action all accounts between the co-owners must be settled, and the amounts of their respective contributions to the amount of the ship's liabilities must be determined. A managing owner is entitled to be put in funds before he pays anything, and the fact of his being a creditor makes no difference. [BUTT, J.—On consideration, I think you are right in that, Mr. Aspinall.] The worst that can happen to the plaintiff is that the defendant Cory should be credited with the amount paid by him, and that such amount, not having been paid by Bowen, should be debited against all the owners, including Cory.

BUTT, J.—In my view of this case the report must be amended in one respect. It seems to me perfectly clear that during Mr. Bowen's management as managing owner he received from Mr. Cory, one of the co-owners, and one of the parties to this suit, the sum of 34*l.* 8*s.* 9*d.*, that sum being the exact amount of Mr. Cory's share of the total debts and liabilities of the ship, as appearing in the account which was then audited and settled. I have no hesitation in saying that Mr. Bowen received that sum as the agent of all the owners of the ship, and, if he has misappropriated it, it is a loss, which must be borne by all the owners. Mr. Cory, being one of the owners, will bear his share of that loss; but the proper way of settling the account, in my view, is to credit Mr. Cory with the amount so paid. If it overpays any amount to which Mr. Cory appears to be liable on the final settlement of the accounts of the ship, then his co-owners will have to recoup him the amount so overpaid. So much for Mr. Cory's position. Now, with regard to Mr. Jones, I am sorry to say that I am afraid he has put himself in the awkward position of having made an advance to Mr. Bowen, the managing owner. It is very true that the claim may be said, in one sense, to be in connection with this ship, but it is not in payment of the accounts of this ship, and he, therefore, must suffer for Bowen's misfortune, or Bowen's dishonesty—I do not know which is the correct view of the matter. That, as I understand it, disposes of all the objections to this report.

Solicitors for the plaintiff, *Ullithorne, Currey, and Villiers.*

Solicitors for Cory and Pike, *Pritchard and Son.*

Solicitor for Jones, *Richard White*, agent for *E. Davies*, Swansea.

Tuesday, June 1, 1886.

(Before Sir JAMES HANNEN.)

THE KEROULA. (*a*)

Restraint—Bond for safe return—Arrest of ship—Mortgage—Damages and costs.

Where persons hold shares in a ship by way of security for a loan under an agreement, by which it is provided (inter alia) that in the event of the owners of the shares failing to meet their acceptances, or to pay interest, the holders of the shares may realise them, calling on the owners of the shares to make good any loss arising therefrom, or paying them any balance left after repaying themselves the loan, they are merely mortgagees of such shares, and do not become owners thereof on the acceptances being dishonoured, and hence they, not having taken possession of the shares, are not entitled to institute an action of restraint against the ship.

Where shipowners, in an action of restraint instituted by mortgagees alleging themselves to be owners, enter an appearance not under protest, and give bail for the safe return of the ship, they are not precluded at the trial from questioning the plaintiffs' title, and, if it in fact appear that the plaintiffs are merely mortgagees, the Court will order the bond to be given up and cancelled.

Semble, a mortgagee of shares in a ship, when in possession, may institute an action of restraint.

THIS was an action of restraint, instituted by Messrs. Westcott and Laurance, the alleged owners of eight sixty-fourth shares in the steamship *Keroula*, in which they claimed that the co-owners should give a bond for the value of the plaintiffs' shares in the steamship, and for her safe return from her intended voyage.

The plaintiffs having threatened to arrest the

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

Keroula, the defendants gave a bail bond in the sum of 1500*l.* for the safe return of the vessel.

The defendants having required the plaintiffs to deliver a statement of claim, the plaintiffs delivered one as follows:—

1. The plaintiffs are the lawful and registered owners of eight sixty-fourth shares in the steamship *Keroula*.

2. At the time of the institution of this suit, the said steamship was lying in the river Tyne, or in one of the docks adjacent thereto, in the possession of the defendants, who were about to despatch her on a voyage against the will of the plaintiffs, who always disapproved of, and dissented from, and protested against, any such employment of the said ship, and desired that the said ship should not be employed in trading or attempting to trade for the present.

3. After the institution of the suit, the defendants appeared in the action, and gave a bail bond to the plaintiffs for the safe return of the ship to the satisfaction of the plaintiffs, and as claimed by the plaintiffs, and the plaintiffs are satisfied with the said bail bond, but the defendants have required the plaintiffs to deliver a statement of claim, and in accordance with such demand, and in compliance with the Rules and Orders of Court, the present claim is delivered.

4. The plaintiffs claim that the court should pronounce for the liability of the defendants, to answer judgment in the action, and for the validity of the said bail bond, and condemn the defendants in the costs of these proceedings, and for such other and further relief as the nature of the case may require.

The defendants, by their defence, alleged as follows:—

1. The plaintiffs are not the lawful owners of eight sixty-fourth shares of the said steamship. The plaintiffs, although registered as owners of the said shares, hold the same only by way of security for the repayment of a loan from Messrs. Porteous and Senior, who are the owners of the said shares.

2. At the time of the institution of this suit, the *Keroula* was under charter for a voyage from the Tyne to Savona, and the defendants pointed out to the plaintiffs that they were only mortgagees of the said shares, and not entitled to commence an action of restraint, but the plaintiffs persisted in their claim and the defendants, rather than suffer the arrest of the said ship, which would have caused very serious damages, entered an appearance in the said action, and gave, under protest, a bail bond for the safe return of the said steamship, at the same time stating that they would hold the plaintiffs responsible for all costs and damages occasioned by their proceedings.

3. Save in so far as they are consistent with this defence, the defendants deny the several allegations contained in the statement of claim.

4. The defendants submit to this honourable court that it was gross negligence on the part of the plaintiffs to institute or proceed with the said action after the said notice, and the defendants pray that the said bail bond may be delivered up to them to be cancelled, and that the plaintiffs be condemned in the costs of this suit, and also in all damages and expenses arising out of the said proceedings, and that, if necessary, a reference may be made to the registrar to report the amount of such damages and expenses.

The terms upon which the plaintiffs held the eight sixty-fourth shares were contained in the following letters between themselves and the defendants, Messrs. Porteous and Senior:—

9, Fenchurch-street, 7th Feb. 1886.—Messrs. Porteous and Senior.—Dear Sirs,—Loan. In consideration of your depositing sufficient steamer shares to cover a loan of 3000*l.*, we agree to pay you 1000*l.* to morrow, and a further 1500*l.* by the 15th inst., the shares to be transferred equally to each partner, and our Mr. W. G. Westcott would be prepared to advance a further 500*l.* against further shares in his name; the loan to bear interest at the rate of 8 per cent. per annum, and for not less a period than three months. If agreeable to you, we shall be glad to receive at same time your acceptances for the amount by six drafts of 500*l.* each for twelve months, you being at liberty to withdraw any one of these at any time you please. It is further agreed you give us a letter indemnifying us against any claims or losses that may accrue on these shares whilst we hold them, as we simply hold them as security on the loan. If you let us know this is in order we will at once arrange accordingly.—Yours truly, WESTCOTT AND LAURANCE.

In answer thereto, Messrs. Porteous and Senior wrote the following letter:—

4, Great St. Helens-street, 15th Feb. 1886.—Messrs. Westcott and Laurance.—Dear Sirs,—In accordance with arrangements, we hand you herewith our acceptances for 3000*l.* in six drafts of 500*l.* each, payable in twelve months hence, and also bills of sale for eight shares in s.s. *Keroula*, and six shares in s.s. *Mareca*, it being understood that these do not constitute you owners of these shares, but are merely given as collateral security for payment of acceptances and security. You are not to receive any profits on these shares, nor to be liable for any losses, and we hereby agree to indemnify you against any claims that may be made on you in consequence of your being registered owners of such shares. After the expiration of three months, and at any time between that date and the date when acceptances become due, we are to be at liberty to retire any or all the above acceptances, in which case you agree to re-transfer such shares as we may wish, to the extent of the acceptances retired, and in accordance with the values stated in the respective bills of sale. Interest to be paid at expiration of each three months, at the rate of 8 per cent. per annum on amount of acceptances running. Should we fail to meet our acceptances, or to pay interest when due, you will then be at liberty to realise the shares, calling on us to make good any loss arising therefrom, or handing us any difference you may have in hand, after repaying yourselves what we may then owe you,—Yours truly, PORTEOUS AND SENIOR.

In answer, Messrs. Westcott and Laurance wrote as follows:—

15th Feb. 1886.—Dear Sirs,—Loan 3000*l.* Your letter of the 15th inst. is before us, and we agree to the contents contained therein. Please find herewith one further cheque for 1500*l.*, and our Mr. W. G. Westcott's cheque for 500*l.*, receipt of which please acknowledge.—Yours truly, WESTCOTT AND LAURANCE.

It was admitted that the acceptances given by Messrs. Porteous and Senior had been dishonoured. The plaintiffs had never taken possession of the said shares, having never given any notice either to Porteous and Senior or to the managing owner that they had taken possession of the shares, or intended to receive the benefits thereof.

Dr. *Raikes* for the plaintiffs.—We are satisfied with the bond given by the defendants, and it is now too late for them to question our right to have such a bond. Had they intended to raise the question of our ownership, they should have appeared under protest:

The Vivar, 35 L. T. Rep. N. S. 782; 3 Asp. Mar. Law Cas. 308; 2 P. Div. 29;
The Vera Cruz, 5 Asp. Mar. Law Cas. 270; 51 L. T. Rep. N. S. 104; 9 P. Div. 96.

The defendants having elected to appear absolutely, and having given the bond, cannot now ask to set it aside. In the case of *Skeate* v. *Beale* (11 A. & E. 983) it was held that duress of goods was not a ground for avoiding an agreement. In the present case the bond is an agreement, and therefore the seizure of the ship is no ground for the defendants asking for the cancellation of the bond. Apart from that, my clients are substantially the owners of these shares, and therefore, on the authority of *The Innisfallen* (L. Rep. 1 Ad. & Ec. 72; 16 L. T. Rep. N. S. 71; 2 Mar. Law Cas. O. S. 470), entitled to a bond as claimed. The plaintiffs are on the register as

owners, and by the correspondence relating to the loan, they are to "be at liberty to realise the shares," assuming the defendants fail to meet their acceptances. It is admitted that the acceptances have been dishonoured, and therefore by the agreement we can at once sell; and if so, we are virtually in the position of owners, and not mortgagees. In *The Innisfallen* (*ubi sup.*) Dr. Lushington says that, under some circumstances, an agreement similar to the present might put mortgagees into the position of owners. My clients, by this agreement, became invested with all the rights of owners on default being made, and therefore are entitled to institute this action.

H. F. Boyd for the defendants.—On the authority of *The Innisfallen* (*ubi sup.*) the court may look behind the register to see what the real nature of this transaction was. By the agreement contained in the letters it is clear that the plaintiffs' position was that of mortgagees, with the usual power of sale. That they never were to become owners is conclusively proved by the term that in the event of sale the plaintiffs were to hand over the balance to the defendants, or to be repaid any loss. That is inconsistent with ownership, and therefore the plaintiffs are merely mortgagees. If so, they are not entitled to institute an action of restraint:

The Highlander, 2 W. Rob. 109;
Collins v. *Lamport*, 11 L. T. Rep. N. S. 497; 34 L. J. 196, Ch.;
The Innisfallen (*ubi sup.*).

The giving of the bail bond does not prevent the defendants contesting this action. They were bound by the practice of the court to give bail in the form in which they did. They gave notice to the plaintiffs' solicitors that they protested against the course taken by the plaintiffs. The bail bond does not constitute an agreement, and it was not given under duress of goods, but in compliance with the practice of the court. The court sets aside improper salvage agreements, and by analogy should order this bond to be given up and cancelled. In consequence of the plaintiffs' proceedings, the defendants were put to the expense of paying commission on bail. This is in the nature of damages, and, as it was caused by the gross negligence of the plaintiffs in instituting this action, notwithstanding their knowledge of their true position, the plaintiffs should be ordered to pay it:

The Numida, 10 P. Div. 158; 53 L. T. Rep. N. S. 681; 5 Asp. Mar. Law Cas. 483;
The Evangelismos, Swa. 378;
The Cathcart, L. Rep. 1 A. & E. 314; 16 L. T. Rep. N. S. 211;
The Victor, Lush. 72.

Dr. *Raikes* in reply.—There has been no such gross negligence as to entitle the plaintiffs to damages. By the terms of the agreement, the plaintiffs were entitled to look upon themselves as owners. In the case of salvage agreements, there is duress of the person in the sense that but for the services the salved might lose their lives.

Sir JAMES HANNEN.—I am of opinion that the plaintiffs have failed in this case. *The Innisfallen* (*ubi sup.*) decides very clearly that, though a person may appear to be owner on the register, yet that may be investigated. In other words, the court may look behind the register, and it may be ascertained whether or not the apparent owner is really owner or only mortgagee. Having regard to the facts of this case, and to the correspondence between the parties, I am clearly of opinion that the plaintiffs are only mortgagees. It is not necessary to go through the letters at length, because the plaintiffs have admitted that, subject to one particular passage, they were only mortgagees. That passage is in these words: "Should we fail to meet our acceptances, or to pay interest when due, you will then be at liberty to realise the shares, calling on us to make good any loss arising therefrom, or handing us any difference you may have in hand after repaying yourselves what we may then owe you." That in untechnical language, in my opinion, puts the plaintiffs in the position of mortgagees, and nothing else, and therefore, upon nonpayment of the acceptances, the plaintiffs were not to become owners, but to remain what they were before, with the rights and duties of mortgagees. That being so, the case of *The Innisfallen* (*ubi sup.*) is an authority for the proposition that the mortgagee of the shares, not being in possession, is not entitled to institute an action of restrainst. I do not think Mr. Boyd was justified in contending that that decision goes the length of deciding that the mortgagee, when in possession, is not entitled to maintain an action of restraint. It appears to me to permeate the whole judgment, that if the mortgagee is in possession he may institute the suit. In this case the mortgagee was not in possession. A mortgagee who assumes the character of owner may be subject to certain liabilities, and therefore the plaintiffs, for their own protection, were content to remain with only the rights of mortgagees. I am clearly of opinion, now that this case has been investigated, that the plaintiffs were not entitled to institute this suit.

Then comes the question whether the defendants, by giving the bond, have precluded themselves from raising this question. It has been argued that duress of goods does not vitiate a contract. This has nothing to do with duress of goods. In the case cited the duress had nothing to do with the proceedings in a law suit. It was a threat to distrain, and was totally different to the proceedings in this case. This is a case in which the plaintiffs asserted their right to seize the vessel, and the defendants, in accordance with the practice of this division, gave bail. They also very clearly and distinctly gave notice that they disputed their liability in the action, and that they intended to take such proceedings as they might be advised, to assert their rights. They gave bail in the usual form in which a bail bond is given in these actions. It was therefore only an ordinary step in Admiralty litigation to prevent possible loss consequent on the arrest of the ship. I am of opinion that the bail bond must be set aside. As to damages, I think that this is not a case in which I ought to award them. It does not appear to me to be a case of gross negligence. With regard to costs, I think that, having regard to the case of *The Innisfallen* (*ubi sup.*), I must give costs to the successful party. I therefore order the bond to be given up and cancelled, and dismiss the action with costs.

Solicitors for the plaintiffs, *Downing, Holman, and Co.*

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

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Thursday, June 3, 1886.

(Before Sir JAMES HANNEN.)

THE BERTIE.(*a*)

Salvage — Government transport — Government stores—Regulations for Her Majesty's transport service.

The owners, master, and crew of a steamship chartered to Government as a transport under the ordinary form of Government charter incorporating the transport regulations (by which it is provided that "when necessary, steam transports will be required to tow other vessels"), are entitled to recover for salvage services rendered to a ship and her freight, even though the services be rendered with the assistance of a naval officer and naval seamen and the salved vessel be laden (inter alia) with Government stores.

THIS was an action *in rem* instituted by the owners, master, and crew of the steamship *Dilston Castle* to recover salvage remuneration for services rendered to the steamship *Bertie* and her freight.

The facts alleged by the plaintiffs were as follows:

The *Dilston Castle* was a screw steamship of 1055 tons register, with engines of 150 horse power, and was of the value of about 18,000*l.*

On the 19th July 1885 the *Dilston Castle* was under charter by the British Government as a transport, and was in Suakim Harbour laden with a cargo of forage belonging to the Government, when news was received that the steamship *Bertie*, laden with a general cargo, was on shore about twenty miles to the northward of Suakim. Next morning, an officer and forty-five seamen of the Royal Navy having come on board, the *Dilston Castle*, with a naval steam launch in tow, went in search of the *Bertie*, and found her upon the inner edge of a dangerous coral reef, with her bows out of the water. The *Dilston Castle* having approached close astern of the *Bertie*, her anchor was let go, and she was swung with her stern towards the stern of the *Bertie*. The *Dilston Castle* was then made fast to the *Bertie*, and, on her anchor being got up, she steamed slowly ahead, but failed to move the *Bertie*. After several unsuccessful efforts had been made, it was determined to lighten the *Bertie* forward. The *Dilston Castle* was accordingly got alongside the *Bertie*, and part of the *Bertie's* cargo was discharged by the crews of both vessels and the seamen of the Royal Navy into the *Dilston Castle*. Another unsuccessful attempt was made to move the *Bertie*. Next morning, the 20th July, another unsuccessful attempt was made to move the *Bertie*, during which the *Dilston Castle* sustained damage. Discharging of the cargo was again continued, and about 5 a.m. on the 21st July the *Bertie* suddenly slipped off the reef, when both vessels were safely navigated into Suakim Harbour.

The defence was as follows:

1. The defendants admit that salvage services were rendered by the *Dilston Castle* on the 19th, 20th, and 21st July, but say that the circumstances under which the said services were rendered are greatly exaggerated in the statement of claim, and, further, that the said services were not rendered to the steamship *Bertie*, or to any freight which was at the risk of the defendants at the time, but that the said services were rendered to certain Government stores then laden on board the *Bertie*.

2. Except as herein admitted, the defendants deny the various allegations in the statement of claim, and say that the following are the correct circumstances of the said services: The *Bertie* is a screw steamship of 1109 tons register, propelled by engines of 140 horse power nominal, and, at the time of the circumstances hereinafter mentioned, was under charter for a voyage from England to Jeddah, Suakim, Aden, Bushire, and Bussorah, for a lump sum of 2250*l.*, and, by the terms of the said charter-party, it was further agreed that the sum of 2000*l.*, part of the said chartered freight, should be paid to the defendants in London fourteen days after the ship had sailed from Liverpool in prosecution of the said voyage, and that the payment of the residue, not exceeding 250*l.*, was secured by deposit of the bills of lading for the whole cargo.

3. The *Bertie* left Liverpool on the 24th June in prosecution of the said voyage, laden with a general cargo, a portion of which, consisting of Government stores, was loaded in the foreholds, and whilst at Port Said and Jeddah she shipped about 170 tons of coal on deck for the English Government, to be carried to Suakim, and, whilst in prosecution of her voyage from Jeddah to Suakim, at about 10.15 a.m. on the 18th July, and more than fourteen days after leaving Liverpool, the *Bertie*, by reason of dangers and accidents of the seas and navigation, took the ground forward.

4. The place where the *Bertie* grounded is a coral reef of new growth, and is soft and pulpy, and the *Bertie* was only on it for about 12 feet from the stem, the rest of her length being water-borne, and the *Bertie* was in no danger whilst so lying with her bows on the reef, and could, by jettisoning the cargo from the deck and foreholds, have got off without assistance; but having regard to the vicinity of Suakim, which was only about twenty miles off, and the probability that the Government stores were urgently needed, the master of the *Bertie* despatched his chief officer with a boat's crew to Suakim to communicate the circumstances to the senior naval officer there.

5. By the directions of the senior naval officer, the *Dilston Castle*, which is a Government transport, and under his orders, was despatched for the purpose of salving the Government stores. She was piloted to the place where the *Bertie* was aground by the chief officer of the *Bertie*, and all the subsequent operations were performed under the directions of the naval officers, who, with a party of seamen belonging to the Royal Navy, and some Egyptians, had been sent on board the *Dilston Castle* for the purpose.

6. The defendants admit that attempts were made to tow the *Bertie* off as alleged, but say the ropes and chains were carried away by the *Dilston Castle* jerking at them instead of keeping a steady strain upon them as she should have done. They also admit that a considerable quantity of Government stores, but nothing else, out of the foreholds of the *Bertie* were transshipped to the *Dilston Castle* alongside.

7. At about 5 p.m. on the 21st July the *Bertie*, having been lightened forward by the discharge of the said stores, came off the reef without assistance, the *Dilston Castle* at the time not having steam up to work her main engines, and not being in a position to render any assistance.

8. The *Bertie* afterwards, and as soon as the *Dilston Castle* was ready to get under weigh, proceeded herself under steam to Suakim, where she delivered the Government stores remaining on board.

9. While the said alleged services were being performed the weather was fine, and the sea smooth, and neither vessel was in any danger.

10. The services were such as the *Dilston Castle* was bound to render as a Government transport, and under the terms of her agreement with the Government, and were not services for which the defendants were liable to pay salvage.

11. If the defendants had jettisoned the Government stores from the foreholds they would have got off the reef much sooner, and before the arrival of the *Dilston Castle*, and there was, and would have been, more than enough cargo left on board undamaged to secure the payment of the residue of the freight.

12. The *Bertie* was examined after arriving in Suakim, and was found to have sustained no material damage.

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

13. The defendants further say the value of the *Bertie* at the time of the said alleged services was 14,000*l.* and no more.

14. The defendants further say that the plaintiffs, the owners of the *Dilston Castle*, are unable to maintain this action by reason of having no interest at risk in the ship at the time and under the circumstances under which the said services were rendered.

By the terms of the charter-party under which the *Dilston Castle* was working, it was provided (*inter alia*) that the master should in all respects comply with the Regulations for Her Majesty's Transport Service. Art. 35 of the Regulations for Her Majesty's Transport Service provides as follows:

A "transport" being a ship wholly engaged by Government either on monthly pay or for the execution of a special service, the rate of hire is to represent merely the charge for her use as a ship complete and ready for sea as defined by art. 36, and manned in accordance with art. 42. The vessel will be employed in the conveyance of troops, horses, or other animals, stores, or as a hospital ship, or in any other way that may be ordered, and the place of fitting will be decided on acceptance. When necessary, steam transports will be required to tow other vessels.

Sir *Walter Phillimore* and *Barnes* for the plaintiffs.—The services were meritorious salvage services, and should be amply rewarded. The defendants have failed to establish the defence that the services were rendered to the cargo, and not to the ship. The fact that the *Dilston Castle* was under charter to the Government, and bound to obey the orders of Government officers, does not preclude the plaintiffs from claiming salvage. In the case of *The Nile* (33 L. T. Rep. N. S. 66; L. Rep. 4 A. & E. 449; 3 Asp. Mar. Law Cas. 11), salvage was awarded under precisely similar circumstances. The effect of the transport regulations is only to make towage in the ordinary sense of the word obligatory on transports, and it was never contemplated that transports were to be exposed to perils in rendering salvage services which are wholly unconnected with transport duties.

C. Hall, Q.C. and Dr. *Raikes* for the defendants.—The case of *The Nile* (*ubi sup.*) is not in point. The defendants in that case admitted their liability, and the only question before the court was the apportionment of the accepted tender. The services here were not rendered to the ship, but to the cargo, and therefore the shipowners are not liable. The services were performed under the direction of naval officers by naval seamen, and were only beneficial to the Government stores. Neither vessel was exposed to risk, and, moreover, by the transport regulations it is expressly provided that, when necessary, transports will be required to tow other vessels. If so, the *Dilston Castle* was only doing what she was bound to do under the charter, and is entitled to no salvage.

Barnes in reply.

Sir JAMES HANNEN.—I am of opinion that the plaintiffs are entitled to recover. The case of *The Nile* (*ubi sup.*) is a direct authority on the point, and, even if it were not an authority binding on me, I entirely assent to it. It appears to me that the plaintiffs' vessel was hired by the Government for certain purposes, which did not include the rendering of salvage services to other vessels. Mr. Hall's argument mainly rests on the clause in the Regulations for Her Majesty's Transport Service, that, when necessary, the vessel employed is to tow other vessels; but I think it perfectly clear that that only means to tow in the ordinary sense of the word—*i.e.*, to remove a vessel from one place to another. It does not mean that the vessel is to be used for the purpose of towing another vessel out of a place of danger, when by so doing she will be exposing herself to risk. Mr. Hall says that the Government would be justified in ordering a vessel to incur that risk. I, however, think the true view of the matter is correctly expressed by Sir Robert Phillimore in *The Nile* (*ubi sup.*), when he says that the vessel employed is so far under the control of the officer in charge that she would not be justified in going off and rendering salvage services without his permission, but that if he permits her to go and render the services, she is entitled to salvage remuneration.

I therefore now come to the consideration of the services which were rendered. First I have to deal with the ship. The cargo must be eliminated altogether, and the question is, what is the value of the ship and the freight which have been salved. The value of the ship is agreed upon at 14,000*l.*, and then comes the question of the freight. If the owners of the ship were already out of pocket by their expenditure, then the enabling them to earn their freight has saved them from that loss, although upon the balance of accounts it may be, as alleged, that there would not be any profit. Therefore the freight must be taken into account. According to the evidence, the services had to be rendered by passing through a difficult and intricate passage, exposing the salving vessel to some risk. Can it be doubted that the *Bertie* resting upon this coral reef was in a position of considerable danger? That is plain, and I need not enlarge upon it. It is true that there was nothing to show that the weather was bad; but of course there is always risk of the weather changing, and it was of great importance that this vessel should be rescued from the perilous position in which she was as soon as possible. There were several efforts made to get her off, all of which were unsuccessful while the cargo remained on board. It is plain that the cargo was removed at the instance of the captain of the *Bertie* for the purpose of saving his ship, and not only for saving the cargo. That was effected by lightening her, and transporting the cargo to the *Dilston Castle*. As has been observed, the bringing of a great number of men to assist in carrying out the transport of the cargo was in itself a meritorious salvage service. In addition to that, I think there was considerable straining to the vessel and her engines. All these are circumstances which are to be taken into account. I come to the conclusion that valuable services were rendered, and, taking into consideration the values in question, I award 560*l.* I should have said that I consider myself limited to the remuneration of the owners, officers, and crew of the vessel, and am not dealing with the services rendered by the men of the Royal Navy.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

Solicitors for the defendants, *Turnbull*, *Tilly*, and *Mousir*.

May 11 *and July* 13, 1886.

(Before Sir JAMES HANNEN.)

THE RINGDOVE. (*a*)

Master's disbursements—Maritime lien—Service of writ—Bill of sale—Admiralty Court Act 1861, *s.* 10.

The master of a ship has a maritime lien for disbursements made on behalf of the ship, and therefore his claim has priority over that of a bonâ fide purchaser.

THIS was a motion in objection to the registrar's report in an action *in rem* for master's wages and disbursements against the barque *Ringdove*.

The writ, by which the plaintiff claimed 550*l.* for wages, disbursements, and damages for wrongful dismissal, was issued on Dec. 17, 1885. The writ and warrant of arrest were both served on Dec. 21, and an appearance was subsequently entered for her owners.

On Dec. 17, the date of the issue of the writ, the ship was transferred by bill of sale from her then owners to the West of England Shipping Company Limited, and the bill of sale was registered on Dec. 22. The validity of this transfer was disputed by the plaintiff. But this contention was waived for the purposes of the present motion.

Before the delivery of a defence the amount of the plaintiff's claim was by order referred to the registrar, and on March 24, 1886, the registrar reported that 410*l.* 0*s.* 7*d.* was due in respect of wages and disbursements.

The plaintiff now moved to vary the report by a direction from the judge that the disbursements should be disallowed on the ground that there was no maritime lien in respect thereof.

The Admiralty Court Act 1861 (24 Vict. c. 10):

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.

Sect. 10. 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.

May 11.—*J. P. Aspinall*, for the defendants, in support of the motion.—The master of a ship has no maritime lien for disbursements, and if so his claim against the ship only commences from the date of the service of the writ. As that was on the 21st Dec., and the ship had previously been transferred to the present defendants on Dec. 17, his claim in respect of disbursements is postponed to the rights of the defendants. In support of the contention that there is no maritime lien for master's disbursements, reliance is placed upon the recent decision of the Court of Appeal in the case of *The Heinrich Bjorn* (5 Asp. Mar. Law Cas. 391; 10 P. Div. 44; 52 L. T. Rep. N. S. 560), that 3 & 4 Vict. c. 65, s. 6, does not create a maritime lien in respect of necessaries supplied to a foreign ship. The *ratio decidendi* of that case was that the words the "High Court of Admiralty shall have jurisdiction" do not of themselves create a maritime lien. These words merely mean what they say, viz., give jurisdiction, and do nothing more. In the same way it has been decided that sect. 5 of the Admiralty Court Act 1861, giving jurisdiction over claims for necessaries supplied to any ship, does not create a maritime lien. If so, sect. 10, upon which the plaintiff relies, does not create a maritime lien:

The Heinrich Bjorn (*ubi sup.*);
The Pacific, 10 L. T. Rep. N. S. 541; 2 Mar. Law Cas. O. S. 21; Br. & Lush. 243;
The Troubadour, 2 Mar. Law Cas. O. S. 475; 16 L. T. Rep. N. S. 156; L. Rep. 1 A. & E. 302;
The Two Ellens, 26 L. T. Rep. N. S. 1; 1 Asp. Mar. Law Cas. 208; L. Rep. 4 P. C. 161.

True it is, that there have been decisions of this court holding that a maritime lien does exist in respect of disbursements, but it is contended that the *ratio decidendi* of those cases is virtually condemned by the recent case of the Court of Appeal in *The Heinrich Bjorn* (*ubi sup.*). The fact that wages and disbursements are dealt with in the same section, and that a maritime lien exists in the case of wages, is no argument that the Legislature intended to create a maritime lien in respect of disbursements. In the recent case of *The Beeswing* (53 L. T. Rep. N. S. 554; 5 Asp. Mar. Law Cas. 484) the Master of the Rolls in express terms doubted the existence of a maritime lien in respect of disbursements. It is therefore submitted that, as no maritime lien existed independently of the statute, and that as the statute has not created one, the purchasers of this ship have priority over the master's claim for disbursements. [Sir JAMES HANNEN referred to the cases of *The Mary Ann*, L. Rep. 1 A. & E. 8; 2 Mar. Law Cas. O. S. 294; 13 L. T. Rep. N. S. 384; and *The Rio Tinto*, 5 Asp. Mar. Law Cas. 224; 50 L. T. Rep. N. S. 461; 9 App. Cas. 356.] The Privy Council in *The Rio Tinto* (*ubi sup.*) did not assent to the point actually decided in *The Mary Ann* (*ubi sup.*), but only expressed approval of certain passages in Dr. Lushington's judgment. As to the decision in *The Mary Ann* (*ubi sup.*) it is submitted that it cannot be supported since the case of *The Heinrich Bjorn* (*ubi sup.*). It cannot be contended that sect. 191 of the Merchant Shipping Act 1854 created a maritime lien in respect of disbursements. All that section did was to enable shipowners in an action for master's wages to have all accounts between them and the master settled. It was a section in favour of shipowners, and was never meant to create a maritime lien. Assuming that no maritime lien exists, then the plaintiff's right against the ship only comes into existence on the institution of the action. It is submitted that the institution of the action is the service of the writ, and not the issue of the writ. The right against a ship only commences from the time when her owners can have notice that a right is alleged. The mere issue of a writ gives them no notice of a claim. It is the service of the writ which is the first indication they have of the claim. If the right dates from the issue of the writ, a material man might issue a writ and keep it in his drawer for months without serving it, and thereby prejudice the position of innocent purchasers for value. Prior to the Judicature Act there was no writ, and the institution of the suit was the service of the

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

warrant. Therefore, when the judges in the old cases speak of the institution of the suit, they refer to the service of the warrant:

The Pacific (*ubi sup.*);
The Troubadour (*ubi sup.*);
The Two Ellens (*ubi sup.*).

In support of this contention I rely on the practice with regard to garnishee orders, by which the order must be served before the judgment creditor acquires any right of priority:

Re Stanhope Silkstone Colliery Company, 11 Ch. Div. 160; 40 L. T. Rep. N. S. 204;
Hamer v. *Giles*, 41 L. T. Rep. N. S. 270; 11 Ch. Div. 942.

If, therefore, the plaintiff acquired no right against the vessel until the service of the writ, which was not till the 21st Dec., then the defendants have a prior right because their right commenced on the day on which the bill of sale was made, viz., the 17th Dec. It is the date of the bill of sale, and not of its registration, which is the commencement of the purchaser's title. The registration is merely required to enable the public to ascertain who are the owners of a ship, before they have any transactions in respect of her. The property in a ship passes by bill of sale, even though it is not registered:

Stapleton v. *Haymen*, 2 H. & C. 918;
The Two Ellens (*ubi sup.*)

Sir *Walter Phillimore* (with him Dr. *Raikes*), for the plaintiff, *contra*.—This court and the Court of Appeal have for many years recognised the existence of a maritime lien in respect of a master's disbursements. The decision in *The Heinrich Bjorn* (*ubi sup.*) is confined to necessaries, and is therefore no authority on the present point. Moreover, that decision was greatly based upon the fact that the decisions as to a maritime lien in respect of necessaries were not uniform. Whereas, in the case of disbursements, the courts have unanimously for a long series of years decided in favour of a maritime lien:

The Mary Ann, 13 L. T. Rep. N. S. 384; L. Rep. 1 A. & E. 8; 2 Mar. Law Cas. O. S. 294;
The Feronia, 17 L. T. Rep. N. S. 619; L. Rep. 2 A. & E. 65; 3 Mar. Law Cas. O. S. 54;
The Fairport, 8 P. Div. 48; 5 Asp. Mar. Law Cas. 62;
The Limerick, 34 L. T. Rep. N. S. 708; 1 P. Div. 411; 3 Asp. Mar. Law Cas. 206;
Re Rio Grande Do Sul Company, 36 L. T. Rep. N. S. 603; 5 Ch. Div. 282; 3 Asp. Mar. Law Cas. 424.

The reasoning of Dr. Lushington in *The Mary Ann* (*ubi sup.*) is based upon the existence of a maritime lien, independently of the jurisdiction conferred by the Act of Parliament. If so, *The Heinrich Bjorn* (*ubi sup.*) is really an authority in favour of the plaintiff. It is also to be noticed that sect. 10 of the Admiralty Court Act 1861 couples wages and disbursements together, and as there is undoubtedly a maritime lien in respect of wages, there are strong reasons for inferring that the Legislature meant to create a maritime lien in respect of masters' disbursements. The observations of the Master of the Rolls in *The Beeswing* (*ubi sup.*) are merely *obiter*. Even assuming there is no maritime lien, the plaintiff has priority because his right dates from the institution of the action, which was on the 17th Dec., whereas the defendants' right only commences from the 22nd Dec., the day on which the bill of sale was registered. By the rules of the Supreme Court actions are to be commenced by a writ of summons. A subsequent step, after the action has been instituted, is the service of the writ. If so, the plaintiff's right dates from the issuing of the writ, which is prior to the transfer of the ship. By virtue of the Statute of Limitations a right of action is kept alive by the issue of a writ, provided it be issued, but not served, before the times prescribed by the statute have elapsed.

Aspinall in reply.

Cur. adv. vult.

July 13.—Sir JAMES HANNEN.—This is an action *in rem* by the master of the *Ringdove* for wages and disbursements. It is alleged that on the day on which this action was commenced a bill of sale was executed by the then owners to a company called the West of England Shipping Company Limited. The *bona fides* of this transfer is disputed by the plaintiff, and it would be necessary, before judgment could be pronounced for the company, that their claim should be investigated before the registrar, but for the present purpose the validity of the transfer is assumed, and the question now to be determined is, whether the master of a ship has a lien on the vessel for disbursements which is to be preferred to the claim of a purchaser. This point was distinctly raised in the case of *The Mary Ann* (*ubi sup.*) in 1865, when Dr. Lushington held that the master's claim for disbursements was to be preferred to that of the mortgagee. This decision, in which the learned judge went very carefully into the history of the law of masters' liens, has been acted on ever since. It was followed by Sir Robert Phillimore in *The Feronia* (*ubi sup.*) and in *The Fairport* (*ubi sup.*), and the law, as then declared, was recognised by James, L.J. and the present Master of the Rolls in *The Rio Grande do Sul Steamship Company Limited* (*ubi sup.*). But it is said that *The Mary Ann* (*ubi sup.*) is overruled by *The Heinrich Bjorn* (*ubi sup.*). That case, however, related only to necessaries, and decided that the 3 & 4 Vict. c. 65, s. 6, did not confer a maritime lien for necessaries supplied to a foreign ship. *The Mary Ann* (*ubi sup.*) related to masters' wages and disbursements which are covered by the Merchant Shipping Act 1854, s. 191, and the Admiralty Court Act 1861, s. 10, Dr. Lushington there clearly laid down the principle which has been confirmed by the Court of Appeal in the *Heinrich Bjorn*, viz., that a maritime lien springs into existence with the circumstances which give rise to it, as damage, salvage, wages, and that the mere conferring of jurisdiction on the Admiralty Court in a particular manner does not carry with it a maritime lien. But Dr. Lushington came to the conclusion that "a master claiming for disbursements was to be preferred to the mortgagee, because, before the Act of 1861, his claim for disbursements was entitled to a similar preference in the only case where the court could take cognisance, namely, in the case of a set-off." I cannot say that this reasoning is altogether satisfactory to my mind, but finding, as I do, that the case of *The Mary Ann* has been followed by my learned predecessor, and has been sanctioned by the Court of Appeal, I do not feel at liberty to disregard its authority. It has now been assumed for twenty years that a master has a lien for disbursements. Innumerable accounts have been settled on that footing, and many existing liabilities for disbursements have been

incurred by masters on the faith of their having a lien for them. I think that it would be a misfortune if masters were deprived of the security they now possess, and I must decline the responsibility of altering to their detriment the law as it has been so long administered. My judgment will be for the plaintiff, with costs.

Solicitors for the plaintiff, *Thomas* and *Hicks*.

Solicitors for the defendants, *Ingledew, Ince*, and *Colt*, agents for *P. T. Pearce*, Plymouth.

Tuesday, Aug. 3, 1886.

(Before BUTT, J.)

THE NAPLES. (*a*)

Collision—Practice—Costs—Inevitable accident—Admissions in the reply.

Where the plaintiffs in a collision action admit in their reply that the collision was not occasioned by the defendants' negligence, and offer to consent to a decree of inevitable accident, the defendants, in the absence of special circumstances, are entitled to judgment with costs.

THIS was a collision action *in rem*, instituted by the owners of the steamship *Ruperra* against the owners of the steamship *Naples*.

The collision occurred in Aden Harbour on the 3rd July 1885. The *Ruperra* was at anchor, and the collision was due to the *Naples* dragging her anchor and drifting into the *Ruperra*. The defendants in their defence alleged that the cause of the *Ruperra* dragging her anchor was a hurricane, and that the collision was, so far as they were concerned, an inevitable accident. The plaintiffs by their reply admitted that the collision was caused by an inevitable accident, and consented to a decree that the collision was so caused.

The defendants now moved for judgment upon the admissions in the reply, and for an order that the plaintiffs should pay the costs of the action and of the motion.

J. P. Aspinall, for the defendants, in support of the motion.—The reply is in effect an admission that the action should never have been brought, and if so, it would be unjust to make the defendants pay the costs occasioned by an action which never ought to have been instituted.

Sims Williams, for the plaintiffs, *contra*.—It is admitted that the defendants are entitled to judgment, but it is contended, on the authority of the Privy Council in *The Marpesia* (26 L. T. Rep. N. S. 333; L. Rep. 4 P. C. 212; 1 Asp. Mar. Law Cas. 261), that where a collision is found to be the result of inevitable accident, the court should make no order as to costs. Although the Court of Appeal in *The Condor* (40 L. T. Rep. N. S. 442; 4 P. Div. 115; 4 Asp. Mar. Law Cas. 115) departed from this principle, Sir Robert Phillimore in the subsequent case of *The Buckhurst* (46 L. T. Rep. N. S. 108; 6 P. Div. 152; 4 Asp. Mar. Law Cas. 484) followed the old practice. The plaintiffs were justified in instituting the present action. The fact of one vessel drifting into another at anchor is a strong *primâ facie* case of negligence.

Aspinall was not called upon to reply.

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

BUTT, J.—I am of opinion that in this case there must be judgment for the defendants with costs. I have been asked by the counsel for the plaintiffs not to give the defendants their costs, and this request has been based on the authorities which have been cited. I do not think they apply to this case, for the rule that each side shall bear their own costs when a collision is the result of inevitable accident has only been applied when there has been a judgment to that effect on a finding of fact. Moreover, in the case of *The Condor* (*ubi sup.*), the Court of Appeal decided against there being different practices in different branches of the High Court, and James, L.J. there clearly laid it down that the practice should be the same in all divisions of the High Court. With that opinion I entirely agree. I think it would be altogether wrong that this court should deal with questions of costs differently to other divisions. No doubt, in special circumstances, it might be reasonable to depart from this otherwise general rule. Some of the circumstances of this case have been disclosed, and it appears that there was a hurricane blowing at the time of the collision. I should have thought that that circumstance would of itself be notice to the plaintiffs that the collision was probably not occasioned by the defendants' negligence. The plaintiffs, however, chose to bring this action, but have, on consideration, come to the conclusion that they were mistaken in charging the defendants with negligence. In these circumstances I can see no reason why the plaintiffs should not pay the costs, and in so ordering I think I shall be acting in accordance with the practice laid down by the Court of Appeal.

Solicitors for the plaintiffs, *Ingledew, Ince*, and *Colt*.

Solicitors for the defendants, *T. Cooper* and *Co.*

QUEEN'S BENCH DIVISION.

July 26 *and Aug.* 12, 1886.

(Before FIELD and WILLS, JJ.)

DIXON *v.* FARRER, SECRETARY OF THE BOARD OF TRADE. (*a*)

Prerogative of Crown—Right to demand a trial at bar—"Interest" of Crown in an action—Change of venue—Detention of ship—Crown Suits Act 1865 (28 *&* 29 *Vict. c.* 104)—*The Merchant Shipping Act* 1876 (39 *&* 40 *Vict. c.* 80), *s.* 10.

In an action under the 10th section of the Merchant Shipping Act 1876 (39 *&* 40 *Vict. c.* 80), *s.* 10, *against the Secretary of the Board of Trade, to recover costs and compensation for the detention of a ship without reasonable and probable cause the Attorney-General is entitled, on behalf of the Crown, to demand as of right a trial at bar, and he is therefore also entitled under the Crown Suits Act* 1865, *on stating to the court that he waives his right to a trial at bar, to change the venue to any county in which he elects to have the cause tried.*

THIS was a motion by Her Majesty's Attorney-General on behalf of the defendant in the action, "that this cause being one in which Her Majesty's Attorney-General on behalf of the Crown is entitled to demand as of right a trial at bar, and

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

the said Attorney-General stating to the court that he waives his right to a trial at bar, the venue herein be changed to Middlesex."

The action was brought by the plaintiff, Thomas Dixon, part owner of the steamship *Isle of Hastings*, on behalf of himself and others the owners of the said steamship, against Thomas Henry Farrer, Knight, Secretary to the Board of Trade, to recover damages for the wrongful detention of the ship by the defendant.

The statement of claim stated that whilst the said ship was in the port of North Shields, laden with a cargo of coals and coke, in all respects seaworthy, and about to proceed to sea on a voyage thence to Alexandria, the defendant, by a person claiming to be duly appointed in that behalf, wrongfully and improperly, and without reasonable and probable cause, detained or caused the detention and survey of the ship on the alleged ground that she was overladen, whereas in fact she was not overladen, but was safely and properly laden, and the defendant wrongfully and improperly required and caused a large quantity of cargo to be discharged out of the ship before releasing her and allowing her to proceed on her voyage; and after the ship had been detained, surveyed, and lightened, the defendant wrongfully and improperly continued to detain the ship until the payment or deposit of a sum of 10*l*., and compelled the plaintiff thereby to pay or deposit that sum alleged to be due in respect of the detention and survey; by reason of which things the plaintiff was deprived of the use of the ship, and sustained loss.

The plaintiff laid the venue at Newcastle-on-Tyne.

The defendant, in his defence, said that he was being sued as Secretary to the Board of Trade, pursuant to the 10th section of the Merchant Shipping Act 1876, and not otherwise; and that on the 27th Feb. 1886 the *Isle of Hastings*, being a British ship, and in the port of North Shields, was, under the 6th section of the said Act, provisionally detained by the detaining officer appointed under that section, who then had reason to believe, on the complaint of two persons, that she was unsafe within the meaning of the said Act by reason of overloading; that the ship was lightened by the removal of cargo to such an extent that on the 1st March she was no longer unsafe, and was released; and that it had not appeared, and could not be made to appear, that there was not on the 27th Feb. 1886 reasonable and probable cause by reason of the condition of the ship or the act or default of the owner, for the provisional detention of the ship.

Issue having been joined, a master's order, made at the plaintiff's instance, that the action should be tried by a special jury, was on appeal confirmed by Smith, J. on the 1st July, and by a Divisional Court on the 22nd July.

On the 19th July, however, the Attorney-General moved *ex parte* on behalf of the defendant that the venue should be changed from Newcastle to Middlesex, on the ground that it being a case in which the Crown was interested and was entitled to demand as of right a trial at bar, the Attorney-General had a right, under the 46th section of the Crown Suits Act 1865 (28 & 29 Vict. c. 104), on waiving his right to a trial at bar, to an order for a change of venue. This motion the Court granted, but subsequently stayed the order on the ground that no notice had been given to the plaintiffs, and ordered that notice should be given. Notice of motion in the above-mentioned terms was then given, and this was the motion which now came on for argument.

Sir *Walter Phillimore* (with him *J. P. Aspinall*), for the plaintiff, against the motion. — An action brought under the Merchant Shipping Act 1876 to recover damages for the unlawful detention of the plaintiff's ship is not an action in which Her Majesty's Attorney-General on behalf of the Crown is entitled to demand, as of right, a trial at bar, so as to bring it within the operation of the 46th section of the Crown Suits Act 1865 (28 & 29 Vict. c. 104). (*a*) The Crown has only a right to a trial at bar where it is interested in its own right or in respect of its ancient and hereditary revenues and prerogatives, and not where its interest is merely that of one of the executive departments of the State. The provision on which the action is founded (the Merchant Shipping Act 1876, 39 & 40 Vict. c. 80, s. 10) is simply, "If it appears that there was not reasonable and probable cause by reason of the condition of the ship, or the act or default of the owner, for the provisional detention of the ship, the Board of Trade shall be liable to pay to the owner of the ship his costs of and incidental to the detention and survey of the ship, and also compensation for any loss or damage sustained by him by reason of the detention or survey;" and it is further directed that, "an action for any costs or compensation payable by the Board of Trade under this section may be brought against the secretary thereof by his official title as if he were a corporation sole." It cannot be contended upon the authorities that, under these circumstances, the Crown is entitled as of right to a trial at bar. In Coke's Institutes, part 2, p. 424, it is said, with reference to ch. xxx. of the second Statute of Westminster, appointing justices of assize: "Albeit this Act be general, yet a *nisi prius* shall not be granted where the king is party, or where the matter toucheth the right of the king, without a special warrant from the king, or the assent of the king's attourney." In such cases, therefore, the King was entitled to a trial at bar, and the words used are applicable only to cases in which the King is personally interested or his property affected. Again, in *Rowe* v. *Brenton* (8 B. & C. 737), the Attorney-General appeared and suggested that the Crown was interested in the result of the cause, and demanded a trial at bar as a matter of right, the court not having power to grant a writ of *nisi prius* where the King is party, or where the matter toucheth the right of the King, and a trial at bar was granted on the authority of 2 Inst. 424, and Fitz. N. B. 241a, tit. "Procedendo;" but there the property which was the subject-matter in the action

(*a*) The 46th section of the Crown Suits Act 1865 (28 & 29 Vict. c. 104) provides that: Where a cause in which Her Majesty's Attorney-General on behalf of the Crown is entitled to demand, as of right, a trial at bar is at any time depending in any of Her Majesty's Superior Courts of Law at Westminster, whether instituted before or instituted after the commencement of this Act, and the Attorney-General states to the court that he waives his right to a trial at bar, the following provisions shall have effect: (1.) The court, on the application of the Attorney-General, shall change the venue to any county in which the Attorney-General elects to have the cause tried.

belonged to the Crown in right of the Duchy of Cornwall, that is, in right of its ancient and hereditary revenues. Then, in *Frith* v. *The Queen* (26 L. T. Rep. N. S. 774; L. Rep. 7 Ex. 365), a suppliant by petition of right sought to recover from the Crown a debt alleged to have become due to the person whom he represented, from the sovereign of Oude before that province was annexed in 1856 to the territories of the East India Company, and it was held that, assuming the East India Company became liable to pay the debt by reason of the annexation of the province, the Secretary of State in Council for India, and not the Crown, was, by the provisions of the Act for the better Government of India 1858, the person against whom the suppliant must seek his remedy. That Act provided, in the same terms aa those used in the 10th section of the Merchant Shipping Act 1876, "That the Secretary of State in Council should and might sue and be sued as well in India as in England, by the name of the Secretary of State in Council as a body corporate," and it was decided that there was a distinction between the Crown and the Secretary of State for India, and that the remedy therefore was not by petition of right against the Crown, but by action against the Secretary of State. The proper procedure in cases to which the Crown is a party is now to be found in the Petitions of Right Act 1860 (23 & 24 Vict. c. 34). In *Thompson* v. *Farrer* (47 L. T. Rep. N. S. 117; 4 Asp. Mar. Law Cas. 562; 9 Q. B. Div. 372), which was a precisely similar action, there was no attempt to set up this claim.

The *Attorney-General*, Sir Charles Russell, Q.C. (with him *R. S. Wright* and *Danckwerts*) for the defendant.—The right to change the venue was probably given because there might be cases such as the present where the action could not properly be tried where the venue was originally laid, and the Act therefore gives the Attorney-General a discretion assuming that he will not exercise it unreasonably. There is no force in the argument that the Crown can only claim a trial at bar where its personal property is affected, because the Crown property has now ceased to exist in its old form, and has been transferred to the Executive, no personal interest in it remaining in the Sovereign. Nevertheless the Crown retains its old right to intervene in actions respecting it. In the *Attorney-General and the Humber Conservancy Commissioners* v. *Constable* (4 Ex. Div. 172) it was held that the prerogative of the Crown to intervene in actions affecting the rights or revenue of the Sovereign had not been affected by the Judicature Acts, and the action as it concerned Her Majesty's revenue and privileges was transferred from the Chancery to the Exchequer Division on that ground. Kelly, C.B., in his judgment in that case, says that "it was settled law before the Judicature Acts that it was part of the prerogative of the Crown that the Sovereign was entitled to be an actor in any litigation affecting the rights of the Crown, and to determine in the Court of Exchequer any matter in which the Crown is interested." The relation of the Crown to Crown property is now determined by 1 & 2 Vict. c. 2, but the material point at issue is as to the relation of the Crown to the annual grants of money made by Parliament. This appears clearly in the case of *Reg* v. *The Lords Commissioners of the Treasury*. (26 L. T. Rep. N. S. 64; L. Rep. 7 Q. B. 387). In his judgment in that case Cockburn, C.J. says: "Therefore the question comes to be, whether the Lords Commissioners of the Treasury, when this money gets into their hands, are bound to apply it as the servants of the Crown, or as the servants of Parliament who vote the money. Independently of authority I think there is no doubt whatever we must look upon them as servants of the Crown. The money is voted by Parliament as a supply to the Crown; ways and means are found with a view of furnishing the necessary funds for making that supply effectual. It is true that the money is appropriated te a specific purpose, and it is true that the money can only be appropriated to the purpose so specified in the Appropriation Acts. It is also true, as pointed out by Mr. Gorst, that the particular mode of obtaining the money is also prescribed by statute. It is not a supply to be at once handed over to the Crown, but it is a supply to be got at by a certain specified process, and it is true that the Crown must issue warrants or orders under the sign-manual to enable the Lords Commissioners of the Treasury to have this money paid to them. But nevertheless, when the money is paid, I can entertain no doubt that it is paid to the Lords of the Treasury as servants of the Crown." The money out of which compensation would be paid in case the plaintiff recovers in this action is granted in the same way:

> The Merchant Shipping Act 1876 (39 & 40 Vict. c. 80), s. 39;
> The Merchant Shipping (Expenses) Act 1882 (45 & 46 Vict. c. 55), ss. 3, 5, 10.

The money is granted to the Queen, and the officials who receive it receive it as servants of the Queen and not of Parliament. The Queen therefore is interested as having to pay the money. The contrary contention is untenable, because, if it were correct, the Crown would only be able to demand a trial at bar in cases dealing with the Queen's private savings or the revenues of the Duchy of Lancaster. The right was never so restricted. In *Lord Bellamont's case* (2 Salk. 625) the Attorney-General moved for a trial at bar in an action against the Governor of New York for matter done by him as governor, and it was granted because the King defended it. Again, in *Buron* v. *Denman* (2 Ex. 167) an action was brought against a naval commander, because, when engaged in the suppression of the slave trade, and in the liberation of British subjects detained as slaves, he took military possession of a barracoon belonging to the plaintiff, who was a Spaniard engaged in the slave trade, and fired it and carried away his slaves and liberated them, and here it appears (1 Ex. 769) that a rule was granted for a trial at bar. These cases are exactly analogous to the present. The right is broadly stated in Tidd's Practice, vol. 2, 9th edit., p. 748, without reservation in these terms: "When the Crown is immediately concerned the Attorney-General has a right to demand a trial at bar (1 Str. 52. 644; 2 Str. 816; 1 Barnard K.B. 88, S. C.)." It was allowed in *Rowe* v. *Brenton* (8 B. & C. 737; 3 Mann. & R. 133-364; 449-532); and in *Paddock* v. *Forrester* (1 M. & G. 583). Tindal, C.J. says shortly: "The Attorney-General has certified that the Crown is interested in the matter in dispute between these parties, and has stated that Her Majesty does not consent that any

writ of *nisi prius* shall issue in this case. We are therefore bound to direct that the cause shall be tried at bar. (*a*) It is submitted, on these authorities, that the Crown is immediately concerned in the present case, and would have been entitled to demand a trial at bar.

Cur. adv. vult.

Aug. 12.—FIELD, J.—This is an action brought by a shipowner against the department of State called the Board of Trade, to recover compensation for an alleged improper seizure without reasonable and probable cause of his ship, and the shipowner laid the venue at Newcastle, where he resides. The action is brought pursuant to s. 10 of 39 & 40 Vict. c. 80, against the Secretary of the Board of Trade, "by his official title as if he were a corporation sole." Upon that Her Majesty's Attorney-General appeared personally, and came here in accordance with the procedure in these matters, and alleging an interest in the Crown in the suit, prayed that the venue might be charged from Newcastle to Middlesex. We at the moment assented to his prayer, understanding that the plaintiff had had notice of the application. But it appeared doubtful that he had received it in time. At all events he was very desirous of having the question considered, and in consequence of a doubt, or, I will not say a doubt, but in consequence of an expression of reserve used by Lord Bramwell, then speaking as a Lord Justice of Appeal in the *Attorney-General* v. *Crossman* (14 L. T. Rep. N. S. 856; 4 H. & C. 568; L. Rep. 1 Ex. 381), my brother and I thought it desirable that the matter should be discussed, particularly also having regard to the various changes in procedure which have taken place during the last few years, in order to see whether or not anything had occurred to deprive the Crown of its originally undoubted right to a trial at bar.

Now the present state of the matter is this: In 1865 an Act of Parliament was passed for the purpose of improving and regulating the procedure in Crown suits, and to deal with various matters on the Exchequer side and causes in the Exchequer, but also in sect. 46 to deal with other matters, of which this is one, and the enactment there is this: Where a cause in which Her Majesty's Attorney-General on behalf of the Crown is entitled to demand as of right a trial at bar is at any time depending in any of the Superior Courts, and the Attorney-General states to the court that he waives his right to a trial at bar, amongst other things the court, on the application of the Attorney-General, shall change the venue to any county in which the Attorney-General elects to have the case tried. The Attorney-General did, in pursuance of this Act, appear, and he asserted that he was entitled on behalf of the Crown to demand as of right a trial at bar upon the ground of the Crown's interest in the litigation, and further, that he waived that right, and then he applied to us to change the venue to the county of Middlesex. Now the language of the Act is very clear and plain. It is, that whenever Her Majesty's Attorney-General is entitled to demand a trial at bar as of right, the consequence follows that he has a right to have, and the courts shall give him, the venue which he elects to have. It is new legislation, although based to some extent on the old prerogative. The question, therefore, is a very plain one here, and a very simple one. It is whether or not this is a cause in which Her Majesty's Attorney-General is entitled to demand a trial at bar as a matter of right. That question has to be decided in the ordinary way, by authority and precedent, and the views which writers of text-books and judges and others have held with regard to the matter. Now originally, every cause, as is well known, was a trial at bar; that is, until the writ of *nisi prius* was introduced by the Statute of Westminster all cases were tried before the bench at Westminster, and the Statute of Westminster was passed for the purpose of relieving the subject of this. It had been the practice grown up before this statute was passed for the justices in eyre to try any cause that was ready for trial, before the return of the *distringas*, and it was commonly done except in all important cases. (*a*) Then the Statute of Westminster the Second (13 Edw. 1, c. 30) gave the subject a writ of *nisi prius* which enabled him to try a cause if any of Her Majesty's judges should first come into the county where the venue was laid. (*b*)

(*a*) In that case, in addition to the cases above cited, reference was made to 1 Ventr. 74; *Rex* v. *Hales*, 2 Str. 816; *Reg.* v. *Banks*, 2 Salk. 651; 6 Mod. 245; Cowp. 161.

(*a*) The ancient justices in eyre, *justiciarii in itinere*, were directed by Magna Charta, c. 12, to be sent into every county once a year, to take or receive the verdict of the jurors or recognitors in certain actions then called recognitions or assizes, the most difficult of which they were directed to adjourn into the Court of Common Pleas, to be there determined: (Steph. Comm. Bk. V. c. V., 8th ed. vol. 3, p. 352.) The jury process of *distringas juratores*, in the award of which the proviso of *nisi prius* used to be inserted, was abolished by 15 & 16 Vict. c. 76, s. 104: (Ibid. p. 355.)

(*b*) On reference to Tidd's Practice, p. 747, we find the following passage:—"Before the Statute Westminster 2 (13 Edw. 1, c. 30) civil causes were tried either at the bar, before all the judges of the court, in term time; or where of no great moment before the justices in eyre; a practice having very early obtained of continuing the cause from term to term, in the court above, provided the justices in eyre did not previously come into the county where the cause of action arose; and if it happened that they arrived there within that interval then the cause was removed from the jurisdiction of the justices at Westminster to that of the justices in eyre." The Statute of Westminster the Second having abolished the justices in eyre, and having substituted justices of assize, gave them jurisdiction in certain specified cases. The statute is in Latin, and it is worthy of notice to point out a seeming error in translation, which appears both in Ruffhead's edition of the Statutes, and also in Coke's Institutes, part 2, p. 421. The statute, after providing for the appointment of justices of assize, proceeds: "Atterminentur inquisitiones capiendæ de transgressionibus placitatis coram justitiariis de utroque banco, nisi ita enormis sit transgressio quod magna indigeat examinatione." According to Ruffhead's Statutes, and in Coke's Institutes, the meaning of this passage is that, "inquisitions of trespass shall be determined before the justices of both benches, except the trespass be so heinous that it shall require great examination." In other words, inquisitions of trespass, which are not so heinous as to require great examination, are to be determined by the justices of either bench, and not as one would have expected by the justices of assize. When it is remembered that the statute is providing what causes shall be tried by the justices of assize, it would seem that the correct translation is, "Inquisitions to be taken of trespasses, pleaded before the justices of either bench, shall be determined by the justices of assize, unless the trespass be so heinous that it requires great examination." This is the translation given in Tidd's

But that statute did not bind the Crown, and the consequence of that was and is, that the Crown retained its prerogative of trying at Westminster. It was not bound by the statute at all, and although the subject had the right the Crown was not bound by it, and this state of things has existed, the Crown retaining its right. The practice has been uniform from that time down to the present for the Crown to be entitled as of right to a trial at bar, and the mode in which that right has been asserted has invariably been that which Her Majesty's Attorney-General on this occasion pursued, namely, by appearing in court and stating that the Crown has an interest in the suit and claiming to have a trial at bar, or, as in this case, waiving the right to his trial at bar, but asking to have the venue changed.

Now the cases are very numerous. The Crown may be interested because it is a party to the suit, or it may be prior in interest; or, though the litigation is between two subjects, still the Crown may be interested, and may therefore claim an interest as though it were actually a party. First of all, there are the cases in which the Crown was a party, and the most important case of that kind was the case of *R.* v. *Hales* (2 Str. 816). That was a case in which the Crown was a party because it was an indictment—a Crown case. In that case the prosecutor was a private prosecutor, but the Crown thought right to intervene, and the court allowed the intervention and gave the Crown accordingly a trial at bar. Therefore, although the Crown was nominally a party, and was not the actual person prosecuting, still being a party the court gave the Crown the right on that occasion. Then there is another case in which the Crown was suing in a civil matter. That was a case of *R.* v. *Webb* (1 Siderfin, p. 412). In that case the Crown was suing for the embezzlement of stores by a servant, and there it was distinctly laid down, and has been followed ever since, and was afterwards affirmed by the court in the case of the *Attorney-General* v. *Churchill* (8 M. & W. 171), that the Crown has the right, as the King's prerogative, to try his personal actions where he pleases. Now, in all these cases the Crown was actually a party to the litigation, either in its capacity of a body corporate suing for money belonging to it, or else acting as the prosecutor. Then, in a case of the *Attorney-General* v. *Barker* (26 L. T. Rep. N. S. 34; L. Rep. 7 Ex. 177), the Crown was the lady of the manor, and in that case also the Crown was held entitled and had its trial at the bar. Again, the same thing occurred in the *Attorney-General to the Prince of Wales* v. *Crossman* (14 L. T. Rep. N. S. 856; 4 H. & C. 568; L. Rep. 1 Ex. 381) in more modern times. This was the case which induced my brother and myself to consider the matter, because in that case the venue was changed in the mode which the Attorney-General suggested, but the court expressly changed the venue upon the ordinary ground of convenience, and reserved the question whether or not the Crown as of right could change the venue, Lord Bramwell saying that before he held that, he should like to take time for further consideration, and that was the reason why we also took further time to consider. These cases to which I have adverted are all of them cases in which the Crown was a party by right. But the right of the Crown is not limited to cases of this description, because the Crown may by alleging an interest intervene in litigation between subjects. Now, I entertain some little doubt myself whether it is sufficient for the Crown merely to allege an interest. My brother's judgment, which I am going to read immediately, seems to think it is sufficient. I should entertain a good deal of doubt about that, and I asked the Attorney-General the question, and he answered me frankly that he was not prepared to say that the prerogative of the Crown went to that extent, and that the court could not inquire into the question for the purpose of seeing whether or not there was such an interest in the Crown, not for the purpose of going into the proof of it, but as reasonably entitling the Crown to the privilege. Now, the cases in which this has happened are first of all, the well-known case of *Rowe* v. *Brenton* (8 B. & C. 737), in which the defendant was a lessee under the Crown as Duke of Cornwall; and another case of *Paddock* v. *Forrester* (1 M. & G. 583), in which the defendant justified under a demise by the Crown. In both these cases there was a personal interest in the Crown in the suit. Property of the Crown was sought to be affected by it, and the Attorney-General claimed and exercised, without objection, his right to a trial at bar.

Then comes the question which we have to decide in this case. It was argued on behalf of the plaintiff, that that was the true limit of the Crown's right, and that the Crown had only the right to a trial at bar where its own personal interest was concerned, its property, its personal feelings, or its personal matters connected with its revenue, and that these were the only matters in which the Crown could have this right. But this argument is absolutely inconsistent with *Lord Bellamont's case* (2 Salk. 625), in which an action being brought against the Governor of New York at that time, the Crown intervened, claiming the right to defend its own servant, and a trial at bar was granted. Again, in a more recent case, of *Buron* v. *Denman*, an action was brought against the captain of one of Her Majesty's ships. The Ministers of the Crown adopted and ratified the act of the defendant, and in that case a trial at bar was claimed and had. Therefore, in those cases, the privilege of the Crown seems to have been carried further, and beyond the limit that it was argued on behalf of the plaintiff was the true limit. Since then the Crown Suits Act has been passed. That Act was passed in 1865, and clearly recognises the privilege or prerogative of the Crown. Therefore, whatever might have been the state of things if the matter had, as it were, lapsed, it is perfectly clear that the Legislature has recognised and fortified the privilege of the Crown to a change of venue. It also seems reasonably clear, from the case of *Attorney-General and The Humber Conservancy Commis-*

Practice, p. 747, and in support of it is to be noticed the fact that the inquisitions here referred to "are not to be so heinous as to require great examination." The meaning of this qualification would seem to be, that such inquisitions are to be tried by the justices of the bench, whereas the matters which are not of such moment are to be determined before the justices of assize. On reference to the statute it will be found that a distinction is throughout drawn between simple matters and matters of difficulty, the latter being confined to the justices of the bench.—ED.

sioners v. *Constable* (4 Ex. Div. 172), that the Judicature Act has not interfered with the prerogative of the Crown in this respect. Therefore, the only question now to consider is, whether or not this is an action in which the Crown may as of right claim a trial at bar. It is, in the first place, a personal action, and therefore comes within the case of *Reg.* v. *Webb*. It is also an action to which I think the Crown is a direct party, because the Crown is being sued, in truth, by means of its department, that is, the President and Council of the Board of Trade and Foreign Plantations, the President being a Minister of Her Majesty and the other persons acting under him being her servants. Further, it seems to me quite clear the case falls within the principle of *Lord Bellamont's case*, and that the Crown has a right to intervene to defend the acts of its servants. Independently of that, the Attorney-General put the case upon a third ground, which seems to me to further remove any doubt, and that is, that by sect. 39 of the Merchant Shipping Act, if the plaintiff shall succeed, the compensation which he is to be entitled to is to be provided for out of the moneys annually voted to Her Majesty by Parliament; and then the Attorney-General referred to the case of *Reg.* v. *The Lords Commissioners of the Treasury* (26 L. T. Rep. N. S. 64; L. Rep. 7 Q. B. 387) to establish a point which is very clear, namely, that all the moneys which are paid into Her Majesty's Treasury are Her Majesty's moneys, and therefore the Crown has a direct interest in protecting them. That is the view I take of the case, and I therefore think this motion must be granted with costs.

FIELD, J. then read the written judgment of

WILLS, J.—This is an action brought under the provisions of the 39 & 40 Vict. c. 80, s. 10, against the Secretary of the Board of Trade, to recover compensation for the detention alleged to be without reasonable and probable cause of a sea-going vessel, by an officer of the Board of Trade, acting under sect. 6 of the same Act. The Attorney-General, stating that the Crown is interested in the litigation, and that he waives a trial at bar, claims under the provisions of the Crown Suits Act 1865 (28 & 29 Vict. c. 104), s. 46, that the court shall order the venue to be changed from Newcastle to Middlesex, as the county in which he elects to have the cause tried. As by the terms of sect. 46, the Attorney-General is entitled to the order he claims in any cause in which the Crown is entitled to demand as of right a trial at bar, the only matter for inquiry is whether the Crown is so entitled in the present case. In consequence of a doubt expressed by Bramwell, B. in *The Attorney-General of the Prince of Wales* v. *Crossman* (4 H. & C. 573; 14 L. T. Rep. N. S. 856; L. Rep. 1 Ex. 381) as to the extent of the rights of the Crown in such a matter, we took time to consider our judgment. The authorities seem to me conclusive both that where the Crown is interested in litigation, whether civil or criminal, the Attorney-General is entitled to demand a trial at bar, and that he is entitled to it on his statement that the Crown is interested, and without more. The right on the part of the Crown to a trial at bar has been treated in argument, as I think erroneously, as a branch of the Royal prerogative, and, as clear notions on any question affecting the peculiar rights of the Crown are of great importance, I will presently state my views of the origin and history of the right; but of its existence I have no doubt. It is said in Chitty's Practice (12th edit. p. 376) to be the right of the Crown in cases in which the Crown is "actually and immediately interested"—adjectives or adverbs are parts of speech which require to be watched, and in my opinion the adverbs here used are misleading. In *Rowe* v. *Brenton* (8 B. & C. 737) a trial at bar was granted in a case in which the defendant justified alleged mining trespasses under a grant from the Duchy of Cornwall, there being at that time no Prince of Wales, so that the duchy was in the hands of the Crown. The Crown would not have been bound by the judgment between the parties, and was only interested in the sense in which any subject is interested in a decision of the courts upon points of law or fact which are identical with those which may govern his own rights either with respect to one of the parties to the suit in question or as to strangers. In *Brown* v. *Lord Granville* (1 Harr. & Woll. 270) a trial at bar was granted on an allegation by the Attorney-General that the rights of the King in respect of the Duchy of Lancaster would come in question; in *Paddock* v. *Forrester* (1 M. &. G. 583), upon a justification by the defendant under grants from the Crown of the right of getting coal. In all these cases, which are not an exhaustive list, but examples of a class of cases in which a trial at bar has been always granted, the interest of the Crown, however substantial, is indirect and not immediate. No private person would be considered "as interested" in the litigation so as to make him either a necessary or even a possible party to the contest. In *Lord Bellamont's case* (2 Salk. 625) the report is very short; and the roll, if it exist in the Record Office, is very difficult to find, (*a*) but I think it sufficiently appears from the short report in Salkeld that Lord Bellamont was sued by some one for some act done by him as Governor of New York, and that the Crown undertook his defence upon that ground. In *Buron* v. *Denman* (reported on points of law in 2 Ex. 167), the defendant was sued for acts done by him as a naval officer in command of one of Her Majesty's ships, and the Crown took upon itself his defence. A trial at bar was had—I have caused the roll to be inspected to see whether the trial at bar was had on the demand of the Attorney-General, but it is incomplete, and stops at the award of *venire*. I believe, however, that there is no doubt the trial at bar was had on the demand of the Attorney-General. In *Lord Bellamont's case* it is so stated in the report. In neither of these cases can the interest of the Crown be termed "actual" or "immediate." In *R.* v. *Hales* (2 Str. 816), which was a prosecution for a misdemeanour, a trial at bar was refused to the Attorney-General applying on behalf of a private prosecutor, but granted on his afterwards stating that the Crown had taken up the prosecution. In *Reg.* v. *Castro* (30 L. T. Rep. N. S. 320; L. Rep. 9 Q. B. 350) a trial at bar was granted on the demand of the

(*a*) The only index to the rolls of this date is an index of defendants. Lord Bellamont's name is not to be found in it. The records of this period are entered as of the respective terms in which issue was joined, often many terms before that in which the trial was had, and of which the case appears in the reports.

Attorney-General prosecuting on behalf of the Crown.

These cases make it abundantly clear that the right to a trial at bar exists when demanded on behalf of the Crown in cases in which either the private rights of the Sovereign in respect of the estates and property to which, or to the fruits of which, the Sovereign is entitled for the personal use or advantage of the Sovereign are in question, and in cases in which the Sovereign intervenes in a different capacity, as the head of the State, and authorised by the Constitution, through the responsible Ministers of the Crown, to enforce law and good government, and to afford the protection of the State to public officers sued in courts of justice for acts done by them in the discharge of their duties as servants of the Crown. It is clear also that the right applies equally to civil cases and to criminal prosecutions which have been removed by *certiorari* to the Queen's Bench, and which have so become subject to many of the incidents of civil trials. It would be more accurate to say that the right exists in cases in which the Crown is interested than to confine it to cases in which the interest of the Crown is actual and immediate; probably what the learned writer meant was to exclude cases of ordinary criminal prosecution, in which the Crown is merely the nominal prosecutor, the distinction between which and cases in which the prosecution is really that of the Crown, is illustrated and emphasised by the two branches of the case of *R.* v. *Hales* (2 Str. 816), where the trial at bar was refused to the Attorney-General as counsel for a private prosecutor, but awarded on his application on behalf of the Crown. In my opinion it is sufficient for the Attorney-General to allege, or surmise (in the language of the older cases) that the Crown is interested in the litigation. As a matter of propriety or courtesy he may state the ground for the allegation, but I do not think he is bound to do so, or that the court can require it of him. This appears to me to be abundantly clear on the authorities. If, however, it were necessary to consider how the Crown is interested in the present action, I think it clear, as I have pointed out, that the right exists where the interest of the Crown is that of protecting the servants of the great departments of State, or of conducting such litigation as may be necessary for the efficient conduct of the public administration. The case of *Reg.* v. *The Lords Commissioners of the Treasury* (26 L. T. Rep. N. S. 64; L. Rep. 7 Q. B. 387) shows that in the most correct legal phraseology the Commissioners of the Treasury, though administering funds whose destination is fixed by Act of Parliament, are servants of the Crown, and not of Parliament, or of the public, nor to be otherwise described than as servants of the Crown. The same proposition must hold of the persons serving in other public departments. I proceed to inquire what is the origin of the right in question, and I think it clear that it is in no accurate sense a branch of the Royal prerogative, but the survival of a very ancient state of things, in which the Crown in respect of litigation stood upon the same footing as the subject, the difference between the position of the Crown and the subject in the present day being due simply to the fact that the Crown not being expressly named or included by necessary implication in the various statutes which have since then modified the rights of the subject, still retains rights which have been taken away from the subject. That this is so as regards the right of the Crown to determine the place of trial of an information filed by the Attorney-General on behalf of the Crown is shown by the learned and interesting judgment of the Court of Exchequer in *R.* v. *Lord Churchill* (8 M. & W. 171, 193), where it is laid down that the right to lay the venue where the actor in the litigation chose was once common to Crown and subject; that the right of the subject to keep the venue where it was once laid has been modified by legislation, whereas that of the Crown has not because the statutes in question do not bind the Crown, and where the alleged prerogative right of the Crown to change the venue at its option was denied, and a rule for that purpose which had originally been granted absolute in the first instance on the motion of the Attorney-General was, after full argument and time taken to consider the judgment, discharged. In the same way trials at bar were anciently had in all causes whether at the suit of the Crown or of an individual. But by the second Statute of Westminster, c. 30, a writ of *nisi prius* was granted, the effect of which was to deprive the subject of the right to a trial at bar. In Bacon's Abr. tit. "Trial" (E) it is said: "By the Statute of Westminster the Second, c. 30, trials at bar which were before had in all causes were confined to such causes as by reason of the greatness or variety of the matters in question require a more solemn examination." Again: "The Attorney-General may pray a trial at bar in any civil cause wherein the King is interested, for, as the Statute of Nisi Prius does not extend to him, the King has a right to try every civil cause in which he is interested at bar." See also Com. Dig. tit. "Trial" (C, *a*.) In *Paddock* v. *Forrester* (1 M. & G. 583) a trial at bar was ordered on the suggestion of the Attorney-General that the Crown was interested in the matter of dispute. The Lord Chief Justice (Tindal, C.J.) said: "The Attorney-General has stated that Her Majesty does not consent that any writ of *nisi prius* shall issue in this case. We are therefore bound to direct that the cause shall be tried at bar." In a note to that case the learned editor says: "As the King is not named in the second Statute of Westminster, c. 30, which gives the writ of *nisi prius*, a *nisi prius* is not grantable where the King is a party or where the matter in question in an action between subjects touches the King's right, without a special warrant from the King or the assent of the Attorney-General" (p. 586, note *a*). See also *Rex* v. *Jolliffe* (4 T. R. 285, 288, and 292).

This view of the origin of the right now unde consideration is of much historical interest. I am, speaking for myself, convinced that in the early periods of our legal history the Sovereign sued exactly as the subject did—by the same writ, *per attornatum suum*, with the same process and the same incidents in all respects. The right of the Crown to bring an action in the ordinary sense of that word, and as distinguished from an information, was affirmed in *Bradlaugh* v. *Clarke* (48 L. T. Rep. N. S. 681; 8 App. Cas. 354), and in the course of that case two precedents of such actions from the Year Books of the reign of Henry IV. were cited: (see p. 375.) It was not called to the notice of

their Lordships that the *Placita de Quo Warranto* are full of such actions; the records there set forth, many of them at full length, date from the 6th Edw. 1 to the 4th of Edw. 3. Some years ago I had occasion to examine them very carefully and exhaustively with reference to this question, and I am able to say that there are very numerous entries——certainly hundreds, if not more—of records of common actions brought by the Sovereign against subjects, wholly undistinguishable in the manner of origination, and in every stage of procedure, and every other incident connected with it from an ordinary action between subject and subject, and I have found none which indicate any difference in the mode of suit or incidents of process or trial between actions by the King and actions by the subject. There are entries of the same character—though, from their abbreviated nature, less conclusive—in the Abbreviatio Placitorum, which carry the evidence back to the reign of Richard I. The right of the Crown, therefore, to a trial at bar is, in my opinion, not a branch of the prerogative, but an interesting and instructive survival in the case of the Crown of a state of things in which, at an early period of our legal history, the rights of the Crown and subject were identical. The mode in which the Crown can claim a trial at bar, on the other hand, affords a genuine instance of prerogative right, for the Crown can here do what no subject ever could do; the Attorney-General can allege on his own authority that the Crown is interested in the subject-matter of the suit, and upon such allegation can intervene, and having done so can claim the ancient right of both Crown and subject, which for many centuries has been taken away from the subject by legislation.

Field, J.—The judgment of the court therefore is, that the rule be made absolute, with costs.

R. S. Wright having intimated that by inadvertence Middlesex had been inserted in the rule instead of London,

Aspinall, for the plaintiff, consented.

Rule absolute, that the venue be changed to London, with costs.

Solicitors for the plaintiff, *Botterell* and *Roche*.
Solicitor for the defendant, *The Solicitor to the Board of Trade*.

Supreme Court of Judicature.

COURT OF APPEAL.

June 1 *and* 2, 1886.

(Before the Lord Chancellor (Herschell), Lord Esher, M.R., and Fry, L.J., assisted by Nautical Assessors.)

The Main. (a)

ON APPEAL FROM THE ADMIRALTY DIVISION.

Collision—Overtaking and overtaken ships—Flare-up light—Regulations for Preventing Collisions at Sea, arts. 3, 11, 20.

Where one of two ships is abaft the beam of the other in such a position that the hinder ship cannot see the side lights of the leading ship, and the former is going at a greater speed than the latter, and getting nearer to her, the latter is a "ship which is being overtaken by another" within the meaning of art. 11 *of the Regulations for Preventing Collisions at Sea, even though the hinder ship broadens on her quarter; and she is in such circumstances bound to show a stern light in sufficient time to enable the other, by the exercise of reasonable precautions, to avoid risk of collision.*

The Reiher (45 *L. T. Rep. N. S.* 767; 4 *Asp. Mar. Law Cas.* 478) *overruled.*

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

This was an appeal by the defendants in an action brought by the owners of cargo on the barque *Kalaja* against the steamship *Main* for the loss thereof by collision. Sir James Hannen found the defendants' steamship *Main* alone to blame for the collision.

The collision occurred in the North Atlantic about 1.30 a.m. on the 14th April 1885, and in consequence thereof the *Kalaja* and her cargo were totally lost. The owners of the cargo thereupon instituted the present action *in rem* against the owners of the *Main*.

The facts alleged on behalf of the plaintiffs were as follows:—At about 1 a.m. on the 14th April 1885, the barque *Kalaja*, of 666 tons register, laden with the plaintiffs' cargo, was in the Atlantic Ocean, in the course of a voyage from Jamaica to Havre. The wind was a moderate breeze from about W.N.W. to N.W., and the weather was fine and clear, but rather overcast. The *Kalaja* was making about four to five knots, steering about N.E. by E. ¼ E. true. Her side lights were duly exhibited, and burning brightly, and a good look-out was being kept. In these circumstances those on the *Kalaja* saw the masthead light of the *Main* distant about five miles, and bearing about three points on the port quarter. In about a quarter of an hour the *Main's* green light was also seen on the port quarter, and the *Main* continued to approach, showing her masthead and green lights; but when she was on the *Kalaja's* port quarter, distant about two cables, she was seen to be altering her course to starboard, and although the helm of the *Kalaja* was immediately ported, and the *Main* loudly hailed, she came on, and with her stem struck the port quarter of the *Kalaja*, causing the *Kalaja* to sink in a few minutes.

The facts alleged on behalf of the defendants were as follows:—Shortly before 1.20 a.m. on the 14th April 1885, the steamship *Main* of 1737 tons nett was in the Atlantic Ocean, on a voyage from New York to Southampton. The weather was dark and cloudy, and the *Main* was making about thirteen knots, steering E. ¼ N. true. Her regulation lights were duly exhibited, and burning brightly, and a good look-out was being kept. In these circumstances two dim lights, red and white respectively, of a vessel which proved to be the barque *Kalaja*, were seen bearing from one to two points on the starboard bow, and distant in fact about 500 yards, but apparently further. The helm of the *Main* was immediately ported, and, the red light of the *Kalaja* becoming more distinct, the helm was hard-a-ported, and her engines were immediately after stopped and reversed full speed astern, but the two vessels

came into collision, the stem of the *Main* striking the port quarter of the *Kalaja*.

The defendants (*inter alia*) charged the defendants with a breach of art 11 of the Regulations for Preventing Collisions at Sea, in failing to exhibit a white flare-up light over the stern.

It was suggested in evidence that the white light seen on the *Kalaja* was the light of a lantern hung in the galley.

Art. 3 of the Regulations for Preventing Collisions at Sea, provides that the red and green side lights are respectively to show an "uniform and unbroken light over an arc of the horizon of ten points of the compass so fixed as to throw the light from right ahead to two points abaft the beam."

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. 20. Notwithstanding anything contained in any preceding article, every ship, whether a sailing ship or a steamship, overtaking any other, shall keep out of the way of the overtaken ship.

Aug. 7, 1885.—The case came on for trial before Sir James Hannen, assisted by Trinity Masters.

Sir *Walter Phillimore* and Dr. *Raikes* for the plaintiffs.

J. P. Aspinall and *L. Pyke* for the defendants.

Sir James Hannen.—I cannot say that this case is by any means free from difficulty; but, upon a consideration of the whole evidence, we have come to the conclusion that the steamer is alone to blame. The steamer was steering E. ¼ N. true, and the *Kalaja* was steering E.N.E. ¼ N. Therefore, their courses were slightly converging. The *Kalaja* first of all saw the white light of the steamer at a distance which is estimated at five miles, and, taking the chief mate's evidence, three points on her port quarter. That continued for about a quarter of an hour. He says he watched it himself, and after a quarter of an hour he saw the green light bearing three and a half points. Then he says he thought there was no risk, and that the *Main* would pass them by going clear on their port side. Next, he says that he saw the green light twelve or thirteen minutes before there was any alteration, and that the steamer was three and a half points, but that ultimately she got broader, up to six or seven points. His evidence, therefore, is that, seeing the white light and afterwards the green, the two lights continued to broaden on his port quarter. I have gone through the evidence of the other witnesses, and, though they vary slightly about it, there is nothing that is inconsistent with that statement, and we accept, in a general way, the true view of the facts to be that those lights did continue to broaden on the port quarter of the *Kalaja*. Taking that view of the facts, I am of opinion that the *Kalaja* was not an overtaken vessel. If it be true, as is contended, that the alleged overtaking vessel is constantly broadening on the quarter of the alleged overtaken vessel, then those terms do not apply; and, that being so, it was not the duty of the *Kalaja* to show a light at her stern. At the same time, though I have stated this as my view of the facts and the law, shared in so far as the facts are concerned by the Trinity Brethren, I cannot but see that the steamer would have been greatly assisted had there been a light shown at the stern, and it is in the highest degree probable that if a light had been so shown this accident would not have happened.

I now must deal with the steamer. She first sees a white light, or, rather, a white glare or white shine, and then a dim red light is seen. I am advised that the seeing of that white shine or reflection of a white light ought to have indicated to those on board the steamer that they were in close proximity to another vessel. It seems to me to be more than probable that the officer in charge of the *Main* did, on first seeing this red light, take it to belong to a vessel sailing close-hauled, and it is with reference to that supposition that I say that, had there been a light shown at the stern, he probably would not have fallen into that error; but, having the red light suddenly presented to him, he did not realise that this white shining, reflected light indicated the close proximity of a vessel, which ought at once to have led him to stop and reverse. Instead of doing that, he, giving himself no time to consider what the red light was, ported his helm, and by so doing brought about a collision. Whereas, if he had not been in such a hurry and confusion, and waited only a short time longer, he would have been able to form an opinion upon the facts which he says he observed, namely, that the red light, which at first was feeble and weak, gradually grew stronger and larger, which should have indicated to him that the *Main* was an overtaking vessel. Unfortunately, as I have said, he rushed too hastily to the conclusion, that it was a vessel crossing close-hauled, and made the manœuvre which led to the collision; and I am myself disposed to think that the confusion which caused him to do it was caused by there not being a good look-out. I think there are several things that indicate it, and, on the whole, I come rather to the conclusion that there was a bad look-out. I therefore come to the conclusion that there was confusion and uncertainty on the steamer, and that, under the influence of that confusion and uncertainty, time was not taken to form a true judgment of the correct inference to be drawn from the fact that there was a vessel quite close, and that her red light was rapidly becoming brighter, which should have told him the true position of the *Kalaja*,

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From this decision the defendants appealed.

June 1.—Sir *Richard Webster*, Q.C. and *J. P. Aspinall* (with them *Pyke*), for the defendants, in support of the appeal.—The learned President was wrong in finding the *Main* solely to blame, and should have found the *Kalaja* solely to blame. By art. 11 of the regulations a ship which is being overtaken by another is bound to show a stern light. On the authority of *The Franconia* (35 L. T. Rep. N. S. 721; 2 P. Div. 8; 3 Asp. Mar. Law Cas. 295) it is submitted that the *Kalaja* was an overtaken ship within the meaning of this article. Inasmuch as a duty is imposed on the overtaking ship to keep out of the way of the leading ship, it is only reasonable that she should have due warning to enable her to manœuvre so as to pass clear. As the side lights only show two points abaft the beam, the rule must be applicable in all cases where the hinder ship is

overhauling the leading ship from such a position that she is more than two points abaft her beam. If a ship has no notice that there is a vessel ahead of her, she may at any moment alter her course, and so bring about risk of collision, although her original course, if continued, would have taken her clear. The words "risk of collision" were therefore designedly omitted from this article, in order that a light might be exhibited in all cases so as to give the hinder ship ample notice how she ought to manœuvre, and to prevent her innocently bringing about a position of risk. In addition to the authority of *The Franconia* (*ubi sup.*), the decisions in the following cases all tend to support the appellants' contention:

The City of Brooklyn, 34 L. T. Rep. N. S. 932; 1 P. Div. 276; 3 Asp. Mar. Law Cas. 230;
The Anglo-Indian, 33 L. T. Rep. N. S. 233; 3 Asp. Mar. Law Cas. 1;
The Breadalbane, 46 L. T. Rep. N. S. 204; 7 P. Div. 186; 4 Asp. Mar. Law Cas. 505.

The remarks of the judges in *The Peckforton Castle* (37 L. T. Rep. N. S. 816; 2 P. Div. 222; 3 Asp. Mar. Law Cas. 533) if opposed to *The Franconia* (*ubi sup.*), which is denied, are *obiter*, and should not be followed. In the present case it is submitted that, on the facts, the *Main* was not broadening on the *Kalaja's* quarter. And, even if she did broaden, it was so slight a broaden ing as to necessarily indicate that the *Main* was approaching in such a way as to be entitled to the assistance of a stern light. If the *Main* was entitled to notice by the exhibition of a stern light, then her porting was not negligent, and the learned President ought not to have found her look-out was bad.

Sir *Walter Phillimore* and Dr. *Raikes*, for the plaintiffs, *contra*. — The *Main* was solely to blame for this collision. [The Lord CHANCELLOR (Herschell).—You may take it that the *Main* was in the wrong. On that we are agreed. But we want to hear you as to whether or no the *Kalaja* has infringed the regulations.] It is submitted that the *Main*, had she been keeping a good look-out, had ample materials to enable her to see what the *Kalaja* was doing. The obligation to show a stern light, under the rule, is only incumbent when the hinder ship is on such a course that if it be continued she will run into the leading ship. The leading ship is not bound to act upon the assumption that the hinder ship will be negligent or will capriciously manœuvre in such a way that no reasonable man would anticipate. Had the *Main* continued her course, she must have gone clear at a considerable distance from the *Kalaja*. It is submitted that the remarks of the court as to this question in *The Franconia* (*ubi sup.*) were practically overruled in *The Peckforton Castle* (*ubi sup.*). In *The Franconia* (*ubi sup.*) it was the duty of the *Franconia*, on either art. 14 or art. 17, to have kept out of the way and hence the observations as to the meaning of an overtaking ship were *obiter*. [Lord ESHER, M.R.—I do not think so. We certainly said that the overtaking rule had been broken.] The only direct authority on the point is the decision of Sir Robert Phillimore in *The Reiher* (45 L. T. Rep. N. S. 767; 4 Asp. Mar. Law Cas. 478), which has been acted upon for many years. That learned judge says the obligation to show a stern light only arises when there is "ground for an apprehension of danger." Were it otherwise, a vessel navigating crowded waters would practically have to carry a permanent stern light, which is directly contrary to the regulations

Sir *Richard Webster*, Q.C. in reply.

The LORD CHANCELLOR (Herschell).—This is an appeal from a judgment of the Admiralty Division in a suit between the owners of the cargo on the *Kalaja* and the owners of the steamship *Main*. The vessels came into collision, and each alleges that the collision arose from the fault, and the exclusive fault, of the other. Sir James Hannen has found the *Main* alone to blame. The appellants, the owners of the *Main*, have taken two points: first, that the *Main* was not to blame; secondly, that if she was to blame, the *Kalaja* was also to blame. As regards the first point, we think the judgment of the court below was correct. I do not think it is necessary to go into the circumstances which immediately preceded the collision; but I think, for the reasons given by the learned President, that the *Main*, when she came near the *Kalaja*, was guilty of negligent navigation, either in porting when she did, or perhaps in not stopping and reversing much sooner than she did. In either case the conclusion of the learned judge is correct, and we think that on that point the appeal is not well founded.

But then comes the more important question whether the learned judge has properly exonerated the *Kalaja* from all blame. It is contended on behalf of the appellants that she must be deemed to be in fault by reason of her breach of art. 11 of the Regulations for Preventing Collisions at Sea (*a*). It has been held in the case

(*a*) A decision has recently been given by the Hanseatic Court of Appeal (Hamburg) on art. 5 of the Regulations 1880, which is well worthy of attention. The question for decision was, what lights should a vessel exhibit which has taken the ground, and so put herself out of command. The question is a novel one, and as yet has received no judicial answer in England. In the last edition of Maude and Pollock's Merchant Shipping, p. 590, it is stated that "a ship accidentally aground should, it would seem, exhibit these signals," *i.e.*, the three red lights mentioned in art. 5; and in Marsden's Collisions at Sea, p. 329, it is said, referring to the same article, "Perhaps it would apply to a ship ashore in a fairway." Prior to the provisions of art. 5, Sir Robert Phillimore, in the case of *The Industrie* (1 Asp. Mar. Law Cas. 17; L. Rep. 3 A. & E. 303), had to decide in 1871 what was the duty of those in charge of a vessel aground in the fairway of a navigable channel, and laid it down that, apart altogether from the regulations, they were "bound by the general maritime law as administered in this court to take proper means to apprise other vessels of her position." In 1880 art. 5 of the Regulations provided that a steamship, "which from any accident is not under command, should exhibit three red lights in globular lanterns." The Regulations of 1884 contain the same provisions so far as is material to the present case, and therefore the decision of the Hanseatic Court, although based upon the Regulations of 1880, is equally applicable to those of 1884. The facts of the case are very shortly as follows: The steamship *John Johnasson* took the ground forward on the south side of the river Elbe, and her master, instead of exhibiting three red lights, put up a white light. In her vicinity was a vessel at anchor, which exhibited the usual white riding light. The steamship *Etna*, while proceeding up river, noticed these two white lights, and at first took them to be the lights of a tow. The helm of the *Etna* was thereupon ported. On getting nearer it was seen that they were on different vessels, and it was then assumed that they were the riding lights of two vessels at anchor in the fairway. The helm of the *Etna* was again ported, and

of *The Khedive* (43 L. T. Rep. N. S. 610; 5 App. Cas. 876; 4 Asp. Mar. Law. Cas. 360) that the Merchant Shipping Act of 1873, under which these regulations are made, compels the court to come to the conclusion that a vessel which has infringed the regulations shall be deemed to be in fault; that it is not necessary for the court to consider whether the breach of the regulations in fact contributed to the accident; that if two vessels have come into collision, although that collision be the fault of reckless navigation on the part of one, yet if at the trial it appears that the other vessel was guilty of a breach of one of these regulations, then that vessel must be deemed to be in fault. That is the decision in *The Khedive* (*ubi sup.*), the supposed ground, as there stated, of the intention of the Legislature being to enforce obedience to these regulations, which were made for the purpose of preserving life and property at sea, which purpose it was thought would better be effected by laying down certain rules and insisting on their performance, than by leaving those navigating a vessel to the exercise of their own judgment at a moment when it was not likely to be exercised in the calmest and best manner. That is the decision of the House of Lords by which we are bound, and the question we now have to determine is, whether there has been a breach by the *Kalaja* of art. 11 of the regulations. That article provides that a ship which is being overtaken by another ship shall show from her stern a white or flare-up light. That is an article introduced in recent times, and was not one of the regulations which existed prior to 1880. Before that time several cases had arisen in which it had been contended that the failure to exhibit a light to a vessel which was overtaking you was a want of reasonable care and skill. But there was no rule on the subject. It was therefore thought expedient not to leave it to the judgment of an officer navigating a vessel which was being overtaken to determine, as a matter of prudence or precaution, whether a stern light should be exhibited, but to lay down an absolute obligation on the overtaken vessel to discharge a duty towards the vessel which was overtaking her, that other vessel being by art. 20 of the regulations bound to keep out of her way. The question therefore is, what is the meaning, under art. 11, of a "ship which is being overtaken by

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it was not until she was within three or four lengths of the *John Johnasson* that it was seen that the *John Johnasson* was aground. The *Etna* having concluded that the *John Johnasson* was a vessel at anchor, had determined to pass inside of her under a port helm, but when it was seen that the *John Johnasson* was ashore on that side of the river towards which the *Etna* was making under her port helm, her helm was at once starboarded and her engines put full speed astern, but too late to be of avail, and the vessels came into collision. The owners of the *John Johnasson* thereupon sued the owners of the *Etna* in the Court of Justice of Hamburg, and that court, on the 20th May 1886, held the *John Johnasson* to be free from blame for breach of the regulations. The owners of the *Etna* thereupon appealed to the Hanseatic Court of Appeal, which decided that art. 5 of the Regulations was applicable to the *John Johnasson*, and that she was therefore to blame for not exhibiting three red lights. The Court having held the regulations to be applicable to the place of collision proceeded: "The general terms of art. 5 admit of no distinction between vessels which are within or without the fairway marked by buoys. The question is what is, within the meaning of art. 5, a vessel which in consequence of some accident is not under command. The application of the same regulation to vessels not under command and vessels laying, picking up, or searching for cables, must not be allowed to influence our definition of the expression 'not under command.' It would be better to have different regulations for the two cases, as in the English law, which provides that vessels laying, picking up, or searching for cables shall carry two red lights with a white one between them. A vessel 'not under command' is evidently not in so bad a position as one totally incapacitated to act as a vessel, and therefore the expression 'not under command' would not be applicable to sunken vessels. In ordinary language no one would define a sunken vessel as one 'not under command.' On the contrary, a vessel 'not under command' within the meaning of art. 5 is one which cannot comply with the regulations for preventing collisions by being prevented from executing the manœuvres which would be required of her if in a seaworthy condition. . . . This interpretation is supported by the provision in paragraph (*c*) of art. 5, that vessels not under command whilst not making way shall not carry side lights, whereas when making way they must carry them. This provision shows that art. 5 refers only to vessels which to judge by their outward appearance seem capable of obeying the regulations, and which only on account of 'not being under command' are prevented from so doing. The English regulations explain this still clearer, for at the end of art. 5 a reference is made to art. 27, specifying the signals to be made by ships in distress and requiring assistance. . . . The meaning of art. 5 would certainly be too limited if a vessel were to be regarded as outside it which is prevented from executing manœuvres by having touched the ground. In the Elbe especially there are many instances of vessels slightly touching the ground in the fairway, so that they can only get off on the tide rising. There is no imaginable reason for not considering them as 'not under command' within the meaning of art. 5, and, as already pointed out, this article makes no difference between the fairway and the remaining water, and therefore the article must be applicable to vessels aground outside the fairway. Stranded vessels, however, ought to be placed on a level with sunken ones. It is, however, different with the *John Johnasson*. Although ashore with her stem, still she lay with the greater part of her length in deep water, and could get afloat with the high tide. Moreover, in order to keep the ship ashore, and to prevent her sliding off, the pilot considered it necessary to order the engines to be worked ahead. . . . The liberty of her movements was consequently only so far impeded by reason of her being ashore with her stem, and purposely kept in that position. In these circumstances she ought to have acted as a vessel 'not under command.' . . . It might be urged as justification for exhibiting the anchor light that art. 8 treats of stationary vessels, and art. 5 of drifting vessels not under command. But this contention, which violates the literal meaning of art. 5, is not sufficient. The passing of a vessel at anchor does not entail any danger. It is only necessary to get out of her way at a suitable distance. But to approach a vessel which is not under command whether it is at the moment stationary, or drifting, or making way, is attended with danger, because the approaching vessel is generally unable to judge in what direction the vessel under command is going to move. Prudence therefore requires the approaching vessel to advance slowly and cautiously. This position and the precautions thereby necessitated are according to art. 5 to be intimated to approaching vessels by the exhibition of three red lights. The English authorities, which up to the present have expressed opinions on art. 5, appear to be inclined to accept the above interpretation. Thus in Maude and Pollock, 4th edit. vol 1, p. 590, in reference to art. 5, 'A ship accidentally aground should, it would seem, exhibit these signals.' Marsden, On Collisions at Sea, 2nd edit. p. 329, expresses himself as to art. 5, 'Perhaps it would apply to a ship ashore in a fairway.'" The Court thereupon came to the conclusion that the *John Johnasson* was to blame for breach of art. 5 of the Regulations in not exhibiting three red lights.—Ed.

another?" It is contended by Sir Richard Webster on behalf of the appellants, that a ship is being overtaken by another within the meaning of the article, and therefore bound to show a light, when another vessel is approaching her in such a position that the other vessel is unable to see her lights. On the other hand, it is contended by Sir Walter Phillimore that a vessel is only overtaking another, and the other vessel overtaken within the meaning of the article, when the course of the sternmost vessel is such that if it be unchanged a collision must ensue. I think the latter is too narrow a construction of the rule. To say that a vessel is not overtaken by another, and that the other is not an overtaking vessel, unless the courses be such that if there be no alteration a collision will ensue, would be a dangerous construction to put, not only on this article, but also on art. 20. It would be specially dangerous in regard to art. 20, because, were that construction put upon it, a vessel being navigated in a perfectly prudent manner might nevertheless come into collision with a vessel ahead of her, because the obligation to show a light would never arise until they were so near, and the collision so imminent, that it would be impossible to prevent it, even when notice of the position of the vessel being overtaken was distinctly given. What, then, is the true construction to be put upon art. 11? To ascertain that we must look at its purpose and its object. The Legislature having laid down that the overtaking vessel must keep out of the way of the vessel she is overtaking, I think it must be taken to have contemplated that the vessel whose duty it is to keep out of the way could not be in a position to discharge that duty unless she were made acquainted with the position of the vessel she is approaching. Until she sees some light from the other vessel, she is in absolute ignorance that any vessel is there at all, and she is at liberty to navigate the ocean as she pleases, so long as she has no reason to believe that another vessel is near. She may keep on her course, or change her course, or perform any manœuvre she pleases, and, unless she receives an intimation that a vessel is ahead of her, there is nothing to guide her as to those manœuvres. It appears to me that the object of this rule was that, where a vessel sees, or ought to see, that another vessel is approaching her, going faster than herself, coming nearer to her, and being navigated on such a course as may ultimately lead to a position of danger, and approaching in such a way that she cannot see the lights of the vessel ahead of her, then the obligation rests upon the vessel which is being overtaken in that sense to show from her stern a white light or flare-up light. This, of course, determines nothing as to the time when the obligation arises to show the light. The obligation does not arise till the vessel which is being overtaken has had an opportunity of seeing that the vessel which is overtaking her is a vessel coming nearer and nearer to her. Although, in point of fact, the other vessel is approaching, yet, until there has been an opportunity of ascertaining whether she is approaching on such a course that she cannot see the lights of the vessel ahead, the duty does not arise. The duty appears to me to arise when a vessel is seen to be thus approaching in reasonable time to afford her an opportunity to discharge her duty of keeping out of the way. This question would never arise unless the two vessels were coming nearer to each other. Extreme cases have been put forward by Sir Walter Phillimore where it would be absurd to show a light, although the other vessel was coming nearer, and on such a course as to prevent her seeing the lights of the vessel ahead—the time would not have come, might perhaps never have come. The question can never arise except when the vessels are coming nearer to one another, and it must be for the vessel which is being overtaken to judge when she is so nearly approached that the reasonable and proper time has arrived for giving a signal to the other by showing from her stern a white or flare-up light. Taking the view we do of this article, it seems to me that we are not laying down any new principle of interpretation of these regulations, because, to my mind, we are only adopting the view taken by the Court of Appeal in the case of *The Franconia* (*ubi sup.*) I think it is worth observing that that view of the Court of Appeal, as to the meaning to be attributed to an overtaking and an overtaken ship in what is now art. 20, was enunciated in 1876. The article under consideration was promulgated in 1880, and was therefore subsequent to the view which the Court of Appeal had expressed as to the meaning of an overtaking and overtaken ship. That had been intended, not as an exhaustive definition, but as a good working definition, which I think it is, of an overtaking and an overtaken ship, viz., that if the ships are in such a position, on such a course and at such a distance, that, if it were night, the hinder ship could not see any portion of the side lights of the forward ship, they cannot be said to be crossing ships, and if the hinder of two such ships is going faster than the other, she is an overtaking ship. Now, I think that rule is obviously applicable to the construction of art. 11, and shows that the duty which art. 11 imposes applies to a vessel which is being overtaken in that sense. I also think it is a reasonable construction, having regard to the purpose and object of art. 11, because when the duty is cast on the overtaking ship to keep out of the way of the overtaken ship, it is only reasonable to expect that the vessel, which is to do nothing but keep her course, should give in reasonable time an intimation to the other of her presence, so that the overtaking vessel may not manœuvre in the dark in ignorance that a vessel is in her immediate neighbourhood. I do not see any better rule that could be laid down as to what is an overtaking and overtaken ship within the meaning of art. 11 than that to which I have adverted. I do not think it will be found in practice to be an inconvenient rule, because it will only apply, as I have pointed out, when a vessel has approached within such a distance of the other as to make it reasonable that the signal should be given.

In the present case, if this is a sound rule, it is obvious that the *Kalaja* must be deemed to be in fault. If that is the meaning of the article, it is clear that she was an overtaken vessel, and that therefore it became her duty to show a light to intimate her presence to the *Main*. That duty was undoubtedly neglected because she never showed a light at all. We have not to determine whether she did it too late, because she never did it at all, and gave no

intimation of her presence until the vessels were in close proximity. I think the present case shows the expediency of enforcing such a rule, because the learned President himself is of opinion that the steamer would have been greatly assisted had there been a light shown at the stern, and also thinks it to be in the highest degree probable that if there had been such a light this accident would never have happened. I think this shows that the construction we are putting on the article is a construction which is expedient as well as sound, because undoubtedly, if you impose the obligation on the hinder vessel of keeping out of the way, it must inevitably be that accidents of this kind will happen unless some intimation be given to the vessel coming up astern that there is a vessel ahead of her. I think upon these grounds that the judgment of the court below must be varied, and that both vessels must be held to blame.

Lord ESHER, M.R.—The real question in this case is, what is the construction of art. 11, and therefore it is that the case is important beyond the effect of it in the particular instance. These rules are divided into two classes. There are certain rules which are to determine the conduct of two vessels on the assumption that they see each other, and all the rules as to the conduct of vessels in the daytime assume that they see each other. These rules are enacted to prevent hesitation and to prescribe to each vessel what she shall do under certain circumstances when she sees another vessel. But the rules which apply to lights, are rules which are only applicable at night or in the dark, and are enacted for the purpose of enabling vessels, so far as can be, to see each other and to know each other's position just as if it were daylight. Then, where by reason of the lights they know their position, the rules as to navigation apply in the same way as in daytime. Therefore the object of all rules as to lights is to show each vessel where the other is. When the rules, as originally made, came to be put into practice, it was found that there was one position of affairs which the rules did not provide for, and that was the position where one vessel was overtaking another in such a way that she could not see the lights of the vessel in front of her. In these circumstances the overtaking vessel could not know the position of the other, because she had no opportunity of seeing her lights. This was the difficulty which was to be overcome by art. 11. When you see what the difficulty is, and then see the terms of the rule, the two together lead you to the correct construction of the rule. Where the vessel which is coming up behind cannot see the lights of the other, she is the same as if she were on the open sea without anything near her. She has then no duty towards anyone but herself, and her officers have no duty towards anybody but their owners. Therefore it is wrong to follow the argument of Sir Walter Phillimore, and say that a vessel has no right to deviate from her course, or that she is guilty of negligence if she alters her course out of her track. If that lengthens her voyage it may be a neglect of duty which the officers owe to their owners but not to the ship. Therefore, if the hindermost ship is in such a position that she has no means of knowing that there is another ship in front of her, you cannot say that any alteration on her part is negligence towards that ship, because she has a perfect right, if there be no other ship near, to do as she pleases. It has been pointed out in the argument that she may at any moment, for various good reasons, have to alter her course very considerably; but I wish to go this length and say that, even if she altered her course out of mere caprice, she would neglect no duty if she could not know there was any other ship in the neighbourhood. If that is so, what must be the true interpretation of the rule? It would seem that, in order to avoid the difficulty to which I have referred, you must say that where the leading ship has the opportunity of seeing that the other ship is in such a position that she sees, or ought to see, that the other ship is going faster than she is, and coming nearer to her in such a position that the leading ship must know that she cannot see her lights, then she knows that the hinder ship is in the very difficulty which this rule is intended to obviate, and that she herself is in the position under the rule which obliges her to show a light over the stern. If she does not show such a light under those circumstances, she has broken the rule. And if she has not so acted as to give the other ship the notice this rule requires, what is there to prevent the other ship doing precisely what she likes? Now, when is the hinder ship in this position? It would seem that she is in this position so long as she cannot have the opportunity of seeing the side lights of the ship which is before her. But that in itself is not enough; she must be going faster than the other ship, and, by reason of that, getting nearer to her. These three circumstances constitute the position which makes the rule applicable. It is said that, even though these three circumstances exist, nevertheless the rule is not applicable unless the vessel is coming on such a course as will bring her into danger of collision. Therefore it is said that if she is crossing the track of the other ship, and within the area of obscurity as to lights, although crossing is coming nearer, the rule does not apply. But that overlooks the fact that although she is crossing, yet she is in fact coming nearer; she has the right, and may, if she please, alter her course, and so come dangerously near to the vessel in front of her. I think the rule laid down in *The Franconia* (*ubi sup.*) is a good working rule by which to determine which of the two ships is the overtaken and which is the overtaking, and I abide by it. I have the satisfaction of stating that I have consulted our nautical assessors, not by way of giving us advice on this point, because that they cannot do, and I have the satisfaction of learning from them that they, as nautical men, think that interpretation of the rule will lead to valuable and reasonable results. Therefore, I take it that that is the definition, although not an exhaustive one, of an overtaken and an overtaking ship. It is not exhaustive, because there may be other conditions which would constitute an overtaken and an overtaking ship, and I do not desire to exclude the possibility of such other conditions arising. In the case in question one is an overtaken ship and the other an overtaking ship. Then the overtaken ship has to show a light. There is nothing in the rule which determines the time at which the light is to be shown. What follows? Why, of course, according to all the ordinary rules of construction, it must be shown within a reason-

able time. In a reasonable time with regard to what? What you want to do is to take away from the following ship the liberty of action which she would otherwise have. It seems to me that the light must be shown at a reasonable time before the following vessel is brought into a position of danger, in order that she may know where the leading ship is, and so avoid putting herself into a position where there might be probable danger of collision. Therefore I think the time is a reasonable time before the following vessel will be brought into a position of danger. Whether the light has been shown within a reasonable time or not must be in each particular case a question for the nautical assessors. In this case the question does not arise, because this vessel never showed a light at all.

Therefore, assuming that the learned President is right in his inference of fact, I cannot agree with his decision. His inference of fact is that the lights continued to broaden on the port quarter, and then he lays it down that if the light is constantly broadening on the quarter the rule does not apply. Now, assuming that these lights were broadening, it does not appear to me to be right to say that because they are broadening the rule does not apply. That overlooks the liberty of the overtaking vessel to change her course. I may say that in this case I give my judgment upon the supposition that these lights were broadening. I am told that it is very doubtful whether the learned President has not in fact drawn an erroneous conclusion; but nevertheless our decision is upon the assumption that the learned President is right in saying that the lights were constantly broadening. That does not seem to me to affect the question, and I stand by the rule laid down in *The Franconia* (*ubi sup.*). I cannot agree with the contention that that was a mere dictum, because I believe that the principle upon which that case was decided was to say that the vessels were respectively overtaken and overtaking vessels because they were within the terms of the rule. I have failed to understand the hesitation, or doubt, or criticism of the learned judges in the subsequent case of *The Peckforton Castle* (*ubi sup.*). I cannot understand what their objection was, and I do not think they have stated it. With regard to the case of *The Reiher* (*ubi sup.*), I, of course, after what I have said, cannot agree with the rule of construction there laid down by the learned judge. That rule, as there enunciated, introduces a limitation upon the rule we have laid down, which limitation does not exist in the rule. Whether that case was rightly decided on the facts is immaterial, but with its principle of construction we cannot agree, as it is inconsistent with the judgment we are now giving. I therefore think that the proper judgment is that both these vessels are to blame—the *Kalaja* for breach of the regulations, and the *Main* for careless navigation. The consequence is that there can be no costs of this litigation, either in the Admiralty Court or here.

THE LORD CHANCELLOR (Herschell).—I desire to add that I quite agree with what the Master of the Rolls has said about the case of the *Reiher* (*ubi sup.*). I think the interpretation there put on the article adds to it words of qualification which are not to be found in the article.

FRY, L.J.—I quite agree. The question we have to determine arises on the construction of art. 11 of the Regulations for Preventing Collisions at Sea. That article is one which regulates the conduct of a ship at night. The terms of the article have nothing to do with daytime, and the article is part of a series of articles which regulate the lights to be carried by ships. Now, a ship being overtaken by another is bound to show a light. It appears to me that a ship which is being overtaken by another must mean a ship towards which another ship is coming at a greater pace than herself, and going in such a direction as to be approaching her. But that definition is not enough to determine whether she is an overtaken ship or not. We must further inquire what is to be the position of one ship to the other, in order to bring them within the category of overtaking and overtaken ships. It appears to me that the answer to that inquiry is to be found in the regulations themselves. Preceding regulations provide that every sea-going ship shall carry lights which cover twenty points of the horizon. That leaves a region in which the lights exhibited do not operate. Now art. 11 is one which is introducing an additional light, and what is more reasonable than that that light should be introduced for the purpose of giving notice to a vessel within that area which is not covered by the other lights. It is very probable that the new light was intended to apply to that new region not covered by the other lights. Taking that view, it appears to me that one vessel may be said to be overtaking another when she is within the region not covered by the red and green lights, and when she is nearing the other. But I am far from thinking that this case is not determined by authority. The case of *The Franconia* (*ubi sup.*) determines what is an overtaking vessel. That decision was based on the 17th article of the regulations then in force. It is said that the definition was *obiter*, but I think it was part of a chain of reasoning by which the court came to a conclusion in that case. I therefore think, notwithstanding the view expressed by this court in *The Peckforton Castle* (*ubi sup.*), that this case is really determined by *The Franconia* (*ubi sup.*). That being the view which I take of the article, there is no further question, because there can be no doubt that in the present case the *Main* was within the area not covered by the red and green lights of the *Kalaja*. The *Main* was an approaching ship, and therefore she was an overtaking ship, and the *Kalaja* was an overtaken ship. The *Kalaja*, not having shown a white or flare-up light, infringed the regulations, and conduced in all probability to this unfortunate collision. For these reasons I concur with the judgment of the noble Lords.

Solicitors for the plaintiffs, *Waltons, Bubb*, and *Johnson*.

Solicitors for the defendants, *Clarkson, Greenwell*, and *Wyles*.

June 24 *and Aug.* 9, 1886.

(Before Lord ESHER, M.R., BOWEN and FRY, L.JJ.)

PANDORF AND CO. *v.* HAMILTON, FRASER, AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party — Bill of lading — Excepted perils — "Dangers and accidents of the seas" — Sea-water let in by rats—Damage to cargo—Liability of shipowner.

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, is not a "danger or accident of the seas" within the meaning of a charter-party and bill of lading.

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," 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 (reversing the judgment of Lopes, L.J.), that the damage did not come within the words "dangers and accidents of the seas" in the charter-party and bills of lading, and therefore the shipowners were liable to the owners of the cargo.

APPEAL by the plaintiffs from the judgment of Lopes, L.J., on further consideration.

The plaintiffs were the shippers of a cargo of rice, and brought the action against the defendants, the shipowners, to recover 1008*l.* 1*s.* 8*d.* as damages for injury to the rice on a voyage from Akyab to Liverpool.

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 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 rice was damaged during the voyage by sea-water passing through a hole in a pipe connected with the bath-room in the vessel, which pipe had been gnawed through by rats.

It was agreed that all reasonable precautions had been taken to keep down the rats on the voyage to Akyab.

The following questions were left to the jury: 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.

Lopes, L.J. reserved the case for further consideration, and afterwards gave judgment for the defendants, holding that the damage complained of had occurred by reason of excepted perils; and from this judgment, which is reported 5 Asp. Mar. Law Cas. 568; 54 L. T. Rep. N. S. 536, and 16 Q. B. Div. 629, the plaintiffs now appealed.

(*a*) Reported by P. B. HUTCHINS, Esq., Barrister-at-Law.

June 24.—The appeal was argued by

Sir *Charles Russell* (A.-G.) and *Joseph Walton* for the plaintiffs, and *Bigham*, Q.C. and *J. G. Barnes* for the defendants.

The arguments used appear from the judgments.

The following authorities were referred to:

Chartered Mercantile Bank of India, London, and China v. *Netherlands India Steam Navigation Company*, 5 Asp. Mar. Law Cas. 65; 48 L. T. Rep. N. S. 546; 10 Q. B. Div. 521;
Woodley v. *Michell*, 5 Asp. Mar. Law Cas. 71; 48 L. T. Rep. N. S. 599; 11 Q. B. Div. 47;
The Xantho, 6 Asp. Mar. Law Cas. 8; 11 P. Div. 170; 55 L. T. Rep. N. S. 203;
Laveroni v. *Drury*, 8 Ex. 166; 22 L. J. 2, Ex.;
Kay v. *Wheeler*, 16 L. T. Rep. N. S. 66; 2 Mar. Law Cas. O. S. 466; L. Rep. 2 C. P. 302;
The Chasea, 2 Asp. Mar. Law Cas. 600; 32 L. T. Rep. N. S. 838; L. Rep. 4 A. & E. 446;
Story on Bailments, 512, a;
Buller v. *Fisher*, 3 Esp. 67;
West India Telegraph Company v. *Home and Colonial Marine Insurance Company*, 43 L. T. Rep. N. S. 420; 6 Q. B. Div. 51; 4 Asp. Mar. Law Cas. 341;
Laurie v. *Douglas*, 15 M. & W. 746;
McArthur v. *Sears*, 21 Wendell (New York), 190;
Cullen v. *Butler*, 5 M. & S. 461.

Cur. adv. vult.

Aug. 9. — The following judgments were delivered:—

Lord ESHER, M.R.—This is an action brought by the charterers of a ship, who are also the holders of bills of lading, for damage done by sea-water to a cargo of rice. The question was tried before Lopes, L.J., and after certain questions had been left to the jury, and had been answered by them, he gave judgment in favour of the defendants on the ground that the damage done to the rice was the result of causes excepted in the charter-party and the bills of lading. The questions raised, therefore, are, what is the true construction of the charter-party, and the bills of lading, which are in this case identical, and what is the reasonable mode of applying that construction to the facts of this case? The excepted perils are, "The act of God and the Queen's enemies, and all and every other dangers and accidents of the seas, rivers, and steam navigation, of whatsoever nature or kind, and errors of navigation during the voyage." The vessel was chartered by the plaintiffs to proceed to Akyab, and there load a cargo of rice, and the rice was loaded under the charter-party, and bills of lading were given in the same terms as the charter-party. During the voyage home to Liverpool, rats gnawed through a pipe communicating with a cistern in the ship, and thereby let in the sea-water, which damaged the rice. There was a dispute at the trial as to whether the rats had been allowed to come on board by the shippers in the course of shipping the rice at Akyab; this question was left to the jury. Another question was put to the jury: "Did those on board take reasonable precautions to prevent the rats coming on board during the shipping of the cargo?" That also was at Akyab. The jury answered the first question in the negative—that is, that the rats were not brought on board. The second question they answered in the affirmative, namely, that those on board did take reasonable precautions to prevent the rats coming on board during the shipping of the cargo. The learned judge states

that at the trial there was no dispute about the cause of the damage to the cargo; it was agreed that the damage was caused during the voyage by sea-water passing through a hole in a pipe connected with a bath-room in the vessel, such pipe being gnawed through by rats. Therefore the cause of the damage to the rice is, that rats gnawed through the pipe, thereby letting the water in.

The question is, whether, on the true construction of the charter-party and the bills of lading, and applying it in the legal way to the facts, the cause of the damage is a peril excepted out of the bills of lading and charter-party. Now, charter-parties, bills of lading, and policies of marine insurance are documents which do not materially differ from an ordinary daily form of each. No doubt as mercantile business has been enlarged they have differed from time to time, but they do not differ from day to day, and in their substantial structure, which is very peculiar, they are much the same as they have been from the beginning. Where documents are in daily use in mercantile affairs, without any substantial difference in form, it is most material that the construction given to them years ago, and which has from that time been accepted in the courts of law, and in the mercantile world, should not be in the least altered, because all subsequent contracts have been made on the faith of the decisions. Therefore, whether we think that we would have come to the same conclusion as the judges did in the beginning is immaterial, for we ought to adhere strictly to the construction which has been put upon such documents. Moreover, if those documents, construed as the judges have construed them for many years, have also for many years been applied in a particular way to facts similar to those which are in question, it is equally material, in my opinion, to adhere to that application, for otherwise mercantile business becomes wholly uncertain. Now, with regard to charter-parties, bills of lading, and policies of marine insurance, there have been certain rules of construction determined upon and accepted, and there has been a distinction as to the mode of construing the first two documents and the third. With regard to policies of marine insurance a very strict rule as to the application of the doctrine of *causa proxima* has been adopted. It was pointed out long ago that if this doctrine of *causa proxima*, as against *causa remota*, is taken in a large sense it is equally applicable to charter-parties, bills of lading, and policies of marine insurance. One would not seek either as to a charter-party or a bill of lading a cause in the one sense remote; but with regard to policies of insurance, the doctrine of *causa proxima*, or the immediate cause, has been much more strictly applied than in the other two cases, and the difference has been that in a policy of marine insurance one looks strictly only to the *causa proxima*, or immediate cause; whereas in the other documents, one looks to that which is called in the law books the *causa causans*, which has been interpreted by judges to mean the real effective cause of the damage. All these documents were constructed originally in a very peculiar elliptical form of mercantile language. The statement that the shipowner will deliver the cargo in the same order as he has received it in, except the act of God and so on, and all and every other dangers or perils of the seas, shows that it is a most extraordinary elliptical form. The exceptions do not describe the damage, although if the document were construed only grammatically they would be rather supposed to describe the damage; they describe the cause of the damage, not the damage itself. It is necessary, therefore, to see whether the cause of the damage is one which is excepted. The first cause which may produce the damage is the act of God, as it was called in the old times. I shall not now enter into a discussion as to what was the exact meaning of the term "the act of God." In the older, simpler days I have never had any doubt but that it did not mean the act of God in the ecclesiastical and biblical sense, according to which almost everything is said to be the act of God, but that in a mercantile sense it meant an extraordinary circumstance which could not be foreseen, and which could not be guarded against. But in this case there cannot possibly be any foundation for any such suggestion as that this gnawing of a pipe by rats and letting in sea-water is, within the terms of the bills of lading and charter-party, the act of God. The real question is whether the cause could be said to be a cause brought about by dangers and accidents of the seas. It obviously was not a danger or accident of steam navigation, nor is it an error of navigation. Therefore the only term in the bills of lading and charter-party under which the cause could be brought, if it is a cause, is dangers or accidents of the seas. Now, it has been long ago held, that these words "dangers of the seas" are really the same as perils of the seas, for perils and dangers in the English language are synonymous words.

Therefore the question is, whether this is a peril of the sea. That depends on the meaning of the term "perils of the seas" in charter-parties, bills of lading, and policies of marine insurance. They really are the perils to which people who carry on their business on that dangerous element, the sea, are liable, because they carry on their business on the sea. They are the perils of the sea, not the perils of journeying. In Arnould on Marine Insurance, book 2, chap. 2, vol. 2, p. 741, 5th edit., it is stated that, "the words 'perils of the sea' only extend to cover losses really caused by sea damage, or the violence of the elements *ex marinæ tempestatis discrimine*. They do not embrace all losses happening upon the seas." There may be many dangers which come under other words, but which do not come under the words "perils of the seas." If perils of the seas really included all losses happening on the sea, it is obvious that none of the subsequent words which have been added to charter-parties, bills of lading, and policies of insurance, would have been wanted, or would have been included in them. Therefore perils of the seas are those perils which are peculiar to carrying on business on the sea. They obviously, therefore, include the violence of the sea itself. They include the danger which is caused by being on the sea by reason of the action of other elements acting upon the sea. But rats do not come from the sea, and are not generated by the sea. They are no more a difficulty on board ship than they are in a warehouse or in a mill. Therefore *à priori* one would have said that damage done to the ship or cargo by rats could not be a peril of the seas, as construed from the beginning. The first time a similar question was

raised, in *Rohl* v. *Parr* (1 Esp. 445), that was done which in the old days the great judges were in the habit of doing much more than judges have been in the habit of doing in later times. It was at a time before the distinction was so strictly drawn between the construction of a mercantile document being for the court and not for the jury, and the question being partly for the court and partly for the jury. Lord Kenyon asked a mercantile jury at Guildhall whether, in the mercantile world, damage to the ship's bottom by worms was treated as a peril of the sea. The jury answered that it was not. Thereupon Lord Kenyon having asked for that opinion of the jury, not as decisive, but in order to instruct him, held that, upon the true construction of the policy, damage done to the ship by worms did not come within the term "perils of the sea," and that decision, which he, having had himself instructed by the jury, held as a matter of law, has been adopted ever since. My brother Lopes, in his judgment in the present case, which is most elaborate and careful, has not controverted that view, but has adopted the view that damage to the ship or cargo by rats of itself is not a damage caused by a peril or danger of the seas. It is hardly necessary to go through all the cases, but I think it is better to refer to some of them to show how clear this has been. The case of *Rohl* v. *Parr* (1 Esp. 445), which was on a policy of insurance on the ship, shows it very strongly. The ship sailed from St. Bartholomew, and arrived safely at the coast of Africa, and began to trade. Afterwards, being about to return, it was found that the worms had eaten her bottom, and had destroyed it so effectually that the ship could barely get to Cape Coast, where she was condemned as irreparable. This case seems to me very strong. The worms had eaten the bottom of the ship—it must have been a wooden ship in those days—so as to render her unfit to be on the seas, so that it was wrong to continue the voyage, and so that it was right and proper to take her into a port of distress, where, if what had happened was caused by the perils of the sea, she was from the other circumstances a constructive total loss; yet it was held that this eating by the worms was not, even in a policy of insurance, a damage caused by a peril of the sea. The damage in that case was done by worms, but the result would have been exactly the same if it had been done by rats. If rats were to gnaw a wooden ship from the inside nearly through to the outside of her planks, so that she became wholly unfit and unsafe to keep the seas, and she were carried into a port, where her condition was such that she could not be repaired so as to be a sea-going ship, in the ordinary business sense of being capable of repair, that would not be a loss caused by a peril of the sea.

The next proposition which I shall lay down is, that in business, if it is attempted to distinguish with extreme fineness either as to construction or as to application of facts, the possibility of real business is destroyed, and it seems to me impossible to hold that if rats gnaw within the eighth of an inch of the outside of the planks of a ship and so make the ship unfit to keep on the seas and render her irreparable, that constructive total loss is not a loss caused by perils of the sea, yet if the rats gnaw the eighth of an inch further it would be a loss by perils of the sea. That is far too fine for me, and I think far too fine for business. If that case, therefore, is carried to its full length, the damage caused by the gnawing by rats is not, even in a policy of insurance, a peril of the seas, and much more, as I shall presently show, is this in the case of a charter-party or a bill of lading. There is a case with regards to rats—*Hunter* v. *Potts* (4 Camp. 203)—which was again on a policy of insurance. The ship having touched at Antigua was detained there a considerable time by the sickness of the crew, and while she lay at that island the rats ate holes in her transums and other parts of her bottom. In consequence a survey was called, and the ship was found to be unfit to proceed to Honduras, and she was therefore condemned and the cargo sold. Here was a ship reduced to extremities, unfit to keep the sea and properly sold, but the loss having been charged as caused by a peril of the sea, Lord Ellenborough was clearly of opinion that it was not a loss within any of the perils insured against. One would expect to find in America the same law as in England, because the American people of business have adopted the same forms of bills of lading and of policies and of charter-parties that we have ourselves. In the case of *Hazard's Administrator* v. *New England Marine Insurance Company* (8 Peters, 557) the damage was caused by worms. The judge directed the jury (or, as it is called in America, charged the jury) that, "if they should find that in the Pacific Ocean worms ordinarily assail and enter the bottoms of vessels, then the loss of a vessel destroyed by worms would not be a loss within the policy." I quote this case because the Court there adopt the English decision to which I have already referred. They say: "In 1796 the case of *Rohl* v. *Parr* (1 Esp. 445) was tried, which involved this question, before Lord Kenyon and a special jury. His Lordship said, that 'it appeared to him a question of fact rather than of law, such as the jury were competent to decide on from the opinion on the subject adopted by the underwriters and merchants.' And, 'the jury found it was not a loss within the term 'perils of the sea' in policies of insurance, and, of course, that the plaintiff could not recover for a total loss.' There seems to have been a general acquiescence in this decision in England, as it has never been overruled:" (8 Peters, at pp. 583, 584.) Then some other cases are cited, and it is said that in America the Courts have adopted that finding of the English jury, and acted upon it. In this American case the question left to the jury was whether in the Pacific Ocean worms ordinarily assail the bottoms of vessels. It seems to me that there must be a distinction between rats and some worms which attacked ships in the old days at sea. If by worms are meant worms which ate through the ship from the outside, those are worms which are generated by the sea and which attack from the outside, and this would immediately, I think, raise the question which was left to the jury in that case. Therefore the real ground why the loss was not held to come within the term "perils of the sea" was this, that if the circumstances were the ordinary circumstances of the voyage insured then the loss would not come within the terms of the policy, for it would come within the ordinary circumstances, not the extraordinary circumstances, of the voyage. Therefore to my mind it is different

in a case of worms which are peculiar to the sea, attacking the ship from the sea, which I think would be a peril of the sea, unless it were that it is an ordinary circumstance of the voyage, which either the underwriter, or the shipowner, or the owner of the cargo, ought to anticipate as an ordinary circumstance of the voyage. That question with regard to the attack of worms or barnacles can hardly arise in later days, because it was a danger to wooden ships which were not metalled. The metalling of ships was invented and applied chiefly in order to guard against that very danger, and now if a ship were sent into seas frequented by such worms without being metalled it would be a very strong circumstance upon which a jury would be asked to find that the ship was not seaworthy for that voyage even when she started, it being known at the time that in the ordinary course of the voyage such a danger must be anticipated. But with regard to rats, it stood from the beginning, as I say, subject to the other view that a danger to the ship or cargo by rats was not caused by an excepted peril in the bill of lading or by a sea peril as insured against in the policy.

Coming to later times, there is the case of *Laveroni* v. *Drury* (8 Ex. 166; 22 L. J. 2, Ex.), which, to a certain extent, is decisive in my opinion. There the question arose upon bills of lading. The cargo, which was cheese, a thing most liable to the attacks of rats, was damaged by rats. It is true that the sea-water did not come in. The only damage was the damage by the rats themselves. Pollock, C.B. said: "We agree with the learned judge that the true question is whether damage by rats falls within the exception, and we are clearly of opinion that it does not. The only part of the exception under which it possibly could be contended to fall is as a danger or accident of the sea and navigation, but this we think includes only a danger of the sea or navigation properly so-called, namely, one caused by the violence of the winds and waves (a *vis major*) acting upon a seaworthy and substantial ship, and does not cover damage by rats, which is a kind of destruction not peculiar to the sea, or navigation, or arising directly from it, but one to which such a commodity as cheese"—(this is also true as to rice)—"is equally liable in a warehouse on land as in a ship at sea." With regard to the observations which were made in the old days about a cat being on board, it was characteristic of the refined minds of those times to deal with such a matter. Pollock, C.B., who was a very practical judge, said he did not think much of the case of cats, because from the way in which cargoes are now stowed it would be very difficult for a cat to make its way in amongst the cargo; and so it would. However, that question of the cats was dropped long ago, as is well known. That case is a distinct decision that damage done to a cargo by rats, where it does not let in sea-water, is not damage caused by perils of the sea. I have dealt with the cases as to damage to the ship by rats or worms under a policy of insurance. Now I come to the case of damage to a ship or a cargo where the question arises under the exception in a bill of lading, or a charter-party. In the case of a bill of lading or charter-party, not the last immediate cause, but the real effective cause, is to be looked to, so that it must come to this, if the rats, as I said before, gnaw within the eighth of an inch of the outside of the planks of the ship and so damage the ship, or if rats eat the cargo, or otherwise damage the cargo, this is not a cause of damage which is excepted, yet if the rats go a little further so as to let the sea-water in, then the damage to the cargo is to be excepted. It cannot be that there are such distinctions. Therefore I take the case of *Laveroni* v. *Drury* (8 Ex. 166; 22 L. J. 2, Ex.) to be decisive, not only of what had then to be decided, namely, that damage caused by rats is not damage caused by a peril of the sea, but also, as a necessary consequence, to prove this, that if rats gnaw through a pipe and let the water in, nevertheless, as the rats are the cause, and the sea is not, and the letting in of the sea-water is only an effect of the cause, the real effective cause being the rats, what the rats do is not damage caused by perils of the sea. I think myself the cases would make it doubtful, even in a policy of insurance, whether where rats gnaw through the planks of the ship, the act is not so closely immediate that the coming in of the sea-water should be treated, not as a cause at all, but as an effect, so that even in that case there would be *causa proxima* as well as *causa causans*; but this is a matter which we need not determine on the present occasion, and which must remain open until the point is raised. Taking the distinction of construction which has always been applied as between charter-parties, bills of lading, and policies of insurance, I feel in my own mind perfectly clear that where the effective cause is the conduct of rats, as the learned judge has found here in terms, and properly found, it cannot be held that the coming in of the sea-water is the cause. Therefore, with the greatest deference I cannot agree with the judgment of Lopes, L.J. I think he has in reality, although he did not mean to do it, acted upon this: "The immediate cause of damage in this case," he says, "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." It seems to me that he has inadvertently applied to this case the strictest rule of the *causa proxima*, which is only applicable to policies of insurance, and not to bills of lading or charter-parties. In my opinion, it has been held from the beginning that in a bill of lading or in a charter-party the effective cause is to be looked to, and not the immediate cause, in the sense of its being the *causa proxima*, as in the case of a policy of insurance. That is the defect in his careful and elaborate judgment. For the purpose of regularity in business, and in order that people may know what their liabilities are, and what they are undertaking, it seems to me that we must revert to the old rule, and say that where the effective cause of a loss under a charter-party or a bill of lading is damage to the cargo by rats that is not a peril excepted, and where the rats, by being the effective cause, let in the sea this letting in of the sea is not a cause at all. It is the effect of what was done by the rats, and the rats were the effective cause. For these reasons I cannot agree with the judgment, and am of opinion that the plaintiffs are entitled to judgment, and this appeal ought to be allowed.

Bowen, L.J.—The judgment I am about to read is the judgment of my brother Fry and myself. This was an action brought against the owners of a ship to recover damages for sea

injury to the cargo caused by a leakage of which rats were the authors. The defendants' ship had been chartered by the plaintiffs to proceed to Akyab and there load a cargo of rice for Liverpool. 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 whatsoever nature and kind, and errors of navigation during the voyage, and the tenor of the bills of lading was the same. It appeared that the damage was caused during the voyage to Liverpool, after the ship had left Akyab, by sea-water passing through a hole in a metal pipe connected with a bath-room in the vessel, this pipe having been gnawed through by rats. It was not disputed at the trial that all reasonable precautions had been taken by the captain and his crew to keep down the rats on the voyage from Liverpool to Akyab. The jury found further that the rats which caused the damage were not brought on board by the shippers in the course of shipping the rice at Akyab, and that those on board had taken reasonable precautions to prevent the rats coming on board at Akyab during the shipping of the cargo. There was, on the other hand, no finding of the jury, and no admission by the parties, as to the condition of the vessel in respect of rats when she left Liverpool for Akyab, or as to the original cause of the presence of rats on board the ship. The case was dealt with by Lopes, L.J. on further consideration, and he directed a verdict for the defendants, on the ground that the case was one of danger or accident of the seas within the exception in the shipping documents, and that the shipowners were thereby exonerated. From this judgment the plaintiffs now appeal. That damage done to cargo by the direct action of rats, which devour it on the voyage, is not due to a peril of the sea, was decided in *Kay* v. *Wheeler* (16 L. T. Rep. N. S. 66; 2 Mar. Law Cas. O. S. 466; L. Rep. 2 C. P. 302) by the Exchequer Chamber; see *Laveroni* v. *Drury* (8 Ex. 166; 22 L. J. 2, Ex.); and *Aymar* v. *Astor* (6 Cowen's Reports, Supreme Court of New York, p. 266). It was contended, however, in the present case, on behalf of the shipowners, that the question is a different one where cargo is directly damaged by sea-water entering a ship through leaks which rats have caused, and that although the shipowner is not excused when the rats eat a cargo of rice directly, if a rat eats through a pipe which lets the sea-water in upon the rice, the accident is one for which the shipowner will not be responsible — a distinction which, if it exists, must be admitted to savour of subtlety. By the common law of this country, which in this respect is stricter than either the civil law or the law of many continental nations, a carrier by sea was liable for loss or damage to goods, except only in the event of accidents caused by the act of God or of the king's enemies. In *Dale* v. *Hall* (1 Wils. 281), the loss was occasioned by a leakage caused by rats gnawing a hole in the bottom of the vessel. The goods were not carried under any bill of lading, and it was held that by the common law the hoyman was not excused on the ground of any act of God. The larger exception to the carrier's liability contained in the exception of perils of the seas or accidents and dangers of the seas has sprung up gradually since the reign of Queen Elizabeth, no such provision being found in the forms of charter-parties or of bills of lading given in West's Symboleographie, but being known apparently in the reign of Charles I.: (see *Pickering* v. *Barkley*, Style, 132; *Mors* v. *Slew*, 3 Keb. p. 73; and *Barton* v. *Wolliford*, Comb. 56.)

The cargo in the present case was carried under a bill of lading containing the now familiar exception, and we have to consider accordingly whether a carrier who would not be excused by the common law for loss due to leakage caused by rats, can find protection under the express term "accident or danger of the sea." The exact definition of the term "dangers or accidents of the sea," or of the cognate expression "perils" of the sea, which latter name is only the Latinised equivalent for "dangers," has been the subject of perpetual discussion both in England and America. On the one side it has been sought to confine it to calamities which occur only through the violence of the elements (*ex marinæ tempestatis discrimine*), or (to use the language of Marshall, vol, 2, p. 487, part 1, c. 12, s. 1), "such as arise from stress of weather, winds and waves, from lightning and tempests, rocks and sands," &c. By others it has been sought to extend it so as to include all inevitable accidents which occur upon the seas, or at all events all such as occur by the action of sea-water in the course of navigation, for which human negligence, or for which at all events the carrier's negligence, is not responsible. The term "peril of the sea" is one which has long been employed in policies of insurance as well as in contracts of carriage, though losses which fall within the meaning of the policy (owing to the different nature of the contract) are not always losses which would fall within the bill of lading exception. But it may be at least considered probable (subject always to any question of usage or construction) that if a loss is not due to a peril of the sea within the meaning of a policy of insurance, neither will it be due to a peril of the sea within the meaning of the ordinary bill of lading. According to Lord Tenterden the decision of the judge upon what is a peril of the sea may be guided by usage and the course of practice among merchants, and it is observable that the case in which pirates were first held to be a peril of the sea was decided upon a certificate of merchants, read in court, that they were so esteemed: (Style, 132). It is not necessary in the present instance, and not being necessary it would be undesirable, to lay down an exhaustive definition as to the meaning of the term "perils of the sea," either in contracts of carriage or in policies of insurance. We desire to leave ourselves entirely free to consider (whenever the necessary occasion arises) whether the term "perils of the sea" may not embrace other dangers beyond those which are due directly to the violent action of the elements. Unless there be some exception to such a definition it is difficult to account for the fact that pirates by mercantile custom are a peril of the sea, or that shipwreck upon a hidden boulder, when not due to the negligence of the master, would be due to the same excepted cause. It is sufficient to affirm broadly that within the meaning of an ordinary charter-party or bill of lading a loss cannot be due to the perils of the sea which the exercise of reasonable skill and diligence on the part of the shipowner might

have averted. In the case of the schooner *Reeside* (A.D. 1837, 2 Sumner, at p. 571) Story, J. thus expresses himself: "The phrase 'danger of the seas,' whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include only such losses as are of an extraordinary nature, or arise from irresistible force, or some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence." So again in Marshall on Insurance, vol. 1, p. 234, part 1, c. 7, s. 4: "If any loss or damage happen to the goods, from any fault or defect of the ship (not arising from sea damage, or from any accident or misfortune in the voyage, but from some latent defect before she sailed), the owner of the goods has his remedy against the owners of the ship for such loss or damage."

The judgment of Lopes, L.J. in the court below accepts this principle, but proceeds upon the basis that the action of the rats in gnawing through the pipe and letting in the sea-water upon the cargo was a matter beyond all human control—that it was, to adopt his own words, a case "of sea damage at sea and nobody's fault." The burden of proof of this rested upon the shipowner, but the admission made during the trial of the case and the finding of the jury seem to us to fall far short of establishing the inference drawn by Lopes, L.J. It is consistent with both the verdict and the findings that the presence of rats may have constituted an original vice in the ship when she sailed to take in cargo, which continued down to and at the time when she in fact took it in. Their presence at such a time—so far as their presence constituted any element of danger to the cargo—was to that extent a defect in the ship. Even if it were shown to be impossible to have excluded the rats which caused the mischief to the pipe—a topic which it may be said we have not the materials before us for discussing exhaustively—it would still we think be doubtful whether a ship with rats on board her that receives goods into her hold ought not to bear the responsibility for all damage done to the goods by the rats. The burden, as we have said, rests upon the shipowner. An owner of cargo has no means of knowing what has been done by the ship in respect of rats or what is the condition of the vessel. He has a right to assume that the ship is reasonably fit for the carriage of his goods. The broad inference of fact which most persons would accordingly be inclined to draw is that rats capable of doing substantial mischief to a ship or cargo, and which do not come on board with the cargo itself, are not the kind of inevitable misfortune which happens to ships fit to carry cargo—that a rat, and all the direct or indirect mischief a rat does, is, in other words, a peril of the ship and not a peril of the sea. Sir William Jones (Essay on the Law of Bailments, p. 105), commenting upon the case of *Dale* v. *Hall* (1 Wils. 281), in which the rats had gnawed out the oakum and made a small hole through which the water gushed, says that it must have been at least ordinary negligence to let a rat do such mischief in a vessel, and quotes the Digest (19, 2, 13, 6): "Si fullo vestimenta polienda acceperit, eaque mures roserint, ex locato tenetur, quia debuit ab hac re cavere." The Court of Exchequer in *Laveroni* v. *Drury* (8 Ex. 166; 22 L. J. 2, Ex.) seem to have been of the same opinion. Speaking of a passage from Roccus, which states that keeping cats on board excused the shipowner from damage by rats, Pollock, C.B., says: "Whatever might have been the case when Roccus wrote, we cannot but think that rats might be now banished from a ship by no very extraordinary degree of diligence on the part of the master:" (8 Ex. at p. 172). It is not impossible that it was on some such broad common-sense view of the case that Lord Ellenborough proceeded when in *Hunter* v. *Potts* (4 Camp. 203) he held that a loss arising from rats eating holes in the ship's bottom is not within the perils insured against by the common form of a policy of insurance. As a rule, rats can be kept out of ships which are fit to carry cargo, and, speaking broadly, a loss which is due to leakage caused by rats will probably be found to be due, not to the perils of the sea, but to the defects of the ship or the want of precautions of the shipowner. In his chapter dealing with policies of insurance, the learned author of Kent's Commentaries says: "It has even been a vexed question whether the damage done to a ship by rats was among the casualties comprehended under perils of the sea, and the authorities are much divided on the question. The better opinion would, however, seem to be that the insurer is not liable for this sort of damage, because it arises from the negligence of the common carrier, and it may be prevented by due care, and is within the control of human prudence and sagacity:" (vol. 3, pp. 300, 301.) He adds in a note some references to a number of foreign juridical writers, who have all maintained the principle that the owner, and not the insurer, is liable for any injury by rats, and states that the only case which he has met with directly to the contrary is that of *Garrigues* v. *Coxe* (1 Bin. 592). Story on Bailments, sect. 513, adds, that "it seems that a loss occasioned by a leakage which is caused by rats gnawing a hole in the bottom of the vessel is not in the English law deemed a loss by a peril of the sea." Lord Tenterden in his work on Shipping, part 4, c. 5, s. 4, adopts language to the same effect: "Where rats," he says, "occasioned a leak in the vessel, whereby the goods were spoiled, the master was held responsible for the damage notwithstanding the crew afterwards, by pumping, &c., did all they could to preserve the cargo from injury. And this determination agrees with the rule laid down by Roccus, who says: 'If mice eat the cargo and thereby occasion no small injury to the merchant, the master must make good the loss, because he is guilty of a fault. Yet if he had cats on board his ship he shall be excused.' This rule and the exception to it, although bearing somewhat of a ludicrous air, furnish a good illustration of the general principle, by which the master and owners are held responsible for every injury that might have been prevented by human foresight or care. In conformity to which principle, they are responsible for goods stolen or embezzled on board the ship by the crew or other persons, or lost or injured in consequence of the ship sailing in fair weather against a rock or shallow known to expert mariners."

It is not strictly necessary to decide what would be the result in the somewhat improbable case of a shipowner who succeeded in proving that the presence of rats that have caused mischief by leakage to the cargo, was neither due to any defect in the reasonable condition of his ship nor a matter which by reasonable precautions could have been prevented. This hypothetical case of a possible exception to what we may call the broad and natural inference of fact is reserved by Marshall (vol. 1. p. 235, part 1, c. 7, s. 4), where he says that the owners are liable for damage done by rats, unless it appear that all necessary precautions were used to prevent it. The academical question which Marshall and other writers have left open it is not necessary in the present case to close, so far as relates to leakage caused by rats as distinguished from damage done by them to the cargo directly. It is, however, obvious that the continental writers to whom Story refers as entertaining a view that in such a case the owner would be protected, wrote at a time when ships were very different from the carrying ships of the present day, nor indeed were their views followed by the Court of Exchequer in *Laveroni* v. *Drury* (8 Ex. 166; 22 L. J. 2, Ex.), or by the Exchequer Chamber in *Kay* v. *Wheeler* (16 L. T. Rep. N. S. 66; 2 Mar. Law Cas. O. S. 466; L. Rep. 2 C. P. 302). It never must be forgotten that the English law is less indulgent to the carrier than either the Roman law or the law of many continental nations. In the present instance—the burden of proof resting with the shipowner—no facts have been established which raise this speculative point. It was consistent with all the findings that the mischief done to the pipe, and the incursion of sea-water which followed, would never have happened but for either a defect in the condition of the ship or some want of providence in the shipowner or his servants. The question therefore does not arise whether there may not be a conceivable case of leakage caused by rats which would not fall within the broad and everyday rule. For these reasons we are of opinion that the judgment of the court below must be reversed, and the appeal allowed, with costs.

Appeal allowed. Judgment for the plaintiffs.

Solicitors for plaintiffs. *Hollams, Son,* and *Coward.*

Solicitors for the defendants, *W. A. Crump* and *Son.*

June 3 *and* 9, 1886.

(Before the Lord Chancellor (Herschell), Lord Esher, M.R., and Fry, L.J.)

The Annot Lyle. (*a*)

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

Collision—Ship at anchor—Negligence—Onus of proof—Appeal to the House of Lords—Bail—Stay of execution—R. S. C., Order LVIII., r. 16.

Where a ship is shown to have been properly at anchor with her anchor light burning, and is struck and damaged by another ship, the fact of the collision is primâ facie evidence of negligence on the part of the ship in motion, and the onus is upon the latter to prove that the collision was not occasioned by her negligence.

In an appeal from a decision of the Court of Appeal to the House of Lords in an action in rem, in which bail has been given, the Court of Appeal will not stay execution pending the appeal unless special circumstances are shown by affidavit.

This was an appeal by the plaintiffs in a collision action *in rem* from a decision of Butt, J. dismissing an action brought by them against the owners of the vessel *Annot Lyle*, to recover damages occasioned by a collision between the *Annot Lyle* and their barque the *Nenuphar*.

The collision occurred in the Downs on the night of the 10th Dec. 1884. The *Nenuphar* was properly at anchor, with her anchor light burning, in the Downs, heading between S.W. and W.S.W., when the barque *Annot Lyle* was seen to cross her bows. The *Annot Lyle* was exhibiting a green light and was about a cable's length off, and when about ahead of the *Nenuphar* it was seen that she was drifting towards the *Nenuphar*. Those on board the *Annot Lyle* hailed the *Nenuphar* to pay out chain, but a collision occurred, whereby the *Nenuphar* was damaged. The plaintiffs (*inter alia*) charged the defendants with taking up a foul berth, with neglecting to take proper measures to keep clear of the *Nenuphar*, and with negligence in coming to an anchor at all.

At the trial before Butt, J., the learned judge having found that the *Annot Lyle* had not taken up a foul berth, and had done all she could to avoid the collision, proceeded as follows: "The remaining question is whether, having regard to the state of the weather and to the fact that she had only one anchor available for letting go at the time, it was negligence on the part of those in charge of the *Annot Lyle* to go to anchor amongst the shipping in the Downs? Finding that there was a difference of opinion between the Elder Brethren on that point, and as the word 'negligence' is not always clearly understood, I thought it well to put what is practically the same question in a different form, and I asked them 'Would an officer in the exercise of ordinary care and skill, under the circumstances, have brought his vessel to anchor in the Downs and amongst the shipping?' That altered form of question did not advance the matter much, because one of the Elder Brethren answered it in the affirmative and the other in the negative, and I have to decide; and I shall say that I am not satisfied that it was negligence so to act, that the allegation of negligence is not proved by the plaintiffs, and that therefore I must dismiss the suit. I do not wish it to be understood that I exercise no judgment of my own in this matter; I exercise the best judgment I can in the difference of opinion which prevails between my assessors."

June 3.—*Bucknill*, Q.C. and *Hannen* for the appellants, the plaintiffs.—On the evidence the *Annot Lyle* was guilty of negligence. Moreover, as the *Nenuphar* was at anchor, the onus was upon the *Annot Lyle* to prove absence of negligence on their part. This has not been done.

Sir *Walter Phillimore* and *Kennedy*, Q.C. for the defendants.—There was no evidence of negligence against the *Annot Lyle*. The learned judge was right in dismissing the action.

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

The Lord Chancellor (Herschell).—In this case the *Nenuphar* was properly anchored in the Downs when the collision, the subject of this action, occurred; no blame can therefore be attributed to her. Under these circumstances, the burden is on the defendants to discharge themselves *primâ facie* from the liability which arises from the fact that the *Annot Lyle* came into collision with and damaged a ship at anchor. The cause of the collision in such a case may be an inevitable accident not arising from negligent navigation, but unless the defendants can prove this the law is clear, and they are liable for the damage caused by their ship. I advert to this point because, though the arguments addressed to the court to-day were in regard to the conduct of the *Annot Lyle*, there are expressions in the judgment of the learned judge which seem to indicate that the plaintiffs must prove that those on board the *Annot Lyle* were negligent, and that unless they do so the defendants are entitled to judgment. I do not think that this can have been the intention of the learned judge; but the expressions are somewhat unguarded in their from, and therefore it is desirable that the court should not allow any misapprehension to exist with regard to this point. The *Annot Lyle*, in order to discharge herself from liability, says that the collision occurred owing to her anchor dragging when she was endeavouring to come to anchor in the Downs. In the court below the learned judge put to the Trinity Masters this question, "Would an officer in the exercise of ordinary care and skill, under the circumstances, have brought his vessel to an anchor in the Downs?" Upon an answer to that question the Trinity Masters were not agreed, and the learned judge thereupon saying it was a matter upon which he did not feel competent to decide, expressed the opinion that he was not satisfied that it was negligent so to act, and that therefore he must dismiss the suit.

Now the facts were these. The *Annot Lyle* had endeavoured to come to an anchor under the lee at Dungeness some hours earlier in the afternoon. She there had to slip her anchor to avoid collision, because her anchor would not hold. She then made sail to the Downs with only one anchor available, because there had not been time between her leaving Dungeness and arriving at the Downs to prepare her other spare anchor for use. She had therefore dragged one anchor in the gale at Dungeness and lost it. The question is whether, under these circumstances, she was justified in anchoring in the Downs. It seems to me perfectly clear that a vessel about to come to anchor is entitled to consider her own safety, but she is not entitled to consider herself alone. She is bound to have regard to the safety of other vessels which are navigating or at anchor in her vicinity, and hence those on board her must act as reasonable men, as men of prudence and skill would act with due regard not only to the safety of their own vessel, but also to the safety of other vessels. There may no doubt be circumstances in which danger to the vessel would be so imminent and so great that she may be justified, for the purpose of saving herself from that danger, in so acting as to cause some risk—it may be a small risk, but still a risk—to another vessel. All that is a matter of degree. On the other hand, there are cases in which the other course is open to her, viz., to go where she will cause no danger to others, and be freed from danger herself. She is not justified, in order to do that which is more convenient to herself, to expose other vessels to serious risk. That I apprehend to be clear as regards the law. I will now deal with the facts. It is certain that the fact of the *Annot Lyle* anchoring with only one anchor, and ahead of another vessel, with a gale blowing, caused peril to the other vessel. The question is whether the circumstances were such as to justify her in so doing, and that depends very much upon the alternatives open to her. In view of these circumstances we have put this question to the nautical gentlemen who assist us: "Would an officer of ordinary care and skill, with due regard to the safety of his own ship and the safety of other ships anchored in the Downs, considering the fact that the anchor had been slipped at Dungeness, endeavour to anchor in the Downs?" Our assessors have answered that question in the negative. I entertain no sort of doubt that that is a correct and proper answer, looking at all the circumstances of the case. This vessel had other courses open to her, either of employing a tug, or going into the North Sea, or better still, into Margate Roads, which she might have done with safety to herself. Why was that course not taken? Not because it was thought safer to come to anchor in the Downs; not because it was thought that going to Margate Roads would have caused danger to the vessel. The master of the *Annot Lyle*, when asked, "Could you not have reached Margate Roads in safety?" answered "No, because I wanted to run into the Downs for the purpose of getting an anchor and chain." It had nothing to do with the safety of the ship, but he thought he would run the risk, inasmuch as it was more convenient that the *Annot Lyle* should there and then go on to the Margate Roads. If there had been no other vessel there he might have been justified in taking that course. But when there was the fact that there was another vessel in the vicinity, and he knew that if his anchor did not hold it would be disastrous to that other vessel, he was not justified in going there. If there is another course open to him he must take that course which the safety of other vessels demands rather than that course which is the more convenient to himself. Under these circumstances I think the judgment of the court below cannot stand, that it should be reversed, and that judgment should be given for the owners of the *Nenuphar*, the *Annot Lyle* being held alone to blame.

Lord Esher, M.R. and Fry, L.J. concurred.

Appeal allowed.

Wednesday, June 9.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

The defendants applied for a stay of execution pending an appeal by them to the House of Lords. No affidavits had been filed in support of the application. It appeared that the defendants had given bail to answer damages and interest.

Sir *Walter Phillimore*, for the defendants, in support of the application.—No injustice can be done to the plaintiffs by this application being granted. Sufficient bail has been given to answer

damages and interest, and hence if this appeal is unsuccessful the fruits of the litigation are secured to the plaintiffs. When the Privy Council was the appellate court from the Admiralty Court, execution was stayed as a matter of course pending an appeal. A similar application was granted by this very court in the case of *The Khedive* (41 L. T. Rep. N. S. 392; 4 Asp. Mar. Law Cas. 182; 5 P. Div. 1), and my clients are willing that the same terms should be imposed upon them as were imposed in that case.

Bucknill, Q.C., for the plaintiffs, referred to *Barker* v. *Lavery*, 14 Q. B. Div. 769.

Lord Esher, M.R.—In this case we are invited to lay down a general rule as to staying execution upon appeals in Admiralty cases from this court differing from that which is in force in regard to other cases. It was argued that we ought to do so because bail has been given by the defendants, and interest is payable on the amount of the damages. Although this may be so, yet the respondents would not receive either the principal or the interest until the appeal was heard and decided. I can see no sufficient reason why the successful party should be so kept out of his money. Sir Walter Phillimore argued that it was the practice of the Privy Council to stay execution in similar cases, and that we were only asked to do that which, under the old practice, was always done. We must, however, assume that that practice was known to the Legislature when they transferred Admiralty appeals to this court, and that they intended such appeals to be subject to the same rules of practice as exist in other cases in the High Court. There is an express rule (Order LVIII., rule 16), that an appeal shall not operate as a stay of execution unless the court appealed from shall otherwise order. This present application therefore in effect asks us to break that rule, although it is admitted that there are no special reasons for our so doing. If in any particular case there is danger of successful appellants not being repaid, that must be shown by affidavit, and may induce us to order a stay. But we should be departing from the Act of Parliament and acting directly contrary to the rule if we made a general practice of staying execution in Admiralty cases pending an appeal to the House of Lords.

Bowen, L.J.—I agree. The unsuccessful litigant is asking us to deprive the successful litigant of the fruits of his judgment pending the determination of a further appeal. There is no affidavit, and therefore no reason is alleged why, if the money is paid over, but the appeal be successful, the appellants will not get their money back. I can see no reason why in Admiralty cases we should make a practice of keeping a successful litigant out of his money and locking up funds because they are secured by a bail bond. We are asked to assume that it is a matter of small importance to a successful litigant to go without his money pending an appeal to the House of Lords. I do not assent to that suggestion. The rule laid down by this court in *Barker* v. *Lavery* (*ubi sup.*) applies to Admiralty cases as much as to any others, and I therefore think that this application must be dismissed.

Fry, L.J.—I also think that this application in the absence of special circumstances must be refused. The case of *The Khedive* (*ubi sup.*) has been pressed upon us, but that case is really not in point. The only question there was, whether the court had jurisdiction. The successful party did not oppose the application, so that really the order was made by consent.

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

Solicitors for the defendants, *T. Cooper* and *Co.*, agents for *Simpson* and *North*, Liverpool.

Nov. 3 *and* 5, 1886.

(Before Lord Esher, M.R., Lindley and Lopes, L.JJ.)

Dixon v. Farrer, Secretary of Board of Trade. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Change of venue—Trial at bar—Action against officer of State—Interest of Crown—Rule absolute on statement of Attorney-General—Unreasonable detention of ship by Secretary of Board of Trade—Merchant Shipping Act 1876, *s.* 10—*Crown Suits Act* 1865, *s.* 46—*R. S. C.* 1883, *Order XXXVI., r.* 9.

By the Crown Suits Act 1865, *s.* 46, *where, in any cause in which the Attorney-General is entitled, on behalf of the Crown, to demand as of right a trial at bar, he states to the court that he waives that right, "the court on the application of the Attorney-General shall change the venue to any county he may select." The Crown is entitled as of right to a trial at bar, in any cause in which it is interested, whether as a party or on behalf of any of its servants, or by reason of its interests being affected, and the Attorney-General, on behalf of the Crown, may obtain such trial at bar upon an ex parte application made by him to the court, he stating that the Crown is interested; and, in like manner, he is entitled to an order for a change of venue in any such case on a similar application; and in either case it is open to the other party to apply to set aside the order upon the ground that the Crown is not, in fact, interested, and that the court has been therein misinformed.*

In order that the Crown should be interested in the action, it is not necessary that such action should affect either the personal property of the Sovereign or the property of the Crown in its capacity of head of the State. When an action is brought against an official of one of the departments of State, in respect of damage occasioned to a private person by the unreasonable exercise of his power as such official, and the Crown undertakes the defence of such action, the interest of the Crown in such action is sufficient to entitle the Attorney-General to a trial at bar or a change of venue.

In an action under sect. 10 *of the Merchant Shipping Act* 1876, *against the Secretary of the Board of Trade, to recover damages for the detention of a ship without reasonable and probable cause, the Attorney-General is entitled, on behalf of the Crown, to demand as of right a trial at bar, and he is therefore also entitled, under the Crown Suits Act* 1865, *on stating to the court that he*

(a) Reported by A. H. Bittleston, Esq., Barrister-at-Law.

waives his right to a trial at bar, to change the venue to any county in which he elects to have the cause tried.

The Judicature Acts and Rules of Court have not the effect of abolishing trials at bar.

Judgment of Field and Wills, JJ. (*reported ante, p.* 30; 55 *L. T. Rep. N. S.* 438) *affirmed.*

This was an appeal from an order of a divisional court changing the venue in the action from Newcastle to London.

The action was brought by a shipowner against the Secretary of the Board of Trade, under 39 & 40 Vict. c. 80, s. 10, to recover damages for wrongfully, improperly, and without reasonable and probable cause detaining his ship for survey, while in harbour at North Shields. The plaintiff having laid the venue at Newcastle, the Attorney-General applied to the court to change the venue to London, under 28 & 29 Vict. c. 104, s. 46, subsect. 1, alleging that the Crown was interested in the action, and that he was therefore entitled as of right to a trial at bar, and that he waived that right. The Court made the order, and the plaintiff now appealed.

Sir *W. Phillimore* and *J. Aspinall* for the appellants.—It is conceded that, if this is an action in which the Attorney-General could of right demand a trial at bar, the order for a change of venue was rightly made. But the right of the Crown to a trial at bar is confined to cases where the King is a party, or the matter touches the right of the King: (see the authorities cited in Chitty's Archbold, 14th edit., p. 586.) *Rowe* v. *Brenton* (8 B. & C. 737; 3 Mann. & Ry. 133, 449) decided that a trial at bar might be granted in cases where the Crown was not actually a party to the suit, if the revenues of the Crown were affected. *Paddock* v. *Forrester* (1 M. & Gr. 583; 8 Dowl. Pr. Rep. 834) was very like the case of *Rowe* v. *Brenton*. It appeared on the record in that case that the property of the Crown was in question. [Lord Esher, M.R.—The present case is more like *Buron* v. *Denman*, 2 Ex. 167.] The Crown is not in any sense interested in this action. The Crown chooses to take up the defence of an action against one of its servants; that does not give the Crown an interest in the action. No case can be found in which the Attorney-General has intervened where the Crown was not a party, or the property of the Crown was not in question. Trials at bar were constantly granted at the instance of private persons, and the Attorney-General would sometimes be retained to make the application on behalf of such persons. In *Buron* v. *Denman*, for instance, the trial at bar may have been granted because it was an important case without any question as to the Crown's being interested. It appears from the *Times* report of that case that, at the close of it, the Attorney-General claimed the right of reply; the Court, however, doubted, and the Attorney-General withdrew his claim. By stat. Westm. 2, trials are to be at Nisi Prius, except in important cases. That statute did not bind the Crown, and therefore, where the Crown is a party, there is no right on the other side to a trial at Nisi Prius. There is also a further principle established by the cases, that where the Crown is interested, although not a party, there is no right to a trial at Nisi Prius. But it is submitted that the interest must be a property interest. Then it is further submitted that trials at bar are abolished by the Judicature Acts and Rules. By the Statute Law Revision and Civil Procedure Act 1881 (44 & 45 Vict. c. 59), s. 6, "The enactments relating to the making of rules of court, contained in the Supreme Court of Judicature Act 1875, and the Acts amending it, shall extend and apply to . . . all proceedings by or against the Crown." Order LXVIII. provides that nothing in the rules shall affect the procedure or practice in any of certain specified matters. Trials at bar are not within that order, and therefore the ordinary rules will apply to them. Then rule 9 of Order XXXVI. provides that "Every trial of any question or issue of fact with a jury shall be by a single judge, unless such trial be specially ordered to be by two or more judges." Under that rule there could be a trial before two judges at Newcastle, if so ordered. A trial before two judges, under that rule, is now substituted for a trial at bar. In *Langworthy* v. *Langworthy* (11 P. Div. 88) Cotton, L.J. says: "It would be a singular state of things if where an order from a judge is necessary he is to be held to have no discretion as to making it." The words "special order" import that it is an order to be made by the court after the consideration of the facts. [Lopes, L.J.—Rule 9 has no application whatever to trials at bar. There is no provision in the rules as to trials at bar.] Order XXXVI. was intended to comprehend all matters not excepted by Order LXVIII

Sir *Charles Russell*, Q.C. (Sir *Richard Webster*, A.-G., *R. S. Wright*, and *Danckwerts* with him) for the Crown. — There is nothing in the Rules of the Supreme Court which binds the Crown so as to take away the right to a trial at bar. Order LXXII., r. 2, preserves the right. The Attorney-General only asks that the court should accept his statement in the absence of any ground for not accepting it. It is *primâ facie* correct, and need not be supported by evidence; but it is not conclusive. There is a note by the reporter in 12 Jurist, p. 82, as to the case of *Buron* v. *Denman*: "I find on inquiry that the rule in *Buron* v. *Denman* was drawn up absolute in the first instance." That shows, therefore, that in *Buron* v. *Denman* the application for a trial at bar was made by the Attorney-General on behalf of the Crown. That case shows that there is a sufficient interest in the Crown, when an act has been done by a servant of the Crown, which the Crown chooses to adopt and justify. That is the case here. It is quite clear that, if damages are recovered in this action, a *fi. fa.* could not go against the private goods of the official of the Board of Trade, nor against the office furniture. The money would have to be voted by Parliament, and raised by taxation; but as, according to constitutional law, the Queen is the head of the Executive, and hers is the hand that receives the taxes, the damages will be paid by the Crown.

Sir *Walter Phillimore* in reply.

The following cases were referred to during the argument, in addition to those mentioned:

2 Inst. 424;
Brown v. *Lord Granville*, 1 Harr. & Woll. 270
Attorney-General v. *Constable*, 4 Ex. Div. 172
Lord Bellamont's case, 2 Salk. 625

Bradlaugh v. *Clarke*, 8 App. Cas. 354;
Rex v. *Hales*, 2 Stra. 816;
Rex v. *Jolliffe*, 4 T. Rep. 285.

Lord Esher, M.R.—In this case an action was brought against the Secretary of the Board of Trade under a statute which gives an action to a shipowner if his ship is detained unreasonably. The statute gives the Board of Trade the right to detain a ship for the purpose of ascertaining whether it is fit to go to sea, and, if it is found not to be fit, to forbid its going to sea until it has been made fit; but the statute, in order to protect the shipowner as far as was possible, gave him an action against the Secretary to the Board of Trade in his official capacity if he could show that in what they had done they had acted unreasonably. The plaintiff in this case has brought such an action, and laid the venue at Newcastle, as he had a perfect right to do. The Attorney-General, however, applied to the Divisional Court to change the venue, stating that the Crown was interested in the matter and that he appeared, instructed by the Crown, to defend the action. Upon that statement alone, an order was made to change the venue. It is urged that the Divisional Court was wrong to make the order upon those materials. On the other hand, it is urged by the Attorney-General that wherever an action is brought on the civil side of the court to which the Crown is a party, or in which the Crown is interested, the Attorney-General can come before the court and claim a change of venue, he having the right in such a case to claim a trial at bar. It is admitted on behalf of the plaintiff that, if the Attorney-General could have claimed a trial at bar in the present case, he is entitled to claim a change of venue. The question, therefore, comes to be, could the Attorney-General in the present case have claimed a trial at bar? It was at first asserted that, if the Attorney-General stated that the Crown was interested, the court was bound to make a rule for a trial at bar absolute in the first instance, and that that could not afterwards be in any way questioned. But it was afterwards suggested that, when the Attorney-General came forward, the court accepted his statement and made the rule absolute in the first instance, but that the other side might afterwards come before the court on this sole ground, namely, to show that the Attorney-General had been misinformed, and having been misinformed had misinformed the court, upon the question whether the Crown was interested, and, if they established that, then the court would set aside the rule. I think that this latter contention is right. Looking at the reports of the case of *Rowe* v. *Brenton* (8 B. & C. 737; 3 Mann. & R. 133, 449), I think that there was a discussion in that case as to whether the Attorney-General could obtain a rule absolute in the first instance for a trial at bar; and it was held that the court gave absolute credence to the Attorney-General and would make the rule absolute in the first instance, so recognising his right to have the order on his mere statement. Then Mr. Brougham endeavoured to set aside that rule; and he was certainly heard upon the question whether the Crown was interested. It turned out that upon his own affidavits the Crown was sufficiently interested; and, Mr. Brougham having failed to show that the Attorney-General was misinformed, the rule was maintained. That case is not strong to show that the court can set aside a rule absolute in the first instance obtained by the Attorney-General, because, as the affidavits showed that there was an interest in the Crown, it was not necessary to determine the point. But, in the case of *Paddock* v. *Forrester* (*ubi sup.*), we have the high authority of Tindal, C.J. as to what the law was on this point. In that case the Attorney-General prayed that a trial at bar might be had, and said that the rule was demanded as of right, and was not *nisi* in the first instance. Tindal, C.J. says: "No doubt you have a right to demand it on the part of the Crown, and it is for the plaintiff to show the court that it is misinformed upon the case, if that is the fact." And he then gives judgment as follows: "The Attorney-General has certified that the Crown is interested in the matter in dispute between these parties, and has stated that Her Majesty does not consent that any writ of *nisi prius* shall issue in this case. We are therefore bound to direct that the cause shall be tried at bar." And the rule was made absolute in the first instance. I think that that shows that where the Attorney-General comes into court and says the Crown is interested, he is entitled to a rule absolute in the first instance; but that the other side may afterwards appear to show that in fact the court was misinformed, and that the Crown is not interested. Unless they can show that, they fail; no further question can come before the court.

Then, what is an interest of the Crown? When is the Crown interested? It is obvious that the Crown is interested when its property is directly touched. But can the Crown be said to be interested, although neither the personal property of the Sovereign, nor the property of the Crown in its capacity as head of the State, is affected? On one side it is said that the Crown is not interested, except in one of those two cases; while on the other side it is said that the Crown is also interested in cases like the present, where one of its servants, an executive officer, is charged with maladministration, and that the Crown must be interested in the conduct of its servants? Is that interest within the rule or not? We have *Lord Bellamont's case* (*ubi sup.*) upon that point, which seems to make it clear that it is. The report of the case is short, and Sir Walter Phillimore was therefore enabled to make some fanciful suggestions with regard to it. Lord Bellamont was Governor of New York, and the act in respect of which he was sued must have been done by him in execution of his office. If that action had been successful he must have been liable to pay damages out of his own property. The Crown could not have any liability in respect of his acts. Therefore, in that case, neither the private property of the Sovereign, nor the property of the Crown in its capacity of head of the State, were affected. Nevertheless the claim of the Attorney-General, who was instructed by the Crown, to a trial at bar was allowed. That must have been because the Crown was interested in seeing whether its servants acted rightly or wrongly. That case is an authority, therefore, for the proposition that the Crown has a sufficient interest to enable the Attorney-General to come in and claim a trial at bar where the action is brought against one of its officers in respect of an official act. Then you have the case of *Buron* v.

Denman (ubi sup.). The passage which was read from the *Times'* report of that case shows that a rule absolute had been obtained by the Attorney-General for a trial at bar. That must have been on the ground that the Crown was interested. Probably the reason why no report is to be found of the application is, because, after the case of Lord Bellamont, it was obvious that there was a sufficient interest in the Crown. It is clear to my mind that in that case, as in Lord Bellamont's, neither the private property of the Sovereign nor the public funds were affected, and that the defendant alone was liable to pay damages; but Captain Denman, being an officer of the navy, had assumed to act for the Crown as its servant. On that ground, the Crown could ratify his act, and was interested in defending the action. It would be impossible for us, without departing from the practice of this court, to overrule those cases decided so long ago. They establish that, apart from the interest which arises where the Crown's right to property is in question, whenever an act is done by an officer of the Crown, on behalf of the Crown, the Crown has a sufficient interest to make the rule under consideration applicable. This action is against the defendant, as representing one of the great departments of the State, and is therefore within the rule. In those cases the trial would have been at Nisi Prius but for the right of the Crown to demand a trial at bar. It was a special order, therefore, that was made. So here a special order that the trial shall take place in London has been made. If the same interest of the Crown exists in this case as in those, unless the right of the Crown has been taken away by the Judicature Acts, that order must be affirmed. It seems to me that there can be no doubt in the present case but that the act in respect of which the defendant is sued was done by him as a servant of the Crown. He is a servant of one of the departments of State, he has done the act in question in his official capacity, and this case is therefore within the rule.

Then as to the point that the Judicature Acts have taken away the right to a trial at bar, those Acts have done away with the distinction that formerly existed between the three courts of common law, and have constituted one high court, and into that court have introduced divisional courts. Whatever was done by each of the three courts in banco is now done by divisional courts. That which was called a trial at bar was a trial before the court in banco. If divisional courts are substituted for courts in banco, it follows that a trial at bar is a trial before a divisional court here. It is to be tried according to the rules of court so far as they are applicable to a trial at bar. By Order XXXVI., r. 9, every trial of any question or issue of fact with a jury shall be by a single judge, unless such trial be specially ordered to be by two or more judges. By the combined effect of that rule and of sect. 26 of the Judicature Act 1873, a trial by jury before more than one judge can now be had in the country. A trial at bar is to be conducted in the way laid down in the rules as to other trials; but, by reason of its being a trial at bar, it must be tried before two judges sitting here. What is there in the Judicature Acts or the rules of court to take away the right to a trial at bar? There is nothing touching it. Then, if trials at bar are still in existence, and I can see nothing to take them away, where are they to be held? A trial "at bar" is in terms a trial here. A trial at Newcastle before two judges would not be a trial at bar. I am of opinion that this case is one in which the Atttorney-General has a right to a trial at bar. If so, he has a right to have the venue changed from Newcastle to London. The Divisional Court made an order to change the venue upon the statement of the Attorney General that the Crown was interested. If it could be shown that the Attorney-General was mistaken when he made that statement, the order would be set aside; but, in my opinion, the plaintiff in this case has failed to show it.

Lindley, L.J.—I am of the same opinion. This is an action brought by the owner of a ship for damage sustained by him by reason of its unreasonable detention by the Board of Trade, under one of the clauses of the Merchant Shipping Act 1876. The right of the Attorney-General to change the venue in the action rests upon sect. 46 of 28 & 29 Vict. c. 104, which is as follows: "Where a cause in which Her Majesty's Attorney-General, on behalf of the Crown, is entitled to demand as of right a trial at bar is at any time depending in any of Her Majesty's Superior Courts of law at Westminster, whether instituted before or instituted after the commencement of this Act, and the Attorney-General states to the court that he waives his right to a trial at bar, the following provision shall have effect: The court, on the application of the Attorney-General, shall change the venue to any county in which the Attorney-General elects to have the cause tried." Under that section the Attorney-General went before the Divisional Court and asked that the venue in this action should be changed from Newcastle to London. Whether he is entitled to this change of venue depends upon whether this is "a cause in which Her Majesty's Attorney.General, on behalf of the Crown, is entitled to demand as of right a trial at bar." It has been suggested by Sir Walter Phillimore that such an action as this, not being possible till 1876, it could not be within the words I have quoted from the Act of 1865. But I should construe those words as meaning causes in which the Attorney-General is entitled at the time of his application to demand a trial at bar; not causes in which he is entitled at the time of the passing of this Act to demand a trial at bar. I think, therefore, that the Attorney-General was right in saying that, if he was entitled to a trial at bar, he was entitled to a change of venue.

Then there was a point taken by Mr. Aspinall, that the right to a trial at bar was taken away by the Judicature Acts. There is nothing in the Judicature Acts or Rules of Court about trials at bar, or of depriving the Crown of the right thereto. The Rules of Court merely deal with procedure. It would be a very strong thing to say that, by reason of those rules, the right to a trial at bar had disappeared without having been mentioned. There is nothing in the rules to prevent the court making an order for a trial at bar, when asked to do so. On the contrary, there is something that warrants it. I refer to Order LXXII., r. 2, which preserves the old practice where no other pro-

vision is made by the Acts or rules. It is said that Order XXXVI., r. 9, has introduced a different practice. But that only says, "Every trial of any question or issue of fact with a jury shall be by a single judge, unless such trial be specially ordered to be by two or more judges." Although under that rule a trial before two judges may be ordered either in the country or here, a trial at bar, which can only take place here, may also be claimed in cases in which it could have been before that rule, and I do not see any difficulty in holding that trials at bar are not abolished. Trials at bar, therefore, are not abolished by the Judicature Acts or rules. So far the case is clear.

Then the next question, and the substantial question, is, Is this a case in which the Attorney-General is entitled to a trial at bar? That depends upon whether the Crown is interested in the action. That inquiry naturally resolves itself into two branches—the first being whether it is sufficient for the Attorney-General to state that the Crown is interested; the second being what is an interest of the Crown within the meaning of the rule. The cases of *Rowe* v. *Brenton* (*ubi sup.*) and *Paddock* v. *Forrester* (*ubi sup.*) show that the court does give credence to the mere statement of the Attorney-General, and acts upon that statement alone, though it is still open to the other side to show the court that he is misinformed and that the Crown is not interested. In the present case the plaintiff does not rely upon any affidavit with regard to this point, but contends that the nature of the action shows that the Crown has no sufficient interest. The material fact of the case as to this point is, that a nominal defendant is being sued, as representing one of the departments of State, and it is agreed on all hands that, if a verdict goes against him, the money to satisfy the verdict must be got from Parliament, and that that money must be granted to the Crown. That seems to me to be a much simpler case than either that of Lord Bellamont or of Captain Denman. Upon the statement of that fact, it seems to me plain that the Crown has an interest in the action. The Crown is interested to this extent, at all events, that it is entitled to defend the action, and to claim a trial at bar or a change of venue.

Lopes, L.J.—In this case the Attorney-General claims to have the venue changed from Newcastle to London, under sect. 46 of the Crown Suits Act 1865. Now, if this is a case in which the Attorney-General would be entitled to claim a trial at bar, it is perfectly clear that, under that section, he is entitled to have the venue changed. That raises two questions, both important. First, is this a case in which the Attorney-General is entitled to demand a trial at bar? Secondly, is he so entitled on his mere statement without going into evidence? The first question depends upon whether the Crown is interested in the action. As to that it is only necessary to refer to two facts in the case. First, that, in doing the acts in respect of which he is sued, the defendant was acting as an officer of the Crown. Secondly, that any damages that are awarded to the plaintiff in respect of those acts must come, not out of the defendant's pocket, but out of the public purse. It was contended by Sir Walter Phillimore that the Attorney-General could only intervene in this manner when the property of the Crown was touched. Two cases answer that contention, viz., *Lord Bellamont's case* (*ubi sup.*) and *Buron* v. *Denman* (*ubi sup.*). Sir Walter Phillimore suggested that the trials at bar in those cases took place, on account of their general importance, without reference to any interest of the Crown. But it seems to be beyond doubt that in both cases the rule was made absolute in the first instance. It is therefore clear that it was obtained by the Attorney-General on behalf of the Crown because the Crown was interested. The procedure would not have been such as it was unless that had been the case. The defendant in this case is a responsible officer in a department of Government; and, on grounds of convenience, apart from the question of prerogative, I should myself think it much better that the trial of this action should be moved to London.

As to the other question, whether the Attorney-General is entitled to the order on his mere statement, there was at first some doubt as to the practice, but it seems now to be clear. It appears that the Attorney-General is entitled on his mere statement to have the rule made absolute in the first instance; but that the other party to the action can get the rule set aside by showing that the interest of the Crown is insufficient, or that the statement of the Attorney-General was incorrect. That that is the practice is established by the two cases of *Rowe* v. *Brenton* (*ubi sup.*) and *Paddock* v. *Forrester* (*ubi sup.*). Then there is one other point that has been raised, which is, that the Judicature Acts and Rules of Court have abolished trials at bar. By Order XXXVI., r. 9, "Every trial of any question or issue of fact with a jury shall be by a single judge, unless such trial be specially ordered to be by two or more judges." I quite agree with everything that has been said by the Master of the Rolls as to that rule. I think that it had no reference to trials at bar; that they remain exactly where they were before the rule was passed. I think that it gives power to order a trial by jury before more than one judge in the country. But, although a trial at bar is a trial by jury before more than one judge, it is a special description of such trial, and is necessarily always to be at London.

Appeal dismissed with costs.

Solicitors for the plaintiff, *Botterell* and *Roche.*

Solicitor for the defendant, *The Solicitor to the Board of Trade.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, Feb. 16, 1886.

(Before Sir JAMES HANNEN and BUTT, J.)

THE IDA. (*a*)

Shipping casualty—Rehearing and appeal—Board of Trade—Shipping Casualties Investigations Act (42 *&* 43 *Vict. c.* 72) 1879.

By the provisions of the Shipping Casualties Investigations Act 1879 *no right of appeal is given from the refusal of the Board of Trade to order a rehearing of an investigation into the conduct of a certificated officer.*

THIS was an appeal from the refusal of the Board of Trade to order a rehearing of an investigation into the stranding of the Steamship *Ida*, on the 15th Sept. 1885.

The investigation was held at North Shields, the 21st and 23rd Nov. 1885, before two justices, assisted by nautical assessors, and a decision was given therein, holding John Steel, the master of the *Ida*, in default, and suspending his certificate for six months.

The master having subsequently discovered what he alleged was new and important evidence which could not be produced at the investigation, laid the same before the Board of Trade on the 24th Dec. 1885, and applied for a rehearing of the case under sect. 2, sub-sect. 1, of the Shipping Casualties Investigation Act 1879.

On the 11th Jan. 1886 the Board of Trade wrote to the master's solicitors refusing to grant a rehearing.

From this refusal the master now appealed.

The material provisions of the Shipping Casualties Investigations Act (42 & 43 Vict. c. 72) 1879 are as follows:

Sect. 2, sub-sect. 1. Where an investigation into the conduct of a master, mate, or engineer, or into a shipping casualty, has been held under the Merchant Shipping Act 1854, or any Act amending the same, or under any provision for holding such investigations in a British possession, the Board of Trade may, in any case, and shall, if new and important evidence, which could not be produced at the investigation has been discovered, or if for any other reason there has, in their opinion, been ground for suspecting a miscarriage of justice, order that the case be reheard, either generally or as to any part thereof, and either by the court or authority by whom it was heard in the first instance, or by the Wreck Commissioner, or in England or Ireland by a judge of Her Majesty's High Court of Justice exercising jurisdiction in Admiralty cases, or in Scotland by the Senior Lord Ordinary, or any other judge in the Court of Session whom the Lord President of that court may appoint for the purpose, and the case shall be so reheard accordingly.

Sub-sect. 2. Where, in any such investigation, a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or engineer, and an application for a rehearing under this section has not been made or has been refused, an appeal shall lie from the decision to the following courts; namely,

(*a*) If the decision is given in England or by a naval court, the Probate, Divorce, and Admiralty Division of Her Majesty's High Court of Justice.

(*b*) If the decision is given in Scotland, either division of the Court of Session.

(*c*) If the decision is given in Ireland, the High Court of Admiralty, or the judge or division of Her Majesty's High Court of Justice exercising jurisdiction in Admiralty cases.

Sub-sect. 3. Any rehearing or appeal under this section shall be subject to and conducted in accordance with such conditions and regulations as may from time to time be prescribad by general rules made under sect. 30 of the Merchant Shipping Act 1876.

The Shipping Casualties (Appeal and Rehearing) Rules 1880:

Rule vi. Every appeal under sect. 2 of the Shipping Casualties Investigations Act 1879 shall be subject to the conditions and regulations following, namely:

(*a*) The appellant shall, within seven days after the day on which the decision appealed against is pronounced, serve on such of the other parties to the proceedings as he may consider to be directly affected by the appeal, notice of his intention to appeal, and shall also, within two days after the appeal is set down, serve on the said parties notice of the general grounds of the appeal.

Myburgh, Q.C. for the master.—It is submitted that the word "decision" covers not only the decision of the tribunal holding the inquiry, but also the determination of the Board of Trade to grant or refuse a rehearing. If an appeal is given from the decision of the court, *a fortiori* is it given from the Board of Trade. Unless this is so, the sole judge of what is "new and important evidence" is the Board of Trade, who have the conduct of the inquiry and are therefore somewhat in the position of prosecutors. Should the Board of Trade official whose business it is to determine what is "new and important evidence," come to a wrong conclusion, in the absence of an appeal great injustice may be done and the party aggrieved will have no redress. There is also this difficulty, that, should the decision of the Board of Trade be not given until seven days after the inquiry, the appellant is out of time for appealing. [BUTT, J.—I think the language of sub-sect. 2 avoids that difficulty. I should say that the time for appealing runs from the refusal of the Board of Trade to order a rehearing.] The words of rule vi of the Shipping Casualties (Appeal and Rehearing) Rules 1880 are precise, and say that notice of appeal shall be given "within seven days after the day on which the decision appealed against is pro- nounced."

Danckwertz, for the Board of Trade, *contra.*—This case is governed by the previous decision of this court in *The Golden Sea* (5 Asp. Mar. Law Cas. 23; 7 P. Div. 194; 47 L. T. Rep. N. S. 579), where it was said 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." [Sir JAMES HANNEN.—That was in giving judgment on quite a different point from the present. The only question there was whether an owner had a right of appeal.] From the very language of sub-sect. 2, it is obvious that a marked distinction is drawn between a decision with respect to the cancelling of the certificate of a master, mate, or engineer, and a decision on an application for a rehearing. [He was stopped by the Court.]

Sir JAMES HANNEN.—I think this is a clear case. I abstain from saying unfortunately, because that would imply that I had formed an opinion on the ground of the Board of Trade's refusal; I have no right to do that, for I do not know what their grounds are. By the 2nd section of the Act, provided for the rehearing of these

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

investigations, "the Board of Trade may, in any case"—that is plainly discretionary—"and shall"—that is obligatory—"if new and important evidence which could not be procured at the investigation has been discovered, or if for any other reason there has, in their opinion, been ground for suspecting a miscarriage of justice, order that the case be reheard." I am of opinion that that imposes a duty on the Board of Trade, if new and important evidence has been discovered, to grant a rehearing; and if the facts be such as the tribunal that has cognisance of such matters should consider establish a case for further investigation, on the ground that new and important evidence has been discovered, the Board of Trade may be compelled by *mandamus* to grant a rehearing. However, we have simply to deal with the provisions of the Act as to a rehearing. What the Board of Trade has power to do is to order that the case be reheard, which has previously been described as an "investigation into the conduct of a master, mate, or engineer." Then the 2nd sub-section says, "Where, in any such investigation"—that means such an investigation as has been before referred to as dealing with the cancellation of certificate—"a decision has been given . . . . an appeal shall lie from the decision." The word "decision," there must of necessity mean a decision in the investigation, and cannot be interpreted to mean the decision of the Board of Trade not to grant a rehearing. The concluding words of the sub-section make this clearer, if, indeed, it can be made clearer. I allude to the condition which is imposed on the appeal. It is in these words: If "an application for a rehearing under this section has not been made or has been refused, an appeal shall lie from the decision." So that a careful distinction is made between the decision in the investigation and the decision of the Board of Trade to grant or refuse a rehearing. It appears that there have been some rules made which require that the appellant shall, within seven days after the decision appealed against, serve notice on the parties concerned. On that a difficulty has been suggested as to the interpretation of the section. That question, however, is not now before us and I do not wish to prejudge it. It certainly does seem a hardship that, assuming new and important evidence has been discovered, the person aggrieved should be precluded from appealing by reason of the refusal of the Board of Trade to order a rehearing being given after the seven days have elapsed. Of course that is only an argument *ad convenientem*, and it ought perhaps not to prevail. I do not now express or intimate any sort of opinion on that question. It is sufficient to say that the present application must fail and is therefore dismissed with costs.

BUTT, J.—I am entirely of the same opinion. It seems to be quite clear that, on considering this section, there is no appeal given to this division against the refusal of the Board of Trade to grant a rehearing. What the effect of the words giving an appeal from the decision may be, it is unnecessary to inquire into, but it certainly is a decision other than the refusal of the Board of Trade.

Appeal dismissed with costs.

Solicitors for the appellant, *Botterell* and *Roche*.

Solicitor for the Board of Trade, *Murton*.

Monday, July 26, 1886.

(Before the Right Hon. Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE AUGUSTA. (*a*)

Collision—Compulsory pilotage—Duties of pilot—Pilotage regulations for the river Seine—Port of Havre.

Although the employment of a pilot by a vessel entering the port of Havre is by French law compulsory, such pilot does not as of right as is the case in England supersede the master and take charge of the ship, but according to French decisions the master remains in charge, the pilot being merely his adviser. Hence, though the master may allow such pilot to take charge in fact, the owners are not exempted from liability for damage done to another ship by the negligence of the pilot.

THIS was a collision action *in rem* instituted by the owners of the British steamship *Chilian* and her cargo, against the owners of the steamship *Augusta*, to recover compensation for damages occasioned by a collision between the two vessels.

The collision occurred about 1.10 p.m. on Jan. 12, 1886, in the Bassin de l'Eure, at Havre.

The facts alleged on behalf of the plaintiffs were as follows: On Jan. 12, 1886, the *Chilian*, a steamship of 1415 tons net, was lying properly moored to the quay in the Bassin de l'Eure, at Havre. About 1.5 p.m. the British steamship *Augusta* was observed about one hundred yards distant, and bearing about two points on the starboard quarter. She was approaching in such a manner as to render a collision imminent and with her anchor in a dangerous position, and although those on board the *Chilian* did everything in their power to save the blow by placing fenders between the two ships, the *Augusta* coming on struck the *Chilian* on the starboard quarter abaft the mizzen rigging, with the bluff of her port bow and anchor, thereby doing her great damage.

The defendants alleged that on Aug. 12, 1886, the *Augusta* was entering the Bassin de l'Eure in charge of a duly qualified pilot for that place, and was under his orders and control going to make fast alongside the *Chilian*, when she came into collision with the *Chilian*. The defendants denied that the collision was caused by their negligence, and alleged that by the laws of France in force at the time and place of the said collision, the *Augusta* was by compulsion thereof in charge of a duly qualified pilot, and that such pilot was not their servant, and that the collision was solely caused by his negligence, and not in any way caused or contributed to by the master or crew of the *Augusta*. The defendants at the trial alleged that when the *Chilian* was first seen they were proceeding to a berth in the dock going about two knots an hour; that at this time the *Chilian* was about 250 yards distant on their port bow, and that their engines were at once stopped and reversed full speed. The pilot alleged that the cause of the collision was the failure of the *Augusta* to answer her port helm. He also alleged that all his orders were obeyed with the exception of the order to let go the anchor. He further stated that the anchor was in an improper place, and that it could not be

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

moved because there was something wrong with the stopper. This was denied by the defendants, who asserted that it could have been placed anywhere the pilot wished if he had given an order to have its position altered, which he did not do. It appeared that the pilot and master were on the bridge of the *Augusta* together, and that the master transmitted the orders of the pilot to the crew.

Evidence was given by one French advocate on each side as to the French law of compulsory pilotage, and it was agreed that judgment should be given on the facts first, and that the argument as to the effect of the French law should be reserved for a future date. The evidence of the French advocates will be found set out below.

Bucknill, Q.C., *Raikes*, and *Beard* for the plaintiffs.

Sir *Walter Phillimore* and *J. P. Aspinall* for the defendants.

Sir JAMES HANNEN (the President).—For the purposes of to-day I shall confine myself to the facts, and deal with the case as if this collision had taken place in an English port where the taking of a pilot was necessary, and I shall reserve the question of French law for argument. In dealing with the question of fact, it appears to me that it must be taken as a starting point that the pilot admits that all his orders were obeyed, with the exception of the order to let go the anchor. From the damage done it is obvious that these vessels came together in a manner which was not intended, and which was improper. How did that arise? The pilot says it arises from the circumstance that whereas his orders were all obeyed, yet to his surprise the vessel did not answer her helm, and so when he gave the order to port for the purpose of bringing the *Augusta* up in a line with the *Chilian*, she did not go off to starboard as he expected, and so the collision was occasioned. On this point I have consulted the Trinity Masters, and they and I concur in thinking that the cause of the collision was that she was coming at such a speed as made it necessary for the vessel's helm to have been put to port earlier than it was, and also that her engines ought to have been stopped and reversed earlier than they were. I must say that I and the Trinity Masters agree in thinking that there was very great exaggeration in the evidence as to the speed of this vessel. I think it pretty clear that the captain at the time considered that his vessel was coming in at too great a rate of speed, because the pilot admits that an observation to that effect was made by the captain to him, but he says that at the moment he had already lessened the speed of the vessel, and that he thought he had done it sufficiently soon, in which, however, he turned out to be mistaken. The view therefore which is taken by the Trinity Brethren of the cause of the accident, and in which I entirely concur, is that the vessel was being navigated by the pilot in such a way that the steps which he took to prevent a collision were taken too late to prevent a collision.

There then remains the question as to the anchor. The collision, which arose from the mistaken navigation of the pilot, would not have caused the mischief which happened if the anchor had not been in the position in which it was. The question therefore arises whether it was in such an improper place that it must have been manifest to the captain so as to make it his duty not to proceed into the port with the anchor in that position. With regard to its position, I am advised that in ordinary circumstances there is nothing improper in that position, but whether it would be right to go into dock with the anchor in that position is another question. But it appears to me to be plain that the pilot was perfectly aware of where this anchor was. There is absolutely no evidence that there was anything to have prevented the anchor being in some other place if the pilot had insisted upon it. His statement as to there being something wrong with the stopper is unintelligible to us. The case amounts to this, that the anchor being in that position, and it being brought to the notice of the pilot that it was so, he did not object to it. If it really was in such a position as to make it unsafe for him to proceed, or if it had been contrary to the regulations of the port that it should have been so placed, of course his duty was to say, "I cannot take this vessel in with the anchor in this position." But it being known to him in what position it was, and he electing to go on in that position, he takes upon himself the responsibility, and it is not negligence on the part of the captain to say that that which satisfied the pilot in that respect was plainly wrong, and that he would not go into the port with the anchor so placed. The truth of the matter is, that nobody contemplated, and under ordinary circumstances no injury could have arisen from the anchor being where it was. It was only in consequence of the pilot's wrongful navigation that it became of importance to consider the position of the anchor. That leaves the remaining question of whether or not the pilot gave the order to let go the anchor, and whether it was obeyed. It is a question of fact, but it is one which I have not decided without first asking the Trinity Brethren what their view of the probabilities of the case is, and the result is that we all agree that the order to let go the anchor was not given by the pilot. No reason can be suggested why if the order had been given it should not have been obeyed. I therefore come to the conclusion that the injury which was caused arose from the negligence of the pilot, and that no case has been made against the master and crew of the *Augusta*.

June 4.—The case now came on for argument as to the effect of the French law. The evidence of the French advocates before referred to was in substance as follows:

Charles Lecouflet, a French advocate, practising at Havre, gave the following evidence on behalf of the defendants:

The pilotage regulations material to the present case are contained in articles 34 and 35 of the Decree of 1806, and in article 216 of the Decree of 1854. Articles 34 and 35 make it obligatory upon vessels entering the port of Havre to take a pilot. Under the provisions of article 34 the master is bound to pay for a pilot even if he refuses to take one, and in that case he, the master, is responsible for any accident that may happen. The Regulations of 1854 modify those of 1806. Article 216 of the Regulations of 1854 makes it obligatory upon the master to take the first pilot that presents himself. In these circumstances the French tribunals have held pilotage to be compulsory. In France the pilot takes command of the navigation of the ship and gives orders, and is not merely the adviser of the captain. A pilot at Havre taking charge of a ship out-

side the harbour is bound to take her in and moor her at the quay in the dock; his duty does not end until then: (art. 244 of 1854.)

In cross-examination he admitted that, while the French law as contained in the codes or statutes contained no express provision as to the liability of the captain when a pilot is compulsorily on board, yet, according to the modern French decisions, the master in his representative capacity, *i.e.*, as the agent of the owners, is liable for damage occasioned by the negligent navigation of the ship, even though such negligence is that of the pilot alone; but he pointed out that the present decisions on this subject were in conflict with the earlier decisions of the French tribunals, which had held that the pilot being in charge compulsorily the owners were not responsible for his negligence.

Edouard Clunet, a French advocate practising in Paris, gave the following evidence on behalf of the plaintiffs:

There is no express statutory provision defining the responsibilities of the owners and master when a pilot is compulsorily on board. According to the existing French decisions the presence of a compulsory pilot does not free the owner from liability for damage occasioned by the negligence of the pilot. The pilot is merely the adviser of the captain, and does not superintend the navigation of the ship. If a pilot is compulsorily on board, and damage is done by his negligence, the captain is liable in his representative capacity, but not in his personal capacity. A captain would be liable personally for any damage done by his ship through the negligence of himself or his crew if he had the choosing of them, but would not be personally liable for damage brought about by following the wrong orders or advice of a pilot.

In support of their evidence the advocates referred to the following French treatises and decisions therein contained:

Traité de Droit Commercial Maritime, par M. Desjadins, 1886, art. 1113;
Cours de Droit Maritime, par M. Cresp, 1876, p. 588;
Recueil de Jurisprudence Commercial, par M. Gueraud, pp. 288, 289;
Précis de Droit Commercial, par M. Caen et M. Renault, art. 1823;
Dictionnaire Universal Maritime, par M. A. Caumont.

The following decrees of the French Government containing pilotage regulations were referred to, and are material to the decision:

Décret du 12 *Décembre* 1806, *contenant Reglement sur le Service du Pilotage.*

Art. 34. Tout bâtiment entrant ou sortant d'un port, devant avoir un pilote, si un capitaine refusait d'en prendre un, il serait tenu de le payer comme s'il s'en etait servi. Dans ce cas, il demeurera responsable des événements; et s'il perd le bâtiment, sera jugé suivant l'article 31 du présent réglement. Sont exceptés de l'obligation de prendre un pilote: les maîtres au grand et petit cabotage, commandant des bâtiments français au-dessous de quarte-vingts toneaux, lorsqu'il font habituellement la navigation de port en port et qu'ils pratiquent l'embouchure des rivières. Mais les propriétaires des navires chargeurs ou tous autres intéressés, pouvront contrainde les capitaines, maîtres, ou patrons à prendre des pilotes, et ils auront la faculté de les poursuivre devant les tribunaux, en cas d'avaries, échouements, et naufrages occasionnés par le refus de prendre un pilote.

Art. 35. Il est expressément défendu aux pilotes de quitter les navires qu'ils conduiront, avant qu'ils soient ancrés dans les rades ou amarrés dans les ports, ainsi que d'abandonner ceux qu'ils sortiront avant qu'ils soient en pleine mer, au-delà des dangers, à peine de la perte de leurs salaires, de trente francs d'amende, d'interdiction pendant quinze jours et de plus fortes punitions s'il y a lieu. Il est defendu aux capitaines de retenir les pilotes au-delà du passage des dangers, et aux pilotes de monter à bord contre le gré des capitaines.

Décret du 29 *Août* 1854.—*Pilotage de le Seine.*

Art. 216. Tout autre bâtiment destiné pour le Havre ou Honfleur, ou qui étant destiné pour la Seine, doit relâcher dans l'un de ces deux ports, est tenu de recevoir le pilote do l'exterieur qui se presente le premier, sans pouvoir le refuser sous prétexte d'un trop grand éloignement; toutefois, les pilotes du Havre ne peuvent monter les navires destinés pour Honfleur, et reciproquement, ceux de ce dernier port ne peuvent être reçus à bord des navires destinés pour le Havre que dans le cas où il n'y aurait pas en vue un pilote du lieu de destination se dirigeant sur le bâtiment.

Art. 244. Les pilotes ne peuvent exiger aucun salaire pour le passage du port dans l'un des bassins, ou de l'un des bassins dans le port, à la meme marée d'entrée ou de sortie. Tout pilote requis pour passer un navire d'un bassin dans un autre reçoit 3 francs.

Sir *Walter Phillimore* and *J. P. Aspinall* for the defendants.—The responsibility of the defendants must depend either upon the liability of the *res* for damage done by the *res*, or upon the agency of the persons whose negligence causes the damage. It is submitted that in law the defendants are liable upon neither of these grounds. According to *The Halley* (18 L. T. Rep. N. S. 879; L. Rep. 2 P. C. 193; 3 Mar. Law Cas. O. S. 131), a shipowner is not responsible for a person not his servant notwithstanding foreign law if that law forces such person as servant upon him. Having to pay pilotage is by English law a test of compulsion, and therefore in the present case the pilot was compulsorily on board:

The Maria, 1 W. Rob. 95;
The City of Cambridge, 30 L. T. Rep. N. S. 439; L. Rep. 5 P. C. 451; 2 Asp. Mar. Law Cas. 239.

The defendants had no opportunity given of selecting any particular pilot. According to art. 216 of the Regulations of 1854 the master was bound to take the first pilot that presented himself. The restricted power of selecting out of a particular class does not make the pilotage less compulsory:

The Batavier, 2 W. Rob. 407;
The Hibernian, 27 L. T. Rep. N. S. 725; L. Rep. 4 P. C. 511; 1 Asp. Mar. Law Cas. 491.

The pilot in giving evidence spoke of giving orders, and of his orders being obeyed. M. Lecouflet also alleged that the pilot gives the orders as to the navigation of the ship. If so, it would seem that the pilot does in fact supersede the authority of the master, and superintends the navigation of the ship. According to French law, if a pilot is on board the master is not personally responsible for damage occasioned by the negligence of the pilot. Therefore the pilot is not the servant of the master, and is therefore on board and in charge in an independent capacity. For the plaintiffs to succeed they must make out that there was negligence on the part of the defendants' servants. But there was no negligence in letting the pilot take charge, and also no negligence in obeying his orders. Even assuming the pilot to have been only an adviser, the master was entitled to look upon him as a competent adviser, and therefore there was no negligence in the master in allowing his vessel to be navigated under his advice. In other words, the pilot was to be looked upon as a living chart. If a master is led into an error which occasions damage owing to a mistake in his chart, he is not responsible for the fault in the chart, and there-

ore his owners are not liable for the damage. As the owners are liable only through the act of an agent, and the master is not liable if a pilot is on board, it must necessarily follow that the defendants cannot be liable for the present damage, because the master who was transmitting the orders of the pilot to the crew is relieved of liability, and consequently there is no one through whom the defendants can be made liable.

Bucknill, Q.C., *F. W. Raikes*, and *Lewis Beard* for the plaintiffs.—Even assuming the pilotage to have been compulsory in the English sense, the master ought to have interfered, and not allowed the pilot to navigate the ship as he did. It is, however, submitted that the master was in fact solely responsible for the navigation of the ship. The pilotage no doubt was compulsory in the sense that the master was compelled to take a pilot on board, but the pilot was only to act as his adviser, and not to supersede his authority. The evidence of the French advocates is, that the pilot is only an aid, and nothing more. This question must be decided according to the French decisions, and according to those decisions the presence of a pilot, although compulsorily on board does not free the shipowner from responsibility for damage occasioned by the negligent navigation of his ship, and therefore, on the authority of *The Guy Mannering* (4 Asp. Mar. Law Cas. 553; 7 P. Div. 132), the defence of compulsory pilotage is bad. If this be so, the captain was wrong in giving up the charge of the ship to the pilot, and therefore the owners are liable for his negligence. It is also to be noticed that art. 216 places no limit as to the place where a pilot is to be taken, and therefore, if the defendants' contention is right, the moment a pilot is on board, even if it be many miles from the port, the owners are relieved from liability.

Aspinall in reply.—No Legislature can make enactments applicable to places outside its territorial jurisdiction, *i.e.*, three miles, and therefore the extent of the pilotage district is necessarily restricted. Moreover the decrees themselves specify the limits of the various pilotage stations.

Cur. adv. vult.

July 26.—Sir JAMES HANNEN.—This was an action by the owners of the steamship *Chilian* and her cargo against the steamship *Augusta*, for damage sustained by a collision between the two vessels in the Bassin de l'Eure, at Havre, on the 12th Jan. 1886. The *Chilian* was lying moored to the quay at the time of the collision, and the *Augusta* entered the basin and was proceeding to make fast to the *Chilian*, and in so doing caused the injuries complained of. I came to the conclusion that the *Chilian* was in no way to blame, and that the collision arose entirely from negligence on the part of those navigating the *Augusta*. The defendants, however, pleaded that, by the laws of France in force at the time of the collision the *Augusta* was by compulsion thereof in charge of a duly qualified pilot, and that such pilot was not the servant of the defendants, and that the collision was solely caused by the negligence of the said pilot, and was not in any way caused or contributed to by the master or crew of the *Augusta*. I was of opinion upon the facts that, if the collision had occurred in English waters where pilotage was compulsory, the *Augusta* would not be responsible, inasmuch as the collision arose solely from following the directions of the pilot, and without contributory negligence on the part of her master and crew.

The leading authority on this subject is that of *The Halley* (*ubi sup.*). In that case the collision was between a Norwegian barque and a British steamer in Belgian waters, and it was pleaded that the vessel was in charge of a pilot whom the master was compelled by the Belgian law to employ. The Privy Council, overruling the decision of Sir Robert Phillimore, held that this plea disclosed no defence. The principle upon which the decision of the Privy Council was based will appear from the following passages in the judgment: "Their Lordships agree with the learned judge in his statement of the common law of England with respect to the liability of the owner of a vessel for injuries occasioned by the unskilful navigation of his vessel while under the control of a pilot whom the owner was compelled to take on board, and in whose selection he had no voice; and that this law holds that the responsibility of the owner for the acts of his servant is founded upon the presumption that the owner chooses his servant and gives him orders which he is bound to obey, and that the acts of the servant, so far as the interests of third persons are concerned, must always be considered as the acts of the owner. Assuming, as for the purposes of this appeal their Lordships are bound to assume, the truth of the facts stated on the pleadings, and applying the principles of the common law and the statute law of England to those facts, it appears that the tort for which damages are sought to be recovered in this cause was a tort occasioned solely by the negligence or unskilfulness of a person who was in no sense the servant of the appellants, a person whom they were compelled to receive on board their ship, in whose selection they had no voice, whom they had no power to remove or displace, and who so far from being bound to receive or obey their orders was entitled to supersede, and had in fact at the time of the collision superseded, the authority of the master appointed by them; and their Lordships think that the maxim, *Qui facit per alium facit per se*, cannot by the law of England be applied as against the appellants to an injury occasioned under such circumstances; and that the tort upon which this cause is founded is one which would not be recognised by the law of England as creating any liability in or cause of action against the appellants. It follows therefore that the liability of the appellants and the right of the respondents to recover damages from them as the owners of the *Halley*, if such liability or right exists in the present case, must be the creature of the Belgian law; and the question is whether an English court of justice is bound to apply and enforce that law in a case when, according to its own principles, no wrong has been committed by the defendants and no right of action against them exists." And their Lordships arrived at the conclusion that "it is alike contrary to principle and to authority to hold that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which according to its own principles imposes no liability on the person from whom the damages are claimed." This case is a

binding authority upon me unless it can be shown that the facts of the present case are essentially different. The plaintiffs seek to show that they are different in this respect, that it was in that case assumed that the pilot was in charge of the vessel in fault, whereas they claim to have proved by their evidence in this case that the pilot was not by the law of France in charge of the vessel, but was solely the adviser of the captain, and assuming this to be proved, the case of *The Guy Mannering* (*ubi sup.*), in the Court of Appeal, is an authority that the owner is not exempt from liability for damage arising from the negligence of a pilot though compulsorily taken on board. It is with great diffidence that I venture to express an opinion upon a question upon which French jurists do not appear to be altogether agreed; but it is my duty to form the best judgment I can with the assistance of the learned advocates who have given evidence before me. It appears to me that M. Clunet's evidence states the law in the most coherent manner, and is best supported by the authorities which have been referred to. His evidence amounts to this, that the French law has no express provision on the subject of the liability of the captain when a pilot is on board, but that the recognised principle is, that the captain is liable in his representative capacity (that is, as representing the ship and owners), notwithstanding the compulsory presence of a pilot, and that the master is not personally liable if he has taken a pilot, because in that case he has done his duty by taking his adviser, but that the pilot is only the adviser, the captain remaining free to obey him or not. The witness stated that in 1827 the Tribunal of Marseilles decided that a pilot's presence freed the ship, but that in 1829 the opposite was held, and that the latter has been acted upon from that time. He also referred to the most recent treatise on this subject as confirming his view. In the Traité de Droit Commercial Maritime of M. Desjardins, 1886, article 1113, it is said: "Lorsque le capitaine s'est soumis à l'obligation de prendre un pilote pour obéir au décret du 12 Dec. 1806 (art. 34), ce dernier, s'il commet une faute et que l'abordage s'ensuivre, est evidemment responsable soit envers le navire soit même directement envers les tiers. Mais cette responsabilité doit elle exclure la responsabilité du capitaine et du navire? Oui en droit anglais, non en droit français." Here the difference between the English and French law is distinctly stated. And after referring to the English law the author proceeds: "Il n'en est pas ainsi en droit français par cela même que le capitaine reste libre non seulement de préférer son avis a celui du pilote, mais encore de ne pas se conformer à la rigueur aux intentions du legislateur en refusant d'embarquer le pilote. La Cour de Rennes a jugé formallement le 3 Août 1832, que l'armateur du navire abordant actioné en responsabilité ne pouvait pas pour faire écarté la demande par une fin de non recevoir alléguer la présence à bord du pilote lameneur que ce pilote etait comme le capitaine son préposé, que la mesure de precaution prise dans l'intérêt bien entendu de l'armateur pouvait pas se retourner contre les tiers le lésés par le fait du navire. Cette jurisprudence a prévali et devait prévaloir." And M. Cresp, in his "Cours de Droit Maritime," 1876, p. 588, says: "Dans le systeme de sa loi le pilote est en effet un aide et non un remplacant, il en resulte que sa presence à bord ne saurait en cas d'accident dégager la responsabilité du capitaine vis-à-vis des tiers, le capitaine reste encore le maître et le directeur supreme du navire, que le pilote n'est que son préposé, son aide dans l'accomplissement de la tâche qui lui est dévolue et qu'il doit dèslors répondre des fautes de celui-ci commises; tout commettant répond des fautes de son préposé." The advocate called to support the defendants' contention admitted that in actual jurisprudence, by which I take him to mean according to the law of France as at present interpreted by its courts, the pilot is only an aid. It follows from this definition of the functions of a pilot that he was not in this case when on board in performance of his duty in charge of the vessel in the sense in which it was assumed that he was in the case of *The Halley* (*ubi sup.*), for he was not entitled to supersede, and did not in fact supersede, the authority of the captain. I think that the question may be thus summarised, that, while by the French law there is no express provision defining the responsibilities of captain and owners when a compulsory pilot is on board, the regulations for the navigation of the Suez Canal on this head substantially represent the actual jurisprudence of France on the subject, and that therefore this case falls directly within the authority of the decision of the Court of Appeal in *The Guy Mannering* (*ubi sup.*). Judgment will therefore be for the plaintiffs with costs.

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

Solicitors for the defendants, *Botterell* and *Roche*.

Tuesday, Aug. 10, 1886.

(Before BUTT, J.)

THE ANDALINA. (*a*)

Seamen's wages—Maritime lien—Freight—Sub-charter—Arrest of cargo—Light and dock dues—Towage—Priority of claims—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 401.

Where a ship is chartered for a round voyage out and home, and sub-chartered for the homeward voyage, and earns freight under the sub-charter-party, the freight due to the original charterers under the sub-charter-party is liable to pay seamen's wages earned upon the round voyage, even though only a part of such freight is due to the shipowners under the original charter.

A seaman's claim for wages has priority over a claim for payments made for light dues, and for the towage of a sailing vessel from sea to an inland port.

THIS was a motion by the mate and certain seamen of the foreign brig *Andalina* for payment out of court of wages in respect of which they had recovered judgment in the County Court of Hull.

The voyage on which the mate and seamen had earned their wages was a round voyage from Hull to Demerara and back. On the 5th June 1886 the ship had been chartered to Crauford and Rowatt for this voyage. On the 22nd July Crauford and Rowatt had sub-chartered the

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

Andalina to A. Bergmann in respect of the homeward voyage.

The ship proceeded to Demerara with a cargo, discharged it, and then under the sub-charter loaded a homeward cargo for Hull, where she duly arrived with her homeward cargo. Upon an investigation of accounts it appeared that there was due to the charterers under the sub-charter-party the sum of 159*l.* 7*s.* 9*d.* in respect of the homeward voyage, and that of this the charterers owed the shipowners 34*l.* 19*s.* 3*d.* as freight due under the original charter for the round voyage.

A necessaries action had also been instituted against the same ship in the County Court of Hull by one Meek, claiming for sums paid for light dues at Hull, and also for the towage of the *Andalina* inwards to Hull, and from Hull to Goole. Meek had obtained judgment for his claim.

A further action had been instituted in the Admiralty Division of the High Court by Messrs. Burney and Dalzell for necessaries. In this action the ship had been sold, and had realised after payment of the costs of sale the sum of 110*l.* 2*s.* 9*d.* In consequence of the ship having been so sold in the High Court, the wages action and Meek's action were transferred to the High Court to enable the plaintiffs to enforce their judgment.

The freight, amounting to 159*l.* 7*s.* 9*d.* in respect of the homeward voyage from Demerara to Hull, had been paid into court.

J. P. Aspinall, for the mate and seamen, in support of the motion.—My clients are entitled to priority over the other claimants, and therefore their claim should be satisfied in full out of the money in court. The fact that the freight in court was due on the sub-charter does not make it the less available to satisfy the seamen. It was freight earned by the ship on the voyage during which they were navigating the ship. They have a right to arrest the cargo to enforce their claim against the freight, and it is immaterial under what charter or by whom the freight is paid.

E. S. Roscoe for Meek.—Mr. Meek's claim is, under the circumstances, entitled to precedence over all others. One item in his claim is money paid for towing the *Andalina* from sea to Hull. This was in the nature of salvage, and as but for that towage the ship might not have been available for any of these claims, this item should have priority even over the seamen's claims:

The Gustaf, Lush. 506.

Meek having paid light dues at the master's request, therefore his claim in respect of such payment is in the nature of a claim for light dues. As to the light dues, he is entitled to priority under the provisions of sect. 401 of the Merchant Shipping Act 1854. By that section the collector of light dues, in the event of their nonpayment, is entitled to distrain on and sell the vessel to satisfy the claim. Meek having paid the light dues is entitled to the same remedies, and therefore has priority in respect of such payment:

The William F. Safford, Lush. 69.

Witt for Messrs. Crauford and Rowatt.—The seamen can have no right against the freight due under the sub-charter, except against such part as the shipowners are entitled to. That arises under a contract between the charterers and other persons, and is payable to the charterers. The seamen's only remedy as against freight is in respect of the freight due under the charter-party, which the shipowners, the seamen's employers, made. If it were otherwise, the seamen would have a right against two freights.

J. Gorell Barnes, for Messrs. Burney and Dalzell, asked for costs.

BUTT, J.—The order I shall make is, that the amount of the judgment in the sailors' suit is to be paid out of the freight payable by the sub-charterers so far as the freight will suffice to pay it, and out of the balance from the sale of the ship if the freight does not suffice. With regard to the necessaries claim, I am clearly of opinion that no part of that claim can take rank before the seamen's lien for wages. Mr. Roscoe appears to rest the first part of his claim upon an assertion or an assumption that towage and salvage are for this purpose on precisely the same footing. I do not agree with that at all and I cannot accede to that proposition with regard to the payment of the light and dock dues. I think that, if Meek has any lien at all for what he has paid, it is one that takes rank after the sailors'. With regard to Mr. Witt's client my opinion is that the sailors have a lien on the freight earned on the voyage, and that they have therefore a right of arresting the cargo when it arrives at its port of destination in order to enforce that lien. That they have a lien is unquestionable, and their rights are not and cannot be interfered with by any contracts between the sub-charterer and the charterer on the one hand, and the charterer and shipowner on the other. Therefore I decide that they must have their wages out of the fund in court in the way I have indicated. That saves the right of Mr. Barnes' clients, if that sum is sufficient. As to priorities between the other claimants I say nothing. It is sufficient for to-day to decide the question raised by the present motion on behalf of the mate and seamen.

Solicitors for the mate and seamen, Meek, and Crauford and Rowatt, *Pritchard* and *Son*.

Solicitors for Burney and Dalzell, *Bateson* and *Co.*, Liverpool.

Tuesday, Dec. 7, 1886.

(Before Sir JAMES HANNEN and BUTT, J.)

THE ISCA. (*a*)

ON APPEAL FROM THE COUNTY COURT OF MONMOUTHSHIRE HOLDEN AT NEWPORT.

Tug and tow—Towage contract—Breach—Negligence of tug—County Court—Jurisdiction—County Courts Admiralty Jurisdiction Amendment Act 1869 (32 *&* 33 *Vict. c.* 51), *s.* 2.

A tugowner, having been engaged to tow a vessel, contracted with another tugowner to provide a tug, which was guilty of negligence in the course of towage occasioning damage to the tow. The owners of the tow recovered this damage from the tugowner with whom they contracted, and the defendant in that action instituted the present action in rem in the County Court under the County Courts Admiralty Jurisdiction Amend-

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

ment Act 1869, *against the owner of the wrong doing tug to recover back this amount.*

Held, on appeal, that sect. 2, *sub-sect.* 1 *of the County Courts Admiralty Jurisdiction Amendment Act* 1869, *giving County Courts with Admiralty jurisdiction power to try "any claim arising out of any agreement made in relation to the use or hire of any ship," covered the present action.*

As a general rule it is the duty of a tow to give orders to the tug, and if a specific order is given by the tow to the tug, the responsibility for that order will rest with the tow; but there is no obligation on the tow to be constantly giving directions to the tug as to matters which are specially the duty of the tug, and if the latter by reason of local circumstances or knowledge has the means of forming a judgment as to what is to be done, it is her duty to do it without waiting for orders from the tow.

THIS was an appeal from the County Court of Monmouthshire, holden at Newport, by the defendants in an action *in rem* instituted under the County Courts Admiralty Jurisdiction Amendment Act 1869.

On March 19, 1886, Messrs. Williams and Sons, tug proprietors, towed with their steam-tug *Alexandra* the brigantine *Mary*, of 196 tons, from sea to the Bangor Wharf, in the river Usk, at Newport.

On March 22nd the brigantine required shifting about one and a half miles down the river, and her captain thereupon went to Messrs. Williams and Sons and agreed with them that they should provide a tug to shift his vessel. Messrs. Williams not having a tug of their own available, went to Thomas Cox, the owner of the tug *Isca*, and hired the *Isca* for the purpose of towing the brigantine down the river.

The brigantine was lying on the west side of the river, heading up river, and the *Isca* made fast to her about 7.30 p.m., the tide being about three hours flood. A tow line was passed from the brigantine's starboard bow, and a bridle was put on it from her starboard quarter, and the tug then commenced towing the brigantine stern foremost close into the bank to avoid the flood tide. When opposite the Corporation Pill (which is an estuary of a small stream running into the Usk) the bridle was let go, and the brigantine's stern swung into the Pill. In consequence of this there was danger of the brigantine's stern hitting against the north wall of the Pill, and her master thereupon ordered the tug to keep the brigantine's head out of the Pill. The tug thereupon began to lay across the river, and so exposed the brigantine to the force of the tide. The tug was in these circumstances unable to hold the brigantine, which drove up the river and came into contact with the Newport Stone Bridge, sustaining damage to the amount of 160*l*. The owners of the brigantine thereupon instituted an action against Williams and Son to recover the damage sustained by them, and were successful in their action. Messrs. Williams and Son instituted the present action *in rem* in the County Court at Newport, against the owner of the *Isca*, to recover 160*l*., the damages sustained by them arising out of the hire of the tug *Isca*.

The action came on for trial at Newport, on June 18, 1886, when judgment was given for the plaintiffs.

The plaintiffs' witnesses alleged that the tug-master ordered the bridle to be slipped; that it was not prudent to slip the bridle at the time when it was slipped; that the only order given by the master of the brigantine was to keep the brigantine's head out of the Pill, and that the tug thereupon went across the stream, and so caused the accident.

The defendants' witnesses alleged that all the orders were given by those on board the brigantine; that the order to slip the bridle came from the brigantine; that when there was danger of the brigantine's stern hitting the north wall in the Pill, the order was not to get her head out of the Pill but to lay off, and that they considered this order a very dangerous one.

The County Court judge found that the master of the tug took upon himself the whole management of the towage; that he ordered the bridle to be slipped; that the master of the brigantine ordered the tug to keep the brigantine's head out of the Pill, that this order was not properly obeyed, and that the accident was thereby occasioned. He also stated that he believed the plaintiffs' witnesses, and disbelieved the defendants' witnesses.

The appeal was heard upon the judge's notes.

Abel Thomas, for the defendants, in support of the appeal.—The County Court had no jurisdiction to try this case. The action was instituted under sect. 2, sub-sect. 1, of the County Courts Admiralty Jurisdiction Amendment Act 1869, which gives County Courts with Admiralty jurisdiction power to try "any claim arising out of any agreement made in relation to the use or hire of any ship." Those words relate to the hiring of ships by charter-party and the like, and are not applicable to a claim arising out of negligent towage. [BUTT, J.—Surely this case falls within the very words. Is not this an action for breach of contract for the hire of a ship?] It is submitted not. It is, however, contended that on the merits the tow was solely to blame, or if not solely to blame, was guilty of contributory negligence. It is the duty of the tug only to provide the motive power, and the duty of the tow to superintend the navigation. In the present case those on the tow failed to give proper orders, and this was the cause of the accident. A tug which executes any manœuvres in the absence of orders from the tow does so on her own responsibility, and she has a right to expect that the tow will give all the orders necessary to the performance of the towage:

The Duke of Manchester, 2 W. Rob. 470;
The Christina, 3 W. Rob. 27.

In the present case the disaster was solely due to the order of the brigantine to lay off when her stern was in the Pill. In order to do this the tug was obliged to starboard, and go across the stream. Although the tug-master thought the order a dangerous one, yet he was bound to obey it, and the only way to obey it was the manœuvre he executed. [BUTT, J.—I doubt whether it is the duty of the tow to give all the orders where a tug is employed merely to shift a vessel in a river.] The courts have always thought so, and as is pointed out in *The Energy* (23 L. T. Rep. N. S. 601; L. Rep. 3 A. & E. 48; 3 Mar. Law Cas. O. S. 503), were it left to the tug to execute some manœuvres without orders the result would be a divided command, which would be most

prejudicial to safe towage. It therefore can make no difference in principle where and under what circumstances the towage is going on.

G. Barnes, for the plaintiffs, was not called upon.

Sir JAMES HANNEN.—On the point of jurisdiction of the County Court, the question is whether the present claim is a "claim arising out of any agreement made in relation to the use or hire of any ship." I cannot conceive more general words than these, and I think they plainly embrace the present case. As to the law, it has been contended that it is the duty of the tow to give directions to the tug, and undoubtedly that is true in a general sense. If a specific order is given by the tow to the tug, the responsibility for that order will rest with the tow. But it does not follow that the tow is to be constantly interfering with that which is especially the duty of the tug. That must depend upon a variety of considerations. Where there are a number of other vessels and small boats in the vicinity, of whose manœuvres the tug is in a position to judge, she is bound to exercise her judgment as to them, and not to be always waiting for orders from the tow, which may be a long way behind. In this particular case the tow was up a river in which it appears to be difficult to get down to a place where she could be conveniently turned. That is obviously a matter which the tug-master would be more likely to know about than the master of a vessel which comes only occasionally to the port.

It is a question of fact whether or not the tug-master had taken upon himself this particular duty of turning the tow round. That is a question of fact which the learned judge has had under consideration, and he has found that the tug-master did take upon himself the duty of turning this vessel. I see nothing to justify us in calling in question that finding. If the tug-master took upon himself the duty of turning the tow, did the master of the tow improperly interfere in that matter? That depends upon what was done in the Pill. Now, the general result of the evidence is that the judge did not think the defendants' evidence trustworthy. The master of the tow says he gave no orders whatever, but left it entirely to the tug until he was in the Pill, when he told the tug to keep his head out of the Pill, and that is consistent with the view the judge has taken. By that order the master of the tow meant that his vessel was not to be allowed to go further into the Pill, where there was danger of the stern getting against the wall. The master of the tow says that was the only order he gave, and he never said, "Take her head out into the river." On the other hand, the tug-master says he considered it an order to lay out into the river, and although he knew it to be dangerous he did it. I agree with the learned judge, that if the master of the tow sees danger, and says, "Keep me out of the Pill," the tug-master has no right to construe that into an order to go right across the river. I see no reason to think that the learned judge has not arrived at a correct conclusion, and I think this appeal must be dismissed with costs.

BUTT, J.—I am of the same opinion for the same reasons.

Appeal dismissed with costs.

Solicitors for the plaintiffs, *Ingledew, Ince*, and *Colt*, for *Downing* and *Hancock*, Newport.

Solicitor for the defendants, *G. Llewellyn*, Newport.

Dec. 7 and 26, 1886.

(Before the Right Hon. Sir JAMES HANNEN.)

THE BERNINA. (*a*)

Collision—Cost of repairs—Restitutio in integrum—Lloyd's survey—Damage to cargo—Evidence—Registrar and merchants.

A successful plaintiff in a collision action is entitled to have his ship put into the same condition in which it was previous to the collision at the cost of the wrong-doer, irrespective of the fact that some of the repairs necessitated by the collision would shortly have been necessary to enable the ship to pass her classification survey, and in estimating the amount of the wrong-doer's liability no deduction can be made on this account.

On a reference in a collision action the registrar and merchants are not bound by uncontradicted evidence as to the amount of damage done, but are entitled to use their own judgment and experience, and find in accordance therewith.

THIS was an objection by the plaintiffs in a collision action to the registrar's report therein.

The action was instituted by the owners, master, and crew of the steamship *Ann Webster* and her cargo, against the owners of the steamship *Bernina*, to recover damages in respect of a collision between the *Ann Webster* and the *Bernina*. The hearing took place on the 20th and 22nd March 1886, when the Court found the *Bernina* solely to blame for the collision, and referred the amount of the damages to the registrar and merchants.

The collision took place on Dec. 29, 1885, in the Thames. The *Ann Webster* was laden with a cargo of coals. In consequence of the collision the *Ann Webster* grounded on the south shore in such a position that at high water the water was over her deck. Part of the cargo having been discharged the *Ann Webster* floated, and was taken to Beckton Jetty, where the rest of the cargo was unloaded.

The reference took place on June 18 and 19. Amongst other repairs effected to the *Ann Webster*, she was painted inside. The plaintiffs' witnesses alleged that, owing to the amount of mud which got into her when ashore, painting was necessary. The defendants' witnesses alleged that scraping would have been sufficient. It also appeared that, even if there had been no collision, the vessel would have had to undergo certain repairs, and among others painting within a twelvemonth, to pass her No. 2 survey for classification at Lloyd's.

It also appeared that about Dec. 1886 the *Ann Webster* would have had to pass her No. 2 survey for the purpose of classification at Lloyd's, and that some of the work which was actually done after the collision would, if no collision had occurred, have been required to be done for the purpose of enabling her to pass such survey; for instance, the painting of the holds inside.

After the repairs so done, the *Ann Webster* in

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

fact passed the No. 2 survey without any further work.

It was contended before the registrar that the painting of the holds and other work required for the No. 2 survey was not necessitated by the collision at all, and that the plaintiffs could not recover in respect of it; or, if any portion of it was occasioned by the collision, the plaintiffs could not recover the whole, but only a proportion, as they got the advantage of work which enabled them to pass the No. 2 survey without further expense.

As to the damage to cargo the following affidavit was filed by the plaintiffs:

1. The Harton Coal Company of Newcastle-on-Tyne were the shippers of a cargo of coal which was being carried on board the steamship *Ann Webster*, on the 29th Dec. 1885, on which day the said steamship was, as I am informed and believe, run into and sunk by the steamship *Bernina*, off Tripcock Point, in the river Thames. In consequence of the said collision, the *Ann Webster* was entirely submerged, but was subsequently raised, and her cargo was discharged.

2. The said cargo consisted of 995 tons or thereabout of Bolton gas coal for delivery, under contract at Beckton, to the Gas Light and Coke Company.

3. A portion of the said cargo was necessarily discharged into lighters with the utmost possible despatch in order to float the *Ann Webster*, and in consequence of the circumstances attending the discharge the actual out-turn of the said cargo was 961 tons 14 cwt., being a deficiency of 33 tons 6 cwt. on the cargo shipped, which was solely lost by reason of the said collision. The value of the said 33 6-20th tons of coals so lost was the sum of 11*l.* 13*s.* 1*d.*, being at the rate of 7*s.* a ton, which was the shipping value of the said coals.

4. In consequence of the said collision and the subsequent submersion of the said coals they were greatly deteriorated, and were below contract quality, and the said Harton Coal Company, in order to prevent a refusal by the Gas Light and Coke Company to accept the said coal under their contract, came to an arrangement with the Gas Light and Coke Company by which they allowed the said company 2*s.* per ton on the weight delivered as aforesaid, and the said Harton Coal Company have thereby lost the sum of 96*l.* 3*s.* 5*d.* through depreciation in the value of the said coal at the rate aforesaid.

The defendants gave no evidence to contradict the above affidavit.

The Registrar (*inter alia*) disallowed two items of 80*l.* and 10*l.* in respect of repairs, and reduced the amount claimed for damage to cargo, viz., 107*l.* 16*s.* 6*d.*, to 52*l.* 10*s.*

The plaintiffs objected to the report for the following reasons:

(1) Because the sum of 80*l.* or thereabout was erroneously disallowed on the ground that the owners of the *Ann Webster*, by reason of the repairs of the damage done, were saved an equivalent expenditure on the vessel at the No. 2 survey, which would have been due some months afterwards.

(2) Because 10*l.* was deducted from the sum charged and actually paid for plates and angles, and there was no evidence that such sum was unreasonable or unusual.

(3) Because the assistant registrar erroneously reduced the plaintiffs' claim for damages to the cargo through the said collision from 107*l.* 16*s.* 6*d.* to 52*l.* 10*s.*

(4) Because the plaintiffs sufficiently proved damage to the cargo to the extent of 107*l.* 16*s.* 6*d.*

(5) Because there was no evidence whatever by the defendants in contradiction of the plaintiffs' proof of such damage.

(6) Because such last-mentioned reduction was entirely arbitrary and unsupported, and was not justified by the evidence.

The Registrar's reasons for his report were as follows:

The items objected to, originally more numerous, have now been reduced to three.

(1) The disallowance of about 80*l.* for expenses of No. 2 survey, saved by the repairs done after the collision.

(2) The disallowance of 10*l.* of the charge for plates and angle iron.

(3) The disallowance of 55*l.* 6*s.* 6*d.* of the claim for damage to the cargo.

(1) As to the first item it was distinctly stated by the plaintiffs' witness, Mr. Honor, the shipbuilder, who repaired the *Ann Webster*, that the repairs done after the collision "really saved them going through a second survey," which would have been done about the end of this year 1886. I am advised that the cost of the second survey for a vessel of the *Ann Webster's* tonnage, 77 tons gross, would probably have exceeded 130*l.* in addition to the loss from detention say for seven days, which at 6*l.* per day, the rate allowed by us for demurrage, would amount to 42*l.*, making altogether more than 170*l.* To allow 82*l.* of this, as actually saved by the repairs done after the collision in Jan. and Feb. 1886, *i.e.*, less than twelve months before the second survey would have been due but for these repairs, seems to be a moderate estimate.

J. G. Barnes for the plaintiffs.—The 80*l.* has been erroneously disallowed on the ground that the plaintiffs might have been obliged to subsequently expend the same sum, even if there had been no collision, to enable the ship to pass her survey. Shipowners are entitled to a *restitutio in integrum*, and they are therefore entitled to have their ship put into the same condition as she was in before the collision. True it is that, while an assured recovers his loss less one-third for new materials, it is to be observed that he recovers on a contract, an implied condition of which is that this reduction shall be made. In the present case the liability of the defendants arises from a tort, and the measure of indemnification in such cases is co-extensive with the amount of damage done:

The Gazelle, 2 W. Rob. 279;
The Inflexible, Swa. 200.

Although it was highly probable that repairs would have had to be done to the vessel to enable her to pass her survey, yet her owners might for various reasons have seen fit not to keep up her classification, or the vessel might have been lost before the repairs would have been effected. It is also submitted that the registrar was wrong in disallowing 10*l.* for plates. The registrar had no right to reduce the plaintiffs' claim for damage to cargo. He was bound by the uncontradicted evidence of the plaintiffs, and yet he has in fact utterly disregarded it.

J. P. Aspinall, for the defendants, *contra*.—The case of *The Inflexible* (*ubi sup.*) is not in point. In consequence of these repairs the plaintiffs have been saved expenditure in respect of repairs which would have been subsequently necessary. In the case of *The Marine Insurance Company* v. *The China Transpacific Steamship Company* (55 L. T. Rep. N. S. 491; 11 App. Cas. 573), the House of Lords held that, where a ship underwent repairs in a dock some of which were covered by a policy of marine insurance and others not, both going on at the same time, the dock charges are to be apportioned between the assured and the underwriters. So here, if any portion of the repairs claimed is incidental both to repairing damage done by the collision and putting the ship in a state to enable her to pass her survey, it is only reasonable that the plaintiffs should bear some share of those expenses. As to the reduction for the damage to cargo, the registrar was entitled to attach such weight to the plaintiffs' evidence as

he might think fit. The registrar and merchants were in the position of a jury, and were justified in bringing their own experience to bear upon the matter. Moreover the plaintiffs' affidavit does not state the extent of the real reduction in the value of the coal; all it does is to allege that the plaintiffs, in order to secure the coals being taken by a certain company, thought fit to make an allowance of 2*s.* per ton.

Barnes in reply.

Sir JAMES HANNEN.—I think the principle upon which the cost of repairs ought to be estimated is exceedingly simple. It is clear that a person who has had an injury done to his property is entitled to have it restored to him so that it may be used by him as effectually as it would have been if it had not had damage done to it. I entirely assent to the proposition that Mr. Barnes has urged, that because the doing of repairs which have been rendered necessary by the collision procures an advantage to the owner of the damaged property, it is not to be taken into account by way of diminishing the amount which the wrong-doer has to pay in respect of that which is necessary to put the damaged property in the condition it was in before. If a distinction can be drawn between amounts which the registrar has allowed in respect of such repairs as were necessary to make the vessel seaworthy again, and amounts which he has disallowed because they would have to be done some time afterwards in order that the vessel might pass her survey, the distinction must be drawn. For that purpose I think it will be necessary that the case should go back to the registrar in order that this item may be considered on the principle that I have indicated, that is, to find what repairs would be necessary to restore the vessel to the condition in which she was before the collision. Take an illustration: if this vessel was soiled with mud inside so that it would be necessary to make her fit to receive cargo, that the mud should be removed and she thoroughly washed out, then all her owner would be entitled to would be the cost of the washing and cleansing. But if, knowing that he would have to do the painting some time hence, and if he did it now it would save him subsequent trouble and expense, he would not be entitled to be paid for it, because the necessity had not arisen in consequence of the collision. If, on the other hand, in order that the vessel might be used again in the ordinary course of business, painting was necessary, then the fact that it enabled the vessel to pass her survey is not to be taken into account by way of diminution. As to the other two items, I do not think it necessary to refer them back. On questions of value the registrar and merchants are entitled to use their own knowledge and experience, and they are not bound hard and fast by the evidence, whether verbal or on affidavit, of any particular witness. Having heard the evidence they came to the conclusion that the charge for plates was too high, and they have taken off a certain amount. As to the damage to the cargo, while the affidavit puts the damage at a very high figure, the registrar and merchants, using their own experience, have reduced the amount by 15 per cent. They have treated the coal as deteriorated, but have not accepted the estimate of deterioration put on it by a particular witness. On these points I shall not interfere with their discretion, but must send the report back on the first point, and I shall reserve the question of costs pending the registrar's finding. If it should be that the registrar has acted upon principles which I think are right, then the defendants will succeed altogether.

Dec. 20.—On the matter coming before the registrar the plaintiffs proffered the evidence of the surveyor to Lloyd's Registry, on whose recommendation the damages had been repaired. This evidence was objected to by the defendants, but was admitted by the registrar.

The registrar subsequently made a supplementary report, which was so far as is material as follows:

> Having on the 20th ult. heard the evidence of the surveyor to Lloyd's Registry, on whose recommendation the damages were repaired, and the *Ann Webster* passed the No. 2 survey (but who had not been produced at the previous inquiry), we have come to the conclusion that the special works required by the rule were not in this case insisted upon, the surveyor having in the exercise of his discretion satisfied himself as to the fitness of the vessel for the class from the investigation which the damage repairs afforded him. To that extent therefore the reason for the deduction in question has been removed, and we are of opinion that the disallowance should be reduced to 35*l.*, which I am advised fairly represents the proportion disallowed for other repairs not properly attributable to the collision.

Jan. 26, 1887.—*Barnes*, for the plaintiffs, moved to vary the report in accordance with the registrar's finding, and for an order condemning the defendants in the costs.

J. P. Aspinall for the defendants.—The second reference was solely necessitated by the plaintiffs' failure to call Lloyd's surveyor at the first inquiry. Had this witness been called, none of these subsequent proceedings would have been required. The defendants have succeeded on two of the items in dispute, and have now practically succeeded on the third. The plaintiffs should therefore be condemned in the costs of all the proceedings subsequent to the first reference. The Court said that if the registrar had acted upon principles which it thought right, then the defendants should succeed altogether. The registrar has done so, and therefore the defendants are entitled to the costs.

Barnes in reply.—The plaintiffs have in principle succeeded in getting a larger allowance, and therefore are entitled to costs.

Sir JAMES HANNEN.—The way I propose to deal with this matter is this: The plaintiffs are to have the costs of the reference and objections generally; but the defendants are to have such costs of objection as the plaintiffs failed on, so far as they can be separated. Each party is to pay the costs of the second reference.

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

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

HOUSE OF LORDS.

July 12, 13, *and* 30, 1886.

(Before the Lord Chancellor (Herschell), Lords Blackburn, Fitzgerald, and Ashbourne.)

The Marine Insurance Company Limited *v.* The China Transpacific Steamship Company Limited. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance — Particular average loss — Measure of loss—Apportionment of dock dues.

A partial loss sustained by a shipowner by a disaster insured against is not to be measured by the depreciation in the value of the vessel thereby occasioned; but where there is such a loss, and the ship is repaired by the owner, he is entitled so recover the sum properly expended in executing the necessary repairs, less the usual allowances.

Pitman *v.* Universal Marine Insurance Company (4 *Asp. Mar. Law Cas.* 544; 46 *L. T. Rep. N. S.* 863; 9 *Q. B. Div.* 192) *approved.*

A ship insured under a policy containing the warranty "free from average under 3 per cent." went into dock to be cleaned, scraped, and painted; while in dock an injury previously unknown, causing a particular average loss within the policy, was discovered. The cleaning, scraping, and painting went on concurrently with the necessary repairs to the injury, and the ship was in dock eight days, being detained the last five days solely for the purpose of the repairs apart from the cleaning, scraping, and painting. If half the dock dues during the first three days were to be attributed to the repairs, the average loss exceeded 3 per cent. The arbitrator, who stated a special case between the parties, found that, if there was to be an apportionment of these dues, one half should be attributed to the repairs, the other half to the cleaning, scraping, &c.

Held, that the measure of the assured's damage was not the depreciation in the value of his ship occasioned by the loss, and therefore was not the actual cost of repairs plus the dock dues for the days necessary for cleaning, scraping, &c., but was the sum properly expended in effecting the necessary repairs less the usual allowances, and that such sum was the cost of the repairs plus the whole cost of the dock dues less half the cost of the first three days.

This was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R. and Fry, L.J., Baggallay, L.J. dissenting) which had reversed a judgment of the Queen's Bench Division (Pollock, B. and Manisty, J.) upon a special case stated by an arbitrator.

The respondents were owners of the steamship *Vancouver*, and the appellants were an insurance company carrying on business in London and elsewhere. In April 1874 the respondents effected an insurance on their ship with the appellants, the policy containing a clause that in case of an average loss, if the loss were under 3 per cent., the underwriters were not to be liable. In the course of her voyage from Hong Kong to San Francisco the vessel encountered very heavy weather and her sternpost was then broken by the sea. The damage, however, was not known or suspected at the time it occurred.

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

The *Vancouver* lay in San Francisco Bay without employment until Jan. 1876, when her bottom became so excessively foul that no prudent owner would have sent her to sea again without having her first scraped and cleaned, and she was therefore on the 4th Jan. put into dry dock to be cleaned, scraped, and painted. While those operations were going on the injury to her sternpost was discovered and the damage was made good with all possible speed, and she was discharged out of dock on the 11th Jan.

Had the vessel required nothing but cleaning, scraping, and painting she might have been finished and discharged out of dock by the evening of the 6th Jan., and the dock bill would then have amounted to $3292; on the other hand, if she had not required cleaning, scraping, and painting, but had gone into dock solely for the purpose of surveying and repairing the fracture of the sternpost, she would have required to be in dock the whole time from the 4th to the 11th Jan. The total dock bill was $9869, and the question arose how much of that sum ought to be charged against the appellants. On behalf of the appellants it was contended that no part of the dock charges incurred during the time the vessel was being cleaned, scraped, and painted ought to be included in the amount charged against the appellants, notwithstanding the fact that the repairs to the sternpost were being carried on at the same time. The Queen's Bench Division (Pollock, B. and Manisty, J.) decided the point in favour of the underwriters, but the Court of Appeal (Lord Esher, M.R., Baggally and Fry, L.JJ.) reversed their decision and held that the underwriters were liable for half the docking charges while the vessel was in dock for the common purpose of being cleaned, scraped, and painted and repaired. By the decision of the Queen's Bench Division the average loss was brought within the 3 per cent. clause under which the underwriters were not liable, and by that of the Court of Appeal it was made to exceed that percentage, and therefore the appellants were held liable to pay the whole cost of the repairs and a proportion of the dock charges.

The *Attorney-General* (Sir C. Russell, Q.C.) and *Barnes* appeared for the appellants; *Cohen*, Q.C. and *Shiress Will*, Q.C. for the respondents. The following authorities were cited:

Lidgett v. *Secretan*, L. Rep. 6 C. P. 616; 1 Asp. Mar. Law Cas. 95; 24 L. T. Rep. N. S. 942;
Livie v. *Janson*, 12 East, 648;
Stewart v. *Steele*, 5 Scott N. R. 927, 949; 11 L. J. 155, C. P.;
Pitman v. *Universal Marine Insurance Company*, 4 Asp. Mar. Law Cas. 544; 46 L. T. Rep. N. S. 863; 9 Q. B. Div. 192;
Darrell v. *Tibbits*, 5 Q. B. Div. 560;
Castellain v. *Preston*, 11 Q. B. Div. 380; 49 L. T Rep. N. S. 29;
Stewart v. *Merchants' Marine Insurance Company* 16 Q. B. Div. 619; 6 Asp. Mar. Law Cas. 506;
Wallace v. *Ohio Insurance Company*, 4 Ohio, 234
Perry v. *Ohio Insurance Company*, 5 Ohio, 305.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

July 30.—Their Lordships gave judgment as follows:—

The Lord Chancellor (Herschell).—My Lords: The sole question arising for decision in this case is whether a particular average loss sustained by the respondents exceeded 3 per cent. within the

meaning of the warranty contained in a policy of insurance underwritten by the appellants. The *Vancouver*, the vessel insured, while on a journey from Hong Kong to San Francisco, encountered very heavy weather, which resulted in a fracture of her sternpost. At the time when the damage was incurred the vessel had a very foul bottom, which so much affected her speed that no prudent owner would have sent her to sea again without having her first scraped and cleaned. She lay for some time in San Francisco Bay, and was on the 4th Jan. 1876 put into the graving dock for the purpose of being cleaned, scraped, and painted. She was put into dock for this purpose only, the injury to the sternpost being then unknown, and only discovered by a survey made in the dry dock. The vessel lay in dock until the 11th Jan., the work necessary for repairing the sternpost occupying all that time. The cleaning, scraping, and painting proceeded concurrently with the necessary repairs to the sternpost. If the former alone had been requisite the vessel might have left the dock on the evening of the 6th Jan. The cost of repairing the sternpost, irrespective of dock dues, was less than 3 per cent. under the policy. The question then arose, what portion of the dock dues ought to be added for the purpose of ascertaining the average loss? The appellants contended that only the dues for the days subsequent to the 6th Jan. ought to be so added, and this would still leave the loss under 3 per cent. The respondents contended that either the whole or a portion of the dues for the earlier days must be taken into account as part of the average loss. If half of these dues are to be attributed to the repair of the sternpost, then the average loss exceeded 3 per cent. It was found by the arbitrator, who stated a special case between the parties, that if there was to be an apportionment of the dues, then, so far as the apportionment was a question of fact, it was to be taken that one-half the sum should be attributed to the repairs and one-half to the cleaning and scraping.

The Court of Appeal, reversing the judgment of a divisional court, held that one-half of the dues incurred while both operations were being carried on ought to be attributed to each of them, and that the average loss, therefore, exceeded 3 per cent. From this judgment the present appeal is brought. I have entertained considerable doubt whether the appellants' contention ought not to prevail, but I have after consideration come to the conclusion, which, I believe, is shared by your Lordships, that the judgment of the court below must be affirmed. It is truly said for the appellants that a contract of insurance is a contract of indemnity only, and they urge that if the judgment stands the respondents will obtain something more than an indemnity for the injury to the sternpost—that they will obtain an actual advantage from its having been fractured. If, they say, no such disaster had occurred, the shipowners must, before using the vessel again, have had her cleaned and scraped, and for this purpose have paid for three days' docking. As it is, besides getting the sternpost repaired without cost to themselves, they are relieved of one-half of the dock dues that they must otherwise necessarily have paid for the purpose of getting their vessel cleaned and scraped. I think it cannot be denied that they do obtain this advantage, but I do not think this conclusively establishes that the court below have proceeded on an erroneous principle. It may, as it seems to me, sometimes unavoidably happen that the assured gain an incidental advantage from the fact that a damage arising from a risk within the policy has necessitated repairs at the expense of the underwriter. For instance, a vessel requires scraping and painting at certain intervals, say of five years. Suppose that a year before the time has arrived for this being done in ordinary course the vessel meets with a disaster for which the underwriters are responsible, and is docked for repairs. The shipowner takes advantage of the opportunity to scrape and paint his ship, in no way delaying the work of repair. It could not be contended that the entire dock dues for the time occupied in scraping and painting were to be borne by the shipowner, if they were to be borne by him at all; and yet, even if they were apportioned, the shipowner would obtain some advantage. Again, suppose that a vessel needs repairs on account of two different injuries, for only one of which the underwriter is liable, but certain materials required for repairing both injuries were obtained more cheaply than they would have been if purchased in the quantities required for one alone. It could surely never be contended that the underwriter was to pay less than the cost of repairing the sea damage for which he was liable, diminished as that cost would be by the cheaper acquisition of the material, and that part of the cost of it was to be thrown on the shipowner, and yet, if not, the shipowner would obtain some advantage by the circumstance that his vessel had sustained a disaster covered by a policy of insurance, and that the repairs thereby rendered necessary, and other repairs which the shipowner had to undertake, were executed together. It was contended by the Attorney-General and Mr. Barnes, for the appellants, that the loss sustained by the shipowner by the disaster insured against was to be measured by the depreciation of the value of his vessel thereby occasioned. And they ingeniously argued that in the present case, inasmuch as the vessel whose sternpost was injured had already so foul a bottom as to necessitate docking before another voyage was prosecuted, she was only depreciated to an extent that would be covered by the cost of the necessary repairs *plus* the cost of the extra docking for that purpose beyond what was requisite for cleaning her. It is on this point that I have entertained doubts whether the view presented on behalf of the appellants was not the sound one. But I have come to the conclusion that a particular average loss is not, as an ordinary rule, to be measured in the manner contended for. Although there was considerable difference of opinion expressed by the judges in the Court of Appeal in the case of *Pitman* v. *The Universal Marine Insurance Company* (46 L. T. Rep. N. S. 863; 4 Asp. Mar. Law Cas. 544; 9 Q. B. Div. 192) as to the mode in which the amount of the particular average loss in that case was to be arrived at, all the judges were, I think, agreed that where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the shipowner, he is entitled, as a general rule, to recover the sum properly expended in executing the necessary repairs less the usual allowances. This is, I think, the correct view. It

has not been usual in cases of partial loss to apply the test suggested by the appellants, and it would often launch the parties upon an inquiry embarrassing and difficult of determination. I have not lost sight of the fact that the vessel was put into dock only for the purpose of being scraped and painted. But I cannot think that this is material. The injury to the sternpost was immediately discovered, and she remained and was kept there, and the dock was employed for both purposes. Once this conclusion is arrived at, and also that the cost of repairing the damage caused by the perils insured against is the true test, all the rest, I think, follows. And I concur in and have nothing to add to the reasoning by which the Master of the Rolls reached the conclusion that one-half of the dock dues for the first three days should be considered part of the cost of the repairs for which the appellants were responsible. I therefore move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Lord BLACKBURN.—My Lords: This is an appeal against an order of the Court of Appeal of the 8th July 1885, on appeal from an order made by the Queen's Bench Division by which it was ordered that judgment on the special case herein be entered for the defendants. The order appealed against then proceeds: "This court doth declare in respect of paragraph 10 of the special case stated herein that the warranty contained in the said policy has been satisfied by reason of there having been a particular average loss of 3 per cent." I think that the only question before this House is whether on the statements in the special case this declaration is right. I have come to the conclusion that it is right. But before stating my reasons for so thinking I wish to say a word as to an argument urged by the Attorney-General which I think does not apply to this case. The *Vancouver* steamship was at the time when the stern-post was broken on a voyage to San Francisco with cargo. I agree with the Attorney-General that the primary duty of the shipowners was, if practicable, to carry that cargo to San Francisco and there deliver it. And though I think it not necessary to decide it, I am not prepared to say that, if in order to fulfil that primary duty it had been necessary to bring the ship into dock and pay dock and harbour dues, there would have been ground for charging any portion of those to underwriters on the ship, even though in consequence she was brought into a place where the repairs for which they were liable would be more cheaply and conveniently done than if the vessel had not been brought in. But that primary duty was in this case completely fulfilled on Feb. 18, 1875. And then the owners were under no obligation to anyone to proceed at once to put the ship in order for a fresh voyage, or to go into dock till it suited them. It suited their convenience to allow her to lie in the Bay of San Francisco till Jan. 1876, a space of nearly eleven months, during which the policy for twelve months from the 1st March 1874 ran out by efflux of time. Then they proceeded to put the ship in order. I agree with the Master of the Rolls that the first question is, what would be the measure of the average on the hull which the underwriters would have had to pay if there had been no warranty free of average on the policy, and that we are then to see whether that amounts to 3 per cent. Some cases were referred to by Mr. Barnes on the argument which show that there sometimes is difficulty as to what averages could be joined to make up 3 per cent., but no such question is raised on the statements in the special case, and I think it unnecessary to pursue this subject.

Now I think that, if by delaying as they did for nearly a year the owners had increased the cost of the repairs, it would be unfair to charge more against the underwriters on that account; but except in that respect I agree with the Master of the Rolls that the shipowners might take their own time, and then when they do the whole repairs as well those which they have to bear themselves as those which concern underwriters or others, that, if fairly and reasonably done, fixes the amount, and it is a question how much of that expense is to be attributed to the repairs, the cost of which the owners themselves had to bear, and how much to the repairs of that damage for which they had to be indemnified by the underwriters. All depends on the statements in the special case. The first paragraph of the special case sufficiently states the effect of the policy. I think it indisputable that the fracture of the stern-post described in the second paragraph of the special case was a damage to the hull of the *Vancouver* during the time she was covered by the policy. It was occasioned by one of the perils against which the appellants were to indemnify the respondents. And I think it also indisputable that the foulness of the bottom of the ship was a damage to the hull of the vessel occasioned by wear and tear against which the underwriters were not bound to indemnify the respondents. It is said in the third paragraph that "at the time when the damage" occasioned by the underwriters' peril was incurred, the bottom of the vessel was already very foul, and that "it may be taken as a fact in the case that she would not have put to sea again after the 18th Feb. without being first put into dry dock for the purpose of having her scraped and cleaned." I do not think it important when the foulness which rendered it reasonable and proper for the owners for their own sakes to have the vessel put into the dry dock arose. The foulness would, I presume, go on increasing from day to day till the day when the *Vancouver* was put into the dry dock, and indeed that may be inferred from the statement in the fourth paragraph, but no part of it was chargeable to the underwriters, whether it was incurred earlier or later. And the shipowners, acting as reasonable men, would have sooner or later to put her in the dry dock in order to scrape, clean, and paint her. They were under no obligation to anyone to have her put in a state for proceeding to sea till it suited them to do so. That was not till January, about eleven months, during which time the appellants' policy expired by efflux of time. But the appellants were liable to indemnify against the expense of the repairs due to the underwriters' perils accruing whilst the policy was unexpired, unless the warranty is satisfied. That expense was not in any way increased by this delay. The owners, acting with a view to their own benefit, caused the *Vancouver* to be placed in the dry dock. It is said in paragraph 4 of the special case that the owners "determined to put her in dry dock for the

purpose of having her cleaned, scraped, and painted, and for that purpose only." I do not understand this as meaning more than that they determined to do this on that account. whether there were other reasons for putting and keeping her in the dry dock or not. The first step which was taken as soon as the ship was dry was, what I think is usual and was evidently reasonable, to hold a survey, and then the surveyor discovered that the stern-post was broken about thirty inches above the keel, and recommended its repair. This was proper advice, whether the cause of that breakage was one for which the owners were entitled to come upon underwriters, or one on which they stood their own insurers. The case then proceeds, "It was accordingly repaired in dry dock with all reasonable speed and economy, and the vessel was discharged from dry dock on the 11th Jan. repaired, cleaned, scraped, and painted." Then follow the 6th and 7th paragraphs which I need not read, and which I cannot abridge. The 8th and 9th paragraphs only state the contentions of the parties. The Court of Appeal all agreed that the $3292.37 should be attributed partly to repairs, and partly to cleaning, scraping, and painting. I do not think it can properly be said to be a question of pure fact, or a question of pure law, in what proportions the sum should be divided. I think, when it is established that part of the expense is to be attributed to one cause and part to another, it is a mixed question of law and fact under the circumstances how much to each. And I agree with the majority that in this case it ought to be in equal proportions.

I have now to dispose of one further argument made at the bar, which seems to have been what mainly influenced Manisty, J. There is no doubt that a contract of insurance is a contract of indemnity. And it was argued that, if the owners who, had there been no damage to the stern-post, would in order to clean and scrape the ship have had to pay the whole $3292.37 of dock dues, now get that done for one-half of the sum, the other half being paid by the underwriters, they got more than an indemnity. They make, it is said, a profit. I think this is a fallacy—ingenious, but not sound. The whole, both what concerns the shipowners and what concerns the underwriters, has to be repaired. It is best and most cheaply done by doing them both together, for whom it may concern, in the dry dock at the same time; and that being so, each of the parties concerned gets his work done more cheaply because it is done wholesale. Neither is entitled to take the whole benefit of the reduction of cost and apply it to his own work exclusively. The facts in the case of *Kemp* v. *Halliday* (6 B. & S. 723) were very complicated; but I think it will be found on examination that the judgment of the Exchequer Chamber, reported in 6 Best and Smith, recognises the principle that in calculating whether the repairs necessary to save the insured subject bore such a relation to its value when saved as to justify the assured in refusing to do them, the fact, if it be one, that the best way of doing them was in such a manner as to benefit others, who would then have to pay part of the joint expenses, is not to be ignored. I think that the appeal should be dismissed with costs, and I agree in the judgment proposed by the Lord Chancellor.

Lord FITZGERALD.—My Lords: I entirely concur in the judgments which have been delivered, and I can with advantage add nothing. From an early stage in the argument I thought that the reasoning of the Master of the Rolls in the Court of Appeal ought to be adopted together with his very simple and sensible mode of adjusting the expenses which have been incurred in San Francisco in the joint operation of cleaning and repairing the vessel and repairing her stern-post.

Lord ASHBOURNE.—My Lords: I also think that the judgment appealed from ought to be affirmed. In my opinion the judgment of the Master of the Rolls in the Court of Appeal proceeds on entirely sound grounds, and I think that the decision which he pronounced quite met all the justice of the case.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Waltons, Bubb, and Johnson.*

Solicitor for the respondents, *G. M. Clements.*

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, Oct. 28, 1886.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

THE SAILING SHIP GARSTON COMPANY LIMITED *v.* HICKIE, BORMAN, AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party, excepted perils in — "Dangers and accidents of navigation" — Freight — Short delivery—Collision through negligence of another ship—Liability of shipowner.

A clause in a charter-party, that the balance of freight is to be paid on the delivery of the cargo agreeably to bills of lading, less cost of cargo delivered short of bill of lading quantity, entitles the charterers where there has been short delivery to set off the cost of such short delivery against the balance of freight, although such short delivery has been occasioned by one of the excepted perils.

A shipowner is not liable to the shipper for damage done to the cargo through collision with another ship, if such collision was due solely to the negligence of the other ship and the shipowner is by the charter-party not to be liable for "dangers and accidents of the seas, rivers, and navigation."

Judgment of Grantham, J., affirmed.

THIS was an action by shipowners against the defendants as charterers and cargo owners to recover a general average contribution and a balance due in respect of freight under the charter-party. The defendants counter-claimed in respect of damage done to cargo and short delivery of cargo. By the charter-party it was agreed that the plaintiffs' ship should proceed to Cardiff, and there load a cargo of coal from the defendants' factors, and should forthwith proceed to Bombay and deliver the same there, "the freight to be paid on unloading and right delivery of the cargo at and after the rate of 18*s.* 6*d.* per

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

ton on the quantity delivered (the act of God, the Queen's enemies, restraint of princes and rulers, fire, and all and every other dangers and accidents of the seas, rivers, and navigation always mutually excepted)," part of the freight to be paid in advance and the balance "on the right and true delivery of the cargo agreeably to bills of lading, less cost of coals and coke delivered short of bill of lading quantity." The plaintiffs' ship accordingly loaded a cargo of coal at Cardiff and proceeded on her voyage; but, in consequence of a collision with another ship (caused solely by the negligence of those in charge of such other ship), she had to put back and unload for repairs. Owing to this unloading and reshipment, upon the cargo being delivered to the defendants at Bombay, it was short of the quantity mentioned in the bills of lading by 134 tons.

The defendants claimed under the provisions of the charter to set off against the balance of freight due from them to the plaintiffs the cost of the coals so short delivered.

At the trial, before Grantham, J., without a jury, at Liverpool, the learned judge gave judgment for the plaintiffs on the claim for a general average contribution, and for the defendants on the claim for freight, and for the plaintiffs on the counter-claim. The defendants appealed against this judgment, and there was a cross-appeal by the plaintiffs.

Carver for the defendants.—The defendants are entitled to recover on their counter-claim for short delivery of cargo. The contention of the plaintiffs is that the loss of cargo was due to a danger or accident of navigation, for which, by the charter-party, they are not to be liable. But the loss occurred owing to the negligence of another ship. That is not within the words of the exception. Those words refer to dangers and accidents inseparable from navigation—perils that must arise in the navigation of ships in the ordinary way, that is, with ordinary care. A collision which is caused by the negligence of another ship cannot be caused by a danger or accident of navigation; it is caused by something which has no special connection with navigation, viz., the neglect to take ordinary care. In *Woodley* v. *Michell* (48 L. T. Rep. N. S. 599; 5 Asp. Mar. Law Cas. 71; 11 Q. B. Div. 47) it was held that a collision caused by the negligent act of one of two ships, without any difficulty of waves or wind contributing to such collision, was not a peril of the sea. So here "dangers and accidents of navigation" denote dangers peculiar to navigation, which do not happen by the intervention of man and are not to be prevented by human prudence. By the very terms of the charter the defendants were entitled to set off against the balance of freight the cost of the coal short delivered, whether the short delivery was caused by an excepted peril or not.

French, Q.C. and *Synnott* for the plaintiffs.—Collision by the negligence of another ship is a danger or accident of navigation. In *Lloyd* v. *General Iron Screw Collier Company* (33 L. J. 269, Ex.; 3 H. & C. 284) Bramwell, B. said: "Suppose a man were to go blindfold along the street, and to run against something, could anyone say he met with an accident? He would do an act that would be very likely to lead to a mischief. It is different with the person who might suffer by such an act; he might fairly say that he met with an accident—a peril—which every man is liable to who goes out in the road and meets with negligent people. But I do not think the fair meaning of the word, or the reason of the thing, extends 'accident' to the case of a mischief accruing to the ship and cargo from the negligence of her own crew." With regard to the case of *Woodley* v. *Michell* (*ubi sup.*), the expression "perils of the sea" in a charter-party have only a limited meaning, and refer to the action of the wind and the waves, apart from human agency. The present case is quite different, because the word "navigation" at once introduces human agency. [Lopes, L.J.—While the sea is not under the control of man, navigation is. Lindley, L.J.—Do you say that a shipowner, under these general words, would be protected against the negligence of his own captain?] It is not necessary to say so in this case. They cited

Hayes v. *Kennedy*, 41 Penn. State, 378;
Angell on Carriers, 5th edit. p. 153, note (*a*).

The clause as to deductions from freight of cost of coal not delivered must be read subject to the excepted perils. The consequences of otherwise deciding would be illogical:

Meyer v. *Dresser*, 33 L. J. 289, C. P.

Carver in reply.

Lord Esher, M.R.—I will deal first with the question whether the defendants were entitled to set off against the balance of freight the cost of the non-delivered cargo. Parties may so contract if they please, and the question is, have they done so here? The rate of freight is stated in the charter-party, after it is the clause containing the excepted perils, and it is said that those perils apply to the freight. But although those excepted perils have come in every charter in the same place, nobody till to-day has suggested that they apply to freight. Part of the freight is to be prepaid, and there can be no deduction for short delivery. The rest is to be paid on "right and true delivery of the cargo agreeably to bills of lading, less the cost of coals or coke delivered short of the bill of lading quantity." That means the balance of freight to be paid is to be at the named rate, less the cost of the coal not delivered. No language could be plainer. It may be that the cargo owner could not recover damages in an action for short delivery, but it is plainly stated that in paying the freight for cargo delivered he may deduct the cost of the coal not delivered. The remaining point is, whether the defendants were entitled to recover on the counter-claim. The facts are, that damage was done to this ship by collision with another ship, which collision was brought about solely through the negligence of the other ship. Owing to this damage, there was a loss of cargo and consequent short delivery. For this the shipowners are *primâ facie* liable. But they say that they have contracted that they are not to be liable for "dangers and accidents of navigation." The question is, therefore, whether a loss of cargo, caused by a collision through the negligence of another ship, is caused by a danger or accident of navigation. It has been held that such a loss is not a loss by perils of the sea within the meaning of that expression in a charter-party. It is a loss occasioned by the act of man and not by the sea.

But this charter-party contains an exception, not only of dangers and accidents of the sea, but also "of navigation." Perils of navigation must not be construed as if it meant the same as perils of the sea, or else you make the former expression nonsense. Perils of navigation must be held to mean something different to perils of the sea in a charter-party. The question which the court, with the knowledge it has as to what happens at sea, has to determine is, whether a loss which happens by a collision through the negligence of another ship is a loss by a danger or accident of navigation. If the sea drives a spiked instrument into the ship, that is a peril of the sea. It is an act done by the sea. But navigation is done by men. The danger or accident may be caused by the mode in which the ship itself is navigated. I do not say that the expression "dangers and accidents of navigation" could never cover what was done on the ship itself. Something might be done on the ship itself without negligence which would be a peril of navigation. But a collision with another ship is the great peril in the navigation of narrow seas. All the navigation rules about navigation are directed to this. It is undoubtedly a danger caused by bad navigation, and must, therefore, be a danger of navigation. It is a danger to you who are navigating caused by the negligence of others navigating near you. But if the collision is caused by the negligence of those on board the shipowner's own ship, it is not a danger of navigation. It would be a danger of employing inefficient servants. In a case like the present, where the collision has happened solely through the negligence of those on board the other ship, if the shipowner has excepted his liability in the case of dangers of navigation, he is not liable. My brother Grantham was therefore right, and this appeal must be dismissed.

LINDLEY, L.J.—The main question is, whether the collision by which the loss of cargo was caused comes within the perils excepted by the charter-party, which include "dangers and accidents of navigation." To my mind, that is capable of only one answer. The expression "dangers of navigation" is intended to extend and enlarge the expression "perils of the sea." We have to ask ourselves whether such a collision as this was is a danger of navigation. I should have thought that it was a most prominent danger of navigation. We should be narrowing the expression down in an unjust way if we were to confine it to matters arising in the navigation of the ship itself. I think that a shipowner could not cover the negligence of himself or his servants under those words. Our decision in this case is perfectly consistent with the decision in the case of *Woodley* v. *Michell* (*ubi sup.*). The other question is whether the defendants can deduct from the freight the cost of the quantity of coal short delivered. By the very words of the charter the balance of freight is to be paid less the cost of coal short delivered. That is apparently an express bargain that the charterers may make that deduction. But it is said they are not entitled to do so, because the short delivery was caused by the excepted perils. I do not agree with that. It seems to me that the words of the contract are too plain to admit of doubt, and that on this point also the decision of Grantham, J. was right.

LOPES, L.J.—I entirely agree with what has been said by the Master of the Rolls and my brother Lindley, and have very little to say myself. The important question is, what is the effect of the excepted perils clause in this bill of lading? The case of *Woodley* v. *Michell* (*ubi sup.*) has been cited to the court as an authority upon this question. There it was held that a collision caused by negligence was not a peril of the sea. But the words here are different; they are much larger. They are "dangers and accidents of the seas, rivers, and navigation." The question is, are the words "dangers and accidents of navigation" senseless and superfluous, or are they to have some meaning given to them? I am of opinion that they are to have some meaning given to them. It may be said, why should "dangers of navigation" cover a loss occasioned by the negligence of the other ship, when "perils of the sea" do not? The answer is that while the seas are beyond human control, navigation is directly subject to it; and that while negligence cannot be a peril of that which is beyond human control, it may be a peril of anything that is subject to that control.

Appeal dismissed.

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

Solicitors for the defendants, *Trinders and Romer.*

Dec. 14 *and* 15, 1886.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

THE JOHANN SVERDRUP. (*a*)

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

*Collision—Compulsory pilotage—River Tyne—Foreign ships—*41 *Geo.* 3, *c. lxxxvi.—Merchant Shipping Act* 1862 (25 *&* 26 *Vict. c.* 63), *s.* 39—*Tyne Pilotage Order Confirmation Act* 1865 (28 *&* 29 *Vict. c.* 44).

The Tyne Pilotage Order Confirmation Act 1865 (28 *Vict. c.* 44) *was meant to be a complete code for regulating pilotage in the river Tyne, and was intended to supersede the pilotage provisions in the Act* 41 *Geo.* 3, *c. lxxxvi., and therefore sect.* 16 *of the schedule of the Tyne Pilotage Order Confirmation Act* 1865 *exempts all vessels, whether British or foreign, from compulsory pilotage in the port of Newcastle-upon-Tyne.*

THIS was an appeal by the defendants in a collision action *in rem* against a decision of the Divisional Court of the Probate, Divorce, and Admiralty Division.

The collision occurred in the river Tyne on the 12th Oct. 1884, between the British steamship *Rose* and the Norwegian steamship *Johann Sverdrup*. The action was instituted by the owners of the *Rose* against the owners of the *Johann Sverdrup*, and came on for trial at Newcastle on the 23rd Oct. 1885, when the judge found that the collision was caused by the negligence of the *Johann Sverdrup*, but gave judgment for her owners on the ground that at

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

the time of the collision she was in charge of a duly licensed pilot by compulsion of law, and that it was his negligence which solely caused the collision.

From this decision the plaintiffs appealed to the Divisional Court of the Probate, Divorce, and Admiralty Division. The appeal came on for hearing on the 10th Feb. 1886 before the President and Butt, J., and on the 23rd March the Court gave judgment, allowing the appeal on the ground that the Tyne Pilotage Order Confirmation Act 1865 exempted all ships, British and foreign, from compulsory pilotage in the Tyne.

The case below is reported in 6 Asp. Mar. Law Cas. 16; 54 L. T. Rep. N. S. 800; and 11 P. Div. 49.

H. Boyd, for the appellants, argued as in the court below.

J. Gorell Barnes, for the respondents, was not called upon.

Lord Esher, M.R.—Although this case has been argued with great ability and vigour on behalf of the appellants, I do not think the argument will hold good. The case is a very clear one. It is immaterial what were the rights and powers of pilotage authorities before the Merchant Shipping Act Amendment Act 1862, for by sect. 39 of that Act a new power was given by the Board of Trade to deal with almost anything relating to pilotage. They have power, by provisional order under the Act, to do the following, amongst other things: "To transfer the whole or any part of the jurisdiction of the said pilotage authority to a new body corporate or body of persons to be constituted for the purpose by the provisional order." They have power to create the pilotage authority, to determine the limits of the district of the pilotage authority, to sanction a scale of pilotage rates, and by sub-sect. 4 of the same section they have power "to exempt the masters and owners of all ships"—that is, foreign or otherwise—"from being obliged to employ pilots in any pilotage district, or in any part of any pilotage district, or from being obliged to pay for pilots when not employing them . . . . and to annex any terms and conditions to such exemptions." The simple question then, is, Have the Board of Trade made this exemption with regard to Newcastle-upon-Tyne, or any part of that district. To ascertain this we must turn to the Tyne Pilotage Order Confirmation Act 1865. By that Act a new corporate body is constituted as the Tyne Pilotage Commissioners. Does this wholly new body get rid of the old commissioners? It is absurd to suppose that there are two sets of commissioners in the same district. Therefore the creation of the new body got rid of the old. Sect. 10 then provides that "the pilotage district of the Tyne shall for the purposes of this order"—therefore the old district may remain for other purposes—"be deemed to include the whole of the river Tyne, and to extend seaward over a radius of seventy miles;" that is, a part of the old district is made into a new district. To what district do the new powers of the new body apply? Why, to the new district, and that only. So far we have new commissioners and a new district. By sect. 11, "The jurisdiction in pilotage matters within the district aforesaid now vested in the Trinity House of Newcastle-upon-Tyne shall be and is hereby transferred to and vested in the hands of the commissioners incorporated by this order." Therefore the jurisdiction of the old commissioners is transferred to the new. There are no negative words that the jurisdiction of the old commissioners shall cease, because they are not wanted. If you have new commissioners and a new district and say that the jurisdiction which vested in the old commissioners shall vest in the new, you do not want words to get rid of the old commissioners. Then by sect. 12, "All pilots licensed for the Tyne or its entrance by the Trinity House of Newcastle-upon-Tyne at the commencement of this order shall be entitled to continue to act as such pilots under the commissioners incorporated by this order for one year after the commencement of this order without further licence or payment in respect of that year, but in all other respects shall become and be subject to the authority of the commissioners and the provisions of this order as if they had been severally licensed under this order." This section only deals with the pilots' licences. Sect. 39 of the Merchant Shipping Act 1862 also gave power to the Board of Trade to make a table of pilotage rates. How do they carry out that power? Why, they draw up a scale of rates. What is the result of that? Are there to be two scales? If the old scale is different to the new scale, are both scales to be applied? There are no negative words to get rid of the old scale, simply because they are not wanted. If a body has power to make a new scale of rates and makes it, it thereby does away with the old scale. It follows that the only scale of rates which could be collected is this new scale of rates. Clause 15 of the provisional order provides that "the pilotage dues shall be paid to the commissioners or to the pilot performing such pilotage duty within five days after the performance thereof, provided that the commissioners may from time to time increase or diminish the said pilotage dues subject to the approval of the Board of Trade." Therefore the commissioners have power to diminish or increase the scales, subject to the approval of the Board of Trade.

It will be observed that the words used above are that the "pilotage dues shall be paid," and to meet an argument founded on that, it is necessary to refer to the following clause, which is, "Nothing in this order shall extend to oblige the owner or master of any vessel to employ or make use of any pilot in piloting or conducting such vessel into or out of the said district, or within any part thereof, if he is not desirous so to do, or to pay any pilotage dues when not employing or making use of a pilot." Now, the very essence of compulsory pilotage is that the master of a vessel is bound to take a pilot and pay him the rates imposed, and if he refuse to take a pilot, nevertheless to pay the rates. That is the only compulsion you can put on a master, and therefore the Legislature had that present to their minds when this provision was enacted. Can it possibly be said that this provision is not meant to carry out the power given by sect. 39 of the Merchant Shipping Act 1862 to exempt masters and owners from being obliged to employ pilots, and from paying for them when they do not employ them. It can have no power or effect unless it does this, and might be struck out as senseless. The proper meaning of the provision is, that no vessel coming into the Tyne shall be obliged to take a pilot, and that no vessel if it refuses to take a pilot shall be

liable to pay the rates. Therefore it does away with compulsory pilotage in the Tyne. But it has been argued that its force is altered by clause 22, which is, "Nothing in this order shall exempt the commissioners of the pilotage district aforesaid from the provisions of any general Act of Parliament now in force or hereafter to be passed relating to pilotage or pilotage dues, or to merchant shipping, or to ports, harbours, or docks, or to dues on shipping or on goods carried therein, or from any future revision or alteration under the authority of Parliament of the pilotage dues authorised by this order, or of the limits of the district defined by this order." But that is merely a general saving clause to meet anything and everything, past, present, and future, which, according to all rules of construction, cannot limit, alter, vary, enlarge, or have any effect on a particular enactment such as that contained in clause 16. I therefore think clause 16 abolishes compulsory pilotage in the Tyne, and that its force is not diminished by any other provision. This appeal must therefore be dismissed with costs.

Lindley, L.J.—I have come to the same conclusion. I am unable to reconcile clause 16 of the Tyne Pilotage Order with sect. 6 of 41 Geo. 3, c. lxxxvi., which was in force up to 1865. Clause 22 does not refer, even by implication, to the special Act of Geo. 3, but to the general Act. So far as one can discover, until this order came into force, compulsory pilotage existed in the Tyne under the Act of Geo. 3. We have to determine whether it still exists. The order of 1865 is equivalent to an Act of Parliament. Mr. Boyd himself admits that which cannot possibly be denied, that the only pilotage rates in force in the Tyne are those mentioned in clause 15 of the order. Those, therefore, and no others, are the rates which are payable, and whenever they are payable they are payable under the order of 1865, and not under any other order or Act of Parliament. Suppose for a moment we adopt Mr. Boyd's argument, and say that as compulsory pilotage was not expressly and in terms abolished, it must therefore be taken to exist. What is the effect of this argument? On that theory there are circumstances which make these rates payable under the order of 1865, but then clause 16 takes away any obligation to pay these rates for pilotage when a pilot is not employed. If compulsory pilotage exists, it is impossible to give any force or meaning to these two sections, because shipowners would, if pilotage were compulsory, be bound to pay rates, whereas by clause 16 they are exempt from so doing. These two Acts are irreconcilable, and on that ground I think it is utterly impossible to attempt to construe them together, and that the old Act is gone. I therefore think it clear that compulsory pilotage was abolished in the Tyne after 1865.

Lopes, L.J.—This case is disposed of by sect. 39 of the Merchant Shipping Act 1862, and clause 16 of the Provisional Order. By sect. 39 of that Act very large powers were given to the Board of Trade, and by sub-sect. 4 power is given to exempt the master and owners of all ships—therefore including foreign ships—from compulsory pilotage. By the Provisional Order that exemption is carried into execution. Notwithstanding, therefore, the able argument of Mr. Boyd, I can feel no doubt that the effect of clause 16 was intended to, and does, abolish compulsory pilotage in the Tyne.

Appeal dismissed with costs.

Solicitors for the plaintiffs, *W. A. Crump* and *Son*.

Solicitors for the defendants, *Gregory, Rowcliffe*, and *Co.*

Nov. 8, 1886, *and Jan.* 24, 1887.

(Before Lord Esher, M.R., Lindley and Lopes, L.JJ.)

The Bernina. (*a*)

ON APPEAL FROM BUTT, J.

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 and seamen off duty are killed in a collision between two ships both of which are to blame, the deceased are not identified with their carrying ship so as to be deemed to be guilty of contributory negligence, and hence their personal representatives are entitled under Lord Campbell's Act to sue the owners of the non-carrying ship.

Thorogood *v.* Bryan (8 *C. B.* 115; 18 *L. J.* 336, *C. P.*) *overruled.*

Sect. 25, *sub-sect.* 9, *of the Judicature Act* 1873 *providing that "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," has no application to actions under Lord Campbell's Act instituted to recover damages for loss of life occasioned by a collision between two ships for which both are to blame, and hence successful plaintiffs in such cases are entitled to recover full damages, and are not limited by the Admiralty Court rule as to the division of damages to recovering only a moiety.*

This was an appeal by the plaintiffs in three actions *in personam* under Lord Campbell's Act from a decision of Butt, J. giving judgment for the defendants in all three actions.

The actions were instituted 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*.

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*, and the actions were brought against the owners of the *Bernina*.

It appeared that the collision was occasioned by the joint negligence of both vessels. At the time of the collision the second officer was in charge of the *Bushire*, and was directly responsible for the navigation of the *Bushire*. The engineer and passenger had nothing to do with the collision. (*b*)

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

(*b*) It was admitted that the appeal could not be prosecuted on behalf of the representatives of the second officer.—Ed.

It was arranged that in the event of the plaintiffs being successful, there should be a reference to the registrar and merchants to assess the damages in accordance with the judgment of the court.

The facts were set out in a special case which appears in the report below (54 L. T. Rep. N. S. 499; 5 Asp. Mar. Law Cas. 577; 11 P. Div. 31).

Nov. 8, 1886.—*Bucknill*, Q.C. and *Nelson* for the plaintiffs, in support of the appeal.—Butt, J. declined to give judgment for the plaintiffs, on the ground that he was bound by the decision of *Thorogood* v. *Bryan* (8 C. B. 115; 18 L. J. 336, C. P.). This court has power to overrule that decision, and should do so. The decision has from the outset been questioned, and no text-writer has approved of it. Moreover, condemnation has been passed upon it by high judicial authority in this country, in Scotland, and in the United States:

Adams v. *The Glasgow and South-Western Railway Company*, 3 Scotch Sess. Cas., 4th series, 215;
The Milan, Lush. 388;
Hay v. *Le Neve*, 2 Shaw Sc. App. 505;
Chapman v. *Newhaven Railway Company*, 6 Smith's Rep. 341;
Colegrove v. *New York and Newhaven Railway Company*, 6 Smith's Rep. 492;
Webster v. *Hudson River Railroad Company*, 38 N. Y. Rep. 260;
Smith's Leading Cases, 4th edit., vol. 1, p. 220, a.

The decision cannot be supported on any sound legal principle. The assumption upon which it is founded, that the plaintiff by selecting his conveyance thereby identifies himself with those who have charge of it so that their negligence is to be considered his, is an erroneous assumption and not warranted by fact or principle. The passenger has, in fact, no control over those who have charge of the conveyance, and they are neither his agents nor his servants. True it is that Lord Bramwell in *Armstrong* v. *The Lancashire and Yorkshire Railway Company* (33 L. T. Rep. N. S. 228; L. Rep. 10. Ex. 47) assented to the doctrine of *Thorogood* v. *Bryan* (*ubi sup.*), but nowhere else has it been in terms approved of, and many decisions are inconsistent with it:

Quarman v. *Burnett*, 6 M. & W. 499;
Rigby v. *Hewitt*, 5 Ex. 240;
Greenland v. *Chaplin*, 5, Ex. 243;
Reedie v. *London and North-Western Railway Company*, 4 Ex. 244.

Assuming the plaintiffs are entitled to judgment, they should recover the whole of their damages and not half. The Admiralty Court rule as to the division of damages where both ships are to blame has no application to this case. By sect. 25 of the Judicature Act 1873, that rule is to apply to any cause for damages arising out of a collision between two ships, if it be a rule hitherto "in force in the Court of Admiralty." But no such rule had been in force in the Admiralty Court, because these are actions under Lord Campbell's Act, and none of these actions could be brought in the Admiralty Court before the Judicature Act.

Sir *Walter Phillimore* and *Barnes*, for the defendants, *contra*.—The decision in *Thorogood* v. *Bryan* (*ubi sup.*) has been law for the last thirty-eight years, and, although sometimes adversely criticised, has been followed in numerous cases. Lord Bramwell has in terms approved of it, and many decisions impliedly support the principles upon which it was based:

Armstrong v. *Lancashire and Yorkshire Railway Company* (*ubi sup.*);
Spaight v. *Tedcastle*, 44 L. T. Rep. N. S. 589; L. Rep. 6 App. Cas. 217;
Waite v. *North-Eastern Railway Company*, E. B. & E. 719;
Child v. *Hearn*, L. Rep. 9, Ex. 176;
Vanderplank v. *Miller*, M. & M. 169;
Brown v. *New York Central Railway Company*, 31 Barbour's Rep. 385;
Mooney v. *Hudson River Railroad Company*, 5 Robertson, 549.

Even apart from *Thorogood* v. *Bryan* (*ubi sup.*), Armstrong's personal representatives have no right of action. They could not recover against the owners of the *Bushire*, because Armstrong's death was caused by the negligence of a fellow-servant. If therefore they have no right against the one wrongdoer, it is manifestly contrary to sound principle that they should have a right against the other. It is also submitted that the provisions of the Judicature Act 1873, s. 25, sub-sect. 9, are applicable to these actions, and therefore the plaintiffs if successful are only entitled to a moiety of their damages. That section deals with "any cause or proceeding for damages arising out of a collision between two ships." These actions are clearly causes or proceedings "for damages arising out of a collision between two ships."

Bucknill, Q.C. in reply.

Cur. adv. vult.

Jan. 24.—Lord Esher, M.R.—This was a special case heard and determined by Butt, J., sitting in the Court of Admiralty. It appears from the case that three actions had been brought and entered in the Admiralty Division, each for damages against the owners of the ship *Bernina*, the actions being founded on Lord Campbell's Act. In the first, Elizabeth Armstrong sued as administratrix of her husband on behalf of herself and children. In the second, Catharine Owen sued as administratrix of her husband. In the third, Habiba Toeg sued as administratrix of her son. The collision took place between the *Bernina* and the *Bushire*, both British ships, and the collision was caused by the fault or default of the master and crew of the *Bushire*, and by the fault or default of the master and crew of the *Bernina*. Armstrong was one of the crew of the *Bushire*, but at the time of collision was off duty, and had nothing to do with the negligence of the *Bushire*, which partly caused the accident. Owen was second officer of the *Bushire*, and was at the time of the collision in charge of the *Bushire*, and was directly responsible for the negligence or carelessness which partly caused the collision. Toeg was a passenger on board the *Bushire*, and had nothing to do with the negligent or careless navigation which partly caused the collision. Butt, J. gave judgment for the defendants in all three actions, in obedience to, but apparently without himself acquiescing in, the case of *Thorogood* v. *Bryan* (*ubi sup.*). It is evident from this statement that the question raised is, What is the law applicable to a transaction in which a plaintiff has been injured by negligence, and in the course of which transaction there have been negligent acts or omissions by more than one person? Upon many points as to such a transaction the common law is clear. (1.) If no fault can be

attributed to the plaintiff, and there is negligence by the defendant and also by another independent person, both negligences partly and directly causing the accident, the plaintiff can maintain an action for all the damages occasioned to him against either the defendant or the other wrongdoer. (2.) If in the same case the negligence is partly that of the defendant personally and partly that of his servants, the plaintiff can maintain an action either against the defendant or his servants. (3.) If in the same case the negligence is that of the defendant's servants, though there be no personal negligence by the defendant, the plaintiff can maintain an action either against the defendant or his servants. (4.) If in the same case the negligence, though not that of the defendant personally or of a servant of the defendant, consists in an act or omission by another done, or omitted to be done, in the way in which it is done, or omitted to be done, by the order or direction, or authority, of the defendant, the plaintiff can maintain an action either against the defendant or the person personally guilty of the negligence. (5.) If, although the plaintiff has himself or by his servants been guilty of negligence, such negligence did not directly partly cause the accident, as if, for example, the plaintiff or his servants having been negligent, the alleged wrongdoers might by reasonable care have avoided the accident, the plaintiff can maintain an action against the defendant. (6.) If the plaintiff has been personally guilty of negligence, which has partly directly caused the accident, he cannot maintain an action against anyone. (7.) If, although the plaintiff has not been personally guilty of negligence, his servants have been guilty of negligence which has partly directly caused the accident, the plaintiff cannot maintain an action against anyone. (8.) If, although the defendant or his servants has or have been guilty of negligence the plaintiff or his servants could by reasonable care have avoided the accident, the plaintiff cannot maintain an action against anyone. In all the propositions thus enunciated the persons named have been confined to the plaintiff, the defendant, and their servants, and in one an agent. It was laid down in *Quarman* v. *Burnett* (*ubi sup.*) in 1840 that a defendant is only liable for the negligence of those who have the relation of servant to him as master, "upon the principle," it was said, "that *Qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer—he who had selected him as his servant from the knowledge or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey, &c. But the liability by virtue of the principle of the relation of master and servant must cease where the relation itself ceases to exist; and no other person than the master of such servant can be liable on the simple ground that the servant is the servant of another, and his act the act of another. Consequently, a third person entering into a contract with the master which does not raise the relation of master and servant at all is not thereby rendered liable." And in *Reedie* v. *The London and North-Western Railway Company* (*ubi sup.*), in 1849, "The liability of anyone other than the party actually guilty of any wrongful act proceeds on the maxim *Qui facit per alium facit per se* . . . But neither the principle of the rule nor the rule itself can apply to a case where the party sought to be charged does not stand in the character of employer to the party by whose negligent act the injury has been occasioned." So stands the common law as to the rights and liabilities of a plaintiff in such actions, unless the case of *Thorogood* v. *Bryan* (*ubi sup.*) is to be supported, by which, although the liabilities of such a plaintiff are not said to be increased, it is said that his rights are diminished. Before entering upon the consideration of that and some other cases, it may be well to observe that in cases of negligence the first point usually dealt with is, whether there has been in fact any negligence by the defendant personally; secondly, or by his servants; then, thirdly, whether that negligence, if any, has been wholly or partly a cause of the accident; fourthly, has the plaintiff personally, or by his servants, been guilty in fact of any negligence; fifthly, has such negligence, if any, either wholly or partly directly been a cause of the accident. In many of the cases with which we shall have to deal, it will be necessary to observe which of these points has been in dispute, and, if more than one has been in dispute, to distinguish that to which the judgment has been applied. The main question, however, before us is, whether for any reason we think that the case of *Thorogood* v. *Bryan* (*ubi sup.*) can now be supported in a court of appeal. *Thorogood* v. *Bryan* (*ubi sup.*) and *Cattlin* v. *Hills* (8 C. B. 123) were decided in 1849.

The first was an action under Lord Campbell's Act against the owner of an omnibus. The facts were that the deceased got out of the omnibus in which he was a passenger whilst the omnibus was in motion, and without waiting for it to draw up to the kerb; and that the omnibus of the defendant coming up very fast at the moment, the deceased was unable to get out of the way of it, and was run over and killed. In summing up the learned judge, Vaughan Williams, J., told the jury that, "if they were of opinion that want of care on the part of the driver of Barber's omnibus in not drawing up to the kerb to put the deceased down, or any want of care on the part of the deceased himself had been conducive to the injury, in either of those cases, notwithstanding the defendant, by her servant, had been guilty of negligence, their verdict must be for the defendant." The jury gave a verdict for the defendant. A rule *nisi* having been obtained for a new trial on the ground of misdirection, on cause being shown, Williams, J. said: "The objection to the summing up applies to that part of it which relates to the want of care and caution on the part of the driver of Barber's omnibus. I acted upon the dictum of the Court of Exchequer in *Bridge* v. *The Grand Junction Railway Company* (3 M. & W. 244). If that be correct, I was right." During the argument, Cresswell, J. asked, "Must not the negligence which is to exonerate the defendant be the negligence of the plaintiff or his agent? . . . It seems strange to say that A. shall not be responsible for his negligence because B. has been negligent likewise, C. being the party injured." In *Cattlin* v. *Hills* (*ubi sup.*) the plaintiff was a passenger on the steamer the *Sons of the Thames*. A collision occurred with the *Sapphire*, belonging to the defendants, which struck the anchor of the *Sons of the Thames* pro-

jecting over the bow and knocked it down on the plaintiff's leg, and crushed it. Cresswell, J. told the jury that the plaintiff was not entitled to recover if they were of opinion that the damage sustained by the plaintiff had been occasioned by negligence on the part of those intrusted with the care and management of the *Sons of the Thames*. The jury gave a verdict for the plaintiff. A rule *nisi* was obtained for a new trial for misdirection. The first of these cases was tried after Trinity Sittings 1848; the second after Michaelmas Term 1848. Cause was shown in both cases on the 20th June 1849. During the arguments, the note regarding *Bridge* v. *The Grand Junction Railway*, of the then editors of Smith's Leading Cases—Willes and Keating—was read. The judgments were as follows:—Coltman, J.: "In *Thorogood* v. *Bryan* the question raised is, whether a passenger in an omnibus is to be considered so far identified with the owner, that negligence on the part of the owner or his servants is to be considered negligence of the passenger himself. The law is that a party who sustains any injury from the careless or negligent driving of another may maintain an action, unless he has himself been guilty of such negligence or want of due care as to have contributed or conduced to the injury. In the present case the negligence that is relied on as an excuse is not the personal negligence of the party injured, but the negligence of the driver of the omnibus in which he was a passenger. But it appears to me that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and his servants that if any injury results from their negligence he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling that want of care of the driver will be a defence of the owner of the carriage which directly caused the accident." Maule, J. said: "Although I at one time entertained a contrary impression, upon further consideration I incline to think that for this purpose the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased. . . . On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. . . . He enters into a contract with the owner, who by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. . . . But as regards the present plaintiff, he is not altogether without fault. He chose his own conveyance, and must take the consequences of any default of the driver whom he thought fit to trust." Cresswell, J. said: "I must own I should not have been sorry if the point could have been raised on a bill of exceptions. The subject is an important one, and ought to be definitely set at rest. . . . If the driver of the omnibus the deceased was in had by his negligence or want of due care and skill contributed to an injury from a collision, his master clearly could maintain no action. And I must confess that I see no reason why a passenger who employs the driver to convey him stands in any better position." Vaughan Williams, J. said: "I think the passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed by."

The first observation to be made upon this case is that made by Cresswell, J., that, inasmuch as the judgment was given on a motion for a new trial for alleged misdirection, there being no bill of exceptions, it was not possible to carry the judgment to the Exchequer Chamber. Secondly, that, although there was evidence in the case which showed that the defendant's servants had been guilty of negligence partly directly causing the accident, and that the driver of the omnibus in which the plaintiff was a passenger was also guilty of negligence partly directly causing the accident, there was also evidence upon which the jury might well have found, and probably did find, that the plaintiff himself had personally been guilty of negligence directly causing the accident. But objection was, taken to the summing up, and the judgment was given in respect of the summing up, and we must therefore confine our attention to the summing up. Upon that summing up it is possible that the jury found for the defendant, although the plaintiff was, in their opinion, not personally guilty of any negligence. Now, it is plain that the driver of the omnibus in which the plaintiff was a passenger was not the plaintiff's servant. It is plain that the plaintiff had no legal power or authority to direct him how to drive, or when or where to stop. It is plain that the plaintiff did not in fact direct him. According to the judgment, the defendant was excused, although the owner of the omnibus in which the plaintiff was a passenger was only a contractor with the plaintiff to carry him, it being by the contract left to such owner to determine who should be the driver, and the manner of the driving, and although the driver of the omnibus was not the servant of the plaintiff, but was the servant of the owner of the omnibus. In the face of previous authorities, it was not then said, and is not now said, that the plaintiff could in such circumstances be made liable to anyone else in respect of the negligence of the driver. It is not said that the plaintiff could be made liable in any respect to or for the driver; but it is said that the conduct of the driver prevented the plaintiff from recovering, not from that driver's master, but from an independent wrongdoer, who, by his servant's negligence, had injured the plaintiff. Coltman, J. states, as the ground of his judgment, "that the plaintiff, having trusted the party by selecting the particular conveyance, had so far identified himself with the owner and his servants that if any injury results from their negligence he must be considered a party to it." With great deference, this passage is so loosely worded that it would make the plaintiff liable to persons injured by the negligence of the driver, which was not intended by the learned judge. He then goes on to say: "In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care on the part of that driver will be a defence of the driver of the carriage which directly caused the accident." With regard to the phrase used by all the judges, of the plaintiff being identified with other persons, or with a carriage, it can be but a figure of speech. To say in any sense, other than by way of an analogy contained in a figurative expression, that one man is identified with another, still more with a carriage, is absurd. What is

obviously meant is, that the passenger is in the result in the same position as if he had been the driver or owner bringing the action. The figure describes the result; but, as is sometimes the case, the figure which describes the result is taken to be the enunciation of the principle which produces the result. The effect is that the reason for the result is made the result. In order, therefore, to be satisfied with the judgments in this case, we must look to the causes which are relied upon in them to produce the result. The sole cause stated by Coltman, J. is the selection by the plaintiff of the conveyance, and his thereby trusting the party, apparently meaning thereby the driver. As to the selection, it can hardly be said to exist in fact. There are not always two omnibuses starting at the same place and time on the same journey. Hardly ever two ships. Never two railway trains. But, if there be a selection, reliance on it seems to be opposed to a part of the judgment as delivered by Parke, B., in *Quarman* v. *Burnett* (*ubi sup.*): "As to the supposed choice of a particular servant, &c., it seems to us that, if the defendants had asked for this particular servant amongst many, and refused to be driven by any other, they would not have been responsible for his acts and neglect. If the driver be the servant of a jobmaster, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant, where there is a choice amongst more, any more than a hack post-boy ceases to be the servant of an innkeeper where a traveller has a particular preference for one over the rest, on account of his sobriety and carefulness." Referring to *Thorogood* v. *Bryan* (*ubi sup.*), Maule, J. says that "the negligence of the driver was the negligence of the deceased." That as above observed, is inaccurately worded. Then he says: "It is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him." The learned judge could not have meant to state anything so preposterous as that the passenger has in fact, or even by agreement, any power or right to control the manner of driving of the driver. It is obvious that he again rests his conclusion upon the alleged selection of the conveyance. Then he further says: "But as regards the present defendant (he means plaintiff), he is not altogether without fault. He chose his own conveyance, and must take the consequences of any default of the driver whom he thought fit to trust." Where is the fault—*i.e.*, want of care—in doing that which every passenger, however careful, who travels by omnibus does and must do? Where is the trust in a man whom you cannot know beforehand; who can be changed at any moment during the journey without your knowledge or consent? And if this be applied as a principle to railways and ships, is not it still more glaringly untrue in fact? And further, suppose it to be admitted that the passenger does select and thereby does trust, and is therefore guilty in that respect of want of ordinary care, how can it be said that any or all of these are in the end partly directly a cause of the accident? Cresswell, J. evidently desired that the question should be further considered. He does, however, speak of the passenger as of one "who employs the driver to convey him." It is not true in fact. Does a passenger by railway select or employ the engine-driver, or a passenger by ship select or employ the officer of the watch? Williams, J. gives similar reasons. In truth, the judgments in *Thorogood* v. *Bryan* (*ubi sup.*) all amount to saying that by what the plaintiff did, he made the driver his agent so as to be liable for his acts. But, if he did, he must in consistency not only be by reason of such liability deprived of his remedy against third persons, but must be affirmatively liable to third persons. In truth, the driver in the case is not the servant or agent of the passenger, and has not even any one of the attributes which are evidence of being like a servant or agent.

Thorogood v. *Bryan* (*ubi sup.*) was stated by Vaughan Williams, J. to have been founded on a dictum of Parke, B. in *Bridge* v. *The Grand Junction Railway Company* (3 Mee. & W. 244). It is sometimes also said to have followed *Butterfield* v. *Forrester* (11 East, 60). But the latter case deals only with the question of the plaintiff himself being the direct cause of his own injury; although there has been a previous negligence by the defendants. Only the plaintiff and defendant were concerned. It is not in point. In *Bridge* v. *The Grand Junction Railway Company* (*ubi sup.*), in 1838, the declaration was for injury by negligence of servants of the defendants in the conduct of a train of the defendants'. The plea was that the train of carriages, in one whereof the plaintiff was a passenger, did not belong to the defendants, nor was the same under the care and management of the defendants or their servants; and that the persons who had the control and management of the train of carriages, in one whereof the plaintiff was then being carried, were guilty of negligence, and that in part by and through the negligence of the last-mentioned persons, as well as in part by and through the negligence on the part of the servants of the defendants, the collision took place. Special demurrer that the plea amounts to not guilty, that it is argumentative, alleges evidence, &c. During the argument Parke, B. said: "The question is whether the plea is not altogether bad in substance. It is consistent with all the facts stated in it that the plaintiff, or those under whose guidance he was, was guilty of negligence and yet that the plaintiff is entitled to recover. Can it be said that, because a carriage is on the wrong side of the road, a party is excused who drives against it? It ought to have been shown that there was negligence in not avoiding the consequences of the defendants' defaults. The principle is very clearly laid down in *Butterfield* v. *Forrester* (*ubi sup.*)." In giving judgment finally, Parke, B. said: "The plea undoubtedly amounts to the general issue. But I think it is also bad in substance on the ground I before stated, that all the facts alleged in it may be true, there may have been negligence in both parties, and yet the plaintiff may be entitled to recover, The rule of law is laid down with perfect correctness in the case of *Butterfield* v. *Forrester* (*ubi sup.*), and the rule is that, although there may have been negligence on the part of the plaintiff, yet, unless he 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 own wrong." It is clear that the case dealt with the proposition laid down in *Butterfield* v. *Forrester* (*ubi sup.*), a proposition wholly distinct from that in question in *Thorogood* v. *Bryan* (*ubi sup.*). The only applicable words are those of Parke, B. used during the argument, and omitted in the final judgment. The suggestion contained in the words was challenged before *Thorogood* v. *Bryan* (*ubi sup.*), and was argued in banco by the editors—Willes and Keating—of Smith's Leading Cases. In the note to *Ashby* v. *White* (Smith's L. C. vol. 1, 3rd edit. p. 132, a) they said, speaking of *Bridge* v. *The Grand Junction Railway Company* (*ubi sup.*): "A hasty perusal of the report of that case might lead to the supposition that, according to the opinion of the court, the plea might have been made good in substance, though not in form, by an averment that the plaintiff's driver could by ordinary care have avoided the accident. But that result does not by any means follow from what the learned judges said, much less from what they actually decided. It may perhaps safely be asserted that the plea was at all events bad in substance for not alleging that the passenger who brought the action was guilty of negligence. If two drunken stage coachmen were to drive their respective carriages against each other, and injure the passengers, each would have to pay for his own carriage no doubt; but it is inconceivable that each set of passengers should by a fiction be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer." This note has been adopted by every subsequent editor. I have been allowed to see the volume in which *Thorogood* v. *Bryan* (*ubi sup.*) is reported in Parke, B.'s own library, and I have seen in his own handwriting "Quære" written against the case, and also "See the note in Smith's Leading Cases." The inference seems to be that he, upon whose casual dictum the case of *Thorogood* v. *Bryan* (*ubi sup.*) is assumed to be founded, was not satisfied with the decision. In *Rigby* v. *Hewitt* (*ubi sup.*) and *Greenland* v. *Chaplin* (*ubi sup.*) the point discussed was that raised in *Butterfield* v. *Forrester* (*ubi sup.*). They are not authorities in support of *Thorogood* v. *Bryan* (*ubi sup.*). In *Tuff* v. *Warman* (2 C. B. N. S. 740), decided in 1857, the present point was not raised. The case is only useful for the remark of Vaughan Williams, J., when *Thorogood* v. *Bryan* (*ubi sup.*) was cited. "That case," he said, "has been made the subject of some damaging remarks in the last (the fourth) edition of Smith's Leading Cases: (vol. 1, p. 220, a.)" The note there referred to was written after the decision in *Thorogood* v. *Bryan* (*ubi sup.*), and is as follows: "If two drunken coachmen were to drive their respective carriages against each other, and injure the passengers, each would have to bear the injury to his own carriage no doubt; but it seems highly unreasonable that each set of passengers should by a fiction be identified with the coachman who drove them, so as to be restricted for remedy to actions against their own driver or his employer. This, nevertheless, appears to be the result of the decision in *Thorogood* v. *Bryan* (*ubi sup.*); but it may be questioned whether the reasoning of the court in that case is consistent with those of *Rigby* v. *Hewitt* (*ubi sup.*) and *Greenland* v. *Chaplin* (*ubi sup.*), or with the series of decisions from *Quarman* v. *Burnett* (*ubi sup.*) to *Reedie* v. *The London and North-Western Railway Company* (*ubi sup.*). Why, in the particular case, both the wrongdoers should not be considered liable to a person free from all blame, not answerable for the acts of either of them, and whom they have both injured, is a question which seems to deserve more consideration than it received in *Thorogood* v. *Bryan* (*ubi sup.*)."

The case of *Waite* v. *The North-Eastern Railway Company* (E. B. & E. 719), decided in 1858, requires to be examined. It was an action on behalf of an infant by his next friend. The plaintiff, an infant of five years, with his grandmother, who took a half ticket for the child and a ticket for herself, were run over by a passing train as they were crossing the railway, the grandmother being killed. The jury, in answer to questions left them by Martin, B., found that the defendants were guilty of negligence, that Mrs. Park, the grandmother, was also guilty of negligence which contributed to the accident. No negligence of course was attributed to the infant plaintiff. A verdict was entered for the plaintiff with leave to move to enter it for the defendants. Lord Campbell said: "We think the rule ought to be made absolute for entering a verdict for the defendants. The jury must be taken to have found that Mrs. Park, the grandmother of the infant plaintiff, in whose care he was when the accident happened, was guilty of negligence without which the accident would not have happened; and that, notwithstanding the negligence of the defendants, if she had acted upon this occasion with ordinary caution and prudence neither she herself nor the infant would have suffered. Under such circumstances, had she survived, she could not have maintained any action against the company; and we think that the infant is so identified with her that the action in his name cannot be maintained. The relation of master and servant certainly did not subsist between the grandchild and the grandmother, and she cannot in any sense be considered his agent; but we think that the defendants in furnishing the ticket to the one and the half ticket for the other, did not incur a greater liability towards the grandchild than towards the grandmother, and that she, the contracting party, must be implied to have promised that ordinary care should be taken of the grandchild. We do not consider it necessary to offer any opinion as to the recent cases in which passengers by coaches or by ships have brought actions for damages suffered from the negligent management of other coaches and ships, there having been negligence in the management of the coaches and ships in which they were travelling, as, at all events, a complete identification seems to us to be constituted between the plaintiff and the party whose negligence contributed to the damage, which is the alleged cause of action, in the same manner as if the plaintiff had been a baby only a few days old to be carried in a nurse's arms." In the Exchequer Chamber Mellish, for the defendants, commenced by saying it was not necessary to determine whether *Thorogood* v. *Bryan* (*ubi sup.*) was or was not correct. Cockburn, C.J. said: "I put the case on this ground, that when a child of such tender and imbecile age is brought to a railway station, or to any conveyance, for the pur-

pose of being conveyed, and is wholly unable to take care of itself, the contract of conveyance is on the implied condition that the child is to be conveyed subject to due and proper care on the part of the person having it in charge. Such care not being used, when the child has no natural capacity to judge of the surrounding circumstances, a child might get into serious danger from a state of things which would produce no disastrous consequences to an adult capable of taking care of himself." Upon this case it must be observed that the action was against the company with whom the contract for conveyance was made. It may be that the reasons given for this decision might also absolve an independent wrongdoer. But it would be strange to say that this case supports *Thorogood* v. *Bryan* (*ubi sup.*) when the judges in one court and the counsel in the other declined to discuss that case. The case of the infant might be decided as it is though *Thorogood* v. *Bryan* (*ubi sup.*) were discarded. In *Child* v. *Hearn* (L. Rep. 9 Ex. 176), decided in 1874, the plaintiff, a platelayer in the employment of the Great Eastern Railway Company, was returning from his work upon the line in a trolley, which was upset by the defendant's pigs escaping through the fence between the defendant's field and the railway. The case was heard before Bramwell, Pigott, and Pollock, BB. Bramwell, B. said that it was the duty of the railway company to keep the fence in a reasonably fit condition; that by reason of their default their property—*i.e.*, the railway—was not sufficiently protected; that if the plaintiff who was on their property by their leave was injured by reason of that want of protection he could not maintain an action against the defendants. "Without saying," he said, "anything as to the decision in *Thorogood* v. *Bryan* (*ubi sup.*) it is sufficient to say that the defendant's pigs escaped through the negligence of the plaintiff's employers, and that, having met with the accident through his employers' negligence, the plaintiff cannot maintain an action against the defendant." Pigott, B. said: "The defendant, then, it not being shown that he has been guilty of any negligence, is not responsible to the plaintiff for the accident which has occurred." Pollock, B. said: "If the case were within the passage cited from Shearman & Redfield's Law of Negligence, 2nd edit., p. 58, sect. 46, this might be open to doubt; but that passage has no application to the present case, where the plaintiff met with his injury through being upon the premises originally insufficiently protected by those in whose employment he was." The learned Baron then gave an instance of a rotten carriage, by which he seemed to bring back the case to *Thorogood* v. *Bryan* (*ubi sup.*), and then used the somewhat startling figure: "I think in such a case the person riding in the carriage (*i.e.*, the rotten carriage) would be identified with the carriage (*i.e.*, the rotten carriage) in which he was riding." In what respect, to what purpose, in regard to what liability or disability, is not stated. The learned judge, in giving this analogy, was trying to avoid the difficulty of saying that the supposed plaintiff was identified with the driver or owners of a carriage in which he was a passenger. The carriage mentioned is therefore a carriage not belonging to the plaintiff or under his control. But then the carriage cannot be guilty of any negligence. There is no negligence with which to identify the supposed plaintiff. If the supposed carriage is one belonging to the plaintiff and there is negligence in using it in a rotten state, and such rottenness contributes to the accident, it is not a case in point. The passage from Shearman & Redfield on Negligence is as follows: "When the negligence of any other person is imputed to the plaintiff, it must appear that such person was the plaintiff's agent in the transaction, and either that he was under the plaintiff's control or that he controlled the plaintiff's conduct." Considering the facts of the case, and what was said by Bramwell and Pigott, BB., it cannot be fairly said that this case was decided on the authority of *Thorogood* v. *Bryan* (*ubi sup.*). In *Armstrong* v. *The Lancashire and Yorkshire Railway Company* (*ubi sup.*), decided in 1875, the plaintiff, a travelling inspector of the London and North-Western Railway Company, in their train with a pass, was injured by the train in which he was running into waggons of the defendants left standing at a crossway. The jury found joint negligence in the management. A verdict was directed for the defendants, with leave to move. Bramwell, B. gave judgment discharging the rule on the ground that the case could not be distinguished from *Thorogood* v. *Bryan* (*ubi sup.*). He made the important statement that "it must not be supposed that he was at all dissatisfied with *Thorogood* v. *Bryan*." He somewhat diminished the importance of his assent—the first expressed by any English judge—by adding that he "also thought that the alleged negligence of the defendants' servants did not conduce to the accident, so that the sole negligence which caused the accident was that of those in charge of the London and North-Western train." If this was so, the doctrine of *Thorogood* v. *Bryan* (*ubi sup.*) was not wanted. Pollock, B. agreed on both points. But, as to the doctrine laid down in *Thorogood* v. *Bryan* (*ubi sup.*), he said: "The identification does not involve any volition on the part of the passenger. It merely means that he has equal rights with the driver." And again, "The only difficulty arises from the use of the word 'identified' in the judgment. If it is to be taken that by the word 'identified' is meant that the plaintiff by some conduct of his own, as by selecting the omnibus in which he was travelling, has acted so as to make the driver his agent, this would sound like a strange proposition which could not entirely be sustained. But what I understand it to mean is that the plaintiff, for the purpose of the action, must be taken to be in the same position as the owner of the omnibus or his driver." This no doubt reiterated the result of the judgment in *Thorogood* v. *Bryan* (*ubi sup.*), but, with deference, does not elucidate the means by which that judgment was arrived at, or explain the difficulties which have puzzled lawyers.

Then comes the case of *The Milan* (*ubi sup.*), decided in 1861. The action was brought in the Admiralty by the owner of cargo on board the *Lindisfarne* against the owners of the *Milan* for loss of cargo as the result of a collision. Both ships were held to blame. Dr. Lushington, in considering the legal consequences of that finding, said: "The principle, I apprehend, of this rule of common law is, that a party shall not recover where he himself is in any degree to

blame for the loss. Now, cases apart, can it be reasonably contended that the owner of a cargo is responsible for the acts of the master and crew of the vessel in which his goods are taken, he himself not being owner or part owner of the ship? The owner of the cargo does not, as it seems to me, commit any negligence contributing to the loss; certainly not by himself personally, certainly not by his agents, for the master and crew are in no respect under his control. It is difficult to conceive how he can be *particeps criminis* when he is not so either as principal or agent. It is argued that he should be so considered and deprived of his remedy because he himself, or his agent, selected the ship by which his goods were carried. But there is, in my judgment, in the mere selection of the ship for the conveyance of his cargo none of the ingredients which constitute any kind of responsibility for a collision; for I cannot conceive a responsibility for an act done where the individual has not either by himself or his agent any power of interference or control. . . . I decline to be bound by *Thorogood* v. *Bryan* (*ubi sup.*); because it is a single case; because I know upon inquiry that it has been doubted by high authority; because it appears to me to be not reconcilable with other principles laid down at common law; because it is directly against *Hay* v. *Le Neve* (2 Shaw's Sc. App. 395) and the ordinary practice of the Admiralty Court." It has been supposed that the ultimate judgment of Dr. Lushington was inconsistent with this stout disagreement; but he decided to give the plaintiff only half his loss upon wholly other grounds, peculiar to the Admiralty, namely, that it had always been the practice there, instead of saying that an innocent plaintiff might recover his whole loss against any one wrongdoer, to say that he must recover part from one and part from the others, and if there are only two half from each. He said in terms that the plaintiff must sue the owners of the ship in which his cargo was for the other half. In *Spaight* v. *Tedcastle* (*ubi sup.*), decided in the House of Lords in 1881, the action was by owners of a ship against the owners of her towing tug. The ship was in charge of a compulsory pilot, who it was alleged had by negligence contributed to the injury. It was decided in an elaborate judgment that there was no evidence of negligence by the pilot which had contributed to the accident. It was therefore not necessary to review the decision in *Thorogood* v. *Bryan* (*ubi sup.*). With regard to it Lord Blackburn said: "The counsel for the appellants did not rest their case on this point of law, and it was not argued at your Lordships' bar. It is one of general importance, and, if it were necessary to decide it either way, I should wish to have a further argument upon the point."

These being the English cases, it was interesting and profitable, as it always is, to consider the American cases. Several were cited to us—some before and some subsequent to *Thorogood* v. *Bryan* (*ubi sup.*). In *Smith* v. *Smith* (2 Pickering Rep. 621) decided in 1825 by the Supreme Court of Massachusetts, the action was for injury to the plaintiff's horse by an obstruction in the highway placed by the defendant. It raised the question decided in *Butterfield* v. *Forrester* (*ubi sup.*), not the doctrine of *Thorogood* v. *Bryan* (*ubi sup.*). In *Simpson* v. *Hand* (6 Wharton's Rep. 311), decided in 1840 by the Supreme Court of Pennsylvania, the action was for injury to Spanish hides of the plaintiff on board the *Thorn* against the owners of the *William Henry*. Contributory negligence was alleged, and that the *Thorn* was alone to blame. Gibson, C.J. said: "It is an undoubted rule that for a loss from mutual negligence neither party can recover in a court of common law . . . *Vanderplank* v. *Miller* (*ubi sup.*)" he says, "is an authority that the owner of goods on board cannot recover." He then says: "There is at least privity of contract between a merchant and his carrier, and the former, when he commits the management and direction of his goods to the latter, giving him, as he does, authority to labour and travail about the transportation of them, necessarily constitutes him to some extent his agent." It does not seem clear that the owner of cargo gives the authority suggested, if by it is meant the authority to an agent by a principal. The owner of cargo contracts with the shipowners that the latter will carry his goods; but the relation is that of co-contractors, not that of principal and agent. The case of *Chapman* v. *The Newhaven Railway Company* (5 Smith Rep. 341), decided in June 1859, was before the Court of Appeal in New York on appeal from the Supreme Court of New York. The action was for damages from a collision between a train of the New York and Harlem Railway Company, on which the plaintiff was a passenger, and a freight train of the defendants. The plaintiff had a verdict and judgment at the trial before Duer, J., which were upheld in the Superior Court. In the Court of Appeal therefrom, Johnson, C.J. said: "There was evidence of negligence in the management of each train, and the position on which the defendants rely is that such negligence on the part of the Harlem train as would preclude that company from an action against the defendants will also preclude the plaintiff from sustaining his action. The general rule is, that one who receives an injury from the negligence of another may maintain an action for his damages. Upon this rule a natural and reasonable exception has been engrafted, that if the injured party by his own negligence has contributed to the injury, he cannot maintain an action, unless the negligence of the other party has been so gross in its character as to be equivalent to a wilful injury. I do not think this exception or any reasonable extension of it can be applicable to the plaintiff. He was a passenger on the Harlem cars, conducting himself as he lawfully ought, having no control over the train or its management; on the contrary, bound to submit to the regulations of the company and the directions of their officers. To say that he is chargeable with negligence because they have been guilty, is plainly not founded on any fact of conduct on his part, but is mere fiction." After discussing *Thorogood* v. *Bryan* (*ubi sup.*), the Chief Justice says: "But I do not see the justice of the doctrine in connection with the case before us. It is entirely plain that the plaintiff has no control, no management, even no advisory power over the train on which he was riding. Even as to selection, he had only the choice of going by that railroad or by none. To attribute to him, therefore, the negligence of the agents of the company, and thus bar him of a right of recovery, is not applying any existing exception to the general rule of law, but is form-

ing a new exception which does not in fact rest upon the reason of the original exception, and is based on fiction, and inconsistent with justice." Six judges were parties to this judgment! A more absolute negation of every point *seriatim* in *Thorogood* v. *Bryan* (*ubi sup.*) cannot be. In *Colegrove* v. *The New York and Newhaven Railway Company* (6 Smith's Rep. 492), decided in Dec. 1859, again before the Court of Appeal in New York, the question was, whether the action could be maintained against both railway companies. The verdict and judgment for the plaintiff, a passenger in the New York and Harlem Railway, were maintained and affirmed against the defendants. In *Frances Brown* v. *The New York Central Railway Company* (31 Barbour's Rep. 385), decided in June 1860, before the Supreme Court of New York, the plaintiff had employed Thomas, the owner and driver of a stage coach from Albion to Batavia, to carry her to Elba, a place between those villages, and had taken her seat in the stage with other passengers. The route was across the track of the defendants' railroad. The conductor of the railway train was dropping two cars at Albion. He performed the operation near the crossing, the train going fast. The driver of the coach attempted to cross in front of the two detached cars which were in motion, and was caught by them. It was concontended for the plaintiff that, assuming both drivers to have been negligent, as the jury found, so as that the joint negligence produced the accident, the plaintiff was entitled to recover. This the court denied on the authority of *Thorogood* v. *Bryan* (*ubi sup.*). The case was brought by appeal before the Court of Appeals of New York (3 Tiffany's Rep. 597), as *Brown* v. *The New York Central Railroad Company*, in June 1865. Davis, J. said: "Since the trial of this action the decisions of this court in *Chapman* v. *The Newhaven Railway Company* and *Colegrove* v. *The New York and Newhaven Railway Company* have been published. I do not perceive why those cases do not dispose of the question as to the negligence of the driver in this case. The plaintiff was a passenger in a public stage. She had no control of its management or direction, and occupied no relation to the driver different from that which passengers occupy to any public carrier of persons. In principle there is no difference whatever between the relation to the carrier and that of a passenger on a train of railway cars. But a majority of the judges are of opinion that the true rule in a case of this kind was laid down at the circuit." The majority could not have intended to overrule the former cases, and must therefore have seen some distinction which escapes us between this case and them. The same difficulty seems to have been felt in America, for although one cannot on reflection suppose that the judges in the last case intended to impeach the previous recent decisions of their own court, it was thought that they had so intended. In *Mooney* v. *The Hudson River Railroad Company* (5 Robertson, 549), decided in May 1868, the action was by the plaintiff against two companies, the defendants and the Tenth Avenue Railway Company, in whose train he was a passenger. The verdict was for the plaintiff. On a motion for a new trial, questioning the judge's charge, in the Superior Court of New York, Robertson, C.J. said: "The court in substance charged the jury that the defendants were jointly responsible if they were both guilty of concurring negligence, and so the jury found. The charge was made pursuant to the decisions of the Court of Appeals in *Chapman* v. *The Newhaven Railway Company* and *Colegrove* v. *The New York and Newhaven Companies*; but I understand the decision in the subsequent case of *Brown* v. *The New York Central Railway Company* to have in a great measure overruled those decisions." A new trial was ordered. The question, however, was again before the Court of Appeals of New York in *Webster* v. *The Hudson River Railroad Company* (11 Tiffany, 260), decided in June 1868. The plaintiff was a passenger by the Hudson and Boston Railroad Company. The negligence of the defendants was established and not questioned. The judge refused to charge that if the Hudson and Boston Railroad car, on whose train the plaintiff was a passenger was also guilty of negligence, the plaintiff could not recover against the defendants. This refusal was upheld by the General Term Court and thereupon the appeal. Hunt, C.J., in the Appeal Court, said: "It is not pretended that the plaintiff was guilty of any personal negligence, or that it was within his power by any means, or in any degree, to have prevented the collision by which he was injured. . . . The imputation to the plaintiff of the negligence of another is based upon no sound principle." The judge then declared that *Chapman* v. *The Newhaven Railway Company* and *Colegrove* v. *The Harlem Railway Company* were in point, and that *Brown* v. *The New York Railway Company* was not inconsistent with them. The verdict and judgment were affirmed.

Since the argument before us, we have seen in the American Law Record, April 1886, No. X., the case of *Little* v. *Hackett*, in Jan. 1886, before the Supreme Court of the United States in error from the District Court of New Jersey. Field, J. gave the judgment: "The plaintiff below was injured by a collision between a train of the Central Railroad Company of New Jersey and a hack carriage in which the plaintiff was riding. The defendant legally represented the railroad company. The plaintiff had hired the public hackney carriage and had directed it to drive him to a park. The collision occurred whilst the carriage was crossing the railway track. There was evidence that both the driver and the servants of the railway company were guilty of negligence which partly directly caused the accident. The judge charged the jury: 'I charge you that when a person hires a public hack carriage, which at the time is in the care of the driver, for the purpose of contemporary conveyance, and gives directions to the driver as to the place or places to which he desires to be conveyed, but gives no special directions as to his mode or manner of driving, he is not responsible for the acts of negligence of the driver, and if he sustains an injury by means of a collision between his carriage and another, he may recover damages from any party by whose fault or negligence the injury occurred, whether that of the driver of the carriage in which he was driving, or of the driver of the other. He may sue either. The negligence of the driver of the carriage in which he is riding will not prevent him from recovering damages against the other driver if he was negligent at the same time.' The plaintiff recovered

judgment, and the instruction was alleged as error for which its reversal is sought." The judgment then discusses all the English cases. With regard to *Thorogood* v. *Bryan* (*ubi sup.*), Field, J. continues: "What is meant by the passenger being 'identified with the carriage,' or 'with the person having its management,' is not very clear. In a recent case Pollock, B. said that he understood it to mean 'that the plaintiff for the purpose of the action must be taken to be in the same position as the owner of the omnibus or his driver. . . . Assuming this to be the correct explanation, it is difficult to see upon what principle the passenger can be considered to be in the same position with reference to the negligent act as the driver who committed it, or 'his master the owner.' Cases cited . . . show that the relation of master and servant does not exist between the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger where no fault of omission or commission is chargeable to him is against all legal rules. . . . The truth is, the decision in *Thorogood* v. *Bryan* rests upon indefensible grounds. The identification of the passenger with the negligent driver or owner without his personal co-operation or management is a gratuitous assumption. There is no such identification." The judge then cited several American cases to the same effect, and upheld the instruction and verdict for the plaintiff.

After having thus laboriously inquired into the matter, and having considered the case of *Thorogood* v. *Bryan* (*ubi sup.*), we cannot see any principle on which it can be supported, and we think that, with the exception of the weighty opinion of Lord Bramwell, though that does not seem to be a final view, the preponderance of judicial and professional opinion in England is against it, and that the weight of judicial opinion in America is against it. We are of opinion that the proposition maintained in it is essentially unjust and inconsistent with other recognised principles of law. As to the propriety of dealing with it at this time in a court of appeal it is a case which, from the time of its publication, has been constantly criticised. No one can have gone into, or have abstained from going into an omnibus, railroad, or ship, on the faith of the decision. We therefore think that, now the question is for the first time before an English Court of Appeal, the case of *Thorogood* v. *Bryan* must be overruled. It follows that the propositions stated at the commencement of this judgment contain the law on this matter, perhaps not exhaustively, and that the proposition contained in *Thorogood* v. *Bryan* (*ubi sup.*) is not to be added to them. We have therefore to apply those propositions to the actions mentioned in the special case. But before doing so we must state that, for the reasons given by Butt, J., we are in accord with him in saying that actions brought under Lord Campbell's Act are not Admiralty actions at all; that they are pure common law actions; that they are not touched by the Judicature Act 1873, s. 25, sub-sect. 9; that they are to be ruled in every respect by the common law. We desire to say that we do not express in this judgment any opinion as to whether an action brought at common law, in respect to damage to cargo, will, by virtue of the above section, be governed by the Admiralty practice laid down in the case of *The Milan* (*ubi sup.*), or whether the application of the section is to be limited to actions for injury to one of two ships, or to both, by a collision between them. In Armstrong's action a point is suggested that he ought not to recover against the defendants, the owners of the *Bernina*, because he could not recover against the owners of the *Bushire*. He would, in an action against the latter, be met by the doctrine of the accident being occasioned by the negligence of a fellow-servant. The suggestion would go far. It would apply where passengers or goods are carried by railway, or in ship, under a notice limiting the liability of the railway company or shipowner. It would work manifest injustice by enabling a person to take advantage of a contract to which he was a stranger, and for the advantage of which he had given no consideration. The rule of law is, that a person injured by more than one wrongdoer may maintain an action for the whole damage done to him against any of them. There is no condition that he might, if he pleased, maintain an action against each of them. There is no disadvantage to the one sued, because there is no contribution between joint wrongdoers. The plaintiff Armstrong is therefore entitled to judgment for the whole of the damages he may be able to prove, according to the rule of damages laid down in Lord Campbell's Act. So in the case of the plaintiff Toeg. In the case of Owen, the deceased was personally negligent, so that his negligence was partly directly a cause of the injury, he could not have recovered, neither can his administratrix. The two cases must, according to the agreement between the parties, be sent to the registrar and merchants. I have been allowed by my brother Lopes to say that this judgment is his as well as mine, though I hope he will add some observations of his own.

Lindley, L.J.—This was a special case, and was in substance as follows: Three actions were brought in the Admiralty Division of the High Court by the respective legal personal representatives of three persons on board the *Bushire* against the owners of the *Bernina*. Those persons were killed by a collision between the two vessels, both of which were negligently navigated. One of the three persons, Toeg, was a passenger on the *Bushire*. One Armstrong was an engineer of the ship, but was not to blame for the collision. The third, Owen, was her second officer, and was in charge of her, and was himself to blame for the collision. All three actions are brought under Lord Campbell's Act (9 & 10 Vict. c. 93). The questions for decision are whether any, and if any which, of these actions can be maintained, and, if any of them can, then whether the damages recoverable are to be measured according to the principles which prevail at common law or according to those which are adopted in the Court of Admiralty in cases of collision. In order to determine these questions it is first necessary to consider the statute on which the questions are founded, for it must not be forgotten that such actions as these could not be brought at common law. Neither could they be maintained in the Court of Admiralty before that court became a branch of the High Court by virtue of the Judicature Acts 1873 and 1875. Lord Campbell's Act (9 & 10 Vict. c. 93) enacts by sect. 1 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." Then by sect. 2 it is enacted that such action shall be for the benefit of the wife, husband, parent, and child of the deceased, and shall be brought in the name of his or her executor or administrator. The 2nd section then goes on as follows: "And in every such action the 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." This provision as to damages was wholly inapplicable to the Court of Admiralty when Lord Campbell's Act was passed. At that time no action for damages in the then technical sense of the expression could be brought in the Court of Admiralty. Moreover, that court did not consist of a judge and jury, nor had it any machinery for summoning juries by whom damages could be assessed or by whom damages could be divided amongst the persons beneficially entitled to them by the statute. Although, therefore, actions under Lord Campbell's Act can now be brought in the Admiralty Division of the High Court, it is plain that the damages must be assessed by a jury as directed by the statute, and not by the judge, with or without other assistance, according to the rules which are usually applied in that court in cases of collision. When the Judicature Acts passed, the Court of Admiralty had no rules applicable to actions brought under Lord Campbell's Act, simply because that court had no jurisdiction to try such actions. It follows, as a consequence, that, whether we regard the right to sue or whether we regard the damages to be recovered in actions founded upon Lord Campbell's Act, it is impossible to comply with sub-sect. 9 of sect. 25 of the Judicature Act 1873. It is manifest that this clause in the Judicature Act has no application to such actions, although it does apply to ordinary actions for collision at sea.

Having cleared the ground thus far, it is necessary to return to the statute and see under what circumstances an action upon it can be supported. The first matter to be considered is, whether there has been any such wrongful act, neglect, or default of the defendants as would if death had not ensued have entitled the three deceased persons respectively to have sued the defendants. Now, as regards one of these, viz., Owen, the second officer, who was himself to blame for the collision, it is clear that if death had not ensued he could not have maintained an action against the defendants. There was negligence on his part contributing to the collision, and no evidence to show that, notwithstanding his negligence, the defendants could, by taking reasonable care, have avoided the collision. There was what is called such contributory negligence on his part as to render an action by him unsustainable. It follows, therefore, that his representatives can recover nothing under Lord Campbell's Act for his widow and children, and their action cannot be maintained. The other two actions are not so easily disposed of. They raise two questions, viz. (1) whether the passenger Toeg, if alive, could have successfully sued the defendants, and, if he could, then (2) whether there is any difference between the case of the passenger and that of the engineer Armstrong. The learned judge whose decision is under review, felt himself bound by authority to decide both actions against the plaintiffs. The authorities which the learned judge followed are *Thorogood* v. *Bryan* (8 C. B. 115) and *Armstrong* v. *The Lancashire and Yorkshire Railway Company* (33 L. T. Rep. N. S. 228; L. Rep. 10 Ex. 47), and the real question to be determined is, whether they can be properly overruled or not. *Thorogood* v. *Bryan* (*ubi sup.*) was decided in 1849, and has been generally followed at Nisi Prius ever since when cases like it have arisen. But it is curious to see how reluctant the courts have been to affirm its principle after argument; and how they have avoided doing so and have preferred, when possible, to decide the cases before them on other grounds, see, for example, *Rigby* v. *Hewitt* (5 Ex. 240); *Greenland* v. *Chaplin* (5 Ex. 243); *Waite* v. *The North-Eastern Railway Company* (E. B. & E. 719). I am not aware that the principle on which *Thorogood* v. *Bryan* (*ubi sup.*) was decided has ever been approved by any court which has had to consider it. On the other hand, that case has been criticised and said to be contrary to principle by persons of the highest eminence, not only in this country, but also in Scotland and America, and whilst it is true that *Thorogood* v *Bryan* (*ubi sup.*) has never been overruled, it is also true that it has never been affirmed by any court which could properly overrule it, and it cannot be yet said to have become indisputably settled law. I do not think, therefore, that it is too late for a court of appeal to reconsider it and to overrule it if clearly contrary to well-settled legal principles. *Thorogood* v. *Bryan* (*ubi sup.*) was an action founded on Lord Campbell's Act. The facts were shortly as follows: The deceased was a passenger on the outside of an omnibus, and he had just got off it. He was knocked down and killed by another omnibus belonging to the defendant. There was negligence on the part of the drivers of both omnibuses, and it appears that there was also negligence on the part of the deceased himself. The jury found a verdict for the defendant, and there does not seem to have been any reason why the court should have disturbed the verdict if not driven to do so on technical grounds. In those days, however, a misdirection by the judge to the jury compelled the court to grant a new trial, whether any injustice had been done or not; and accordingly the plaintiff moved for a new trial on the ground of misdirection, and it is with reference to this point that the decision of the court is of importance. The learned judge who tried the case told the jury in effect to find for the defendant, if they thought that the deceased was killed either by reason of his own want of care or by reason of want of care on the part of the driver of the omnibus off which he was getting. This last direction was complained of, but was upheld by the court. Hence the importance of the case. The *ratio decidendi*

was, that if the death of the deceased was not occasioned by his own negligence it was occasioned by the negligence of both drivers, and that, if so, the negligence of the driver of the omnibus off which the deceased was getting was the negligence of the deceased; and the reason for so holding was that the deceased had voluntarily placed himself under the care of that driver. Maule, J. puts it thus, at p. 131: "The deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased." This theory of identification was quite new. No trace of it is to be found in any earlier decision, nor in any legal treatise, English or foreign, so far as I have been able to ascertain. Nor has it ever been satisfactorily explained. It must be assumed, for the purpose of considering the grounds of the decision in question, that the passenger was not himself in fault. Assuming this to be so, then, if both drivers were negligent and both caused the injury to the passenger, it is difficult to understand why both drivers or their masters should not be liable to him. The doctrine of identification laid down in *Thorogood* v. *Bryan* is to me quite unintelligible. It is in truth a fictitious extension of the principles of agency; but to say that the driver of a public conveyance is the agent of the passengers is to say that which is not true in fact. Such a doctrine, if made the basis of further reasoning, leads to results which are wholly untenable; *e.g.*, to the result that the passengers would themselves be liable for the negligence of the persons driving them, which is obviously absurd, but which of course the court never meant. All the court meant to say was, that, for purposes of suing for negligence, the passenger was in no better position than the man driving him. But why not? The driver of a public vehicle is not selected by the passenger otherwise than by being hailed by him as one of the public to take him up; and such selection, if selection it can be called, does not create the relation of principal and agent or master and servant between the passenger and the driver. The passenger knows nothing of the driver, and has no control over him; nor is the driver in any proper sense employed by the passenger. The driver, if not his own master, is hired, paid, and employed by the owner of the vehicle he drives, or by some other person who lets the vehicle to him. The orders he obeys are his employer's orders. Those orders, in the case of an omnibus, are to drive from such a place to such a place, and take up and put down passengers; and in the case of a cab, the orders are to drive where the passenger for the time being may desire to go within the limits expressly or impliedly set by the employer. If the passenger actively interferes with the driver by giving him orders as to what he is to do, I can understand the meaning of the expression that the passenger identifies himself with the driver; but no such interference was suggested in *Thorogood* v. *Bryan* (*ubi sup.*).

The principles of the law of negligence, and in particular of what is called contributory negligence, have been discussed on many occasions since that case was decided, and are much better understood now than they were thirty years ago. *Tuff* v. *Warman* (*ubi sup.*), in the Exchequer Chamber, and *Radley* v. *The London and North-Western Railway Company* (*ubi sup.*), in the House of Lords, show the true grounds on which a person, himself guilty of negligence, is enabled to maintain an action against another for injury occasioned by the combined negligence of both. If the proximate cause of the injury is the negligence of the plaintiff as well as that of the defendant, the plaintiff cannot recover anything. The reason for this is not easily discoverable. But I take it to be settled that an action at common law by A. against B. for injury directly caused to A. by the want of care of A. and B. will not lie. As Pollock, C.B. pointed out in *Greenland* v. *Chaplin* (5 Ex. 248), the jury cannot take the consequences and divide them in proportion according to the negligence of the one or the other party. But if the plaintiff can show that, although he has been himself negligent, the real and proximate cause of the injury sustained by him was the negligence of the defendant, the plaintiff can maintain an action, as is shown not only by *Tuff* v. *Warman* (*ubi sup.*) and *Radley* v. *The London and North-Western Railway Company* (*ubi sup.*), but also by the well-known case of *Davies* v. *Mann* (10 M. & W. 546) and other cases of that class. The cases which give rise to actions for negligence are primarily reducible to three classes, as follows: (1) A., without fault of his own, is injured by the negligence of B.; then B. is liable to A. (2) A., by his own fault, is injured by B., without fault on his part; then B. is not liable to A. (3) A. is injured by B. by the fault more or less of both combined, then the following further distinctions have to be made: (*a*) If, notwithstanding B.'s negligence, A., with reasonable care, could have avoided the injury, he cannot sue B.: (*Butterfield* v. *Forrester*, 11 East, 60; *Bridge* v. *The Grand Junction Railway Company*, 3 M. & W. 244; *Dowell* v. *The General Steam Navigation Company*, 5 E. & B. 195). (*b*) If, notwithstanding A.'s negligence, B., with reasonable care, could have avoided injuring A., A. can sue B.: (*Tuff* v. *Warman*, 5 C. B. N. S. 573; *Radley* v. *The London and North-Western Railway Company*, 35 L. T. Rep. N. S. 637; 1 App. Cas. 754; *Davies* v. *Mann*, 10 M. & W. 546). (*c*) If there has been as much want of reasonable care on A.'s part as on B.'s—or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides—A. cannot sue B. In such a case, A. cannot with truth say that he has been injured by B.'s negligence; he can only with truth say that he has been injured by his own carelessness and B.'s negligence, and the two combined give no cause of action at common law. This follows from the two sets of decisions already referred to. But why in such a case the damages should not be apportioned I do not profess to understand. However, as already stated, the law on this point is settled and not open to judicial discussion. If now another person is introduced, the same principles will be found applicable. Substitute in the foregoing cases B. and C. for B., and unless C. is A.'s agent or servant there will be no difference in the result, except that A. will have two persons instead of one liable to him. A. may sue B. and C. in one action, and recover damages against them both, or he may sue them separately, and recover the whole damage sustained against the one he sues. See *Clark* v. *Chambers* (38 L. T.

Rep. N. S. 454; 3 Q. B. Div. 327), where all the previous authorities were carefully examined by the late Lord Chief Justice Cockburn. This is no doubt hard on the defendant, who is alone sued, and this hardship seems to have influenced the court in deciding *Thorogood* v. *Bryan* (*ubi sup.*). In that case the court appears to have thought it hard on the defendant to make him pay all the damages due to the plaintiff, and that it was no hardship to the plaintiff to exonerate the defendant from liability as the plaintiff had a clear remedy against the master of the omnibus in which he was a passenger. But it is difficult to see the justice of exonerating the defendant from all liability in respect of his own wrong, and of throwing the whole liability on someone who was no more to blame than he. The injustice to the defendant which the court sought to avoid is common to all cases in which a wrong is done by two people, and one of them alone is made to pay for it. The rule which does not allow of contribution between wrongdoers is what produces hardship in these cases; but the hardship produced by that rule (if really applicable to such cases as those under discussion) does not justify the court in exonerating one of the wrongdoers from all responsibility for his own misconduct, or for the misconduct of his servants. I can hardly believe that, if the plaintiff in *Thorogood* v. *Bryan* (*ubi sup.*) had sued the proprietors of both omnibuses, it would have been held that he had no right of action against one of them.

Having given my reasons for my inability to concur in the doctrine laid down in *Thorogood* v. *Bryan* (*ubi sup.*), I proceed to consider how far that doctrine is supported by other authorities. The court in deciding *Thorogood* v. *Bryan* (*ubi sup.*) considered that they were following *Bridge* v. *The Grand Junction Railway* (3 M. & W. 244). In that case a passenger in one train sued the owners of another train for an injury caused by a collision between the two trains. The defendants pleaded that the collision was caused in part by the negligence of the persons who had the management of the train in which the plaintiff was. The court held the plea bad, both in substance and in form, because the plea did not state that those who had the management of the plaintiff's train could, with ordinary care, have avoided the collision; and that, even assuming the negligence pleaded to be proved, the plea was bad on the authority of *Butterfield* v. *Forrester* (11 East, 60), which was, and still is, a perfectly sound decision. When *Bridge* v. *The Grand Junction Railway Company* is carefully looked at it will be found to be no authority for the doctrine laid down in *Thorogood* v. *Bryan* (*ubi sup.*). I cannot find in *Bridge* v. *The Grand Junction Railway Company* (*ubi sup.*) any authority for the proposition that the negligence of the driver of an omnibus or railway train is for any purpose to be regarded as the negligence of the passengers in it. Nor is there any case prior to *Thorogood* v. *Bryan* (*ubi sup.*) which warrants any such proposition. *Vanderplank* v. *Miller* (Moo. & M. 168), which was relied upon by Mr. Barnes as an earlier authority in point, is very shortly reported. The plaintiff was the owner of goods on board the *Louisa*, and he sued the owners of another ship which ran into and sank the *Louisa*, for the loss of the goods. The plaintiff obtained a verdict, but Lord Tenterden told the jury that, if there was fault on both sides, the plaintiff could not recover; to enable him to do so, the action must be attributable entirely to the fault of the crew of the defendants. This direction cannot be properly understood without knowing more of the facts and pleadings in the case. For anything that appears to the contrary, the plaintiff may have been the owner or charterer of the *Louisa*, and the employer of those on board of her; or the declaration may have been so drawn as to account for the direction that the plaintiff could not succeed unless the accident was attributable entirely to the fault of the crew of the defendants. I cannot regard this case as an earlier illustration of the principle laid down in *Thorogood* v. *Bryan* (*ubi sup.*) Nor is the relation between bailor or bailee an element in the class of cases now under consideration, and to decide this case on principles applicable to bailments of goods would be to proceed on a misleading analogy. *Waite* v. *The North-Eastern Railway Company* (E. B. & E. 719) is materially different from *Thorogood* v. *Bryan* (*ubi sup.*), and was decided on a different and perfectly sound principle. The plaintiff was a child in the care of her grandmother, who had taken tickets for herself and the child to go by a train belonging to the defendant company. The plaintiff was injured in consequence of the want of care of her grandmother quite as much as by the negligence of the defendants, and it was very properly held that the defendants were not liable. There was no obligation or duty on the part of the defendants to take more care of the plaintiff than of grown-up persons. The defendants had a right to expect that proper care would be taken of the child, and if such care had been taken there would have been no accident. The plaintiff sued both in contract and in tort, but the same principle applied to both aspects of the case. In *Waite's* case Bramwell, B. said he thought *Thorogood* v. *Bryan* (*ubi sup.*) rightly decided, but on wrong reasoning; but the importance of the case turns entirely upon the reasoning; and Bramwell, B. himself, when he gave his judgment in *Waite's* case, preferred to rest his decision, not on *Thorogood* v. *Bryan* (*ubi sup.*), but on the ground on which the court decided it, as already mentioned. *Child* v. *Hearn* (*ubi sup.*) and *Armstrong* v. *The Lancashire and Yorkshire Railway Company* (33 L. T. Rep. N. S. 228; L. Rep. 10 Ex. 47) are the only other cases which require notice. In *Child* v. *Hearn* (*ubi sup.*) the plaintiff was in the employment of a railway company whose duty it was to fence its line. The defendant was the owner of some pigs which had got through the fence and upset a trolley, whereby the plaintiff was hurt. There was evidence that the defendant knew that his pigs had got through the fence on previous occasions, and his negligence consisted in not preventing them from so doing. The verdict was for the plaintiff, but the court granted a new trial. Pigott, B. clearly was of opinion that the true cause of the injury to the plaintiff was the negligence of the railway company, and not the negligence of the defendant. The other members of the court, Bramwell and Pollock, BB. concurred in this view, but went further, and expressed their opinion to be that, whether the doctrine laid down in *Thorogood* v. *Bryan* (*ubi sup.*) was right or not, yet the plain-

tiff, being a servant of the railway company which had omitted to keep its fence in proper order, could not be in a better position than the company would have been in if its property had been injured by the defendant's pigs, and if the company had sued him for such injury. This view was again adopted in *Armstrong* v. *The Lancashire and Yorkshire Railway Company* (*ubi sup.*). In that case the plaintiff was in the employ of the North-Western Railway Company, and was injured by a collision between a train belonging to that company and a train belonging to the defendant company. The collision was, in the opinion of the jury, caused by the negligence of the servants of both companies, and the judge, at the trial, directed the verdict to be entered for the defendants with leave for the plaintiff to move to enter the verdict for him. The court held that the verdict had been rightly entered for the defendants. The court seems to have thought that the negligence causing the collision was really that of the London and North-Western Railway Company, and not that of the defendant company, but the court did not decide the case on this ground. The court followed *Thorogood* v. *Bryan* (*ubi sup.*), as indeed it could hardly avoid doing. Bramwell, B. thought that the plaintiff could not sue his own employers the London and North-Western Railway Company, and could not consequently sue the defendants, who only contributed to the mischief and were certainly not the proximate cause of it. If the learned baron meant that the negligence of the defendants was not part of the proximate cause of the injury to the plaintiff, it is obvious that they were not liable at all. But if the proximate cause of the injury was the combined negligence of the two companies, I confess my inability to understand upon what principle the plaintiff could be held not entitled to sue either company, or, in other words, to be without remedy. Wrongdoers are liable to be sued severally, and one of them may have a defence and the others have none. I cannot see why a servant should not sue a person who injures him, although his master or a fellow-servant also injures him at the same time, and so that his injury is the result of the conduct of both of the others. Both *Child* v. *Hearn* (*ubi sup.*) and *Amstrong* v. *Lancashire and Yorkshire Railway Company* (*ubi sup.*) were rightly decided on the ground that the negligences of the defendants in those actions were not the proximate causes of the injuries sustained by the plaintiffs. But the reasons for which Bramwell, B. considered that the plaintiffs must fail even if *Thorogood* v. *Bryan* (*ubi sup.*) was decided on wrong grounds, are really open to the same objections as the doctrine enunciated in that case. *Thorogood* v. *Bryan* (*ubi sup.*) and *Armstrong* v. *The Lancashire and Yorkshire Railway Company* affirm that, although if A. is injured by the combined negligence of B. and C., or either of them, he cannot sue C. if either he A. is under the care of B. or is in his employ. From this general doctrine I am compelled most respectfully to dissent. But, of course, if B. is A.'s agent or servant, the doctrine holds good.

In Scotland the decision in *Thorogood* v. *Bryan* (*ubi sup.*) was discussed and held to be unsatisfactory in the case of *Hobbs* v. *The Glasgow and South-Western Railway Company* (3 Sc. Sess. Cas. 215). In America the subject was recently examined with great care by the Supreme Court of the United States in *Little* v. *Hackett* (14 Amer. Law Record, 577), in which previous English and American cases were reviewed, and the doctrine laid down in *Thorogood* v. *Bryan* (*ubi sup.*) was distinctly repudiated as contrary to sound principles. In *Little* v. *Hackett* (*ubi sup.*) the plaintiff was driving in a hackney carriage and was injured by a collision between it and a railway train on a level crossing. There was negligence both on the part of the driver of the carriage and on the part of the railway company's servants, but it was held that the plaintiff was not preventrd by the negligence of the driver of the carriage in which he was from maintaining an action against the railway company. The previous American authorities will be found referred to in this case. In this country *Thorogood* v. *Bryan* (*ubi sup.*) was distinctly disapproved of by Dr. Lushington in *The Milan* (*ubi sup.*), and even Lord Bramwell, who has gone further than any other judge in upholding the decision, has expressly disapproved of the grounds on which it was based. No text-writer has approved it, and in Smith's Leading Cases the comments on it are clearly adverse to it (see vol. 1, p. 266, edit. 6). For the reasons above stated, I am of opinion that the doctrine laid down in *Thorogood* v. *Bryan* (*ubi sup.*) and *Armstrong* v. *The Lancashire and Yorkshire Railway Company* (*ubi sup.*) is contrary to sound legal principles, and ought not to be regarded as law. Consequently, I am of opinion that the decision in Toeg's case and in Armstrong's case ought to be reversed.

Lopes, L.J.—Two very important questions are raised by this case. First, does the Admiralty rule as to joint liability for joint negligence apply to a case like this brought under the provisions of Lord Campbell's Act? Secondly, can the plaintiffs, or either of them, recover against the defendants, or, in other words, is the decision in *Thorogood* v. *Bryan* (*ubi sup.*) good law, and ought it to be followed? The facts of the case have been fully and accurately stated. I agree with the facts as stated by the other members of the court. The general law of negligence has been discussed. I agree with the law as laid down and explained. The authorities bearing upon this case have also been cited and commented upon. And if the case was not of such general importance, and if it was not proposed to overrule the law as acted upon for nearly half a century, I should think it superfluous to add my opinion to the opinions already so exhaustively and elaborately expressed. I shall, however, deal with both questions shortly. First, is the Admiralty rule as to joint liability for joint negligence applicable to this case? According to the Admiralty rule, when both vessels are to blame, the owners and cargo owners of each can recover half their loss from the other. This rule before the Judicature Acts clearly did not apply to claims brought by passengers, or by representatives of deceased passengers, under Lord Campbell's Act. Such claims were not brought in the Admiralty Court at all, because there was no question of maritime lien, but were brought in a court of common law, in which the ordinary rule as to contributory negligence was in force. Since the Judicature Acts the Probate, Divorce, and Admiralty Division has jurisdiction

concurrent with the other divisions to try claims of this kind. Whether the Admiralty rule as to joint liability for joint negligence applies to this class of cases depends on sect. 25 of the Judicature Act 1873, sub-sect. 9. It is in these words: "In any case or proceeding for damages arising out of a collision between two ships, if both ships shall have been 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." The rule in Admiralty was only to prevail so far as it conflicted with the rule of common law. But there never was any conflict between the Admiralty and the common law rule. On the principle *Actio personalis moritur cum personâ*, none of these actions could be maintained before the passing of Lord Campbell's Act, and could not have been brought in the Admiralty Court before the passing of the Judicature Acts, when the Admiralty Court became a branch of the High Court. It is clear, too, from Lord Campbell's Act that that Act was never intended to apply to a court where there was no machinery for a trial by jury, and where the damages could not be assessed by a jury. I am clear, therefore, that the Admiralty rule as to joint liability for joint negligence does not apply to the present case.

Secondly, can the plaintiffs, or either of them, recover against the defendants? Owen clearly cannot, because he was himself to blame. Can Toeg the passenger and Armstrong the engineer, neither of whom were in any way to blame? If *Thorogood* v. *Bryan* (*ubi sup.*) is to be maintained they cannot, but if it is to be overruled they can. *Thorogood* v. *Bryan* (*ubi sup.*) was an action under Lord Campbell's Act against the owner of an omnibus for a death caused by the negligence of the driver. The defendant's omnibus had knocked down and killed the deceased just as he was leaving the omnibus of another person in which he had been a passenger. The judge told the jury that if, by the exercise of proper care on the part of the omnibus in which the deceased had been, the injury might have been avoided, they should find for the defendant. The court held this was a good direction in law. No weight was attached to the fact that the deceased had ceased to be a passenger in the omnibus which contributed to his death, and it seems to have been assumed that he was still to be considered a passenger. Nor was it suggested that the passenger was himself to blame. No points, however, of this kind arise in the cases now before the court, as Toeg and Armstrong were actually on board one of the guilty ships, and Toeg and Armstrong were in no way in fault. That a plaintiff cannot recover damages for an injury to which he has directly contributed is an established principle of law, and it matters not whether that contribution consists in participation in the direct cause of the injury, or in the omission of duties which, if performed, would have prevented it. If the fault, whether of omission or commission, has materially contributed to the injury, the plaintiff is without remedy against one also in the wrong. So much is undisputed law. The converse of this doctrine ought to follow as a necessary corollary, namely, when one has been injured by the wrongful act of another, to which he has in no way contributed, he should be entitled to compensation from the wrongdoer, unless the negligence of somebody towards whom he stands in the relation of principal or master has materially contributed to the injury, in which case the negligence is imputed to such principal or master, though he in no way personally participated in it, or had knowledge of it. It cannot be contended that the driver of the omnibus in *Thorogood* v. *Bryan* (*ubi sup.*), or those in charge of the ship, here stood in the relation of principal or master to the injured persons. The driver and those in charge of the ship were the servants of their respective employers. They selected and hired them; they controlled them; they paid them; they alone could discharge them. Neither the driver of the omnibus nor those in charge of the ship were bound to obey any order of the injured persons; the injured persons could neither direct nor alter the course or the mode of navigation of the ship, nor the destination nor mode of driving of the omnibus. It is impossible, therefore, to contend that the relationship of master and servant existed, and that the persons injured lost their remedy because of the contributory negligence of somebody under their control. Nor do the court in *Thorogood* v. *Bryan* (*ubi sup.*) rely upon any such relationship between the passenger and the driver. So far as I understand the case, they rest their judgment on the ground that the passenger trusted the driver by selecting the particular conveyance in which he was carried, and therefore so identified himself with the owner and the owner's servants that if injury resulted from their negligence he must be considered a party to it; in other words, to quote the language of Coltman, J., "the passenger is so far identified with the carriage in which he is travelling that want of care on the part of the driver will be a defence of the driver of the carriage which directly caused the injury." Maule, J. said: "The passenger chose his own conveyance, and must take the consequences of any default of the driver he thought fit to trust." Cresswell, J. said: "If the driver of the omnibus the deceased was in had by his negligence or want of due care contributed to any injury from a collision, his master clearly could not maintain an action, and I must confess I see no reason why a passenger who employs the driver to carry him stands in any different position." Williams, J. added, "I think the passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed in." If the driver could be said to be the servant of the passenger, these judgments would be intelligible and according to well-established law. What is meant by the passenger being "identified with the carriage" or "with the person having its management" I am at a loss to understand. In *Armstrong* v. *The Lancashire and Yorkshire Railway Company* (*ubi sup.*) Pollock, B. said he understood it to mean "that the plaintiff, for the purposes of the action, must be taken to be in the same position as the owner of the omnibus or his driver." If that is the true explanation, then the passenger, who is blameless, is to be in the same position as the driver who committed a wrongful act, or his master who is responsible for the negligence of his servant. This is in accordance neither with good sense nor justice, and if, again, the passenger is to be considered in the same position as the driver or

owner, and their negligence is to be imputed to him, he would be liable to third parties. For instance, in the case of a collision between two omnibuses, where the driver of one was entirely in fault, every passenger in the omnibus free from blame would have an action against every passenger in the other omnibus, because every such passenger would be identified with the driver and is responsible for his negligence. Nor again, in the case just put, could any passenger in the other omnibus bring an action against the owner of the omnibus in which he was carried, because the negligence of the driver is to be imputed to the passenger. If the negligence of the driver is to be attributed to the passenger for one purpose it would be impossible to say he is not to be affected by it for others. Other cases might be put. The more the decision in *Thorogood* v. *Bryan* (*ubi sup.*) is examined, the more anomalous and indefensible that decision appears. The theory of the identification of the passenger with the negligent driver or owner is, in my opinion, a fallacy and a fiction contrary to sound law and opposed to every principle of justice. A passenger in an omnibus whose injury is caused by the joint negligence of that omnibus and another may, in my opinion, maintain an action either against the owners of the omnibus in which he was carried or the other omnibus or both. I am clearly of opinion that *Thorogood* v. *Bryan* (*ubi sup.*) should be overruled. The plaintiffs can therefore, in my opinion, maintain their action, and this appeal must be allowed.

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

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

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Oct. 30 *and Nov.* 1, 1886.

(Before the Right Hon. Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE MONARCH. (*a*)

Salvage — Compromise — Authority of solicitor — Mistake of fact — Right of pilot to salvage.

Where, in a salvage action, the agents of the plaintiffs' solicitor settle the plaintiffs' claim under a mistake of fact, and one of the claimants is present at the compromise, and under a misapprehension of the facts acquiesces therein, such compromise is not binding on him when the true state of affairs is discovered.

The services of a pilot on a salved ship are not changed from those of pilot to salvor where his services consist in trifling assistance by helping at the wheel and windlass.

THIS was a salvage action instituted by the owners, masters, and crews of the steam-tugs *Empress of India* and *Wild Rose*, and John Williams, a pilot, against the owners of the ship *Monarch*, her cargo and freight.

The facts alleged on behalf of the plaintiffs were as follows:—

Shortly after 5 p.m. on the 15th Oct. 1886 the two steam-tugs *Empress of India* and *Wild Rose*, of seventeen and eleven tons respectively, were in the Bristol Channel, proceeding down channel to the assistance of vessels which had been reported in distress, when they observed the full-rigged ship *Monarch* driving up channel stern first towards the Flat Holms Island. The wind at this time was blowing with hurricane force from W.S.W., and a fearful sea was running up channel. Shortly afterwards it was seen that the *Monarch* had fallen off to southward, and as it was thus evident that her chains had parted, the tugs steamed after her, and overtook her about a mile and a half to the E.N.E. of the Flat Holms. Meanwhile those on board the *Monarch* had been trying to get her under command by setting sail, but the sails were blown away before they could be set. After great difficulty and danger the *Wild Rose* was made fast to the *Monarch*, but whilst the *Empress of India* was getting fast she unavoidably came into collision with the *Wild Rose*, and in order to clear the rope of the *Wild Rose* had to be let go. After some time both tugs succeeded in getting made fast, and at about 6.45 p.m. began to tow the *Monarch* towards Newport. As the vessels approached the entrance to the river Usk the hawser of the *Wild Rose* parted, As it was impossible, in the then state of the weather, to replace it, the *Empress of India* alone continued the towage. Subsequently the *Wild Rose* managed to get a warping line fast to the *Monarch's* quarter. After they had made the river the *Monarch* sheered over towards the eastern bank, causing the *Empress of India's* rope to part, and the *Monarch* at about 8.30 p.m. fell broadside on the soft mud, where she was in a position of safety. Next morning she floated and was towed into the Alexandra Dock.

The master of the *Monarch* was on shore at the time the services were rendered. The plaintiff (John Williams) had been engaged to pilot the vessel to sea, and alleged that, on the anchors dragging, he had given orders to slip the anchors and set sail, and that he had helped at the wheel and windlass, and had by his exertions and advice materially assisted in getting the vessel into a position of safety.

The defendants alleged that on the 15th Oct. 1886 the *Monarch*, a full-rigged ship of 1187 tons register, was at anchor between Barry Island and Sully Island, being in the course of a voyage from Cardiff to Yokohama. The pilot, John Williams, had been engaged to pilot the ship to sea, and was in the meantime on board for a charge of 10*s.* a day. On the vessel commencing to drag her anchors it was deemed prudent to slip her cables and put her under sail. Sail was thereupon set, and the *Monarch* proceeded on the port tack at a speed of about three knots an hour. When the services of the tugs were accepted the *Monarch* was perfectly tight, and in no immediate danger. The defendants also denied that there was danger to the tugs in rendering the services.

The value of the *Monarch* was 4000*l.*, of her cargo 900*l.*, and of her freight 288*l.*

Paragraph 12 of the defence was as follows:

The plaintiffs, by their agent, the owner of the *Empress of India*, on the 27th inst., after considerable bargaining, agreed to accept the sum of 350*l.* in settlement of the said services, which sum was thereupon paid by the defendants, and also received in exchange

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

a receipt for the same, to which they crave leave to refer.

The receipt above referred to was as follows:

Received of Messrs. Thomas Cooper and Co. the sum of 350*l.* in full and final discharge of all claims by the owners, masters, and crew of the steam-tugs *Empress of India* and *Wild Rose*, and John Williams, of Eleanor-street, Cardiff, and all matters in dispute in this action, with the exception of costs, which are to be taxed in the usual way as between party and party.

This receipt was signed by Messrs. Ingledew, Ince, and Colt. From the evidence on this point it appeared that an offer of 350*l.* had been made, and that Messrs. Ingledew, Ince, and Vachell, the plaintiffs' solicitors at Cardiff, had telegraphed to their London agents, Ingledew, Ince, and Colt, to accept the 350*l.* as if paid into court, meaning thereby that payment of the cheque for 350*l.* should be tantamount to a payment into court, leaving them at liberty to accept or reject it as a tender. The London agents mistook the purport of the telegram, and understood it to mean that they were to accept 350*l.* in full satisfaction of all the plaintiffs' claims. Mr. Strong, the managing owner of the *Empress of India*, happened to be in London, and on the 27th Oct. was at the office of Messrs. Ingledew, Ince, and Colt. He was then informed of the telegram, and an interview then took place between the defendants' solicitors and the agent of the plaintiffs' solicitors. Mr. Strong, acting under the impression that the parties in Cardiff had seen fit to accept the 350*l.*, reluctantly consented to take such sum, and the above receipt was given. On the mistake being ascertained the acceptance of the 350*l.* was at once repudiated by the plaintiffs.

Finlay, Q.C. and *Pyke* for the plaintiffs.—This compromise was effected under a mistake of fact, and is therefore not binding. Even a settlement made by counsel in court is not binding if made in ignorance of material facts, though with the client's authority:

Furnival v. *Bogle*, 4 Russ. 142.

Moreover, an agent is not clothed with authority for all purposes, and even if there were no mistake it would be sufficient to set aside the compromise to show that he had no authority:

Yates v. *Freckleton*, 2 Doug. 623.

The plaintiffs are therefore entitled to ask the court for an award considerably in excess of the 350*l.* The services were of a very valuable character. The pilot is entitled to salvage reward.

Sir *Walter Phillimore* and *Barnes* for the defendants.—It is contended only as against the *Empress of India* that the compromise is binding. As against the other salvors we do not ask to enforce it. It is immaterial whether the compromise arose through a mistake or not. Mr. Strong admittedly acquiesced in it, and therefore the court should not go behind the compromise:

Griffiths v. *Williams*, 1 Term. Rep. 710.

The court refuses to inquire into the authority of counsel to compromise, and will hold the compromise binding on the client subject to any remedies the client may have against his solicitor for compromising without authority:

Swinfen v. *Swinfen*, 25 L. J. 303, C. P.;
Chambers v. *Mason*, 28 L. J. 10, Ex.;
Thomas v. *Harris*, 27 L. J. 353, Ex.

It is also submitted that 350*l.* is in fact an adequate reward for the services rendered. As to the claim of the pilot, it is contended that his services were never converted into those of salvage. He was on board for the purpose of piloting the ship, and has been paid in respect of his services.

Finlay, Q.C. in reply.

Sir JAMES HANNEN.—I am glad that I have been relieved from the necessity of giving a decision upon a question which has been raised as to the effect of the alleged settlement with the plaintiffs, who had not assented to the compromise, and I think that the course taken by the defendants in admitting that they do not contend that the compromise is binding against the *Wild Rose* and the pilot is highly creditable to them. I am still, however, called upon to give a decision as to the effect of the transaction between the defendants' solicitors and the agents of the plaintiffs' solicitors on the claim of the *Empress of India*. I am of the opinion that the owners of the *Empress of India* are, in the circumstances, not bound by the agreement, and I so decide, for the following reasons: Mr. Strong was under the impression that his solicitors, who also represented the other claimants, had agreed to take 350*l.* in full discharge of their claim, and he under that mistaken apprehension of the facts did give assent to the whole of the claims being settled on that basis. But, as no arrangement was made as to what apportionment should be made, I do not know how it would be possible for me to apportion it so as to bind Mr. Strong, while the other claimants are to be released from the settlement. The ground, therefore, upon which my judgment rests is, that there was a misapprehension of fact on Mr. Strong's part as to the compromise by the other claimants, and a compromise made under a mistake by one creditor as to something done by others does not bind him. I also think it clear that Mr. Strong, though he acquiesced reluctantly in taking 350*l.*, evidently considered 400*l.* as not unreasonable. He bargained for 400*l.*, and when the other side would not give it him he consented to take 350*l.* His conduct, therefore, has a bearing on the question of how much should be paid for the services. I however consider the settlement not to be binding, and must therefore proceed to consider the respective claims.

The occurrences prior to the *Monarch* clearing the Flat Holms are of little importance, because when the tugs arrived she had by her own manœuvres avoided that difficulty, and had proceeded some considerable way towards the river Usk. The pilot said that if the sails had held he would have tried to put her on the mud to the west of the Usk, but that if they had not held, which is alleged to have been the danger from which the tugs saved the vessel, she would have driven ashore on the coast where it is hard sand, and must have become a total wreck. Now it appears from the chart, and from the experience of one of the Elder Brethren, that that representation is not correct, and that there is a mud soil on the east as well as on the west of the river Usk. Even, therefore, if her sails had not held I am advised that there was no extreme danger, and that, as she was then protected by Lavernock Point, the danger arising from the weather was greatly diminished, and that there

was no reason to fear the extreme results which the pilot has pictured to us. Of course nobody would choose in such weather to go ashore, even on soft mud, and from that danger the plaintiffs saved the vessel, for which they are entitled to liberal compensation. The question is whether 350*l.* is sufficient. We have carefully considered the matter, and we are of opinion that this sum is not sufficient. There being a slight difference in the value of the tugs, and in the admitted services of each, we award 235*l.* to the *Empress of India*, and 215*l.* to the *Wild Rose*, making 100*l.* more than the amount tendered. With regard to the pilot's claim, the question is whether his services were changed by reason of the peril in which the ship was. That seems to be a question peculiarly for the Trinity Brethren, and I have adopted their opinion that this claimant's services were not changed from those of a pilot to those of a salvor. What was in fact the nature of his so-called salvage services? He took a turn at the wheel and helped at the windlass, things which it was only natural and proper he should do. But such trifling services can give him no claim to salvage.

Solicitors for the plaintiffs, *Ingledew, Ince,* and *Colt.*

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

HOUSE OF LORDS.

Nov. 15, 16, *and Dec.* 7, 1886.

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

ROYAL EXCHANGE SHIPPING COMPANY *v.* DIXON. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Carriage of goods—Bill of lading—Exception of jettison—Goods carried on deck at shipowners' risk.

Cargo carried on deck at the shipowners' risk, in violation of the contract contained in the bills of lading, but with the knowledge and acquiescence of the shipper, was properly jettisoned in the course of the voyage.

Held (affirming the judgment of the court below), that the case did not come within an exception in the bills of lading relieving the shipowner from liability in respect of goods jettisoned, and that the indorsees of the bills of lading could recover the value, and that the cause of damage was not too remote.

THIS was an appeal from a judgment of the Court of Appeal (Brett, M.R., Baggallay, and Bowen, L.JJ.), who had reversed a decision of Cave, J. in an action tried before him at Liverpool, without a jury, at the Summer Assizes 1884.

The question raised was, whether the respondents were entitled to recover from the appellants the sum of 1487*l.*, in respect of the short delivery to the respondents of cotton shipped on board the appellants' vessel, the *Egyptian Monarch*, at New Orleans for Liverpool.

The appellants were shipowners, and the respondents were cotton merchants at Liverpool.

The action was brought against the shipowners in respect of cotton carried on deck and properly jettisoned during the voyage.

By the bills of lading it was provided that the shipowner should not be liable in respect of goods jettisoned, or for the "negligence or default of master or other persons in the service of the ship, whether in navigating the ship or otherwise, and all and every the dangers and accidents of the sea and of navigation of whatever nature or kind." The respondents asserted that the cotton had been improperly stowed by being carried upon instead of under the deck. The cargo was shipped under four bills of lading, three of which contained the words "under deck."

In reply to the charge of improperly stowing the goods, the appellants endeavoured to set up a practice in regard to shipments of cotton from New Orleans to Liverpool, under which cotton was carried on deck at the shipowner's risk, with the acquiescence of the shippers.

Cave, J. held that under the custom the appellants were not liable for the loss of the cotton, but his decision was reversed by the Court of Appeal, as above mentioned.

The shipowners appealed.

Sir *H. Davey*, Q.C. and *Haldane*, for the appellants, contended that the respondents were bound by the terms of the bill of lading, under which the shipowners were not liable for goods jettisoned. The shippers must be taken to have known of, and to have assented to, the practice of carrying cargo on deck at the shipowner's risk, which included damage by sea water, &c., which would be the direct consequence of deck stowage. But the breach of contract in carrying on deck was not the proximate cause of the jettison, which is admitted to have been proper under the circumstances. They cited

Milward v. *Hibbert*, 3 Q. B. 120;
Miller v. *Tetherington*, 6 H. & N. 278; 7 H. & N. 954;
Wright v. *Marwood*, 45 L. T. Rep. N. S. 297; 4 Asp. Mar. Law Cas. 451; 7 Q. B. Div. 62;
Burton v. *English*, 49 L. T. Rep. N. S. 768; 5 Asp. Mar. Law Cas. 187; 12 Q. B. Div. 218;
Steel v. *State Line Steamship Company*, 37 L. T. Rep. N. S. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72.

Sir *C. Russell*, Q.C., *Cohen*, Q.C., *French*, Q.C., and *Barnes*, for the respondents, maintained that there was no consent to the goods being carried on deck, and the shipowner was liable, and was not protected by the clause in the bill of lading. The damage was not too remote. They cited

Stephens v. *Australasian Insurance Company*, 27 L. T. Rep. N. S. 585; 1 Asp. Mar. Law Cas. 458; L. Rep. 8 C. P. 18;
Davis v. *Garrett*, 6 Bing. 716;
Scaramanga v. *Stamp*, 41 L. T. Rep. N. S. 191; 4 Asp. Mar. Law Cas. 295; 4 C. P. Div. 316;
Bartlett v. *Pentland*, 10 B. & C. 760;
Gould v. *Oliver*, 2 M. & G. 208.

Haldane was heard in reply.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

Dec. 7.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case the respondents, indorsees of four bills of lading of certain cotton shipped on board the appellants' screw steamer *Egyptian Monarch*,

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

sue the appellants, the owners of the steamer in question, for the non-delivery to them in Liverpool of certain portions of the cotton, which were jettisoned during the voyage by reason of the *Egyptian Monarch* having taken the ground. The cotton in question was stowed on deck, and, with respect to three of the bills of lading, it will not be denied that the bills of lading themselves expressly stipulated that the cotton should be stowed under deck. With respect, however, to the fourth bill of lading, the words "under deck" are not to be found in it. It appears to me that there is no real difference between the bills of lading. *Expressio eorum quæ tacite insunt nihil operatur*, and I think it is clear, therefore, that this cotton was carried under a contract that it should be stowed under deck. The exception in the bills of lading of "jettison" cannot avail the shipowners, who broke their contract in stowing the cotton upon deck, and thereby directly caused the loss to the merchants. That this would be the general law was not, indeed, disputed; but it was said that a practice prevailed at Liverpool, so extensively practised that it must have been known to the plaintiffs, of loading cotton upon deck. But the very same evidence which established the practice, established also that the shipowners paid for any damage resulting from the practice. Now, as they could only be called upon to pay as for a breach of their contract, it follows that the supposed practice established no more than this, that a great many people in Liverpool were in the habit of acting in breach of the contract into which they had entered, and were in the habit of paying damages when injury resulted from such breach. How such a practice can be supposed to affect the contractual relations of merchant and shipowner, I am wholly at a loss to understand; or how the generality of such a practice could alter the legal rights of the parties more than a single example, it is equally difficult to discover. Every carrier by land as by water, when he breaks his contract, and causes damage thereby, is liable to be called upon to make good the damage; but how such a liability, and constant submission to damages for such liability, can license the supposed breach, is a problem that has never been solved. I have had some difficulty in understanding the suggestion that the cause of damage was too remote to give rise to the claim now made. I could imagine a state of facts in which, though I should not agree with it, the argument would be intelligible. In this case it is hardly susceptible of plausible statement. The jettison of this cargo was the direct result of its being stowed upon deck. I am therefore of opinion that the judgment of the Court of Appeal should be affirmed, and the appeal dismissed with costs, and I move your Lordships accordingly.

Lord BLACKBURN.—My Lords: In this case I have had considerable difficulty in understanding what the ground was upon which Cave, J. decided below; but, upon the best consideration which I can give to it, I think that there has been a misapprehension upon his part, and that really the point which in his imagination had arisen did not arise. Upon the facts it appears, as the Lord Chancellor has just stated, that the case really comes to this: the goods were shipped on board, and probably with the knowledge, or at least without any objection on the part of the shippers, were put on the deck, on which they ought not to have been put. That being so, I quite agree that the judgment of the Court of Appeal is right.

Lord WATSON.—My Lords: Notwithstanding the able argument addressed to us on behalf of the appellants, I have come without difficulty to the conclusion that the judgment of the Court of Appeal is right. The appellants did not maintain that they have established a proper mercantile custom, which, if not excluded by the terms of the bills of lading, would become an implied term of the contracts thereby constituted. But it was said that a practice had been admitted by the respondents, which was described as "a practice to carry goods on deck from New Orleans to Liverpool at the risk of the shipowner." From an examination of the statements and concessions mutually made in the course of the trial before Cave, J., I am satisfied that the only practice ultimately alleged by the appellants, and admitted by the respondents, was in substance this: that owners of vessels trading between New Orleans and Liverpool were in the habit of stowing goods on deck in violation of their contract with the shipper, they accepting full responsibility for the consequences. Such being the state of the facts, it appears to me to be absolutely immaterial, so far as concerns the liability of the shipowner, whether the shipper knew or was justifiably ignorant of the practice. Shippers who are aware of the existence of such a practice, and do not object to it, cannot be said to have consented to a modification of the contract embodied in their bills of lading. Their non-interference merely implies that they do not think it necessary to prevent a deviation from the contract, because they are satisfied of the shipowner's ability to make good all loss arising from his having broken it. In short, the liability of the shipowner upon each occasion of deck stowage under the admitted practice is precisely the same with the liability which he would incur, in the absence of any such practice, by stowing goods on deck, on one occasion, in violation of his contract to carry, and without the knowledge of the shipper.

An interesting argument was addressed to your Lordships by the appellants' counsel as to the extent to which the law of England admits claims for contribution in respect of deck cargo properly jettisoned; and all the authorities, from *Milward* v. *Hibbert* (3 Q. B. 120) to *Burton* v. *English* (49 L. T. Rep. N. S. 768; 5 Asp. Mar. Law Cas. 187; 12 Q. B. Div. 218), were referred to and criticised. In the view which I take of the real character of the practice upon which the appellants rely, neither that argument nor the authorities cited in the course of it have any bearing upon this case. It was admitted that the general rule of law excludes such claim of contribution; and it was not seriously disputed that the decisions which establish certain exceptions from that rule either affirm or assume that the jettison of goods placed on the deck of a seagoing vessel, not under contract with the shipper, but by the act of the shipowner, and at his risk, cannot give rise to any claim of average, whether general or particular. To admit an exception in these circumstances would be tantamount to an abolition of the general rule. Of the 120 bales of the respondents' cotton which were stowed on the deck of the *Egyptian Monarch*

by the appellants, 95 bales were carried under bills of lading which bore that the cotton was "under deck," and 25 bales under a bill of lading in which the same condition of stowage was implied. Accordingly, at the time when jettison was made of those 120 bales, they were being carried in breach of the contract, and were not within the exceptions specified in the bills of lading, which have exclusive reference to goods safely stowed under hatches. In these circumstances I cannot doubt that the appellants are liable to pay to the respondents the value of the 120 bales, seeing that they cannot make delivery in terms of their contract and have no legal excuse for their failure to deliver. It was argued that the actual cause of damage was too remote to found any claim against the appellants; but that argument appears to me to be at variance with the principle laid down by Tindal, C.J. in *Davis* v. *Garrett* (6 Bing. 716), which has been recognised and acted upon in subsequent decisions. It was also argued that the respondents were not entited to recover the full value of the cotton, because it was said that if all the cargo had been below deck it would have been necessary to jettison part of it, and, consequently, that these 120 bales would have been liable in a sum, by way of general average contribution, which ought to be deducted in calculating damages for the purposes of this suit. Whether the appellants could have made out such a defence, it is in my opinion unnecessary to consider. It is not even indicated in the pleadings, and the evidence before us affords no materials for raising or disposing of any such question.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *McDiarmid* and *Teather*.

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

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Nov. 26, 30, *and Dec.* 18, 1886.

(Present: The Right Hons. Lords BRAMWELL, HOBHOUSE, and HERSCHELL, Sir BARNES PEACOCK, and Sir R. COUCH.)

COLONIAL INSURANCE COMPANY OF NEW ZEALAND AND OTHERS *v.* ADELAIDE MARINE INSURANCE COMPANY. (*a*)

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

Marine insurance—Insurance "at and from"—Meaning of word "cargo"—Insurable interest—Loss before loading completed.

The word "cargo" is a word susceptible of different meanings in different contracts, and must be interpreted with reference to the context.

The respondents, who had agreed with M., the charterer of a ship, to insure a cargo of wheat, applied to the appellants to hold them covered for a portion of the risk "at and from T. to the United Kingdom." The appellants replied, "In accordance with your written request . . . you are hereby held provisionally insured . . . on wheat cargo . . . from T. to the United Kingdom." M. had purchased the cargo from third parties upon the terms that the goods should be at the risk of M., as they were put on board the ship. The ship and cargo were lost by perils insured against at T., when a portion only of the cargo was on board.

Held (*affirming the judgment of the court below*), (1) *That, on the true construction of the appellants' letter, the contract was to insure "at and from" T.;* (2) *That the risk commenced as soon as any portion of the wheat was on board;* (3) *That M., the purchaser, who was himself the charterer of the ship, had an insurable interest in the wheat which had been shipped, the right of possession and the right of property being vested in him.*

Anderson *v.* Morice (35 *L. T. Rep. N. S.* 566; 3 *Asp. Mar. Law Cas.* 290; 1 *App. Cas.* 713) *distinguished.*

A man may have an insurable interest in goods for which he has neither paid, nor become liable to pay.

THIS was an appeal by the Colonial Insurance Company of New Zealand, defendants, in an action brought against them and Walter Reynell and Charles August Reinecke by the respondents in the Supreme Court of South Australia, from a judgment of the full court dated the 27th Nov. 1884, whereby the court ordered an appeal from the judgment, dated 19th Sept. 1884, of Way, C. J., in favour of the respondents, to be dismissed with costs.

The action was brought in the year 1883 by the respondents against both the appellants to enforce against the first appellants a contract of reinsurance, and to recover from them a certain sum payable thereunder, with damages, and in the alternative against the second appellants, damages for breach of warranty of their authority to enter into the said contract on behalf of the first appellants.

The first-named appellants in their defence traversed most of the allegations in the claim, and the other appellants in their defence did the same, but pleaded that they had authority from the first appellants to enter into the contract in question, and that it was ratified by the first appellants.

The action came on for trial on the 27th May 1884, before Way, C.J.

The circumstances which gave rise to the action were as follows:—The respondents were a company duly incorporated by an Act of Parliament of South Australia, and carrying on business of marine and fire insurance in Adelaide and elsewhere. The appellants, the Colonial Insurance Company of New Zealand, were a company duly incorporated under and according to the law of New Zealand, and carrying on business (*inter alia*) of marine insurance in New Zealand, and also at Adelaide and elsewhere, and at the time of the matters in question the appellants Reynell and Reinecke were the local agents and managers at Adelaide of the appellants, the Colonial Insurance Company of New Zealand, and duly authorised and empowered by that company to transact and manage the marine insurance business of that company at Adelaide.

On the 29th Sept. 1881 a firm of Messrs. Morgan, Connor, and Glyde, of Adelaide, chartered from her owners a vessel called the *Duke of*

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

Sutherland to proceed to certain named ports, with an option to the charterers of loading her in New Zealand, to load from the charterers a cargo of wheat and (or) flour in bags, the latter not exceeding one-fourth, and being so loaded to proceed to a port of call for orders for the United Kingdom or Continent, as in the charter-party mentioned.

On or about the 10th March 1882 Messrs. Morgan, Connor, and Glyde entered into a contract with the New Zealand Grain Agency and Mercantile Company Limited for the supply of a cargo of wheat for the said vessel at 4*s.* 7*d.* per bushel, f.o.b. Timaru, and upon the terms that the goods should be at the risk of Messrs. Morgan, Connor, and Glyde as they were put on board.

Messrs. Morgan, Connor, and Glyde ordered the vessel to Timaru, in New Zealand, to load the goods, and she accordingly proceeded there and began to load her cargo, and at the time of her loss hereafter mentioned had taken on board about 10,571 bags of wheat of the value of 11,500*l.* 19*s.* 5*d.*, but at the time of her loss there still remained about 2500 bags to be shipped by her.

On the 30th March 1882, before the vessel had commenced her loading ,Messrs. Morgan, Connor, and Glyde effected an insurance for not exceeding 14,000*l.* on the wheat, valued at invoice cost and 10 per cent., per the *Duke of Sutherland*, at and from Timaru, New Zealand, to the United Kingdom or Continent, with the respondents.

On the 30th March 1882 the respondents reinsured the whole of their risk by the said vessel, except 1000*l*, with other companies, including the appellants, the Colonial Insurance Company of New Zealand. The amount re-insured with the said appellants was 2000*l.* or one-seventh interest, and in order to effect the insurance with the appellants, after arranging the matter verbally, the respondents sent to the appellants the following request for cover:

Memorandum.—To the Colonial Insurance Company of New Zealand.—The Adelaide Marine and Fire Insurance Company, Adelaide, 30th March 1882.—Please hold us covered for not exceeding 2000*l.*, being 2-14ths interest in cargo of wheat per *Duke of Sutherland*, at and from Timaru, New Zealand, to United Kingdom or continent, F. P. A. rate charged to be that ruling in New Zealand for similar risks.—(Signed) E. M. ASHWIN, Secretary.

To that request the Colonial Insurance Company of New Zealand, through the appellants Reynell and Reinecke, their local managers, sent the following accepting the cover:

Marine Department, The Colonial Insurance Company of New Zealand, Fire and Marine.—To Secretary of Adelaide Marine, &c., Assurance Company, Adelaide Branch, 30th March 1882.—Dear Sir, In accordance with your written request of even date, you are hereby held provisionally insured in the sum of (not exceeding) 2000*l.* (being 2-14ths interest) on wheat cargo now on board or to be shipped in the *Duke of Sutherland* tons, from Timaru, New Zealand, to United Kingdom or Continent. Warranted F. P. A. Declaration to be made upon completion of shipment, and rate to be charged in New Zealand for similar risks.—We are, dear Sirs, yours faithfully, J. EDWIN THOMAS, for Local Managers.

It was proved by the evidence of a number of witnesses called on behalf of the respondents, that in insurance business, it was the universal custom that in covering a cargo there was no difference between "from" and "at and from" a port, and that a cover note, with the words "from" a port, included the loading risk the same as "at and from," and that the policy issued in pursuance of the cover was always issued "at and from." And it also was proved that the appellant company on a cover note "from" always issued their policies "at and from." The usual form of policy which would have been issued by the appellants the Colonial Insurance Company of New Zealand in accordance with the said cover note would have been "at and from Timaru to the United Kingdom or Continent." Such form would have been in the usual printed form supplied by the appellant company to their agents, and in it the words "at and from" were printed.

On the 3rd May the vessel was lost by perils insured against at Timaru, with the cargo of 10,571 sacks of wheat on board, but before the loading was completed, and the loss was duly declared by Morgan, Connor, and Glyde at 11,500*l.* 19*s.* 5*d.*, and the respondents paid their liability to Messrs. Morgan, Connor, and Glyde, and in turn settled with all the other re-insuring companies, except the appellants the Colonial Insurance Company of New Zealand, who refused to issue any policy to the respondents in accordance with their contract to do so, or to pay their proportion of the loss falling upon them under their contract of re-insurance which amounted to the sum of 1708*l.* 14*s.* 2*d.*

The appellants the Colonial Insurance Company of New Zealand disputed their liability on the following grounds:—(1) That the appellants Reynell and Reinecke had no authority to bind them by the cover note above set out. (2) That there was no contract to insure, as the parties were never *ad idem*. (3) That the adventure insured against had not begun. (4) That the plaintiffs had no insurable interest. But the court held that the evidence and documents clearly proved that the appellants Reynell and Reinecke had full authority from the appellant company to bind them by the said cover note, and that the appellant company ratified the contract, that the contract was entered into and was binding, and both in its terms and by the usage aforesaid and the dealings between the parties covered the goods at and from Timaru, and that the goods were lost at Timaru while at the risk of the respondents assured and while covered by the respondents to their assured and by the appellant company to the respondents, and that the respondents were liable to their assured and were entitled to recover from the appellant company.

The appellants Reynell and Reinecke were joined as defendants after the original defence was filed, in order to make them directly liable to the respondents in the event of it being held that they acted beyond their powers in giving the cover note to the respondents.

On the 19th Sept. 1884 the learned Chief Justice delivered judgment, and directed that judgment be entered for the respondents against the appellants the Colonial Insurance Company of New Zealand for 1708*l.* 14*s.* 2*d.* and interest thereon; that the respondents should have their costs from the appellant company; that the appellants Reynell and Reinecke should have their costs from the appellant company, failing them from the respondents, who were to be at

liberty to claim over against the appellant company.

From this judgment the appellant company appealed to the full court, and the appeal came on on the 27th Nov. 1884, and was heard before the full court, and the Court ordered that the appeal be dismissed with costs.

On or about the 1st Dec. 1884 the appellants the Colonial Insurance Company of New Zealand obtained leave to appeal to Her Majesty in Council against the judgment of the Supreme Court dismissing the appeal, and the appellants Messrs. Reynell and Reinecke were joined as appellants for conformity, but they were nominal appellants only, and did not allege that they felt themselves aggrieved by the judgment, or the dismissal of the appeal.

Graham, Q.C. and *Torr* appeared for the appellants; the arguments appear sufficiently from the judgment of their Lordships.

Cohen, Q.C. and *Barnes* appeared for the respondents.

The following cases were cited in the course of the arguments:

Borrowman v. *Drayton*, 35 L. T. Rep N. S. 727; 3 Asp. Mar. Law Cas. 303; 2 Ex. Div. 15;
Kreuger v. *Blanck*, 23 L. T. Rep. N. S. 128; 3 Mar. Law Cas. 470; L. Rep. 5. Ex. 179;
Anderson v. *Morice*, 35 L. T. Rep. N. S. 566; 3 Asp. Mar. Law Cas. 290; 1 App. Cas. 713;
Appleby v. *Myers*, 16 L. T. Rep. N. S. 669; L. Rep. 2 C. P. 651;
Gabarron v. *Kreeft*, 33 L. T. Rep. N. S. 365; 3 Asp. Mar. Law Cas. 36; L. Rep. 10 Ex. 274.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 18.—Their Lordships' judgment was delivered by

Sir B. PEACOCK:—This is an appeal from a judgment of the Supreme Court of South Australia in a suit in which the Adelaide Marine and Fire Assurance Company, now the respondents, were plaintiffs, and the Colonial Insurance Company of New Zealand, and certain other persons to whom it is not now necessary to refer, were defendants. In stating their reasons for the recommendation which their Lordships are about to make to Her Majesty in Council, they will, for the sake of clearness, speak of the parties to this appeal respectively as the plaintiffs and the defendants. [The judgment here set out the facts.] The present appeal is from the judgment of the full court. The reasons of the Chief Justice are fully set out, but no reasons for the judgment of the full court, which is the one from which this appeal has been preferred, have been communicated pursuant to the rule of the Judicial Committee of the 10th Feb. 1845. Their Lordships think it right to remark upon the absence of such reasons, as it is most desirable that the judges in the colonies should always comply with the rule. Upon the argument before their Lordships, the learned counsel for the defendants contended, first, that there was no contract of insurance; secondly, that at the time of the loss the risk had not commenced; thirdly, that the plaintiffs had no insurable interest. As to the first point, they contended that the proposal by the plaintiffs and the acceptance by the defendants were not *ad idem*, the proposal being "at and from" and the acceptance only "from" Timaru; and also that the acceptance contained the words, "declarations to be made on completion of the shipment," which were not in the proposal. The second point of contention was that, if there was a contract on the part of the defendants, it was merely to insure a wheat cargo from Timaru, whereas the vessel was lost before the cargo was complete and before the commencement of her voyage from Timaru. Parol evidence was admitted by the Chief Justice to prove that the defendants intended by the word "from" in their letter of the 30th March to insure at and from Timaru. One of the plaintiffs' prayers in the suit was that the policy should, if necessary, be amended. The defendants contended that the evidence was inadmissible. It is unnecessary to determine whether it was admissible or not, for their Lordships are of opinion that, upon the true construction of the defendants' letter, independently of any parol evidence, the contract was to insure at and from Timaru, and consequently that the first contention fails. The proposal to the defendants was to hold the plaintiffs covered "at and from" Timaru; the defendants' letter commenced, "In accordance with your written request of even date, you are hereby held provisionally insured 'from' Timaru to United Kingdom," &c. There could be no doubt entertained by the defendants as to the meaning of the words "at and from" contained in the proposal, and their Lordships are of opinion that the answer showed that their acceptance was intended to be in all respects in accordance and in conformity with the proposal, and that, notwithstanding they used only the word "from," they intended to accept the proposal at and from, and consequently that there was a binding contract to that effect.

As to the contention that the loss happened before the cargo was complete, the answer is, that the word "cargo" is a word susceptible of different meanings and must be interpreted with reference to the context. The sellers were to supply a cargo of wheat free on board the *Duke of Sutherland* at Timaru, and the defendants agreed, as a cover to the plaintiffs, to insure, at and from Timaru, a wheat cargo then on board, or to be shipped in the *Duke of Sutherland*. Their Lordships interpret the meaning of the words "wheat cargo" or "cargo of wheat to be shipped on board" to be such a quantity of wheat to be shipped at Timaru as the ship could properly carry, and as the defendants' contract was to insure a wheat cargo then "on board or to be shipped in the *Duke of Sutherland*," &c., the insurance must be construed in the same manner as if it had been on 13,000 bags of wheat to be shipped, &c., at and from Timaru. The risk, therefore, in their Lordships' opinion, commenced as soon as any portion of the wheat was on board. If the sellers had neglected to supply the full quantity of 13,000 bags, and the vessel had been obliged to sail with only 10,500 bags, it could not possibly have been contended that, if the ship had been lost on the voyage, the risk had not commenced because only a part of the cargo had been put on board. Their Lordships hold that the risk had commenced before the loss was incurred.

The last objection, viz., that the plaintiffs had not an insurable interest, was the most important one. It depends upon the question whether Messrs. Morgan, Connor, and Glyde had an

insurable interest, for if they had not an insurable interest the plaintiffs had not an insurable interest, and the payment by the plaintiffs to them under their policy was a mere voluntary payment. The appellants laid great stress upon *Anderson* v. *Morice* (35 L. T. Rep. N. S. 566; 3 Asp. Mar. Law Cas. 290; 1 App. Cas. 713). The Chief Justice considered that there was a striking resemblance between the facts of that case and those of the present. He proceeded, however, to consider three points which in his opinion constituted a difference between the two cases. Having discussed those points in an elaborate judgment, he arrived at the conclusion that they did not constitute any substantial difference in favour of the plaintiffs, and therefore, but for certain parol evidence which he had admitted on the trial, he would have held that neither Messrs. Morgan, Connor, and Glyde nor the plaintiffs had an insurable interest. Acting, however, upon what he considered to be an admission made by Mr. Glyde during the loading, to the effect that he understood that the wheat which had been shipped prior to the loss was at the buyers' risk as it was put on board, the Chief Justice found as a fact that the letters "f.o.b." in the particular contract were used with the meaning that the bags were to be at the buyers' risk immediately that they were put on board, and consequently that the buyers had an insurable interest. Their Lordships are of opinion that Mr. Glyde's statement as to what he understood was not admissible. He did not prove any additional facts, but merely expressed his opinion, and that at most merely by inference, as to the effect of the contract with the sellers. He merely denied that the wheat was at the risk of the shippers before it was on board. Their Lordships must therefore determine whether or not, independently of what Mr. Glyde was proved to have said, the buyers had an insurable interest. Their Lordships differ from the Chief Justice in this respect, and are of opinion that they had an insurable interest. In *Anderson* v. *Morice* it was held by the Exchequer Chamber, reversing a unanimous judgment of the Court of Common Pleas, that the property in the rice which was put on board the seller's vessel in the course of completing the cargo, and was lost by perils of the sea before the cargo was complete, did not vest in Anderson under his agreement for purchase; that there was nothing to show that it was to be at his risk, and consequently that he had no insurable interest. The decision of the Exchequer Chamber, from which one of the judges (Quain, J.) dissented, was appealed from to the House of Lords, and affirmed, the noble Lords who heard the appeal being equally divided in opinion. Their Lordships, notwithstanding the great diversity of opinions expressed in that case, are not prepared to throw any doubt on the correctness of the decision. But admitting it as an authority to the fullest extent, they consider that it is not applicable to the circumstances of the present case.

In each of the cases the insurance was on a "cargo," a word which, as already pointed out, is susceptible of different meanings in different contracts, and must be interpreted with reference to the context. In *Anderson* v. *Morice* Anderson agreed with Messrs. Borradaile, Schiller, and Co. to purchase the cargo of new crop Rangoon rice per *Sunbeam* at 9*s.* 1½*d.* per cwt. cost and freight, expected to be March shipment. Payment by seller's draft on purchaser at six months' sight with documents attached. The cargo to be purchased in that case was an entire thing, and was not in existence at the time when the contract was entered into, and would not be in existence until the whole cargo should be put on board. In the present case the vendors did not sell a particular cargo on board a ship chartered by them, but merely offered to supply a cargo of wheat for the *Duke of Sutherland* at 4*s.* 7*d.*, free on board at Timaru. No time or mode was fixed for payment, and nothing was said as to the place to which the cargo, when supplied and put on board, was to be carried, or to the effect that the sellers were to have anything to do with bills of lading or other shipping documents. The purchasers accepted the offer, they themselves being the charterers of the *Duke of Sutherland*, whereas, in *Anderson* v *Morice*, the firm who agreed to sell the cargo of rice by the *Sunbeam* were themselves the charterers of that vessel, and were to receive freight for the carriage of the rice, such freight being included in the purchase money. In putting the rice on board the *Sunbeam* the sellers were not delivering it to Anderson, but were putting it on board a vessel, of which they were the charterers, for the purpose of completing the cargo which they had agreed to sell. The master of the *Sunbeam* received it on their account, and not on account of the purchasers. The purchasers' right was to depend on the shipping documents, which were to be under the direction of the sellers. In the present case, in putting the wheat on board the *Duke of Sutherland*, the contractors were delivering it to the purchasers in pursuance of their contract to put it free on board, the master of the vessel which had been chartered by them being their agent to receive it on their account. The shipowners received it under the charter-party, by which they bound themselves to load from the charterers a full and complete cargo, and to proceed with it, &c., as ordered by the charterers or their agents. The sellers had nothing to do with the wheat or the destination thereof after it was on board, and by putting it on board they did not render themselves liable to the owners of the ship for freight, demurrage, commission, or any other charges provided for by the charter-party. The master would not have been justified in returning to the sellers any portion of the wheat without the authority of the purchasers, who were entitled under the charter-party to have bills of lading signed for it as directed by them according to the terms stipulated by the charter-party. From the very nature of the contract to supply a cargo of wheat for a ship of 1047 tons register, which it is admitted would consist of 13,000 bags of wheat, it could not have been intended that the whole supply should be completed at the same moment, or even in a single day. By the charter thirty days were to be allowed for the loading, and upon a proper construction of the contract of sale, in which nothing was stipulated as to the time of delivery or payment, the sellers would have a reasonable time to deliver it on board. By the charter-party the cargo was to be brought to and taken from alongside at merchant's risk and expense. By the vendors' contract they were to put it free on board for the charterer, and when put on board the master would receive it for the pur-

chasers and hold it for them. In many cases of contract to supply a quantity of goods to be delivered within a fixed period, the whole quantity cannot, from the very nature of the case, be delivered at one time, and it must frequently happen, as in contracts for supplies of provision for the army or navy, or any large establishments, that the quantities first delivered are appropriated and actually consumed by the persons to whom they are delivered before the expiration of the period within which the whole contract is to be performed. As no time was fixed by the contract for the payment of the purchase money the purchasers might not have been bound, if no loss had occurred, to pay for the wheat put on board from time to time until the whole cargo had been supplied; but it does not follow that they had not an insurable interest before the price was paid or payable. It appears from what follows that a man may have an insurable interest in goods for which he has neither paid nor become liable to pay. In the present case, if no loss had happened, and the sellers, without lawful excuse, had neglected to supply a complete cargo, the purchasers must have paid for the wheat which had been put on board, unless they returned it. If the sellers had completed the cargo the purchasers must have paid for the whole. In either case they had, at the time of the loss, an interest in the part which had been put on board. In the one case, that they might be able to return it to excuse them from payment for it in the event of their electing to put an end to the contract in case of the non-completion of the supply; in the other, that they might have the goods for which they would be obliged to pay. In *Oxendale* v. *Wetherell* (9 B. & Cr. 386) it was correctly stated by Parke, J., that, "Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot before the expiration of the time bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed to perform his contract, the latter may recover the value of the goods which he has so delivered." In the case cited it was decided accordingly. Applying the law as laid down in that case to the present, the purchasers, if no loss had occurred, might, subject to the rights of the shipowners to their lien for freight under the charter-party, have returned the wheat which had been put on board if the contractors had, without any lawful excuse, refused to supply a full cargo within a reasonable time, but they would not have been obliged to do so; they might have retained and paid for the part delivered, and sued the contractors for damages for not completing their contract; on the other hand, it is clear that the sellers could not without the consent of the purchasers in the case supposed have taken out of the ship the whole of the wheat which they had put on board, and have compelled the ship to go empty away, because they themselves had failed to complete their contract.

In *Van Casteel* v. *Booker* (2 Ex. 691) it is correctly stated by Parke, B., that "a delivery on board a purchaser's ship is a delivery to him, but that where goods are shipped under a bill of lading making them deliverable to the shipper's own order, the property does not vest in the consignee until the bill of lading has been delivered to and accepted by him." In their Lordships' opinion the rule applies to a delivery of goods in part performance of a contract as well as to a delivery of the whole quantity contracted for. In the present case the sellers had no right to give any directions as to the persons to whom bills of lading should be made out, nor as to the place to which the wheat should be carried. So far as the goods delivered were concerned, the sellers' obligation as to those goods ceased directly they were put on board. The purchasers might have sold them in New Zealand, and were not obliged, except as between them and the shipowners as regards the freight contracted for by the charter-party, to have had the wheat conveyed to the United Kingdom or the Continent. They had the same right to deal with the wheat which was put on board as they would have had to deal with the whole cargo if it had been completed. In *Dunlop* v. *Lambert* (6 Cl. & F. 600) Lord Cottenham, L.C. said: "It is, no doubt, true, as a general rule, that a delivery by a consignor to a carrier is a delivery to the consignee. This is so if, without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance, and it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee, for such carrier then becomes the special agent." In the present case there was a sale, a delivery, and a receipt by the purchasers of the wheat which was put on board. The charterers, and not the contractors, would have been liable to the shipowners for the freight if the wheat had been carried to its destination. Their Lordships are of opinion that the delivery of the wheat from time to time was a delivery to the purchasers, that it vested in them the right of possession as well as the right of property, and that at the time of the loss it was at their risk. The right which they had to return the wheat which had been delivered, in the event of the sellers neglecting, without lawful excuse, to complete the supply, did not prevent them from having an insurable interest. The interest in this case was defeasible, not by the vendors, but at the option of the vendees in the event of the vendors not completing the contract. For the above reasons their Lordships are of opinion that, without taking into consideration the statement made by Mr. Glyde, or the other parol evidence of the intention of the parties upon which the Chief Justice relied, Messrs. Morgan, Connor, and Glyde, and consequently the plaintiffs, had an insurable interest. They will therefore humbly recommend Her Majesty to affirm the judgment of the full bench, and to dismiss the appeal. The appellants must pay the costs of the appeal.

Solicitors: for the appellants, *Horace W. Chatterton*; for the respondents, *Johnston, Farquhar*, and *Leech*.

Nov. 23 *and Dec.* 11, 1886.

(Present: The Right Hons. Lord HERSCHELL, Sir BARNES PEACOCK, and Sir JAMES HANNEN.)

THE THOMAS ALLEN. (*a*)

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF HALIFAX.

Salvage — Amount of award — Appeal — Award reduced.

The Judicial Committee is reluctant to review salvage awards which involve the exercise of the discretion of the judge below, and will not do so unless the amount awarded differs to the extent of one-third from that which the Judicial Committee thinks adequate.

The screw steamship T. A., of 1701 *tons, laden with a cargo of grain, broke her screw shaft on the 3rd Oct.* 1885 *when in the Gulf Stream, about three hundred miles from Halifax. On the evening of the same day the steamship A., of about* 1600 *tons, laden with cargo and bound from Philadelphia to Bordeaux, took the T. A. in tow about* 8.30 *p.m. and brought her safely into Halifax about* 3.30 *p.m. on Oct.* 5. *The weather was fine, and the A. ran no danger in rendering the services. The T. A. was in no immediate danger when picked up. The value of the T. A., her cargo and freight, was* 126,775 *dollars; the value of the A., her cargo and freight, was* 132,500 *dollars. The Vice-Admiralty Court of Halifax having awarded* 12,000 *dollars: Held, on appeal, to be excessive, and reduced to* 7500 *dollars.*

THIS was an appeal by the defendants from the decree of the Vice-Admiralty Court of Halifax, Nova Scotia, in a cause of salvage instituted by the owners, master, and crew of the steamship *Austerlitz*, against the steamship *Thomas Allen*, her cargo and freight.

The services consisted in towing the *Thomas Allen*, which had broken her screw shaft about three hundred miles from Halifax, into Halifax under the circumstances set out in their Lordships' judgment. The towage extended over three hundred and twelve miles, and lasted for about forty-three hours.

The *Austerlitz* was a steamship of 1653 tons gross register, and at the time of the services was on a voyage from Philadelphia to Bordeaux laden with a cargo of syrup and molasses. The value of ship, cargo, and freight was 132,500 dollars.

The *Thomas Allen* was a steamship of 1701 tons register, and at the time of the services was on a voyage from New York to Bordeaux laden with a cargo of grain. The value of the *Thomas Allen*, her cargo and freight, was 126,775 dollars.

On the 10th Oct. 1885 the judge of the Vice-Admiralty Court awarded the plaintiffs the sum of 12,000 dollars and costs.

From this decision the defendants now appealed, and submitted that it should be reversed or varied for the following reasons:

1. Because the amount awarded was excessive, and under the circumstances out of all proportion to the services rendered.
2. Because the finding of the court below was not warranted by the evidence.

In the case on behalf of the respondents it was submitted that the judgment below should be affirmed for the following among other reasons:

1. Because the respondents by their services rescued the *Thomas Allen*, her cargo and freight, from total loss, and saved the lives of those on board.
2. Because the services of the *Austerlitz* were well and efficiently performed, and were attended by much labour and fatigue to her master and crew.
3. Because the sum awarded was arrived at by the court below after careful consideration of the evidence given before him.
4. Because the award is neither exorbitant nor excessive.
5. Because the said award is in accordance with the law and practice of the Court of Admiralty and Vice-Admiralty Courts in salvage actions.

Sir *Walter Phillimore* and *J. P. Aspinall* for the appellants.

Myburgh, Q.C. and *Hollams* for the respondents.

The following cases were cited:

The Glenduror, L. Rep. 3 P. C. 589; 1 Asp. Mar. Law Cas. 31; 24 L. T. Rep. N. S. 499;
The England, L. Rep. 2 P. C. 253;
The Chetah, 3 Mar. Law Cas. O. S. 177; 19 L. T. Rep. N. S. 621; L. Rep. 2 P. C. 205;
The Amerique, 2 Asp. Mar. Law Cas. 460; 31 L. T. Rep. N. S. 854; L. Rep. 6 P. C. 468;
The De Bay, 5 Asp. Mar. Law Cas. 156; 8 App. Cas. 559; 49 L. T. Rep. N. S. 414;
The Lancaster, 5 Asp. Mar. Law Cas. 58; 48 L. T. Rep. N. S. 679; 8 P. Div. 65;
The Carrier Dove, 2 Moo. P. C. 254;
The Clarisse, Swabey, 129;
The Lotus, 47 L. T. Rep. N. S. 447; 7 P. Div. 199; 4 Asp. Mar. Law. Cas. 595.

Dec. 11, 1886.—Judgment was delivered by

Sir JAMES HANNEN.—This is an appeal from a decision of the judge of the Vice-Admiralty Court, at Halifax, Nova Scotia, in an action for salvage, on the ground that the sum awarded by the learned judge is excessive. The material facts are as follows: On Saturday, the 3rd Oct. 1885, the screw steamship *Thomas Allen*, on a voyage from New York, when about three hundred miles from Halifax, broke her shaft. She was then in the Gulf Stream, with a north-easterly current of one and a half to two miles, the wind being south-east. At 6 p.m. she was seen by the *Austerlitz*, a steamer of 1600 tons, on a voyage from Philadelphia to Bordeaux, and at 6.30 the *Austerlitz* reached her, when an agreement was come to that the *Austerlitz* should tow the *Thomas Allen* to Halifax. At about 8.30 the operation of making fast was completed, and the two vessels proceeded on their course. The place where the *Thomas Allen* was picked up was 40° N. and 66° W., at a distance of over one hundred miles in a south-easterly direction from George's Shoal, and within the current of the Gulf Stream setting her north-east. The boat work required in connecting the two vessels was performed by the *Thomas Allen*, and the operation of making fast was accomplished without difficulty or danger. The two vessels anchored in Halifax harbour at 3.30 p.m. on Monday the 5th Oct. Thus the actual towing occupied forty-three hours, and the whole time that the *Austerlitz* was engaged in assisting the *Thomas Allen* was forty-five hours, to which must be added the time required to regain the position she had lost while giving this assistance. The wind was favourable for a portion of the time, and both vessels were able to carry sail. The towing was performed without any stoppage at an average rate of seven miles an hour, and without any unusual consumption of coal. No accident of any kind happened beyond the loss of

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

a running line, and chafing on the poop deck of the *Austerlitz*, which would cost two or three dollars to repair.

It was argued for the *Austerlitz* that it was to be assumed that she had not, by her charter, liberty to tow. But in the absence of any evidence on the point no such assumption can be made. The agreed values were, of the *Austerlitz*, her cargo and freight, 132,500 dollars; and of the *Thomas Allen*, with her cargo and freight, 126,775 dollars. The learned judge awarded 12,000 dollars for the salvage service rendered. Their Lordships are of opinion that this amount is larger than the circumstances of the case justify. The services, though valuable to the *Thomas Allen*, were of a very simple character, unaccompanied by any danger to the *Austerlitz* beyond the ordinary risks of towage, and the fact that the towage was performed at a high rate of speed, and without interruption by breaking of the tow ropes or otherwise, and without damage, except of the most trifling kind, to the *Austerlitz*, shows that it was without difficulty. The danger from which the *Thomas Allen* was rescued was simply that of any steamship which had lost her propelling power. Their Lordships are advised by their nautical assessors that there was no risk of her drifting on to George's Shoal, and she was in the track of steamers, so that there is no reason to suppose that she would not have obtained the assistance of some other vessel if the *Austerlitz* had not fallen in with her. In these circumstances the award of 12,000 dollars is certainly at a higher rate than that which has been adopted by courts of Admiralty in similar circumstances. Their Lordships have felt the hesitation which has so often been expressed at this board in interfering with the judicial discretion upon a mere question of amount, but their Lordships are of opinion that in this case the difference between the sum which they think would be a liberal remuneration for the services rendered and that which has been awarded is so large as to require correction. This subject has been very fully considered by this tribunal on several occasions, and the principle on which the Committee proceeds in these cases is very clearly stated in the judgment delivered by James, L.J. in the *Glenduror* (1 Asp. Mar. Law Cas. 31; 24 L. T. Rep. N. S. 499; 3 P. C. 589). He there says: "In some of these cases which have been referred to in argument, the difficulty has been stated in very strong language, namely, that this Committee would not enter into the question of *quantum* when there has been nothing to shock the conscience, nothing gross or extravagant:" (*The Carrier Dove*, 2 Moo. P. C. 254, N. S.) In the case of *The Clarisse* (Swabey 134) there follows a more accurate expression of the rule according to their Lordships' view. Their Lordships there say: "It is, however, a settled rule, and one of great utility, particularly with reference to cases of this description, that the difference ought to be considerable to induce a court of appeal to interfere upon a question of mere discretion;" and at the conclusion of the judgment is this passage: "With respect to the amount of difference of estimate which would justify their Lordships to review the decisions of the learned judge, they were referred to the case of *The Scindia*, in which this court differed to the extent of one-third. Unless the difference amounted at least to that, they would not have interfered." Acting on the principle thus laid down, and being of opinion that 7500 dollars will be a liberal reward for the services rendered by the *Austerlitz*, their Lordships will humbly recommend to Her Majesty that the sum awarded be reduced to that amount, of which the master and crew will receive 1880 dollars, and that each party bear his own costs of this appeal.

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

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

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 24 *and* 25, 1886.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

RODOCANACHI, SONS, AND CO. *v.* MILBURN BROTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party and bill of lading, discrepancy between—Contract between charterer and owner of ship—Cargo lost by negligence of master—Exception in bill of lading—Construction of charter-party—Measure of damages—Sale of cargo "to arrive"—Advanced freight.

The charter-party contains the contract between the owner and the charterer of a ship; and, unless it expressly provides that that contract may be varied by the bill of lading, the shipowner will not be relieved from liability by an exception in the bill of lading which is not in the charter-party.

In an action by the charterer against the shipowner for failure to deliver, the measure of damages is the market value of the cargo at the port of destination at the time when the ship would in due course have arrived independently of any circumstances peculiar to the plaintiff, less any freight which has not been prepaid.

A charter-party contained the following clause: "The master to sign bill of lading at any rate of freight, and as customary at port of loading, without prejudice to the stipulations of this charter-party, receiving the difference, if less than the rates specified therein, at port of loading against his receipt for the same." The cargo having been shipped, a bill of lading was signed by the master, acknowledging that the cargo was shipped in good condition, and was to be delivered in a like condition at the port of destination, but excepting the shipowner from all liability in consequence of "any act, neglect, or default whatsoever of the pilot, master, or mariners." This exception was not in the charter-party. The cargo was lost during the voyage by the negligence of the master. In an action by the charterers against the owners of the ship for damages for the loss of the cargo, the jury found that it was usual to sign bills of lading with a similar exception, but that there was no special custom in that respect at the port of loading.

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

Held (affirming the judgment of Manisty, J.), first, that the clause in the charter-party did not mean that the master was to sign a bill of lading containing the provisions that were customary at the port of loading, but that he was to sign in the manner customary at the port of loading; secondly, that, if the clause in the charter-party meant that the master was to sign a bill of lading in the form customary at the port of loading, the jury had found that there was no customary form at the port of loading, and that finding was in accordance with the evidence; thirdly, that, supposing the bill of lading that was signed to be in a form customary at the port of loading, and the clause in the charter-party to give authority to the master to sign a bill of lading in such a form, there were no express words in the charter-party incorporating the provisions of the bill of lading with those of the charter-party; that, in the absence of such words, the charter-party was the contract between the owner and the charterer of the ship; and that, consequently, the shipowner was not relieved from liability by the exception in the bill of lading.

After the charter-party had been entered into, but before bills of lading had been signed, the charterers had contracted to sell the cargo on its arrival at the port of destination at 7l. 2s. 6d. per ton.

Held (reversing the judgment of Manisty, J.), that the measure of damages was not the amount at which the cargo had been sold, less freight, but the market value of the cargo at the port of destination at the time when the ship would in due course have arrived (which was 7l. 7s. 6d. per ton), less unpaid freight.

The charter-party contained a clause providing that "sufficient cash for ship's disbursements to be advanced if required to the captain by charterers on account of freight at current exchange subject to insurance only." Under this clause the charterers advanced 160l. *(less premiums for insurance thereon) to the captain at the port of loading, the whole freight being* 735l. *The charterers did not insure the* 160l.

Held (reversing the judgment of Manisty, J.), that, in estimating the damages, the amount to be deducted from the value of the cargo was unpaid freight and not advanced freight as well.

This was an action by the charterers of the *Redesdale* against her owners for damages for the loss of a cargo of seed.

By the charter-party the ship was to proceed to Alexandria, and there load a cargo to be delivered at a port in the United Kingdom.

The 10th clause of the charter-party was as follows:

> The master to sign bill of lading at any rate of freight, and as customary at port of loading, without prejudice to the stipulation of this charter-party, receiving the difference, if less than the rates specified therein, at port of loading, against his receipt for the same.

The 13th clause was:

> Sufficient cash for ship's disbursements to be advanced, if required, to the captain by charterers on account of freight at current exchange subject to insurance only.

The cargo having been shipped, a bill of lading was signed by the master acknowledging that the cargo was shipped in good order and condition, and was to be delivered in a like condition at the port of destination; and containing a number of exceptions which do not appear in the charter-party, the one material in the present case being an exception of the owners' liability for any consequences of "any act, neglect, or default whatsoever of the pilot, master, or mariners." The cargo shipped was lost by the negligence of the master of the *Redesdale*.

Evidence was given at the trial with regard to the form of bill of lading in use at Alexandria. There was also evidence given on behalf of the plaintiffs to the effect that on the signing of the bill of lading a discussion had taken place as to its divergence from the terms of the charter-party, and that the captain and ship's agents had said that the bills of lading were only receipts for the cargo taken on board, and did not in any way affect the clauses of the charter-party.

The learned judge (Manisty, J.) asked the jury the following questions:

1. Was it the custom at Alexandria to insert in all bills of lading a clause exempting the ship from liability for loss occasioned by the negligence of the master and crew?

2. Was the bill of lading in this case signed in the form in which it is upon the understanding that it was to be treated only as a receipt for the cargo, and in no way to affect the clauses in the charter-party?

The jury answered as follows: It appears to have been usual to sign bills of lading with a clause which exempted the owners in a greater or less degree, but there was no special custom in Alexandria; and they answered the second question in the affirmative.

After the execution of the charter-party, and before the shipment of the cargo, the plaintiffs had sold the cargo "to arrive" at 7l. 2s. 6d. per ton, a price less than the market price at the port of discharge at the time when the ship in the ordinary course should have arrived there, which would have been 7l. 7s. 6d. per ton. The plaintiffs had made advances to the amount of 160l. under the charter-party on account of freight for ship's disbursements at the port of loading, retaining, however, out of such advances the amount necessary for premiums of insurance thereon. The whole amount of the freight was 735l.

The learned judge entered judgment for the plaintiffs for the price at which they had sold the cargo, less the total amount of the freight.

From this judgment the defendants appealed, and the plaintiffs gave notice of a cross-appeal as to damages.

Bigham, Q.C. and *Manisty* for the defendants.—Assuming the findings of the jury to be right, the judgment was wrongly entered for the plaintiffs. The contract contained in the charter-party imports the term that the goods are to be carried under a bill of lading in the customary form. The parties contemplated a document coming into existence which was to define the terms upon which these goods should be carried, and that that document should be in the form customary at the port of Alexandria. The words "without prejudice to the stipulation of this charter-party" do not qualify the words "the master to sign bill of lading as customary at port of lading." They only refer to the stipulation in the charter-party as to freight. If the jury have found that there was no customary form of bill of lading at Alexandria, their finding is against the weight of

the evidence. But, if the substance of their finding is looked to, it supports the contention that it is usual or customary for bills of lading there to contain the clause in question. Although the bills of lading that were produced at the trial differed in some respects, they all of them contained a stipulation which would relieve the defendants in the present case. There was therefore, a customary form of bill of lading at Alexandria in this sense, that it was customary to have an exception protecting the shipowner from liability for the default of the master and mariners. [Lord Esher, M.R.—Supposing that this clause is customary at Alexandria, and that the master was therefore right in signing bills of lading containing it, is it not the case that, as between the charterer and the shipowner, wherever there is a charter-party and a bill of lading, the charter-party is the contract, and the bill of lading a mere receipt for the goods?] It is submitted not. Lord Bramwell, in *Sewell* v. *Burdick* (52 L. T. Rep. N. S. 445; 5 Asp. Mar. Law Cas. 386; 10 App. Cas. 74, 105), is only referring to the case of a charter-party that is silent as to the provisions of the bill of lading. In such a case the charter-party is, no doubt, the contract. But here, by the terms of the charter-party, this customary form of bill of lading is incorporated in it. As to the cross-appeal on the question of damages, the learned judge has given the plaintiffs their actual loss, having regard to the contract they had made, not the speculative loss dependent upon the market price. [Lord Esher, M.R.—It makes no difference that they have sold the goods; that is a mere accident.] It is submitted that they cannot recover more than they have actually lost by the breach of the charter-party. As to the second point of the cross-appeal, that the advanced freight having been already paid, should not be deducted in estimating the damages it is submitted that it was rightly deducted. The advanced freight was to be insured at the defendants' expense, and the premium for insurance was deducted from the payment. It must be taken, therefore, that it was insured; and, if it is not to be deducted from the damages, the plaintiffs would in effect get it twice over. They cited

Gledstanes v. *Allen*, 12 C. B. 202;
Wagstaffe v. *Anderson*, 5 C. P. Div. 171, 177; 42 L. T. Rep. N. S. 720; 4 Asp. Mar. Law Cas, 290;
The Parana, 1 P. Div. 452; 2 P. Div. 118; 3 Asp. Mar. Law Cas. 399; 35 L. T. Rep. N. S. 32;
Winter v. *Haldimand*, 2 B. & Ad. 649;
Shand v. *Sanderson*, 28 L. J. 278, 282, Ex.; 33 L. T. Rep. O. S. 111;
Gray v. *Carr*, L. Rep. 6 Q. B. 522, 537; 25 L. T. Rep. N. S. 215; 1 Asp. Mar. Law Cas. 115.

Finlay, Q.C. and *Gorell Barnes* for the plaintiffs.—It was at the option of the charterers whether there should be a bill of lading or not. The jury have found that they took the bill of lading only on the understanding that it was not to affect the charter-party. The case is, therefore, on the same footing as if there was no bill of lading. Secondly, the master had no authority to sign a bill of lading containing this exception. The evidence failed to show any custom or any general usage as to the form of bills of lading at Alexandria, and the jury have found that there was no special custom there. Thirdly, if the words "without prejudice to the stipulation of this charter-party" refer only to the rate of freight, then the words "as customary at port of lading" also refer only to the freight. As to the damages, the plaintiffs are entitled to the market value, deducting only the unpaid freight. The rule which has always been laid down as the rule by which damages are to be assessed is to take the market value of the goods at the time and place at which they ought to have been delivered, independently of any circumstances peculiar to the plaintiff:

Great Western Railway Company v. *Redmayne*, L. Rep. 1 C. P. 329.

This is a contract for the delivery of goods; and it is not disputed that upon a sale of goods, which is also a contract for the delivery of goods, the purchaser is entitled to recover the market price, although he may have resold at a less value. As to the question whether the advanced freight should be deducted, the effect of deducting it is, that the plaintiffs pay that part of the freight twice over. In order to get the goods they would have had to pay only such portion of the freight as was still unpaid.

Lord Esher, M.R.—In this case the plaintiffs entered into a charter-party with the defendants, who are shipowners, for the carriage of goods by the defendants' ship. By one of the terms of the charter-party the captain was to sign bills of lading. Bills of lading were presented to him to sign, and he did sign them. In the course of the voyage the ship and cargo were lost by the negligence of the captain. Then the charterer sues the shipowner for damages for non-delivery of the goods. The charterer had, after the charter-party but before bills of lading were signed, sold the goods to someone else. The charter-party and the bill of lading are not identical. In the charter-party, among the exceptions of liability, there is not an exception for loss occasioned by the negligence of the shipowner's servants; in the bill of lading there is such an exception. The plaintiffs therefore say, "Although there is that exception in the bill of lading, we are suing you as charterers. We are entitled to rely on the contract contained in the charter-party. You cannot rely upon the bill of lading. There is no such exception in the contract between you and us." On the other hand the defendants say, "It is true there is no such exception in the charter-party. But you stipulated with us that the captain was to sign a bill of lading, as customary at port of loading, and by which the liability of the charterers was to cease when the goods were shipped. Taking those two clauses together, we say that the proper conclusion is, that the liability which existed between you and us when the charter-party was signed is at an end, and the liability which now exists is regulated by the bill of lading." The judge asked the jury, "Was it the custom at Alexandria to insert in all bills of lading a clause exempting the ship from liability for loss occasioned by the negligence of the master and crew?" When the jury asked him what a custom was, he said that it must be so nearly universal that any exception to it would be very rare and special. He asked then whether it was the custom to insert the clause "in all bills of lading." Their answer is, "It appears to have been usual to sign bills of lading with a clause which exempted the owners in a greater or less degree, but there was no special custom in Alexandria." I should have thought that that finding negatived the existence

of any custom as to any form of bill of lading at Alexandria. It certainly negatives the existence of any such custom at Alexandria in cases where there is a charter-party. It is said that the finding of the jury means that there is a usual, but not a universal form. I think that the jury meant to say, and were justified in saying, that there was neither a universal nor even a usual form. Of the bills of lading produced at the trial as examples, hardly any two were alike. They have all of them something that in substance would relieve the shipowner from liability for the negligence of his servants. But the stipulation that the captain was to sign a bill of lading as customary at port of loading could not mean that if, at the port of loading, the bills of lading had every clause different, except this one in dispute, he was to sign a bill of lading containing such a clause.

What then is the meaning of the words "as customary at port of loading?" When you have it that there is no customary or usual form of bill of lading at Alexandria, they cannot mean in the customary form there. Those words seem to me to refer, not to the form of the bill of lading but, to the manner of signing it. There are many practices with regard to the signing of bills of lading, so that the words would be satisfied if that meaning is given to them. For instance, there may be a custom that the captain or the ship's agent signs the bill of lading. Again, there may be a custom to sign bills of lading before the goods are on board the ship. My view is, that those words apply only to the signing. But suppose that they mean more than that, and apply to the form of bill of lading. What are the words of the clause in the charter-party? "The master to sign bill of lading at any rate of freight, and as customary at port of loading, without prejudice to the stipulation of this charter-party, receiving the difference, if less than the rates specified therein at port of loading against his receipt for the same." That is all one clause. It is to be "without prejudice to the stipulation of this charter-party." Construing those words in a business manner, I have no doubt that they mean without prejudice to this charter-party. If so, there are authorities which exactly cover this question. Suppose that I am wrong in that also, and that those words refer only to the rate of freight. Suppose that the provision is that the master is to sign a bill of lading in the customary form, that this bill of lading was in the customary form, and that the words without prejudice to the charter-party do not apply to that provision. Then you have a bill of lading to be signed under the charter-party, the stipulations of which would not be the same as those of the charter-party. What in that case is the rule as to the construction of the two documents? In my opinion, unless there is something expressly to the contrary written in them, the proper construction of the two together is that, as between shipowner and charterers, the bill of lading is to be taken only as a receipt for the goods shipped; and I adopt fully what has been twice said by Lord Bramwell upon that point. Full effect can be given to both instruments under that doctrine, because the bill of lading is an instrument upon which any person to whom it is indorsed, without notice of its differing from the charter-party, has a right to rely. If that construction is correct, *cadit quæstio*; the shipowner in this case is certainly liable to the charterer, if the charter-party between them alone is looked at. To sum up what I have said: Supposing that the words "as customary at port of loading" refer to the manner of signing, there is nothing to take away from the defendants their liability. But supposing that those words mean that the master is to sign a bill of lading in the customary form, then the words "without prejudice to the stipulation of this charter-party" prevent it having any effect at variance with the effect of the charter-party. Lastly, supposing that those words apply only to the rate of freight, and that the only bill of lading that could be presented to the master to sign was the one he did sign, then still, there being nothing expressly stated in the charter-party to show that, upon the signing of the bill of lading, the charter-party is to cease to be the contract between the parties, the bill of lading is to be treated only as a receipt for the goods. If necessary, you have the finding of the jury, upon the peculiar facts of this case, that there was an understanding to that effect; but I do not think that that finding is required. Under the circumstances, therefore, the shipowners are liable to the plaintiffs.

Then comes the question as to damages. Where, under a charter-party, there is a failure to deliver, the measure of damages must be the difference between the position of the plaintiff if the goods had been delivered, and his position if the goods are lost. What is the difference? If the goods had arrived, he would have them upon payment of the freight, which he necessarily has to pay in order to get possession of them. He would have had the value of the goods at the place of arrival, less the amount of the freight. How is that value calculated if there is no market for the goods there? It is calculated by taking the price that he paid for the goods, *plus* the profit which he would have made upon them at the port of delivery. Where there is a market, it is always to be the market price. It is not, then, necessary to add the cost price to the probable profit, because the market price does that for you. The value of the goods at the port of destination is the market price, if there is a market; if there is no market, a less accurate and more circuitous rule has to be adopted by adding the supposed profit to the original cost. The general rule is now that any intermediate sale or purchase of the goods is not to be taken into account, but is to be regarded as an accidental circumstance not affecting the original contract. Mr. Bigham's contention is, that the market price is to be taken if the plaintiff has sold the goods at a higher price than that; but that, if he has sold the goods at a price below the market price, then he cannot recover more than the contract price. That would be a very unequal rule. The mode of estimating the value of the goods is to take the market price, independently of any circumstances peculiar to the plaintiff. That gives the value of the goods; not the damages. Then the damages have to be estimated. The plaintiff would get the goods of a certain value, but, in order to get them, he would have to pay the accruing freight, for which there is a lien upon the goods. The damages, therefore, would be, not the price at which he had contracted to sell the goods, less the accruing freight, but the market price, less the accruing freight. Upon

that point, therefore, the cross-appeal succeeds. As to the other point raised by the cross-appeal with regard to the advanced freight, the plaintiffs would not have had to pay that freight in order to get the goods, as they would have paid it already. Upon that point also, therefore, the cross-appeal must succeed. The defendants' appeal, on the question of liability, fails; but the cross-appeal by the plaintiffs, as to damages, is successful.

Lindley, L.J.—I am of the same opinion. We have to say what is the effect of these two pieces of paper, one of them called a charter-party, and the other a bill of lading. Now, I am not at all sure what the words "as customary at port of loading" do mean; but I am sure that they do not mean that the master may sign a bill of lading at variance with the charter-party. All difficulty seems to be removed from the case by the finding of the jury that there was no custom at Alexandria as to the form of bill of lading. It was argued that the intention was that the bill of lading should supersede the charter-party as the contract between the parties. I do not think that that was in the least contemplated. That there was the slightest contemplation of any new contract between the charterer and the shipowner, I do not believe. That the charter-party is the contract between the parties in the absence of anything showing a contrary intention, is settled by authority. Unless there is some express provision to the contrary to be found in the charter-party, the bill of lading as between the charterers and the shipowners is to be looked upon as a mere receipt for the goods. Then, looking at this particular case, I can see nothing to show that it was the intention of the parties that the bill of lading was to be the contract between them. I have no hesitation in coming to the conclusion that there was only one contract, and that that is contained in the charter-party.

Then there is the question as to damages. That question is necessarily dependent upon rules that can only be approximately just, and that are to be applied not by mathematicians but by juries. Any special contract which the charterer has made is not to be taken into account in estimating the damages, whether he has agreed to sell for more or less than the market price. The damages are to be the market price at the port of discharge, less the accruing freight. As to the advanced freight, the defendants would of course have had no lien upon the plaintiff's goods in respect of that. It is not, therefore, part of the sum which the plaintiffs would have had to pay in order to get their goods, and ought not to be taken into account in estimating the damages.

Lopes, L.J.—In this case, a cargo was admittedly lost by the negligence of the master of the ship, and an important question arises whether the charter-party or the bill of lading is to govern the claim of the charterers against the shipowners. There is an exception in the bill of lading, which does not occur in the charter-party, protecting the shipowners from liability for any damage arising from any act, neglect, or default of the pilot, master, or mariners. The defendants relied on an alleged custom at Alexandria to introduce such an exception into all bills of lading. In my view, the question does not arise at all in this case upon the true construction of the 10th clause of the charter-party. "As customary," in my opinion, only means "as usual," and all that those words refer to seems to me to be the mode of signing bills of lading. But I will assume that they mean more, and refer to the form of bill of lading. I do not attach importance to the words, "without prejudice to the stipulation of this charter-party," because I think that they mean the stipulation as to rate of freight. But unless it is clearly expressed in the charter-party that there is a different intention, it is to be taken that that is the contract between the parties. I believe the law to be this, that where there is a charter-party, the bill of lading operates as a receipt for the goods, and as a document of title passing the property in the goods, but not as a contract between the charterer and the shipowner.

Then as to the question of damages. This is a case where the goods have been lost, not one where delivery has been delayed. I think the true rule is, that the measure of damages in such a case must be the market value of the goods at the place where, and the time at which they ought to have been delivered, independently of any circumstances peculiar to the plaintiff, and less what plaintiff would have had to pay in order to get them. Applying that rule to the present case, I think that the contract by the plaintiffs for the sale of the goods is a matter peculiar to them, between them and third parties, with which the defendants have nothing to do. It is admitted that this would have been the case if the contract had been for a sale of the goods at a higher price than the market value. I think that it makes no difference that the contract was for a sale at a lower price. The only other matter is as to the advanced freight. It seems to me enough to say that, if this were to be deducted from the damages, it would have been paid twice over. The cross-appeal will therefore be allowed, and the defendants' appeal disallowed.

Appeal dismissed; cross-appeal allowed.

Solicitors for the plaintiffs, *Waltons, Bubb,* and *Johnson.*

Solicitors for the defendants, *W. A. Crump* and *Sons.*

Tuesday, Jan. 18, 1887.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

Berridge *v.* The Man On Insurance Company Limited. (*a*)

*Marine insurance—Cash advances—"Full interest admitted"—*19 *Geo.* 2, *c.* 37, *s.* 1.

A policy of marine insurance which insures cash advances on a ship is within 19 *Geo.* 2, *c.* 37, *s.* 1; *and such a policy containing the terms "full interest admitted" is void under that statute.*

Smith *v.* Reynolds (1 *H. & N.* 221) *and* De Mattos *v.* North (18 *L. T. Rep. N. S.* 797; *L. Rep.* 3 *Ex.* 185) *followed.*

This was an appeal from a judgment of Pollock, B. The plaintiff brought the action upon a policy of marine insurance made with the defendants, who were a joint-stock company registered in

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

England. The defendants pleaded that the policy was void under 19 Geo. 2, c. 37

By 19 Geo. 2, c. 37, s. 1 :

No assurance shall be made by any person or persons, bodies corporate or politic, on any ship or ships belonging to His Majesty, or any of his subjects, or on any goods, merchandises, or effects, laden or to be laden on board of any such ship or ships, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the assurer, and every such insurance shall be null and void to all intents and purposes.

The plaintiff had advanced money on the security of a ship named the *Gainsford*, and entered into the policy in question with the defendants in order to insure such advances. The policy stated that the insurance was upon goods and merchandise upon the ship *Gainsford* for a certain specified voyage, and that "the said goods and merchandise for so much as concerns the assured are and shall be 1250*l.* on cash advances." In the margin of the policy were the words "full interest admitted." It was not disputed at the trial, or at any time, that the plaintiff had made the advances, and was to that extent interested in the ship.

Pollock, B. gave judgment for the defendants upon the ground that the policy was void as being a policy forbidden by the above-mentioned statute.

The plaintiff appealed.

Finlay, Q.C. and *Hollams* for the plaintiff.—The words in the margin of the policy, full interest admitted," do not fairly bear the construction which the learned judge put upon them at the trial. The fair and reasonable construction of those words is, that the full amount of the interest is admitted, and that the quantum of interest need not therefore be proved. The effect, then, of those words would be to make it a valued policy subject to the proof of some interest. [Lord Esher, M.R.—What would there be left for the plaintiff to prove?] That he had advanced money upon the ship. It is not pretended that this is, as a fact, a wagering policy, and it is not disputed that the plaintiff is interested to the full extent. The statute does not apply at all in such a case as this, because this is not a policy of insurance upon a ship or goods, but upon advances. [Lord Esher, M.R. referred to *De Mattos* v. *North*, 18 L. T. Rep. N. S. 797 · L. Rep. 3 Ex. 185; 3 Mar. Law Cas. O.S. 141.] In that case the insurance was upon the profits of goods, and that was taken as part of their value. *Smith* v. *Reynolds* (1 H. & N. 221; 25 L. J. 337, Ex.) and *Allkins* v. *Jupe* (36 L. T. Rep. N. S. 851; 3 Asp. Mar. Law Cas. 449; 2 C. P. Div. 375) were also cited.

Myburgh, Q.C. and *English Harrison*, for the defendants, were not called on.

Lord Esher, M.R.—The first question is, whether this policy is within the statute. Now the cases of *Smith* v. *Reynolds* (*ubi sup.*), *De Mattos* v. *North* (*ubi sup.*), and *Allkins* v. *Jupe* (*ubi sup.*) all seem to show that for this purpose the thing on which the insurance is made is the thing which is physically at risk from the perils insured against, so that the loss of that thing involves the loss of the subject-matter of the insurance. In this case the plaintiff was interested in the ship to the extent of his advances; if the ship was lost his advances were lost also, and he therefore effected an insurance on the ship. I think that, in doing so, he was in respect of his advances effecting an insurance upon the ship within the meaning of the statute. Now, it was suggested on the part of the plaintiff that this court could overrule the decisions to which I have referred; but I do not think that we could overrule them now, even if we did not agree with the reasoning upon which they were based, but I think that the decisions were right. Then the only remaining question is, whether this policy does that which the statute forbids by reason of its being a policy which is to have effect "without further proof of interest than the policy." Now, the words are "full interest admitted." Those words do not seem to me to amount merely to a statement that the value of the interest is admitted to be a certain sum, but I think they imply that no proof of interest is required, the whole being admitted. I cannot imagine words which, being different from the words of the statute, more exactly represent its meaning. This policy is not void as a gaming and wagering policy, but nevertheless I think it is void as a forbidden policy by reason of the words which forbid insurances "without further proof of interest than the policy." I therefore think that this appeal must be dismissed.

Bowen and Fry, L.JJ. concurred.

Appeal dismissed.

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

Solicitors for the defendants, *Harwood and Stephenson.*

Saturday, Dec. 14, 1886.

(Before Lord Esher, M.R., Lindley and Lopes, L.JJ., assisted by Nautical Assessors.)

The Indus. (*a*)

Collision—Steamship and lightship—Compulsory pilotage—Inevitable accident—Negligence—Onus of proof.

Where the plaintiffs in a collision action show that their vessel was at anchor exhibiting a proper light, and was struck and damaged by another ship, they make a primâ facie case of negligence against the defendants, the owners of the ship in motion, and the burden of proof upon the defendants, to rebut the presumption of liability, is not discharged by merely proving that their ship was in charge of a pilot by compulsion of law without proving that the cause of the collision was solely the fault of the pilot.

The steamship I. having come into collision with a lightship, the owners of the lightship sued the owners of the I., and proved that the lightship was at the time of the collision at anchor, and exhibiting a proper light. The defendants gave evidence that the I. was in charge of a compulsory pilot, and that all his orders were obeyed; that the I. was steered by steam-steering gear; that the helm was starboarded in obedience to the pilot's orders, but that the I. failed to answer her helm, and struck the lightship. The President did not find what was the cause of the collision, but dismissed the action on the

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

ground that the plaintiffs had made no case against the defendants.

Held, on appeal, that the plaintiffs had made out a primâ facie case of negligence against the defendants; that the defendants had neither established that the collision was due to inevitable accident, or the fault of the pilot, and that therefore the plaintiffs were entitled to judgment.

This was an action *in personam* by the corporation of Trinity House, as owners of the *Girdler* lightship, against the owners of the screw steamship *Indus*, to recover damages occasioned by a collision between the *Indus* and the lightship on the 20th June 1884.

The plaintiffs proved that, at about 11.45 p.m. on June 20, 1884, the *Girdler* lightship was lying in her usual position in the Thames, and showing her bright revolving light; that the weather was fine and clear; that the *Indus* was seen bearing north, and half a mile distant, heading for the lightship; that she came on without any alteration, and with her stem struck the starboard side of the lightship and sank her.

The evidence on behalf of the defendants was as follows: Shortly before 11.45 p.m. on the 20th June 1884, the *Indus*, a steamship of 1615 tons net register, was in the entrance to the river Thames in the course of a voyage from London to Queensland, laden with a general cargo, and carrying about 400 passengers. The weather was fine and clear. The *Indus* was in charge of a pilot by compulsion of law. Shortly after the *Indus* had passed the Shivering Sand, her course was by the pilot's orders altered, so that the *Girdler* lightship was brought to bear right ahead. When the lightship was half a mile distant, and still right ahead, the pilot ordered the helm to be put to starboard, and then put hard-a-starboard. Both these orders were obeyed, but the head of the *Indus* did not pay off, and when the lightship was about 300 yards distant, and still bearing right ahead, the pilot ordered the helm to be put hard-aport, and her engines to be stopped and reversed full speed astern. But before these orders had any effect, the *Indus* with her stem struck the lightship amidships. The *Indus* was being steered by steam-steering gear, and this was her first voyage. She had been built at Dundee, and brought round from there to London. The steering gear had acted properly from Dundee to London, on the voyage down the river till the collision happened, and subsequently on the voyage to Queensland. The helmsman was not called.

Sir *Richard Webster*, Q.C. (A.-G.), and *Bucknill*, Q.C. for the plaintiffs.

Finlay, Q.C. and *Kennedy*, Q.C. for the defendants.

The President.—The question in this case is whether or not the master or crew of the *Indus* caused wholly or partly by contributory negligence this catastrophe. I have not before me as an issue in the case whether or not the pilot caused the collision. That is only indirectly in question. It was at first suggested by the pleadings, that the owners of the *Indus* caused the collision, or had contributed to it by not providing the *Indus* with proper steering gear; but that charge has been abandoned by the Attorney-General. The next thing is, that it is clear that this vessel was under the charge of the pilot, and I have absolutely no evidence that his orders were not obeyed. On the other hand, I have evidence of the clearest kind by the master and the second officer of the *Indus* that the pilot's orders were obeyed; and the pilot, who has been called, and who of course must know that his skill is being questioned, has not asserted that his orders were not obeyed. Further than that in the evidence which he last gave—he was discreetly left unquestioned upon the subject by the Attorney-General—in answer to questions by Mr. Finlay, he by implication admitted that his orders had been obeyed. It is suggested that, from the previous history of this short voyage, I am to infer that it was by reason of some default on the part of the steersman that the vessel did not answer her helm immediately before the collision. That is based upon the fact which is admitted, that on one occasion a man, who had been at the helm coming down the river, had been removed, because as a matter of fact, whatever the cause, an order having been given by the pilot the manœuvre ordered by him had not been effected, and it appears to have been assumed that that was because the man at the helm had not known how to discharge his duties, and had not in fact discharged his duties of obeying the order of the pilot. First of all, I will assume that it was because the man did not know how to discharge the duties of a steersman. If it was so either once or twice, it is plain that the man had been replaced by somebody else, and that somebody else is not shown by any evidence not to have known how to steer. There is positive evidence that the orders which were given by the pilot were obeyed by the man at the wheel. There is, however, this further observation to be made. It has been elicited by the Attorney-General for some purpose which I do not understand that one or another of the men who were removed from the wheel said when removed, "I know how to steer as well as you do." From which it was suggested that the man was by implication saying it was no fault of his, but was the fault of the steering gear. It appears then that, there being proper steering gear supplied, as is now admitted, the pilot's orders were obeyed. Then there is the fact that the vessel did not answer her helm.

This subject has been considered quite recently in the case of *The European* (5 Asp. Mar. Law Cas. 417; 52 L. T. Rep. N. S. 868; 10 P. Div. 99) by my brother Butt. In that case the facts were very similar with this difference, that there the apparatus had been found defective on the previous voyage, and on that ground my brother Butt, while he held that the owners would not have been liable if the failure of the steering gear had occurred for the first time, yet he held they were liable because they had had a warning that this vice was in the steering gear, and that therefore they ought to have taken steps to repair it. There is a complete absence of any such evidence in this case. It has been proved, and it has not been sought to impeach the evidence, that this steering gear had served perfectly well in bringing the ship up from Dundee, and that it had answered perfectly well on the trial trip.. There only remains what happened when the *Indus* was approaching the lightship, and it seems to me to be clear that there was nothing which occurred then which rendered

it the duty of those navigating to stop, because I have no doubt that they did really and truly believe that it was because the man or men had not steered properly that the vessel did not answer her helm. It is quite possible, from the man's remonstrance about knowing how to steer as well as anybody else, that there might have been a defect in the steering gear, but as that had not been brought to the notice of anybody up to that time—I am only putting this forward as a conjecture—I cannot hold that there was any negligence on the part of those in charge of the vessel in continuing the voyage until this happened. I have already pointed out that it is not necessary for me to say whether or not the pilot was to blame. It is possible that the cause of the catastrophe may have been something not accounted for, and it would appear from this case of *The European* (*ubi sup.*) that these accidents do happen with the best esteemed machinery. It is possible that something or other did happen to the steering gear which caused her not to answer. I repeat this is quite outside what I have to determine, and I must add that, though the question is not whether or not the pilot was to blame, the assessors, whose valuable assistance I have, incline to the opinion that the collision did arise from the default of the pilot; but I repeat, I do not give my decision on that point, because it is not the question before me. A good deal has been said about the helmsman not being called. Undoubtedly, if I had thought that the evidence given left the matter *in dubio*, I should have been influenced by the fact that he had not been called; but when I have the clear and distinct evidence of the master and second mate that the orders of the pilot were in fact obeyed, I come to the conclusion upon the whole that the case has not been established against the defendants.

Bucknill, for the plaintiffs, referred to the case of *The Buckhurst* (46 L. T. Rep. N. S. 108; 6 P. Div. 152; 4 Asp. Mar. Law Cas. 484), and asked that the plaintiffs should not be condemned in costs.

Finlay, Q.C., for the defendants, *contra*.

The President.—I am not much impressed by Mr. Bucknill's contention, that this case is analogous to a case of inevitable accident. It appears to me that, on the first view of this collision, it would be the pilot who was in charge who occasioned it; but I suppose that, because pilots are not able to pay the damages, it was sought to make the owners of the vessel pay, and that attempt has been unsuccessful. The plaintiffs have failed to establish that there was any blame on the part of the defendants, and they must take the ordinary consequences which attach to litigants who fail to establish their case.

From this decision the plaintiffs appealed.

Sir *Richard Webster*, Q.C. (A.-G.) and *Bucknill* Q.C. in support of the appeal.—The learned President was wrong in finding that the plaintiffs had not established a case against the defendants. On showing that their vessel was at anchor and exhibiting a proper light they made out a *primâ facie* case of negligence against the defendants. They have not disproved that *primâ facie* case, and therefore the plaintiffs are entitled to judgment:

The Batavier, 2 W. Rob. 407;
Bill v. *Smith*, 39 Connecticut Rep. 206.

All the defendants have proved is that their ship was compulsorily in charge of a pilot, but the President has expressly refrained from finding that it was solely his fault which caused the collision. He has assumed it was upon the plaintiffs to prove the cause of the collision, and has left that cause *in dubio*. It is submitted that the suggestion of inevitable accident, founded upon the assumpton that the steering gear failed to act on this particular occasion, is inconsistent with the facts. The steering gear previously and subsequently acted properly. The true inference to draw is, that the pilot's orders were never obeyed at all. It is, however, sufficient to say that the defendants have not discharged the burden of proof which lay upon them, and therefore the plaintiffs are entitled to judgment:

The Lochlibo, 3 Wm. Rob. 310;
The Clyde Navigation Company v. *Barclay*, 36 L. T. Rep. N. S. 379; 1 App. Cas. 790; 3 Asp. Mar. Law. Cas. 390.

Sir *Walter Phillimore* and *Kennedy*, Q.C. for the respondents, *contra*.—Though the onus lay upon the defendants to prove either that the collision was due to the fault of the pilot or an inevitable accident, yet, inasmuch as their evidence had put the matter *in dubio*, they were entitled to judgment:

The Boliva, 3 Notes of Cas. 208;
The George, 4 Notes of Cas. 161.

The President has found that the collision was due to either of these two causes, for neither of which the defendants would be liable. The defendants have, therefore, discharged the onus which was upon them, and the onus of proving negligence on the part of their servants causing or contributing to the collision lay upon the plaintiffs:

The Daioz, 37 L. T. Rep. N. S. 137; 3 Asp. Mar. Law Cas. 477.

Bucknill, Q.C. in reply.

Lord Esher, M.R.—I am of opinion that in this case the defendants have not discharged to our satisfaction the burden of proof which was upon them. This is an action for collision, and the action is brought against the owners of a steamer which at night time ran into a vessel at anchor. It was incumbent upon the plaintiffs to make out a *primâ facie* case, one which if unanswered would entitle them to judgment. They, in order to satisfy the burden of proof which was upon them, gave evidence that their vessel was at anchor and was showing a proper light. Under these circumstances, the defendants' vessel being in motion, in my opinion, and as it has been frequently held, the plaintiffs had established a *primâ facie* case of negligence against the defendants' vessel. It is the duty of a vessel in motion to keep clear of one at anchor, if the latter can be seen, and if she does not keep clear of her then she must show good cause for not doing so. In this case the ship at anchor having shown a proper and sufficient light, the circumstances are just the same as if the collision had happened in midday, and can any man, not as a matter of law, but of common sense, suppose that is not a *primâ facie* case of negligence? Therefore here

the plaintiffs have proved a *primâ facie* case of negligence, and if it was not answered by countervailing evidence they are entitled to judgment. In what way could the plaintiffs' case be answered? The defendants could say they did everything that could be done by careful seamen, but that some overwhelming storm occurred which prevented the ship from being navigated as she ought to have been. They could say that an entirely unforeseen accident, which could not have been prevented by proper management, occurred to the machinery with the same result. There are many other things which might be classed under the head of law known as inevitable accident, which is a well-known expression, and though it may not be philosophically correct answers its purpose. If the ship which is *primâ facie* in the wrong sets up the defence of inevitable accident she must prove it, and the burden of proof rests upon her to show that the collision was the result of an inevitable accident. In the present case the learned President seems to have left it an open question, an alternative, whether or not this collision was caused by an inevitable accident. The inevitable accident suggested is, that the machinery was out of order; that is to say, that though it had previously been working perfectly well, something occurred at the particular moment of the collision which prevented it from doing that which everyone might reasonably expect it would do. He has left that open as an alternative, but, in my opinion, there was no evidence to support such a suggestion. It is said that the machinery acted well from Dundee to London, down the Thames, till the accident happened, and afterwards on the voyage to Australia. It is therefore necessary to presume that an inevitable accident happened once, and once only, and that at the most critical moment. In my humble opinion there is no evidence to support such a presumption. Therefore this alternative did not exist, and the defendants never proved the defence of inevitable accident.

In what other way, then, could the defendants discharge their burden? They could show that they had a licensed pilot on board, that he was there by compulsion of law, and that the accident occurred solely through his negligence. They must give evidence which if unanswered would prove that proposition. In my opinion they must show that the fault was one in regard to the navigation of the ship as to the steering, because that is the principal matter over which the pilot has a control, that the collision was due to his fault alone, and that he at the time was in charge of the navigation. If they prove that the pilot gave orders, and that his orders were obeyed, they make out a *primâ facie* case of negligence on his part. But if they only prove that the pilot gave orders without also proving that they were obeyed, they do not even make out a *primâ facie* case that the collision was solely the fault of the pilot. By such evidence they perhaps may show that the pilot was in fault, but they do not show that the pilot was solely in fault. In the present case they gave evidence that the pilot gave the orders as to the steering of the vessel, and that they were immediately obeyed. But the question is whether they gave such evidence as the court can accept. The evidence is that the machinery acted well before and after the collision. According to the evidence the pilot was steering so as to bring the lightship right ahead, about two miles off. He continued that course until within half a mile, or somewhat less, and at this time we on the evidence have come to the conclusion that he ordered the helm to be put hard-a-starboard. I cannot doubt myself that if that order was given half a mile off, and it was obeyed at once, and nothing was done to counteract it, the steamer would have gone clear of the lightship. Now comes the question, was that order obeyed? It is for the defendants, on whom the burden of proof lies, to show that it was obeyed. Have they satisfied that burden? The captain and mate said it was obeyed. The mate said, "I looked and saw the man put the helm over hard-a-starboard," but he added "the ship did not alter her course." His evidence means that the ship did not alter her course until the moment she struck the lightship. On this we have put this question to our assessors, "Assuming that the helm was hard-a-starboarded at a distance of half a mile, is it possible that the ship could not have answered her helm so that the officer must have seen it?" They answer No. Therefore the weak point in the evidence of the second mate is this: He says, "I know the helm was put hard-a-starboard," but immediately adds something which seems to suggest that it was not put hard-a-starboard. It is impossible to account for the ship not altering, except on one of two suppositions, either that the machinery had no effect upon the ship, or that the helm was not in fact put hard-a-starboard. It is important to notice that the helmsman, who could have said whether he put the helm hard-a-starboard or not, was not called. I do not say he was not called through any fault of the defendants; but, however it is, their case is open to this criticism, that their evidence that the helm was hard-a-starboarded is supplemented by the evidence that the order was not effective. To my mind, the inference is, that the order was not obeyed, unless there is something else to show that, even if it was obeyed, it was counteracted. But the evidence is that, even at the moment of the collision, the helm had not been got over to hard-a-port, though the pilot had so ordered when he saw the likelihood of a collision arising. We come to the conclusion that nothing was done which would counteract the effect of the hard-a-starboard order if it had been obeyed; and that the order to hard-a-port was given at a time when it had no effect.

So far from agreeing with the learned President that there was a double alternative, it seems to me that the evidence, when carefully considered, proves with a reasonable certainty, sufficient for the court to act on, that the order to put the helm hard-a-starboard was given nearly half a mile from the lightship, and that it was not in fact obeyed. I myself think it would have been better if the pilot had given the order more than half a mile off; but, if the disobedience to the order contributed, as I think it did, to the collision, it cannot be said that it was caused solely by the default of the pilot, and therefore the defendants fail, because they have not satisfied the burden of proof which lay upon them. With the greatest deference to the learned President, I cannot understand that part of his judgment where he says that judgment ought to be given against the plaintiffs, because they did not make out their case. I think they did make out a

primâ facie case, and the only thing that remained to be tried was whether it was rebutted by the defendants. I do not think they have rebutted it. With regard to the cases which have been cited at the bar, none of them seem to be contrary to the proposition I have laid down—that where a *primâ facie* case of this sort is made out by the plaintiffs, and the defendants rely on compulsory pilotage, they must prove two things at least: that the default was in the steering, and that the orders as to that were given by the pilot, and were obeyed. The case in the House of Lords of *The Clyde Navigation Company* v. *Barclay* (*ubi sup.*) amounts, in my opinion, to this, that where the plaintiffs make out a *primâ facie* case, and the answer is, that the defendants are exempt from liability on the ground of compulsory pilotage, and they give evidence which *primâ facie* proves that the accident was solely the fault of the pilot who was in charge of the ship by compulsion of law, the burden of proof is then shifted back on to the plaintiffs if they allege that the defendants were guilty of some other act of negligence. That is all the House of Lords there decided; it does not alter the general and long accepted rules as to the burden of proof which I have already stated. For these reasons, I think that this appeal should be allowed.

LINDLEY, L.J.—I am of the same opinion. The difficulty in this case is to find out what was the cause of the collision. Here is a lightship at anchor, exhibiting proper lights, and she is run into by a steamer in fine and clear weather. The *primâ facie* case is that the collision was due to the negligence of some one on board the steamer. Now the evidence satisfies me that the steamer was not navigated according to the pilot's orders. A theory of inevitable accident was suggested, in support of which I can see no evidence at all. So far as we can ascertain, the steering apparatus had previously and subsequently acted properly, but it is suggested that it may not have acted properly on this occasion. That is a mere suggestion. The evidence is that the pilot gave the orders starboard and hard-a-starboard, and yet nobody observed the ship alter. If that is so it is inconceivable that the pilot's orders can have been complied with. I am quite aware that the captain and mate say that they were, but it is proved to demonstration that that cannot be, and I decline to accept their evidence on that point. If so the allegation that the steamer's crew were to blame is made out. But the evidence does not stop there. It may be that the pilot was to blame. If the course of the steamer was not changed, I cannot see why he did not stop the engines sooner, but that does not exonerate the defendants, for the reasons I have given. I come to the conclusion therefore that whatever may have been the fault of the pilot, the defendants were guilty of negligence, and that this appeal must be allowed.

LOPES, L.J.—In order to make out that this collision was solely the pilot's fault the defendants must show that his orders were executed by the crew, and, unless they established that, they do not, in my opinion, make out that which they are called upon to prove. There is a good deal of evidence that the pilot's orders to the helm were obeyed, but there is also the fact that though these orders were given nearly half a mile off the ship did not in any way alter her course. How can that be accounted for? Either there must have been something wrong with the steering gear or those orders could not have been obeyed. The evidence is that before and after the collision the steering gear acted perfectly. It is impossible therefore, to my mind, to say that the steering gear had anything to do with this collision, but it seems to me an irresistible inference that it was caused by the pilot's orders not being obeyed. There is a great deal of evidence that they were, but I unhesitatingly say I do not believe that evidence. The defendants have not satisfied the burden of proof which rested upon them to establish a defence to the *primâ facie* case that was made out against them, and I therefore think that the appeal should be allowed.

Solicitors for the plaintiffs, *Sandilands, Humphry*, and *Armstrong*.

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

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Nov. 27 *and Dec.* 21, 1886.

(Before DENMAN, J.)

DUFOURCET AND CO. *v.* BISHOP AND OTHERS. (*a*)

Carriage of goods — Charter-party — Advanced freight—Right of cargo owner to recover—Right of insurer to sue in cargo owner's name.

The plaintiffs bought goods on terms including cost, freight, and insurance. The vendors shipped the goods on the defendants' ship under a charter-party, stipulating for the payment of freight in advance. Freight was paid in advance and insured. The goods were lost by the defendants' negligence. The plaintiffs paid the vendors for the goods a sum which included the advanced freight, receiving in exchange the bills of lading and the policy on the advanced freight.

Held, in an action for damages for non-delivery of the goods, that, as the damages were to be considered with reference to the value of the goods at the port of arrival, the plaintiffs were entitled to recover as part of their damages the advanced freight paid by them as part of the price of the goods, and that the insurer of the advanced freight was entitled to sue for it in the plaintiffs' name as part of the damages which the plaintiffs, but for the insurance, would have sustained by the defendants' negligence.

THIS was an action brought by the plaintiffs, Dufourcet and Co., the owners of a cargo of 1500 tons of superphosphate, shipped on board the steamship *Aurora*, against the defendants, the owners of that steamship, to recover damages for the non-delivery of the cargo which was lost, as was admitted, by the negligence of the defendants.

Cohen, Q.C. and *J. P. Aspinall* for the plaintiffs.

Barnes for the defendants.

The facts of the case, and the arguments of counsel, sufficiently appear in the judgment, the following being the cases cited:

De Silvale v. *Kendall*, 4 M. & S. 37;

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

Hicks v. *Shield and another*, 7 E. & B. 633; 26 L. J. 205, Q. B.;
Frayes and another v. *Worms*, 19 C. B. N. S. 159; 34 L. J. 274, C. P.;
Russell v. *Niemann*, 10 L. T. Rep. N. S. 786; 2 Mar. Law Cas. O.S. 72; 34 L. J. 10, C. P.;
Ireland v. *Livingston*, 15 L. T. Rep. N. S. 206; L. Rep. 5 H. L. 395;
Byrne v. *Schiller*, 25 L. T. Rep. N. S. 211; 1 Asp. Mar. Law Cas. 111; L. Rep. 6 Ex. 319;
Simpson v. *Thomson*, 38 L. T. Rep. N. S. 1; 3 Asp. Mar. Law Cas. 567; 3 App. Cas. 279;
Great Indian Peninsula Railway Company v. *Turnbull*, 53 L. T. Rep. N. S. 325; 5 Asp. Mar. Law Cas. 465;
Rodoconachi v. *Milburn*, 56 L. T. Rep. N. S. 594; *ante*, p. 100; 18 Q. B. Div. 67.

Cur. adv. vult.

Dec. 21.—DENMAN, J.—The question in this case, which was tried before me without a jury, arose upon the following state of facts: In Oct. 1885 the plaintiffs, Dufourcet and Co., were under contract to sell to certain merchants in America named Malcolmson, 1500 tons of superphosphate. In order to enable them to perform this contract they, on the 23rd Oct. 1885 and other days, entered into three contracts with Gibbs and Co., merchants in London, each contract being for 500 tons of superphosphate at so much per ton, to be shipped in fine, dry, merchantable condition, cost, freight, and insurance by steamer to Savannah. Payment three-fourths cash in London against documents, and balance in ten days from shipment. Buyers to have option of insuring in America, seller allowing current rate of premium ruling here. Discount and commission 3½ per cent.

As explained by Lord Blackburn, in the well-known case of *Ireland* v. *Livingstone* (15 L. T. Rep. N. S. 206; L. Rep. 5 H. L. 395, at p. 406) the contract price under these contracts was one for the whole of the valuable things to be done or given by the consignor to the consignee, viz., the actual cost of the goods with the premium of insurance and the freight. On the 5th Nov. Gibbs and Co. entered into a charter-party with the defendants for the steamer *Aurora*. It was admitted that the plaintiffs did elect to insure in America. If they had not done so Gibbs and Co would have insured as part of their duty under the contract, and have handed over the policy to the plaintiffs. The charter-party provided, that if "required by the captain the whole freight to be advanced on signing bills of lading, subject to a deduction of 3½ per cent. for interest and insurance," and that the ship was to "have an absolute lien upon the cargo for all freight, dead freight, and demurrage, charterer's responsibility ceasing on shipment of cargo." Gibbs and Co. paid the master 600*l.* on account of the freight on signing bills of lading as required by the master, and they effected, on the 24th Nov., an insurance for 600*l.* on the freight so advanced in the name of their own brokers, Brown and Co., on behalf of the plaintiffs, with the City of London Insurance Company, and handed that policy over to the plaintiffs. The 1500 tons were shipped in London, and the ship went to Hartlepool in accordance with the charter-party and bills of lading. She left Hartlepool on her voyage to Savannah on the 25th Nov. at 5 p.m. and was lost on the same evening within three hours by, as was admitted, the negligence of the defendants' servants. On the 1st Dec. the plaintiffs paid Gibbs and Co. for the 1500 tons, including the 600*l.* paid for advanced freight, and the amount due in respect of the policy (for which they had become liable at the current rate of premium according to the contract), the sum of 3672*l.* 15*s.* 6*d.*; received in exchange for the policy for 600*l.*, and three bills of lading each for 500 tons of superphosphate. Upon the loss of the vessel being known the plaintiffs claimed from the defendants the above sum of 3672*l.* 15*s.* 6*d.*, and brought this action on the 12th Dec. 1885. In the statement of claim, as originally delivered on the 7th Jan., the plaintiffs sued upon the bills of lading, alleging default in the delivery of the goods and negligence, which occasioned the loss of the ship and the goods on board, subsequently the statement of claim was amended by adding a statement that prior to the shipment Gibbs and Co., from whom the plaintiff had purchased the goods for 3672*l.* 15*s.* 6*d.*, to cover cost, freight, and insurance, and who had been paid that amount by the plaintiffs, had paid to the master 600*l.* as an advance of freight. To this part of the statement of claim (as amended) the defendants pleaded in the 7th and 8th paragraphs of their amended defence, first, that Gibbs and Co. and the plaintiffs, by the charter-party and the bills of lading, undertook to insure the advanced freight, and to look to the underwriters thereon for any loss of the same capable of being covered by an ordinary marine policy, and not to the defendants; and, secondly, that if the defendants were liable to be sued by the plaintiffs, the plaintiffs ought not further to maintain the action, *i.e.* in respect of the 600*l.*, for that on the 18th March 1886, the defendants satisfied and discharged all claims of the plaintiffs against the defendants, and all damages and costs in respect thereof by payment of 2700*l.*, which was accepted and received by the plaintiffs in satisfaction and discharge of the said claim, damages, and costs.

The only question raised before me was whether the plaintiffs could maintain this action for the benefit of the underwriters of the policy for 600*l.* advanced freight. The facts relating to this part of the case were as follows: After the present action was brought it was found that the defendants were insured in two mutual insurance companies which had insured them, not only for the loss of the ship, but against such liabilities as they might incur by the loss of the ship. Negotiations were entered into between one Wetherby on behalf of the plaintiff, and Riley, acting for the mutual companies and for the defendants, with the object of enabling the plaintiffs to obtain compensation from those companies instead of looking to the defendants for compensation. Ultimately, a compromise was arrived at, and the plaintiffs received 2700*l.*, which the defendants, in their 8th paragraph of the defence, set up as a settlement of the plaintiffs whole claim, including the 600*l.* which was part of the 3672*l.* 15*s.* 6*d.* paid by them to Gibbs, but which the plaintiffs alleged was expressly excluded from the settlement. The letter, which the defendant contended had the effect of a settlement of the whole of their claim of 3672*l.* 15*s.* 6*d.*, was dated the 17th March 1886, addressed to the owners of the ship, signed by Dufourcet and Co., and was as follows: "*Dufourcet and Co.* v. *Bishop and others*; *Re Aurora* s.s. In consideration of your paying us the sum of 2700*l.* in full settlement of our claim for

the loss of the cargo of the superphosphate in the above action, we hereby agree to abandon that part of the said action which relates to the cargo, and to pay all our own costs therein, to discharge all our witnesses, and not to render any assistance to the company in which the advance freight of 600*l.* is insured unless compelled to do so. We also agree to hand you the original invoices and bills of lading duly indorsed for the whole of the said cargo, the invoices of costs thereof, and the charter-party, &c., also to assign to you, at your expense, all our rights to the recovery of the loss of the said cargo against the American underwriters on the same, and to hand you all requisite documents we may have in our possession and control in support of the claim against the said underwriters, and to render you every assistance in our power at your expense, with a view to a recovery of the same, which, when recovered, shall be entirely for your benefit, you holding us harmless and indemnified against any claim that may be made on us by the said underwriters consequent upon any proceedings by you against them. We further agree not to apply to the said underwriters for the return of the premium of insurance on the said cargo within six months from this date, unless in the meantime you inform us that you will not proceed against the said underwriters for the loss of the cargo." This letter is somewhat ambiguous in its terms, but I can only understand it as abandoning that part of the plaintiffs' claim which consists of the claim in respect of the cargo as distinct from, and exclusive of the amount of, the advanced freight of 600*l.* which is specifically mentioned in the letter. The whole action, and not part only at that time (the 17th March) related to the cargo, so that the provision to abandon that part would be senseless unless something was meant to be excluded, and there is nothing else which can be suggested except the advanced freight in respect of which the plaintiff could have recovered anything by reason of the loss of the cargo. I think, therefore, that the agreement of the 17th March does not prove the 8th paragraph of the defence, setting up the payment of 2700*l.* as a settlement of all claims of the plaintiffs against the defendants, and all damages in respect thereof.

The defendants, the shipowners, further contended that no action would lie against them at the suit of the plaintiffs in respect of the 600*l.* advanced freight, because, by the charter-party and bill of lading, the plaintiffs and Gibbs and Co. were bound by the stipulation as to advanced freight, and the freight of 600*l.* had been advanced accordingly, and the plaintiffs and Gibbs and Co. undertook to insure and look to the underwriters for any loss which could be covered by insurance, and that, inasmuch as the plaintiff could not recover back the 600*l.* from the defendants on their own account (according to *De Silvale* v. *Kendall*, 4 M. & S. 37, and other cases), neither could they sue for the benefit of the insurers in order to indemnify them against a risk for which they were liable under the policy, but for which the defendants, the shipowners, were not liable at all. I am of opinion that this defence merely amounts to an ingenious attempt to defeat the City of London Insurance Company of its right to be subrogated to the rights of the plaintiffs as against the defendants in respect of so much of the damages recoverable by the plaintiffs as they had covered by the policy of 600*l.*, on which the company had been compelled to pay the plaintiffs that amount. I think it clear from the decision of the Court of Appeal in the very recent case of *Rodoconachi* v. *Milburn* (56 L. T. Rep. N. S. 594; *ante*, p. 100; 18 Q. B. Div. 67) that, upon the loss of the vessel by the negligence of the defendants, the plaintiffs were entitled to damages, including the 600*l.* for which they were liable to Gibbs and Co., as part of the value of the cargo at the end of the voyage. I think it equally clear that they had no right, as against the insurers of that advance freight, to barter away their right to recover it as part of the damage sustained by them by the loss of the cargo; and I also think that they have not even purported to do this by the compromise of the 17th March, which does not use language which need necessarily so be constructed, inasmuch as they only profess to abandon a portion of their action, and the document in which they do so draws a distinction between that part which relates to the cargo and the 600*l.* in question, and contemplates the possibility of their being called upon to do the very thing they are now doing, viz., to be plaintiffs for the benefit of the insurance company, as insurers of the 600*l.* advance freight. All they stipulate to do in that respect is not to render any assistance to the company in which the advanced freight is insured unless compelled to do so; but if the insurance company has a right to be subrogated to their rights as against the defendants, so far as the loss of this 600*l.* is concerned, they are compelled to give all the assistance which is required, viz., not to object to the use of their name to enable the insurance company, who have fully indemnified them for this part of their damage, to recover it from the defendants as part of the damage caused by the negligent loss of the cargo. It was admitted on the hearing that the insurance company had insisted on the action being continued for their benefit in respect of the 600*l.* in question. I do not think that the cases cited by Mr. Barnes are at all inconsistent with this view. Though they establish, as a general rule, that money paid by way of advanced freight cannot be recovered back on the failure of the voyage, they by no means establish that where the cargo owner has, as part of the price of the goods, paid, or become liable to pay a sum, for freight in advance, and the goods are lost by negligence of the shipowner, he may not, as part of his damages (which are to be considered with reference to the value of the goods at the port of arrival), be allowed as against the shipowner an amount equal to the freight so advanced; and if he happens to be partially indemnified against that loss by an insurance of that very amount of advanced freight, I can see no reason why the insurer of that amount should not be entitled to sue in his name for it as part of the damage which the cargo owner but for the insurance would have sustained by the defendants' negligence. I think, for the above reasons, that the plaintiffs are entitled to judgment for 600*l.*, and I give judgment accordingly for that amount with costs. *Judgment for plaintiffs.*

Solicitors: for the plaintiffs, *O. H. Clarkson*; for the defendants, *Turnbull, Tilly*, and *Mousir*, for *Turnbull* and *Tilly*, West Hartlepool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 11 *and Dec.* 7, 1886.

(Before the Right Hon. Sir JAMES HANNEN.)

THE BERNINA. (*a*)

Carriage of goods—Charter-party and bill of lading—Collision—Transhipment of cargo—Excepted perils—Limitation of liability—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 506—*Merchant Shipping Act Amendment Act* 1862 (25 *&* 26 *Vict. c.* 63), *s.* 54.

Where a vessel laden with cargo discontinues her voyage, and the cargo is transhipped by the shipowner into other bottoms for the purpose of earning the freight due under the original contract of carriage—but without the assent of the cargo-owners, although they were within reach of communication—the shipowner cannot, in an action by the cargo-owner for non-delivery, protect himself from liability by exceptions in the bills of lading given by the masters of the ships into which the goods have been transhipped, if such exceptions were not contained in the original charter-party and bill of lading.

When, in consequence of a collision, cargo is transhipped and lost by the negligence of the master and crew of the then carrying ship, the decree in a limitation action limiting the liability of the owner of the original ship in respect of the loss or damage caused by the improper navigation of his ship on the occasion of the collision, does not protect him from liability for the subsequent loss of the cargo, and the cargo-owners, notwithstanding such decree, are entitled to sue him for the loss.

The defendants' vessel while carrying cargo of the plaintiff's under a charter-party and bill of lading, not excepting the negligence of her master and crew, came into collision with another ship through the joint negligence of both. She was, in consequence, obliged to put into a port of refuge and there discharge her cargo for repairs. The master, without the assent of the cargo-owners, justifiably transhipped the cargo into three other ships under bills of lading excepting the negligence of the master and crew, and by which the master was represented as shipper, and the cargo made deliverable to the order of his owners. Two of the ships into which the cargo had been transhipped were lost by the negligence of their respective masters and crews. The defendants limited their liability in respect of the loss or damage caused by the improper navigation of their ship on the occasion of the collision. The cargo-owners having sued the shipowners for the loss of their cargo:

Held, that the transhipment was for the purpose of enabling the defendants to earn the freight; that they could not protect themselves from liability by exceptions in the subsequent bill of lading which were not contained in the original contract of carriage between themselves and the plaintiffs; and that the decree in the limitation action did not prevent the plaintiffs suing them for the loss of the cargo.

THIS was an action *in personam* by Edward John Howard, against James Mills and others, the owners of the steamship *Bernina*, to recover damages for non-delivery of his cargo laden on board the *Bernina* in breach of a charter-party, dated the 18th Aug. 1884.

The cargo, consisting of 1700 tons of ore, was shipped at Porman for carriage to Cardiff, East Bute Dock, but 1147 tons were not delivered to the plaintiff, although such non-delivery was, according to the plaintiff, not caused by any of the excepted perils in the charter-party or bill of lading given in receipt for the cargo at Porman.

The defendants by their defence, after denying that the plaintiffs had suffered damage or that there had been any breach of the charter-party, alleged as follows:

2. The plaintiff is a merchant, carrying on business at Cardiff. The defendants are shipowners, and owners of the steamship *Bernina*, which was, at the times hereinafter mentioned, and is a duly registered British ship.

3. By a charter-party, dated Aug. 18, 1884, being the charter-party in the statement of claim mentioned, the plaintiff chartered the defendant's steamship *Bernina* to proceed to Porman, and there load a cargo of ore for delivery at Cardiff or Newport, as ordered, certain perils excepted.

4. The said steamship proceeded to Porman, and there loaded a cargo of about 1700 tons of ore in accordance with the said charter-party. Such cargo was shipped and owned by the plaintiff, and the master duly signed and delivered to the plaintiff a bill of lading for the same, being the bill of lading referred to in the statement of claim, by which the said cargo was to be carried to Cardiff and there delivered (certain perils excepted) for freight and other conditions as per the said charter-party.

5. The *Bernina* duly proceeded on her voyage towards Cardiff from Porman with the said cargo and about 250 tons of Esparto grass belonging to other persons on board, and while prosecuting her said voyage, namely, on the 28th Sept. 1884, the *Bernina* came into collision with the steamship *Bushire*, in consequence of which the said steamship *Bushire* sank with her cargo, and fifteen persons on board her were drowned, and the *Bernina* sustained such damage that she was compelled to put into Lisbon and discharge her cargo.

6. The said collision was occasioned by the fault or default of the master and crew of the *Bernina*, and the fault or default of the master and crew of the *Bushire*.

7. The *Bernina* could not be repaired at Lisbon so as to carry on the said cargo, and she was obliged to proceed after temporary repairs in ballast to be repaired in England, and her repairs would have taken so long before she could have returned to Lisbon that it would have been unreasonable, and cost more than the cargo was worth to keep it for her, and the proper thing to be done with the cargo of ore was to forward it to its destination by other vessels.

8. Accordingly the said cargo of ore was shipped under bills of lading hereinafter mentioned from Lisbon for Cardiff, its destination by Messrs. Pinto Basto and Co. (in whose custody it was at Lisbon, and to whom it had been delivered, and who had received it as agents for and on behalf of the plaintiff) by and with the consent and authority of the plaintiff and on his behalf in three other steamships bound for Cardiff, namely, the *Avebury*, the *Curlew*, and the *Brixham*, all of which were proper and efficient for the purpose. The Esparto grass was also shipped in a similar manner by the said firm with the authority and consent and on behalf of its owners by the *Avebury*.

9. Only one of the said three steamships, the *Curlew*, arrived safely at Cardiff with her cargo. The other two, the *Brixham* and the *Avebury*, were totally lost on their voyage, with such portions of the said cargo as they were respectively carrying. The portions shipped and lost as aforesaid in the *Brixham* and *Avebury* make up and are the 1147 tons of the said cargo referred to in the said statement of claim. Bills of lading for the said portions of cargo put on board the *Brixham* and *Avebury* respectively were signed by their respective masters or agents, and were in the customary form in use at Lisbon, and the defendants crave leave to refer thereto.

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

10. The loss of the *Brixham* and *Avebury* and their cargoes was occasioned by perils excepted both in the said charter-party and bill of lading of the *Bernina*, and in the said bills of lading of the *Brixham* and *Avebury*.

11. On the 30th Sept. 1884, an action was commenced, in the Admiralty Division of the said court, by the defendants as owners of the steamship *Bernina*, against the owners of the *Bushire* for the damages they had sustained by the said collision, and on the 10th Oct. 1884 an action was commenced in the said division of this court by the owners of the *Bushire* against the owners of the *Bernina* and her freight to recover damages for the said collision, and these two actions were afterwards consolidated.

12. At the hearing of the consolidated actions on the 20th Nov. 1884, the court found both vessels to blame, and decreed accordingly.

13. On the 11th Dec. 1884, the defendants commenced an action in the Admiralty Division of this court against the Persian Gulf Steamship Company, the owners of the steamship *Bushire*, and others, to limit their liability to 8*l*. per ton in respect of the said collision.

14. On the 17th March 1885 a decree in the said limitation suit was made, limiting the liability of the present defendants (the plaintiffs in that suit) according to the provisions of the Merchant Shipping Act 1854 and the Merchant Shipping Act Amendment Act 1862, and decreeing that in respect of loss or damage to ships, boats, goods, merchandise, or other things caused by reason of the improper navigation of the said steamship *Bernina* on the occasion of the said collision, the present defendants, the owners of the *Bernina*, were answerable in damages to an amount not exceeding 11,437*l*. 15*s*. 2*d*., such sum being at the rate of 8*l*. for each ton of the registered tonnage of the said steamship *Bernina* without deduction on account of engine room, and that, the said sum having been paid into court, together with the sum of 170*l* 9*s*. 5*d*. for interest thereon, at the rate of 4 per cent. per annum, from the date of the said collision until such payment into court, the judge ordered that all proceedings in the consolidated actions be stayed, that advertisements as in the said decree mentioned should be inserted in the papers therein mentioned, intimating to all persons having any claim in respect of loss or damage to ships, goods, merchandise, or other things caused as aforesaid, that if they did not come in and enter their claim on or before the 17th June then next, they should be excluded from sharing in the aforesaid amount, and he referred all claims brought in, or thereinafter to be brought in, in the said limitation action to the registrar assisted by merchants to assess the amount thereof.

15. The said sum of 11,437*l*. 15*s*. 2*d*., which was at the rate of 8*l*. per ton of the registered tonnage of the *Bernina*, without deduction on account of engine room, together with interest as aforesaid, had been paid into court in the said limitation action prior to the said decree, namely, on or about the 17th Feb. 1885. Advertisements in accordance with the said decree were duly issued as directed by it. On the 12th June 1885, the plaintiff in the present action came in and appeared in the said limitation action. On the 24th June 1885 the present plaintiff gave notice in the said limitation action that he withdrew his said appearance therein. On the 17th July 1885 the writ in this action was issued by the plaintiff against the defendants. The amount brought into court in the said limitation action as aforesaid was duly distributed on or before the 16th Feb. 1886, rateably amongst the several claimants entering and preferring their claims in the said limitation action.

16. The said collision and the losses by the two steamships aforesaid, the *Brixham* and the *Avebury*, occurred without the actual fault or privity of the defendants or any of them.

17. The defendants say that, under the circumstances aforesaid, they were and are not liable to the plaintiff in respect of the said losses or either of them, and that if any liability attached to them in respect of the said losses, such liability is limited as in the said decree mentioned, and the plaintiff is precluded from maintaining this action and prosecuting his claim therein by reason of the proceedings in the limitation suit as aforesaid.

The plaintiffs by their reply joined issue, and alleged that, even if the facts stated in paragraphs 2 to 17 of the defence were true, they formed no answer to the plaintiff's claim.

The allegations in the defence were correct, subject to the following facts:

The charter-party and bill of lading relating to the carriage of the goods in the *Bernina* contained the following excepted perils, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation."

The bills of lading relating to the carriage of the goods in the *Avebury*, *Curlew*, and *Brixham* contained, in addition to the above excepted perils, "neglect or default by the master or mariners in the navigation of the ship." By these bills of lading the master of the *Bernina* was represented as the shipper, and the agents of the owners of the *Bernina* were represented as the consignees.

The plaintiff was not informed by the defendants of the additional excepted perils contained in these latter bills of lading, and no evidence was given to show that they were in the customary form in use at Lisbon. The plaintiff knew of the transhipment, but neither assented to or dissented from it. The *Avebury* and the *Brixham* and their cargoes were lost, owing to the negligence of their masters and crews, and it was in respect of such loss of cargo that this action was brought.

The above facts were contained in written admissions made by the plaintiff and correspondence.

Nov. 11. — Sir *Walter Phillimore* and *J. P. Aspinall* for the plaintiffs.—As the loss of the cargo was due to the negligence of the defendant's agents, and was not caused by any of the excepted perils contained in the charter-party and bill of lading relating to the *Bernina*, the defendants are liable. The rights of the plaintiffs are solely governed by that charter-party and bill of lading, and the subsequent contract of carriage made between the defendants and the owners of the *Avebury* and *Brixham* does not affect the plaintiffs. The cargo was landed at Lisbon for the purpose of repairing the *Bernina*, and was therefore in safety. Hence there was no necessity constituting the master of the *Bernina* the agent of the plaintiffs. The master was at liberty to procure another ship to complete the voyage, but only for the purpose of earning the freight, and only as agent for his owners:

Matthews v. *Gibbs*, 30 L. J. 55, Q. B.;
Notara v. *Henderson*, 26 L. T. Rep. N. S. 442; L. Rep. 7 Q. B. 225; 1 Asp. Mar. Law Cas. 278.

Where a ship, injured by perils of the sea, lands cargo and abandons the voyage, it may be that the master, *ex necessitate*, becomes the agent of the cargo-owners, with power to contract and bind them, but not so where the discontinuance of the voyage is due to a breach of contract or a tort, for, if so, the shipowner would be taking advantage of his own wrong to escape liability to an innocent plaintiff:

De Cuadra v. *Swan*, 16 C. B. N. S. 772;
Shipton v. *Thornton*, 9 A. & E. 314;
Abbott's Merchant Shipping, 12th edit. p. 314.

In this case it cannot be said that the master contracted on behalf of the cargo-owners. He

never consulted them. There was no necessity to constitute such an agency. By the bills of lading relied upon by the defendants the goods were consigned to the shipowners, and not to the plaintiffs. The defendants are therefore liable, unless protected by the proceedings in the limitation suit. Those proceedings, however, dealt solely with the collision between the *Bushire* and the *Bernina*, and had no reference either directly or indirectly to the subsequent loss of the cargo. Sect. 54 of the Merchant Shipping Act 1862, by virtue of which the defendants were allowed to limit their liability, speaks of loss of goods "on board any such ship." That is the *Bernina* and not the *Avebury* and the *Brixham*. Moreover, the very terms of the decree itself limit the damage to damage "caused by reason of the improper navigation of the *Bernina* in the said collision," and cannot be extended to cover loss caused by reason of the improper navigation of the *Avebury* and *Brixham*. It is also to be noticed that sect. 506 of the Merchant Shipping Act 1854 speaks of the loss or damage "arising on distinct occasions." Here the loss of the plaintiff's cargo arose on distinct occasions from the occasion of the collision. Had the cargo never been transhipped and carried on in the *Bernina*, and lost or damaged whilst being carried on, how could the defendants have contended that the loss or damage did not arise on a distinct occasion from the occasion of the collision. It is therefore clear that the limitation decree can have no application to the present claim.

Cohen, Q.C. and *Gorell Barnes* for the defendants.—The state of the *Bernina* on reaching Lisbon was such that it was the duty of the master, for the benefit of all concerned, to tranship the cargo. The circumstances were such that, in effecting the latter contracts of carriage, the master was acting both on behalf of his owners and also on behalf of the cargo-owners:

Notara v. *Henderson* (*ubi sup.*);
De Cuadra v. *Swann* (*ubi sup.*);
Shipton v. *Thornton* (*ubi sup.*);
Tronson v. *Dent*, 8 Moo. P. C. C. 419.

If so, the plaintiffs are bound by such contracts, to the making of which they never objected, and they therefore have no right of action against the defendants. It is also submitted that the defendants are protected by the decree in the limitation suit. The words of sect. 54 of the Merchant Shipping Act 1862 are very wide, and should receive a comprehensive construction. The limitation of liability granted the defendants was in respect of all loss or damage consequent on the improper navigation of the *Bernina*. The present loss of cargo was clearly a consequence of that improper navigation. Had the cargo been directly lost at the time by that improper navigation, the defendants would have been protected, and why should they not have the same protection because subsequently a loss occurs which, but for that improper navigation of the *Bernina*, never would have occurred.

Sir *Walter Phillimore* in reply.

Cur. adv. vult.

Dec. 7.—Sir JAMES HANNEN.—This is an action by charterers against shipowners for non-delivery of cargo, though not prevented by any peril excepted by the charter-party. The defendants, in addition to denying their liability in respect of their non-delivery complained of, allege that if any liability attach to them, such liability has been limited to 8*l.* per ton by a decree in a limitation suit of which the plaintiff might have had the benefit, and that therefore the plaintiff is precluded from maintaining this action. The material facts are as follows: The plaintiff chartered the defendant's ship *Bernina* to proceed to Porman and there load a cargo of iron ore for delivery at Cardiff or Newport as ordered, certain perils excepted, which did not include loss from fault or default of the master and crew of the *Bernina*. Under this charter the *Bernina* was loaded with 1700 tons of ore, and proceeded on her voyage to Cardiff. On the 28th Sept. 1884 she came into collision with the *Bushire*; the result of this collision was that the *Bushire* with her cargo sank, and fifteen persons on board of her were drowned, and the *Bernina* was so much damaged that she was compelled to put into Lisbon and discharge her cargo. This collision was occasioned by the fault or default of the master and crew of the *Bernina*, and the fault or default of the *Bushire*. The *Bernina* could not have been repaired at Lisbon so as to carry on the said cargo without so large an expenditure of money as to render it impracticable that such a course should be pursued. In these circumstances the owners of the *Bernina* determined to tranship the cargo into other bottoms and to bring it to England, and to have only such temporary repairs done to the *Bernina* in Lisbon as would enable her to come to England in ballast. The plaintiff's cargo was accordingly transhipped into three other steamers bound for Cardiff, viz., the *Avebury*, the *Brixham*, and the *Curlew*. The plaintiff was informed of this transhipment, as to which he expressed neither assent or dissent. The cargo thus transhipped to the three steamers was shipped under bills of lading, which represented the captain of the *Bernina* as the shipper, and the agents of the owners of the *Bernina* as consignees, and contained a clause exempting the owners from liability for fault or default of master and crew. The plaintiff was not informed of this exemption. No evidence was offered that these bills of lading were in the customary form in use at Lisbon. Of these three steamers, two, namely, the *Avebury* and the *Brixham*, were lost by the fault or default of the master and crew. On the 11th Dec. 1884 the defendants commenced an action in the Admiralty Division against the owners of the *Bushire* to limit their liability to 8*l.* per ton in respect of the collision between the *Bernina* and the *Bushire*. On the 17th March 1885 a decree in the limitation suit was made that "in respect of loss or damage to ship, boats, goods, merchandise, or other things caused by reason of the improper navigation of the said steamship *Bernina* on the occasion of the said collision," the defendants were answerable in damages to an amount not exceeding 1,437*l.* 15*s.* 2*d.*, such sum being at the rate of 8*l.* per ton. On the 12th June 1885 the plaintiff in the present action came in and appeared in the limitation action. On the 24th June 1885 the present plaintiff gave notice in the limitation action that he withdrew his appearance therein, and on the 17th July he issued his writ in the present action.

I find that the transhipment of the cargo from the *Bernina* to the three other steamers was

justifiable and prudent, and that the cargo was shipped in the three steamers on account of the defendants, and to enable them to earn their freight, and that it was not so shipped on account of the plaintiff. The plaintiff is entitled to recover damages for breach of the contract entered into by the defendants to carry the plaintiff's cargo to its destination, unless the defendants can show that they have been prevented from doing so by any of the excepted perils; and, secondly, unless the proceedings in the limitation suit have deprived the plaintiff of the right to recover for such damage. The collision between the *Bernina* and the *Bushire* did not prevent the defendants from performing their contract. The defendants were entitled to tranship the cargo into other vessels as they, in fact, did for the purpose of earning their freight. But if the collision had prevented the defendants from performing their contract, it would not have excused them, as it did not arise from one of the excepted perils, and it was from the default of their servants that the defendants were obliged in their own interest to endeavour to complete the carriage of the cargo in vessels other than the *Bernina*. In selecting these vessels the defendants exercised their own judgment, and made the masters and crews of the substituted steamers their agents for the purpose of completing their contract with the plaintiff. The defendants were not entitled, as between themselves and the plaintiff, to substitute any other conditions upon which the cargo was to be carried than those which had been agreed upon in the original charter-party and bills of lading of the *Bernina*, and thus the defendants could not free themselves from their liability under their original contract without showing that the non-delivery of the cargo arose from perils excepted in that contract. It is not necessary to consider what would have been the position of the parties if the *Avebury* and the *Brixham* had been lost by perils of the seas, because that is not the existing state of facts. The vessels with the plaintiff's cargo were lost through the fault or default of the defendant's agents, and, therefore, not by one of the perils for which the defendants had agreed that they should not be liable.

This appears to me to reduce the question in the case to the effect of the limitation action. The material provisions in the Merchant Shipping Act Amendment Act 1862 are as follows: Sect. 54. "The owners of any ship . . . . shall not, where all or any of the following events occur, without their actual fault or privity, that is to say . . . . (2) where any damage or loss is caused to any goods, merchandise, or other things . . . . on board any such ship . . . . be answerable in respect of . . . . loss or damage to ship, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage." And by the principal Act (1854) it is enacted (sect. 506) that the "owner of every seagoing ship . . . . shall be liable in respect of every such . . . . 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." By the decree in the limitation suit the judge pronounced that "the owners of the *Bernina* were entitled to limited liability according to the provisions of the Merchant Shipping Acts 1854 and 1862, and that in respect of loss or damage to ship, boats, goods, merchandise, or other things caused by reason of the improper navigation of the said steamship on the occasion of the collision between that vessel and the steamship *Bushire* on the 28th Sept. 1884, the owners of the said steamship *Bernina* are answerable in damages to an amount not exceeding 11,437*l.* 15*s.* 2*d.*, being at the rate of 8*l.* per ton," and the judge further ordered that advertisements should be published, intimating to all persons having any claim in respect of loss or damage to ship, goods, merchandise, or other things, caused as aforesaid, that if they did not come in before the 17th June they should be excluded from sharing in the aforesaid amount. It appears to me that this decree does not apply to the loss in respect of which the present plaintiff claims. His goods were not lost by reason of the improper navigation of the *Bernina* on the occasion of the collision. The goods were saved from the effects of that collision, and were lost by reason of the improper navigation of the substituted ships, the masters and crews of which were the agents of the defendants. The defendants are not entitled to be put in a better position than if the *Bernina* had been repaired at Lisbon, and after reshipping the cargo had been lost by subsequent improper navigation. Nor does the case come within the terms of the Act. The damage or loss to this cargo was not caused on board the *Bernina* in respect of which the liability of the owners was sought to be and was limited, but on board other ships to which the cargo was safely removed from the *Bernina*. There will be judgment for the plaintiff with costs.

Solicitors for the plaintiff, *Thos. Cooper* and *Co.* for *Ingledew, Ince,* and *Vachell,* Cardiff.

Solicitors for the defendants, *Pritchard* and *Sons* for *Bateson, Bright,* and *Warr,* Liverpool.

Monday, Dec. 20, 1886.

(Before the Right Hon. Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE WERRA. (*a*)

Salvage—Amount of award—Ingredients of a salvage service.

The court, in estimating the value of salvage services, takes into consideration the value of the property saved, the risks to which it has been exposed, the perils from which it has been saved, the possibility of other assistance being obtained, the value of the salving ship, the sacrifices and risks incurred by the salvors, and the length of time to which they are exposed to such risks.

In a salvage action the plaintiffs' ship, cargo, and freight being worth 90,000*l.*, *and the value of the defendants' ship, cargo, and freight* 240,000*l.*, *the Court awarded* 7000*l.*

THIS was a salvage action, instituted by the owners, master, and crew of the steamship *Venetian* against the owners of the steamship *Werra,* her cargo and freight, to recover salvage for services rendered in the Atlantic Ocean from the 31st July, to 7th Aug. 1886.

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

The *Venetian* was a steamship of 2733 tons net, and at the time of services was in the Atlantic Ocean, lat. 44° N. and long. 47° 57′ W. on a voyage from Liverpool to Boston. She had a general cargo on board, sixteen cattlemen and seven stowaways, and was manned by a crew of fifty-five hands all told. At about 4.30 p.m. on the 31st July 1886, those on board the *Venetian* observed a four-masted steamship (which proved to be the *Werra*) seven or eight miles off on the port bow and under all plain sail. The *Venetian* bore down upon the *Werra*, and when within three or four miles of her it was seen by her signals that she had broken her shaft and was in want of assistance.

She also had three black balls hoisted on her forestay, meaning that she was unmanageable.

On the *Venetian* approaching the *Werra* a boat came off from the *Werra* asking to be towed to New York. The master of the *Venetian* having agreed to tow her to Boston the *Venetian* was manœuvred close to the *Werra*, and after some difficulty the *Venetian* made fast ahead. At about 7 p.m. towing commenced on a W.-½-S. course. At about 10 p.m. a fog set in, causing danger to both vessels. At about 4 a.m. on the 1st Aug. the course was changed to N.W. by W.-½-W., and towing was continued through passing banks of mist and fog till about 11.15 a.m. on the 3rd Aug., when the starboard wire hawser parted, and as there was a heavy sea running, there was great danger and difficulty in getting another hawser made fast. At 12.30 p.m. towing was recommenced. Very heavy weather was experienced during the 3rd and 4th Aug., and on the morning of the 6th a dense fog came on. At about 8 p.m. on the 6th Cape Cod bore S. by W.-½-W. distant about twenty miles, and preparations were made to cross the bar on the morning tide. Owing, however, to a fog, it was found impossible to do so till the afternoon, and at about 9 p.m. the *Werra* was anchored in safety in the port of Boston.

The *Werra* was a four-masted steamer of 2856 tons net, belonging to the North German Lloyd Steamship Company, and was at the time of the services on a voyage from Bremen to New York.

She was manned by a crew of 175 hands all told, and she carried 544 passengers and English and German mails. She had broken down on the 30th July, and when picked up was in the track of ice. The distance towed was about 1000 miles.

The value of the *Venetian* was 70,000*l.*; of her cargo 20,166*l.*; and of her freight 1103*l.*

There was a dispute as to the value of the *Werra*. Upon the defendants' affidavits of values their agent in England swore that she had been valued for the purposes of general average in New York at 104,000*l.*; and he was of opinion that was her true value. The plaintiffs refused to accept this valuation and got an order for appraisement, but it was ultimately arranged that the question of value should be settled by the judge at the hearing, it having been sworn in another affidavit by the defendants' agent that she had been valued in the company's books at the beginning of the year at 140,000*l.*

Her value was in fact settled by the judge at 125,000*l.* The value of her cargo was 114,145*l.* 17*s.* 6*d.*; and of her freight 1364*l.* 18*s.* 7*d.*

Sir *Richard Webster* (A.-G.), Sir *Walter Phillimore*, and *J. P. Aspinall* for the plaintiffs.

Myburgh, Q.C. and Dr. *Raikes* for the defendants.

Sir JAMES HANNEN.—The magnitude of the values at stake, and the fact that an important foreign company is interested in the matter, make it desirable that I should state at somewhat greater length than I usually think it necessary to do the principles on which the court acts in awarding salvage remuneration. The first thing to be considered is the value of the property saved. By that I do not mean that it is to be taken as absolutely the most important element but that it is the subject-matter in respect o which the action arises. It is the fund which has to be dealt with and divided between its owners and the salvors who have acquired a claim upon it. In the present case I have somewhat to conjecture the value of the *Werra*. She has been valued in the United States at 104,000*l.*, but I think that that estimate is too low. On the other hand, her value has been estimated by her owners at the beginning of this year at 140,000*l.*, but I think that is too high an estimate. The tendency would be to put the company's property upon their books at the highest figure; but it is a matter of common knowledge that there has recently been a great depreciation in the value of shipping. I think I am making a very liberal allowance by way of discount from the value in the company's book by taking her price for this purpose at 125,000*l.* There is no dispute about the cargo or freight, and the passengers' fares were prepaid and not at risk. Therefore the total value of the property saved is about 240,500*l.* The next question is as to the actual perils from which the *Werra* has been saved. It appears to me and my assessors that she was not saved from actual imminent risk. She had lost her propelling power, which I have often had occasion to say reduces a steamship to such a condition of impotence that to rescue her from that situation is in itself a service that is the subject of salvage award. The *Werra* had some sailing powers, but I am advised that she could not have reached her destination by that means alone. On the other hand, it is possible, nay probable, that she might have been able to reach the coast of Europe if her master had determined to abandon the voyage on which the ship had started. But having regard to the fact that the *Werra* had between 400 or 500 passengers on board, the captain only did his duty towards his owners in determining to prosecute the voyage by any means he could get, and he in fact exercised a very wise discretion in accepting the assistance which offered. I think it is shown that there was no risk of starvation or even of hardships to the passengers and crew, because it is shown that there were forty days provisions on board, as well as a cargo which would have yielded food for a very long time. She was therefore not saved from imminent danger. But she was exposed to two kinds of risk until she fell in with the *Venetian*, risks arising from fog and ice. She no doubt ran a risk of coming in contact with other vessels during the fog and also with icebergs. I am advised that at that season of the year, although icebergs are occasionally met with, yet it would be rather the exception than the rule to fall in with them. Still it was a danger which cannot be disregarded. She therefore was saved from the costly and disadvantageous course of retracing her way to Europe, and from risks of fog and icebergs. It does not appear that she saw any other vessel till some time after the *Venetian*

fell in with her. That might of course be the consequence of the fog. It is alleged on the one hand that the *Werra* could easily have been picked up, and on the other, that she would have had to pay salvage services to another vessel. The latter observation is true, but the probability of another vessel being obtained tends to depreciate the salvage remuneration. If two masters were bargaining as to payment for salvage services and one were to say, "You are in a dangerous position and not likely to be picked up," the other might well answer, "Not at all, I am in the track of vessels, and if you refuse to assist me for a moderate price, I shall soon fall in with somebody else who will." That would have the effect of inducing reasonable terms, and it is a circumstance which the court must take into consideration.

Having dealt with the risks to the *Werra*, I now turn to the sacrifices and risks the *Venetian* incurred in rendering these services. Her value is to be taken into consideration, though it does not largely increase the amount of the reward, and that only in so far as it exposes the owner of the salving ship to risk of greater loss. It is also said that the *Venetian* was detained three days on her voyage, and that this detention should be paid for by way of demurrage. She was, however, able to reach Boston in time to fulfil her contracts, and to sail on the regular day; so that in this case I see little ground for taking detention into consideration. It is further said that some part of the life of her machinery was, so to say, sacrificed, but it is a small matter scarcely worth dwelling on. However, the *Venetian* was exposed to risks of navigation from fogs and icebergs for a longer time in consequence of these services, and under circumstances of great difficulty which would make it more likely for her to incur disaster. Then she towed the *Werra* for the very long distance of 1000 miles, and during the towage there was some heavy weather, amounting on one occasion to a moderate gale, but for the most part there were no exceptionally dangerous circumstances. Her rate of speed during the services goes far to show that she was able to maintain an average speed throughout, which her captain says he kept up because of the pressing necessity of getting the *Werra* into a place of safety; and undoubtedly, having regard to the fact that there were a large number of passengers on board the *Werra*, it was the duty of the master, and also in the interest of the owners, that these passengers should arrive at their destination as soon as possible. This is certainly a case in which the remuneration should be of a liberal kind, and I have not forgotten how desirable it is that shipowners should encourage their captains to render services to vessels in distress. I have very fully taken into consideration the circumstances of this case, and I shall award 7000*l.* I apportion 5250*l.* to the owners; 583*l.* to the master, and 1167*l.* to the crew.

Solicitors for the plaintiffs, *Gregory, Rowcliffe, and Co.*

Solicitors for the defendants, *Clarkson, Greenwell, and Wyles.*

Tuesday, Dec. 21, 1886.

(Before the Right Hon. Sir JAMES HANNEN.)

THE ANNIE. (*a*)

Life salvage—Vessel sunk in collision—Raising of wreck—Expenses of raising—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 459—*Thames Conservancy Act* 1857 (20 *&* 21 *Vict. c. cxlvii.*), *s.* 86.

Where a conservancy authority, in pursuance of their powers under an Act of Parliament, raise a sunken ship and sell her to defray the expenses of raising her, their lien upon the ship and its proceeds takes priority of any claim to life salvage, and if the proceeds are less than the expenses, there being no property saved against which life salvage can attach, life salvors cannot recover either against the sunken ship or against the owners, notwithstanding the fact that the owners have recovered from the wrongdoers causing the sinking of their ship the amount of the loss that they have sustained.

The A. was sunk in a collision in the Thames solely through the negligence of the R. Some of her crew were saved by the S. The A. was subsequently raised by the Thames Conservancy, and sold by them to defray the expenses. The proceeds being insufficient, the deficiency was recovered from the owners of the A., who in their turn recovered it, and the value of the A., from the owners of the R. The S. now claimed life salvage against the owners of the A., but did not arrest the A. or demand bail.

Held, that the A. had not been saved, and that there was no property to which the claim for life salvage could attach, notwithstanding the fact that the defendants had recovered the value of their vessel.

THIS was a salvage action, instituted in the City of London Court by the owners, master, and crew of the steam-tug *Stormcock*, against the owners of the schooner *Annie*. The plaintiffs claimed life salvage for saving the lives of the pilot and one of the crew of the *Annie*, and of a Custom House officer on board the *Annie* at the time the services were rendered.

At the hearing before the City of London Court the following facts were proved:—At about 10 p.m. on Jan. 16, 1886, the *Stormcock*, a screw-tug of 60-horse power, was proceeding down the river Thames when those on board of her observed a collision between the steamship *Recepta* and the schooner *Annie* off the entrance to the Victoria Docks. The plaintiffs, fearing that the *Annie* was in danger of sinking, at once stopped their engines and launched their lifeboat.

On coming up to the *Annie* it was found that she was rapidly sinking. Cries for help were heard, and ultimately the pilot of the *Annie* was picked up out of the water, and one of the crew and a Custom House officer were taken off the rigging. The men were then taken on board the *Stormcock*, and were landed next morning at Gravesend.

The services were rendered in fine weather.

In consequence of the collision the *Annie* sank, and in an action by her owners against the owners of the *Recepta* the *Recepta* was found solely to blame, and the owners of the *Annie* recovered the

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

damages sustained by them by reason of the collision. The *Annie* was subsequently raised by the Thames Conservators. The expense of raising the vessel amounted to 149*l*. She was then sold by the Conservators under the provisions of the Act 20 & 21 Vict. c. cxlvii., to defray the expenses of the raising, and realised 92*l*. The Conservators recovered the balance from the owners of the *Annie*. At the reference in the collision action against the *Recepta* the owners of the *Annie* recovered not only the value of their ship, but also the money paid by them to the Thames Conservators for raising the ship. The present action was entitled as an action *in rem*, but as a matter of fact the writ had never been served on the wreck, nor had she been arrested. It also appeared that no bail had been given, and that no money had been paid into court in lieu of bail.

In these circumstances, the learned judge of the City of London Court valued the plaintiffs' services at 30*l*., but refused to give judgment, and ordered the action to be transferred to the High Court.

The action was thereupon transferred to the High Court, and the plaintiffs now moved for judgment.

For the purposes of the motion, the following agreed statement of facts was used:

1. The *Annie* was run into and sunk by the steamship *Recepta* in about midstream of Bugsby's Reach of the river Thames.

2. The steam-tug *Stormcock*, and her master and crew, rescued some of the crew of the *Annie*, viz. the pilot, one A. B., and a Custom House officer.

3. The owners of the *Annie* commenced an action against the *Recepta* for the damages they incurred in consequence of the sinking of their vessel. The *Recepta* was held solely to blame for the collision, and the plaintiffs recovered the full value of their ship and cargo.

4. The *Annie* and her cargo of stone were abandoned and treated as a total loss by the owners thereof.

5. The wreck was subsequently, without communication with or with the consent of the owners of the *Annie*, raised by the Thames Conservancy at an expense of 149*l*. 4*s*. 9*d*.; and was sold by them for the sum of 92*l*. 5*s*. 2*d*, the balance being paid by the owners of the *Annie* at the request of the Thames Conservancy, and subsequently recovered by the said owners from the owners of the *Recepta* in the aforesaid action. The Thames Conservancy, in acting as herein stated, acted in pursuance of their statutory powers.

6. The owners, master, and crew of the *Stormcock* brought an action against the *Annie* to recover salvage remuneration in respect of the services they had rendered as aforesaid.

7. The said action for life salvage came on for hearing before the judge of the City of London Court (Admiralty jurisdiction) on the 11th Nov. 1886, and having, with a view of saving expense to the parties, taken evidence as to the nature of the said services, he referred the action to the High Court with a statement that in his opinion, if the plaintiffs were entitled to recover at all, the amount of salvage remuneration should be 30*l*.

Dr. *Raikes* for the plaintiffs.—The defendants are liable to pay salvage. The fact that the ship has not been arrested is immaterial. The *Annie*, or her equivalent, has been saved, and therefore the plaintiffs are entitled to be paid salvage:

The Hope, 3 C. Rob. 215;
The Trelawney, 3 C. Rob. 216, n.;

It cannot be said that the *Annie* has been "destroyed" within the meaning of sect. 459 of the Merchant Shipping Act 1854. Moreover the defendants are in the same position as if the *Annie* had never been sunk. They have recovered her value from the owners of the *Recepta*, and hold such sum of money subject to the plaintiffs' claim for life salvage. It was never intended that sect. 459 of the Merchant Shipping Act 1854 should bar such a claim as this. The mere loss of the *res*, provided it is replaced by an equivalent compensation for its loss, cannot take away the right to life salvage. The amount recovered by the defendants from the *Recepta* is held by them subject to the present claim:

The Empusa, 41 L. T. Rep. N. S. 383; 5 P. Div. 6; 4 Asp. Mar. Law Cas. 185.

Pyke, for the defendants, after citing *The Cargo ex Schiller* (36 L. T. Rep. N. S. 714; 2 P. Div. 145; 3 Asp. Mar. Law Cas. 439), was stopped by the Court.

Sir JAMES HANNEN.—I have no doubt in deciding this case against the plaintiffs. In my opinion, to found a claim for life salvage there must be something saved to which the claim can attach. In the present case the *Annie* was not saved, and yet a claim is made against her owners for life salvage. It is true that the present defendants did recover damages from the *Recepta* in respect of the total loss of their vessel, but to that sum of money a claim for life salvage cannot attach. Now sect 459 of the Merchant Shipping Act 1854 provides as follows: "Salvage in respect of the preservation of the life or lives of any person or persons belonging to any such ship as aforesaid, shall be payable by the owners of the ship or boat in priority to all other claims for salvage; and in cases where such ship or boat is destroyed, or where the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of the salvage due in respect of any life or lives, the Board of Trade may in its discretion award to the salvors of such life or lives out of the Mercantile Marine Fund such sum or sums as it deems fit in whole or in part satisfaction of any amount of salvage so left unpaid in respect of such life or lives." In this case, the *Annie* being at the bottom of the river, the Thames Conservancy, in fulfilment of a public duty, raised her as being an obstruction to the navigation of the river. They were also entitled under their Act to sell the raised property and to recover any expenses they had incurred over and above the proceeds of the sale of the wreck from her owners. The owners of the *Annie* had to pay a balance to the Thames Conservancy, and this they recovered from the owners of the *Recepta* as part of their damages occasioned by the collision. But that is a totally different transaction from the saving of property by salvors. I am clearly of opinion that the present plaintiffs have no rights as against the Thames Conservators, and I think that the rights of the Conservators have priority over the rights of all other persons. The section I have read refers only to salvage claims, and does not entitle life salvors to any priority over the charge created in favour of the Conservancy. I therefore think the plaintiffs' claim entirely fails, and it must be dismissed with costs.

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

Solicitors for the defendants, *Botterell* and *Roche.*

Jan. 18 *and* 19, 1887.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE AGNES OTTO. (*a*)

Collision—Compulsory pilotage—Regulations for the navigation of the Lower Danube, arts 85, 89, *and* 92.

The provisions of arts. 85, 89, *and* 92 *of the regulations for the navigation of the Lower Danube, making the employment of pilots by steamers compulsory but confining their duties to pointing out the local peculiarities of the river and leaving the responsibility of the navigation with the master, do not relieve shipowners from liability for damage solely caused by the negligent navigation of the pilot.*

THIS was a collision action, instituted by the owners of the steamship *Fitzjames* against the owners of the steamship *Agnes Otto*, to recover damages occasioned by a collision between the two vessels in the Danube, below Galatz, on May 12, 1886. The defendants counter-claimed.

The *Fitzjames* was proceeding up the river, and was approaching the 86th mile post, where there is a very sharp bend in the river, near which the collision occurred.

The *Agnes Otto* was coming down the river and was above the bend when those on board of her sighted the *Fitzjames* below the point.

The evidence showed that it was the practice for vessels coming down the river to slacken speed as they approached the point, but, as they got to the point, to put their engines full speed ahead to give them sufficient way to answer their helms in rounding the point.

The facts alleged on behalf of the plaintiffs were as follows:—Shortly before 9.15 p.m. on May 12, 1886, the steamship *Fitzjames*, of 865 tons net, in charge of a duly licensed pilot, was proceeding up the Danube between Reani and Galatz in ballast on a voyage from Constantinople to Galatz. The *Fitzjames* was well over to the bank of the river on her starboard side, and was making about five or six knots an hour over the ground. In these circumstances those on board of her observed over the land at a distance of about two miles the red and masthead lights of the *Agnes Otto* bearing about four or five points on the starboard bow of the *Fitzjames*. The engines of the *Fitzjames* were immediately eased to half speed and shortly afterwards to slow, and her whistle was duly sounded and she was kept well over to the bank of the river on her starboard side under a steady a-port helm stemming the current and waiting for the *Agnes Otto* to round the bend in the river before passing her. The *Agnes Otto* came on at great speed with her red light open rounding the bend of the river under a starboard helm, and after opening her green light and showing all three lights for a very short time on the port bow of the *Fitzjames*, she again shut in her green light and approached with her red and masthead lights only visible to those on board the *Fitzjames*, but suddenly she opened her green light and shut in her red, as if under a starboard helm, coming across towards that bank of the river which lay on the *Fitzjames* starboard side, and attempting to cross the bows of the *Fitzjames* so as to cause danger of collision. The whistle of the *Fitzjames* was repeatedly blown, and when the green and masthead lights of the *Agnes Otto* had got a little on the starboard bow as the only means of avoiding a collision, the helm of the *Fitzjames* was put hard-a-starboard and her engines full speed ahead, but the *Agnes Otto* again opened her red light, and coming on with her stem and starboard bow struck the *Fitzjames* on the starboard side, thereby doing her great damage.

The facts alleged on behalf of the defendants were as follows:—Shortly before 9.30 p.m. on May 12, 1886, the *Agnes Otto*, a steamship of 1319 tons gross, whilst on a voyage from Ibrail to Cork laden with grain, was proceeding down the Danube in charge of a duly licensed pilot, keeping that side of the channel which was on her own starboard hand. In these circumstances the masthead light of the *Fitzjames* was seen across the land distant between one and two miles, and bearing about four to five points on the port bow of the *Agnes Otto*. When the *Agnes Otto* had cleared the point the red light of the *Fitzjames* came into view, and the whistle of the *Agnes Otto* was blown, and her engines were eased down to easy ahead, and her helm was ported so as to pass the *Fitzjames* well clear port side to port side, but the *Fitzjames*, when at a short distance, suddenly opened her green light, causing danger of collision, and although the engines of the *Agnes Otto* were reversed full speed astern and her helm put hard-a-port, the *Fitzjames* came on and with her starboard side struck the stem of the *Agnes Otto*.

Both vessels pleaded (*inter alia*) compulsory pilotage.

The following regulations for the navigation of the Lower Danube were cited and are material to the decision:

Art. 85. In the case of steamers, pilotage is compulsory both in ascending and descending the river.

Art. 89. The captain who has taken a licensed river pilot on board is none the less responsible for the observance of the regulations of navigation and police in force upon the Lower Danube, and especially arts. 30 and 44 of the present regulations, and this even where pilotage is compulsory.

Art. 92. The responsibility of the pilot is confined to pointing out the navigable channels and the peculiarities of the navigation of the river; a captain, therefore, who abandons the direction of his vessel to his pilot does so on his own responsibility.

Sir *Walter Phillimore* (with him *Barnes*), for the plaintiffs, argued that on the merits the *Agnes Otto* was solely to blame, and that if the navigation of the *Fitzjames* was negligent, the negligence was solely that of the pilot, who was in charge by compulsion of law. He referred to

The Guy Mannering, 46 L. T. Rep. N.S. 905; 4 Asp. Mar. Law Cas. 553; 7 P. Div. 132;
The Augusta, 56 L. T. Rep. N. S. 58; 6 Asp. Mar. Law Cas. 58.

Hall Q.C. (with him *J. P. Aspinall*), for the defendants, *contra*.

BUTT, J.—In this case I have come to the conclusion that the green light of the *Agnes Otto* was not only open to those on board the *Fitzjames*, but was kept open until it got on the starboard bow of the *Fitzjames* so as to justify her in starboarding. This state of things ought never to have occurred had the *Agnes Otto* been carefully and properly navigated. I also accept the plaintiffs' evidence to the effect that, after the vessels

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

had been brought starboard to starboard as I have mentioned, the *Agnes Otto* counteracted the effect of this manœuvre by porting, and so the collision was brought about. I have now to consider the question whether the *Fitzjames* was not also to blame for not stopping her engines when the green light of the *Agnes Otto* was first opened on the second occasion she got on her port bow. It is very true that in these local regulations there is none corresponding to that in the Regulations for Preventing Collisions at Sea, which provides for slackening of speed when vessels are approaching so as to involve risk of collision; and even if there were any such rule the penalty imposed by sect. 17 of the Merchant Shipping Act 1873 would not apply to it. But the Elder Brethren advise me that they think ordinary prudence should in the circumstances have dictated the stopping of the engines, and that those in charge of the *Fitzjames* were to blame for not doing so. The result is, though I regret it, because I think the other ship was the main offender, that I must hold the navigation of the *Fitzjames* to have been negligent.

Then comes the question of pilotage. The owners of both vessels have claimed exemption from liability on the ground that they were in charge of pilots by compulsion of law. In one sense pilotage is no doubt compulsory in the Danube; but the question is, whether it is compulsory on the master to give up the charge of his ship to the pilot. Rule 85 says that "in the case of steamers pilotage is compulsory both in ascending and descending the river." If there had been no other rule I should have interpreted it as meaning that the pilotage was compulsory as we understand it in England, viz., that it was compulsory to give up the charge of the vessel to the pilot. But I find by rule 89 that a captain who has taken a pilot on board is none the less responsible for the observance of the regulations for the navigation of the Danube; and by rule 92 the responsibility of the pilot is confined to pointing out the navigable channels and the peculiarities of the navigation of the river, and the captain who abandons the direction of the vessel to the pilot does so on his own responsibility. Apart, therefore, from any decisions of the courts on cases analogous to this, I should have thought that the true construction of these rules was, that the master of a vessel navigating the Danube is compelled to take a pilot on his vessel, but is not compelled to give up the navigation of the ship to him. The pilot is on board to point out the peculiarities of the navigation, but the responsibility rests with the captain. If so, it cannot be said that the law forces on masters in the Danube the employment of pilots to navigate their vessels for them. That is the view I take apart from authority, and the decisions in *The Guy Mannering* (*ubi sup.*) and *The Augusta* (*ubi sup.*) confirm me in that view. I must therefore hold that neither of these vessels was in charge of a pilot by compulsion of law, and the result is, that I pronounce both of them to blame.

Solicitors for the plaintiff, *Thos. Cooper* and *Co.*

Solicitors for the defendants, *W. A. Crump* and *Son.*

Tuesday, Jan. 25, 1887.

(Before BUTT, J.)

THE VICTORIA. (*a*)

Damage to cargo—Collision—"Damage done by any ship"—Action in rem—The Admiralty Court Act 1861 (24 *Vict. c.* 10), *ss*, 6, 7.

The jurisdiction conferred by sect. 7 *of the Admiralty Court Act* 1861 *"over any claim for damage done by any ship" does not cover a claim by a cargo-owner against the ship carrying the cargo for damage received by the cargo in a collision.*

THIS was a motion by the defendants in a damage action *in rem* against the steamship *Victoria* to "set aside the writ of summons and warrant of arrest, and to dismiss the action with costs."

The facts upon which the defendants moved the court were contained in the following affidavit, which was filed on behalf of the defendants.

I, William Arnold, of Nos. 4 and 6, Throgmorton-avenue, in the City of London, a member of the firm of Wendt and Co. of the same place, underwriters' representative, makes oath and say as follows:

1. My said firm are the representatives in England of the owners of the steamship *Victoria* for the purposes of this action.

2. This action is brought in the names of "owners of cargo lately laden on board the steamship *Victoria*" to recover 6500*l.* for damages done to the said cargo by a collision between the steamship *Cerwin* and the steamship *Victoria* in the Mediterranean, on the 4th Nov. 1885.

3. The *Victoria* is a Swedish steamship of 1045 tons register, and is now at Newport, Monmouthshire. The plaintiffs have arrested her, and she still remains under arrest, and my said firm has received telegraphic instructions to obtain her immediate release.

4. At the time of the collision between the *Cerwin* and the *Victoria* the *Victoria*, laden with a cargo of sugar, was on a voyage under charter-party, by which she was bound from Sourabaya to Malta for orders. The collision between the above vessels occurred in the Mediterranean Sea on the 4th Nov. 1885, and I am informed and believe that the *Victoria* received damage thereby.

5. The *Victoria* proceeded to Malta, and there received orders from the charterers to proceed to Havre and there deliver her cargo. The *Victoria* having undergone necessary repairs, proceeded, as I am informed and verily believe, to the port of Havre, where she discharged her cargo, and delivered it to the owners of the bills of lading.

6. The general average statement relating to the damages, consequent upon the collision as between the owners of the *Victoria* and her cargo was, as I am informed and believe, made up at Havre and accepted by the owners of the cargo.

7. I am informed, and believe that no part of the cargo of the *Victoria* laden on board her at the time of the collision was brought into any port in England or Wales by the *Victoria*, but that such cargo was delivered at the port of Havre aforesaid.

The following sections of the Admiralty Court Act 1861 were referred to, and are material to the decision:

Sect. 6. The High Court of Admiralty shall have jurisdiction over any claim by the owner or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof, by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the 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.

Sect. 7. The High Court of Admiralty shall have

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

jurisdiction over any claim for damage done by any ship.

Finlay, Q.C. (with him Dr. *Stubbs*), for the defendants, in support of the motion.—The court has no jurisdiction *in rem* in the present case. [He was stopped by the Court.]

Barnes, for the plaintiff, *contra*.—The plaintiffs have not instituted their action under sect. 6 of the Admiralty Court Act 1861, but are suing in tort under sect. 7. By the terms of that section the court has "jurisdiction over any claim for damage done by any ship." The word "damage" has a technical meaning, and covers the damage done to the plaintiff's cargo in the present case. In the case of *The Malvina* (Br. & L. 57), it was laid down that the widest construction is to be put upon this section. [BUTT, J.—It is not your carrying ship which does the damage. It is the other ship. Your ship suffers damage.] It was owing to the negligent navigation of the carrying ship that the damage was done to the cargo. Just as she damaged the other ship's cargo, so she damaged her own cargo. It would be illogical to say that, under this section, the owners of cargo on the other ship have a right against the *Victoria*, and the owners of her cargo have not. It was the same negligence which did damage to both cargoes. To found a right of action under this section, it is not necessary that the vessel sued should have been in contact with the other ship:

The Energy, L. Rep. 3 A. & E. 48; 3 Mar. Law Cas. O. S. 503; 23 L. T. Rep. N. S. 601;
The Sisters, 1 P. Div. 117; 3 Asp. Mar. Law Cas. 122; 34 L. T. Rep. N. S. 338.

[BUTT, J.—If your argument is right, sect. 6 is practically useless, because a goods owner might always sue in tort, whether the goods were carried into an English port in the ship or not.] That section deals with contract, whereas sect. 7 deals with tort. [BUTT, J. referred to *The Dantzig*, 1 Mar. Law Cas. O. S. 392; 9 L. T. Rep. N. S. 236.]

BUTT, J.—I am of opinion that this is an attempt to extend the jurisdiction *in rem* of this court to an extent not warranted by the words or the intention of the Act of Parliament. It appears clear to me that the damage alleged to have been done to this cargo was not damage done by a ship within the meaning of the Act. I shall therefore make an order in the terms of the motion.

Barnes applied that the order might be stayed till the day following, to enable his clients to determine whether they would take the question to the Court of Appeal.

BUTT, J.—As I have no doubt at all about the matter, I cannot accede to your application.

Solicitors for the plaintiffs, *Waltons, Bubb*, and *Johnson*.

Solicitors for the defendants, *Stokes, Saunders* and *Stokes*.

Tuesday, Feb. 8, 1887.

(Before BUTT, J.)

THE J. H. HENKES. (*a*)

Collision—Practice—Plea of compulsory pilotage—Discontinuance of action—Costs.

Where in a collision action the plaintiffs, upon the defendants pleading compulsory pilotage, discontinue the action, they must in the absence of special circumstances pay all the costs.

THIS was a summons before the judge by way of appeal, by the plaintiffs in a collision action *in rem*, from an order of the registrar condemning them in the costs of the action.

The collision occurred on the 4th Dec. 1886 in the English Channel, between the schooner *Mary Capper* and the defendants' steamship the *J. H. Henkes*.

After the statement of claim had been delivered, the defendants delivered a defence, in which it was admitted that there was no negligence on the part of the plaintiffs' vessel, but it was alleged that the *J. H. Henkes* was at the time of the collision in charge of a pilot by compulsion of law, and that it was his default which solely occasioned the collision.

The plaintiffs thereupon at once took out a summons asking that the action might be discontinued on the terms of each party paying their own costs. The registrar made an order discontinuing the action but condemned the plaintiffs in all the costs of the action. From this order the plaintiffs now appealed.

The summons was heard in chambers before Butt, J.

J. P. Aspinall, for the plaintiffs, contended that, in the circumstances, the plaintiffs were justified in instituting the action, and that, had the plaintiffs prosecuted the action and the defendants succeeded on the plea of compulsory pilotage, it was the practice of the court to make each party pay their own costs.

J. G. Barnes, for the defendants, contended that the ordinary practice of the other divisions should be followed, and that the practice of the Admiralty Court in cases of compulsory pilotage could not be followed, because the action having been discontinued there were no materials to guide the judge's discretion.

Cur. adv. vult.

Feb. 8.—BUTT, J. gave the following judgment in court:—This was an action of damage, and on the defendants pleading (1) no negligence of the owner, master, or crew; (2) compulsory pilotage and the fault of the pilot alone, the plaintiffs applied in the registry to discontinue their action. But the registrar would only allow them to do so on their paying all the costs of the action. I have now to decide the question raised by the summons on behalf of the plaintiffs to review the registrar's decision as to costs. The Admiralty Court is now merged in a division of the High Court, and it is therefore desirable, so far as is possible, that the practice in this division should be the same as in the other divisions. Although there is no doubt that damage was done to the plaintiffs' ship, though it may have been reasonable to bring the action, and although

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

the defence of compulsory pilotage may have taken the plaintiffs by surprise, yet the ordinary rule is that, when a party loses, he must pay the costs. No doubt, when the defendants after an action has been tried have succeeded on the ground of compulsory pilotage, the court in the exercise of its discretion has been in the habit of making each side pay their own costs. But this judicial discretion can only be properly exercised after the facts of the case have been ascertained at the trial of the action. If, however, a plaintiff elects to discontinue his action before trial, there are no materials by which the judge's discretion can be guided. Therefore, as the plaintiffs have brought an action and have failed to carry it to a hearing, the ordinary rule must be applied, and they must pay the defendants' costs.

Solicitors for the plaintiffs, *Wynne, Holme,* and *Wynne,* for *H. Forshaw* and *Hawkins,* Liverpool.

Solicitors for the defendants, *Pritchard* and *Sons,* for *Genn* and *Nalder,* Falmouth.

HOUSE OF LORDS.

July 19, 20, 22, 1886, *and Feb.* 14, 1887.

(Before the LORD CHANCELLOR (Herschell), Lords BRAMWELL, FITZGERALD, and ASHBOURNE.)

BAKER *v.* OWNERS OF THE THEODORE H. RAND. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Regulations for Preventing Collisions at Sea, arts. 14 *and* 22—*Merchant Shipping Act* 1873 (36 *&* 37 *Vict. c.* 85), *s.* 17.

Where those in charge of a ship, although exercising reasonable care, do not in fact know, and have not the means of knowing, that they are infringing one of the Regulations for Preventing Collisions at Sea, the ship will not be held in fault under sect. 17 *of the Merchant Shipping Act* 1873 (36 *&* 37 *Vict. c.* 85).

The T., a sailing ship, close-hauled on the port tack, in dark and hazy weather, saw the red light of the S., another sailing ship, on the starboard bow. The S. was in fact running free, but those navigating the T. believed her to be close-hauled on the starboard tack, and ported their helm. A collision took place, and the S. was lost.

Held (affirming the judgment of the court below), that, in the absence of sufficient evidence to show that by the exercise of any reasonable care and diligence on the part of the T. it could have been ascertained that the S. was running free and was not close-hauled, the T. was not to be deemed in fault, though she had in fact infringed art. 22 *of the Regulations for Preventing Collisions at Sea by not keeping her course.*

Observations of Brett, M.R. in The Beryl (51 *L. T. Rep. N. S.* 554; 5 *Asp. Mar. Law Cas.* 321; 9 *P. Div.* 137) *approved.*

THIS was an appeal from a judgment of the Court of Appeal (Baggallay, L.J., Sir J. Hannen, and Lindley, L.J.), who had reversed a judgment of Butt, J. in an action *in rem* brought by the appellants, the owners of the brigantine *Statesman,* against the respondents, the owners of the ship *Theodore H. Rand,* for damages arising out of a collision by which the *Statesman* was lost. There was a counter-claim by the owners of the *Theodore H. Rand* for damages. The facts are set out fully in the judgment of Lord Herschell.

Sir *R. Webster,* Q.C., *C. Hall,* Q.C., and *Stubbs* appeared for the appellant, the plaintiff.

Finlay, Q.C. and *Baden Powell* (Sir *W. Phillimore* with them) for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Feb. 14.—Their Lordships gave judgment as follows:—

Lord HERSCHELL. (*a*)—My Lords: The appellants in this case, who are the plaintiffs in the action, were the owners of the *Statesman,* a brigantine of 150 tons register, which was sunk whilst on a voyage from South Shields to the Isle of Wight, owing to a collision with the respondents' vessel, a full-rigged ship of 1198 tons register, called the *Theodore H. Rand.* The collision took place between 4 and 5 a.m. on the morning of the 3rd Feb. 1884, about five miles to the S.W. by S. of Beachy Head. All the crew of the *Statesman,* except one man, who was below at the time of the collision, were drowned. It was therefore impossible to call any witness from that vessel to speak to her manœuvres prior to the disaster. The master, mate, and several of the crew of the *Theodore H. Rand* were called as witnesses. Their story was as follows: That the *Theodore H. Rand* was close-hauled on the port tack heading E., the wind being light from the N.N.E. That the weather was dark and hazy. That the red light of the *Statesman* was seen about half a point or a point on the starboard bow of the *Theodore H. Rand,* about half to three-quarters of a mile distant. That the red light was watched, and as it kept open the helm of the *Theodore H. Rand* was for a short time put hard-aport. That this brought the *Statesman's* red light about two points on the port bow of the other vessel. That the green light of the *Statesman* was then seen, and almost immediately afterwards the collision occurred, the stern of the *Statesman* coming into contact with the port bow of the *Theodore H. Rand.* Upon the trial before Butt, J. he pronounced the *Theodore H. Rand* alone to blame. This judgment was reversed by the Court of Appeal, who were of opinion that there was no sufficient evidence to establish blame on the part of either vessel. The most important question argued before your Lordships was, whether those navigating the *Theodore H. Rand* had infringed any of the Regulations for Preventing Collisions at Sea, and must therefore be held to blame. It was contended that they had infringed articles 14 and 22. (*b*) The *Statesman,* it was said, was running free whilst the *Theodore H. Rand* was close-hauled; it was therefore the

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

(*a*) In the interval between the argument of the case and the judgment Lord Herschell had ceased to hold the office of Lord Chancellor.

(*b*) Art. 14. When two sailing ships are approaching one another, so as to involve risk of collision, one of them shall keep out of the way of the other, as follows, viz.: (*a*) A ship which is running free shall keep out of the way of a ship which is close-hauled; (*b*) a ship which is close-hauled on the port tack shall keep out of the way of a ship which is close-hauled on the starboard tack. Art. 22. Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course.

duty of the *Statesman* to keep out of the way of the *Theodore H. Rand*, and the duty of the latter vessel to keep her course, and as she admittedly had not done so, but ported, she must be held to be in fault. There was no question that the *Theodore H. Rand* was close-hauled, but there was some controversy at the bar on the part of the respondents whether the *Statesman* was running free. The Court of Admiralty and the Court of Appeal both came to the conclusion that she was running free, and I see no reason to think that their conclusion was incorrect. This being so, there can be no doubt that the *Theodore H. Rand* did, in point of fact, fail to obey the rule. The appellants contend that this is enough to establish her liability, and that it matters not whether those who were navigating her knew or had the means of knowing that they were infringing the rule. I am of opinion that this view cannot be supported. In the case of *The Beryl* (51 L. T. Rep. N. S. 554; 5 Asp. Mar. Law Cas. 321; 9 P. Div. 137) Brett, M.R. uses the following language in relation to the Regulations for Preventing Collisions at Sea: "When you speak of rules which are to regulate the conduct of people, those rules can only apply to circumstances which must or ought to be known to the parties at the time; you cannot regulate the conduct of people as to unknown circumstances. When you instruct people, you instruct them as to what they ought to do under circumstances which are or ought to be before them. When you say that a man must stop and reverse, or, I will say, slacken his speed in order to prevent risk of collision, it would be absurd to suppose that it would depend upon the mere fact that there was risk of collision if the circumstances were such that he could not know there was risk of collision. I put some instances during the argument to show that that was so. . . . How can you regulate their conduct if neither can see the other until they are close together? It is absurd to suppose that you could regulate their conduct not with regard to what they can see, but to what they cannot see. Therefore the consideration must always be, in these cases, not whether the rule was in fact applicable, but were the circumstances such that it ought to have been present to the minds of the person in charge that it was applicable." I entirely concur in the view thus expressed, and adopt the language of the learned judge.

The next question that arises is whether those in charge of the *Theodore H. Rand* ought to have known that the *Statesman* was running free, or, in other words, whether they could, with ordinary skill and by the exercise of reasonable care, have ascertained what the fact was. Upon this, the courts below have differed in their conclusions. The question is, of course, most material, for the allegation on the part of those navigating the *Theodore H. Rand* is, that they believed the other vessel to be close-hauled, and therefore ported, whereas, if she was not only in fact running free, but could have been ascertained by them to be so, there can be no doubt as to their default. Butt, J. (and I gather that the Trinity Masters agreed with him) was of opinion that the officers of the *Theodore H. Rand* might and ought to have seen that the *Statesman* was not close-hauled. The Court of Appeal took a different view, and were advised by the nautical gentlemen who assisted them that there was not sufficient evidence to show that, by the exercise of any reasonable care and diligence on the part of the *Theodore H. Rand*, it could have been ascertained that the *Statesman* was running free, and was not close-hauled. We are invited to adopt the view taken by the learned judge and his assessors in the Admiralty Court, and reject that taken by the Court of Appeal It is, of course, not sufficient for the appellants to establish, even if they could do so, that it might have been discovered by extraordinary care or skill that the *Statesman* was not close-hauled; it is incumbent upon them to prove that a competent seaman exercising reasonable care would have discovered it. Now, upon a review of the facts deposed to in evidence, the skilled nautical assessors who assisted the Court of Appeal have come to a conclusion on this point adverse to the appellants. I think it would be a strong measure in the face of this opinion for your Lordships to hold that those in charge of the *Theodore H. Rand* exhibited in this respect a want of reasonable care or skill. And I am not satisfied that they did so. [His Lordship then discussed the question of whether there was evidence that the *Theodore H. Rand* had been negligently navigated in other respects, and concluded as follows:] Under these circumstances I am not prepared to advise your Lordships to reverse the judgment of the Court of Appeal, and pronounce the respondents to blame on the ground that the chief officer of their vessel was guilty of the negligence imputed to him. Although I feel the weight of the appellants' argument, I do not think the facts upon which it must rest have been so clearly established that it would be safe to found a judgment against the respondents on the case now set up. Upon the whole, therefore, I move that the judgment appealed from be affirmed, and the appealed dismissed with costs.

Lord BRAMWELL.—My Lords: I have been favoured with a copy of the opinion of my noble and learned friend who has just addressed your Lordships, and I entirely agree in his reasoning and in his conclusion.

Lord FITZGERALD, after stating the facts, proceeded as follows:—My Lords: Has it been established on the part of the *Theodore H. Rand*, that it was impossible for the officer of that ship, under the circumstances in which he was placed, and by any amount of care and diligence, to ascertain the true position of the *Statesman*, and that she was not close-hauled, and was running free? This was the question which was so very much pressed on us on behalf of the *Statesman*, and it depends on the proper inference to be drawn from the evidence of KNOWLTON, the chief officer of the *Theodore H. Rand*. On the most careful examination of his statements, I have not been able to see that he is not entitled to credit, and I have come to the conclusion, though with considerable hesitation, that it was not practicable for him to have ascertained the position of the *Statesman*. He judged erroneously that she was close-hauled, but the question is, are the owners of the *Theodore H. Rand* responsible for this error? Upon this point of the case, it seems to me to be desirable that your Lordships' reasons should be so expressed as to leave no opening for the supposition that the ship may not be liable for an error in judgment of the officer in charge, even where that officer acted *bonâ fide* according

to the best of his judgment, and under circumstances of difficulty. The *Statesman* not being to blame, the onus was then cast on the owners of the *Theodore H. Rand* to show that she was not to blame. Baggallay, L.J. rather reverses the position when he says, "I have come to the conclusion that there is not sufficient evidence in this case to show that, by the exercise of any reasonable care or diligence on the part of those on board the *Theodore H. Rand*, the actual course which the *Statesman* was pursuing could have been ascertained." The learned Lord Justice places the onus of proof on the *Statesman*, and in using the flexible term "reasonable," leaves an opening for misconception. Lindley, L.J. deals with this part of the case somewhat more fully, and is reported to have said: "The conclusion was wrong, and therefore what the *Theodore H. Rand* did was wrong, and that raises the real difficulty, or, what I have felt all throughout to be the real difficulty, in the case. But the exigency of the statute is very strict, and we must have regard to the statutory enactment, which is the 17th section of the 36 & 37 Vict. c. 85, and, although the language of it is very wide, I cannot construe that section as applying to a case where a man acts perfectly *bonâ fide*, and makes a mistake for which he is not in any way morally to blame. The position of affairs was this: I am stating the conclusion at which I have arrived from the evidence—that the persons on board the *Theodore H. Rand* could not by any amount of reasonable diligence have ascertained what the course of the other ship was, whether she was free, or whether she was, as they suppose, closed hauled on the starboard tack. It seems plain, when one comes to investigate these rules, that such a state of things might arise. Then if a man is not in a position to find out what the other ship is doing, if he cannot with reasonable diligence find it out, and happens to make a mistake, is he to be made liable under the terms of the 17th section? I think so to construe the 17th section would be erroneous." The language imputed to the Lord Justice is too wide, and seems to be capable of misinterpretation, especially in the passage where he says that the statute does not apply, "where a man acts perfectly *bonâ fide*, and makes a mistake for which he is not morally to blame." If the application of the statute was to be excluded in such a case, its wholesome operation and effect would be seriously limited. I can well conceive many instances in which the master of the ship, acting *bonâ fide* and according to the best of his skill and judgment, commits an error for which he may not be morally responsible, and yet the owners of his ship would be answerable for the consequences. It seems to me that the statute intended to exclude considerations of mere mistake, error of judgment, and the like, and to lay down a very rigid, though not inflexible, rule. The language of the 17th section of the statute is, "If, in any case of collision, it is proved to the court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts 1854 to 1873, has been infringed, the ship by which such 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." There were no circumstances shown to make a departure from the regulation necessary. The *Statesman* obeyed rule 14 by taking the proper manœuvre to keep out of the way of the close hauled ship (the *Theodore H. Rand*), and the question seems rather to be on the construction of article 22 whether the *Theodore H. Rand* violated or broke that rule. The 22nd article is, "Where by the above rules one of two ships is to keep out of the way, the other shall keep her course." The *Theodore H. Rand* did not keep her course. It seems, however, hard and unreasonable to affirm that the 22nd article was violated by the master of the *Theodore H. Rand*, if it was impossible for him to ascertain that the 14th article was applicable, and if in the critical emergency which was thus forced on him he took the step which the crisis seemed, in his judgment, imperatively to demand. Butt, J. puts the matter thus, and I think with accuracy: "The mistake on the part of the port-tacked ship brought about the collision because the other was acting rightly." "I have to apply this statutory rule. I would not apply it against a port-tacked ship if I thought it were impossible." (your Lordships will observe that he uses the word impossible) "for her officers to tell what they had to deal with." The *Statesman* was not to blame. The *Theodore H. Rand* caused the calamity. It lay on her owners to establish that she was not to blame by clear and satisfactory proof that it was impracticable for the officer in charge, using his utmost care and diligence, to make out the situation he had to deal with in relation to the *Statesman*, and that, being placed in circumstances of great difficulty, he had acted to the best of his skill and judgment. After much hesitation, I have come to the conclusion that the owners of the *Theodore H. Rand* have established that position in evidence, and that their ship consequently was not to blame.

Lord HERSCHELL.—My Lords: Lord Ashbourne, who took part in the hearing of this appeal and is unable to be present to-day, has asked me to state that he has perused in print the opinion that I have delivered this morning, and that he entirely concurs in it.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Lowless* and *Co.*

Solicitors for the respondents, *Thomas Cooper* and *Co.*

Tuesday, Feb. 15, 1887.

(Before the LORD CHANCELLOR (Halsbury), Lords BRAMWELL, HERSCHELL, and MACNAGHTEN.)

THE KRONPRINZ. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Practice — Collision — Actions by shipowner and cargo owner—Agreement to discontinue—Action for limitation of liability—Claims.

The owners of a ship, and the owners of the cargo on board it, respectively instituted actions in rem against another ship for damage by collision. In the ship action the parties signed a consent to "this action being discontinued on the ground of inevitable accident," and the registrar made an

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

order for discontinuance accordingly. In the cargo action both ships were found to be in fault, and the defendants obtained a decree limiting their liability. The plaintiffs in the ship action thereupon obtained an order from the court to rescind the order for discontinuance, and made a claim in the limitation action against the fund in court.

Held (affirming the judgment of the court below), that they were entitled to do so, the agreement and consent order amounting only to a discontinuance, and not to a release of all rights.

The Bellcairn (53 *L. T. Rep. N. S.* 686; 5 *Asp. Mar. Law Cas.* 503; 10 *P. Div.* 161) *distinguished.*

THIS was an appeal from a judgment of the Court of Appeal (Lindley and Lopes, L.JJ., Lord Coleridge, C.J. *dubitante*), which had affirmed a judgment of the President of the Admiralty Division Sir J. Hannen).

The action arose out of a collision between the steamships *Kronprinz* and *Ardandhu*, whereby the former and the cargo on board were totally lost.

The case is reported below under the name of *The Ardandhu*, in 54 L. T. Rep. N. S. 468 and 819; 5 Asp. Mar. Law Cas. 573 and 594; and 11 P. Div. 40.

The facts appear sufficiently from the headnote above, and from the reports in the court below.

Sir *W. Phillimore* and *Stubbs*, for the appellants, the owners of the cargo on board the *Kronprinz*, contended that the agreement and order operated as a release of all claims in the first action, and not merely as a discontinuance. If the latter had been intended a notice under Order XXVI., r. 1, would have been sufficient, there would have been no necessity for an order, nor for the insertion of the words "on the ground of inevitable accident," which support our contention. *The Bellcairn* (53 L. T. Rep. N. S. 686; 5 Asp. Mar. Law Cas. 503; 10 P. Div. 161) was a very similar case, though it may perhaps be distinguished on the ground that in that case there was a judgment by consent dismissing the action, not only an order.

C. Hall, Q.C. and *Barnes*, who appeared for the respondents, the owners of the *Kronprinz*, 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 (Halsbury).—My Lords: This appeal turns upon a somewhat narrow question, namely, what is the meaning of the agreement between the parties, and what is the effect of the order which purported to carry it out. Those are the only materials from which to ascertain what the agreement between the parties was, I can find no clue to what the object of the parties was, except in those two documents. But it is important to observe that the formal parties entering into the arrangement were the two solicitors, who must be taken to be familiar with the effect and meaning of the forms which they were using. It being conceded that, as matter of law, the form which they adopted was one which allowed all matters to be open, and did not conclude the rights of the parties, the question of the form which they used becomes very material in construing their meaning. It would have been easy to have said that "this action shall be dismissed;" and if they had said that, it is admitted that, as between these two parties, a bar would have been created which would have prevented any further proceeding. But they deliberately (for people must be supposed to intend the reasonable consequences of their acts) adopted language which can only be used if it is the intention of the parties to leave themselves at large so as to reassert their rights if they please. Sir Walter Phillimore has not contested that that must be the ordinary and natural meaning of the words; but he relies upon the language which is added to the order, but which, properly speaking, forms no part of an order to discontinue, namely, the reasons which the parties gave for consenting to that course, that is to say, that it was on the ground of inevitable accident. I am not able to conjecture, with any reasonable degree of certainty, for what purpose those words were used. Various reasons have been suggested, and I think others might occur to one; but the question for your Lordships is whether, when the bargain between the parties and the form which they adopted, lead to the inference that, so far as the instrument itself is concerned, it was intended to leave the parties free to bring a fresh action or to do that which is equivalent to bringing a fresh action, namely, to make this claim, your Lordships are to assume that they intended that that should not be done. I am unable to come to any such conclusion. It seems to me that the plain and obvious inference which is to be drawn from this instrument is, that the parties intended that which is the plain construction of the language which they have used, and, as there is nothing to cut down that construction, I assume that that is what they have meant; and, inasmuch as it is not denied that that is the real meaning of the bargain between the parties, it appears to me that it is competent for the owners of the *Kronprinz* to make this claim. For these reasons, the matter being an extremely simple and short one, I move your Lordships that this appeal be dismissed and the order of the Court of Appeal affirmed, with costs.

Lord BRAMWELL.—My Lords: I am of the same opinion. If the claim of the *Kronprinz* against the *Ardandhu* is in existence, the owners of the *Kronprinz* have a right, as it seems to me, to share in the fund which has been brought into court. If it is not in existence of course they have no right to do so. That reduces the question to this, Is the claim in existence? It is said that it is not; partly, as I understand, by the effect of the order of discontinuance. I can see nothing in the order of discontinuance which, by what you may call its intrinsic effect, would bar a claim of the owners of the *Kronprinz*. But then it is said that there was a bargain between the parties which is embodied in that order, and that the bargain is operative to prevent the owners of the *Kronprinz* claiming against this fund. As I have said, that can only be because that bargain has extinguished the right. But has it? We have not the slightest evidence that there was any agreement between the parties that the claims on the one side should be given up in consideration of the claims on the other being given up. One might make a guess that it was in the contemplation of the parties, but I am

by no means sure that it was. I am, on the other hand, by no means sure that they may not have thought it just as well for them to keep silent and not to go on litigating a matter which might have disastrous results to both of them. But supposing that there was such a bargain, that bargain has been rescinded by them, as it was open to them to do. If it had been a bargain the effect of which was to extinguish a debt at the time, I do not say that they could have rescinded it; but if it was not such a bargain as that, but an executory one only, then of course they could rescind it. What I mean is, that if all that was done was that if an action was brought there was to be an application to an equitable jurisdiction to stay the action, I should have doubted very much whether that would extinguish a debt. But be that as it may, in the first place I do not find that there was any such bargain; and in the next place, I do not find, or rather I do not see (for there is no doubt about it), than any such bargain, if ever entered into, was rescinded by parties competent to rescind it. I cannot see therefore any evidence to show, or any ground for saying, that either the claim of the *Kronprinz* on the *Ardandhu* or of the *Ardandhu* on the *Kronprinz* was extinguished. If so, it seems to me that the respondents had a right to make that claim against this fund. In *The Bellcairn* (53 L. T. Rep. N. S. 686; 5 Asp. Mar. Law Cas. 503; 10 P. Div. 161) what was really decided was, that the judgment was a bar to any further claim being made, or to the same claim being made over again; that the judgment having been pronounced by the court it was *res judicata*, and that the claim was gone. Of course, therefore, it could not be set up against the fund. That was the distinction between that case and this; there the claim had ceased to exist, here it has not.

Lord HERSCHELL.—My Lords: I am entirely of the same opinion. Sir Walter Phillimore was driven to admit that he could not establish his case unless he could show that the respondents had in fact released all their claims against the *Ardandhu*, because he was compelled to admit that an order for discontinuance does not of itself operate as a release or an extinguishment of the claims, or in any other way bar further proceedings. But he contended that, from the document signed by the solicitors, and from the order, we were to infer an agreement between the parties that there should be a mutual release of the claims of the one against the other. What evidence have we of any such agreement? Sir Walter Phillimore relied on the use of the words "on the ground of inevitable accident." I will concede, for the purpose of the argument, that those words do point in the direction of such an agreement; but then it is impossible to shut one's eyes to the fact that the rest of the language used and the form which the transaction takes point as strongly, and as it seems to me much more strongly, in the other direction, namely, that the parties have adopted a means of carrying out the object which they had in view, which *primâ facie* imports, whether you look at the terms of the agreement or at the order itself, that there shall not be a bar; because not merely does the fact of the plaintiff discontinuing not operate in any way as a bar, but the judge's order to discontinue—unless it were made a condition of the discontinuance that no other action should be brought—would not operate as a bar. Under these circumstances, and looking at the two documents as a whole, whatever speculation one may enter into as to what the parties had in view, it seems to me that it would be utterly impossible for us out of those documents to spell an agreement such as alone would establish the case of the appellants before your Lordships' House. I therefore entirely concur in the judgment which has been proposed.

Lord MACNAGHTEN.—My Lords: I also entirely agree. It appears to me that on the face of the documents there is nothing equivalent to a release, and, from the materials before your Lordships' House, I am unable to infer anything of the kind.

Order appealed from affirmed, and appeal dismissed, with costs.

Solicitors for appellants, *Stokes, Saunders*, and *Stokes*.

Solicitors for respondents, *W. A. Crump* and *Son*.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Feb. 16, 1887.

(Before Lord ESHER, M.R., BOWEN and FRY, L.JJ.)

BURN *v.* HERLOFSON AND SIEMENSEN; THE FAUST. (*a*)

Mortgage action — Shipowners — Charge by managing owner — Bills of exchange—Appointment of receiver—Rights of co-owners.

In an action in personam by a plaintiff claiming to be equitable mortgagee of the foreign ship F. and her freight to secure a liability incurred by him in accepting bills of exchange which had been drawn by the managing owner, it appeared that the alleged mortgage was given to the plaintiff by the managing owner; that the plaintiff, when he accepted the bills, thought the managing owner was sole owner, and that it was subsequently sworn on affidavit that the managing owner was only a part owner, but it did not appear whether the amount of the bills was in fact expended on the purposes of the ship.

The F. was in an English port under charter to carry cargo to a foreign port, when, on application by the plaintiff, Butt, J. made an order appointing a receiver and authorising him to proceed with the ship to the foreign port and there receive the ship and all the freight due upon the voyage. The defendants appealed.

Held, that, even assuming the managing owner to be only a part owner, yet that, as it did not appear that the amount of the bills was not expended solely for the purposes of the ship, the court had authority to appoint a receiver to receive the whole of the freight, and that, in the circumstances, it was expedient that the order should stand.

THIS was an appeal by the defendants in a mortgage action *in personam* from an order made by Butt, J. in chambers.

The plaintiff, Richard Burn, was a shipbroker,

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

carrying on business in Liverpool, and claimed to be equitable mortgagee or assignee of the Norwegian barque *Faust* and her freight, and to be entitled to payment of 2000*l.*, together with interest and expenses, out of the proceeds of the ship and freight.

On the 15th July 1886, in accordance with the course of business carried on between the plaintiff and the defendant Axel Herlofson, whom the plaintiff believed to be the sole owner of the *Faust*, Herlofson drew upon the plaintiff two bills of exchange for the sum of 1000*l.* each.

These bills were accepted by the plaintiff, the defendant undertaking to place the plaintiff in funds to meet the bills.

A letter from Herlofson, containing the bills of exchange for the plaintiff's acceptance, was in the words following:

Arendal, in Norway, 22nd Jan. 1886.—To Captain M. Siemensen.—Dear Sir,—Messrs. Richard Burn and Co., 14, Batavia-buildings, Liverpool, have advanced me on earned freight per your ship the *Faust* 2000*l.*, two thousand pounds Br. st. in their six months' acceptances from this day. This bill is due on the 22/25 July 1886. Please pay this amount to the above-mentioned firm at maturity as soon after as possible, as I have bound and do hereby bind the ship and her freight or freights liable for the same.—Believe me, dear Sir, yours truly, A. Herlofson, owner of the *Faust*.

Upon this letter, and upon the course of business in similar transactions between the parties for some time past, the plaintiff claimed to be entitled to an equitable mortgage upon the said ship to cover both the amount of the said bills and his general account.

These bills were indorsed to certain holders, who were now suing the plaintiff upon them. The defendant Herlofson had never put the plaintiff in funds to meet the bills; and Herlofson was now a bankrupt.

On the 5th Jan. 1887 the *Faust*, laden with cargo, arrived at Falmouth for orders.

This action was instituted *in personam* against Herlofson and Siemensen, the master of the *Faust*, on the 7th Jan. 1887, and on the same day an injunction was granted till the 11th restraining the defendants from removing the *Faust* from out of the jurisdiction, and from receiving her freight. On the 11th Jan. Butt, J. made an order continuing the injunction, and appointing a receiver to take possession of the ship and receive the freight. On the 18th Jan. the defendant Siemensen, by special leave, applied to Butt, J. in chambers to vary the above order, and filed an affidavit alleging that Axel Herlofson owned three-eighths of the *Faust*, that Oscar Herlofson owned three-eighths, and that he himself owned two-eighths; that he had no knowledge of the letter of the 22nd Jan., or of the bills of exchange; that he had never given any authority to Axel Herlofson to mortgage or charge his shares; and that the *Faust* was then at Falmouth laden with a cargo of sugar waiting for orders to proceed to a foreign port. The judge thereupon dissolved the injunction, but continued the order appointing the receiver and authorising him to proceed with the *Faust* to her port of destination, and there receive the ship and the whole of the freight due, and after paying the crew's wages and all proper disbursements to pay the balance into court.

The *Faust* subsequently sailed to Nantes with the receiver on board, where on her arrival proceedings were instituted by the plaintiff's representatives to give effect to the above order.

The defendants now appealed to set aside or vary the order of the 18th Jan.

Pyke, for the defendants, in support of the appeal.—According to the facts on oath Herlofson was not the sole owner of the ship or freight. He therefore had no authority to pledge the whole of the ship and her freight. [Lord Esher, M.R.—He may, as managing owner, have raised the money solely for the purposes of the ship.] It is not stated upon the affidavits that the money was borrowed for, or expended upon, the ship. [Lord Esher, M.R.—Neither have your clients stated that the money was not borrowed for the purposes of the ship, and only for the private purposes of Herlofson.] If, in fact, Herlofson was only a part owner the court has no jurisdiction to appoint a receiver to take possession of the ship and receive all the freight. [Lord Esher, M.R.—The court has only put the receiver into the position of the managing owner. He would be entitled to receive the freight, and therefore the receiver must have the same right.] It is the master, not the managing owner, who has the right to receive the freight at a foreign port:

Guion v. *Trask*, 29 L. J. 337, Eq.

This is an oppressive order, and also without precedent. It directs the receiver to go to Nantes with the ship, and practically amounts to the arrest of the ship, which the court has no power to do. A test of the validity of the order is the fact that, now the ship is out of the jurisdiction, were the defendants to disobey it, the court would have no means of enforcing it. It could only do so by attachment or sequestration, neither of which could be effected in the present case. Moreover, the court has no jurisdiction, because the rights of the parties are governed by the law of the flag. [Fry, L.J. referred to *Hart* v. *Herwig*, 29 L. T. Rep. N. S. 47; L. Rep. 8 Ch. App. 860; 1 Asp. Mar. Law Cas. 572.] The court will not interfere between foreign co-owners, and here the plaintiff's alleged rights are derived from a foreign owner:

The Graff Arthur Bernstorff, 2 Spinks, 30.

J. P. Aspinall (with him Sir *Henry James*, Q.C.).—The order of Butt, J. should stand. [Lord Esher, M.R.—How do you meet the contention that Herlofson had no right to mortgage more than his own share, and if so, how can the receiver take possession of the whole ship and all the freight?] The purposes for which the money was raised are in issue, and will not be determined till the trial. It may turn out that in fact the money was borrowed for the necessary purposes of the ship. If so, to allow this appeal would defeat the just rights of the plaintiff. If it prove that the money was borrowed for the private purposes of the managing owner, no injustice will be done to the other owners, because security has been given to answer any just claim they might have in consequence of this order. The mortgage on which the plaintiff sues is an English contract, and the court undoubtedly has authority to appoint a receiver to collect the freight and take it out of the hands of the master:

The Edmond, Lush. 57.

Moreover, this order has by now been partly

worked out. If this court uphold the order, the receiver will be able to invoke the assistance of the court abroad to carry it out, and to obtain an order certifying that he is the proper person to receive the freight. By these means the consignees would be protected from any liability for paying freight to him. It is submitted, both as a matter of legal right and as a matter of convenience, the plaintiff is entitled to hold the order.

Pyke in reply.

Lord Esher, M.R.—In this case the ship is a foreign ship and her owners are foreign owners. One of them, who was in fact the managing owner, borrowed money in England by a contract which he made in England, and by way of security mortgaged, or assumed to mortgage, the ship and her freight. In truth he was not the sole owner, but was only one of three owners. Now, the mortgagee, an Englishman, under these circumstances, applies, I will not say to the Court of Admiralty, but to the court over which Butt, J. was presiding, to enforce the mortgage, which was given to him by an English contract. If neither the ship nor any of the parties had been in England or had been within the jurisdiction of the court, it seems to me that Butt, J. could not have acted as against these foreigners. The ship came within the jurisdiction of the court, but she was not seized into the Admiralty. She could not be seized under any process but an Admiralty process, and she was not in fact seized. But one of the part owners, the captain, or the captain representing the owners, was within the jurisdiction, *i.e.*, within the three miles limit, and I take it that he was served. Whether any order was made as to the service on the captain being a service on the other owners I know not. Herlofson was the person who borrowed the money, and he was the managing owner. He would have no right as managing owner to mortgage the ship for a private debt of his own, although he might mortgage his own shares in the ship for that purpose. In the same way he would have no right as managing owner to mortgage the whole of the freight for his own private wants, although he might mortgage his own share in it. As managing owner he would, as between himself and the lender, have a right to borrow money if it was borrowed for the necessary purposes of the ship. Now he did borrow money, but he did not state that it was for the purposes or necessities of the ship. It was not necessary, so far as the lender is concerned, that he should have stated, if it was in truth the fact. It is suggested that we know that the money was borrowed not for the purposes of the ship, but for the private wants of the managing owner. But that is not clear, and although it may be found to be so when this case comes to trial, at present it is in doubt. It is said that it is impossible, having regard to the amount, that the loan could have been on account of the ship. But is that so? The ship was a new ship. She was about to start from Norway on an extremely long voyage to Australia, and then she was to go seeking for a cargo to take back to Norway. It might very well be that she would not find that cargo at once. I cannot find from the fact that the loan amounted to 2000*l.* that that is conclusive to show that it was not borrowed for the purpose of repairing or fitting the ship out. Therefore it may be that the money was properly borrowed by him as managing owner. If it was properly borrowed by him as managing owner it was borrowed on behalf of all the owners.

The ship having come to Falmouth, the learned judge had, I think, authority to deal with the contract, and with the alleged right of the plaintiff, both with regard to the ship and the freight. He had authority and jurisdiction to do so by the service on the defendant. He had jurisdiction because the contract which he was asked to enforce was an English contract, and the persons against whom it was to be enforced, although foreigners, were within the jurisdiction, or, if all of them were not, one of them certainly was. The injunction seems to me to be practically an interim injunction. It will last until the hearing of the action which is brought on behalf of the plaintiff. It at all events is in the nature of an interim injunction, and is, I think, subject to the rules applicable to such an injunction. It is an appointment of a receiver till the hearing, and is subject to the rules which are applicable to an action in the court till the hearing. Now what are those rules? We are asked to set aside what has been done, and we are to consider whether it is more convenient that what has been done should remain, or that it should be set aside. Now let us test it in this way. Supposing the receiver was removed, what would happen? The ship would go abroad, the defendant would go abroad; the freight would be received by the captain, one of the defendants; he would not return to England, he would take the ship to Norway; the freight would be, according to his duty, then handed over to this very defendant, who has borrowed the money as managing owner, or to the trustees of his estate in Norway, if there are such people in Norway. Under these circumstances the English mortgagee would be absolutely without remedy, he would have lost all. If the order for the receiver stands, he will receive the freight. Whether he will receive it from the consignees, or whether the captain having received the freight from the consignees will pay it to him, is not material. He probably has received it by this time. What inconvenience or injustice will that do to anybody? It is obvious that, if it turns out that the defendant who gave the charge was not entitled to mortgage the whole freight, he was at least entitled to mortgage his own share. In that case the court would direct the receiver—after having paid the proper disbursements or allowed them to be paid—to keep the share of this defendant, which would be the righteous and proper thing to do, and to pay over their respective shares to the other owners. To my mind they would not be entitled to have their shares of the profits of the voyage handed to them until the account, as between the ship's husband and the co-owners, is made out. That must be the law in Norway as it is here. Therefore, it seems to me that their rights are in no jeopardy if this order stands, and so far as I can see their rights will probably not be detained by an hour. The balance of convenience therefore seems to me to be—and more particularly considering the length of time which has elapsed, and how much of this order must have been already carried out—greatly in favour of maintaining this order for the receiver on these grounds: that no injustice

will be done if it is maintained; that injustice will inevitably follow if it is set aside; and that it has been so far carried out that it is almost futile to interfere at this moment. All these three grounds are grounds for maintaining the order.

But then it is said that the court has done that which it has no jurisdiction to do. It has been said that the receiver has been put into possession of the ship or part of it. I think the terms of the order may be read so as to lead me to suppose that the receiver has been put into possession of every part of the ship, and it may be very arguable whether a part owner himself—after having agreed that Herlofson should be the managing owner, and after having agreed that the ship should commence to gain freight, and perhaps after a charter-party has been entered into—could go on board and remain on board. But to my mind this order does not really give possession of the ship or any part of it to the receiver. The probable working of it would be, that it would enable the receiver, if the captain abroad attempted to sell the whole ship, including the mortgagee's interest, to represent to the foreign court that that was unjust and unfair, and say it could not be done, and the foreign court would not then give the captain possession of the ship. With regard to the freight, the presence of the receiver on board is immaterial. The freight is not due until the ship arrives at Nantes, and the receiver might just as well have used any other means of getting there. It is not suggested but that the English court would have a right to appoint a receiver to act abroad. The objection urged is, that the English court has sent a receiver on board the ship. If there was anything wrong in that the court could have said, "Very well, I will not send him in the ship, but I shall make an order detaining the ship here unless you give an undertaking to let him go on board the ship at Nantes." It seems to me that the sending him on board the ship does not affect the right or propriety of the court to send him to receive the freight. Another point has been taken, that the court is sending an English receiver to receive the freight abroad. It did at first suggest itself to my mind, that that might put the consignees of cargo into a difficult position. They, in ordinary course, would be entitled to their cargo on offering to pay the freight to the captain, and they might object to paying the freight to an English receiver of whom they knew nothing; or the captain might refuse to deliver the cargo to the consignees unless they paid the freight to him. But the difficulty was met by Mr. Aspinall showing that, if the receiver were objected to, he might in the ordinary course of justice obtain an order from the court at Nantes that he was the proper person to receive the freight. The court at Nantes would, by the comity of nations, give the receiver authority to receive the freight. Therefore the consignees would be protected. On the whole I do not take this to be an order to take possession of any part of the ship, but merely that the receiver shall go on board and receive the freight as any receiver would be entitled to do. Therefore the balance of convenience is all one way, and the court had jurisdiction and authority to make the order, although it may not be strictly in the form in which (after all that has been said to us, and which perhaps may not have been said to Butt, J.) we might draw it. I therefore think that the order as made must stand, and that this appeal must be dismissed.

Bowen, L.J.—I am of the same opinion with regard to the form of the order. I take this judgment as not to be considered as approving or settling any such form of order. I think it is a very exceptional form, and is one which would be found to be an inaccurate and objectionable form if it were used as a precedent. There are two things to consider here: First, had the court jurisdiction to make the order it made; second, if it had, it now being suggested that we should interfere with the particular form of the order, whether we should do more harm by altering the form of the order than by leaving it to stand as it is. With regard to the question of whether the court had jurisdiction to make the order let us consider how matters stood when these bills were drawn. The bills were drawn by a Norwegian on a Liverpool house, and in the letter the drawer sent to the Liverpool house he purported to create, and did create, so far as I know, a charge on the ship and freight for the security of the Liverpool house, and that letter contained a representation to the Liverpool house to the effect that he was the owner of the ship. Supposing that nothing further happened, can it be suggested that that did not form a contract which an English court would not have a right to enforce? Now what is the difficulty which is raised in the way of the English court? It is said that as soon as she comes within the jurisdiction of the English court it transpires that she is not the property of the so-called assuming owner, Mr. Herlofson, who had represented himself as such, and got the loan on that representation, but it is alleged that he was the managing owner only and was himself the owner of only three-eighths, and that the rest of the ship was owned by her captain and another person. If that be so, the managing owner would have no right to pledge more than his own interest in the ship for his own debt. It is also left *in dubio* for what purposes he borrowed the money or any part of it. On the ship arriving at Falmouth to receive orders she was arrested, and an injunction was issued to prevent the captain removing her. That injunction went upon the urgent ground that she might at any moment be removed out of the jurisdiction. How far can we be sure as to the rights of the parties? It seems to me that at present we cannot be sure at all, because, having regard to what we as yet know, it is left more or less in doubt whether the managing owner had the power or not to pledge what he did pledge. That can only be decided at the hearing. It was impossible, unless the ship was to be kept for an abnormal time, to get further information as to the right of these parties. It was in the interest of all that, rather than the ship should be detained, she should be allowed to prosecute her voyage to Nantes. I cannot say that I think Butt, J. was wrong in assuming that for the purpose of protecting the plaintiffs' alleged rights there was jurisdiction to make the order he did; and if there was jurisdiction it comes to the single question of what was the best thing to do under the circumstances, the object being to preserve the rights of the parties *in statu quo*, in case anything was done to defeat the claim that was pending. The order has been half worked out. No injustice, as has

been pointed out by the Master of the Rolls, can be done if we let the order stand. Considerable injustice might be done if we took the opposite course. With regard to the question of the form of the order, I entirely agree with what has been said by the Master of the Rolls, that the receiver should not be put into possession of the whole ship, but only of Herlofson's shares. I think the true answer to the objection of informality is, that this informality should have been cured at the time the order was made. It is too late now. If it had been put before the court below in the way it has been put now, I think the same end would have been attained by taking an undertaking from the captain to allow the receiver to come on board at Nantes, by which undertaking the owners would have been bound.

Fry, L.J. concurred.

Solicitors for the plaintiff, *Sharpe, Parkers, and Co.*

Solicitors for the defendants, *Clarkson, Greenwell, and Wyles.*

Wednesday, March 16, 1887.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

The Banshee. (*a*)

Collision—Reasons of nautical assessors—Appeal.

Where in a collision action the nautical assessors sitting in the Admiralty Division reduce their reasons into writing, parties appealing from the decision are not entitled to see these reasons or have copies of them for the purposes of the appeal. (*b*)

This was an application to the Court of Appeal by the plaintiffs in a collision action *in rem* for an order that the Registrar of the Admiralty Division should deliver up to them the written reasons of the assessors in the court below, and for leave to print such reasons in the record for the purposes of the appeal.

The action was instituted by the owners of the steamer *Kildare* against the owners of the steamer *Banshee* to recover damages in respect of a collision between the two steamers on the 27th Jan. 1887.

At the hearing before Butt, J. he found the *Kildare* solely to blame, but stated that in the opinion of his nautical assessors the *Banshee* was solely to blame, adding, "I do not know whether this case will travel any further or not, but the Elder Brethren have been good enough to write out for me not only their views, but their reasons; and I have asked them to preserve them should any court to which this case may travel think fit to call for them."

It appeared that the plaintiffs had applied to the registrar for a copy of these reasons, and that he had refused to let them have them, stating that the judge had told him that the plaintiffs were not entitled to them.

The plaintiffs had filed notice of appeal from the decision finding the *Kildare* to blame.

Carson, for the plaintiffs, in support of the application.—The plaintiffs are entitled to these reasons. [Lord Esher, M.R.—What power has this court to order the Registrar of the Admiralty Court to give up these reasons? He is not our officer.] As the appeal is pending before this court, it would have jurisdiction to make the order. [Bowen, L.J.—At the hearing of Admiralty appeals we often put written questions to our assessors. How could parties appealing from our decision have any right to those questions and answers?] They form part of the judgment. [Lord Esher, M.R.—They do not form part of the judgment. My experience is, that the judge of the Admiralty Court used to retire with the Trinity Brethren before giving his decision, and no one ever knew what advice he got.] I ask the court to make the order as a matter of discretion.

J. P. Aspinall, for the defendants, was not called on.

Lord Esher, M.R.—It would be a very wrong discretion to make this order. Such a thing has never been done. The application must be dismissed with costs.

Bowen and Fry, L.JJ. concurred.

Solicitors for the plaintiffs, *Carlisle, Unna*, and *Rider.*

Solicitor for the defendants, *C. Mason.*

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

(*b*) At the hearing of the appeal, Lord Esher called for and looked at the assessors' reasons.—Ed.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Monday, Dec. 13, 1886.

(Before Smith and Wills, JJ.)

Carmichael and Co. *v.* The Liverpool Sailing Shipowners' Mutual Indemnity Association. (*a*)

Marine insurance—Mutual indemnity association—Damage to cargo by improper navigation—Loading port inefficiently closed.

A shipowner neglected to efficiently close a loading port in the side of his ship. The act of negligence occurred before the completion of the loading. Goods were damaged by sea-water which leaked in during the voyage, but the leak did not endanger or impede the navigation of the ship.

Held, that the damage was "caused by improper navigation of the ship" within the meaning of the articles of association of a shipowners' mutual indemnity association.

This was a special case stated by order for the opinion of the court.

The case was, so far as material, as follows:—

Special case.

1. The plaintiffs are the owners of an iron sailing ship called the *Argo*, which was at the times hereinafter mentioned duly entered on the books of the defendant association.

2. The defendants are an association of sailing ship owners who have agreed to indemnify each other, as appears in their articles and rules, against losses, damages, and expenses for which any of them may be liable in respect of any ship duly entered on the books of the association arising from or occasioned by (amongst other matters) any loss or damage of or to any goods or merchandise "caused by improper navigation of the ship carrying the goods or merchandise or of any

(*a*) Reported by Joseph Smith, Esq., Barrister-at-Law.

other ship (but not from damage caused by bad stowage)." A copy of the articles and rules of the association in force at the times hereinafter mentioned forms part of this case.

3. In Oct. 1882 a cargo of wheat in bags was shipped in the *Argo* at San Francisco in good order and condition, to be carried to Queenstown or Falmouth for orders to discharge at a safe port in the United Kingdom, or on the Continent between Havre and Hamburg, both ports included. She sailed with the cargo, and called at Queenstown. There she received orders to discharge at Liverpool, and she accordingly proceeded to Liverpool, and discharged the wheat there. The voyage was performed in the ordinary manner, and in safety in all respects save as hereinafter appears.

4. The wheat on being discharged at Liverpool was found to be damaged by salt water, and it is admitted by the parties hereto for the purposes of this case, that the water got into the ship and consequently into the cargo in the manner hereinafter described.

5. The cargo was in part taken on board through a certain opening or port made for this purpose in the side of the ship above the 'tween decks. When part of the wheat was on board, and before the loading was completed, this opening was closed in the ordinary way by means of an iron door or shutter. The door by which this opening is closed is fitted for the purpose on the outside of the ship on hinges. When shut it is made fast by bolts passing through iron bars on the inside of the ship, and screwed up by nuts on the inside. The joint between the ship's side and the over-lapping flange of the door is made tight by smearing the flange with a mixture of white or red lead and oil before the door is shut.

6. The port through which cargo was taken as aforesaid on the voyage in question was not, however, closed efficiently. The joint between the flange of the door and the ship's side was not perfectly tight, and as the port was below the water-line some water leaked in. It is admitted for the purposes of this case, that the defect in the joint was due to negligence on the part of persons employed by the plaintiffs.

7. The water which thus leaked in damaged part of the cargo in the lower hold, and the plaintiffs in consequence became liable to pay and paid 450*l.* compensation to the owners in respect of the damage. They also justifiably incurred expenses amounting to 75*l.* 5*s.* 2*d.* in connection with the claims of the cargo owner. It is agreed that if the defendants are liable to indemnify the plaintiffs in respect of the said compensation, they shall also pay to the plaintiffs the amount of the said expenses.

8. The leak did not endanger the ship nor did it hinder or impede the navigation of her on the course of her voyage.

9. The question for the opinion of the court is, whether the plaintiffs are under the said articles and rules entitled to be indemnified by the defendants in respect of the compensation which the plaintiffs became liable to pay as aforesaid. If the plaintiffs are so entitled, judgment is to be entered for them for 525*l.* 5*s.* 2*d.*; if they are not, judgment is to be entered for the defendants.

Kennedy, Q.C. (with him *Squarey*) for the plaintiffs. — The damage was caused by improper navigation of the ship within the meaning of the articles of association. (*a*) In *Good* v. *The London Steamship Owners' Mutual Protecting Association* (L. Rep. 6 C. P. 563) the plaintiff was a member of a similar association, and his ship having encountered heavy weather put back to coal and trim her cargo. Going into harbour she took the ground, but was got off. The pumps were put on to try whether she had made any water, and for this purpose the bilgecock was opened, and, through the negligence of the crew, was not closed when the pumping ceased. Shortly afterwards the seacock was also opened to fill the boilers, and through like negligence left open, and the water consequently entered and damaged the cargo. On these facts it was held that the damage arose from "improper navigation." [SMITH, J.—Was not the damage in that case caused during the voyage?] The ship was at the time moored alongside the quay. It is contended that there is no difference between opening the ports improperly during the transit of the ship, and leaving them slightly open as was done in this case from the commencement of the voyage. Both cases amount to improper management of the ship upon the high seas, or, in other words, improper navigation. The word "navigation" is not confined to the actual period of transit of the ship. In *Lawrie* v. *Douglas* (16 M. & W. 746) a vessel laden with goods arrived in the port of London, and was taken into the Commercial Dock to discharge her cargo. For this purpose she was fastened by tackle on the one side to a loaded lighter lying outside her, and on the other to a barge lying between her and the wharf. The crew were discharged except the mate, and lumpers were being employed unloading her, when the tackle broke whereby she was fastened to the lighter, and in consequence she canted over, water got in through her ports, and the goods still on board were damaged, and it was held that this was a loss within the meaning of the words "all and every the damages and accidents of the seas and navigation." In *Steel* v. *The State Line Steamship Company* (37 L. T. Rep. N. S. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72) the damage was caused by water which obtained access to the cargo in consequence of one of the

(*a*) The articles of association were, so far as material, as follows: "We, the undersigned persons, firms, and companies hereby agree to become members of the 'Liverpool Sailing Ship Owners' Mutual Indemnity Association,' for the purpose of indemnifying each other as hereinafter appearing against losses, damages, and expenses arising from or occasioned by all or any of the following matters or things, for which any of us may be liable in respect of any ship which may be duly entered on the books of this association. 1. From loss of life or personal injury howsoever and to whomsoever the same may be caused. 2. From loss or damage of or to any other ship or boat, or of or to any goods, merchandise, or other things whatsoever on board such other ship or boat, howsoever such loss or damage may be caused, so far as the same shall not be covered by the usual form of Lloyd's policy with running down clause attached. 3. From loss or damage of or to any goods or merchandise other than as aforesaid, whether on board any ship so entered as aforesaid or not, caused by improper navigation of the ship carrying the goods or merchandise or of any other ship (but not from damage caused by bad stowage), or of or to any piers or jetties, or other fixed or movable things whatsoever, whether on board such ship or not, howsoever such damage may be caused."

ports being insufficiently fastened, and it was there held that, in order to bring the loss within the exception of the charter-party, "peril of the sea however caused," it must be found that the ship sailed with the port in a seaworthy state. That case, however, does not affect the point, because there there was an antecedent warranty of seaworthiness, whereas here the sole question is whether the damage was caused by improper navigation. In *The Warkworth* (49 L. T. Rep. N. S. 715; 51 L. T. Rep. N. S. 558; 5 Asp. Mar. Law Cas. 194, 326; 9 P. Div. 20, 145) it was held that the words "improper navigation" in 25 & 26 Vict. c. 63, s. 54, sub-sect. 4, are not to be restricted to the negligent navigation of a vessel by her master and crew, for the statute includes all damage wrongfully done by a ship to another whilst it is being navigated, where the wrongful action is due to the negligence of a person for whom the owner is responsible, as, for instance, to the negligence of a person on shore in overlooking the machinery, and thereby causing the vessel to steer badly. In that case the damage resulted from a collision which was the result of a pin of the steam steering gear not being in its place. The case shows that the negligence need not necessarily take place during the voyage, but may be antecedent.

Carver for the defendant association.—The word "navigation" must be read in its ordinary sense, and cannot be extended to a time when the ship is being used merely as a warehouse for the cargo. The primary object of the association, as appears from the risks against which the members are indemnified, is to protect the members against collision risks, and therefore the word "navigation" must be taken in its ordinary colloquial sense. [SMITH, J.—Why, then, is damage caused by bad stowage excepted?] Those words are inserted because of the expression of opinion of Wills, J. in *Good* v. *The London Steamship Owners' Association* (*ubi sup.*), that damage arising from bad stowage would come under the head of "improper navigation." [SMITH, J.—If the ship started with the hatchways off, would that be "improper navigation?"] In that case there would be a continuing act of neglect. [SMITH, J.—Does not Brett, M.R. meet that objection in *The Warkworth* (51 L. T. Rep. N. S. 559; 5 Asp. Mar. Law Cas. 194, 326; 9 P. Div. 147)? He there says: "Although the negligence occurred before the vessel started, its effect was continuous, and operated while the ship was on her voyage."] In that case there was clearly improper navigation, inasmuch as the vessel ran into another vessel which was at anchor; but Fry, L.J. in the same case takes "navigation" as meaning "the science or art of conducting a ship from place to place through the water." Here there was no improper navigation in that sense. The association does not undertake to indemnify the shipowner if he fails to provide a ship which is reasonably fit to carry the cargo. In *Tattersall* v. *The National Steamship Company Limited* (50 L. T. Rep. N. S. 299; 5 Asp. Mar. Law Cas. 206; 12 Q. B. Div. 297) the cargo owner was damnified in consequence of the shipowner's negligence in failing to disinfect his ship after carrying a previous cargo of cattle suffering from foot-and-mouth disease, and it was held that an exception in the bill of lading providing that under no circumstances should the shipowner be responsible for more than 5*l.* for each of the animals, did not protect him. [WILLS, J.—Is not that an entirely different class of contract?] In *Hayn, Roman, and Co.* v. *Culliford and Clark* (39 L. T. Rep. N. S. 288; 40 L. T. Rep. N. S. 536; 4 Asp. Mar. Law Cas. 128; 3 C. P. Div. 410; 4 C. P. Div. 182) the bill of lading contained a clause that the shipowners should not be liable for the default of the pilot, master, or mariners in navigating the ship, and, sugar having been damaged by bad stowage, it was held that the expression "default in navigating the ship" did not cover negligent stowage. [WILLS, J.—At what moment do you say navigation commences?] As soon as the crew begin to move the fastenings of the ship for the purpose of setting out on the voyage.

Kennedy, Q.C. in reply.—There is a difference between the construction of the expression "navigation," as is the case with many other expressions and phrases also, in charter parties and bills of lading on the one hand, and policies of insurance on the other.

SMITH, J.—This is an action brought by the plaintiffs against the Liverpool Sailing Ship Owners' Mutual Indemnity Association to recover the loss sustained by them in respect of a cargo of wheat shipped in a vessel of which they are owners, and which is duly entered on the books of the defendant association at San Francisco, and damaged by sea water in the course of the voyage across the Atlantic. The question we have to decide is as to the true meaning of the article of association enumerating the risks against which the members of the association are indemnified. As far as I can judge, no case has been cited to us throwing any light upon the meaning of the third paragraph, except the case of *Good* v. *The London Steamship Owners' Mutual Protecting Association* (L. Rep. 6 C. P. 563) since, in my opinion, the cases cited as to the meaning of the word "navigation" in bills of lading are of no authority, and do not assist us at all in determining in what way we ought to construe the word "navigation" in this case. This is a matter in which the plaintiffs, although they are really shipowners, stand in the place of owners of cargo. They are engaged in carrying goods in their ship, and they therefore contract with the defendant association to make good damage occurring to the goods under certain circumstances. Under the circumstances stated in the case, damage has occurred to goods shipped on board one of the plaintiffs' ships entered in the association, and the question is, whether the plaintiffs can make out that the loss sustained by them comes within any of the clauses of the article of association enumerating the risks. If they can bring it within one of those clauses, they are entitled to succeed; if not, they must fail. The purpose of the association is to indemnify its members against losses, damages, and expenses for which they may be liable in respect of any ship duly entered on the books of the association arising from: First, loss of life or personal injury howsoever or to whomsoever the same may be caused; secondly, from loss or damage of or to any other ship or boat, or of or to any goods, merchandise, or other things whatsoever on board

such other ship or boat, howsoever such loss or damage may be caused, so far as the same shall not be covered by the usual form of Lloyd's policy with running down clause attached. Clearly neither of these clauses affect the case. Then comes the third clause, which is: "From loss or damage of or to any goods or merchandise other than as aforesaid, whether on board any ship so entered as aforesaid or not, caused by improper navigation of the ship carrying the goods or merchandise, or of any other ship (but not from damage by bad stowage), or of or to any piers or jetties, or other fixed or movable things whatsoever, whether on board such ship or not, howsoever such damage may be caused." As to the first words of the clause, I agree with Mr. Kennedy that the meaning is that if the goods are damaged while being carried on board a lighter or on the quays, the member is to be indemnified against such damage. Then come the words "caused by the improper navigation of the ship carrying the goods or merchandise or of any other ship (but not from damage caused by bad stowage)."

What is the meaning of the words "damage to goods caused by the improper navigation of the carrying ship"? It has been argued on behalf of the defendant association that they are not liable for the damage, unless the plaintiffs are able to make out that their ship was endangered; but the plaintiffs are not seeking an indemnity in the character of shipowners, but as the owners of goods, and, in my judgment, if the goods were damaged by the improper navigation of the carrying ship, the plaintiffs are entitled to an indemnity. Let us assume for a moment that goods were carried with the hatches off from port to port, and that the ship was not at all damaged or endangered thereby, but nevertheless water got into the hold and damaged the cargo, could it be said in that case that the navigation was not improper, because the safety of the ship was never imperilled? It seems to me that this was not the meaning of the parties when they entered into this agreement. In my judgment, that would be improper navigation by the ship with respect to the goods. But the damage was not caused on this occasion in that way, but by the negligence of persons employed by the plaintiffs to put the cargo on board. It seems that this cargo was in part taken on board through an opening made for the purpose in the side of the ship, and when part of the wheat was on board, and before the loading was completed, this opening was closed in the ordinary way by means of an iron door, fitted for the purpose on the outside of the ship on hinges, which, when shut, was made fast by bolts passing through iron bars on the inside of the ship and screwed up by nuts on the inside, the joint between the ship's side and the overlapping flange of the door being made tight by smearing the flange with a mixture of white or red lead and oil before shutting the door. On the voyage in question, this port was not closed efficiently, inasmuch as the joint between the flange of the door and the ship's side was not perfectly tight, and, as the port was below the water-line, some water leaked in, and it is admitted that the defect in the joint was due to negligence on the part of persons employed by the plaintiffs. Can it, under these circumstances, be said that the ship was properly navigated with respect to the cargo carried from the commencement to the end of the voyage? The port was unclosed at the commencement of the voyage, and continued unclosed during the whole of the voyage; and I think that that amounted to improper navigation of the ship with respect to the cargo carried. As to the authorities, I only desire to add that I do not deal at all with the cases in which similar words in bills of lading have been discussed and construed, because I do not think that those cases are in point. I will refer to two cases only. In *Good* v. *The London Steamship Owners' Association* (*ubi sup.*) Willes, J. said that "improper navigation, within the meaning of this deed, is something improperly done with the ship or part of the ship in the course of the voyage;" but I do not think that the learned judge intended by those words to confine the meaning of the term to things actually done by some hand during the actual voyage, and I think that it applies equally to a thing done before the voyage, and continued through it. In the case of *The Warkworth* (49 L. T. Rep. N. S. 715; 5 Asp. Mar. Law Cas. 194, 326; 51 L. T. Rep. N. S. 558; 9 P. Div. 20, 145) the default occurred before the commencement of the voyage, and the Master of the Rolls there says (51 L. T. Rep. N. S. 559; 9 P. Div. 147): "Although the negligence occurred before the vessel started, its effect was continuous, and operated while the ship was on her voyage." It is quite true that, in that case, the act of negligence operated with respect to the ship, whereas in the present case it operated with respect to the goods; but I do not think that that constitutes a fatal distinction, and I therefore think that the plaintiffs are entitled to judgment.

WILLS, J.—I am of the same opinion. The case is not free from difficulty, and the course which the argument took is an illustration of the danger of trying to arrive at the meaning of a term in a particular contract by the aid of the construction placed upon the same term in a contract of a totally different nature. In this case there is, I think, singularly little to be gathered by way of illustration from the cases. With regard to cases dealing with bills of lading the words which we have to construe are, in the generality of cases, found in connection with a number of other words which have such a large effect in limiting or extending their meaning that we can gather but little from them as to the construction of the words when standing, as they do here, by themselves. In the same way with reference to the case of *The Warkworth* (*ubi sup.*), the section of the Merchant Shipping Act there construed deals with a state of things so different from this contract of insurance, that we are in danger of being misled, rather than guided, by the construction of the word in such widely different circumstances. Looking, then, at the contract itself, the covenant which we have to construe was clearly intended to indemnify the owner of any ship entered on the books of the association from any losses he might sustain by reason of the goods he may be carrying in the ship being damaged. The circumstances under which he is to be indemnified are not confined to cases in which there is no negligence on his part, because

the majority of the cases to which the articles of association apply are cases in which the shipowner or his servants are guilty of negligence, so that there is no force in the argument that he ought not to be protected from the consequences of his own negligence in sending the ship to sea in an unfit state. The question we have to decide is as to what was in contemplation of the parties to this contract at the time they entered into the agreement. The only case which is sufficiently germane to the present to throw light upon it is that of *Good* v. *The London Steamship Owners' Mutual Protecting Association* (*ubi sup.*). In that case a literal interpretation was placed upon the words "improper navigation" occurring in a contract of indemnity. Damage was done to goods which were being carried in the ship, and it was held that these words covered a state of things which did not endanger or even delay her. The only difference between that case and the present is that there the improper act was done, and the improper condition of the ship with respect to the cargo supervened while the ship was on the voyage. Here these things occurred before the ship set sail. Is that a valid distinction? I do not think that this distinction was present to the minds of those who prepared this contract. If those who framed it had intended to draw this fine distinction between an improper condition of the ship with respect to the cargo before she set sail and after she set sail, they would have introduced words to indicate the distinction. The case of a ship sent to sea with the hatches open has been discussed, and it is not denied that, if that were done, and the hatches were left open, the weather being such that the act would not impede or endanger the ship, but would damage the cargo, there would be improper navigation of the ship with respect to the cargo. What is the difference between failing to remedy that defect, and failing to stop up the hole which was in this case left open in the ship's side? The only difference I am able to see is, that in the one case the cause of the mischief would be apparent, and in the other it would not be so, which is equivalent to saying that in the one case there would be a negligent act, and in the other there would not; and therefore to draw this distinction would be to construe the term "improper navigation" as implying and depending upon negligence. I agree, therefore, with my brother in thinking that the sending of this ship to sea with a hole in her side was improper navigation of the ship with respect to the goods, and that there must be judgment for the plaintiffs, with costs.

Judgment for the plaintiffs.

Solicitors for the plaintiffs and for the defendants, *Gregory, Rowcliffes, Rawle*, and *Johnstone*, for *Hill, Dickinson, Lightbound*, and *Dickinson*, Liverpool.

Wednesday, Dec. 15, 1886.

(Before WILLS and GRANTHAM, JJ.)

WILLIAMS *v.* THE BRITISH MARINE MUTUAL INSURANCE ASSOCIATION LIMITED. (*a*)

Marine insurance—Mutual association—Annual policies—Forfeiture for nonpayment of contribution—Set-off of contribution against loss.

By the rules of a marine insurance association, the members insured each other's ships from noon of Feb. 20 *in any year, or from the date of entry of a vessel, until noon of Feb.* 20 *in the succeeding year; and the managers were empowered to levy contributions of one-fourth part of the estimated annual premium quarterly in each year, such premiums of insurance to form a fund for the payment of claims; and if any member should refuse to pay his contributions thereto, his respective ship or ships should cease to be insured, and he should thenceforth forfeit all claims in respect of any loss.*

On the 5th April 1881 *a loss incurred in the year* 1880-1 *upon a ship belonging to the plaintiff, and insured in the association, was fixed by an average adjuster at* 180*l. A call of* 41*l.* 10*s., made on the plaintiff on the 5th May* 1881 *for the second quarter of* 1881-2, *was by mutual consent set off against the loss. On the 13th May* 1881 *the association paid the plaintiff* 100*l. on further account of the loss. On the 23rd June* 1881 *a call was made on the plaintiff of* 52*l.* 16*s.* 8*d., and on the 5th July* 1881 *another call of* 31*l.* 4*s. The plaintiff having tendered the balance due from him, the association refused to accept it, and during the pendency of an action to recover the full amount of the two calls one of the plaintiff's ship insured in the association was wholly lost.*

Held, on case stated, that as the calls were in respect of matters relating to the 1880-1 *policy, and it was not shown that they were in respect of his ship insured as aforesaid, the plaintiff's ship did not cease to be insured, and that he had not forfeited his claim in respect of the loss.*

THIS was a case stated for the opinion of the court by an arbitrator, pursuant to a submission entered into by the parties to the action.

The case was, so far as material, as follows:—

CASE.

1. The question in this case is whether Mr. William Humphrey Williams is entitled to recover against the British Marine Mutual Insurance Association under two polices of insurance granted to him by the association on the hull and freight of the ship *Mathilde*.

2. The association is a company limited by guarantee and registered under the Companies Act 1862. It has no capital divided into shares.

3. Mr. Williams was, in 1880, a member of the association, and he had insured therein for twelve months the hull and freight of two ships called the *Mathilde* and the *Oasis*. A loss amounting to 19*l.* 10*s.* was incurred in respect of the *Oasis*, and a loss, the amount of which was disputed, was also incurred in respect of the *Mathilde*.

4. By a submission, dated the 8th Dec. 1880, it was agreed to refer the question of the amount of the loss on the *Mathilde* to Mr. Richards, the average adjuster, and on the 5th April 1881 Mr.

(*a*) Reported by JOSEPH SMITH, Esq., Barrister-at-Law.

Richards published his award fixing the amount at 180*l.* 8*s.* 6*d.*

5. In the meantime, viz., on the 20th Feb. 1881, the policies on the *Mathilde* expired, and thereupon Mr. Williams insured the vessel afresh in the association for a further period of twelve months, the hull for 600*l.* and the freight for 300*l.*, the premiums amounting to 72*l.* and 30*l.* respectfully. It is in respect of these insurances that the present dispute has arisen.

6. By the rules of the association these premiums became payable in four instalments of 25*l.* 10*s.* each on the 4th May 1881, 4th Aug. 1881, 4th Nov. 1881, and 4th Feb. 1882. By its rules the association was entitled to draw bills for these instalments in advance, but it appeared that in practice the acceptance of such drafts was not insisted upon, and the members were allowed to pay in cash if they preferred to do so.

7. On the 5th May 1881 the association sent to Mr. Williams a draft for 41*l.* 10*s.*, which was intended to represent the second quarter's premium on the *Mathilde* (25*l.* 10*s.*) and the second quarter's premium (16*l.*) on a fresh insurance of the *Oasis*. Mr. Williams did not accept this draft, and asked that the amount might be set off against the 180*l.* 8*s.* 6*d.* due to him under Mr. Richards' award. No objection was, in the first instance, taken by the association to this course, and, indeed, it appeared that when drawing for the first quarter's premiums on the 1st March 1881 a similar set-off in respect of a small claim then due under the previous policy on the *Oasis* had been allowed by the association.

8. On the 13th May 1881 the association paid to Mr. Williams 100*l.* on account of the sum found due to him by Mr. Richards' award.

9. On or about the 23rd June 1881 a call was made on the members of the association, and a draft for 52*l.* 16*s.* 8*d.*, Mr. Williams' contribution in respect thereof, was on that day sent to him for acceptance according to the provisions of rule 4 indorsed on the policies. And subsequently, viz., on or about the 5th July 1881, there became due from Mr. Williams to the association a sum of 31*l.* 4*s.* in respect of a "protection claim" on both ships.

10. These two last-mentioned sums Mr. Williams also asked to have placed against the balance still due to him under the award, and as they exceeded such balance by a few pounds he expressed his readiness and willingness, and he was ready and willing to pay the difference. The association, however, refused to assent to this course, insisting that both amounts, 52*l.* 16*s.* 8*d.* and 31*l.* 4*s.*, should be paid forthwith without deduction, and on the 11th July 1881, a writ was issued to recover the same. In the action so commenced the association also sought to recover the full amount of the draft for 41*l.* 10*s.* mentioned in paragraph 7 hereof, as also 12*l.* 17*s.* 2*d.* the amount of certain "policy charges" which the association had previously represented to Mr. Williams as being due not to it but to a Mr. Evans, who acted as its agent.

11. While the above-mentioned action was pending, viz., on the 3rd Oct. 1881, the *Mathilde* was totally lost. The association refused to meet any claim in respect of the said loss, either for hull or freight, alleging that Mr. Williams' omission to pay the amounts claimed of him as aforesaid exempted the association from liability by virtue of the provisions of the 5th rule indorsed on the policies.

12. The question for the opinion of the court was whether, under the circumstances aforesaid, the 5th rule applies so as to exempt the association.

The following rules of the association became material in the course of the argument:

2. That the members of this class shall severally and respectively, not jointly or in partnership, nor the one for the other of them, but each only in his own name, insure each other's ships, or shares of ships, from noon of the 20th day of Feb. 1881, or from the date of entry of each vessel respectively, until noon of the 20th day of Feb. then next, and from that time until noon of the 20th day of Feb. in the next succeeding year, and so on from year to year, unless notice to the contrary be given as hereinafter mentioned, against all losses, perils, and damages of what nature or kind soever, which may be sustained or received by their respective ships, or caused or done by them to any other ship or craft, except for personal injury, loss of life, or when on the voyages, in the trades, or under the circumstances hereinafter particularly excepted.

4. The managers are hereby empowered to levy contributions of one-fourth part of the estimated annual premium, which shall be drawn for at two months' date from 1st March, June, September, and December, in each year, such premiums of insurance to form a fund for the payment of claims. Provided always, that if the losses and expenses exceed the amount of premiums so realised, the deficiency shall be made good by an additional percentage on the premiums, to be drawn for as the committee may determine. But should the premiums so realised exceed the losses and expenses incurred, then the surplus to be proportionately returned.

5. That the managers' drafts on any member of this class for his proportion of the annual estimated premium, and for any additional percentage thereon, shall be duly accepted and punctually paid when due; and if any member shall neglect, omit, or refuse to accept any such drafts, or to pay his contributions thereto, his respective ship or ships shall cease to be insured in or by this class, and he shall thenceforth forfeit all claims for or in respect of any loss or average under his policy or policies effected therein, and the managers are hereby authorised and empowered to sue for the amount due from any defaulting member, and if not recovered the loss shall be borne proportionately by all the members.

19. That in case of loss, the owner shall be liable for the amount of estimated annual premium, also additional per centages (if any) from date of entry to date of loss, but if the loss occurs before the 20th August, or within six months of the date of entry, he shall be liable for the annual premium only; in case of sale, the policy may be transferred with the consent of the managers, or the owner released from further liability by an equitable arrangement. In the settlement of claims the managers may retain a sum equal to a year's estimated call, to meet any further demands.

French, Q.C. for the plaintiff.

Barnes for the defendant company.

WILLS, J.—The action in which this special case is stated is brought by Mr. William Humphrey Williams against the British Marine Mutual Assurance Association, of which he was a member, and in which his vessel *Mathilde* was insured, to recover in respect of the total loss of that vessel which occurred on the 3rd Oct. 1881. This question must clearly depend upon the contract between the parties, and to ascertain what that was one must look at the policy, and at the policy alone. That document says that the plaintiff is insured on the *Mathilde* in accordance with the rules, conditions, and regulations annexed thereto, which by mutual agreement are to form part of and be of the same force and effect as if inserted in the body of the document. The first question raised is upon the second of these rules, and is whether the transactions of insurance of

each separate year are to be treated with or without reference to the transactions of any other year. The 2nd rule says that "the members of the club shall severally and respectively, not jointly or in partnership, nor the one for the other of them, but each only in his own name, insure each other's ships, or shares of ships, from noon of the 20th Feb. 1881, or from the date of entry of each vessel respectively, until noon of the 20th Feb. then next, and from that time until noon of the 20th Feb. in the next succeeding year, and so on from year to year unless notice to the contrary be given." I do not see that there is any room for substantial doubt as to the construction of this rule. The cardinal thing to be observed is that the insurance is intended to be a mutual insurance, and I cannot think that it would be mutual unless each year is dealt with separately and by itself. As all the policies come to an end on the 20th Feb. in each year, the persons entering for the succeeding year may be an entirely different set of persons. They are of course in all probability nearly the same, but still it is possible that there might be a very great change, and the insurance would consequently cease to be mutual unless the transactions of each year were separate, giving rise to a separate set of accounts, to be dealt with apart from the accounts of other years. Many passages in the rules show that this was the intention of the parties. The 2nd clause shows that the policies are to come to an end every 20th Feb., and then the 4th clause provides that "the managers are hereby empowered to levy contributions of one-fourth part of the estimated annual premium, which shall be drawn for at two months date from the 1st March, June, September, and December, in each year, such premiums of insurance to form a fund for the payment of claims, provided always that if the losses and expenses exceed the amount of premiums so realised the deficiency shall be made good by an additional percentage on the premiums, to be drawn for as the committee may determine, but should the premiums so realised exceed the losses and expenses incurred then the surplus to be proportionately returned." It is clear that the "premiums" mentioned in that clause are not premiums in the ordinary sense of the word, and that the foundation of the contract is not the payment of a premium, but an agreement that each member should bear his aliquot share of the losses of the year covered by the policy. The provisions of this 4th clause indeed, are, in my judgment, carefully framed so as to apply to each year by itself, and make its transactions separate. It provides that, if the losses and expenses exceed the amount of premiums so realised—that is, the amount of the original estimate of the losses and expenses, for the phrases "estimated losses" and "estimated premium" are synonymous—then the deficiency is to be made good by an additional percentage on the premiums, and if the estimated premium exceeds the losses, then the surplus is to be returned. Taking all these clauses together, it is to my mind clear that the parties meant that the transactions of each year should stand on their own footing, and that the accounts should be adjusted on that basis. The 19th clause also is important, and points in the same direction. It provides that in case of loss, the owner shall be liable for the amount of estimated annual premium, also additional percentage (if any) from date of entry to date of loss, but if the loss occurs before the 20th Aug., or within six months of the date of entry, he shall be liable for the annual premium only, and in the settlement of claims the manager may retain a sum equal to a year's estimated call to meet any further demands.

Now, although this is a limited liability company, and therefore there is a right of action between the company and each insurer, I cannot see any difficulty in adjusting their rights under this contract. Applying the 19th rule to the present case, is there any defence to the action? In the course of the year, extending from the 20th Feb. 1880 to the 20th Feb. 1881, in which year Mr. Williams was a member of the defendant association, and had insured therein his vessel *Mathilde*, a loss was incurred upon that ship, the amount of which was disputed, and it was thereupon referred to an average adjuster, who, on the 5th April 1881, fixed it at 180*l.* 8*s.* 6*d.* This amount was due in respect of the year 1880-1, and was to be satisfied out of the contributions of members for that year, and from no other source. The adjustment, however, was not made until the 5th April 1881, and on the 5th May 1881 a call of 41*l.* 10*s.* was made by the association on Mr. Williams, which, it is said, was intended to represent the second quarter's premium for 1881-2 on the *Mathilde*, and on another ship belonging to Mr. Williams, also insured in the association, and it would seem that the company allowed Mr. Williams to treat that as a set-off against the sum due from the company to him—a very harmless course, because otherwise Mr. Williams would only have had to pay the amount into the coffers of the company with one hand and to receive it back with the other. That call then was settled. On the 13th May 1881 the association paid Mr. Williams 100*l.* on account of the sum due to him. Then on the 23rd June 1881 another call was made upon him by the association for 52*l.* 16*s.* 8*d.* It is not stated in the case in respect of what this call was made, but it is now stated by counsel that it was in respect of losses for the year 1880-1. A contribution therefore is asked of him in respect of the losses of that year, and he desires to set off a loss of the same year. As far as I can see he is perfectly at liberty to do so, and I cannot conceive on what ground it can be contended that he is not. On the 5th July 1881 another call was made on the plaintiff for 31*l.* 4*s.*, and both these last claims he asked to have placed against the balance still due to him under the award, and as they exceeded such balance by a few pounds he expressed his readiness and willingness, and was ready and willing to pay the difference. The association, however, refused to assent to this, and on the 11th July issued a writ to recover both the 52*l.* 16*s.* 8*d.* and the 31*l.* 4*s.*, and also the amount of 41*l.* 10*s.* called on the 5th May, and the *Mathilde* having been totally lost on the 3rd Oct. 1881, during the pendency of the action, they now refuse to meet any claim in respect of that loss on the ground that the plaintiff having refused to pay his contributions, the *Mathilde* has, by the operation of the 5th rule, ceased to be insured, and the plaintiff has forfeited all claim in respect of her loss. Now the 5th rule provides that the managers' drafts, or any member's for his proportion of the annual

estimated premium, and for any additional percentage thereon, shall be duly accepted and punctually paid when due, and if any member shall neglect, omit, or refuse to accept any such drafts, or to pay his contributions thereto, his respective ship or ships shall cease to be insured, and he shall thenceforth forfeit all claims for or in respect of any loss or average under his policy. But the calls mentioned were not necessarily in respect of the *Mathilde*, and I see nothing in the case to show that they were so; but, in order to bring the plaintiff and his vessel within the operation of the 5th rule, it must be shown that there was a default in respect of that ship, and its right and liabilities must not be mixed up with that of any other ship. By the rule a forfeiture is only to take place as to a particular ship where there is a default in payment with respect to that particular ship, otherwise there would be no meaning given to the word "respective." There is nothing here to show that the small amount which was left due by the plaintiff on the 5th July was not in respect of some other ship, and the person relying upon the fact that it was not so must establish it. In my opinion it is not shown that the plaintiff was in default in his contributions with respect to that ship. If I am wrong in saying that the forfeiture applies to a particular ship only, and if, according to the true construction of the 5th rule, there is a forfeiture in respect of a ship in case a member is in default in respect of other ships, I think that the proper inference of fact to be drawn from the facts as stated is that the plaintiff was willing to pay the amount which was due on the balance of the account, and would have paid it, but that the defendant company agreed to waive the formality of a tender and to treat what took place as a tender, taking their stand upon their right to make the plaintiff pay the whole of the contributions levied. I am of opinion that the *Mathilde* did not cease to be insured, and that there was no forfeiture. The plaintiff is therefore entitled to judgment.

GRANTHAM, J.—I am of the same opinion, and I have no doubt that the plaintiff is entitled to recover in respect of this loss. The argument relied upon by Mr. Barnes, that each year's accounts must be considered separately, has considerable weight, but I rely upon the fact that nothing was left undone by the plaintiff which entitles the defendants to say that a forfeiture has been incurred by him. In the case the calls upon the plaintiff's two ships are mixed up, but, as far as the *Mathilde* is concerned, if we take the calls upon that vessel only, the association actually had money in hand, and it is very startling if, under these circumstances, he is to be told that no set-off can be allowed. I think that the plaintiff is entitled to say that he has paid or tendered all his contributions, and that no forfeiture has been shown.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Wynne, Holme*, and *Wynne*, for *Forshaw* and *Hawkins*, Liverpool.

Solicitors for the defendants, *Stocken* and *Jupp*.

Monday, June 13, 1887.

(Before DAY and WILLS, JJ.)

SMITH, EDWARDS, AND CO. *v.* TREGARTHEN. (*a*)

Bill of lading—Non-delivery of cargo—Damages—Bill of Lading Act 1855—18 & 19 *Vict. c.* 111, *s.* 3.

The defendant, the master of a vessel in the cotton trade, signed a bill of lading for 400 *bales of cotton said to be shipped on board that vessel, then lying in a port of the United States and bound for Liverpool. The bill of lading was indorsed over to the plaintiffs, who carried on their business in Liverpool. When the vessel arrived at Liverpool, on the* 26*th Oct.* 1885, *she was found to have on board only* 165 *bales of cotton; and the defendant informed the plaintiffs that another ship would arrive in a few days with the remainder of the bales. The second ship with* 235 *bales arrived on the* 29*th Oct. The plaintiffs accepted the bales of cotton on board both ships. The price of cotton fell between* 26*th and* 29*th Oct.* 1885. *The plaintiffs afterwards brought an action in the County Court at Liverpool against the master of the vessel to recover, on the ground of non-delivery of the* 400 *bales of cotton, the fall in the market price between the* 26*th and the* 29*th Oct.* 1885. *The County Court Judge gave judgment for the plaintiffs for the amount claimed. The defendant appealed.*

Held, that the County Court judge was right, and the plaintiffs were entitled to recover the loss caused by the fall in the value of the cargo as damages for non-delivery.

THIS was an appeal, by way of motion for a new trial, from the judgment of the County Court of Liverpool in favour of the plaintiffs, who were indorsees of a bill of lading for 400 bales of cotton signed by the defendant, the master of the vessel on board which the bill of lading said they were shipped.

The defendant was master of the steamship the *Carbis Bay*, which, in September 1885, was lying in the port of Wilmington in the United States.

On the 25th Sept. 1885, the defendant signed the following bill of lading:

Shipped in good order and condition on board the British steam vessel the *Carbis Bay*, whereof J. D. Tregarthen is master, now lying at the port of Wilmington, North Carolina, and bound for Liverpool, four hundred bales of cotton, being marked and numbered as in margin, and are to be delivered in like order and condition at the port of Liverpool.

This bill of lading was indorsed over to the plaintiffs.

When the bales came to be put on board, the defendant, as master, said that 235 of the bales could go by another vessel, named the *Wylo*. They were shipped on board, and for these 235 bales another bill of lading was signed by the captain of that vessel, which was afterwards also indorsed over to the plaintiffs.

The *Carbis Bay* arrived in Liverpool on the 26th Oct. 1885, and the defendant informed the plaintiffs that the *Wylo* would arrive in a few days.

The *Wylo* arrived on the 29th Oct. The plaintiffs accepted the 235 bales and the 165 bales in respect of the 400 bales mentioned in the bill of

(*a*) Reported by W. P. EVERSLEY, Esq., Barrister-at-Law.

lading. There was a fall in the price of cotton between the 26th and 29th Oct. 1885.

Some time afterwards the plaintiff brought an action in the County Court of Liverpool to recover the fall in the market price of cotton between the 26th and 29th Oct., on the ground that there had been a failure to deliver the cargo in accordance with the terms of the bill of lading.

The County Court judge gave judgment for the plaintiff; the defendant appealed.

By 18 & 19 Vict. c. 111, s. 3:

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 such holder of the bill of lading shall have had actual notice at the time of receiving the same, that the goods had not been in fact taken on board. Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

Cohen, Q.C. (*Shand* with him) for the defendant.—The County Court judge was wrong in holding that there was non-delivery in point of law by the defendant; and that the plaintiffs were entitled to recover as damages the fall of the price of cotton between the 26th and 29th Oct. 1885. This is a mere case of delay in delivering the cargo; and it has been settled that the loss of market resulting therefrom is too remote a consequence to be considered as an element of damage:

The Parana, 36 L. T. Rep. N. S. 388; 3 Asp. Mar. Law Cas. 220, 399; 2 P. Div. 118;
The Notting Hill, 5 Asp. Mar. Law Cas. 241; 51 L. T. Rep. N. S. 66; 9 P. Div. 105.

The plaintiffs accepted these goods, and so are not entitled to damages on such a basis. [Day, J.—There was a clear right of action on the 26th Oct. for non-delivery, which is not lost by subsequent acceptance. The damages would be the value of the goods in the market.] The plaintiffs waived that by accepting the goods.

Pickford, for the plaintiffs, was not called upon.

Day, J.—I am of opinion that the County Court judge was right. The goods in this case were said to be shipped on board the *Carbis Bay*; but on her arrival at the port of destination they were found not to be on board. The defendant, the captain of that vessel, is estopped from denying that they were on board by his having signed bills of lading to the effect that they were on board. It was known what the market value of the goods at the date of the arrival of the *Carbis Bay*, and that was the measure of damages. No doubt afterwards the remainder of the goods was brought by another ship, the *Wylo*, and tendered to the plaintiffs, the indorses of the bills of lading, for what they were worth. The plaintiffs accepted them, and to that extent the claim for damages may be reduced, but the original right to maintain the action remains in full force.

Wills, J.—I am of the same opinion. Under the Act of Parliament, we are bound to assume a state of things which did not exist; we are bound to treat the matter as though the goods were all shipped on board the *Carbis Bay*. But on the arrival of that ship, she is found not to have the goods on board, and at that moment a right of action for non-delivery of the goods enures to the holders of the bills of lading. What takes place afterwards between the plaintiffs and defendant might have taken place in accord and satisfaction of the original cause of action, but there must have been an agreement to that effect. The delivery *ex* the *Wylo* is not delivery *ex* the *Carbis Bay*; and the only result of the subsequent transactions between the parties is the reduction of damages. The cases in which the goods had been actually shipped on board, but were a long time on the voyage are different, because there was never a right of action for non-delivery, but only for delay. *Motion dismissed.*

Solicitors for the plaintiffs, *Field, Roscoe*, and *Co.*, for *Bateson* and *Co.*, Liverpool.

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

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

March 19 *and April* 6, 1887.

(Before Cave, J.)

Re Bruno, Silva, and Son; *Ex parte* Francis and Co. Limited. (*a*)

Stoppage in transitu—End of transit—Purchase by agent in England for foreign principal—Delivery on principal's vessel—Mate's receipts—Bankruptcy.

B. and S., acting as agents in England for a foreign principal, purchased from F. and Co., in England, cement for the New York market; the cement was ordered to be sent alongside a vessel which B. and S. had purchased for their principal, and was shipped on board that vessel; mate's receipts for the cement were taken by F. and Co. and handed on to B. and S., who exchanged them for bills of lading in which B. and S. were stated to be the shippers, and which made the goods deliverable to the order of B. and S. B. and S. gave all necessary directions as to the destination of the goods and the sailing of the vessel. While the vessel was on its way to New York, B. and S. became bankrupt, and F. and Co. claimed as unpaid vendors to stop the cement in transitu. F. and Co. knew not only that the vessel belonged to B. and S.'s principal, but also that the cement was bought by B. and S. for that principal.

Held, that F. and Co. were not entitled to stop the cement in transitu.

This was a motion on behalf of Messrs. Francis and Co. for a declaration that they were on the 2nd March 1885 entitled to stop *in transitu* 2225 barrels of Portland cement.

Messrs. Francis and Co. were cement manufacturers carrying on business at Vauxhall.

In the latter part of the year 1884 Messrs. Bruno, Silva, and Son, who were merchants carrying on business in the city of London, and acting as agents for a Mr. Burmester, a merchant at Oporto, bought of Francis and Co. the cement in question.

The cement was stated to be required for the New York market.

On the 1st Dec. Bruno, Silva, and Son and

(*a*) Reported by J. E. Vincent, Esq., Barrister-at-Law.

Francis and Co. met and agreed upon the terms of the purchase, and Bruno, Silva, and Son then informed Francis and Co. that the cement was to be shipped in a vessel that Bruno, Silva, and Son were then purchasing on behalf of their principal abroad, and which was then lying in the West India Docks.

Early in Jan. 1885 the vessel was so purchased by Bruno, Silva, and Son for Mr. Burmester, their principal abroad.

Bruno, Silva, and Son thereupon instructed Francis and Co. to send the cement alongside the vessel. The cement was sent by Francis and Co. alongside the vessel then loading in the West India Docks, and was duly shipped on board.

Francis and Co. knew not only that the vessel belonged to Burmester, but also that the cement was bought by Bruno, Silva, and Son for him. Mate's receipts for the goods as shipped were in due course given by the mate to Francis and Co.'s lightermen, and subsequently handed by Francis and Co. to Bruno, Silva, and Son.

Bruno, Silva, and Son gave all necessary directions to the master of the ship as to the receipt of the goods, the sailing of the vessel, and her destination.

Bills of lading making the cement deliverable at New York to their order, and in which they were described as shippers, were taken by Bruno, Silva, and Son, and dated 12th Jan. 1885.

The vessel sailed in due course to New York with the cement on board.

On the 14th Feb., while the vessel was on her voyage, and while Francis and Co. were still unpaid, Bruno, Silva, and Son became bankrupt.

Francis and Co. thereupon claimed as unpaid vendors to exercise their right to stop the cement *in transitu*.

On the 2nd March 1885 it was arranged, with the sanction of the official receiver, that instead of stopping the delivery of the cement at New York, Francis and Co. should be considered as having exercised any right of stoppage *in transitu* to which they were then entitled.

And this was a motion by Francis and Co. to declare that they were so entitled to exercise their right of stoppage *in transitu* on the 2nd March 1885.

Myburgh, Q.C. and *Nicoll* for the applicants.—The question is, was there an actual delivery to Bruno, Silva, and Son, or a constructive delivery only? Was the destination New York or London? The destination is the place where the goods are to be sent to by the vendor, and here it was fixed by Burmester as New York. We are to ship the goods. The real question is, are the goods delivered to a person to pass them on? as, if so, the transitus is not at an end. Our directions were that the goods were to be sent on board for shipment and not to be kept there. In Benjamin on Sale, 3rd edit., p. 832, it is stated, "that the question and the sole question for determining whether the transitus is ended is, in what capacity the goods are held by him who has the custody? Is he the buyer's agent to keep the goods? or the buyer's agent to forward them to the destination intended at the time the goods were put in transit?" This is not a case of a delivery of goods to a purchaser's own ship.

[CAVE, J.—Could you have compelled the master to hand you bills of lading?] Yes. They cited

Ex parte Rosevear Clay Company, 4 Asp. Mar. Law Cas. 144; 40 L. T. Rep. N. S. 730; 11 Ch. Div. 560;

Berndtson v. *Strang*, 19 L. T Rep. N. S. 40; 3 Mar. Law Cas. O. S. 154; L. Rep. 3 Ch. App. 588;

Turner v. *Trustees of Liverpool Docks*, 6 Ex. 543;

Schotsman v. *London and Yorkshire Railway Company*, 2 Mar. Law Cas. O. S. 485; 13 L. T. Rep. N. S. 733; L. Rep. 2 Ch. App. 332;

Kemp v. *Falk*, 47 L. T. Rep. N. S. 454; 5 Asp. Mar. Law Cas. 1; 7 App. Cas. 573;

Ex parte Golding, 42 L. T. Rep. N. S. 270; 13 Ch. Div. 628.

Bowen Rowlands, Q.C. and *Linklater* for the trustee.—It is clear that here there was an actual delivery by Francis and Co. Their intention was to part with the goods. The transit was over before March. The second destination means that you must give not only the name of the place to which, but also the name of the person to whom goods are to be sent; and *Ex parte Miles; Re Isaacs* (15 Q. B. Div. 39) shows that the mere fact that the seller knows to what place the goods are going does not make that place the place of destination. Everything shows that the vessel was the place of destination. While the goods were with the lighterman no doubt they could have been stopped.

Myburgh, Q.C. in reply.—We were bound to deliver the goods into the vessel to be carried on, and they accepted them to be shipped to New York.

Cur. adv. vult.

April 6.—CAVE, J.—In this case a motion was made on behalf of Francis and Co. Limited for a declaration that they were, on the 2nd March 1885, entitled to stop *in transitu* 2225 barrels of cement, under the following circumstances: In 1884 Bruno, Silva, and Son, merchants in London, acting as agents of Mr. Burmester, a merchant of Oporto, bought of Francis and Co., cement manufacturers at Vauxhall, the cement in question, which was stated to be wanted for the New York market, and when the terms of purchase were agreed upon Bruno, Silva, and Son informed Francis and Co. that the cement was to be shipped in a vessel then lying in the West India Docks, and which they were then purchasing on behalf of their principal abroad. In Jan. 1885, when the purchase of the vessel had been completed, Bruno, Silva, and Son instructed Francis and Co. to send the cement alongside the vessel; this was done, and the cement was duly shipped on board. Mate's receipts for the cement were given to Francis and Co.'s lightermen, and handed by Francis and Co. to Bruno, Silva, and Son. Bruno, Silva, and Son gave all necessary directions to the master of the ship as to the receipt of the cement, the sailing of the vessel, and her destination, and took bills of lading making the cement deliverable at New York to their order. On the 14th Feb. 1885 Bruno, Silva, and Son became bankrupt, and thereupon Francis and Co. claimed to exercise the right of stoppage *in transitu* over the cement, which had not then arrived at New York. It must, I think, be taken that Francis and Co. knew not only that the vessel belonged to Burmester, but also that the cement was bought by Bruno, Silva, and Son for him. I offered, if any doubt existed on the subject, to take measures to have the truth as to the

matter cleared up, but Mr. Myburgh declined my offer.

Now upon these facts there can be no doubt that, as between Bruno, Silva, and Son and Burmester, the cement was *in transitu* on the 14th Feb., and although the cement was put on board Burmester's own vessel, yet Bruno, Silva, and Son, having taken bills of lading, had as against Burmester the right of stoppage *in transitu*: (*Feise* v. *Wray*, 3 East, 93, combined with *Turner* v. *Liverpool Docks Trustees*, *ubi sup.* But the question I have to decide is not what were the rights of Bruno, Silva, and Son against Burmester, who has not become insolvent, but what were the rights of Francis and Co. as vendors to Bruno, Silva, and Son; what as between them was the transitus? The object of the voyage to New York was to effect delivery to Burmester or his agents. It was not contemplated that Bruno, Silva, and Son should have possession at all, except in so far as they got possession by the delivery on board the vessel. As between themselves and Burmester, Bruno, Silva, and Son were to ship the cement on board, and they did so, and are described in the bills of lading as the shippers. As between themselves and Francis and Co., Bruno, Silva, and Son were to receive the cement on board the vessel. The only possession they required was so much as enabled them to fulfil Burmester's instruction by shipping the cement on his vessel. In the course of the argument I asked Mr. Myburgh what the effect would have been if Bruno, Silva, and Son had sent a clerk to the vessel to count the barrels of cement as they were put on board; and he did not seem to find the question easy to answer. It may be that, if Francis and Co. had taken bills of lading making the cement deliverable to their order at New York, the transitus would not have ended, as between Francis and Co. and Bruno, Silva, and Son, until the cement had arrived at New York, and Burmester, or his agent at New York, might, as between Francis and Co. and Bruno, Silva, and Son, have been treated as the agents of the latter to receive possession at New York, and the master of the ship solely as an agent for carriage. This, however, was not done. On the contrary, Francis and Co., knowing that Bruno, Silva, and Son were buying, not for themselves but for Burmester, or at all events for a principal abroad, and that the cement was to be shipped on board that principal's ship, handed the mate's receipts to Bruno, Silva, and Son, who took bills of lading in which they, and not Francis and Co., were described as the shippers. Under these circumstances was there an actual delivery to Bruno, Silva, and Son, or a constructive delivery only? I think there was an actual delivery on the ground that, although they knew that the cement had been bought by Bruno, Silva, and Son for their principal abroad, and that it was loaded on that principal's ship, Francis and Co. did not take bills of lading from the master, but took the mate's receipts to Bruno, Silva, and Son, who themselves handed those receipts to the captain, and obtained from him bills of lading in which they are described as the shippers. When Bruno, Silva, and Son were in possession of the mate's receipts, I see nothing as between themselves and Francis and Co. but their duty to Burmester, which could have prevented their taking bills of lading from the master for any other port, and thus impressing a fresh destination on the cement. They were, I think, when they got the mate's receipts, in actual possession of the goods, and might, so far as Francis and Co. were concerned have impressed a different destination upon them had they thought fit to do so. Suppose, while they had the mate's receipts and before exchanging them for the bills of lading, they had got a telegram from Burmester directing them to send the vessel with the cement to some other port, or to send the cement elsewhere by some other ship, why could they not have done so? If they could have done so, the cement had got into the possession of the vendees in such a way that they could have altered its destination, and if so the transitus was at an end. For these reasons, I am of opinion that, under the circumstances of this case, Francis and Co. had no right to stop the cement, and the motion must be refused with costs.

Solicitors: for the applicants, *Clarke, Rawlins, and Co.*; for the trustee, *Kearsey, Hawes, and Walsh.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Saturday, Dec. 4, 1886.

(Before the Right Hon. Sir James Hannen.)

The England.(a)

Action of restraint—Rights of part owners.

An agreement between the owners of a ship and two persons appointing them ship's husbands and managers, and empowering them to continue to act as such at all times thereafter for the owners, their executors, administrators, and assigns, and giving them the entire management of the vessel does not prevent a dissentient part owner from instituting an action of restraint, and obtaining bail from his co-owners in the value of his shares.

This was a motion by the defendants in an action of restraint, asking to be discharged from their undertaking to put in bail.

The action was instituted by the owner of two sixty-fourth shares in the steamship *England*, to obtain bail in the value of his shares. The remaining co-owners had entered an appearance, and had given an undertaking to put in bail.

By an agreement, made prior to the vessel being built, between the plaintiff and the defendants and Messrs. Short and Dunn, ship agents, of Cardiff, it was provided as follows: that the owners of the *England*, their executors, administrators, and assigns, agreed that Messrs. Short and Dunn should act as ship's husbands and managers of the *England*; that Messrs. Short and Dunn should be and act at all times thereafter, and discharge the duties of ship's husbands and managers for the said steamer; and that Messrs. Short and Dunn should remunerate and appoint the master and crew, and should in all respects have the entire management of the vessel.

The plaintiff was now dissatisfied with the management of Messrs. Short and Dunn, and thereupon instituted the present action.

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

Sir *Walter Phillimore* (with him *Dove*), for the defendants, in support of the motion.—It is submitted that in the circumstances of this case the plaintiff is estopped from objecting to the present management of this vessel. He has by this agreement bound himself at all times to leave the management of the ship in the hands of Messrs. Short and Dunn, and therefore deprived himself of the ordinary rights of a dissentient part owner:

The Innisfallen, 16 L. T. Rep. N. S. 71; 2 Mar. Law Cas. O. S. 470; L. Rep. 1 A. & E. 72;
The Talca, 42 L. T. Rep. N. S. 61; 5 P. Div. 169; 4 Asp. Mar. Law Cas. 226.

J. G. Baines, for the plaintiff, was not called on.

Sir JAMES HANNEN.—The general principle as to the rights of a part owner who dissents from the employment of a ship is clear, and is that he is entitled to prevent his share of the property being put in jeopardy in a manner which he thinks inadvisable, and is therefore justified in calling on the other owners to give security. He is entitled to bail in the value of his shares, and he then incurs no liabilities, and incurs no profits. But undoubtedly it is possible for a part owner to bind himself not to exercise those legal rights, and the question is whether in this case he has done so. Sir Walter Phillimore has argued that he has so bound himself, but I can find nothing in the facts to support that contention. The agreement among the part owners appointing Messrs. Short and Dunn ship's husbands does not preclude the idea that one or more of them may dissent from the proposed employment of the vessel, and does not prevent any dissentient part owner from exercising his legal rights. The facts would have to be very clear to induce me to say that Messrs. Short and Dunn were by reason of this agreement to have an arbitrary and exclusive management of this vessel so long as she is in existence. If Sir Walter Phillimore's contention were good, all the owners might disagree with the proposed employment of the vessel, and yet be powerless to alter it. I therefore think this motion must be dismissed with costs.

Solicitors: For the plaintiff, *Downing, Holman, and Co.*; for the defendants, *Ingledew, Ince, and Colt.*

Dec. 14, 1886; *Feb.* 7, *March* 28, 1887.

(Before the Right. Hon. Sir JAMES HANNEN and BUTT, J.)

THE ARINA. (*a*)

Master's wages—Extra pay—Ten days double pay—Wages to time of final settlement—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 187. 191—*Merchant Seamen (Payment of Wages) Act* 1880 (43 *&* 44 *Vict. c.* 16) *s.* 4.

Section 191 *of the Merchant Shipping Act* 1854, *giving a master "the same rights, liens, and remedies for the recovery of his wages" as a seaman has, does not give him the right to double pay under sect.* 187 *of the Merchant Shipping Act, nor to wages up to the final settlement of his claim under the Merchant Seamen (Payment of Wages) Act* 1880, *s.* 4.

The Princess Helena (*Lush.* 190) *overruled.*

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

THESE were two motions in objection to the registrar's report in an action for master's wages and disbursements.

The plaintiff was the late master of the barque *Arina*, and sued *in rem* for the recovery of his wages and disbursements.

The action was defended by the mortgagee in possession.

In 1886, while the *Arina* was at Newfoundland the mortgagee wrote to the plaintiff, telling him he was about to take possession of the ship, and giving him certain orders as to the management of the ship. The master wrote back refusing to take orders from anyone but the owner. On the ship arriving at Swansea, the plaintiff found that the owner had absconded, and thereupon telegraphed to the mortgagee that the *Arina* had arrived. Thereupon the mortgagee promised that the wages of the crew and master "were all right with him." The master, however, instituted the present action, and arrested the *Arina*. On the same day the master was discharged, the mortgagee promising to pay him his wages and disbursements, if his accounts were at once sent in.

The action was referred to the Registrar and Merchants, and the plaintiff was ordered to file his accounts, and he did so, claiming his wages to the date of his discharge, ten days double pay and wages to the date of final settlement. Prior to the hearing of the reference, the defendant paid into court the plaintiff's claim, less ten days double pay, wages until the time of final settlement, and costs. The assistant registrar, before whom the reference was heard, allowed the ten days double pay, disallowed the wages to the date of final settlement, and recommended that the plaintiff was entitled to the costs of reference, but not to the costs of the action.

Both parties now moved to vary the registrar's report, the plaintiff claiming to be entitled to wages to the date of final settlement, and the defendant objecting to the allowance of ten days double pay.

The motions were heard before Sir James Hannen, on 14th Dec. 1886, and were ordered to be re-argued on the 7th Feb. 1887, before a Divisional Court, composed of Sir James Hannen, and Butt, J.

L. E. Pyke for the plaintiff.—The registrar was wrong in disallowing wages until the time of final settlement. Upon the authority of *The Princess Helena* (Lush. 190) he was entitled to ten days double pay, and, if so, it is illogical to say he is not entitled to wages to the date of final settlement. The reasons which make a master entitled to ten days double pay, equally entitle him to wages to time of final settlement. [Sir JAMES HANNEN.—It may be that we, sitting as a Divisional Court, may question the accuracy of Dr. Lushington's decision.] By sect. 1 of the Merchant Seamen Act 1880, that Act is to be construed as one with the Merchant Shipping Acts 1854 to 1876, and as sect. 187 of the Merchant Shipping Act 1854, has been held to be applicable to masters, the analogous provisions of sect. 4 of the Merchant Seamen Act 1880 should be equally applicable. Even assuming the court were inclined to criticise the decision in *The Princess Helena* the court would not after this long lapse of years refuse

to follow it. Even admitting the ten days double pay not to form part of the master's wages, he can recover it as a "remedy" for the enforcement of due payment of his wages. Assuming the plaintiff's contention to be correct in principle, he is on the facts entitled to ten days double pay, and to wages till the time of final settlement.

Bucknill, Q.C. for the defendant.—The plaintiff is neither entitled to ten days double pay nor to wages till the time of final settlement. Even if *The Princess Helena* (*ubi sup.*) is rightly decided, it does not necessarily follow that the Merchant Seamen Act 1880 is applicable to masters. But it is submitted that the decision in *The Princess Helena* should be overruled. The reasons which induced the Legislature to inflict a penalty on shipowners for withholding payment of seamen's wages have no application to the case of masters. The relation of the master to his owners is such that the master is not in want of that protection which it is necessary the seamen should have. But, apart from outside considerations, the very language of the Legislature is against the plaintiff's contention; sect. 191 of the Merchant Shipping Act 1854 applies only to the recovery of the master's wages and confines itself to giving him the rights, liens, and remedies possessed by seamen for the recovery of their wages. It does not give him the right to extra payment, which is given to seamen by sect. 187, and as there are no express words so providing, and as this extra payment is a penalty inflicted on shipowners, the language of the section should not be strained to bear a meaning which it is not clear it possesses. The same remarks apply to the plaintiff's contention that he can recover the extra payment as a "remedy" for the enforcement of the payment of his wages.

Pyke in reply.

March 28.—The judgment of the Court was delivered by BUTT, J.—This is an action *in rem.* The plaintiff, a master mariner, claims 219*l.* 0*s.* 2*d.* as the balance of wages and disbursements due to him, and also ten days double pay, and also wages up to the date of final settlement. Mr. George Chas. Stewart, the mortgagee in possession of the vessel intervened, and it is between him and the plaintiff that the questions now under consideration have arisen. The amounts were in the ordinary course referred to the registrar assisted by merchants. Before the reference came on for hearing, the defendant had tendered and paid into court sums sufficient to satisfy the plaintiff's claim, except the sum of 8*l.* 13*s.* 4*d.* which the plaintiff sought to recover as ten days double pay, alleged to be due to him under the provisions of ss. 187 & 191 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), and, except an amount alleged to be due to him under sect. 4 of the Merchant Seamen (Payment of Wages and Rating) Act 1880, for wages up to "the time of final settlement." The registrar allowed the ten days double pay, but disallowed the claim for wages up to final settlement. Against this decision each party has appealed. There is also a question raised as to costs.

Sect. 4 of the Merchant Seamen (Payment of Wages and Rating) Act 1880 (43 & 44 Vict. c. 16), provides as follows: "In the case of foreign-going ships—(1) The owner or master of the ship shall pay to each seamen on account, at the time when he lawfully leaves the ship at the end of his engagement, 2*l.* 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 any Sunday, fast day, in Scotland, or Bank Holiday) after he so leaves the ship. (4) In the event of the seamen's wages, or any part therof, not being paid or settled, as in the 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." But for a case decided by Dr. Lushington in the year 1861, it would have seemed to us clear that the enactment set out above had no reference to master's wages. Sect. 1 provides "that this Act shall be construed as one with the Merchant Shipping Acts 1854 to 1876, and those Acts and this may be cited collectively as the Merchant Shipping Acts 1854 to 1880." By the interpretation clause of the Merchant Shipping Act 1854 (sect. 2), the term "seamen" is defined as follows: "Seamen shall include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship." If the matter rested there, the right of the master to wages up to final settlement would seem to be excluded by the very words of the section under which he claims them, no less than by the general scope and tenor of the Merchant Seamen Act 1880. Acting in conformity with this view of the matter the registrar has been in the habit of disallowing claims of masters of wages up to final settlement. But ss. 187 and 191 of the Merchant Shipping Act 1854, provide as follows: "Sect. 187.—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; and in case of all other ships (except ships employed in the southern whale fishery, or on other voyages for which seamen, by the terms of their agreement, are wholly compensated by shares in the profits of the adventure) within three days after the cargo has been delivered, or within five days after the seamen's discharge, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid on account a sum equal to one-fourth part of the balance due to him; and every master or owner who neglects or refuses to make payment in manner aforesaid, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days pay for each of the days, not exceeding ten ten days, during which payment is delayed beyond the respective periods aforesaid, and such sum shall be recoverable as wages. Sect. 191: "Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages, which by this Act or by any law or custom, any seaman not being a master has for the recovery of his wages; and if any proceeding in any Court of Admiralty or Vice-Admiralty touching the claim of a master to wages, any right of set-off or

counter-claim is set up, it shall be lawful for such court to enter into and adjudicate upon all questions, and to settle all accounts arising or outstanding, and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due."

In the case of *The Princess Helena*, Dr. Lushington held that by virtue of these sections a master has the same right to extra payment as the seaman has, where his wages have not been paid at the proper time. The plaintiff contends that, inasmuch as the Merchant Seamen Act 1880 is to be construed as one with the Merchant Shipping Act 1854; and inasmuch as sect. 191 has been held to give masters of ships the same right to recover extra payment as seamen have; it follows that masters are, equally with seamen, entitled to recover wages to final settlement. Assuming the case of *The Princess Helena* to have been rightly decided, this is a contention not easy to answer. If that case is accepted as an accurate exposition of the law on the subject, it would seem to force us into giving an effect to sect. 4 of the Act of 1880, which we think was not and could not have been intended by the Legislature. It is worthy of remark in this connection that sect. 4 is by express words limited in its operation to the case of foreign-going ships. In other words, to cases in which there are almost invariably accounts to be settled between masters and owners—cases in which, as applicable to masters, sub-sect. 4 could seldom have any effect. Although the decision in the case of *The Princess Helena* has been questioned in the profession, and somewhat reluctantly followed in the registry, it has never been discussed in a Court of Appeal. Under these circumstances, notwithstanding the great weight of any judgment of Dr. Lushington, and notwithstanding the length of time during which his decision in the case of *The Princess Helena* has been followed, it is necessary to consider the accuracy of the law there stated. Some of the reasons for a construction of sect. 191, different from that put upon it by Dr. Lushington, are forcibly stated by that learned judge in the case referred to. He says: "Against the right to extra pay, it may be truly said, that in many respects masters stand in a different position from seamen — they are not *inopes consilii* like the bulk of common seamen. Also, until the passing of the recent statutes they had in no case a lien for wages on ship; and Lord Tenterden says: 'The master can only sue the owner personally in a court of common law; but as he generally receives the freight and earnings of the ship, and may pay himself out of the money in his hands, he has not often had occasion for the aid of a court of justice to obtain his right.' The master, too, has generally a contract with his owners, which may be deemed a special contract. Moreover, he is almost always an accountant to his owners, and it cannot be expected that they should pay him his wages till his receipts and disbursements be accounted for, and the so doing must take time. Then he may delay his accounts, and it is not just that the owner should be mulcted for his neglect. There is still another reason. If the court should hold that the extra pay may be due, but the right modified or taken away by circumstances, the consequences must be that a door is opened for litigation, a consequence I greatly fear." Coming to the words of the sections of the Act of 1854 (and for the moment we are dealing with the sections of that Act alone), they appear to us to tell in the same direction. The master is, so far as the case permits, to have the same rights, liens, and remedies for the recovery of his wages which any seaman, not being a master, has for the recovery of his wages. What is the extra payment in the case of a seaman? Not wages stipulated for in the contract of hiring, for it forms no part of that contract; but something over and above the wages contracted for, which under sect. 187, "shall be recoverable as wages." If the amount were by the enactment in question made part of the seaman's wages, it would seem unnecessary to say that it should be "recoverable as wages." In point of fact, it is a penalty or forfeiture imposed on the owner for making default in payment of wages; a penalty, moreover, the amount of which is not fixed by the statute, but which is left to be determined by the court, the words of the section being: "Shall pay to the seamen a sum not exceeding two days pay for each of the days not exceeding ten days, during which payment is delayed."

It is not unworthy of remark that in sect. 11 of 5 & 6 Will. 4, c. 19, a similar payment is expressly called a forfeiture, that section providing as follows: "And in case any master or owner shall neglect or refuse to make payment in manner aforesaid, he shall, for every such neglect or refusal, forfeit and pay to the seamen the amount of two days pay for each day not exceeding ten days, during which payment shall, without sufficient cause, be delayed beyond the period at which such wages or part wages are hereby required to be paid as aforesaid; for the recovery of which forfeiture the seaman shall have the same remedies as he is by law entitled to for the recovery of his wages." We think, therefore, that the extra payment is not made part of the seaman's wages by sect. 187. Even were it otherwise —were the extra payment made part of the seamen's wages, it would by no means follow that sect. 191 makes a similar extra payment part of a master's wages. By the words of sect. 191, a master is to have, not the same right to wages as the seaman, but only the same rights, liens, and remedies for the recovery of his wages. It does not purport to give the master any additional wages, but only the same rights, liens, and remedies for the recovery of his wages as the seaman has for the recovery of his. This distinction is emphasised by the fact that sect. 187 is one of the sections printed under the heading "Legal Rights to Wages," whereas sect. 191 comes under a different heading, viz., "Modes of Recovering Wages." One of the reasons to which Dr. Lushington says, in the case of *The Princess Helena*, that he attributed weight, was that the master is not by express terms excluded from the claim to extra payment. With deference we should have thought the more correct view would be that, inasmuch as the extra payment is a penalty, or, at least, something in the nature of a penalty, imposed on the shipowner in the case of his default in due payment of the seaman's wages, it could only be imposed in the case of the master (who, *ex hypothesi*, is not a seaman) by express words. The extra payment not being by the Act made part of the master's

wages, he can nevertheless recover it as a "remedy" for the enforcement of due payment of his wages.

The plaintiff contends that, even if the extra payment be regarded as a penalty, it is one of the means of enforcing due payment of wages given to the seamen, and is, in fact, a "remedy" for the recovery of his wages, and therefore enforceable by the master under sect. 191. We do not think this argument maintainable. Before the enactment in question, the master had no lien on the ship for the enforcement of his claim to wages, except under 7 & 8 Vict. c. 112, s. 16, in case of the bankruptcy or insolvency of the owner. We think full and ample effect may be given to sect. 191 of the Act of 1854, by construing it as giving to masters in all cases a lien, and the consequent remedy *in rem*, without holding that it also confers upon him the right of recovering a penalty for the nonpayment of his wages in due time. For these reasons we have come to the conclusion that neither under the 191st section of the Act of 1854, nor under the 4th section of the Act of 1880, is the plaintiff entitled to the extra payment he seeks to recover in this suit. The result is that the report of the registrar must be varied by striking out the 8*l.* 13*s.* 4*d.* allowed as ten days double pay. With reference to the costs, we think each party should bear his own costs of the action and of the reference, but that the defendant, having substantially succeeded on the appeal, is entitled to the costs of the appeal.

Solicitors for the plaintiff, *Pritchard* and *Sons*.
Solicitors for the defendant, *Wynne, Holme*, and *Wynne*.

Thursday, March 31, 1887.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE CLAN GRANT. (*a*)

Pilotage—Gravesend to Northfleet—Tilbury Docks—Rates—Order in Council, May 17, 1882.

The amount to which a pilot is entitled for taking a ship from Gravesend to the outer entrance of the Tilbury Docks, and thence across the tidal basin to the dock gates, is the rate for pilotage from "Gravesend Reach to Northfleet," fixed by Order in Council, May 17, 1882, *and the moving of the ship to the dock gates is not within the meaning of the provision in the Order in Council as to "removing a ship or vessel from moorings into a dry or wet dock," so as to entitle him to charge anything beyond the above pilotage rate.*

THIS was an action by a duly licensed Trinity House pilot to recover moneys claimed by him in respect of the pilotage of the Clan line of steamships.

The statement of claim was as follows:

The plaintiff is a pilot duly licensed by the Corporation of Deptford-Strond, under the authority of the Acts of Parliament Geo. 4, c. 125, 16 & 17 Vict. c. 129, and 17 & 18 Vict. c. 104, to navigate, conduct, take charge of, and pilot vessels on the river Thames, and into and out of the several docks communicating with the same above Gravesend, at certain specified and legally authorised rates, and as such pilot was employed by the defendants at the said rates as pilot on board the said ships to perform certain services in and about piloting the said ships from Gravesend to the Tilbury Docks, and into the said docks, and in and about mooring the said vessels, and in and about unmooring the said vessels, and in and about piloting the said vessels out of the said docks, and from the said docks to Gravesend, and the plaintiff duly performed the said services and thereby is entitled to demand payment from the defendants at the said rates, but the said defendants have declined and refused to pay the plaintiff, and the plaintiff needs the assistance of this honourable court to enable him to obtain payment of the same.

2. The amount due and owing to the plaintiff in respect of the said services is 30*l.* 18*s.* 9*d.*, particulars of which, exceeding three folios, have been delivered to the defendants.

3. In the alternative the plaintiff claims payment of the said sum for services rendered to the defendants at their request in and about the navigating, conducting, taking charge of, piloting, docking, and undocking the said ships.

The defence, after admitting that the defendants had employed the plaintiff, and that he had piloted their vessels, proceeded as follows:

1. Save as aforesaid the defendants deny the several allegations in the statement of claim.

2. Pursuant to the provisions of 17 & 18 Vict. c. 114, s. 333, sub-sect. 5, and s. 380, and under the authority therein contained, the rates of pilotage to be demanded and received by pilots licensed by the Corporation of Trinity House for piloting ships and vessels within the limits above referred to were fixed by the Trinity House, and were duly approved by Her Majesty in Council on the 17th May 1882.

3. The defendants have always been ready and willing to pay to the plaintiff, and before action offered to pay to the plaintiff, in respect of his said services, all sums due and owing to him according to the rates of pilotage so fixed and approved as above mentioned, but the plaintiff refused to accept the same. The defendants are willing that 12*l.* 18*s.* out of the sum of 30*l.* 18*s.* 9*d.* which has been paid into court by the defendants in lieu of bail in this action shall be paid out to the plaintiff, and they say that the said sum of 12*l.* 18*s.* is sufficient to satisfy the plaintiff's claim.

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

Sect. 333, sub-sect. 5. Subject to the provisions contained in the fifth part of this Act it shall be lawful for every pilotage authority, by bye-law made with the consent of Her Majesty in Council, from time to time to do all or any of the following things within its districts; (that is to say,) to fix the rates and prices, or other remuneration, to be demanded and received for the time being by pilots licensed by such authority, or to alter the mode of remunerating such pilots in such manner as such authority may, with such consent as aforesaid, think fit, so that no higher rates or prices be demanded or received from the masters or owners of ships in the case of the Trinity House than the rates and prices specified in the table marked U. in the schedule hereto.

Sect. 358. Any qualified pilot demanding or receiving, and also any master offering or paying to any pilot, any other rate in respect of pilotage services, whether greater or less, than the rate for the time being demandable by law, shall for each offence incur a penalty not exceeding ten pounds.

The schedule referred to in sub-sect. 5, sect. 333, was amended by the following Table of Rates approved by Her Majesty in Council on May 12, 1882:

Table of the rates of pilotage to be demanded and received by pilots licensed by the Corporation of Trinity House of Deptford-Strond, or acting as such under the authority of the Acts of Parliament 6 Geo. 4, c. 125, 16 & 17 Vict. c. 129, and 17 & 18 Vict. c. 104, for piloting ships and vessels within the limits in the said table mentioned:

	To	22 feet.
From Gravesend Reach and *vice versâ*.	Northfleet	£1 18 0
	Moorings, London Docks, City Canal, or St. Katharine's Docks...	8 8 0

The several rates and prices specified above are subject

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

to a reduction of one-fourth part in respect of vessels propelled by steam.

For removing a ship or vessel from moorings into a dry or wet dock, or from one part of the river situated above Greenwich to another part of the river so situated; or for mooring or unmooring a vessel with two anchors; or for putting a vessel alongside a pier or wharf, and remaining while cattle or merchandise are being discharged or taken on board; or for mooring vessels laden with petroleum in accordance with the harbour regulations; or for attendance while adjusting compasses, the following charge may be made in addition to the pilotage, viz.:—For a ship above 1000 tons 1*l.* 10*s.*

The following facts were proved at the trial:

Prior to the opening of the Tilbury Dock, the Clan steamships were taken by the plaintiff to the Royal Albert Dock. His services then used to cease at the outer pierhead, and the dock master then took charge of the vessel. The Tilbury Dock is approached from the river by a tidal basin. There are pierheads at the entrance to this basin without any gates, so that steamers going into the dock from the river, pass through the pierheads and cross the tidal basin to the dock gates. On the Tilbury Dock being opened the defendants' steamships were taken there, and the plaintiff navigated them across the basin up to the dock gates. The steamers in question were all over 1000 tons.

The plaintiff's claim was based upon the alleged right to charge per vessel 1*l.* 18*s.*, less one-fourth for steam power, plus 1*l.* 10*s.*

Cohen, Q.C., with him *F. W. Hollams* (for the defendants), at the end of the plaintiff's case, submitted no case had been made out. The plaintiff is entitled to charge 1*l.* 18*s.*, and no more, and his services come under the head of pilotage from Gravesend to Northfleet. By sect. 333, sub-sect. 5, of the Merchant Shipping Act 1854, the rates are prescribed, and no other rate can be charged. [BUTT, J.—My doubt is, whether the rate of 1*l.* 18*s.* covers all the work done by the plaintiff. You see, not only did he pilot the ship up the river, but also took her across the tidal basin.] That cannot be so, because by sect. 358 of the same Act, any qualified pilot who receives or demands any other than the prescribed rate is liable to a penalty. [BUTT, J.—But if he does something outside the services mentioned in the section, is he to get nothing for it?] If, in fact, any hardship is done to the pilots by the existing state of things, the only remedy is a new Order in Council to make fresh rates. [BUTT, J.—I am told by the Trinity Masters that it has been the practice to pay the 30*s.* claimed under the proviso as to "removing a ship or vessel from moorings into a dry or wet dock."] But, in fact, the plaintiff did not remove the ship from moorings into a dry or wet dock, and therefore there is no legal liability on the defendants to pay the charge.

Bucknill, Q.C. (with him Dr. *Raikes*) for the plaintiff, *contra*.—The plaintiff is entitled to something more than the mere pilotage rate of 1*l.* 18*s.* According to the prescribed rates, the plaintiff is entitled to charge 8*l.* 8*s.* for removing the ship from "Gravesend to moorings." The word "moorings" is not confined to mooring to buoys, and includes taking a vessel to her berth in dock:

The Adah, 2 Hagg. 326.

The plaintiff, however, has not sought to charge the 8*l.* 8*s.* referred to, and only claims an extra 30*s.* under the proviso as to removing ships from moorings into dry or wet docks. If the plaintiff's services do not come within the schedule, it is submitted that he is entitled to a *quantum meruit* in respect of his services in taking the ship through the tidal basin.

BUTT, J.—This is a case in which I do not mean to express any opinion on the question which has been raised by Mr. Bucknill as to whether the rate of remuneration charged by the pilot under the tariff—apart from the extra charge of 30*s.*—is sufficient or not. I do not know whether it is adequate or inadequate. If it is an inadequate one, I am sorry I cannot, in my view of the case, give my decision in favour of the plaintiff. But I am very clear that, even if I had the means of deciding what would be a *quantum meruit* for the whole service, I should not be at liberty to make any award in favour of the plaintiff on that footing. In my view, I am limited to making an order in his favour for such rates, and such rates only, as the terms of the pilotage rate authorise him to charge for the services. The actual services rendered do not seem to me to be expressly provided for in the table, because when the table was made these docks at Tilbury were not in existence. It was not in contemplation that there would be any addition to the duties of pilots such as that of taking a vessel across this tidal basin. That being so, the plaintiff in his claim has resorted to a part of the table under which he is certainly entitled to claim something, but whether it covers his whole claim is another question. According to that part of the table he is entitled, in the case of the *Clan Grant*, to the sum of 1*l.* 18*s.*, less a fourth on account of her having steam-power, but in my opinion he is entitled to no more. It has been said that he is entitled to charge an additional sum of 1*l.* 10*s.* Let us consider how that additional sum is claimed. It is said he is entitled to it because he has piloted the ship to the lock on the inner side of the tidal basin. The words in the table are "For removing a ship or vessel from moorings into a dry or wet dock." That he has not done, because he did not take her from her moorings. "Or from one part of the river situated above Greenwich to another part of the river so situated." That he has not done. "Or for mooring or unmooring a vessel with two anchors." That was not done. "Or for putting a vessel alongside a pier or wharf, and remaining while cattle or merchandise are being discharged or taken on board." That he has not done. "Or for mooring vessels laden with petroleum in accordance with the harbour regulations." That he has not done. "Or for attendance while adjusting compasses." That he has not done. Therefore he has not done anyone of the several things which by this provision entitle him to the extra charge of 30*s.* That is to my mind too clear to admit of argument. But it is said that he is entitled to charge that because he was entitled to charge a great deal more than he has sought to recover under another part of this table of rates. It is said that he has taken this vessel from Gravesend Reach to "moorings," and "moorings" within the meaning of the table. Were that so he would be entitled to charge not 1*l.* 18*s.*, less a fourth, but 8*l.* 8*s.* less a fourth. That is the contention. To my mind an absolutely conclusive and sufficient answer to that is that "moorings,"

as used in the table are totally different and distinct things from a berth in the dock. I therefore feel myself forced to the conclusion that this claim is not made out, except as to the rate sought to be recovered under that part of the tariff which provides for dues to be paid for pilotage from Gravesend Reach. That claim was admitted and the money practically brought into court. There must therefore be judgment for the defendants with costs.

Solicitors for the plaintiffs, *Marshall* and *Haslip*.

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

April 1 *and* 2, 1887.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE FIRE QUEEN. (*a*)

Collision—Lights—Mersey Regulations—Regulations for Preventing Collisions at Sea, arts. 3, 6, 11.

Where in a collision action it is alleged that there has been a breach of the regulations as to lights the question to be determined is whether there has been a reasonable compliance—a literal compliance is not intended; and hence a vessel whose side lights are obscured by the catheads to the extent of two and a half to three degrees on either bow sufficiently complies with the regulations.

The proper place to carry the stern light prescribed by art. 5 *of the Mersey Rules is from the centre of the taffrail, so that it is a foot or eighteen inches below it.*

THIS was an action *in rem* instituted by the owners of the Norwegian barque *Nordens Dronning* against the owners of the steamship *Fire Queen*, to recover damages occasioned by a collision between these two vessels. The defendants counter-claimed.

The collision occurred about 1 a.m. on Jan. 13, in the river Mersey, about abreast of the Canada Dock.

The facts alleged by the plaintiffs were as follows:—

Shortly after 1 a.m. on Jan. 13 the barque *Nordens Dronning*, in charge of a pilot and in tow of the tug *Great Western*, had arrived in the Mersey, a little above the New Brighton Ferry Stage. The *Nordens Dronning* was of 1087 tons register, and was on a voyage from Pensacola to Liverpool, laden with a cargo of timber. The weather was clear with a slight haze, and the tide was the last of the flood. The *Great Western*, with her engines going slow, was towing the *Nordens Dronning* up the river well over to the west side.

The *Nordens Dronning* had her regulation side lights up and a bright globe light on deck aft, and the *Great Western* exhibited the proper lights for a tug towing in the Mersey. In these circumstances the pilot, intending to bring the *Nordens Dronning* to an anchor, ordered the *Great Western* to slew her round and bring her head to tide. As the *Nordens Dronning* began to swing, and her head had come round to about S.E., the masthead and red light of the *Fire Queen*, which had been seen just before from the tug, were observed by those on board the *Nordens Dronning* about a mile off, and about two points on the starboard bow of the *Nordens Dronning*. The *Fire Queen* was proceeding down and well on the east side of the river. When the head of the *Nordens Dronning* had been swung round to nearly N.E., and she was slowly drifting up in about mid-river, the *Fire Queen*, which was then about on the starboard beam of the *Nordens Dronning*, suddenly came round under a starboard helm, and, opening her green light, caused imminent danger of collision. The *Fire Queen* was at once loudly hailed to put her helm hard-a-port and go astern, but she came on and with her stem struck the starboard side of the *Nordens Dronning* between the fore and main rigging.

The facts alleged by the defendants were as follows:—Shortly before 1.10 a.m. on Jan. 13 the *Fire Queen*, of 307 tons register, while on a voyage from Liverpool to Glasgow with a general cargo, was on the east side of the river Mersey, about off the Canada Dock. The weather was hazy, with a slight fog. In these circumstances those on board the *Fire Queen* saw about 400 or 500 yards off, and about a point on their port bow, one bright light, and immediately after the green light of a steamer, which proved to be the *Great Western* crossing the river to the eastward, and crossing the course of the *Fire Queen*, and the helm of the *Fire Queen* was put hard-a-starboard to go under her stern. The *Great Western* was carrying only one bright light, or was carrying a second so dim as not to be visible to those on board the *Fire Queen*. The *Fire Queen's* head went off under her starboard helm, and just after those on board of her saw the masts of a vessel, which proved to be the *Nordens Dronning*, in tow of the *Great Western*, looming through the haze, but her lights were obscured from the *Fire Queen*, and could not be seen by those on board of her, and she showed no stern light. The engines of the *Fire Queen* were immediately stopped and reversed full speed, but the two vessels came into collision, the stem of the *Fire Queen* striking the starboard side of the *Nordens Dronning*.

The defendants further alleged that the *Nordens Dronning* did not carry proper or properly placed side lights, but carried lights of such a nature and so placed as to be obscured from the *Fire Queen*; that she carried no stern light; and that the *Great Western* was not carrying two bright white masthead lights, as required by the rules concerning the lights to be carried by steamers towing in the Mersey, or was carrying a second masthead light so dim as not to be visible a sufficient distance.

At the trial evidence was given to the effect that the catheads of the barque obscured her side lights to the extent of two and a half to three degrees on either bow, but that otherwise her side lights showed an unbroken light over ten points of the horizon. A Board of Trade surveyor who was called by the defendants stated that had the catheads been removed he would have passed the barque as having complied with the regulation as to side lights, but admitted that had the catheads been removed the side lights would intersect at some point ahead of the ship, and each would be seen across the bows of the vessel. It also appeared that the barque's stern light was placed on the after part of the deck abaft a deckhouse.

By art. 1 of the Mersey Rules, "every vesse

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

exceeding ten tons measurement" shall "observe and obey the New Regulations for Preventing Collisions at Sea."

The following regulations are material to the decision:—

Regulations for Preventing Collisions at Sea:—

Art. 6. A sailing ship under way or being towed shall carry the same lights as are provided by art. 3 for a steamship under way, with the exception of the white light, which she shall never carry.

Art. 3 (*b*) A seagoing steamship when under way shall carry on the starboard side a green light so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass; so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side; and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles.

(*c*) On the port side a red light so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass; so fixed as to throw the light from right ahead to two points abaft the beam on the port side; and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles.

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.

Mersey Rules, Jan. 5, 1881.

Art. 5. Instead of the light prescribed by art. 11 of the said regulations, a bright white light, similar to the lights mentioned in rule 4, shall be shown continuously from the stern rail of every vessel while under way and in motion, in all weathers between sunset and sunrise.

Sir *Walter Phillimore* (with him *Stubbs*) for the plaintiffs.—This collision was solely caused by the negligent navigation of the *Fire Queen*. Even assuming the barque's side lights to have been slightly obscured by the catheads, the obscuration was so slight that the court ought not to hold the plaintiffs liable for a breach of the rules. As to the stern light, if the court should be of opinion that it was not in its proper place, then it is submitted that in the circumstances the breach of the article could not by any possibility have contributed to the collision:

The Duke of Sutherland, 32 L. T. Rep. N. S. 129; L. Rep. 4 A. & E. 419; 2 Asp. Mar. Law Cas. 478.

Kennedy, Q.C. (with him *Pickford*) for the defendants.—On the evidence it is submitted that the tug was not carrying two bright lights. It is also submitted that the barque was not carrying a stern light in the position required by art. 5 of the Mersey Rules. It was merely placed on the deck aft. [BUTT, J.—I think the proper place for it is to hang it from the centre of the taffrail.] Therefore the rule has been broken, and therefore the plaintiffs are to blame. [BUTT, J.—If the proper thing is to hang it from the centre of the taffrail, then, having regard to the way in which these vessels approached one another, the infringement of the rule could not by any possibility have contributed to the collision.] It is contended that it is not a compliance with the rule to hang it over the stern. The light is to take the place of the light prescribed by art. 11 of the regulations, and, according to the decision in *The Main* (55 L. T. Rep. N. S. 15; 11 P. Div. 132; 6 Asp. Mar. Law Cas. 37), that light should be exhibited to an overtaking vessel which is more than two points abaft the beam. Were it hung over the stern it would not fulfil these requirements. The effect would be to make it less effective than the light prescribed by art. 11, whereas it was intended, in a crowded thoroughfare like the Mersey, to be a greater protection, and hence the provision that it should be shown continuously. The obscuration of the side lights is a breach of the regulations. The courts have always held parties very closely to the rules. If the court should sanction this infringement of the rules, the effect will be to say that vessels may carry their lights so as to leave a certain area right ahead in which an approaching vessel will see no light at all.

Sir *Walter Phillimore* in reply.

BUTT, J.—In this case the plaintiffs' vessel, the barque *Nordens Dronning*, was in tow of a steam tug called the *Great Western*, and she had come into the river Mersey, and was about to be rounded to by the tug to bring her head upon the tide. The tug and the *Nordens Dronning* came up on the western, or Cheshire side, of the river, and when it became necessary to turn the *Nordens Dronning* round, proper measures were taken for that purpose. At the same time the steamer *Fire Queen* was coming down somewhere about half-way between mid-river and the eastern shore, and navigating in her own water. In these circumstances I see no reason to suppose that the tug and her tow were not quite justified in putting their helms a-starboard, and going round when and where they did. The case set up by the defendants is this: They say that as they came down the eastern side of the river they for the first time became aware of the existence of a vessel ahead, or nearly ahead, of them by seeing what afterwards proved to be the white light at the masthead of the steam-tug at not more than 400 or 500 yards distant. I presume it is pretended that they could not see this light—which they admit was a good one—at a greater distance on account of the thickness of the weather. The master of the *Fire Queen* says, "I thought it was the light of a vessel at anchor. It was slightly on my port bow, and I intended to go down inside of it, leaving it on my port hand, when suddenly a green light, apparently on the same ship, came into view, whereupon I assumed the lights to belong to a steamer standing in across my vessel towards the eastern shore. I at once gave the order to starboard the helm. My vessel cleared the lights, and, had there been nothing else, there would have been no danger; but it turned out—and that was a matter I could not have foreseen—that the vessel showing the lights had a barque in tow, with which I at once collided. I should not have done so had any of the proper indications been given to me of there being a vessel in tow." What indications had the officer in charge of the *Fire Queen* a right to have? He had a right to have a warning that there was a vessel in tow by the tug exhibiting two lights at the masthead. He had a right to have a green light exhibited by the vessel in tow. Possibly he had a right to have a white stern light shown him. Now, he says he had none of these warnings, and therefore had a right, seeing the lights he did, to act as he did.

First of all, therefore, I have to determine the important question of fact whether the tug had one or two good lights at her masthead. Now, there is a very strong body of evidence to the effect that the tug had up to the time of the collision, and at and after the time of the collision, two perfectly good lights at her masthead. There is, however, a strong body

of evidence on the other side to the contrary, and I shall have to determine the matter. But, before dealing with that, I propose to consider whether the barque carried a good green light, and on that I have no hesitation in finding at once that she did. I am speaking now of the exhibition of the light, and not of its position. On the question of its position, I have to determine whether it was properly fixed; that is, was its position a compliance with, or a departure from, the Regulations for Preventing Collisions at Sea, or the analogous regulations applicable to the Mersey. Now the *Nordens Dronning*, like most other vessels, has a cathead, and there is no doubt that it was in the way of the light. Of course, there was the same amount of obscuration on the other side, but it is not necessary to consider that. I think the result of the evidence comes to this: that the cathead obscured the side light for some two and a half or possibly three degrees —that is, considerably less than a third of a point —on the vessel's bow; and therefore, save for that third of a point, this vessel's side lights showed an unbroken light over ten points of the horizon. Now, is it a breach of the regulations for a vessel to have her lights obscured to the extent I have described. It is perfectly certain that a literal compliance with these regulations is not intended. A literal compliance with these regulations as to lights is an impossibility. I will take an instance. A vessel at anchor is required to carry at not more than twenty feet above the water or the deck (I forget which) a light which shall show an unbroken light all round the horizon. If a vessel has any mast or rope which runs to a greater height than the prescribed twenty feet, it is utterly impossible that any lantern could show an unbroken light all round the horizon. A number of other similar instances might be given. I am now only pointing out that the letter of the regulations cannot be complied with. What we must look to is, whether there is a reasonable compliance with the regulations. Now, on the question of lights, we have had several surveyors called, and amongst others a gentleman whose evidence is to be treated with every respect, the Board of Trade surveyor. Now, what he says is this: "I have got the regulations, and I have got my instructions from the Board of Trade, and they would prevent me passing these lights in the position in which they were placed with regard to the catheads." I put some questions to him on the Board of Trade instructions, and the result of following those instructions is, while it frees him from one difficulty it places him in another. The Board of Trade is careful not to have any obscuration of the lights on either bow; but, in ensuring that desideratum, they make a departure from the letter of the rule which, to my mind, is a far more serious matter than the question in this case. It turns out that the Board of Trade surveyor would have passed this vessel if her catheads had been removed, and there had been no obstruction of the lights, although there would have been a greater degree of error by the side sights converging in front of the stem of the ship in the sense that the side lights might have been seen across the bows. I myself do not see how these regulations are in practice to be worked out. There cannot be a strict compliance with the letter of the rules. I am strongly inclined to suspect that the right thing to aim at would be to adhere to the prescribed arc of ten points, starting from two points abaft the beam, and carrying the light so as to allow it to be seen no further forward than an arc of ten points. If that were carried out, there would be a breadth of darkness equivalent to the beam of the ship right ahead. Of course, it is obviously impossible to carry out these requirements to a nicety. You must go as near as you can. My impression is that my proposal is the state of things to be aimed at, because the objection to it would be so very small. But, as it is impossible to comply with these rules literally, one must do the next best thing one can. The question is, whether in this case the departure from the strict requirements of the regulations is a departure which under the circumstances is unreasonable. The question is, whether because this cathead obscured the light to the extent of two and a half or three degrees on the bow, it is a breach of the regulations which is to entail the very severe penalty prescribed by the 17th section of the Merchant Shipping Act 1873. I am not inclined to think it is. I have asked the Elder Brethren a question on this, and they agree with me in thinking that there was a reasonable compliance with the rules regarding lights. I therefore hold that the *Nordens Dronning* is not to blame for having the green light obscured as it was by the cathead. I asked the Board of Trade surveyor the question where he would fix the lights. He said he would carry them further forward, and would place them some three feet higher. He thought that would be a way of obviating the difficulty, but with that suggestion the Elder Brethren do not agree. I have so far been dealing with this matter as a question under the statute.

When I come to the merits of the case, I have not the slightest doubt in coming to the conclusion, as a matter of fact, that the obscuration of the green light had nothing to do with the collision. I say that because I have no doubt that the *Fire Queen* and the *Nordens Dronning* were in such positions that that cathead could not have obscured the light of the barque to those on board the steamer. I now come to the question of the stern light. I have already intimated in the course of the case, after consulting with the Elder Brethren, that this stern light was improperly placed, and was a breach of these regulations, which I understand to have the same statutory effect as the Regulations for Preventing Collisions at Sea, and the breach of which therefore entails the statutory penalty prescribed by sect. 17 of the Merchant Shipping Act 1873. Now, had the defective position of that stern light any effect on the collision? I must consider that question. It appears to me it would be a compliance with art. 5 of the Mersey Regulations to hang a white globe lantern from the centre of the taffrail, so that it would hang a foot or eighteen inches below the taffrail. In this the Elder Brethren agree with me. I think the real intention of this rule is to have the stern light so placed that it shall not be seen in front of the stern. If that be the compliance with the rule, what follows? Why, that, had it been there, by no possibility, in my view of the case, could those on board the *Fire Queen* have seen it before the collision. I know that one or two of the plain-

tiffs' witnesses, when placing the models, put them in a position in which the stern light, carried as I have suggested it should be, would have been seen by those on board the *Fire Queen*. But I do not accept those positions as correct. These vessels never were in those positions, and never could have been. But taking it that the collision between the *Fire Queen* and the *Nordens Dronning* was either a right-angled blow delivered by the stem of the *Fire Queen*, or a blow leading aft, it follows to my mind, having regard to the fact that both vessels were under a starboard helm at and before the collision, the *Fire Queen* never could have been in a position to have seen a light hung over the *Nordens Dronning's* stern. Therefore, although I find that there was an infringement of this regulation, it was an infringement which could have had no effect upon the collision. Therefore with regard to the green and the stern lights I cannot find the *Nordens Dronning* to blame. Now let me consider the other matters. I am asked to believe that the tug had only one masthead light, or rather one good masthead light. Undoubtedly, if there was an absence of one of those two lights, the *Fire Queen* was misled. Two lights would have indicated that the tug had a vessel in tow, and would have put those in charge of the *Fire Queen* on the alert. Were these two lights burning? That is a question on which there is a conflict of evidence. In dealing with this question I do not forget that the defendants have attacked both the side lights and the stern light, and now are attacking one of the masthead lights. But I have found that they did not see the green light, and may it not be that they did not see this white masthead light? The fact is, I am asked to believe too much in this case. I am asked to believe that too many lights were bad. On the whole I and the Elder Brethren think the tug carried two sufficient masthead lights, and that they ought to have been seen by those on the *Fire Queen*. As to the weather, it is said the night was hazy. Had it not been so those on the *Fire Queen* certainly ought to have seen the one masthead light which she admits to have been on the tug at a greater distance than 400 or 500 yards. She is going seven knots an hour; her captain sees a light, one point on his port bow, and 400 or 500 yards off. He could not tell for a minute what that light was. He concludes it is a vessel at anchor, and acts accordingly. It turns out to be a vessel under way. I cannot help saying that, having regard to the state of the weather, the pace at which he was going, and the uncertainty there was with regard to the light, common prudence should at once have dictated his easing his engines. He did not stop at all, but kept on until he got other indications, and so brought about the difficulty with which we have to deal. On the whole I find the *Fire Queen* alone to blame.

Solicitors for the plaintiffs, *Bateson, Bright*, and *Warre*, Liverpool.

Solicitor for the defendants, *H. C. Duncan*, Liverpool.

Wednesday, June 15, 1887.

(Before BUTT, J.)

THE BONNIE KATE. (*a*)

Co-ownership action—Transfer of shares—Bill of sale—Admiralty Court Act 1861 (24 *Vict. c.* 10), *s.* 8.

The managing owners of the steamship B. K. in 1882 *agreed to sell the defendant V. one sixty-fourth share in the B. K., for which he gave them a bill of exchange for* 156*l.*, *and received from them a receipt for the same as "being one sixty-fourth share in the s.s. B. K." In* 1883 *the managing owners sent V.* 8*l. in respect of profits on his share, and subsequently sent him a statement of accounts. No bill of sale of the share was ever executed by the managing owners, and it appeared that their shares in the B. K. were mortgaged at the time of the sale to V., and that subsequently they never were in a position to redeem them. Certain of the owners having paid losses incidental to the working of the ship, now sued V. as a co-owner for his proportion of the losses.*

Held, that, notwithstanding the receipt by V. of the 8*l., he was not, either in law or equity, a co-owner, that the managing owners had no authority to pledge his credit, and that therefore he was not liable.*

Quære, whether sect. 8 *of the Admiralty Court Act* 1861, *giving the Admiralty Court jurisdiction to decide questions between co-owners, is not confined to questions between registered co-owners.*

THIS was a co-ownership action *in personam*, in which the plaintiffs, the owners of sixteen sixty-fourth shares in the steamship *Bonnie Kate*, sought to recover contributions from the owners of the remaining forty-eight sixty-fourth shares.

The defendants, with the exception of a Mr. and Mrs. Vasey, subsequently to the institution of the suit paid their proportions of the ship's liabilities, or became insolvent.

By the defence of Mr. Vasey, it was alleged as follows: That he never was the owner of any share or shares in the *Bonnie Kate*, and that, if any liabilities had been incurred, they had not been incurred on his behalf, nor with his authority.

Par. 3. On or before the 13th Nov. 1882 the said defendant, at the request and on behalf of his wife Louisa Monkhouse Vasey, contracted with R. H. McBryde and Co., who were the then managing owners of the said vessel, for the purchase of one sixty-fourth share in her for his said wife, and gave the said R. H. McBryde and Co. his acceptance for 156*l.* 5*s.* for the same, and from time to time payments were made on account of the said purchase money, and the bill renewed for the balance until the 15th Sept. 1885, when the balance then due, *videlicet* 101*l.* 5*s.*, was met by payment by the said defendant on behalf of his said wife to W. F. Orwin, the defendant, who had become managing owner in place of the said R. H. McBryde and Co.

4. The said managing owners had always refused to give to the said L. M. Vasey, or to the said H. J. Vasey on her behalf, a bill of sale of the said share, until the said acceptance was met, but when the same was met by such payment as aforesaid the said W. F. Orwin refused to execute a bill of sale of the said share on the ground (as the fact was) that the said share had been mortgaged, and the said W. F. Orwin had become bankrupt.

Mrs. Vasey, by her defence, after making similar allegations to those contained in Mr. Vasey's defence, proceeded as follows:

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

5. The said contract of purchase was never carried out, and the essential terms thereof have not been performed. Amongst the essential terms of such contract which have not been performed, and of which the performance was never dispensed with by the said Louisa Vasey or any person authorised by her, were the following: that the one sixty-fourth share in the said vessel contracted to be purchased for the said Louisa Vasey as aforesaid, was unincumbered, and would be transferred free from incumbrances to the said Louisa Vasey, and that no interest in the said share should vest in or be assigned or transferred to the said Louisa Vasey until the whole purchase money for the said share had been paid, and the person or persons from whom the said H. J. Vasey had on her behalf contracted to purchase the said share had by bill of sale transferred the legal title to the said share free from incumbrances to the said Louisa Vasey, or as legal owners or owner of the said unincumbered share had lawfully made a valid equitable assignment of the said share free from incumbrances to the said Louisa Vasey.

6. No share or other interest in the said vessel was ever specifically appropriated to the said Louisa Vasey, or to any person acting at her request on her behalf. If any share or interest in the said vessel was ever specifically appropriated to the said Louisa Vasey or to any person acting at her request on her behalf, the share or interest in the said vessel so specifically appropriated to the said Louisa Vasey or any person so acting at her request on her behalf, was not such a share or such an interest in the said vessel as she or the said H. J. Vasey contracted to purchase or consented to own.

7. No bill of sale, or other instrument assigning or transferring or purporting to assign or transfer any share or other interest in the said vessel to the said Louisa Vasey, or to any person acting at her request on her behalf, was ever executed, and no equitable assignment of any share or interest in the said vessel was ever made to her, or to any such person acting at her request on her behalf.

At the hearing, the plaintiffs called Mr. Orwin, one of the defendants, and a late member of the firm of McBryde and Co., and also put in certain documentary evidence.

The effect of the evidence was as follows:—On Nov. 13, 1882, Mr. Vasey agreed to purchase one sixty-fourth share in the *Bonnie Kate* from McBryde and Co., who were the managing owners of the vessel. In payment he gave a bill for 156*l.* 5*s.* and received the following receipt:

Nov. 14, 1882.—Received from H. J. Vasey, Esq., acceptance at four months, due March 4, 1883, for one hundred and fifty-six pounds five shillings, being 1-64th share in the s.s. *Bonnie Kate*.—McBRYDE and Co.
156*l.* 5*s.*

In Feb. 1883 McBryde and Co. sent Mrs. Vasey a cheque for 8*l.* inclosed in the following letter:

Newcastle-on-Tyne, Feb. 19, 1883.—Mrs. L. M. Vasey.—Madam, We beg to hand you cheque 8*l.* on account of profits on your share in *Bonnie Kate* s.s. A statement of account will be sent you at the end of the month. Please return the enclosed receipt and oblige yours, etc., McBRYDE and Co.

A statement of accounts was subsequently sent to Mrs. Vasey.

In cross-examination Mr. Orwin admitted that no bill of sale of the said share had ever been executed, that at the time his firm sold the share to Mr. Vasey all the shares held by his firm were mortgaged and had never been redeemed, and that during the negotiations between his firm and Mr. Vasey his firm had been in pecuniary difficulties, and never were in a position to pay off the mortgage.

The defendants called no witnesses.

J. P. Aspinall for the plaintiffs.—On the facts of this case it is clear that Mr. Vasey, and not Mrs. Vasey, was the owner of the share, and therefore he is liable in this action. [BUTT, J.—Whether Mr. or Mrs. Vasey is liable, is a minor consideration. My difficulty is to see how either of them is liable.] The fact that no bill of sale was ever executed does not relieve them of liability. In equity they were the owners of this share. They took the profits, and therefore they are liable for the losses. The defendant Vasey had a contract enforceable in equity for the execution of a bill of sale of a share in the ship, and he is therefore an owner:

Hughes v. *Sutherland*, 45 L. T. Rep. N. S. 287; 7 Q. B. Div. 160; 4 Asp. Mar. Law Cas. 459;
Batthyany v. *Bouch*, 41 L. T. Rep. N. S. 177; 50 L. J. 421, Q. B.; 4 Asp. Mar. Law. Cas. 380.

Although the defendants never received a legal transfer of the share, they took profits on the ground of their ownership, and they allowed McBryde and Co. to treat them throughout as the owners of the share. Moreover they ought to have seen that McBryde and Co. expended the purchase money in releasing the share. Can it be doubted that, had the ship proved a paying concern, the defendants would not have claimed to share in the profits? The position of McBryde and Co. to the defendants was that of agents to receive profits, and incur liabilities on their behalf. [BUTT, J.—On the question of my jurisdiction in this case, I have some doubt whether it comes within sect. 8 of the Admiralty Court Act 1861. I rather think that the "co-owners" there mentioned must be registered co-owners, and if so, this case is not within the section.] No such construction has ever been put upon the section before, the effect of which would be to narrow its application and so diminish its utility. The word "registered" applies to ships and not to owners.

J. Gorell Barnes for the defendants.—The defendants never became the owners of a share either in law or equity. Their contract with McBryde and Co. was to purchase an unincumbered share. That contract never was carried out, because McBryde and Co. never were in a position to transfer an unincumbered share. The receipt of the profits is not enough to constitute them owners. Had they been receiving profits over a lengthened period of time and acquiescing in McBryde and Co.'s conduct, they might perhaps have been liable. But in fact they receive only one profit, and they receive that upon the assumption that McBryde and Co. will shortly be in a position to execute a bill of sale of the share.

BUTT, J.—In the view I take of this case, it is immaterial to consider or determine whether Mr. Vasey or Mrs. Vasey was the person to whom the share in this vessel was to be assigned. I will therefore treat the matter as though Mr. Vasey had been negotiating this matter on his own behalf. This was the state of affairs. He went to McBryde and Orwin to negotiate with them for the purchase of one sixty-fourth share, for which he gave a bill of exchange for 156*l.* 5*s.* The sale of that share and the taking of the bill were really a fraud on Vasey. Those who sold the share knew perfectly well that they had not got the share to sell, and that it was mortgaged together

with their other shares. They therefore ought never to have taken the bill of exchange from Mr. Vasey. Owing to their failure, Mr. Vasey never got his share. He has parted with 156*l.*, all he has received is 8*l.*, and he is now called upon to pay something more out of pocket in respect of a share which he has never got. I believe the real facts were these. There was an agreement by McBryde and Co. to sell one sixty-fourth share to Mr. Vasey. They were not in a position to transfer and they knew it. They did not tell Mr. Vasey so, but they took his money, or rather his bill, which was a fraud, and it was in continuation of that fraud that they paid him the 8*l.* as if he had really got the share in the ship. Is he to be affected by taking this 8*l.* so as to be taken to have given McBryde and Co. authority to pledge his credit, although he had never got a transfer of the share? The 8*l.* was taken in the belief that he would immediately have the share transferred to him. The real question, as I have said before, is, whether McBryde and Co. had authority to pledge Vasey's credit, for if they had, of course Vasey would be liable. I hold that, on the facts of this case, he gave no such authority. Had he been asked if he would allow his credit to be pledged in respect of this share, who can doubt what his answer would have been? I think the plaintiffs' case entirely fails, and I therefore dismiss Mr. and Mrs. Vasey from the suit, and order the plaintiffs to pay their costs.

Solicitors for the plaintiffs, *Gregory, Rowcliffes, Rawle,* and *Johnston,* agents for *Phipson, Cooper,* and *Goodyer,* Newcastle-on-Tyne.

Solicitors for the defendants, *Ingledew, Ince,* and *Colt,* agents for *Ingledew* and *Daggett,* Newcastle-on-Tyne.

June 30 *and July* 1, 1887.

(Before BUTT, J.)

THE CUMBRIAN. (*a*)

Salvage—Ship and cargo—Primary liability of shipowner—Verbal agreement for fixed sum.

An agreement made by the master of a vessel in distress to pay salvors a fixed sum is an agreement made on behalf of and pledging the credit of the shipowners so as to make them liable to the salvors for the whole amount so agreed upon, and not merely for such proportion of such amount as the value of the ship and freight bears to the value of the cargo.

The Raisby (53 *L. T. Rep. N. S.* 56; 5 *Asp. Mar. Law. Cas.* 473; 10 *P. Div.* 114) *distinguished.*

THIS was a salvage action *in rem* instituted by the owner, master, and crew of the smack *John Wintringham,* against the owners of the steamship *Cumbrian,* her cargo and freight.

The facts alleged by the plaintiffs were as follows: The smack *John Wintringham,* of seventy-seven tons register, was at about 4 p.m. on Sept. 9, 1886, in the North Sea, about forty miles east by north of Fraserburg, returning to Grimsby from a fishing voyage, laden with a cargo of fish. In these circumstances, the steamship *Cumbrian* was sighted in tow of another steamship, the *Arthur,* and about a quarter of an hour afterwards the tow rope was seen to part. The smack approached, but, owing to the wind and sea, no communication could be made, and she therefore lay by the *Cumbrian* throughout the night. On the morning of the 10th the *Arthur* had disappeared, and the wind having moderated and changed, the master of the smack offered the *Cumbrian* his assistance, but was told that with the wind as it was he could do no good, and was asked to lay by the *Cumbrian* till the wind came from a favourable quarter. The smack laid by until the morning of the 14th, when between 8 and 9 a.m. the master of the smack was directed to make fast the tow rope and tow the *Cumbrian* into the track of steamships. The smack accordingly took the *Cumbrian's* tow rope, and began to tow about 9 a.m., and continued towing until about 2.30 p.m., when the steamship *Swan* came up, and was engaged by the *Cumbrian* to tow her to an east coast port, and the *Cumbrian* was ultimately saved.

The defendants denied that they had ever asked the plaintiffs to stand by till the 14th, and alleged that they had constantly told them to go. They also alleged that, before the tow rope was made fast, it was verbally arranged between the two masters that the smack should tow the *Cumbrian* till she got a steamer to tow her for the sum of 70*l.*

The *Cumbrian* was a steamship of 781 tons net, and was at the time of the services mentioned on a voyage from Whitehaven to Riga. On the 4th Sept. her machinery became disabled owing to the high-pressure cylinder covering breaking, and after being under sail for three days, she on the 7th fell in with the steamship *Arthur,* and took her assistance. At the time when the action was instituted the cargo on board the *Cumbrian* had been discharged and delivered to the consignees, and hence it had never been arrested, nor had bail been given for it. The only defendants who appeared were the owners of the ship and freight, and in their defence they alleged (*inter alia*) as follows:

The said defendants pay into court 51*l.* 13*s.* 7*d.*, such sum being the proportion of the said 70*l.* which, having regard to the values of the *Cumbrian,* her freight and cargo, the said defendants as owners of the said ship and freight should bear, and they say that sum is sufficient to satisfy the plaintiffs' claim against the said defendants.

The value of the *Cumbrian* was 8000*l.*, of her cargo 2950*l.*, and of her freight 321*l.*

Bucknill, Q.C. (with him *J. P. Aspinall*) for the plaintiffs.— On the evidence it is contended that there was an agreement for the smack to lay by from the 10th till the 14th, and in respect of that the plaintiffs are entitled to remuneration. It is also submitted that it has been proved that there was no agreement to tow for 70*l.* as the plaintiffs allege, and that in respect of the towage, the plaintiffs are entitled to substantial reward.

Sir *Walter Phillimore* (with him *Pyke*), for the defendants, was told by the court to confine his argument to the question whether the shipowners were liable for the 70*l.* under the agreement, or only for the 51*l.* 13*s.* 7*d.* paid into court. The decision in *The Raisby* (53 L. T. Rep. N. S. 56; 5 Asp. Mar. Law. Cas. 473; 10 P. Div. 114) decides the point in the shipowners' favour.

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

[BUTT, J.—This is a very different case. In *The Raisby* no specific sum is mentioned, whereas here there is a fixed amount.] Dr. Lushington has decided that shipowners are not liable for salvage to cargo, and therefore the defendants are only liable for a portion of the 70*l.*:

The Mary Pleasants, Swa. 224;
The Pyrenee, Br. & L. 189.

Bucknill, Q.C. in reply.—In *The Raisby* (*ubi sup.*) no specific sum was mentioned, and the matter of compensation was left to arbitration. In the present case, the shipowners' servant binds his owners to pay a fixed sum, and therefore makes them primarily liable for it:

Anderson, Tritton, and Co. v. *The Ocean Steamship Company*, 52 L. T. Rep. N. S. 441; 5 Asp. Mar. Law. Cas. 401; 10 App. Cas. 107.

BUTT, J.— I am of opinion, in this case, that there was no employment of the smack to stand by during the four days, or any portion of them. It is clear to my mind that the master of the smack was anxious to get a job, and chose to take his chance of waiting for employment. When an altered state of circumstances arose, and the wind blew from such a quarter that the smack could be of use to the steamer, he was allowed to take her in tow, and towed her some few miles in a westerly direction. The main question is, what were the terms under which he took the rope of that vessel. It is denied by the captain of the smack that there was any specific agreement. He admits that 70*l.* was offered, but says he declined it. He says the rope was given him by the steamer in these circumstances: 70*l.* having been offered and declined, the master of the steamer said, "Well, if you tow me into the track of steamers, it will be to your advantage." The evidence on the other side is very strong to the effect that the 70*l.* offered was accepted, and that the rope was only given on those terms. I have come to the conclusion that there was an agreement for 70*l.* I do not, however, think it matters very much, because, having come to the conclusion that the smack was not engaged to stand by, I think 70*l.* is adequate remuneration for the services rendered. The only remaining question is, whether the plaintiffs are entitled to get the 70*l.* from the defendants. They have paid into court the sum of 51*l.* 13*s.* 7*d.*, which they say is the ship's share, and they seek to avoid responsibility for the balance on the ground that it is payable by the cargo. That is not my opinion. I think as a matter of fact and of law, that when that agreement was come to, it was intended that the shipowners' liability and credit should be pledged. I think that is so in all cases of this sort, and I do not think that proposition is really affected by the case of *The Raisby* (*ubi sup.*). There the agreement was substantially this, "Tow me to port, and the amount of remuneration shall be settled by arbitration on shore." That is, all the parties interested were to go before the arbitrator. I do not think it has any bearing on the present case. I hold that the shipowners are personally liable, and that it was intended at the time the agreement was made that they should be personally liable for the 70*l.* I must therefore overrule the tender, and increase it by the difference between 51*l.* 13*s.* 7*d.* and 70*l.*, and I allow the plaintiffs' costs on the County Court scale.

Solicitors for the plaintiffs, *Clarkson, Greenwell,* and *Wyles*, agents for *Grange* and *Wintringham*, Great Grimsby.

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

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Dec. 6, 1886.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

COX, PATTERSON, AND CO. *v.* BRUCE AND CO. (*a*)

Bill of lading — Holder for value — Authority of master — Quality marks — Shipping notes— Error of master—Liability of owner.

Where a memorandum on a bill of lading provides that if quality marks are used (on bales of jute) they are to be of the same size as the leading marks, and contiguous thereto, and if such quality marks are inserted in the shipping notes, and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and "the ship shall be responsible for the correct delivery of the goods," and the mate, by mistake, inserts wrong quality marks in the shipping notes, and the master copies such quality marks into the bill of lading, the shipowner incurs no liability to an indorsee without notice of the error who receives the goods actually shipped, because the memorandum does not apply to anything but correct quality marks as existing on the bales themselves, and because the shipowners are not estopped by the representation as to quality in the bill of lading.

SPECIAL CASE.

THIS was an action commenced in the Mayor's Court of the City of London and was transferred by an order dated the 17th March 1886 to this honourable court. The plaintiff's claim against the defendants was for 10*l.* for damages for breach of contract by a bill of lading and the parties concurred in stating the following case for the opinion of the court.

The plaintiffs carry on business as jute brokers in the city of London and the defendants are shipbrokers in London and Dundee, and managing owners of the sailing vessel *Panmure.*

In the month of Sept. 1883 Messrs. R. Steel and Co., who are merchants at Calcutta, shipped on board the *Panmure* at Calcutta 500 bales of jute, each 400lb. net. Of such bales 26 were marked ◇R C 1◇; 192 were marked ◇R C 2◇; 282 were marked ◇R C 3◇.

A bill of lading for the same, dated the 28th Sept. 1883, was signed by the master of the said vessel and delivered to the said shippers, the said bill of lading being as follows:

Shipped in good order and condition by R. Steel and Co., on board the ship *Panmure*, whereof is master for this present voyage Downie, lying in the port of Calcutta and bound for London. Five hundred bales jute being marked and numbered as per margin, and to be delivered

(*a*) Reported by W. P. EVERSLEY and A. H. BITTLESTON, Esqrs., Barristers-at-Law.

in the like good order and condition at the aforesaid port of London (the act of God, the Queen's enemies, loss or damage from fire on board in hulk or craft, or on shore, any act, neglect, or default whatsoever of pilots, master, or crew, in the navigation of the ship in the ordinary course of the voyage, and all and every the dangers and accidents of the seas and rivers and of navigation of whatever nature or kind excepted), unto order or to his or their assigns. Freight to be paid for the said goods at the rate of 2*l.* (two pounds) sterling per ton of five bales, without discount, but otherwise subject to the customary mode of payment average, as accustomed. In the event of claim for short delivery, price to be the market price of the day at port of discharge on the day of the ship's reporting at the Custom House, less charges and brokerage.

Weight, contents, and value unknown.

In witness whereof the master or agent of the said ship has signed three bills of lading exclusive of the master's copy all of this tenour, one of which being accomplished, the others to stand over.

Dated at Calcutta the 28th Sept. 1883,

JAMES DOWNIE.

(In the margin.)

If quality marks are used they are to be of the same size as the leading marks and contiguous thereto, and if such quality marks are inserted in the shipping notes and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain and ship shall be responsible for the correct delivery of the goods.

83/84

R C

1 = 26 B/s.
2 = 251 B/s.
3 = 223 B/s.

The said bill of lading was afterwards indorsed by the said shippers for valuable consideration to the plaintiffs to whom the property in the goods thereby passed who took and had the said bill of lading without any notice of incorrectness in the description of the goods in the said bill of lading.

The said bill of lading is in the customary form of bills of lading in the jute trade for sailing vessels between Calcutta and the United Kingdom. That form and no other has been in use since April 1881 in the said trade of which the defendants were always since that date, and at the time of the shipment in question, aware, and they have, since April 1881, always used the same form for their vessels engaged in the said trade.

Jute is shipped of various qualities, which are indicated on the bales when packed by letters of the alphabet, or by the numbers 1, 2, and 3, No. 1 indicating first quality, No. 2 second quality, and No. 3 third quality. These letters and numbers respectively are termed quality marks.

In the said bill of lading the mark R C is the leading mark borne by each of the 500 bales, and the numbers 1, 2, and 3 are respectively the quality marks, and the numbers 26, 251, and 223 are respectively intended to indicate the number of bales of each quality.

It is admitted that quality marks were used on the goods that were shipped as aforementioned, and that such quality marks were of the same size as the leading marks and contiguous thereto. It is also admitted that the same quality marks and the same number of bales of each of such quality marks as appear in the said bill of lading were inserted in the shipping notes, and that the goods actually shipped were accepted by the mate of the said vessel, and that the said bill of lading was signed by the master of the said vessel in conformity with the said shipping notes.

On the arrival of the *Panmure* in London, and the discharge of the cargo, the defendants delivered to the plaintiffs the 500 bales of jute mentioned in the 2nd paragraph hereof, and being of the quality and bearing the quality marks therein described, and not of the quality and bearing the quality marks stated in the said bill of lading. There were thus delivered to the plaintiffs fifty-nine bales less of the No. 2 quality, and fifty-nine more of the No. 3 quality than appear from the said bill of lading.

It is admitted, however, that the defendants delivered to the plaintiffs the same 500 bales which they received from the shippers.

The difference in value to the plaintiffs between the bales which were delivered to them and those described in the said bill of lading is to be taken at 10*l.*

A statement containing particulars of the voyages made and the cargoes carried by the *Panmure* from 1875, the date of her being built, and until Sept. 1883 (when she loaded the goods in question), was put in and formed part of the case.

The question for the opinion of the Court was, whether the defendants were liable to the plaintiffs for the non-delivery of goods of the quality and bearing the quality marks stated in the said bill of lading.

If the Court is of the opinion in the affirmative, then judgment in the action shall be entered for the plaintiffs for 10*l.* and costs, including the costs of this case.

If the Court is of the opinion in the negative, then judgment in the action shall be entered for the defendants with costs, including the costs of this case.

Barnes for the plaintiffs.—The question here is, whether a bill of lading which is in customary form, and contains an entry of quality marks describing the goods shipped, is binding on the shipowner when, on arrival of the goods at port of destination, the marks on them do not correspond to those in the bill of lading, but show that goods of an inferior quality have been shipped. The plaintiffs contend that it is binding. The case turns on the construction which amounts to a stipulation that, if quality marks on the cargo are used, the ship shall be responsible for the correct delivery of the cargo. This clause is well recognised in the jute trade. The goods here were clearly misdescribed; and this action is not an attempt to make the shipowner liable for goods not shipped, but to obtain a decision to enable parties to rely on this clause in the margin which was inserted with the consent of the jute trade. It is admitted law that the captain cannot sign for goods not received; but these bales were received, but misdescribed in the shipping notes and bill of lading, and the clause was introduced to meet this very point:

Howard v. *Tucker*, 1 B. & Ad. 712.

Bills of lading were made out for these goods, and were indorsed over to the plaintiffs.

Reid, Q.C. (*Hollams* with him) for the defendants.—The ship is not liable except for goods actually put on board. The defendants rely on 18 & 19 Vict. c. 111, s. 1. The indorsee is asking for larger rights than the consignee of the goods

would get. It is perfectly clear that, but for this marginal clause in the charter-party, the shippers would not be liable. It is contended that the parties had not as their intention in inserting it to make the shippers liable for misdescription. It is a merchants' clause, and consists of the parts (1), if quality marks are used they are to be of the same size as and contiguous to the leading marks—this is to facilitate the delivery of identical goods; (2) if such quality marks are inserted in the shipping notes, the ship shall be responsible for the correct delivery of the goods so marked. The second contingency is that, if these marks are inserted in the shipping notes, and the goods are accepted, bills of lading in conformity shall be signed, and the ship shall become responsible for the correct delivery of the goods.

Mathew, J.—I confess that my mind has fluctuated in the course of the argument, but in the end I have come to the conclusion that the shipowner is not responsible in respect of this condition, and the ground for my opinion is that the condition upon which the shipowner undertook to be responsible has not been complied with. The shipowner as a general rule, and apart from the special contract, would have nothing to do with the contents of these bales; he has nothing to do then with the quality of the contents of the bales, and protects himself with the clause "weight, contents, and value unknown" (which is found in this bill of lading) against any loss. It becomes of very great importance to the shippers that they should be able to obtain bills of lading which they can negotiate upon the footing that there is on board the ship goods of a certain quality. Here it seems that there are three qualities of jute which are the subject of commercial transactions. The shipper and the shipowner having come to terms with reference to the requirements of the shipper, the special contract is the result of the arrangement between the two; and I think that we must construe this condition according to the ordinary sense of the language used. There is of course a great deal in the argument of Mr. Barnes, who tells us what the meaning and intention of all parties was, but we are not entitled to look beyond the language that is used in dealing with the terms of the clause in question. This is the bargain between the shipper and the shipowner: "If quality marks are used they are to be of the same size as the leading marks and contiguous thereto, and if such quality marks are inserted in the shipping notes and the goods are accepted by the mate"—what is to follow? that the shipper shall be entitled to bills of lading in conformity therewith—"the ship shall be responsible for the correct delivery of the goods." Now what happened in this particular case was that the quality marks were of the same size of the leading marks which were upon the bales, but those quality marks were not inserted in the shipping notes, but different marks, and somehow or other these goods were passed by the mate. Having been passed by the mate, the shipping notes were returned in the ordinary way to the shipowner's office, and the captain signed the bills of lading corresponding with the shipping notes. The result was that the bills of lading having been signed and having been parted with for value to the indorsee a demand was made on the shipowner here to deliver the goods in accordance with the terms of the bill of lading, that is bearing the quality marks therein referred to. The shipowner was prepared to deliver the very bales that had been received, but it was said "under the terms and conditions you are responsible for delivering all goods as described in the bill of lading." The answer of the shipowner is "No; because the conditions upon which the ship was to be liable for the correct delivery of the goods have not been complied with." Now, if both those conditions were omitted, the shipowner was not to be liable. Why is he to be liable if one and a most material condition has been omitted—a condition which imposes upon the shipper the obligation to see that the correct quality marks were inserted in the shipping notes, those being the documents upon which the captain proceeds when he signs the bill of lading. Any other construction of this contract appears to me to expose the shipowner to the negligence or fraud of the shipper, and I cannot suppose it was intended that any such responsibility should be thrown upon the shipowner. I have very little doubt that Mr. Barnes was right in saying that the great object was to make these bills current, and to give the holder of the bill of lading some security against the ship, but I am not satisfied that it was ever meant that a shipowner in a case like this (if the case had been put to me) should be made responsible for the negligence of the mate of the ship, or the negligence that would have been nothing if it had not been for the preceding negligence of the shipper of the goods. Therefore, not being clear that the language that has been used in this case does impose this liability on the defendants, I give judgment in their favour.

Smith, J.—I am of the same opinion. I am bound to say, that I have had considerable difficulty on account of the argument which has been pressed upon us by Mr. Barnes, who says that, unless we put his construction upon this marginal note in the bill of lading, we do not give any intelligible construction to it at all. I am not so sure about that, the salient point here is, that it is said that under this bill of lading the goods owner can come down upon the shipowner for goods which were never put on board at all. Well, that is a very startling proposition. But, it is said that this contract is such that, although the shipowner can prove conclusively that he has delivered to the goods owner at the port of destination every bale of goods, which the shipowner's agent or the consignor put on board, yet, he is bound to make good to the goods-owner goods which were never put on board. To my mind, it requires a very conclusive contract to make me believe that was ever the intention of the parties. What is done here is patent upon the figures. There were fifty-nine bales too little of No. 2, and fifty-nine too many of No. 3 in the note. The mate passes it. They get the whole 500 bales right on board, but on the shipping note there were fifty-nine too many of No. 2, and fifty-nine too few of No. 3. He gets the whole 500 on board, and when he comes here the shipowner says, "There are your 500 bales which you put on board." "Yes," says the goods-owner, "It is admitted those are the 500 put on board, but the quality marks are wrong, you must make good the deficiency between fifty-nine of No. 2, and fifty-nine of No. 3." I agree with what my

brother Mathew says as to the way we should read this marginal note in the bill of lading. Mr. Barnes asks us to read it, that this is a contract by the shipowner to make good any goods that are not put on board. Well now, upon what condition can he say we are to do that? It says, "if quality marks are used," you must read in these "on the bales"—that is quite manifest. Well, if such quality marks are used on the bales then they must be of sufficient size; that is, of the same size as the others. "And if such quality marks," what is the meaning of that? Does it mean quality marks that are not on the bales, because that is Mr. Barnes's contention? He reads it, "If such quality marks," that is marks that are not on the bales, "are inserted in the shipping notes, and the goods are accepted by the mate, then the ship shall be responsible, and the goods-owner may sue him." What are we to do with the word "such." It seems to me impossible to read the word "such" as meaning quality marks different from those on the bales. It means, "If such quality marks on the bales are inserted in the shipping notes which you bring to the mate, and the mate then accepts the goods, then if the goods are marked as agreed, and the shipping notes have the same quality marks upon them, the ship shall be responsible for the correct delivery of the goods. It has been pointed out by my brother Mathew, that if there was not some such clause as that, the shipowner need not trouble himself about quality at all, as long as he delivered the marks apart from quality marks, that is, the leading marks. It seems to me, that the shippers wanted the bill of lading over here to negotiate, and to show persons what it was they had got on board. Well, they wanted to show the qualities of jute on board, whether Nos. 1, 2, or 3 jute, and the bill of lading would be negotiated on those terms, But, that does not prove that the shipowner under this contract has agreed that if the shipping notes are brought with wrong marks upon them, he will make good any loss to the shipper. It seems to me that it means nothing of the sort, and I cannot help coming to the conclusion that this marginal note is certainly not strong enough in its phraseology to bring about what Mr. Barnes wants, namely, that the shipowner willl make good the goods of the goods-owner, although the goods-owner never put the goods on board the ship at all.

Judgment for the defendants with costs.

From this judgment the plaintiffs appealed.

Dec. 6, 1886.—*Bigham*, Q.C. and *Barnes* for the plaintiffs.

Reid, Q.C. and *Hollams*, for the defendants, were not called upon.

Lord Esher, M.R.—The first point is whether, upon the true construction of the bill of lading, there is a breach of contract by the shipowners in respect of which the plaintiffs, as indorsees of the bill of lading for value, can maintain their action. What is the meaning of this bill of lading? Now, in the first place, whatever meaning it would have as between the shippers and the shipowners, it must also have as between the indorsees and the shipowners. Before the Bills of Lading Act the action would have been brought in the name of the shipper. The only effect of that Act is to enable the indorsee of a bill of lading to sue in his own name. He has precisely the same rights as the shipper. The question, therefore, comes to be whether the shippers could have sued in this case. The memorandum in the margin of the bill of lading is, "If quality marks are used, they are to be of the same size as the leading marks and contiguous thereto, and, if such quality marks are inserted in the shipping notes, and the goods are accepted by the mate, bills of lading in conformity therewith shall be signed by the captain, and the ship shall be responsible for the correct delivery of the goods." It seems to me obvious that the words "such quality marks" refer to the marks actually upon the bales of goods. The mate might reject any of the goods on the ground that the marks on the bales were incorrect; but if he accepts the goods and inserts the marks that are upon them in the shipping notes, then they are to appear in the bills of lading, and they will bind the ship. In the present case, the marks on the bales were not correctly inserted in the shipping notes. The memorandum, therefore, does not apply. It is said that if the memorandum is so constructed it has no meaning. Even if that is so we cannot help it. It is said that we must construe the words so as to give them some effect; but, if the words which the parties have used have no effect, we cannot give effect to some supposed intention by altering those words. It is immaterial whether the construction we place on the words results in their having any effect or not. I do not say that that construction makes them of no effect. All I say is that it is immaterial.

Then it is said that the plaintiffs, being indorsees of the bill of lading for value without notice, are entitled to rely on the marks in the bill of lading. All the goods that were put on board have been delivered; and it was decided in terms, in *Grant* v. *Norway* (10 C. B. 665), that a bill of lading, which is signed by the master in respect of goods not on board, does not bind the shipowner. That case was decided, not merely on the ground that the captain has no authority to sign a bill of lading in respect of goods not on board, but on the ground that the authority of the captain is limited to doing what it is usual for captains to do, and is known to be so limited by persons in business. It is said that the captain has authority to deal with the weight of the goods put on board, so as to bind his owners; and, no doubt, that is true. But it is impossible to contend that he has authority to estimate, determine, and state on the bill of lading so as to bind the owners the particular mercantile quality of the goods. How could a shipowner with any safety give his captain authority to determine questions as to quality, which require special skill and knowledge? But it is said that the captain was bound to see that the marks on the bales were correctly inserted in the shipping notes. There is nothing in the case to show that, irrespective of the particular contract, the quality marks had by the custom of the trade become a recognised part of the marks which it was his duty to insert. I also doubt whether the indorsee being placed by the Bills of Lading Act in the same position as if the contract between the shippers and shipowners had been made with him, can stand for this purpose in any different posi-

tion from that of the shipper. The decision of the court below was, therefore, right.

Lindley, L.J.—This was an action brought by the indorsee of a bill of lading against the shipowner, and upon the argument before us two points have been raised; First, as to what liability the shipowners have incurred by the terms of the bill of lading; secondly, as to the effect of representations of quality in the bill of lading. It is said that the memorandum in the margin of the bill of lading should be construed so as to make the shipowner liable for the correctness of certain distinguishing marks, known as quality marks, inserted in the shipping notes; but that would be to reject the word "such," which there is no reason for doing. If the quality marks that are upon the bales are inserted in the shipping notes, then the shipowner is to be responsible for the correct delivery of the goods. In such a case it becomes the captain's duty to see that the bills of lading are made out in conformity with the marks in the shipping notes. It is said that to construe the words is to give no effect to the provision; but the provision makes it obligatory upon the captain to insert the quality marks in the bill of lading if they are in the shipping notes. It may be that he would not be bound to do that without such a provision. In this case the quality marks are not correctly inserted in the shipping notes, and consequently the memorandum does not apply, and there is no breach of contract. But then it is said that the quality marks incorrectly entered in the bill of lading are a representation binding the shipowners as against *bond fide* holders of it for value. But the shipowners can only be liable for a representation by the captain if it is within the scope of his authority. The captain has no authority whatever to enter the quality marks in the bill of lading unless this memorandum gives it to him. The limits of the captain's authority to enter quality marks in the bill of lading appear upon the face of that document. He has only authority to enter quality marks in the bill of lading, when the marks used on the bales are correctly inserted in the shipping notes. It appears to me, therefore, that this case is governed by the decision in *Grant* v. *Norway*.

Lopes, L.J.—The first question is whether what is written in the margin of this bill of lading applies to the circumstances of this contract. I think that it clearly does not. In this case it is perfectly clear that the actual marks on the bales never were inserted in the shipping notes. It is said that if that is necessary to make the memorandum applicable, its provisions are useless. I am not of that opinion. It appears to me that it imposes upon the captain the duty of inserting the quality marks in the bills of lading, when these are correctly inserted in the shipping notes. But even if our construction would make the memorandum useless, we could not alter the words in order to give them some effect. There has been, therefore, no breach of the contract of carriage. But it is said that though the shippers would have no remedy against the shipowners, yet the indorsees of the bill of lading have one, because of the negligence of the master in signing a bill of lading which incorrectly represented the quality marks of the bales shipped. But the master had no authority to insert the quality marks at all, except such as was expressly given to him; and, therefore, there was no authority in him to bind the owners by any representation as to quality, except in accordance with the terms of the memorandum. I think that this case comes well within the principle laid down in *Grant* v. *Norway*. "If, then, from the usage of trade, and the general practice of ship masters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and, in that case, undoubtedly he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped." I think that that is an authority for the decision in this case, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *W. A. Crump* and *Sons*.

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

Jan. 20 *and May* 21, 1887.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

Henderson Brothers v. The Mersey Docks and Harbour Board. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Liverpool Dock rates—Mersey Dock Acts Consolidation Act 1858 (21 *&* 22 *Vict. c. xcii.*), *s.* 230.

A vessel sailing from Glasgow with part of its cargo, entering the docks at Liverpool and taking on board more cargo, but not discharging any, and proceeding thence to a foreign port, there discharging and loading a cargo, sailing to Liverpool, entering the docks there, discharging cargo, and then returning with the remainder of her cargo or in ballast to Glasgow, is only liable to pay to the Mersey Docks and Harbour Board such dock rates as are payable by vessels trading inwards to Liverpool from Glasgow, and by vessels trading inwards to Liverpool from the foreign port (Lord Esher, M.R. dissentiente).

Per Lord Esher, M.R.: Such a vessel is liable to pay such dock rates as are payable by a vessel trading outwards from Liverpool to such foreign port.

This was an action tried before Mathew, J., in London, in which the plaintiffs, as owners of vessels trading between Liverpool and Glasgow and foreign ports, alleged that the defendants, as the harbour authority for the port of Liverpool, had charged rates for the use of the docks there which were excessive and illegal.

The practice with regard to the voyages of the plaintiffs' ships was that they took in a portion of their cargo at Glasgow; proceeded thence to Liverpool, where they entered the docks and completed their loading, but discharged no cargo; and thence proceeded to some foreign port, generally in India, where they discharged. They then loaded a full cargo in the foreign port for the United Kingdom; and sometimes came back to Liverpool, and having discharged cargo in the docks there, proceeded with the rest of their cargo or in ballast to Glasgow, or sometimes came back to Glasgow direct.

(a) Reported by A. H. Bittleston, Esq., Barrister-at-Law.

By the Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii.), s. 230, it is provided that,

All vessels entering into or leaving the docks shall be liable, according to the tonnage burden thereof, to pay to the board the rates hereinafter called Dock Tonnage Rates, mentioned in the schedule B to this Act annexed, according to the several and respective classes of voyages described in such schedule, that is to say, to or from the port of Liverpool from or to any parts or places in such schedule mentioned, and such rates shall be paid to the board by the masters or owners of such vessels, and shall be charged as follows:

Vessels trading inwards shall be liable to the rates payable in respect of the most distant of all the ports from which such vessel shall have traded to Liverpool.

Vessels arriving in ballast, but trading outwards, and also vessels built within the port of Liverpool or trading outwards, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards, and vessels built within the said port on first trading outwards, shall be liable to one moiety only of such rates, but shall thereafter pay full rates.

Vessels arriving in ballast at and departing in ballast from the said port shall be liable to one moiety only of the rates payable to the most distant of all the ports for which such vessels shall clear out or depart.

One arrival with one departure of a vessel shall be considered as one voyage, whether such vessel shall have traded both inwards and outwards, or arrived or departed in ballast, and without regard to any intermediate ports between which she may have traded while absent from Liverpool, but such vessel shall be liable to the rates payable in respect of the most distant of all the ports to which such vessel shall have traded; vessels arriving in ballast and trading outwards, and vessels built in the port of Liverpool and trading outwards, and having paid the rates payable on such trading outwards, shall afterwards, on trading inwards, be liable to the rates payable on vessels trading inwards.

By schedule B. the rates payable by vessels entering the docks from or leaving the docks for other ports in England or foreign countries were set out, the rates varying according to the distance of the country specified from the docks, the rate being 4½*d.* a ton for vessels trading from or to Scotland, 1*s.* 5*d.* per ton from or to India. The defendants had charged the dock tonnage rates as on vessels trading outwards to the foreign port in respect of the use of the docks on the vessel's way to the foreign port; and had charged rates as on vessels trading inwards from the foreign port in respect of the use of the docks on the vessel's return to Liverpool.

Mathew, J. held, that the defendants were entitled to charge the dock rates in respect of the plaintiffs' vessels as for vessels trading inwards from Scotland, and that they were entitled to charge the dock rates as for vessels trading outwards to India, but that this voyage and the return voyage from India to Liverpool made one arrival and one departure to be considered as one voyage within the meaning of the statute, and that they were therefore not entitled to charge in respect of such return voyage as for a vessel trading inwards from India.

Against this decision both the defendants and the plaintiffs appealed.

Finlay, Q.C., *French*, Q.C., and *T. F. Squarey*, for the defendants.

The *Attorney-General*, *Cohen*, Q.C., and *Joseph Walton*, for the plaintiffs.

The arguments sufficiently appear from the judgment of the court.

Cur. adv. vult.

May 21. — The following judgments were delivered:—

Lord Esher, M.R.—The Liverpool Dock Acts are a long series of statutes dealing with a complicated and technical business, a business which has been developing enormously from period to period. The statutes are therefore necessarily complicated, probably wanting in consistency, and therefore obscure, certainly full of terms and phrases usual in the business, unusual in ordinary colloquial language. The great canon of construction of such documents is to learn the business, and the language of the business with regard to which they are written, and then to construe the documents by applying them to that business and to that language. The business in the present case is that of a great seaport and harbour with docks, the whole adapted, constructed, and managed, for the importation and exportation of goods by sea. In order to carry on such a business, the principal elements are deep channels, beacons, buoys, lights, quays, dock entrances, docks, and warehouses. The staff of persons employed must be various, including pilots, harbour-masters, dock-masters, labourers, police, clerks, &c. The income necessary to maintain so vast a business must be collected from those who use the harbour and docks. They are used by ships, which come to and use them for the purpose of carrying goods. In such a seaport both ships and goods must be subject to the customs. The terms and phrases used in statutes and documents applied to such a business will therefore be those commonly used by merchants and shipowners in regard to ships and to the import and export of goods, and by revenue officers with regard to the business of the customs relating to ships and goods. The income in such cases is collected by a system of rates, and the chief rates are almost necessarily, from the nature of things, harbour rates, light dues, pilotage dues, dock rates, crane and quay rates. The "harbour rates," and "light and pilotage dues," are applicable to ships coming into and going out of the port or harbour; they are payments for facilities given to the ships, which facilities are equally necessary for the ships, whether they are loaded or unloaded, whether they do or do not enter the docks. The "dock rates" are the payments for the use of the docks, as distinguished from the rest of the port or harbour. The docks give facilities to trading ships with regard to their trade, which is the trade of carrying imported and exported goods, and to the goods with regard to the trade of importing and exporting them as articles of commerce. This case deals more with the docks and the dock rates than with the harbour and the harbour rates. It is right therefore to consider with the greater attention the course of business as to the docks. There is considerable skill and labour in moving a ship in a dock to or from the dock gates; but no one who has not seen it can realise the skill and labour exercised by the servants of the dock board in the conduct and superintendence of the entry or exit of a large ship through the gates of a Liverpool dock from or into the fierce tideway of the Mersey. So far as the ship is concerned, the chief anxiety and labour with regard to the use by her of the docks is the anxiety and labour of her entry and exit. The use of the docks for the goods imported and

exported is a use of warehouses, quays, cranes, and the labour of putting the goods into, or taking them out of, the ship. There is, of course, a payment, as of rent, for the time during which ship and goods are in the dock. And there is an immense expense incurred in providing for the safety of ships and goods whilst in the docks. It is obvious that the mode of imposing payment for the various services and facilities thus described required ingenuity. And it was certain to be, and it is the case, that, in order to understand correctly the scheme or schemes of those who have imposed the different rates, one must understand the business with which they were dealing. The light and pilotage dues, and other harbour dues, payable for ships, are easily understood. They are payable in respect of the use of the entrances to the Mersey and of the use of the Mersey. They are therefore obviously payable equally by ships which do, and ships which do not, enter the docks. The dock rates are necessarily extra to these, and are, moreover, the higher rates. It is clear therefore that no ship will enter a dock unless for repairs, or for carrying on its trade, namely, the trade of carrying goods to or from the port of Liverpool. The scheme of payment for the use of the docks by the ship and by the goods, a scheme of payment according to the distance of a port to or from which a ship trades to Liverpool, is based, no doubt, upon good business principles; but it is not easy, and it is unnecessary, to explain the grounds of it. Inasmuch as the dock is, as matter of fact, used only by a ship carrying on its trades (except in the case of repairs), the payment for the ship would be sure to be confined to a trading ship. The trading of a ship consists in her business of carrying goods. The goods which she is thus carrying, as part of her trade, are at Liverpool—goods which she carries to or from Liverpool as a terminus of carriage. The business phrases for the business of the ship in carrying goods to or from such an import or export port as Liverpool, are, in customs phraseology, "vessels clearing inwards or outwards;" in mercantile or business phraseology, "vessels trading inwards or outwards." They are corresponding phrases used to describe the same transaction. Ships which do not carry goods into Liverpool to be there delivered are not by the customs "cleared inwards" to Liverpool, or in business said to be ships "trading inwards" to Liverpool. No business men would, in my opinion, think of saying that a ship which came into Liverpool with a declared intention of not delivering any goods there, and which delivered no goods there, was a ship "trading inwards." They are in customs and business phraseology said to be ships "entering into Liverpool." Ships which do not carry goods by taking them in at Liverpool to be carried elsewhere are not by the customs "cleared outwards" from Liverpool or in business said to be ships "trading outwards" from Liverpool. They are in customs and business phraseology said to be "ships sailing" or "outward bound." The "clearing inwards" is the authority from the customs to "trade inwards;" the "clearance outwards" is the authority of the customs to "trade outwards." So far as the use of the Liverpool Docks is concerned, the trading of the ships means taking goods on board in a dock to be carried elsewhere, or bringing goods into a dock to be delivered to the consignees from that dock. Either of these transactions may happen under different circumstances: First, a ship may come into the dock empty in order to take goods on board and leave the dock loaded; or, secondly, she may come into the dock loaded in order to discharge her goods there, and to leave the dock empty; or, thirdly, she may come into the dock loaded in order to discharge her goods there, and then to load another cargo and leave the dock loaded. There was, I will venture to say, no other state of circumstances (unless she was to come or stay in for repairs) in which, as matter of business and fact, it was, when the original Liverpool Dock Acts were passed, contemplated that a ship would be in a Liverpool dock. The exceptional mode of dealing adopted by the plaintiffs must have arisen at a later period.

The statutes should be first construed according to the usual business which existed when they were enacted. Then it will be necessary to determine how they apply to the exceptional and more novel case. The main point is to see whether the statutes have adopted, as to old existing business, the business phraseology. If they have, we must apply that phraseology to the case under discussion. Having read all the statutes brought before us, it appears that all of them deal with the different rates in, as nearly as possible, the same terms. Attention and examination may therefore be confined to the statute 21 & 22 Vict. c. xcii., passed in 1858. The title divides the subject as I have stated that business must divide it, namely, into a dealing with the docks and a dealing with the port and harbour. The rates are, in the first part of the Act, described to be dock rates, tonnage rates, graving dock rates, harbour rates, wharf rates, warehouse rents, town dues, anchorage dues. The fourth part deals with the management of the docks and quays, and with the absolute control given to the harbour masters and dock masters over the entry and exit of ships into and from the docks. The fifth part deals with the management of the port and harbour; the sixth part deals with the pilotage. The pilotage rates are dealt with in sect. 133, and are imposed in respect of piloting "a vessel" "to the port" or "out of the port"—no limitation of the vessel being a "trading ship;" no mention of going into "dock." They are payable by every vessel "coming to" or "going out of" the port. The seventh part deals with transit sheds, warehouses, and goods. The eleventh part deals with rates and duties. This part divides "the tonnage rates," which is a general nomenclature, into "dock tonnage rates" and "harbour rates," following the business division. By sect. 238, "all" vessels "coming into" or "going out" of "the port" of Liverpool, and not entering the docks, shall be l able, &c., to the tonnage rates, hereinafter called "harbour rates," &c. It must be observed that these are to be paid by all vessels, and they are said to be vessels "coming into" and "going out of;" not trading into or trading out of the port. By sect. 239, "The objects for which such 'harbour rates' shall be levied, &c., are: The maintenance of the lighthouses, light ships, buoys, beacons, sea marks, land marks, telegraphs, lifeboats, &c., and the improvement of the port and harbour in any

other respect than in the construction and maintenance of the docks, &c." The division, the natural division, as matter of business, is exactly followed in the statute, and the statute imposes the incidence of payment exactly as business would. Bearing this in mind, we must endeavour to construe sect. 230. In it vessels are described as first, vessels "trading inwards;" secondly, vessels arriving in ballast but "trading outwards;" thirdly, the statement is "vessels built within the port of Liverpool or trading outwards." These, it is said, shall be liable to the rates payable in respect of the most distant of all the ports to which "they shall trade outwards." The section continues: "One arrival with one departure of a vessel shall be considered as one voyage, whether such vessel shall have traded both inwards and outwards, or arrived or departed in ballast, &c.; but such vessel shall be liable to the rates payable in respect of the most distant of all ports to which such vessel shall have traded." The first of these divisions corresponds with the second of the business divisions above set forth; the second of these corresponds with the ordinary mode of conducting the first business division; the third division in the statute certainly corresponds with the third business division. The question is, whether the third division in the statute does not also describe that which I have called the exceptional mode of conducting the first business division. It is urged that it does not, because it is said that, in order to make a grammatical conclusion to the phrase, "and also vessels built within the port of Liverpool," you must read "and" instead of "or" as the following word, and that then the exceptional mode is not described. But let us dissect the sentence, and it may be read thus: Vessels arriving in ballast, but trading outwards, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards: vessels built within the port of Liverpool shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards; vessels trading outwards shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards. If the section be so read, it covers all modes of trading outwards. If it is true to say that, in order to make good grammar, "or" must be read "and," it follows that the circumstances of the trade described as exceptional are not covered by the statute at all. In such a case the ship most clearly, in my opinion, does not "trade" inwards; she "enters into" the dock, but does not "trade inwards." If she is not within the description of a vessel "trading outwards," although in fact she does trade outwards, and uses the dock solely for the purpose of trading outwards, she will pay nothing in Liverpool at the time for the use of the docks. If she should not return to Liverpool, she would have used the Liverpool docks, and would never pay anything for the use of the docks. I cannot think that it is a real business view, and therefore I think it is not the legal interpretation to say, that for the sake of grammar the word "or" should be changed into "and," so as thereby to produce so unbusinesslike a result. The court cannot properly read one word for another used in a statute, unless it is clear beyond doubt that there is a pure error in the record of the word. If there is any reasonable doubt, the word actually used must remain. It seems to me that a ship which goes into a Liverpool dock solely for the purpose of taking goods on board to carry them away from Liverpool is a vessel "trading outwards" within the words of the statute, and must, under and by virtue of the statute, pay the rates as on a vessel "trading outwards," and is not a vessel "trading inwards."

Another part of the contention between the parties raised the question of the construction of the latter part of sect. 230 as to one arrival and one departure to be considered as one voyage. Here, again, let us examine the business in order to see whether it will not teach us the true construction of the statute. If a ship goes into a dock to unload, does unload, and then loads a new cargo before she goes out, she is moved through the dock twice, comes into the gates once and goes out once. If a ship comes into the dock, and unloads, and goes out empty, and afterwards comes in empty, and loads, and goes out, she is moved through the dock four times, comes into the gates twice and goes out twice. One would expect that the payment in the first case would be less than in the second, considering the difference, before explained, of the skill, labour, and anxiety necessarily bestowed on the two operations. To which of these two cases does the enactment in the statute apply? As matter of business to the first, stipulating for one payment for the performance of one operation. It would seem to be bad business to stipulate for the same payment for the performance of the operations as is charged if one only of the two operations is performed. The words of the section are rather more adapted to the first view than to the second. The words are "one arrival with one departure;" they are not "one arrival and one departure;" not "one departure and one arrival." If the words are ambiguous, the business view should prevail. It was suggested in answer to this meaning and this view, that ships enter a dock and discharge in it, and are then moved round to another dock, and then load. If that is so, which is not proved, the removal is made by order of the dock board for its convenience, the removal giving no advantage to the ship, and the board has in the later Acts taken that burden without additional payment rather than alter the incidents of rating, which had been preserved intact through all the Acts. When the mode of rating was first established, there were not many docks in Liverpool, and this suggested removal from one dock to another in all probability did not take place. I am of opinion that the statute deals with the first case in the limitation it confers, and not with the second. In applying these views to the present case, we must notice the contentions raised between the parties. The contention on behalf of the plaintiffs, raised in the correspondence, was that their ships traded inwards into Liverpool from India, and afterwards traded outwards from Liverpool to India, and that these two voyages made one arrival and one departure, to be considered as one voyage. It must be observed that, in order to make this point, the Glasgow ship was represented as commencing her carrying business in India to Glasgow, instead of as commencing in Glasgow to carry to India. The reason is obvious; without so doing the Indian trade would

not commence by an arrival at Liverpool, but by a departure from Liverpool. And, in this contention, the voyage from Glasgow to Liverpool and from Liverpool to Glasgow were dropped out. The view of the learned judge, as I understand it, is that the entry into the docks from Glasgow is a trading coastwise by the ship, and she must pay the rates accordingly; but the ship then trades outwards to India and afterwards trades inwards from India, these two making one arrival and one departure to be considered as one voyage; and that the voyage to Glasgow is also a part of the voyage from India. As to these views, I cannot agree that, as matter of fact, the ship trades inwards from Glasgow, or that she is to be considered as doing so within the meaning of the statute. Neither for the reasons I have given can I agree that the two Indian voyages are one arrival and one departure, to be considered as one voyage within the meaning of the statute. I do agree that the voyage from Liverpool to Glasgow, whether carrying cargo or not, is to be considered as one voyage with the voyage from India. I have now all the ships' papers, furnished to us at our request. The ships are not "cleared out" from Glasgow to Liverpool, but from "Glasgow to India *viâ* Liverpool." The ships, on arrival at Liverpool from Glasgow, are not "cleared inwards." They are not treated as trading coastwise under a "transire" or under a "special coasting order." The captain's report shows that the Glasgow goods are exported to India and are not to be landed at Liverpool. The ships are at Liverpool "cleared outwards" for India. On their return they are "cleared inwards" from India. All this mode of dealing with the ships by the customs seems to me to lead to the same conclusion. I am of opinion that the ship on arrival from Glasgow does not "trade inwards" to Liverpool. She cannot, therefore, in respect of the entry, when she goes into a dock, be liable to "dock dues." By her entry into the Mersey, she has "entered into the port of Liverpool" and is liable to "harbour dues." When the ship enters into the docks and loads therein for India, she is "trading outwards to India" and must pay the dock dues on such a trading outwards. When she returns to Liverpool and enters the docks to discharge, she is "trading inwards to Liverpool from India" and must pay for dock dues accordingly. This voyage cannot, within the statute, be considered as one with the voyage out to India. The voyage to Glasgow is to be considered as one with the voyage from India. I am, therefore, of opinion that the charges imposed by the defendants were correct, and that the judgment should be entered for them. The appeal, in my opinion, should be allowed.

Fry, L.J. delivered the judgment of himself and Bowen, L.J.—The question in the present case turns entirely on the true construction of the 230th section of the Liverpool Dock Acts Consolidation Act 1858, which imposes dock tonnage rates in the port of Liverpool. These rates, it may be at once observed, apply to all vessels entering into or leaving the dock, whilst the harbour rates apply to all vessels coming into or going out of the port, and not entering into the docks. The plaintiffs are the owners of a line of steamers, and the course of business is that each of these vessels starts from Glasgow with a part of her cargo, then goes to Liverpool, enters the docks, unloads no part of her cargo, takes in more cargo, sails for India and thence returns sometimes to Liverpool, and thence to Glasgow, and sometimes to Glasgow direct. When one of these steamers reaches Liverpool from Glasgow, and enters the docks, is she trading inwards within the meaning of that expression, as used in the section in question? No evidence was adduced as to the meaning of the phrase, if it be a technical one which admits of such evidence. The course of business pursued by the plaintiffs' steamers was at the passing of the Act less common than it is now, but it is not shown to us either by evidence or admission, whether such a course of business was existing or non-existing at that time. We are therefore constrained to ascertain the meaning of the words in question from our knowledge of the English language, aided by the light which the section of the statute throws on them; and by the course of business which we know to be pursued in ports and docks. The words "Trading inwards" would, we think, most naturally and therefore primarily apply to the case of a vessel entering the docks for the purpose of discharging her cargo; but we think that the words may without violence describe also any vessel laden with goods in the course of trade entering the docks for the purposes of her trade, whether loading or unloading, and this includes one of the plaintiffs' vessels arriving from Glasgow; for she is a vessel on a trading voyage; she is a trader; and she enters inwards. Are the words used in the statute in the first of these significations only or in both? The section is far from clear; but a study of it convinces us that the following propositions may be evolved from it. (1) That all vessels entering into the docks as well as all vessels leaving the docks are made liable; (2) that vessels entering the docks are subdivided into two classes, and two classes only, namely, those described as trading inwards, and those described as arriving in ballast; (3) that vessels leaving the docks are capable of subdivision into six classes: first, those trading inwards and trading outwards; secondly, those trading inwards and leaving in ballast; thirdly, those arriving in ballast and trading outwards; fourthly, those arriving in ballast and leaving in ballast; fifthly, those built within the port and trading outwards; and sixthly, those built within the port and going out in ballast; and that all these classes, except the last, are referred to in the section, and are the subject of express charges; (4) that no vessel is to pay both inward and outward rates; (5) that inward rates are to be paid preferentially, as is shown amongst other things by the provision that one arrival followed by one departure is treated as one voyage, and not one departure followed by one arrival; and further, by the enactment of sect. 247, that the rates in question shall be paid on the arrival of the vessel. We have thus stated the conclusions at which we have arrived from a study of the section in question. It is not easy to explain every word in it in accordance with any one of the interpretations suggested to us; nor should we usefully occupy time in a minute criticism of every expression of a somewhat clumsily drawn clause. It may, however, be well to observe that a strong argument was raised on the word "or," in the expression "vessels built within the port of Liverpool or trading outwards," in the third paragraph

of the section in question. But, in our opinion, the word "or" must be read "and;" for the general drift of the clause requires this, and in the description of what must be the same class of vessels at the end of the clause, and is therefore strictly speaking a parallel passage, we find the word "and" substituted for "or" and the class of vessels described as "vessels built in the port of Liverpool and trading outwards." If the view of the section above stated be correct, the plaintiffs' steamer when she enters the dock must be either (1) a vessel in ballast; or (2) a vessel trading inwards; or (3) her case is omitted. But she is plainly not a vessel in ballast for her contents are goods — not ballast; no *casus omissus* can be admitted where the section declares that all vessels entering the port are charged; therefore she is a vessel trading inwards. This conclusion, to which we are driven by the section itself, appears to us for reasons already given to do no violence to the words "trading inwards," and to be in accordance with the general scheme of the enactment which prefers in every case an entering to a leaving charge. It was contended that the dock company are at liberty to charge the plaintiffs' vessels as if the course began in India, and as if one departure with one subsequent arrival constituted one voyage. In our opinion this contention cannot prevail; for in fact each of the vessels has first arrived from Glasgow and not from India, and she is required to pay on that arrival; and secondly the statute declares one arrival with (*i.e.*, followed by) one departure to be one voyage, but contains no declaration in favour of one departure with or followed by one arrival. In our opinion the declaration of the learned judge should be varied, by declaring that the defendants are entitled to charge in respect of every ship of the plaintiffs arriving from Glasgow and sailing for India, as mentioned in paragraph 2 of the statement of claim the dock tonnage rates, as on a ship trading inwards from Glasgow, and in respect of every ship of the plaintiffs arriving from India and sailing for Glasgow, as also mentioned in the said paragraph of the statement of claim, the dock tonnage rate as on a ship trading inwards from India. In our opinion this variation in the judgment ought not to affect the costs of this appeal, which should be borne by the appellants.

Solicitors for plaintiffs, *Gregory* and *Co.*, agents for *Hill, Dickinson, Lightbound*, and *Dickinson*.

Solicitors for defendants, *Gregory* and *Co.*, agents for *Squarey*.

Tuesday, Feb. 15, 1887.

(Before Lord ESHER, M.R., BOWEN and FRY, L.JJ.)

THE AUGUSTA. (*a*)

Collision—Port of Havre—French law—Compulsory pilotage—Duties of pilot.

Although the employment of a pilot by a vessel entering the port of Havre is, by French law, compulsory, such pilot does not as of right, as is the case in England, supersede the master and take charge of the ship, but, according to French decisions, the master remains in charge, the pilot being merely his adviser; hence, though the master may allow such pilot to take charge in fact, the owners are not exempted from liability for damage done to another ship by the negligence of the pilot.

THIS was an appeal by the defendants in a collision action from a decision of Sir James Hannen finding their steamship the *Augusta* solely to blame for a collision with the plaintiffs' steamship the *Chilian*.

The collision occurred at about 1 p.m. on the 12th Jan. 1886 in the Bassin le l'Eure at Havre.

The plaintiffs' steamship the *Chilian* was lying moored to the quay in the Bassin de l'Eure when she was run into by the *Augusta*.

The defendants denied that the collision was caused by the negligence of themselves or their servants, and alleged that it was solely caused by the negligence of the pilot who was in charge by compulsion of law.

Sir James Hannen found that the collision was occasioned by the negligence of the defendants' pilot, but gave judgment for the plaintiffs on the ground that, according to the French law, the pilot was not compulsorily in charge, and did not supersede the authority of the master.

On the question of compulsory pilotage the plaintiffs and defendants respectively called a French advocate to give evidence as to the law connected therewith. On behalf of the plaintiffs it was alleged that the functions of the pilot were confined to assisting the master in the navigation of the ship by pointing out the local dangers, and the like. On behalf of the defendants it was alleged that the pilot superseded the authority of the master, and that the master was bound to give up the navigation of the ship to the pilot.

As a matter of fact, the orders as to the navigation were given by the pilot and transmitted by the master to the crew. The further facts are fully stated in the report of the case below (6 Asp. Mar. Law Cas. 58; 56 L. T. Rep. N. S. 58).

The following decrees of the French Government, containing pilotage regulations, were referred to, and are material to the decision:

Décret du 12 *Décembre* 1806, *contenant Reglement sur le Service du Pilotage.*

Art. 34. Tout bâtiment entrant ou sortant d'un port, devant avoir un pilote, si un capitaine refusait d'en prendre un, il serait tenu de le payer comme s'il s'en etait servi. Dans ce cas, il demeurera responsable des événements; et, s'il perd le bâtiment, sera jugé suivant l'article 31 du présent réglement. Sont exceptés de l'obligation de prendre un pilote: les maîtres au grand et petit cabotage, commandant des bâtiments français au-dessous de quatre-vingts toneaux, lorsq'uils font habituellement la navigation de port en port et qu'ils pratiquent l'embouchure des rivières. Mais les propriétaires des navires chargeurs ou tous autres intéressés pouvront contraindre les captaines, maîtres, ou patrons à prendre des pilotes, et ils auront la faculté de les poursuivre devant les tribunaux, en cas d'avaries, échouements, et naufrages occasionnés par le refus de prendre un pilote.

Art. 35. Il est expressément défendu aux pilotes de quitter les navires qu'ils conduiront, avant qu'ils soient ancrés dans les rades ou amarrés dans les ports, ainsi que d'abandonner ceux qu'ils sortiront avant qu'ils soient en pleine mer, au-delà des dangers, à peine de la perte de leurs salaries, de trentre francs d'amende, d'interdiction pendant quinze jours et de plus fortes punitions s'il y a lieu. Il est defendu aux capitaines de retenir les pilotes au-delà du passage des dangers, et aux pilotes de monter à bord contre le gré des capitaines.

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

Décret du 29 Août 1854.—Pilotage de la Seine.

Art. 216. Tout autre bâtiment destiné pour le Havre ou Honfleur, ou qui étant destiné pour la Seine, doit relâcher dans l'un de ces deux ports, est tenu de recevoir le pilcte de l'exterieur qui se presente le premier, sans pouvoir le refuser sous prétexte d'un trop grand éloignement; toutefois, les pilotes du Havre ne peuvent monter les navires destinées pour Honfleur, et reciproquement, ceux de ce dernier port ne peuvent être reçus à bord des navires destinés pour le Havre que dans le cas où il n'y aurait pas en vue un pilot du lieu de destination se dirigeant sur le bâtiment.

Art. 244. Les pilotes ne peuvent oxiger aucun salaire pour le passage du port dans l'un des bassins, ou de l'un des bassins dans le port, à la meme marée d'entrée ou de sortie. Tout pilote requis pour passer un navire d'un bassin dans un autre reçoit trois francs.

Sir *Walter Phillimore* and *J. P. Aspinall*, for the defendants, in support of the appeal.—The defendants are entitled to judgment upon the plea of compulsory pilotage. According to the true constructions of the French decrees on this subject, the pilot does in effect supersede the authority of the master. The case of *The Guy Mannering* (4 Asp. Mar. Law Cas. 553; 7 P. Div. 132; 46 L. T. Rep. N. S. 905), upon which the learned President based his decision, is not in point. The Suez Canal Regulations which were under consideration in that case are very different from the French decrees applicable to the pilotage in this case. Should the court accept the evidence of the advocate called on behalf of the plaintiffs, then it is submitted that the reasoning of the French decisions upon which that evidence is based is incorrect and contrary to the principles of English law. This pilot was, in fact, forced upon the defendants, and their vessel was necessarily intrusted to his sole charge, and hence, on the authority of *The Halley* (18 L. T. Rep. N. S. 879; 3 Mar. Law Cas. O. S. 131; L. Rep. 2 P. C. 193), the defendants are relieved from responsibility for his negligence. To found any liability against the defendants, the plaintiffs must establish negligence. If, then, the pilot is only to be looked upon as an adviser, he is equivalent to a living chart, and, as he was a duly qualified pilot, the master was justified in regarding him as a competent adviser, and in following his advice as to the navigation of the vessel. The defendants can only be made liable through their servant or agent, and, as according to French law the master is not personally responsible if a pilot is on board, there is no one through whom the defendants can be made liable.

Bucknill, Q.C., *Raikes*, and *Beard*, for the respondents, were not called upon.

Lord Esher, M.R.—This is a perfectly plain case according to the authorities. I will not go further than the authorities in this case. In the case of *The Halley* (*ubi sup.*) the duties of the pilot in his relation to the master and as to the power of the master with regard to him, were stated in a statement of defence. There was a replication, and the learned judge in the Admiralty Court held that the replication might, or would, be an answer if it was proved. The Privy Council overruled this. The articles of replication in that case admitted what was said in the articles of defence; it admitted that the articles of defence stated correctly what were the powers of the pilot, and the powers of the captain with regard to the pilot. They were stated as a matter of fact, and that could not be controverted, because it was admitted on demurrer; and when the case came to the Privy Council the judgment was given by Selwyn, L.J. The grounds upon which it was held that in that case the owners were not liable was, that what happened "was a tort occasioned solely by the negligence or unskilfulness of a person who was in no sense the servant of the appellants, a person whom they were compelled to receive on board their ship, in whose selection they had no voice, whom they had no power to remove or displace." If that had been enough, in a considered judgment of the Privy Council, then it would have stopped there; but he goes on, "and who, so far from being bound to receive or obey their orders, was entitled to supersede, and had in fact at the time of the collision superseded, the authority of the master appointed by them." That is the ground of the decision. If the law of France is correctly laid down by M. Clunet in the answer which I have read more than once, that "the pilot is only an adviser, and the captain remains free to obey, or not to obey, the indications given by the pilot," this case does not satisfy that part of the judgment which says: "And who, so far from being bound to receive or obey their orders, was entitled to supersede, and had in fact at the time of the collision superseded, the authority of the master appointed by them." According to M. Clunet, if that was a true description of the relations between the pilot and the captain, the pilot is not entitled to supersede the captain, and the captain is not bound to obey what the pilot says. Therefore this case is not within the authority of the case of *The Halley* (*ubi sup.*).

Now we come to the case of *The Guy Mannering* (*ubi sup.*). In the case of *The Guy Mannering* the pilotage was compulsory. There was a collision in the Suez Canal, and what happened was solely the fault of the pilot. Therefore you have to pass from this argument that the mere fact of the pilot being compulsory makes him not the servant of the owners, and therefore the owners are not liable for what was solely his fault. If that is the true doctrine to be laid down, *TheGuy Mannering* ought to have said so, and ought to have said that the owner was not liable. It is obvious that, in the case of *The Guy Mannering*, part of what was stated in *The Halley* did not exist: "And who, so far from being bound to receive or obey their orders, was entitled to supersede, and had in fact at the time of the collision superseded, the authority of the master." In *The Guy Mannering* he could not supersede the captain, and the captain was not bound to obey him. Was the point taken there? I say that there he was a compulsory pilot and that the pilot was solely to blame, and the point was evidently taken: "It is said that the pilotage is compulsory, and that a shipowner is not liable for the acts of the pilot whom he is compelled to employ." It is obvious that this argument must have been taken and followed pretty well the same lines as the argument taken by Sir W. Phillimore in this case. What did the court decide? It decided that, although it was compulsory, yet, inasmuch as he did not supersede the authority of the captain, it did not come within the English law. By the English law you are not only obliged to take the pilot on board, but he takes command of the ship out of the captain's hands, unless something extraordinary happens. That is the ground upon which the

English law always existed. *The Guy Mannering* states that, and M. Clunet states that the general law of France, as the President points out, is practically to the same effect as the Suez Canal laws which were dealt with in the case of *The Guy Mannering*. If that is so, this case is entirely on the same footing as *The Guy Mannering*, which did not intend to overrule *The Halley*. It is said that the pilot came on board here to take charge of the ship, in a manner which accords with the decision in *The Halley*. The question is, whether we consider the President was right in adopting the French law as enunciated by M. Clunet. Sir Walter Phillimore objected to the doctrine he enunciated. If the President saw the learned gentleman who gave this evidence, and the manner in which he gave this evidence, I do not see what we can do. We have read the evidence of the two advocates. I do not say anything derogatory to either of them; all I can say is that, having read the evidence of M. Clunet, supported as it is by all the decisions in France, I accept it, and it looks to me as if it were right. If we are going wrong on the law of France, we cannot help it. The evidence of M. Clunet was given before the learned President, and he accepted it. Then it is said that by the law of France the master is not liable. That is going away from the point, and endeavouring to learn what the views of the captain and of the pilot were whilst they were on board the ship, and by that means to come to a conclusion as to what their liabilities were as against the captain, or against the pilot, or against anybody else. With the law of France we are not concerned. We are concerned with the law of England, and in an English action we are bound by the law of France, because the law of France establishes what are the circumstances of the appointment and employment of the pilot. When you find that the pilotage is such that it comes under one head of the English law rather than another, you adopt the terms of the employment according to the English law. I cannot have a doubt myself that the learned President was perfectly right in this case, and that this case comes within the case of *The Guy Mannering* (*ubi sup.*). Therefore the judgment of the court below must be affirmed.

Fry, L.J.—My brother Bowen has asked me to precede him in making a few observations on this case. I have very little to add. The case arose in this way: The shipowners were liable *primâ facie* for the default of the master as their agent. Upon that is engrafted the case of compulsory pilotage, where the pilot, compulsorily taken on board, is, in the language used correctly by Mr. Aspinall, in charge of the ship. He is in charge of the ship, and is entitled to supersede, and does supersede, the authority of the master. It appears to me the pilot is not in charge when he does not so supersede the master, and where the pilot is only the adviser, and where the captain remains free to obey the pilot or not. That is the effect of the decision in *The Guy Mannering*. Now the question here is really one of fact. The learned President of the Probate, Divorce, and Admiralty Division has found, as a matter of fact, that the French law is, that the pilot is only the adviser, and that the captain remains free to obey him or not. The only question we have to inquire into is, whether the learned judge was justified in the finding. It appears to me that the finding is not only justified, but one at which I should have arrived merely on reading the evidence of the two advocates. In the first place, the evidence of M. Clunet is, to my mind, much more satisfactory than that of M. Lecouflet, who was called for the defendants. In the next place, it appears to me far more to agree with the authorities which have been cited, especially the text writers, whose authority is not entirely denied by the advocate for the defendants. But, in the last place, it appears to me that in the re-examination of M. Lecouflet, he did admit that, according to the law as administered in France, in that system of law the pilot was in effect only the assistant, the aid, and did not supersede the captain. I think, therefore, that the learned judge was justified, and was perfectly right, in the conclusion of fact at which he arrived with regard to the law, and that the pilot coming on board was not entitled to supersede, and did not in fact supersede, the authority of the master.

Bowen, L.J. concurred.

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

Solicitors for the defendants, *Botterell* and *Roche*.

Monday, June 20, 1887.

(Before Lord Esher, M.R., Lindley and Lopes, L.JJ.)

The Sara. (*a*)

ON APPEAL FROM BUTT, J.

Master's disbursements — Maritime lien — Bills of exchange—Liability of master—Admiralty Court Act 1861 (24 *Vict. c.* 10), *s.* 10.

The master of a ship has a maritime lien for disbursements made on behalf of the ship.

Where a master has incurred liability by drawing bills of exchange for necessary disbursements in respect of the ship, he has a maritime lien on the ship to the extent of that liability, although he has made no payment in respect of that liability.

This was an action *in rem* for master's disbursements.

By the statement of claim it was alleged that, whilst the plaintiff was serving as master of the vessel *Sara*, he made necessary disbursements for the ship; that he drew a bill of exchange on the owners for such disbursements; that the bill of exchange had been dishonoured by the owners; and that the holders of the bill were claiming against him. The plaintiff claimed judgment for the amount of the said bill, viz., 182*l.* 19*s.* 4*d.*; for notarial charges; and for interest.

The mortgagees intervened and delivered a defence, which, after denying generally that any money was due to the plaintiff in respect of disbursements, proceeded as follows:

8. The plaintiff has brought this action as agent for, and on behalf of, the holders of the bill of exchange, and the holders of the bill of exchange are suing in the name of the plaintiff. The said holders have no right to have their claim satisfied out of the said ship, and the said defendants submit that the alleged claim of the plaintiff, being made on behalf of the holders of the bill of

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

exchange, ought not to be satisfied out of the said ship to the prejudice of the said defendants.

9. Even if all the averments in the statement of claim are true, which as aforesaid the defendants deny, the said defendants submit that the plaintiff has no right to have his alleged claim satisfied out of the ship to the prejudice of the said defendants.

At the trial it was proved that, on the mortgagees taking possession, they paid the captain his wages, but would not indemnify him against liability on the bill; that, on the bill being dishonoured by the shipowners, a claim was made upon the plaintiff; that the holders of the bill were providing the money to prosecute the action; that, in the event of the action being successful, the money recovered was to go into the pockets of the bill-holders; and that the bill-holders had not released the plaintiff from liability on the bill.

Feb. 14.—Sir *Walter Phillimore* (with him *J. G. Barnes*) for the plaintiff.

Finlay, Q.C. (with him *Nelson*) for the defendants.

Butt, J.—This is an action by a master mariner for disbursements, and the claim resolves itself in effect into one for the amount of a bill of exchange which he drew on the owners of the ship for the sum of 182*l.* 19*s.* 4*d.*, he being then at St. Vincent with the ship. The owners either were then, or since that time have become, insolvent, and the bill has been dishonoured. Notice of dishonour was given to the plaintiff by the holders of the bill, and there is no doubt that, unless they have done something to release him from his liabilities as drawer of this bill, he remains at this moment liable for the amount. Now the defence to the action, a defence put forward by the mortgagees of the ship who have intervened, is this: They say, in the first place, this is not the plaintiffs' action at all; it is the action of the payees and holders of the bills of exchange, and the master is suing as trustee for them and in that capacity alone; and inasmuch as if they had appeared as the plaintiffs they would have no claim against the ship which would not be postponed to the claim of the mortgagees, the master suing for them cannot stand in a different position, and therefore he cannot bring his claim for these disbursements into competition with the claim of the mortgagees. That would be a perfectly sound and good argument if the facts were such as the defendants assert them to be; but, having heard the evidence, I have come to a very clear conclusion that the facts do not warrant the assumption that the master is suing merely as trustee for the payees of the bill. He is undoubtedly liable for the amount of the bill. It is true that the payees have asked him either to sue or to lend them his name to sue in this action, and it is true that if the plaintiff succeeds in recovering in this action the money will go in payment of this bill and go into the pockets of Messrs. Miller and Co., the payees of the bill. But it is equally true that, the moment that money finds its way into the pockets of Messrs. Miller and Co., the master will *ipso facto* be relieved from his liability to pay the 182*l.*, and therefore I altogether dissent from the notion and from the assertion that the master is suing here merely as a trustee for the payees of the bill, Messrs. Miller and Co. Therefore, the first contention of the defendants fails.

I now come to the second defence, and it is this: The mortgagees say, assuming this action is, as I have held it to be, brought by the master in his own right, still it is a claim for disbursements, and the master has no maritime lien for disbursements. Having no maritime lien he cannot enforce it against the ship, and at all events he cannot enforce his claim against the ship in priority to the claim of the mortgagees. This is a matter which was considered in the court a long time ago, and there are several authorities on the point, the last of which, apart from a recent case to which I will refer by-and-by, was the case of *The Mary Ann* (L. Rep. 1 A. & E. 8; 13 L. T. Rep. N. S. 384; 2 Mar. Law Cas. O. S. 294). I confess, had this question come before me in the absence of any such decision as that given in *The Mary Ann* (*ubi sup.*) and in the cases which preceded it, I should have had very considerable hesitation in holding that there was any maritime lien for master's disbursements. But there is the case of *The Mary Ann* (*ubi sup.*) and the cases which preceded it. Then the defendants say, "True that is so, but the authority of that case is seriously impaired by the decision of *The Heinrich Bjorn* (55 L. T. Rep. N. S. 66; 6 Asp. Mar. Law Cas. 1; 11 App. Cas. 270) in the House of Lords and in the Court of Appeal." I must say, having regard to the language of the section of the Act of Parliament under the consideration of the Court of Appeal and the House of Lords in the case of *The Heinrich Bjorn*, viz., the 6th section of 3 & 4 Vict. c. 65, it seems to me impossible to say that the case of *The Heinrich Bjorn* (*ubi sup.*) has not thrown considerable doubt upon the authority of *The Mary Ann* (*ubi sup.*). Had the matter rested there I should have had to consider very carefully what the effect of *The Heinrich Bjorn* (*ubi sup.*) really was upon the case of *The Mary Ann* (*ubi sup.*) and the cases that preceded it. But there is the case of *The Ringdove* (55 L. T. Rep. N. S. 552; 11 P. Div. 120; 6 Asp. Mar. Law Cas. 28), decided by the President of this division only last year. While I entirely agree with what he says as to the reasoning in the case of *The Mary Ann* (*ubi sup.*) not being satisfactory, I still do not think I am authorised in going contrary to his decision in *The Ringdove* (*ubi sup.*). I think it is a case decided by a court of co-ordinate jurisdiction, and it is therefore one from which I am not at liberty to depart, and I decline to exercise any independent judgment on the matter. I hold that that case is conclusive upon me, and that if it is to be reconsidered and altered that reconsideration and alteration must be in the Court of Appeal. Therefore I must hold that in this case there is a maritime lien for disbursements, and decide in favour of the plaintiff.

From this decision the defendants now appealed.

Finlay, Q.C. and *Nelson*, for the defendants, in support of the appeal.—The master of a ship has no maritime lien for disbursements, and therefore the mortgagees are entitled to judgment in this action. The decision in the case of *The Heinrich Bjorn* (55 L. T. Rep. N. S. 66; 11 App. Cas. 270; 5 Asp. Mar. Law Cas. 391; 6 Asp. Mar. Law Cas. 1) is an authority in favour of that proposition. The *ratio decidendi* of that case, both in the House of Lords and Court of Appeal

is that the words "the High Court of Admiralty shall have jurisdiction" do not of themselves create a maritime lien. If that be true of sect. 6 of 3 & 4 Vict. c. 65, it is equally true of sect. 10 of the Admiralty Court Act 1861, in which precisely similar words are used. The decisions upon which the plaintiff relies as to the existence of a maritime lien for disbursements are inconsistent with the case of *The Heinrich Bjorn* (*ubi sup.*), and have virtually been overruled by it:

The Mary Ann, 13 L. T. Rep. N. S. 384; 2 Mar. Law Cas. O. S. 294; L. Rep. 1 A. & E. 8;
The Glentanner, Swa. 415;
The Fairport, 48 L. T. Rep. N. S. 536; 5 Asp. Mar. Law Cas. 62; 8 P. Div. 48;
The Ringdove, 55 L. T. Rep. N. S. 552; 6 Asp. Mar. Law Cas. 28; 11 P. Div. 120;
The Feronia, 17 L. T. Rep. N. S. 619; 3 Mar. Law Cas. O. S. 54; L. Rep. 2 A. & E. 65;
Re Rio Grande do Sul Company, 36 L. T. Rep. N. S. 603; 3 Asp. Mar. Law. Cas. 424; 5 Ch. Div. 282.

The court should not be influenced by the fact that the courts have for many years past upheld the existence of a maritime lien for disbursements if in fact there be no lien. In *The Heinrich Bjorn* (*ubi sup.*) the court did not hesitate to overrule the then existing law, notwithstanding the many years during which it had been unquestioned. Reliance is also placed upon *The Beeswing* (53 L. T. Rep. N. S. 554; 5 Asp. Mar. Law Cas. 484), where the Master of the Rolls in express terms doubted the existence of a maritime lien in respect of disbursements. It is also contended that disbursements do not include liabilities, and if so the master's liability on this bill does not come within sect. 10 of the Admiralty Court Act 1861:

The Feronia (*ubi sup.*);
The Fairport (*ubi sup.*);
The Chieftain, Br. & Lush. 105;
The Edwin, Br. & Lush. 281.

It is, however, submitted that the real plaintiffs in this case are the holders of the bill and not the master. If the action is successful, the money recovered is to go into the pockets of the bill-holders, and the master will not get a penny of it. The master is really only suing as trustee for the bill-holders, and if so they are not entitled to take advantage of a maritime lien which they do not possess.

Sir *Walter Phillimore* and Dr. *Raikes* for the plaintiff.—The courts have for a long period of years recognised the existence of a maritime lien in respect of a master's disbursements:

The Mary Ann (*ubi sup.*);
The Fairport (*ubi sup.*);
The Glentanner, Swa. 415;
The Feronia (*ubi sup.*);
The Limerick, 34 L. T. Rep. N. S. 708: 3 Asp. Mar. Law Cas. 206; 1 P. Div. 411;
Re Rio Grande do Sul Company (*ubi sup.*).

It is to be noticed that the decision in *The Heinrich Bjorn* (*ubi sup.*) was greatly based upon the fact that the decisions on the point under consideration had conflicted one with another, whereas the decisions on the present point have been uniform from first to last. Moreover, the decision in *The Heinrich Bjorn* (*ubi sup.*) is not in point. It was a decision on an Act of Parliament and a subject-matter both different from those under consideration in this case. Another point of difference between this case and *The Heinrich Bjorn* (*ubi sup.*) is, that whereas in *The Heinrich Bjorn* (*ubi sup.*) the existence of a maritime lien depended entirely upon an Act of Parliament, in the present case it is contended, upon the authority of *The Mary Ann* (*ubi sup.*), that a maritime lien exists independently of the provisions of the Admiralty Court Act 1861. If a master has a maritime lien for his disbursements, then the fact that the money recovered by the plaintiff in this case is to go into the pockets of the bill-holders does not take away the maritime lien. He is under a liability in respect of his disbursements, and unless the court upholds his maritime lien he will have to pay the amount due on the bill out of his own pocket.

Nelson in reply.

Lord Esher, M.R.—In this case the master of a ship brings an action against the owners of the ship for alleged disbursements made by him. His liability in respect of these disbursements arose in this way: He had obtained necessaries for the ship, and in respect of them he had drawn a bill of exchange upon his owners, who accepted the bill, but afterwards dishonoured it. It is true that he has not paid his liability on the bill; but it is clear that he is liable to the person in whose favour it is drawn. He is liable as drawer of the dishonoured bill without any possible defence that anyone can see. He thereupon institutes this action, and the mortgagees of the ship intervene to show that, whatever right he had against the shipowners, he has no right against them, and that the ship ought not to be dealt with to their injury. This raises the question whether their claim is to be postponed to the master's claim, or, in other words, whether the master has a lien upon the ship by reason of his disbursements. Now, the only lien he can have is a maritime lien, because he has not possession of the ship, and therefore it must be a maritime lien in the sense in which it has been explained—viz., the right on his part to recover as against the ship in an action *in rem* in respect of his disbursements. The first point taken against the master's claim is this, that he has not made any disbursements, because he has not paid his liability upon the bill of exchange. If that be a true proposition that, in order to have a right of action for disbursements, a master must have actually paid the money, then, even if judgment had been obtained against him on this bill of exchange, it must follow that he could not claim in respect of that disbursement until he had paid the amount of the judgment, because a judgment against you is not satisfied one whit more than a liability on a bill of exchange until it is paid. Now, when we consider the practice of the Admiralty Court, it seems to me that this would be properly treated as a disbursement, even though the money has not actually been paid. Therefore, with regard to the first point, I confess I have no doubt whatever that this liability was properly treated by Butt, J. as a disbursement.

I now come to the question whether by virtue of sect. 10 of the Admiralty Court Act 1861 the master had a maritime lien upon the ship. That depends upon what is the construction of the section, which includes many subject-matters. It commences with the words: "The High Court of Admiralty shall have jurisdiction over" all these different matters: "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." It is obvious that that section in terms gives the Admiralty Court jurisdiction over disbursements; but the question is whether, as applied to the particular case of disbursements, it also gives the master a lien on the ship which is to be realised by an action *in rem*. The words introducing the section existed in a previous Act of Parliament, and have been dealt with by the Court of Admiralty. There were certain matters over which the Court of Admiralty had jurisdiction in the sense that there was a maritime lien which the court could carry into effect by an action *in rem*. There were certain other matters over which it had not jurisdiction until it was given by Act of Parliament; for instance, with regard to necessaries supplied to a ship, the court had no jurisdiction until it was given it by the Legislature. On the other hand, the Admiralty Court always had jurisdiction in respect of a collision at sea, whether the vessels were British or foreign. But if a collision occurred within the body of a county the court had no jurisdiction. So with regard to seamen's wages, the court had a jurisdiction by which it could enforce a lien against the ship for the wages of a seaman employed upon the ordinary maritime contract arising from the signing of the articles. But, if there was a special contract, the Admiralty Court had no jurisdiction in regard to it. The first statute, viz., the 3 & 4 Vict. c. 65, s. 6, which begins with the words, "The Court of Admiralty shall have jurisdiction," came before Dr. Lushington in the case of *The Mary Ann* (*ubi sup.*), and he came to the conclusion that, though the words gave the Admiralty Court jurisdiction, they did not of themselves give the court a right to enforce a maritime lien. But that learned judge said also that, if these words occurred as the introductory part of a section dealing with a matter in respect of which under certain circumstances the Court of Admiralty would have been able to enforce a maritime lien, and they gave the Admiralty Court jurisdiction to deal with that very same subject-matter under circumstances in which it could not have dealt with it before, then they were to be regarded as taking away the exception, and as placing the matter under the jurisdiction of the Admiralty Court, so that it could enforce a maritime lien without any exception at all. Then the maritime lien would apply to cases which were formerly excepted, just as it did to cases which were not excepted. The case of *The Mary Ann* (*ubi sup.*) decided that disbursements were brought within this principle; and why? Because, as Dr. Lushington said, the Court of Admiralty in some circumstances had jurisdiction to deal with disbursements as carrying a maritime lien. He said that power was given to the Admiralty Court with regard to disbursements not by reason of its ancient jurisdiction, but by sect. 191 of the Merchant Shipping Act; and in the case of *The Glentanner* (Swa. 415) he held that the 191st section gave to the Admiralty Court, under certain circumstances, the power of enforcing the master's claim for disbursements against the ship. That decision is now challenged. The question is no doubt a difficult one, but I do not find that any court has ever expressed disapproval of the construction put by Dr. Lushington on that section. Dr. Lushington used that construction for his decision in *The Mary Ann* (*ubi sup.*). I am of opinion that we cannot question the decision in *The Glentanner* (*ubi sup.*), for I think it is right. If so, is the reasoning in *The Mary Ann* (*ubi sup.*) right? I think it is. I cannot conceive—I am now referring to sect. 6 of the Act of 1840—that in the case of collisions happening in counties there was only to be a right of action against the owners. What use would the statute be if it gave a shipowner the right to go into the Court of Admiralty, and then only gave him a judgment similar to a judgment of a court of common law? What use, again, was it in the case of a seaman with a special contract to give the Admiralty Court power to construe it and nothing more, when it might just as well have been construed by the common law courts? It seems to me to be obvious that in these cases it was intended not only to give jurisdiction, but also to give a maritime lien. It appears to me to follow that, if *The Glentanner* (*ubi sup.*) was right, *The Mary Ann* (*ubi sup.*) is within the same reasoning, and is also right. Now, has that view been disputed by any court? Many cases have been cited to us. There is the case of *The Two Ellens* (*ubi sup.*), in the Privy Council, which, so far from throwing any doubt on the judgment of Dr. Lushington, really approves of it. It is said that that was a mere dictum. I cannot take that view, but the judgment of the Privy Council is not the judgment of a judge, but of all the members of the Privy Council. *The Heinrich Bjorn* (*ubi sup.*), and especially the judgment of Lord Bramwell, is supposed to throw doubt on *The Mary Ann* (*ubi sup.*). But I cannot see it. Lord Bramwell does not say that the distinction drawn by Dr. Lushington is an unsound one. On the contrary, he seems to countenance it. In dealing with cases of salvage and collision, he with his usual quickness sees the absurdity of holding that in all these case no maritime lien is given. He takes the case of collisions, and says it is not easy to conceive that the Act meant that, if a collision took place 200 yards beyond the Nore Light, there should be a maritime lien, and that if it took place 200 yards within the light, there was to be no maritime lien, but only a personal judgment against the owners of the wrong-doing ship. Lord Bramwell says that would be a strange thing to him, and therefore he seems to me, so far from objecting to the existence of a maritime lien, to be hesitating from saying that there would be no maritime lien in that case. He held, with regard to necessaries, that the words "the Admiralty Court shall have jurisdiction" do not give a maritime lien, but he did so because, as applied to that subject-matter, they cannot be said to take away the exception. I cannot see that he overrules *The Mary Ann* (*ubi sup.*), or objects to the reasoning on which it is founded.

But there is this also to be remembered, that the decision in *The Mary Ann* (*ubi sup.*) was given in 1865, and from that time till now it has been followed over and over again. It was approved and acted upon, if I am right, in *The Edwin* (*ubi sup.*), *The Feronia* (*ubi sup.*), *The Marco Polo*

(*ubi sup.*), *The Fairport* (*ubi sup.*), *The Limerick* (*ubi sup.*), and by the Court of Appeal in the case of *Re Rio Grande do Sul Company* (*ubi sup.*). Sir James Hannen has also acted upon it in the recent case of *The Ringdove* (*ubi sup.*). This series of precedents is of importance. It is not the case of an interpretation of an Act of Parliament which only arises on rare occasions, and on the faith of which men have seldom to act. It is not again like the case of *The Bernina* (36 L. T. Rep. N. S. 258; 6 Asp. Mar. Law Cas. 75; 12 P. Div. 58), in which we reversed the old decision of *Thorogood* v. *Ryan* (8 C. B. 115; 18 L. J. 336, C. P.), on the faith of which no man ever got into or stayed out of an omnibus. But *The Mary Ann* (*ubi sup.*) is a case upon which mercantile man are constantly acting, and, even though we differed from that decision, one must not forget the very good rule of the courts that they will not overrule decisions on the faith of which mercantile business has so long been carried on. Captains are called upon, voyage after voyage, to make disbursements, and on the faith of that decision they have assumed that they are safe in incurring these liabilities, and that they will not be at the mercy of insolvent owners, who perhaps may have mortgaged their ship to third parties. To reverse that decision would go far to justify captains in refusing to order necessaries, and would put an obstacle to this most valuable and useful power of captains. Therefore, even if I differed from the judgment in *The Mary Ann* (*ubi sup.*), which I do not, I should hesitate long before overruling such a decision. I desire to state that its reasoning commends itself to my understanding, and I therefore am of opinion that the judgment of Butt, J. must be upheld, and this appeal dismissed with costs.

LINDLEY, L.J.—The main question in this case is, whether the captain has a maritime lien on the ship in respect of disbursements. That depends on the construction of sect. 10 of the Admiralty Court Act 1861. A construction was put upon that section in 1865 in the case of *The Mary Ann* (*ubi sup.*) which has been followed ever since. It has been referred to as law in the text-books, and has become incorporated as part of English law. There is no authority against it, but we are asked to overrule it because the reasoning upon which it is based is said to be at variance with the reasoning of this court and the House of Lords in *The Heinrich Bjorn* (*ubi sup.*). In my opinion that is not so, and Dr. Lushington himself points out that he bases his judgment on other reasons. I therefore think that this appeal must be dismissed.

LOPES, L.J.—The cases of *The Glentanner* (*ubi sup.*) and *The Mary Ann* (*ubi sup.*) have been cited, and unless this court is prepared to overrule them, they are conclusive as to the matter now before us. I myself have carefully considered those cases, and heard them commented upon, and, in my opinion, they are correct. I therefore think the appeal should be dismissed.

Solicitors for the plaintiffs, *Ingledew, Ince,* and *Colt.*

Solicitors for the defendants, *Lowless* and *Co.*

June 8 *and July* 9, 1887.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

JOHNSTON AND OTHERS *v.* THE SALVAGE ASSOCIATION AND MCKIVER. (*a*)

Practice — Third-party notice — Contracts of indemnity—Marine insurance—Suing and labouring clause—Order XVI., r. 48.

The defendant McKiver insured his ship by a policy containing the usual suing and labouring clause. The plaintiffs sued him for work and labour done and expenses incurred by them, at his request, in attempting to save the ship during the continuance of the policy.

Held (*affirming the decision of the Queen's Bench Division*), *that the defendant McKiver was not entitled to bring in the underwriters as third parties under Order XVI., r.* 48, *because they had not, by the suing and labouring clause, contracted to indemnify him against the demand of the plaintiff.*

APPEAL from the Queen's Bench Division (Lord Coleridge, L.C.J., and A. L. Smith, J.)

This was an action against the Salvage Association and against McKiver for work done, services rendered, and expenses incurred by the plaintiffs for the defendants, at their request, in attempting to save the ship *Maggie Robertson* and her cargo, which was wrecked on the coast of Brazil, and also for damages against the defendants, or one of them, for misrepresentation or breach of warranty of authority to employ the plaintiffs to act on behalf of the underwriters of the ship and cargo. The defendant McKiver, who was the owner of the ship, had chartered her to certain railway companies in Buenos Ayres, to carry coals to South America, and had effected policies of insurance, containing the usual suing and labouring clause, with the Home and Colonial Marine Insurance Company, and other firms of underwriters. The ship became a total loss, and was abandoned, and the underwriters had, long before this action was commenced, paid McKiver as for a total loss. The action had originally been commenced against the Salvage Association only, but McKiver was subsequently joined as a defendant. McKiver then applied at chambers for leave to issue and serve upon the underwriters a third-party notice under Order XVI., r. 48, claiming to be indemnified by them against the claim of the plaintiffs for work and labour done, and expenses incurred, on the ground that the underwriters had by the policies of insurance contracted to indemnify him against such demands.

Manisty, J., in chambers, gave leave to serve a third-party notice, but the Divisional Court rescinded his order.

The defendant McKiver appealed.

Bigham, Q.C. and *J. Walton* for the appellant.—This is a proper case for a third-party notice under Order XVI., r. 48. The underwriters are bound to pay to McKiver whatever he may have to pay the plaintiffs for services to the ship.

Cohen, Q.C. and *Hollams* for the respondents.—Order XVI., r. 48, does not apply here, for there is no contract between the underwriters and McKiver that they will indemnify him against any sums he may be bound to pay to the plaintiffs.

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

The rule is limited to cases in which the defendant has a direct right to be indemnified by the proposed third party, arising from a contract to indemnify:

Birmingham and District Land Company v. *London and North-Western Railway Company*, 55 L. T. Rep. N. S. 699; 34 Ch. Div. 261.

The suing and labouring clause in the policies gives no such right. The only right which McKiver has is to sue the underwriters for any money he may have properly expended on their behalf. The issues between the plaintiff and the defendant, and the defendant and the third party, must be the same, but in this case they are not.

Bingham, Q.C. in reply.—The operation of the rule is not limited to cases where there is a contract to indemnify against liability upon the very contract upon which the plaintiff sues. The expressions of Cotton, L.J. in his judgment in *Birmingham District Land Company* v. *London and North-Western Railway Company* (*ubi sup.*) show that he did not intend so to limit the right given by Order XVI., r. 48. He says: "Of course, if A. requests B. to do a thing for him, and B. in consequence of his doing that act, is subject to some liability or loss, then, in consequence of the request to do the act, the law implies a contract by A. to indemnify B. from the consequence of his doing it. In that case there is not an express but an implied contract to indemnify the party for doing what he does at the request of the other." Here, by the effect of the suing and labouring clause, the defendant did incur liability at the request of the underwriters. It is not necessary that the issues should be the same; one issue must always be different, viz., whether the third party did contract to indemnify the defendant. *Cur. adv. vult.*

July 9.—The following judgments were delivered:—

Lindley, L.J. (after stating the nature of the action).—The claim of the plaintiffs, Johnston and Co., against McKiver is twofold. viz.: (*a*) for work and labour and expenses done and incurred by the plaintiffs for the defendant at his request; (*b*) for damages for misrepresentation or breach of warranty by the defendant of his authority to act for other people in employing the plaintiffs to do what they did. The work and labour and expenses sued for were done and incurred by the plaintiffs in saving or attempting to save a ship and cargo. The ship was insured by the defendant with the persons sought to be introduced as third parties. The misrepresentation alleged is as to McKiver's authority to employ the plaintiffs for the underwriters. The ship was totally lost, and was abandoned to the underwriters, and they long since paid McKiver as for a total loss. His claim against them now is based on the suing and labouring clauses in the policies, and is resisted by the underwriters. The nature and effect of the suing and labouring clause are fully explained in *Kidston* v. *Empire Marine Insurance Company* (3 Mar. Law Cas. O. S. 400, 468; 16 L. T. Rep. N. S. 119; L. Rep 1 C. P. 535; 2 C. P. 357), and *Lohre* v. *Aitcheson* (4 App. Cas. 755; 4 Asp. Mar. Law Cas. 168; 41 L. T. Rep. N. S. 323). It is, in substance, a contract by which the underwriter agrees to pay the assured the expense he may reasonably and properly incur in preventing a loss which, if it occurred, would fall on the underwriters under the other clauses in the policy. Such a contract is not a contract of indemnity in any proper sense; it is a contract to pay the assured expenses which he may incur, but not to indemnify him against any claims made by other people against him. In equity, a contract to indemnify can be specifically enforced before there has been any such breach of the contract as would sustain an action at law. In equity the plaintiff need not pay, and perhaps might ruin himself before seeking relief. He is entitled to be relieved from liability. But in this case McKiver would have no *locus standi* in equity against the underwriters if he were to seek specific performance of a contract to indemnify him against Johnston and Co.'s demand. Assuming, therefore, that the underwriters are liable to pay McKiver for services and expenses under the suing and labouring clause, and assuming that these services and expenses are included in those in respect of which Johnston is suing McKiver, I am of opinion that this case is not within Order XVI., r. 48, and that the underwriters cannot be brought in as third parties under that rule. The effect of the rule was fully considered by the Court of Appeal in *Birmingham and District Land Company* v. *London and North-Western Railway Company* (*supra*), and the court there laid down that the rule only applies to cases where the third party was under some obligation, by contract or otherwise, to indemnify the defendant against the demand of the plaintiff. This construction is, in my opinion, warranted by the history of the rule, by its language, and by the forms referred to in it. Whatever obligation the underwriters may be under to McKiver, they are under no obligation to indemnify him against the claims of the plaintiffs, or any of them or any part thereof. There is clearly no obligation on the part of the underwriters to indemnify McKiver against the consequences of any representation he may have made as to his authority to employ the plaintiffs on their behalf, or on behalf of any other person. The appeal ought to be dismissed. The Master of the Rolls agrees on the ground that the suing and labouring clause does not apply.

Lopes, L.J.—This case raises the question as to what is the meaning and scope of Order XVI., r. 48. Does it apply to cases other than those where the third party has contracted to indemnify the defendant against a claim made by the plaintiff? Under the old rules before the recent amendment, the defendant had a much larger power than under the present rule to bring in third parties against whom he might claim some relief or remedy over. The present rule was intended to curtail the old rule. Under the present rule the defendant must make out a *primâ facie* case, showing that he is entitled to contribution or indemnity against the third party. The defendant here is not entitled to contribution; he must therefore make out a *primâ facie* case that he is entitled to indemnity. I am of opinion that he does not make out such a case. I agree with what was laid down in the case of the *Birmingham and District Land Company* v. *London and North-Western Railway Company* (*sup.*), viz., that to bring a case within the rule there must be a direct right to indemnity as such

—a right which can be enforced either at law or in equity. Lindley, L.J., has fully stated the nature of the claim of the plaintiff, against the defendants, and the other facts of the case which are material. It seems to me that, whatever may be the liability of the underwriters to McKiver, the underwriters are in no way bound, either at law or in equity, to indemnify him against the claim of the plaintiffs in this action, or any part of it. There is no contract by them, either express or implied, to undertake such a liability. This case is covered by the case I have cited, and the appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellants, *Clements.*

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

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

May 12, 13, *and* 19, 1887.

(Before Lord COLERIDGE, C.J. and SMITH, J.)

COURTNEY (app.) *v.* COLE (resp.). (*a*)

Compulsory pilotage — Exemption from — Ship trading from the East to London, thence to Amsterdam—Whether exempt from compulsory pilotage—Meaning of "ship trading to Boulogne, or to any place in Europe north of Boulogne"—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 353, *and s.* 379, *sub-sect.* 3.

The ship C., a British ship, belonging to the port of London, arrived in London, with a cargo from China and Japan; part of such cargo was to be discharged in London, and part to be taken on to Amsterdam and Hamburg. Part was accordingly discharged in London, and the crew were also discharged, and a fresh crew shipped on coasting articles. The ship left London for Amsterdam and Hamburg with the rest of the cargo, but without any fresh cargo from London, and without passengers. Whilst proceeding down the Thames, and off Gravesend, she was boarded by the respondent, a duly licensed pilot, who offered to the master to pilot the ship; the master refused, and continued himself to pilot the ship, without having a pilotage certificate The ship was then in the London pilotage district, and bound for Amsterdam. At Amsterdam she discharged part of her cargo, and then proceeded to Hamburg, where she discharged the rest of her cargo, and then took in a fresh part cargo for the East, with which she returned to London, where she took further cargo, and then she proceeded to the East.. For some years previously she had made similar voyages.

Upon an information being preferred by the pilot against the master for having unlawfully piloted the ship without having a pilotage certificate, contrary to sect. 353 *of the Merchant Shipping Act* 1854, *the justices convicted the master, and imposed a penalty of double the amount of pilotage demandable.*

Held (setting aside the conviction), that the ship was, under the circumstances, exempt from compulsory pilotage, on the ground that, when she started from London for Amsterdam (at the end of the voyage from the East), she was "a ship trading between London and a port in Europe north of Boulogne" within the meaning of sub-sect. 3 *of sect.* 379 *of the Merchant Shipping Act* 1854.

SPECIAL CASE, stated by justices pursuant to 20 & 21 Vict. c. 43.

1. An information was on the 28th day of May 1886 preferred by Joseph Everden Cole against William Rice Courtney, for that on the 28th day of April 1886 the defendant Courtney on the river Thames, at and in the borough of Gravesend, then and there being the master of the unexempted ship *Cardiganshire*, then and there navigating within the compulsory pilotage district called the London District, unlawfully, after the informant Cole, a qualified pilot, had to the knowledge of the defendant offered to take charge of such ship, did himself (the defendant) pilot such ship without possessing a pilotage certificate enabling him so to do, contrary to sect. 353 of the Merchant Shipping Act 1854.

2. After hearing the parties and the evidence adduced by them the undersigned, being three of Her Majesty's justices of the peace in and for the said borough of Gravesend, thereupon convicted the defendant of the offence charged and adjudged him to pay the penalty of 16*l.* 10*s.*, being double the amount of pilotage demandable for the conduct of such ship.

3. The defendant being dissatisfied with the said determination as being erroneous in point of law, did within three days thereafter apply in writing to us, the said justices, to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the High Court of Justice, and at the same time he entered into the recognisance required by law in that behalf. Wherefore in pursuance of the statute in such case made and provided we hereby state and sign this case.

4. The defendant having appeared upon summons before us, the undersigned, to answer the said information, the following facts were proved or admitted:

5. The ship *Cardiganshire*, of which the defendant was at all the times herein mentioned the master, arrived in London on the 22nd April 1886 with a cargo from Japan, China, and the Straits Settlements, she having shipped such cargo at such places, or some or one of them, for, and being bound to discharge part of such cargo in London, and to take the rest on to Amsterdam and Hamburg. She accordingly discharged part of her cargo in London, and in order to get at the London cargo, part of the cargo for Amsterdam and Hamburg was also discharged and afterwards reshipped. The crew who had signed articles for a round voyage from London to the East and back to London were discharged, and runners were shipped on coasting articles for the voyage from London to the Continent and back. The *Cardiganshire* left London on the 28th April for Amsterdam and Hamburg, with the rest of the cargo (including what was reshipped as aforesaid) which she had brought from Japan, China, and the Straits Settlements, but without any fresh cargo from London, and without passengers. Whilst proceeding down the Thames and off Gravesend on such outward passage, she was boarded by the informant, Cole, a pilot, duly licensed for the London Pilotage District below

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

Gravesend, and he offered to defendant, the master, to take charge of the ship for the purpose of piloting her to the seaward limits of such pilotage district below Gravesend. The defendant refused this offer, and continued himself to pilot the ship throughout such limits without possessing a pilotage certificate enabling him so to do. At this time (being the time of the alleged offence) the ship was in the London pilotage district below Gravesend, and bound for Amsterdam.

6. The ship is a British ship, and belongs to the port of London. Her draft was at the time of the alleged offence 18 feet, upon which the double pilotage, if demandable, is 16*l.* 10*s.*

7. At Amsterdam she discharged the cargo destined for that port, and then proceeded to Hamburg to discharge the cargo for that port, and then took in at Hamburg a fresh part cargo for Japan, China, and the Straits Settlements, with which she returned to London, where such part cargo was taken out and reshipped with further goods to complete her cargo outwards, and she thereupon proceeded to Japan, China, and the Straits Settlements on her next voyage with a full cargo shipped as aforesaid.

8. On her said passage from Japan, China, and the Straits Settlements, on reaching the London pilotage district, off Dungeness, she took a pilot up to Gravesend, but pilots may be taken by both exempted and unexempted ships.

9. For some years before the voyage in question the *Cardiganshire* had made similar voyages, and she is one of a line of steamers which sail regularly from London to ports in the East and back to London, and thence to ports in Europe north of Boulogne and back to London.

10. Upon these facts it was contended on the part of the defendant, that at the time in question (28th April) the ship was exempted from compulsory pilotage by sect. 379 of the Merchant Shipping Act 1854, as being (within the commencing words of that section) a ship in the London district not carrying passengers, and within sub-sect. 3) a ship trading to a place in Europe north of Boulogne.

11. But it was contended on the part of the informant that the 379th section was intended to exempt such ships only as were engaged in regular trade between London and Boulogne and ports to the north thereof, and in carrying cargoes between such ports and originally shipped thereat, and that, as the ship took no cargo in at London, but in proceeding thence had only as cargo what she had brought from Japan, China, and the Straits Settlements, she was not trading from London to Amsterdam, but from Japan, China, and the Straits Settlements to Amsterdam, and that her coming up the river to London and there discharging part of her cargo did not make her, on her subsequent passage for Amsterdam and Hamburg, trading from London, nor within the said exemption.

12. It may be remarked that, if the ship had been bound from Japan to Amsterdam, calling in at London without loading or discharging there, she would have been exempt under 25 & 26 Vict. c. 63, s. 41, as a ship passing through a pilotage district, but she lost that exemption by discharging part of her cargo in London.

13. She was claimed to be exempt while between London and Gravesend, as being (in the words of sub-sect. 5 of the said section 379 of the Act of 1854) "a ship navigating within the limits of the port to which she belongs," so that the question in this case is restricted to the ship while below Gravesend.

14. We adjudged and determined that the ship was subject to compulsory pilotage, on the ground that she was not within the exemption given by sub-sect. 3 of the said section 379, inasmuch as she did not confine her trading to the limits stated in that section, namely, between the London district and a place in Europe north of Boulogne, and on the passage in question did not take in any cargo while in the London district except what was landed from her and reshipped as aforesaid.

15. If the court shall be of opinion that, in the London pilotage district below Gravesend, the ship was exempt from compulsory pilotage on her said passage from London for Amsterdam on the 28th April 1886, under the circumstances aforesaid, then the information is to be dismissed. But if the court shall be of a contrary opinion, then the said conviction is to be confirmed.

WM. FLETCHER.
M. GUTTERIDGE.
P. P. WOOD.

Gainsford Bruce, Q.C. (with *J. Fox*) for the appellant.—The justices were wrong in convicting the appellant, as the ship was exempt from compulsory pilotage. This ship was not less trading between British ports because she went from London to Amsterdam, and thence to the East.

Bucknill, Q.C. (with *Aspinall*) for the respondent.—The word "trading" in the exemption means constant trading, and the Legislature never intended to exempt foreign-going ships, as this ship was. In the case of *The Lloyds* or *The Sea Queen* (9 L. T. Rep. N. S. 236; 1 Mar. Law Cas. O. S. 391; Br. & L. 359; 32 L. J. 897, P. M. & A.) it was held by Dr. Lushington that a vessel, ordinarily occupied in the foreign trade, going from Liverpool to London, in order to sail from London under advertisement for foreign parts, not carrying passengers, but having on board a cargo shipped at Liverpool and deliverable at London, is not "a ship employed in the coasting trade of the United Kingdom" within the meaning of the 379th section of the Merchant Shipping Act 1854, and is compellable, by the 376th section, to take a pilot in the London district. That case shows that a ship engaged as the *Cardiganshire* was here is a ship engaged in foreign trading, and so not exempt. The *Cardiganshire* really traded between Amsterdam, China, and Japan, and she merely passed through the London pilotage district to take up cargo in London, which was merely her "calling port." In the case of *The Agricola* (2 Wm. Rob. 10; 7 Jur. 157) the ship had sailed from Calcutta to the river Thames, where she discharged her whole cargo, and proceeded to Liverpool in ballast, and Dr. Lushington held that the ship, on entering Liverpool, was not engaged in "a coasting voyage," and so was not exempt from employing a pilot. That is, he held that the ship was a foreign trader, even on her voyage from London to Liverpool, and in his judgment he gave, as the meaning of a "coasting

voyage," "a trading from one British port to another." But in the present case the ports of destination of the ship were in the East. *The Moselle* (32 L. T. Rep. N. S. 570; 2 Asp. Mar. Law Cas. 586) is to the same effect. From these cases it is clear that no ships are exempt, except those which are in reality home traders.

G. Bruce, Q.C. replied.

Cur. adv. vult.

May 19.—Lord COLERIDGE, C.J.—This is a question which arises under the 379th section of 17 & 18 Vict. c. 104. The question before the magistrates and before us is, to determine whether a ship, under the circumstances which I shall in a moment detail, was or was not, under the provisions of that Act, exempt from compulsory pilotage. The magistrates held that she was not so exempt. I am of opinion that the magistrates were wrong, and that she is exempt, for the reasons which I will give in a moment. The ship, according to the findings in the case, was one of a line of vessels which had been engaged in making a voyage, which may thus be described. The ship started from Hamburg. She came to London, where she took in some cargo, but chiefly her cargo was taken in at Hamburg or Amsterdam. She then came to London, and proceeded from London to Japan and China, and ports in the East, and from the East she came back to London, with a cargo chiefly for Amsterdam; but she came to the port of London, on her way from the East to Amsterdam. In London, it is true, she discharged her cargo; but part of it was taken on board again and she proceeded therewith from London to Amsterdam, having, as before said, discharged some portion of her cargo in London. Now, under those circumstances, is she, when within the port of London on her return voyage, between London and Amsterdam, subject to compulsory pilotage? The magistrates have held that she is, and there is something to be said, no doubt, for the view that she is. But, upon consideration, I think the best opinion I can form is, that she is exempt under the words of the section. Now her object or trading is described in this way in the 9th paragraph of the case: "For some years before the voyage in question the *Cardiganshire* had made similar voyages, and she is one of a line of steamers which sail regularly from London to ports in the East, and back to London, and thence to ports in Europe north of Boulogne and back to London." The 17 & 18 Vict. c. 104 has a number of sections, beginning with sect. 376, devoted to the subject of compulsory pilotage, and there are certain rules given and certain enactments prescribed, subject to which all ships coming within those rules are obliged to have pilotage, within the districts to which those rules apply. The 379th section is this: "The following ships, when not carrying passengers (which was the case of the *Cardiganshire*) shall be exempted from compulsory pilotage in the London District, and in the Trinity House Outport Districts (that is to say), firstly, ships employed in the coasting trade of the United Kingdom. Secondly, ships of not more than 60 tons burden. Thirdly (which is the exemption insisted upon here) "ships trading to Boulogne, or to any place in Europe north of Boulogne." It is now Brest, I believe, by a subsequent order, but that does not alter either the principle, or indeed the detail in this case. I believe it ought to be now read "ships trading to Brest, or to any place north of Brest." (*a*) Fourthly, "ships from Guernsey, Jersey, Alderney, Sark, or Man which are wholly laden with stone;" that is, stone only. "Only" is not in the Act, but the exemption applies only to these island ships laden with stone, the produce of those islands. Fifthly, "ships navigating within the limits of the port to which they belong." Sixthly, "Ships passing through the limits of any pilotage district on their voyages between two places both situate out of such limits, and not being bound to any place within such limits, nor anchoring therein." Now something was said about the possibility of her being exempt under the sixth exemption, but I am of opinion that the true exemption which covers her is the third exemption: "ships trading to Boulogne, or to any place in Europe north of Boulogne." That is now Brest—"ships trading to Brest, or to any place in Europe north of Brest." (*a*) In the first place, it is obvious that she is directly within the words of that exemption. She is a ship trading to a place in Europe north of Brest; and if one went simply by the words of the section, she would be clearly within it. But, it is said, you must not go simply by the words of the section, because the reason of all these exemptions is to be found, not in any protection, or assistance, or favour granted to particular trades, but inasmuch as it has been held by great authority that this compulsory pilotage is not an impost upon trade, but an impost imposed for the benefit really of the ships themselves, and for the safety of human life, it is said, you must see whether the principles of these exemptions will cover the expression, a general and possibly a doubtful expression, "a ship trading to Brest, or to any place in Europe north of Brest." Now, I think it is impossible to say, when you come to look at these exemptions, that they can all have been made upon the principle of protection to human life, and that favouring particular trades had nothing to do with the exemptions. I think it is quite impossible to say that, and it is only due to the respect one feels for Dr. Lushington to observe that Dr. Lushington, as far as I am aware, never said that was so with regard to all of them, nor did he apply the principle, which he undoubtedly laid down, to exemptions such as those which I have at present to deal with. He may have been quite right in saying, and probably was quite right in saying, that compulsory pilotage in itself is not intended to be an impost upon trade, but is intended to be a protection to ships, and to the lives of persons carried in ships. He may have been quite right in saying that that was the principle of the imposition of the duty of taking a pilot compulsorily; but nevertheless it is impossible, as I think, to look at these exemptions and not to see that the principle of protecting particular trades—protecting is a word which has an odious meaning; I will say to favour particular trades—was not in the mind of the Legislature when some at least of these exemptions were enacted; for example, the coasting trade of the United Kingdom. It may be said, possibly, that a person who is engaged in the

(*a*) See Order in Council, dated the 21st Dec. 1871; Maude and Pollock's "Merchant Shipping," 4th ed., vol. 2, p. 78.

coasting trade of the United Kingdom must know all the shallows and the headlands, and so forth, and can do without a pilot. That may possibly be. At the same time one cannot but see that the coasting trade being a small trade, chiefly carried on by small vessels, it has at all events the effect, whatever may have been intended, of relieving the coasting trade of what otherwise would have been a heavy impost upon ships of not more than 60 tons burden, without reference to the cargo they carry. I think it is impossible to say that exemption is not for the direct purpose of lightening the burden of navigation upon small ships. I pass over the third exemption, which is matter of dispute, for obvious reasons. I will come back to it when I discuss the other matters.

Now the next exemption is "Ships from Guernsey, Jersey, Alderney, Sark, or Man, which are wholly laden with stone being the produce of those islands." Now, if they come with fruit, it would seem they are not exempt; if they come with stone they are. There is an exemption which is enacted in favour of a stone-carrying ship which is not enacted in favour of a fruit-carrying ship between exactly the same two termini. Can any man devise a reason, other than a desire to favour the stone trade, why that exemption should have been put in? It seems to me wholly impossible to deny that the exemption, at all events, is an exemption to favour, if they can, the stone trade between these smaller islands and this kingdom. The other two exemptions are not important. The exemption of ships navigating within the ports to which they belong is possibly open to the observation that a person who is always navigating about within a port must know the port as well as a pilot. That may be an adequate reason for that exemption. But founding myself upon the first and second and the fourth, it appears to me impossible to say that into those three exemptions there did not enter the notion of giving a favour to particular trades. Now, it is not for me to say whether the Legislature thought that trading from London or from the Trinity House districts to the north of Europe did or did not require favours. Mr. Bruce suggested (and for aught I know he may be perfectly right in point of history; it will not be very material to him whether we agree with his reasons or not if we are deciding in his favour) that that is an exemption preserved from old time, when there was a legislative desire to favour the trade between this country and the north of Europe and to cut out the French, who were at that time interfering seriously with our trade in those regions. He may be perfectly right—I do not say he is not; but it would be too speculative, in my judgment, even if he be right historically, to place the construction of words of this kind upon an historical basis, which may be correct for aught I know, and very likely is correct if he has looked into it, but which may be incorrect, and which, after all, may be insufficient, and would be insufficient if the words did not admit of the interpretation to which we have come. Now I think that this ship, as a matter of fact, when at the end of her voyage, so to say, she came back from the East and came to London, and then went on with a cargo from London to Amsterdam, was a ship trading (about which I will say a word in a moment) between London and Amsterdam. It is not necessary to consider whether it would have done from any other place because it would clearly do from London. She was a ship trading between London and Amsterdam, a port north of Brest, and was doing that habitually. I say doing that habitually—not, as will be seen from my judgment, that I think it absolutely necessary that she should be habitually trading. I do not decide that it is not, but I do not decide that it is. It does not appear to me to be necessary here, because, in point of fact, this ship did habitually trade, and if it be necessary to apply the principle which Dr. Lushington applied to the coasting trade, that is to say, that it must be constantly and steadily employed in the coasting trade, to a ship trading to the north of Europe, then I say that, at all events in this case, we are well within the authority of Dr. Lushington, because this ship was so constantly and habitually trading. The impression in my mind is, that it is not necessary; but I do not decide that, for the obvious reason that it is never wise, I think, to decide what is not necessary, and in this case it is not necessary to decide that question. Here is a ship trading, and if trading means constantly and habitually trading, then she was constantly and habitually trading between London and Amsterdam. She seems to me to come within the exemption of the third sub-section of the 379th section of the 17 & 18 Vict. c. 104, and therefore to be exempt from compulsory pilotage.

SMITH, J.—The question in this case is whether the ship *Cardiganshire*, when sailing with a cargo on board from London to Amsterdam was exempted from compulsory pilotage by reason of sect. 379 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104). The material facts are as follows, as found in the case: The *Cardiganshire* had sailed from China, with a cargo on board, for London and Amsterdam. On arrival in London she discharged such of her cargo as was for the port of London, and also her crew. With a crew of runners, shipped on coasting articles, for the voyage from London to Amsterdam and back, and with her cargo for Amsterdam on board, she set sail upon the voyage. Was she then trading to Boulogne, or to any place in Europe north of Boulogne, within the meaning of sect. 379, sub-sect. 3, of the Merchant Shipping Act of 1854? That is the question. It is manifest that, upon applying the above-stated facts to the sub-section, the ship was clearly within the words of the sub-section; but it is argued on the part of the respondent, the pilot, that though this may be so, yet such was not the intention of the Legislature, and this is how they proceeded to argue: they in the first place said that Dr. Lushington had decided, under sub-sect. 1 of the same section, that a ship employed in the coasting trade of the United Kingdom meant a ship constantly employed in that trade, and that a ship ordinarily employed in foreign trade, though *de facto* engaged in a coasting trade at the time the question arose, was not a vessel employed in the coasting trade of the United Kingdom within the meaning of sub-sect. 1 of sect. 379 of the Act of 1854. The two cases of *The Agricola* (*ubi sup.*) and of *Lloyds* or *The Sea Queen* (*ubi sup.*) were cited in that behalf. It is quite true that

Dr. Lushington did so decide, but does that decision necessarily govern the construction of sub-sect. 3? I think not. Dr. Lushington gives his views for holding as he did as follows: "In my opinion the principle upon which vessels engaged in the coasting trade are so exempted is this, that the masters of such vessels, from their occupation and experience, are presumed to be so familiarly acquainted with the English coasts that it would be superfluous and oppressive upon owners to impose upon them the necessity of employing a pilot on board." It seems to me that, although this reason may apply to sub-sect. 1, relating to coasting voyages, it certainly and manifestly cannot apply to one at least of the other sub-sections, viz. sub-sect. 4; for why should a stone-laden ship from Guernsey be within the exemption as to having a pilot, whereas a ship not so laden is not within the exemption? Moreover, how can this reason apply to an exemption which opens the whole of the North Sea and Baltic to navigation without a pilot? It seems to me, if it be necessary to give a reason for the exemptions in sect. 379, that such reason is rather to be found in the endeavour to favour or foster particular trades, and is not to be found in the question whether the exigencies of navigation require or not a pilot to be on board. That being so, in my judgment, the words in sub-sect. 3 are not to be read as meaning constant trading to Boulogne or any place in Europe north thereof, but as meaning what they say, that is to say, when a ship is in fact trading to Boulogne or north thereof—I would add from, and possibly to, the London district and the Trinity House outpost districts—she is exempt. The argument addressed by the pilots, that in sect. 59 of Geo. 4, c. 125, the word "constant" is used, and that by sect. 353 of the Act of 1854 compulsory pilotage was to be enforced as theretofore, in my opinion, avails nothing in face of the fact that the word "constant" is expressly omitted in the latter section, namely, sect. 379. I would add that, should I be wrong in the interpretation I put upon the words of sect. 379, sub-sect. 3, the findings in this case, especially those in paragraphs 5 and 9, show that the *Cardiganshire* was a constant trader from London to Amsterdam and back; for it seems to me impossible to hold that the words of the sub-section mean only trading to Boulogne and north thereof, which must be the pilot's contention if they are correct upon their interpretation of the sub-section, as applied to the facts of the case. In my judgment, the decision of the justices was erroneous, and must be reversed, with costs.

Appeal allowed, and conviction set aside, with costs.

Aspinall asked for leave to appeal, but the Court held that, on the authority of *Mellor* v. *Denham* (42 L. T. Rep. N. S. 473; 5 Q. B. Div. 467; 49 L. J. 89, M.C.), this was a criminal proceeding, and that therefore there was no appeal.

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

Solicitors for the respondent, *Sandilands, Humphry,* and *Co.*

Thursday, June 23, 1887.

(Before Mathew and Cave, JJ.)

Bristol Steam Navigation Company Limited *v.* Indemnity Mutual Marine Insurance Company. (*a*)

Marine insurance—Partial loss—Owner altering an obsolete ship instead of reinstating it—Cost of alterations less than the cost of reinstatement—Measure of liability of underwriters.

A ship, insured on a time policy, had, above her main deck, a saloon deck for passengers. During the time covered by the policy the saloon deck was destroyed by fire. At the time af the fire the ship was engaged in carrying cargo, being obsolete as a passenger ship and useless for passenger traffic. After the expiration of the policy the ship was converted into a cargo-carrying ship, and the saloon deck for passengers was not reinstated. The cost of converting the ship was less than the cost of the reinstatement of the saloon deck would have been. The ship, after the alteration, was as valuable for sale or use as she was before the accident.

In an action by the shipowners against the underwriters, to recover the cost of reinstatement of the saloon deck:

Held, on the authority of Pitman *v.* Universal Marine Insurance Company (46 *L. T. Rep. N. S.* 863; 4 *Asp. Mar. Law Cas.* 68; 9 *Q. B. Div.* 192; 51 *L. J.* 561, *Q. B.*), *that, as the shipowners were not entitled to recover more than they had lost, they were not entitled to recover the cost of reinstatement, but only the actual cost of converting the ship.*

Special case stated by an official referee, under Order XXXVI., r. 52, in pursuance of an order of Master Johnson, as follows:—

This was an action on a time policy of insurance for 21,000*l.* on the iron steamship *Clifton* valued at that sum, upon which the defendants were the underwriters for the sum of 1700*l.* The *Clifton* had been built about eighteen years before the accident presently mentioned, as a passenger steamer, with a provision, but a very inconvenient provision, for carrying cargo. Above her main deck a saloon deck was erected, which afforded accommodation for sixty first-class passengers, besides the captain and officers, extending from the engine-room forward nearly up to the bows, and beyond this was the only hatch for loading and unloading cargo, so that the greater portion of the cargo had to be carried for loading and unloading under the saloon deck. She had held a passenger certificate for sixty persons up to the end of May 1882, when it expired, but it had not been renewed, and since its expiration she had been employed in carrying cargo, and having gone to Bombay with a cargo which was there discharged, a charter-party was entered into for the conveyance by her of a cargo of grain to Havre. While this was being loaded, on the 20th April 1883, within the time covered by the policy, a fire broke out in the saloon deck which destroyed the whole of that portion of the vessel, but did only very slight damage to the lower part of the vessel. Some injury was also done to her and to the portion of the cargo which had been put on board by the influx of water to extinguish the fire and prevent its spreading, but as to the

(*a*) Reported by Henry Leigh, Esq., Barrister-at-Law.

injury to the lower part and this latter injury no question arises. Temporary repairs were effected at Bombay. She brought her cargo of grain to Havre, where an adjustment was made of the general average, to which the cargo owners were contributories, and she was brought to England for the purpose of final repairs. After deliberation and obtaining estimates as to the cost of converting her simply into a cargo-carrying vessel, the plaintiffs determined upon that course, and the greater portion of the space formerly occupied by the saloon deck was converted into a receptacle for cargo with two new main hatches through the main decks under it with appliances for loading and unloading cargo, and in the rest of the space they erected accommodation for the captain and officers. The cost of doing all this, I find, was less than the cost which would have been incurred in restoring or reinstating the saloon deck (as to which they also obtained estimates), after making the usual deduction of one-third new for old. I find that the ship was of a type quite obsolete, and unsuited for the passenger traffic, that the saloon deck was at the time of the fire valueless for such traffic, and that no prudent owner, uninsured, would have attempted to restore or reinstate it, and that the course adopted by the plaintiffs in what they did was the best which could be pursued. I find that the vessel, thus altered, was quite as valuable and as useful for sale or use by the plaintiffs as she was before the fire, and that the sum expended in this alteration will afford them a full pecuniary indemnity and compensation for the loss and injury occasioned to them by the fire as far as this portion of their claim is concerned, and that the sum which it would have cost to restore or reinstate the saloon on deck, after deducting one-third as aforesaid, would exceed its value at the time of the fire, which value was certainly not greater at the time of the fire than the said sum so expended in the alteration.

The counsel for the plaintiffs contended before me that they were entitled to recover against the underwriters the full costs of restoring or reinstating this portion of the ship in its original condition less the usual reduction of one-third. The question for the decision of the court is, whether the plaintiffs are entitled to recover against the defendants a proportion, according to their subscription, less one-third new for old, of the entire cost of restoring or reinstating the said saloon deck, or whether the claim of the plaintiffs against the defendants will not be satisfied by awarding against them their proportion according to their subscription of the costs expended in converting this part of the vessel as above mentioned.

G. M. Dowdeswell, Official Referee.

Dated this 16th day of March 1887.

Cohen, Q.C., *Bucknill*, Q.C., and *Macrae*, for the plaintiffs.—The case of *Pitman* v. *Universal Marine Insurance Company* (46 L. T. Rep. N. S. 863; 9 Q. B. Div. 192; 4 Asp. Mar. Law Cas. 68; 51 L. J. 561, Q. B.; 30 W. R. 906) is different from the present, as in that case the ship was sold during the continuance of the risk, and Jessel, M.R. expressly confines his judgment to cases where the ship is sold during the risk. Here the repairs were made after the expiration of the risk.

J. G. Barnes and *J. Fox* for the defendants.—The question is, what did the plaintiffs lose? The principle of *restitutio in integrum* cannot be applied when it is wholly unreasonable that it should be applied. *Pitman* v. *Universal Marine Insurance Company* (*ubi sup.*) governs this case. Cotton, L.J., at p. 218, 9 Q. B. Div., says that the authorities do not support the contention that the estimated cost of repairs is necessarily the measure of the sum to be recovered by the insured.

Mathew, J.—In this case the plaintiffs cannot recover from the underwriters more than they have lost. It has been said by Mr. Cohen that the cost of repairing is the true measure of damages. If the ship were a new ship, it might be so, but, in dealing with an old ship, it is admitted that it is not so, as there has to be a deduction of one-third new for old. Mr. Cohen has attempted to distinguish the present case from the case of *Pitman* v. *Universal Marine Insurance Company* on the ground that what was done here was done after the expiration of the policy. The contract is simply a contract to indemnify. Take the case of a ship with old and obsolete machinery: the cost of repairing the obsolete machinery might be much greater than the cost of supplying new and improved machinery; in such a case the measure of damages would be the costs of the new machinery, and not the cost of replacing the old and obsolete machinery. The present case is similar. The measure of the loss is the same in both cases, and the indemnity ought to be the same also. On the authority of *Pitman* v. *Universal Marine Insurance Company* our judgment ought to be for the defendants, and with costs.

Cave, J.—I entirely agree with what my brother Mathew has said, and I have nothing to add.

Judgment for the defendants, with costs.

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

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

June 18 *and* 25, 1887.

(Before Butt, J.)

The Laertes. (a)

Salvage—Salving and salved ship owned by same persons — Liability of cargo owners — Latent defect — Warranty of seaworthiness — Bill of lading.

Although there is an implied warranty in every bill of lading that the carrying ship shall be seaworthy, this warranty may be abrogated or limited by words to that effect; and hence, where a steamship laden with cargo becomes disabled through a latent defect in existence prior to the commencement of the voyage and salvage services are rendered to such steamship by a vessel belonging to the same owners, the shipowners may recover salvage against the cargo if by the bill of lading the warranty of seaworthiness is abrogated, and the shipowners are not to be liable for latent defects.

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

The steamship L. became disabled through her shaft breaking in consequence of a latent defect in existence prior to the commencement of the voyage. Salvage services were rendered to her by a vessel belonging to the same owners. Her cargo was carried under three bills of lading containing the following provisions: (1.) "*Warranted seaworthy only so far as ordinary care can provide.*" (2.) "*The vessels of the Ocean Steamship Company are warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, and engineers and crew can ensure it.*" (3.) "*The owners not to be liable for loss, detention, or damage, if arising directly or indirectly from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at time of shipment, provided all reasonable means have been taken to secure efficiency, even when occasioned by the negligence, default, or error in judment of the owners, pilot, master, or crew, or of any other servant in the employ of the owners of the above or substituted steamer or craft on the above or any other vessel.*" *The value of the cargo salved was* 116,400*l. The owners, master, and crew of the salving vessel brought a salvage action against the cargo.*

Held, that the above provisions in the said bills of lading qualified the shipowners' warranty of seaworthiness; that in the circumstances the shipowners had complied with these provisions; and that therefore the plaintiffs were entitled to 1200*l. salvage as against the cargo.*

THIS was a salvage action instituted *in personam* by the owners, master, and crew of the steamship *Achilles* against the owners of the cargo laden on board the steamship *Laertes* for salvage services rendered thereto.

The *Achilles* was an iron screw steamship of 1529 tons net register, and at the time of the salvage services she was on a voyage from Singapore to Cochin laden with a general cargo. The *Laertes* was a screw steamship of 1391 tons net, and at the time of the salvage services was on a voyage from Shanghai and other ports to Amsterdam laden with a general cargo. Her owners were also the owners of the *Achilles*.

The facts alleged on behalf of the plaintiffs were as follows: On the 10th of March 1887 the *Laertes* broke her fly-wheel shaft, and on 12th March 1887, at about 9.15 a.m. she, being then in about lat. 5.51 N. and long. 90.50 E., was observed by those on board the *Achilles* flying signals of distress. On the *Achilles* coming up with the *Laertes* it was arranged to tow the *Laertes* to Colombo. At about 10.45 a.m. towing was commenced, and was continued until about 7.50 a.m. on March 16, when the vessels arrived off Colombo and the *Laertes* was shortly afterwards safely moored in the harbour. The towage extended over about 720 miles and lasted about three and a half days.

The defendants, by their defence, alleged as follows:

5. As to the claim of the plaintiffs, the owners of the *Achilles*, the defendants, say as follows:

6. The said plaintiffs are and were at the times mentioned in the statement of claim also the owners of the *Laertes* as well as of the *Achilles*.

7. The cargo laden on board the *Laertes* 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 s.s. *Achilles* 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 partly to London and partly to various other ports of destination, and there deliver it to the defendants on payment of freight, and the act of the said plaintiffs in towing and assisting the *Laertes* as alleged was done only in fulfilment of their said contracts as aforesaid to carry her cargo to its destination, or for the purpose of enabling their own vessel to earn the freight on the said cargo for the purpose of avoiding their liability for the non-delivery of the said cargo to the defendants at its destination or for the purpose 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.

8. The cargo of the *Laertes* was also laden on board her under the said contracts on the terms that the said vessel should be seaworthy for the voyage on which the said cargo was shipped, and reasonably fit to carry the same to its destination at the time when the said vessel sailed on the said voyage, and the defendants say that the said vessel the *Laertes* 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 the screw shaft of the said vessel was defective, unsound, and in improper condition, and in consequence thereof and for no other cause, broke down, and the said vessel *Laertes* became in need of and received the assistance of the *Achilles*, 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.

9. Under the circumstances aforesaid the said plaintiffs the owners of the s.s. *Achilles* are not entitled to any salvage remuneration. The defendants also submit that any remuneration which the master and crew of the *Achilles* 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 *Achilles*, and some of them by way of counter-claim, as hereinafter stated.

By way of counter-claim against the plaintiffs, the owners of the s.s. *Achilles*:

10. The defendants have suffered damage by breaches of contract by bills of lading of the said cargo, shipped thereunder on board the *Laertes* 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 shipped under the said bills of lading by various shippers on board the *Laertes*, and which was signed as aforesaid and endorsed to the defendants, to whom the property in the said goods thereby pass.

11. 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.

12. The said vessel *Laertes* 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 5th paragraph of the defence, and in consequence thereof the said shafting broke down, and the said vessel became in need of and received the assistance in the statement of claim mentioned.

Particulars of damage: Whatever sum may be awarded to the master and crew of the *Achilles* for salvage.

The defendants counter-claim: Judgment for whatever sum or sums they are entitled to recover from the plaintiffs the owners of the *Achilles*, or any of them, and such further or other relief as the case may require.

The plaintiffs by their reply alleged as follows:

1. They join issue with the defence save in so far as it admits the allegations in the statement of claim.

2. The plaintiffs the owners of the *Achilles* say alternatively that if they contracted as alleged in the 7th paragraph of the defence (which they deny) their act

in towing and assisting the *Laertes* her cargo and freight as alleged was not done in fulfilment of the said contract or for the purpose of enabling the *Laertes* to earn the said freight, or for the purpose of avoiding their liability for the non-delivery of the said cargo to the defendants at its destination, and was not an act done for the sole benefit and advantage of the said plaintiffs, and was a salvage service by the plaintiffs. The plaintiffs do not admit that the *Laertes* had put to sea in an unseaworthy condition.

3. The plaintiffs the owners of the *Achilles* also say alternatively as aforesaid that the *Laertes* was seaworthy for the said voyage, and reasonably fit to carry the said cargo to its destination as the time when she sailed on the said voyage. They deny that the screw shaft of the said vessel was defective, unserviceable, or in an improper condition or improperly fitted, and they deny that in consequence thereof the *Laertes* broke down as alleged.

4. In the alternative the plaintiffs the owners of the *Achilles* say that if they contracted to carry the cargo proceeded against in this action, which they do not admit, they did so on the terms of certain bills of lading which contain certain excepted perils, causes, or matters and exemptions and restrictions hereinafter stated, and the said plaintiffs say that the breaking of the shaft of the *Laertes* was an excepted peril, cause, or matter, or was within the said exemptions and restrictions for which they are not liable within the meaning of the said bills of lading.

5. The said bills of lading were in three different forms, and the exceptions and exemptions above referred to were respectively as follows:

(1.) In the first form the vessel was warranted seaworthy only so far as ordinary care can provide, and leakage, breakage, rust, decay, loss or damage by machinery, boilers, or steam, however caused, error in judgment, negligence, or default of pilot, master, owners, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise, and all and every the dangers and accidents of the seas, land, and rivers, and of navigation of whatever nature or kind were excepted, and the ship was not to be liable for any consequence of causes therein excepted, however originating.

(2.) The second form was the same as the first, except that the warranty as to seaworthiness was as follows: The vessels of the Ocean Steamship Company are warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers, and crew can ensure it. The Ocean Steamship Company are the owners of the *Laertes* and the *Achilles*.

(3.) In the third form there was a stipulation that the owners were not to be liable for loss, detention, or damage if arising directly or indirectly from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at time of shipment, provided all reasonable means have been taken to secure efficiency, even when occasioned by negligence, default, or error in judgment of the owners, pilot, master, or crew, or of any other servant in the employ of the owners on the said vessel or any other vessel.

(6.) The *Laertes*, as a fact, broke down during the said voyage, owing to a latent defect in a portion of her fly-wheel against the existence of which it was impossible to provide, and which could not have been discovered by the existence of any ordinary care, skill, prudence, and foresight, and of the existence of which the plaintiffs were ignorant; and the plaintiffs say that the said vessel was seaworthy as far as ordinary care could provide, and further, was seaworthy so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers, and crew could ensure; and further, that all reasonable means were taken to ensure efficiency, and the plantiffs the owners of the *Achilles* were protected from the said breakdown and the consequences thereof by the terms of the said bills of lading respectively.

7. In answer to the counter-claim the plaintiffs the owners of the *Achilles* say that they deny the alleged contracts and breaches thereof as alleged in paragraphs 10, 11, and 12 of the counter-claim, and each and every of the allegations therein, and alternatively repeat the allegations in the 2nd to the 7th paragraphs above, both inclusive.

The material provisions in the bills of lading were those set out in the reply. The facts of the services were contained in the evidence of the master of the *Achilles*, which evidence had been taken before an examiner. The plaintiffs also gave evidence as to how often the shaft had been inspected and what means had been taken to guard against accidents, and as to the defect being latent.

Further evidence was given as to the appointment and capabilities of the superintendents and other servants of the plaintiffs the owners of the *Achilles*.

The defendants called an engineer to prove that, if due vigilance had been exercised, the flaw might have been discovered.

The value of the cargo laden on board the *Laertes* was 116,400*l*.

Cohen, Q.C., with him *J. G. Barnes*, for the plaintiffs.—All the plaintiffs in this action are entitled to salvage, and on the facts to a substantial award. According to *The Glenfruin* (5 Asp. Mar. Law Cas. 413; 52 L. T. Rep. N. S. 769; 10 P. Div. 103) the warranty of seaworthiness implied in a bill of lading is an absolute warranty, but that decision does not say that the parties to the contract cannot if they please agree to modify that absolute warranty. In the present case they have clearly so contracted. In all three bills of lading are to be found provisions modifying the shipowners' warranty, provided all reasonable care has been taken to see the ship was seaworthy, and to see that the superintendent and other servants were fitted for their duties. On the evidence it is proved that the shipowner has taken all due and reasonable means to see that his ship was seaworthy, and therefore the usual warranty of seaworthiness does not preclude the shipowners here recovering salvage against the cargo. The shipowners' contract with the cargo owners was to carry the cargo to its destination under the terms of the bills of lading. There was no duty upon them to employ another of their ships, her master and crew, to salve that cargo:

> *The Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company*, 10 Q. B. Div. 521; 5 Asp. Mar. Law Cas. 65; 48 L. T. Rep. N. S. 546.

Myburgh, Q.C. and Dr. *Raikes* for the defendants.—The owners of the *Achilles* are not entitled to recover. The provisions in the bills of lading do not affect the implied warranty of seaworthiness. All the provisions in the bills of lading have application only to matters occurring after the voyage has commenced:

> *Steel* v. *The State Line Steamship Company*, 37 L. T. Rep. N. S. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72;
> *Tattersall* v. *National Steamship Company Limited*, 5 Asp. Mar. Law, 206; 50 L. T. Rep. N. S. 299; 12 Q. B. Div. 297.

These provisions were inserted for the benefit of the cargo owner. At common law there is no obligation after the voyage has commenced to keep the vessel in a seaworthy condition:

> *Worms* v. *Story*, 11 Exch. 430;
> *Gibson* v. *Small*, 4 H. of L. Cas. 353.

[BUTT, J.—There may be no warranty to keep her in a seaworthy state, but surely it is the shipowners' duty to use ordinary care in keeping her in such a state that she may be able to carry the

cargo to its destination?] These stipulations as to seaworthiness cast upon the shipowner the duty of taking all reasonable care to keep the ship seaworthy during the voyage, an obligation which in the absence of these provisions would not exist. The provision in the third bill of lading as to latent defect does not in any way affect the implied warranty of seaworthiness. The word warranty is not mentioned, and therefore the warranty must exist. All it does is to excuse the shipowner from liability for latent defects, but it does not give him any right to claim compensation for services rendered necessary by a latent defect.

Dr. *Raikes* followed.—The shipowner was a bailee of the cargo, and his duty is to care for its safety in the same way as he would care for the safety of his own ship. Circumstances placed the ship and cargo in the same danger, and therefore the shipowner was bound to use all his appliances to save both. If so, he is not entitled to salvage for doing that which it was his duty to do.

Cohen, Q.C. replied.

BUTT, J.—This is a case of salvage services rendered by the steamship *Achilles*, her master and crew, to the *Laertes* and her cargo. It is the cargo on board of her which is sued. The *Laertes* had broken down in the course of her voyage from Shanghai to Amsterdam. She was laden with a cargo of tobacco and other goods. The *Achilles* is owned by the same people as own the *Laertes*, and that has given rise to the questions raised in this case. The service was rendered in fine weather. There was no danger to the salvors, and very little, if any, to the salving ship. Neither was there any immediate danger to the salved vessel or her cargo. The ship, of course, had broken down; and, had she been left to her own resources, serious danger might have supervened. The value of the salved cargo is 116,000*l*. The cargo alone is sued because the owners of the salving ship being the same as the owners of the salved ship, make no claim in respect of her. But it is said that, inasmuch as some of the plaintiffs the owners of the *Achilles* are also the owners of the *Laertes*, they cannot recover salvage against the cargo owners. When worked out, the defence can only resolve itself into this: "You have contracted to convey the cargo which you are now suing to its port of destination. Your vessel broke down, and you therefore failed to fulfil your contract, and you cannot recover for that failure because, having failed to fulfil your contract, if in consequence of that you recover salvage from the cargo owners, they would at once have an action against you for breach of contract. Therefore you are debarred from recovering in this suit." That is the way the defence must work itself out. The whole thing depends on this. Have the plaintiffs the owners of the *Achilles* and of the *Laertes* been guilty of a breach of contract for which they would be liable to the owners of cargo on board the *Laertes?* That depends upon certain considerations of law and of fact. No doubt in ordinary cases at the commencement of every voyage there is an implied warranty that the ship is seaworthy, not merely that the owner is to use his best endeavours to make her seaworthy, but that as a fact she is seaworthy. The *Laertes* broke down from a latent defect, which I have no hesitation in saying was one which could not have been discovered by the exercise of any reasonable care on the part of the owners. Now the flaw which led to the breakdown of this ship existed when she started, and she was therefore not seaworthy for the voyage. If the implied warranty existed and was not limited by the contracts in the bills of lading, then the owners of the *Achilles*, who are identical with the owners of the *Laertes*, could not sue for salvage.

The cargo in question was shipped under three different bills of lading. It is said on behalf of the defendants that the stipulations in these bills of lading had no effect whatever in limiting the warranty of seaworthiness. The first of these bills of lading provides, amongst other things, that the vessel is "warranted seaworthy only so far as ordinary care can provide." Mr. Myburgh has contended that that is not a limitation of the implied warranty of seaworthiness, but is merely a stipulation by which the shipowner undertakes or warrants to keep his vessel seaworthy during the voyage. I cannot accept that, because I think the words do and were intended to apply as a limitation of the original implied warranty. I think the warranty does not exist in this case, and I have no doubt that in effect these words do abrogate the warranty which otherwise would be implied. The material provision in the second bill of lading is this: "The vessels of the Ocean Steamship Company are warranted seaworthy only so far as due care in the appointment or selection of agents, superintendents, pilots, masters, officers, engineers, and crew can ensure it." That, I understand Mr. Myburgh to say, is only a stipulation to the same effect as the other. With that I disagree, and I cannot accept the defendant's view of it. The third bill of lading provides that "the owners are not to be liable for loss, detention, or damage if arising directly or indirectly from latent defects in boilers, machinery, or any part of the vessel in which steam is used, even existing at time of shipment, provided all reasonable means have been taken to secure efficiency, even when occasioned by the negligence, default, or error in judgment of the owners, pilot, master, or crew, or of any other servant in the employ of the owners of the above or substituted steamer or craft, on the above or any other vessel." I confess I quite fail to appreciate Mr. Myburgh's argument on this. I am not quite sure what he exactly meant, but I have no hesitation in saying that, if it does not abrogate, it at all events limits, the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage. I am perfectly well aware of the decision of the House of Lords in the case of *Steel* v. *The State Line Steamship Company* (*ubi sup.*). That was a decision that under ordinary circumstances the stipulations in a bill of lading apply after the warranty of seaworthiness has come into effect. In the bills of lading which were before their Lordships in that case there was no such stipulations as in these, and I am in no wise departing from that view of the case in deciding that the words in these bills of lading may very well be a limitation of the implied warranty of seaworthiness. I say "may" because I have not yet found the facts, and I must be careful to see whether the facts, which must be established in order to give effect to these bills of lading, are established. I am of

opinion that they are. I find as a fact that the ship was "seaworthy so far as ordinary care could provide." Secondly, I find that the vessel was seaworthy "so far as due care in the appointment and selection of agents, superintendents, pilots, masters, officers, engineers, and crew could ensure it." As to the third bill of lading, I find that the accident occurred from a latent defect in her machinery existing at the time of shipment, though all reasonable means had been taken to secure efficiency. Having held that these clauses limit the warranty of seaworthiness, I must come to the conclusion that there is no reason why the plaintiffs should not recover salvage from the owners of the cargo laden on the *Laertes*. The only question is what is to be the amount. I always feel reluctant to make a large award in a case of this sort. I have a sort of feeling—I do not know whether it is a rational one—that I would rather not give them any award at all. However, having regard to the circumstances of this case, especially the value of the cargo salved, I shall make an award of 1200*l*., 50*l*. to the master, 250*l*. to the crew, and the rest to the owners.

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *Waltons, Bubb*, and *Johnson*.

Tuesday, July 12, 1887.

(Before BUTT, J.)

THE VIVIENNE. (*a*)

Action of restraint—Bail bond—Cancellation—Sureties.

Where a bail bond has been given in an action of restraint holding the sureties liable so long as the ship does not safely return to a port within the jurisdiction from as many voyages as she shall sail upon before notice shall have been given to the defendants by the plaintiffs that they withdraw their claim for security, the court will, upon its being shown that the owners on whose behalf the bond was given have ceased to be owners, cancel the bond and release the sureties from liability thereunder upon the ground that it never was intended that they should remain liable for all time whoever might be the owners.

THIS was a summons (adjourned into court) by the defendants in an action of restraint calling on the plaintiffs to show cause why the bail bond therein should not be cancelled, and the sureties to such bond released from all liability thereunder.

The action was instituted in Aug. 1885 by the owners of twelve sixty-fourth shares in the steamship *Vivienne*, and was defended by the owners of thirty-nine sixty-fourth shares.

The ship was arrested, and in order to obtain her release the following bail bond was given in Oct. 1885 on behalf of the defendants:

Whereas an action has been commenced in the High Court of Justice on behalf of William Stuart, Robert Easthorpe, John Cuthbert, Arthur Daniel Jones, and W. Sultan Eccles, against Messrs. Hooper, Campbell, and Co., and the remaining owners of the s.s. *Vivienne* and freight. Now therefore we, Frederick James Burt, of No. 72, Cornhill, in the city of London, gentleman, and William Newall, of 14, Arlington-street, in the county of Middlesex, gentleman, hereby jointly and severally submit ourselves to the jurisdiction of the said court, and consent that, if the aforesaid steamship *Vivienne* shall not safely return to a port within the jurisdiction of this honourable court from as many voyages as she shall sail upon before notice shall have been given to the defendants by the plaintiffs that they withdraw their claim for security for the value of their shares in the said steamship, execution may issue forth against us, our heirs, executors, and administrators, good and chattels, for a sum not exceeding three thousand pounds, being the value of the plaintiffs' shares in the said steamship.

The defendants filed the following affidavit in support of the summons:

I, Edward Græme Gibson, of No. 21, Leadenhall-street, in the city of London, one of the firm of Thomas Cooper and Co., of the same place, solicitors for the defendants, the remaining owners of the said steamship *Vivienne*, make oath and say as follows:

1. This action was commenced on the 14th day of Aug. 1885, at the suit of the above-named plaintiffs, who were at such time collectively owners of twelve sixty-fourth shares in the above-named steamship.

2. The above-named steamship had been up to the 11th day of Aug. managed by the said John Cuthbert (one of the plaintiffs), but on or about that date the management had been transferred by the owners of thirty-nine sixty-fourth shares in the vessel to the defendants Hooper, Campbell, and Co., who were appointed managers in lieu of the said Cuthbert. The said Hooper, Campbell, and Co. were not then, and never had been owners of any shares in the said steamship.

3. In order to obtain the release of the *Vivienne*, which had been arrested by the plaintiffs, an undertaking to put in bail for the plaintiffs' shares was given by Messrs. Ingledew and Co., of Cardiff, who were instructed by the said Hooper, Campbell, and Co. to act as the plaintiffs' solicitors, but who ceased to act as such solicitors on or about Sept. 18, 1885.

4. On the 27th day of Oct. 1885, to comply with the said undertaking, a bail bond for 3000*l*. was filed and duly executed by Frederick James Burt and William Newall, therein described. The said Frederick James Burt and William Newall became such sureties at the request of Messrs. Vivian Gray and Co., who owned five shares in the said ship, and who represented the owners of the said thirty-nine sixty-fourth shares, who had appointed the said Hooper, Campbell, and Co. to be managers of the said steamship, and the said Frederick James Burt himself owned five shares.

5. As the *Vivienne* was expected to be employed on short voyages with a view to prevent the necessity of the great expense consequent on repeated arrests of the vessel, the said bail bond was not confined to the safe return of the ship from a single voyage, but it was never intended by the bail that they should remain permanently liable for the value of the shares of the plaintiffs, or that they should remain so liable after Vivian Gray and Co. and their friends had ceased to be interested in the said ship, or the same had ceased to be managed by the said Hooper, Campbell, and Co.

6. I am informed and believe that the said steamship *Vivienne* arrived in Cardiff on the night of Thursday, July 7th, and is expected to complete her discharge on Saturday, the 9th inst., and to sail again on Monday, 11th inst.

7. I am informed and believe that since the said vessel was last within the jurisdiction of this honourable court at least thirty, if not more, sixty-fourth shares in the vessel out of the thirty-nine sixty-fourth shares represented by the said Vivian Gray, and Co., have been sold and transferred by their owners together with the beneficial interest thereof to other persons, and that the said Vivian Gray and Co. and their friends, have no longer any interest in the said ship, and the management thereof has been lately transferred by the new owners from the said Hooper, Campbell, and Co. to other managers of whose names I am quite ignorant.

8. The said John Cuthbert, who I am informed acquired the shares of some of the above-named plaintiffs, and who acts for them, has been several times informed that the said sureties seek to be relieved from their bail, and has offered to consent thereto on the defendants paying him large sums of money in respect of his management, which they dispute that he is entitled to receive.

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

The following affidavit was filed in opposition by the plaintiffs:

I, John Cuthbert, of Cardiff, in the county of Glamorgan, coal merchant and ship broker, make oath and say:

1. I am one of the above-named plaintiffs, and from the time when the *Vivienne* was built, viz., in the year 1880, up to the 11th Aug. 1885, I was respectively the owner and the managing owner of the steamship *Vivienne*.

2. I have read a copy of an affidavit purporting to have been sworn herein on the 8th day of July inst., by Edward Græme Gibson, the solicitor for the defendants, and in reply thereto say that I and my co-plaintiffs always owned not less than seventeen sixty-fourths of the steamship *Vivienne*.

3. It is not true to state that the said Messrs. Hooper, Campbell, and Co. never were owners of any share in the steamship *Vivienne*. Mr. Horatio Hooper is the registered managing owner, and is owner of one sixty-fourth of the said *Vivienne*, and has been so for some considerable time, as appears by the register at the Customs House, Cardiff.

4. It is untrue to state that Messrs. Vivian Gray and Co. represented thirty-three sixty-fourths of the *Vivienne*. They only represented and acted for twenty-seven sixty-fourths, which included their own shares.

5. Messrs. Hooper, Campbell, and Co. are still the managing owners of the ship *Vivienne*.

6. It is untrue to state that I have acquired my shares in the ship *Vivienne* since the date of the writ in this action. Some time previous to the 11th Aug. 1885 I purchased back the shares of Mr. Arthur David Jones, but the transfer was not registered until after the date of the writ in this action. I always acted with my partners, not for them.

J. G. Barnes, for the defendants and sureties, in support of the motion, after stating the facts, was stopped by the Court.

J. P. Aspinall, for the plaintiffs, *contra*.—The court should dismiss this motion. [BUTT, J.—Why? It never could have been intended that this bond should be in force for all time.] The bond in terms says so. [BUTT, J.—I call it perfectly monstrous to say that these sureties are to remain always liable after the persons for whom they have gone surety have ceased to be owners.] If the court cancels the bond, the plaintiffs will be left without any security, and the ship may be at once sent out of the jurisdiction. The defendants ought to be made to give an undertaking not to send the ship away until the plaintiffs have had an opportunity of arresting her in another action.

BUTT, J.—What I will do is this. I order the bond to be cancelled within three days unless it be made to appear to the registrar that the ship has left Cardiff, and that the plaintiffs have had no opportunity of arresting her. In that event the bond is to remain in force until the vessel returns to the United Kingdom. If the bond is cancelled within the three days the defendants are to pay the costs of this motion. If not, costs are to be reserved, with liberty to apply.

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

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

Friday, May 20, 1887.

(Before the Right Hon. Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE THETFORD. (*a*)

Collision—Vessel crossing river—Tyne Navigation Rules, arts. 19, 20, 22.

The duty imposed by art. 22 *of the Rules for the Navigation of the River Tyne upon vessels crossing the river not to cause obstruction, injury, or damage to other vessels, does not require them in any event to get out of the way of vessels going up or down, and they are at liberty when crossing at a proper time and in a proper manner to do so at such times as may be convenient to themselves, and vessels proceeding up and down must take the ordinary precautions to avoid collision with crossing vessels.*

THIS was a collision action *in rem* instituted by the owners of the barque *Allonby* against the owners of the steamship *Thetford* to recover damages occasioned by a collision between these two vessels.

The collision occurred about 2.15 p.m. on the 24th Dec. 1886 in the river Tyne.

The facts alleged on behalf of the plaintiffs were as follows:

Between 2 and 2.15 p.m. on the 24th Dec. 1886 the barque *Allonby*, of 1400 tons register, having loaded a general cargo at Smith's Buoys, on the north side of the river Tyne at North Shields, was proceeding to sea in tow of the steam-tug *Selina*.

At this time the *Allonby*, which had shortly before left her moorings on the north side of the river, and had crossed under a starboard helm, in tow of the *Selina*, in order to proceed down the river on the south side, was straightening down the river, proceeding at the speed of about one knot per hour, at a distance of thirty to fifty yards from the tiers on the south side. In these circumstances a steamship, which proved to be the *Thetford*, was observed by those on board the *Allonby* coming down the river at a distance of 500 to 600 yards off, and on the *Allonby's* starboard beam. Two short blasts were blown on the steam whistle of the *Selina* to indicate that the *Allonby* was being rounded under a starboard helm. The *Thetford*, however, proceeded at the rate of from four to five knots an hour, at first as if to pass between the bows of the *Allonby* and the south tier, but shortly afterwards she starboarded her helm, apparently to go under the stern of the *Allonby*, and, although hailed by those on board the *Allonby* to stop and reverse, the *Thetford* came on, and with her stem struck the starboard side of the *Allonby* abreast the main rigging.

The facts alleged on behalf of the defendants were as follows:

At about 2.15 p.m. on the 24th Dec., the *Thetford*, a steamship of 866 tons register, laden with coals, was proceeding down the south side of the river Tyne, on a voyage from Jarrow to London, and was making about three to four knots through the water. In these circumstances those on board the *Thetford* observed the barque *Allonby* about 300 yards distant, and about four points on the port bow, heading across the river to the south

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

shore, and coming away from the tiers on the north side with a tug on her port bow trying to tow her head down river. Very soon afterwards it was seen that the *Allonby*, instead of going head down, was coming across the river. Thereupon the engines of the *Thetford* were stopped and reversed full speed astern. The *Allonby*, however, continued to come across to the south side, and shortly afterwards, with her starboard side, came into collision with the stem of the *Thetford*.

The defendants also alleged that the *Allonby* was brought away from the tiers, and got under way, at an improper time, having regard to the traffic in the river; that she crossed the river at an improper time, having regard to the said traffic; and that proper measures were not duly or in due time taken to get the head of the *Allonby* down river, and that she was improperly allowed to go too far over to the southward.

The following sailing regulations were referred to, and are material to the decision:

The Tyne Improvement Commission Bye-laws.

Art. 19. Every vessel under weigh shall when proceeding seaward be kept to the south of mid-channel, and when proceeding inward from sea or up the river to the north of mid-channel, so that in either case such vessel shall with a port helm always be and be kept clear of any vessel proceeding in the opposite direction.

Art. 20. 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.

Art. 22. Every vessel crossing the river and every vessel turning shall be navigated so as not to cause obstruction, injury, or damage to any other vessel.

Art. 28. Every sailing or steam vessel overtaking any other vessel shall be kept out of the way of the overtaken vessel, which shall be kept on her course, and no obstruction shall be wilfully caused by the overtaken vessel to the passage of the overtaking vessel, and any vessel having passed another shall not cross the bows of the passed vessel until at such a distance as will not necessitate the stopping or easing of the passed vessel to avoid a collision.

Bucknill, Q.C. and *Joseph Walton* for the plaintiffs.—This collision was solely due to the negligent navigation of the *Thetford*. The *Thetford* improperly relied upon the *Allonby* keeping out of her way, and recklessly held on without easing the speed. True it is that art. 22 requires a vessel crossing the river to be navigated so as not to cause obstruction or injury to other vessels, but it does not say that the crossing vessel is to be liable for damage solely caused by the negligence of a vessel going up or down the river.

Sir *Walter Phillimore* and *J. P. Aspinall*, for the defendants, *contra*.—The collision was solely due to the negligence of the *Allonby* in crossing the river. The *Thetford* was, in accordance with the rules, being properly navigated on the south side of the river, and she had a right to expect, under art. 22, that the *Allonby* would not be brought across the river so as to become an obstruction to her. She broke art. 22, and must therefore be responsible for the consequences. For the *Thetford* to have kept out of the *Allonby's* way, it would have been necessary for her to have gone to the north of mid-channel, which by the rules she is expressly forbidden to do.

Bucknill, Q.C. in reply.

Sir JAMES HANNEN.—The first question that has to be considered is, whether there was anything in the state of the weather or the tide to make it improper on the part of the *Allonby* to move out for the purpose of being towed down the river. I am advised that there was nothing resulting from weather or tide to make it imprudent to cross the river. I will next consider the question which has been raised on the Tyne Rules. As to that, I am of opinion that they have not the meaning sought to be attributed to them, viz., that they make the crossing vessel responsible, whatever the circumstances may be, if it comes in contact with another vessel which is on the side of the river prescribed for its navigation. That would be a most unreasonable construction to give to the rule, and it is not a natural one. There is no doubt a very clear direction that those vessels that are going down are to keep on the south side, and that those coming up are to keep on the north side. Then rule 22 provides that every vessel crossing the river is to do so without causing obstruction, injury, or damage to other vessels. That does not mean that if two vessels come into collision, the one that is crossing is to be considered to blame. You still have to look at the circumstances of the case. Now, this vessel was no doubt properly endeavouring to get as soon as practicable to the south side of the river, which is specified as the proper side for its navigation down the river, and if she was doing that properly, even though she came in the way of another vessel coming down, she was not necessarily an obstruction to the other vessel. She was merely making a legitimate use of the river. In this, as in collisions on land, it seems to me that the whole river belongs to everybody, and that nobody has the right to assert that he has the exclusive occupation of the road, whether on sea or land. All depends on the circumstances of each case. What are the circumstances of this case? It is said that the *Allonby* ought not to have attempted to make her passage across the river at the time and in the way she did. But I am advised that the mode in which this vessel was navigated across the river indicates nothing unskilful in the manner in which it was done. Then it has been contended on these rules that, if any vessel was coming down on its proper side, the *Allonby* had no right to go across so as to prevent that vessel continuing her course. I am of opinion that that is not a true construction of the rule, and it is equally opposed to the views of those who assist me as to the duties of vessels under such circumstances. There is some discrepancy as to where the *Thetford* was when the *Allonby* was first seen; but, wherever she was, there was then a distance of about 600 yards between the vessels, and the *Thetford* was higher up the river. Were the circumstances such that it was reasonable for a vessel to endeavour to cross? I am advised that it was, and I am also of opinion that it was. Let us judge by the event whether it was or not. Another vessel, the *Kingscote*, which was ahead of the *Thetford*, went clear of the *Allonby*, but she only just did it. She had to starboard her helm to clear her stern of the *Allonby* even after she had passed her. The *Thetford* was a considerable distance behind. True, she did at some time stop and reverse, and the result was that the blow was a very slight one; but the question is, whether this manœuvre ought not to have been done sooner. I am clearly of opinion that she ought to have done it sooner. She was

able to see that a vessel was being navigated so as to bring herself on the right side of the river, and she had no right to assume that she would not get into a position which would make it necessary for her (the *Thetford*) to slacken her pace. It is plain what misled her was, first, the careless and obstinate following of the *Kingscote*; and, secondly, the assumption that, because she was on the south side of the river, she was not bound, even for the temporary purpose of avoiding a vessel in front of her, to go into the north water. That was clearly the opinion of her pilot. No reasonable man, he said, would think of going into his wrong water. That is, under the circumstances, an entirely mistaken view of his duties. There is no imperative rule of the kind. It must depend on the circumstances of each case. It is not denied by the defendants that the north of the river was perfectly clear of craft, and there was no reason, therefore, why, if he was determined to keep on, seeing that the *Allonby* was coming over to the south shore, he should not have starboarded and gone under her stern. It might have entailed a temporary delay of a very short time, but there must be in navigating a river, just as in walking along the road, a certain amount of give and take. I am of opinion that the *Thetford* is alone to blame.

Solicitors for the plaintiffs, *Wynne, Holme,* and *Wynne,* for *H. Forshaw* and *Hawkins,* Liverpool.

Solicitors for the defendants, *Botterell* and *Roche.*

Monday, May 23, 1887.

(Before the Right Hon. Sir JAMES HANNEN and BUTT, J.)

THE SUTHERLAND. (*a*)

Collision — Compulsory pilotage — Exemption — London district—Trinity House outport districts —Merchant Shipping Act 1854 (17 *&* 18 *Vict.* c. 104), *s.* 379.

A vessel trading from Liverpool to Hamburg, which, in consequence of a collision, puts into the port of London for repairs, and then proceeds on her voyage, is a ship trading to a "place in Europe north of Boulogne," within the meaning of sect. 379 *of the Merchant Shipping Act* 1854, *and is therefore exempt from compulsory pilotage in the London district.*

THIS was an appeal by the plaintiffs in a collision action from a decision of the judge of the City of London Court, by which he had held the defendants exempt from liability on the ground of compulsory pilotage.

The collision occurred on the 22nd Dec. 1886, in the Thames, between the plaintiffs' brig the *Kate* and the defendants' steamship the *Sutherland.*

It appeared that the *Sutherland,* a steamship belonging to the port of London, and owned by the Liverpool and Hamburg Shipping Company, left Liverpool in cargo on the 19th Dec. 1886, for Hamburg. On the 21st Dec. during a fog she came into collision with a vessel off Dungeness. In consequence of damage sustained in the collision, her captain decided to put into London for repairs. She therefore took a Channel pilot, and made for the Thames, and at Gravesend took a river pilot on board. Whilst under his charge she on her way up the Thames collided with the plaintiffs' brig the *Kate.* Upon her arrival in London she went into dock for repairs, where her cargo was discharged for the purpose of effecting the repairs. Part of her cargo was carried on to Hamburg in another ship, the remainder being taken on in the *Sutherland* after she had been repaired.

The owners of the *Kate* instituted the action in the City of London Court. It was admitted that the collision was solely caused by the fault of the pilot of the *Sutherland,* and the judge of the City of London Court held that the defendants were not liable on the ground that the pilot was in charge of their vessel by compulsion of law.

By the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 379:

The following ships when not carrying passengers shall be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts; that is to say, (1) ships employed in the coasting trade of the United Kingdom; (3) ships trading to Boulogne, or to any place in Europe north of Boulogne.

Myburgh, Q.C. and *Pyke,* for the plaintiffs, in support of the appeal.—The learned judge below was wrong in holding that the *Sutherland* was in charge of a pilot by compulsion of law at the time of the collision. She was a ship trading to a "place in Europe north of Boulogne," within the meaning of sect. 379 of the Merchant Shipping Act 1854, and was therefore exempt from compulsory pilotage. When the *Sutherland* left Liverpool for Hamburg she was then trading to a place in Europe north of Boulogne. Inasmuch as she only put into London for temporary repairs, and ultimately carried on part of her cargo to Hamburg, she never ceased to be a vessel trading to Hamburg, and is therefore within the exemption. [BUTT, J.—May it not be said that, though you are within the words of the section, you are not within the spirit of the enactment?] If that were so it would be immaterial, because this enactment imposes penalties for breach of its provisions, and therefore the court must construe the words strictly. Hamburg was her port of destination, the port to which she was trading at the time of the collision, and to which she ultimately traded after being repaired. London was nothing more than a port of distress. But assume that the voyage was terminated at London, and is to be looked upon as a voyage from Liverpool to London, then the *Sutherland* comes within another exemption, and was a ship "employed in the coasting trade of the United Kingdom."

Bruce, Q.C. and Dr. *Raikes,* for the defendants, *contra.*—To comply with the conditions of the exemption the vessel must be trading from the London district, or a Trinity House outport district to Boulogne, or to a place in Europe north of Boulogne. The analogous provisions in the Act of George 4 (6 Geo. 4, c. 125) clearly confine the exemption to vessels sailing from London. [BUTT, J.—The later Act was meant to carry the exemption further.] By an Order in Council dated the 21st Dec. 1871, and made under the provisions of the Merchant Shipping Act 1854, the exemption is limited to vessels "trading from any port or place in Great Britain within the London district, or any of the Trinity House outport districts." [Sir JAMES HANNEN—How

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

does this Order in Council affect the interpretation of the Act of Parliament?] It is also contended that she was not within the exemption, because by putting into London she turned away from her voyage to Hamburg, and therefore ceased to be trading to a place north of Boulogne. Her master then did not know what his owners might do with her on her arrival in London. For all he knew the cargo might have been transhipped, and she might never have gone to Hamburg at all.

Myburgh, Q.C. in reply.—There are no words confining the exemption to vessels trading from the London district or the Trinity House outport districts. The words are general, and should be construed strictly.

The PRESIDENT (Sir James Hannen).—If the policy of the Legislature in granting these exemptions were before us there would no doubt be great difficulty in arriving at a conclusion in this case. But all we have to do is to see what intention is expressed by the words which the Legislature has used. The first question we have to determine is, whether the words used in the section apply to any other vessels than those which start from or are proceeding to the London district, or one of the Trinity House outport districts. In considering this question no section of the Merchant Shipping Acts has been referred to which leads to the conclusion that any limit is to be put on the general words of the section; and when the language of the several sub-sections is considered, it is impossible to say that the construction contended for by the respondent is correct. The words of the section are: "The following ships when not carrying passengers shall be exempted from compulsory pilotage in the London district, and in the Trinity House outport districts." The reference to the London district and the Trinity House outport district, is for the purpose of stating what vessels are not to be subject to compulsory pilotage. When we have to determine the class of vessels which is to be exempt from compulsory pilotage we find them thus described, "ships employed in the coasting trade of the United Kingdom." That obviously means ships going on a coasting voyage from any one port of the United Kingdom to another. It cannot be restricted to vessels coming out or going into the London district, or the Trinity House outport district. Then there come the words, "ships trading to Boulogne, or to any place in Europe north of Boulogne." I can see no reason for putting any restricted construction on these general words which we cannot put on the preceding sub-section. It is not necessary to determine whether or not this applies to foreign vessels, for we are now dealing with an English vessel which was proceeding from a port in England to a port in Europe north of Boulogne, and so far this case seems to fall directly within the words of the sub-section. If we are to speculate upon the object of the Legislature in framing this enactment, it would appear that the idea was to give certain privileges to certain trades, as for instance those engaged in the coasting trade. Again, vessels which were in the habit of trading to places in the north of Europe were to be exempt, and vessels engaged in bringing stone the produce of the Channel Islands were exempted by another sub-section. The question then arises, was this vessel trading to a place north of Boulogne? That she was doing so originally is beyond all dispute, and therefore we have to consider if she had ceased to be a vessel so trading. She was originally trading to Hamburg; can it be said that the moment the captain saw some repairs were necessary she ceased to be a vessel trading to Hamburg? It appears to me that no accident can make her lose her particular trading character. That is the only essential character the Legisture requires. I agree that because a vessel is generally engaged in trading to a place north of Boulogne she would not be exempt if she were not at the time on a voyage of this character. But if a vessel is obliged for a temporary purpose to put into a port she does not on that account cease to be so trading, whether the port be large or small, or near or far. Suppose the *Sutherland* had put into Ramsgate and come out again immediately, could it have been said that she lost her character of a vessel trading to Hamburg? I therefore base my decision upon the generality of the language of the Act, and hold that, as the *Sutherland* was in my opinion trading to a place north of Boulogne, she was not bound to take a pilot. The decision of the learned judge must therefore be reversed, and this appeal allowed.

BUTT, J.—I am of the same opinion. This is a penal statute under which penalties can be imposed for breach of these pilotage regulations. The master of this ship could have been fined by a magistrate for not taking a pilot if he was bound to take one. It is said that the words of the section do not express entirely all that is meant; but in dealing with a penal enactment the court must construe the words strictly. I therefore have no doubt that this vessel was a ship trading to a "place in Europe north of Boulogne," and that her voyage was only temporarily interrupted by putting into the Thames. I therefore agree that this appeal must be allowed.

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

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

Thursday, May 26, 1887.

(Before the Right Hon. Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE OCTAVIA STELLA. (*a*)

Damage to oyster-beds—Navigable river—Place of anchoring—Duty of pilot.

A ship in charge of a compulsory pilot was at high water brought into and anchored by the pilot in a river in which there were oyster-beds, the existence of which was known to the pilot. The place where she was anchored was not the usual and customary place for vessels of her size and draught to anchor in. At low water she grounded, and thereby did damage to an oyster-bed. On notice of the existence of the oyster-bed being given to the master he took all reasonable means to remove his ship as speedily as possible. In an action by the lessee of the oyster-bed against the shipowner and the pilot:

Held, that the act of the pilot in anchoring the ship where he did was negligence which made

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

him liable, but that the ship was not liable because the master's duty on receiving notice of the existence of the oyster-bed was to take all reasonable measures—not extraordinary measures—to remove his ship, and this he had done.

THIS was an action for damage to an oyster-bed by the grounding thereon of the Italian barque *Octavia Stella*.

The plaintiff was one John Tyacke, the lessee of certain oyster-grounds and the owner of the oysters thereon, in Helford Harbour, in the Duchy of Cornwall. The defendants were the owners of the barque, and a pilot by name William Richards, who had brought the barque into the river.

It appeared that shortly before 6 a.m. on Aug. 12, 1885, the *Octavia Stella*, a barque of about 500 tons register, laden with cargo, was brought into Helford Harbour, at about high water, in charge of the pilot William Richards. She was then anchored by the directions of the pilot at a place higher up the river than was usual for seagoing vessels of her size to be anchored. The pilot left the vessel after he had given orders as to where the vessel was to be anchored, but before his orders were carried out. After the barque was anchored, notice was given by the plaintiff to her master that the vessel unless removed would ground on the oysters. The barque, however, was not removed until the evening of the 13th, after she had grounded at low water, and done damage to the oysters.

The defendants delivered separate defences by which they denied that the barque was improperly anchored or allowed to ground on the oysters; that she was improperly and negligently allowed to remain anchored and aground from 7 a.m. on Aug. 11 till 7 p.m. on Aug 12; that the oyster-grounds were marked, or that those in charge of the ship had any knowledge or notice thereof.

Both defences also contained the following paragraph:

Alternatively the defendants say that before or at the time of the matters complained of in this action the *Octavia Stella* was lawfully navigating the river Helford, bound for River Helford, with a cargo of timber to be there discharged; that the said river is and was a public and common navigable river open to the sea, and having a free passage into and from the same for ships and other vessels, and that the said alleged oyster-grounds on which the said ship was anchored and grounded as alleged (which is not admitted) were and still are a part of the said river, and within the flow and ebb of the sea, and that the said river and every part thereof is a public and common navigable river, open to all persons lawfully using the same with their ships and other vessels to navigate, sail, pass and repass in, upon, through, over, and along the same and all parts thereof, at all times and at all states of the tide of the said river, and that the anchoring and grounding of the said barque were acts done in the lawful navigation of the said ship in the said river as aforesaid.

In the defence of the owners of the *Octavia Stella* it was further alleged:

The said ship, at the time she entered the said river and anchored as aforesaid, was in charge of a duly licensed pilot, to wit, the said defendant William Richards, by compulsion of law, and if any damage was caused as alleged by any person in charge of the said barque, such damage was wholly caused by the negligence of the said pilot, and not by the defendants the owners of the said barque or their servants.

The fact that oyster-beds existed in the Helford river was a matter of common knowledge in the neighbourhood, and was known to the pilot, but there were no buoys or other marks on the beds. The plaintiff claimed 100*l.* damages, or a reference to the registrar and merchants to assess the amount of the damages.

Sir *Walter Phillimore* (with him *L. E. Pyke*) for the plaintiff.—The plaintiff is entitled to judgment against all the defendants. The pilot was bound to moor the *Octavia Stella* so as not to do harm to the plaintiff's property, of the existence of which he was well aware. By the exercise of ordinary care and prudence he might have anchored the barque elsewhere, and yet in such a position as not to inconvenience her in her user of the river:

The Mayor of Colchester v. *Brook*, 7 Q. B. 339.

The owners of the *Octavia Stella* are also liable for the negligence of the master in not taking proper steps to remove the vessel after he had notice of the position of the oyster-grounds.

Bucknill, Q.C. (with him *J. P. Aspinall*) for the owners of the *Octavia Stella*.—If there was any negligence it was that of the pilot. The master of the *Octavia Stella* had a legal right to navigate this river, and the responsibility of the proper mooring of the barque was on the pilot. As soon as the master knew of the existence of the oyster-grounds his only duty was to take all reasonable measures, not extraordinary measures, to remove his vessel, and this he did.

Hon. *A. Lyttleton* for the plaintiff.—The pilot had a *primâ facie* right to anchor the vessel anywhere in the river. It is a public navigable river, and unless it was brought to his knowledge that in anchoring where he did he was about to do damage he is under no liability. Though he knew generally of the existence of oyster-beds in the river, there were no marks which would indicate to him exactly where they were. The provisions of the Sea Fisheries Act 1868 seem to require the oyster-beds to be marked before a person damaging them can be made liable.

Sir JAMES HANNEN.—I am of opinion that the plaintiff is entitled to recover, but only against the pilot. The evidence satisfies me that Mr. Tyacke was in possession of the fishery over the *locus in quo*, and I am of opinion that that fact was generally known. It appears from the evidence of the pilot that it was known to him that this was an oyster fishery as distinct from a bank upon which oysters may be found and dredged; and it further appears to me that he being a pilot must be taken to know of its existence, holding himself out as he does to be a person acquainted with the peculiarities of the navigation. In these circumstances he brought the vessel into this estuary where he says he knew there were oysters about. Now he contends that he was entitled to make use of that public way for the purpose of bringing this vessel to its destination; but that contention gives rise to a number of questions. The rights of all vessels are not co-extensive. It may be reasonable and right that a small vessel should go up to the farthest point she can reach in order to give the public the benefit of the public way. But the same right does not exist in the case of a large vessel, and she is not entitled under extraordinary circumstances to try to get to a place where large vessels are not accustomed to go, and where there is no accommodation for loading or unloading them. This vessel was bound by its charter-

party to go as near to the place as she could being always afloat, and the pilot has said that that was what he intended to do. His idea was that he was discharging the duty imposed on him in bringing the vessel to a place where she would still be afloat. But, instead of bringing her to a place where she would be afloat, he brought her to a place where she would be aground. Now, if the *Octavia Stella* had been a suitable vessel for navigating these upper and shallow waters, and in the course of her navigation it had become necessary to take the ground, that would not in itself be negligence which would have made the person allowing the vessel to ground liable. He would be entitled to say, "I was only using this passage in the ordinary way with prudence, and so as not to injure anybody else except in so far as that might be the necessary consequence of my only doing what I had a right to do." But here the whole state of things is different. I am of opinion that the pilot was under no necessity to ground, that it was an act of imprudence and negligence on the pilot's part to ground the vessel where he did, and that in doing so he injured the rights of a private individual which would not have been injured if he had not been guilty of that dereliction of duty. Therefore it appears to me that he is liable for the natural and reasonable consequences of his act, and hence is liable for all the damage the vessel did by grounding until she could by reasonable exertions be got out of the position in which he had put her.

The captain was clearly in no way to blame for the original grounding. He was a foreigner, and was absolutely ignorant about this inlet. He was taken in by the pilot, and his vessel was put into this position by the negligence of the pilot. It was not suggested that he was to blame for the first grounding, but it is said that he was to blame afterwards for not getting the ship off by slipping the anchor, or by allowing her to catch by the heel as she was swinging. If the vessel had taken the ground in the ordinary course of navigation from some accident, it might be that the pilot would not be liable for the consequences of his act, because undoubtedly the river is a high road, a highway, and I assume if in the ordinary course of navigation the vessel could not get up in one tide and anchored and grounded, there would be no negligence. But in this case we must have regard to the fact that the captain, by no negligence of his own, but by the negligence of somebody else for whose acts he was not responsible, was brought into this position, and he therefore had only the duty imposed upon him of getting out of that position by reasonable efforts. His duty was to extricate himself from the position in which he was by the ordinary means of navigation, and he was not bound to take extraordinary measures not in the nature of ordinary navigation, but in the nature of extra exertions, for the purpose of preventing the damage to the oysters. Therefore the question I have put to the Trinity Brethren is, whether they can see in any of the acts mentioned anything which the captain did which it was wrong for him to do in the condition of things in which he was placed by the conduct of the pilot. They tell me that they can see nothing blameworthy on his part, and that the best that could be done was done under the circumstances. With regard to slipping the anchor, I am advised that that would have been a hazardous and improper thing to do, and I think it unreasonable in the circumstances that the captain should have exposed his vessel to any risks by so doing. I think it unreasonable to expect him to incur that risk for the reason that by remaining there he would do damage to the oysters. The same remark applies to the swinging. What he did was in the ordinary course of navigation under the circumstances in which he was placed, and nothing more was to be required of him. I am therefore of opinion that the case is established against the pilot, but not against the captain. There will be judgment against the pilot with costs. I shall not give the shipowners any costs against the plaintiffs, they having raised other defences than that of compulsory pilotage.

Solicitors for the plaintiff, *Gregory, Rowcliffe, and Co.*, for *J. W. Tyacke*, Helston.

Solicitors for the owners of the *Octavia Stella*, *Clarkson, Greenwell*, and *Wyles*.

Solicitors for the pilot, *Meredith, Roberts*, and *Mills*, for *Broad* and *Pottow*, Bristol.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, May 19, 1887.

(Before Lord ESHER, M.R., FRY and LOPES, L.JJ.)

CARMICHAEL AND CO. *v.* THE LIVERPOOL SAILING SHIP OWNERS' MUTUAL INDEMNITY ASSOCIATION. (*a*)

Marine insurance—Mutual Indemnity Association —Damage to cargo by "improper navigation" —Negligence—Loading port inefficiently closed.

The members of the defendant association agreed to indemnify one another against (inter alia) "loss or damage of or to any goods or merchandise caused by improper navigation of the ship." The plaintiffs, members of the association, neglected to efficiently close a loading port in the side of their vessel, so that the cargo was damaged by sea-water, which leaked in during the voyage, but the leak did not endanger or impede the navigation of the ship.

The act of negligence occurred before the completion of the loading.

Held (affirming the judgment of the Queen's Bench Division), that the damage was "caused by improper navigation of the ship" within the meaning of the articles of association of the defendants.

THIS was an appeal from a judgment of the Queen's Bench Division (Smith and Wills, JJ.), reported in 6 Asp. Mar. Law Cas. 130; 19 Q. B. Div. 242; 56 L. T. Rep. N. S. 863.

A special case had been stated for the opinion of the court, which is fully set out in the report of the case in the court below. The material facts were as follows:—

The plaintiffs were the owners of an iron sailing ship, called the *Argo*, which was entered on the books of the defendant association, which was an association of sailing ship owners, who agreed to indemnify each other under their rules and

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

articles against losses, damages, and expenses for which any of them might be liable in respect of any ship duly entered on the books of the association, arising from or occasioned by (amongst other matters) any loss or damage of or to any goods or merchandise "caused by improper navigation of the ship carrying the goods or merchandise or of any other ship (but not from damage caused by bad stowage)."

In Oct. 1882 a cargo of wheat in bags was shipped in the *Argo* at San Francisco, and carried to and discharged at Liverpool. The voyage was performed in the ordinary manner, and in safety in all respects save as hereinafter described. The wheat, on being discharged at Liverpool, was found to be damaged by salt water, and it was admitted, for the purposes of this case, that the water got into the ship and cargo in the manner hereinafter described.

The cargo was in part taken on board through an opening or port made for the purpose in the side of the ship above the 'tween decks. When part of the wheat was on board, and before the loading was completed, this opening was closed in the ordinary way by means of an iron door or shutter fitted for the purpose in the outside of the ship on hinges, and made fast, when shut, by bolts passing through iron bars on the inside of the ship and screwed up by nuts. The joint between the ship's side and the overlapping flange of the door was made tight by smearing the flange with a mixture of white or red lead and oil before the door was shut.

The port through which the cargo was taken on the voyage in question was not efficiently closed, the joint abovementioned not being perfectly tight, and as the port was below the water line some water leaked in. It was admitted, for the purposes of the case, that the defect in the joint was due to negligence on the part of the persons employed by the plaintiffs. The water which thus leaked in damaged part of the cargo in the lower hold, and the plaintiffs in consequence became liable to pay and paid 450*l.* compensation to the owners in respect of the damage, and they also incurred expenses amounting to 75*l.* 5*s.* 2*d.* in connection with the claims of the cargo owners.

The leak did not endanger the ship, nor did it hinder or impede the navigation of her on the course of her voyage.

The question for the opinion of the court was, whether the plaintiffs were under the rules and articles entitled to be indemnified by the defendants in respect of the compensation so paid. If the plaintiffs were so entitled judgment was to be entered for them for 525*l.* 5*s.* 2*d.*; if they were not, judgment was to be entered for the defendants.

The Queen's Bench Division gave judgment in favour of the plaintiffs.

The defendants appealed.

Cohen, Q.C. and *McColl*, for the defendants, repeated the arguments used in the court below. They cited

Good v. *The London Steamship Owners' Mutual Protecting Association*, L. Rep. 6 C. P. 563;
Steel v. *The State Line Steamship Company*, 37 L. T. Rep. N. S. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72;
Tattersall v. *The National Steamship Company Limited*, 50 L. T. Rep. N. S. 299; 5 Asp. Mar. Law Cas. 206; 12 Q. B. Div. 297;
Hayn, Roman, and Co. v. *Culliford and Clark*, 40 L. T. Rep. N. S. 536; 4 Asp. Mar. Law Cas. 128; 4 C. P. Div. 182;
Lawrie v. *Douglas*, 16 M. & W. 746;
The Warkworth, 51 L. T. Rep. N. S. 558; 5 Asp. Mar. Law Cas. 326; 9 P. Div. 145.

Bucknill, Q.C. and *Aspinall*, for the plaintiffs, were not called on to argue.

Lord Esher, M.R.—The question is what is the true meaning of the words "caused by improper navigation?" First of all, it seems to me that those words do not refer merely and simply to improper navigation with reference to the ship herself, but also to improper navigation with reference to the safety of the goods in the ship. In this connection, then, what is the true meaning of improper navigation? I think that those words imply something wrongly done or wrongly omitted to be done by the shipowner or his servants, for whom he is responsible at some time or other. If neither the shipowner nor any servants for whom he is responsible, do anything improperly at any time, then I think, no liability would arise under this clause. They ought not to be negligent, but if they are negligent and consequently do something which they ought not to do or omit something they ought to do, then I think they would have acted improperly, and that negligence must have some effect upon the navigation of the ship while she is being navigated. I do not think that improper navigation can exist except with regard to something happening while the ship is being navigated. But then this question arises, if negligence occurs before the navigation of the ship begins, which has an effect upon her navigation while she is being navigated, is that or not "improper navigation" within the meaning of those words? Now, I think you could hardly find two greater authorities upon mercantile law or upon the construction of mercantile documents than Willes, J. and Montague Smith, J.; and although I do not say that they have laid down any binding ruling, yet I think we may derive great assistance if we look at the principles enunciated by them in the case of *Good* v. *London Steamship Owners' Association* (*ubi sup.*). It is true that in that case the words are confined to bad stowage, but I think that the principle may be easily enunciated with regard to something other than bad stowage. Supposing that counsel in argument had put his question in these terms: "Would negligence arising before the commencement of the voyage be within this deed?" Then I think those learned judges would have answered, "Certainly, if that negligence affected the safe sailing of the ship with regard to the safety of the goods on board during the voyage." I think that would have been a very sound answer to the question. Therefore, it seems to me that, if negligence occurs before the navigation of the ship begins, and that negligence of the shipowner or his servants has the effect of causing the ship during her navigation to be unsafely navigated with regard to the safety of the goods, that makes the navigation improper navigation by the shipowner, or those for whom he is liable, within the meaning of those words. Then the only remaining question is whether this case is within the proposition. Here there was negligence before the navigation—not the voyage, because there might be navigation without any voyage—commenced; but it was negligence of the

shipowner and of his servants for whom he was responsible, and it had the effect of rendering it impossible, unless the matter were remedied, to navigate the ship properly, after her navigation began, with regard to the safety of the goods on board her. Under these circumstances, I think that the damage was caused by improper navigation within the meaning of the rule, and that the judgment of the Divisional Court was right.

Fry, L.J.—I am of the same opinion. We have to construe the words "improper navigation of the ship" with reference to the loss or damage of the goods carried by her. The facts shortly are, that a port-hole in this ship, through which a part of the cargo had been brought on board, was closed before the loading was completed by means of an iron door or shutter, but this door was by reason of the negligence of the plaintiffs' servants insufficiently closed, so that in the course of the voyage water came through and injured the cargo. The question is whether that is improper navigation. In my judgment it is. I do not attempt to define all the cases which may come within the words "improper navigation," but I think those words as used in this rule include the case of something being negligently omitted to be done which ought to be done before the departure of the ship in order to enable her to carry her cargo safely from port to port, whereby it happens that the cargo is not safely and properly so carried. Now it has been argued that the words do not include such a case, for two reasons. First, it has been said that the omission to do some act must take place during the voyage, because navigation does not include anything happening outside the voyage. But, in my judgment, it is impossible reasonably to contend that omission to do a proper act before the commencement of a voyage, which results in bad sailing and injury to the ship during the course of the voyage, is not improper navigation. Supposing, for instance, that a ship's captain omitted to take on board a compass, so that as a consequence the ship lost her way upon the ocean and she and her cargo were lost. I think it could hardly be contended that in such a case there was not improper navigation, even though the captain during the course of the voyage may have done everything that a man without a compass could possibly do. Such a case would be an instance of the omission of a proper act before the commencement of the voyage resulting in damage during the voyage. That was the view of the Court of Common Pleas in the case of *Good* v. *London Steamship Owners' Association* (*ubi sup.*). They considered the case of bad stowage before the commencement of the voyage affecting the sailing of the ship during the voyage, and they thought that would be bad navigation. Next it was urged that navigation only refers to the transit of the ship through the water, without regard to the cargo which she carries. It may be that that contention may be true in some cases, but it seems to me that it is impossible to apply it to this case in which we are considering loss and damage to goods caused by improper navigation. It seems to me that navigation in this context relates to the carriage of the goods by a ship through the water from the *terminus a quo* to the *terminus ad quem*. And here again this conclusion is confirmed by the case of *Good* v. *London Steamship Owners' Association* (*ubi sup.*), because the negligence there, which was held to be improper navigation, was not closing a cock which let in water to the injury of the cargo, and it was not shown, as far as I can see, that the letting in of that amount of water would have interfered with the transit of the hull. I therefore think that the arguments for the defendants fail. The question may be approached in another way. What is proper navigation? Can it be said that propor navigation does not include making proper preparations for navigation? I should hesitate to lay down any such principle. At any rate, I am clearly of opinion, that in this case, having regard to the words which we have to construe, that negligent omission by the plaintiffs has led to improper navigation.

Lopes, L.J.—It is assumed that in this case there was no negligence after the commencement of the voyage, and the case depends upon what is the true construction and meaning of the words "improper navigation," as used in this rule. In my opinion, improper navigation includes the improper management of a ship in respect of the cargo during the voyage. Then it is said that it does not include any negligence before the commencement of the voyage, but that it must be some act done or omitted during the voyage. I cannot adopt that view. I think that negligence before the commencement of the voyage which results in bad management of the ship with respect to her cargo during the voyage is improper navigation within this rule, although the course of the vessel is in no way affected. It was admitted during the argument that sending a ship to sea without a compass would, although the negligence happened before the commencement of the voyage, come within the terms of this rule and be improper navigation. I can see no distinction in principle between that case and this. I am of opinion that the decision of the court below was right, and that the appeal must be dismissed.

Appeal dismissed.

Solicitors for both parties, *Gregory, Rowcliffes, and Co.*, for *Hill, Dickinson, Lightbound, and Dickinson*, Liverpool.

Thursday, June 23, 1887.

(Before Lord Esher, M.R., Lindley and Lopes, L.JJ.)

Lishman v. Christie and Co. (*a*)

Charter-party—Bill of lading conclusive evidence of quantity shipped—Estoppel.

A charter-party, by which the defendants chartered the plaintiff's ship to carry a cargo of timber from Memel, provided that the ship should there load from the agents of the affreighters as customary a full cargo of fir sleepers, that the cargo should be brought to and taken from alongside the ship at merchants' risk and expense, and that the bill of lading should be conclusive evidence against the owners of the quantity of cargo received as therein stated.

When the vessel arrived at Memel the captain had not seen a copy of the charter-party. According to a custom of the port, captains take delivery of timber at timber ponds more than a mile up

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

the river, the timber being then rafted down to the vessel, the expense of the rafting being divided between the ship and the shipper, but the timber being at the risk of the shipowner. The captain took delivery of the timber in such usual way, the mate giving receipts for the timber at the timber ponds. The jury found that the custom did not apply to charter-parties in the form used in this case. Some of the timber was lost in the process of rafting.

When the captain became aware of the provisions of the charter-party and of the loss of part of the cargo, he declined to sign bills of lading which stated the quantities of timber shipped to be the same as mentioned in the mate's receipts, saying to the agents of the shippers that a portion had been lost in the rafting and that he had protested before a public notary in respect of such loss, but on being told by such agent and by a clerk of the ship's brokers that he was bound to sign, he finally did so. The bill of lading stated that such quantity was shipped in good order, to be delivered on payment of freight and all other conditions as per charter-party.

Held, in an action for balance of chartered freight in which the defendants counter-claimed for short delivery, that the plaintiff was estopped by the bill of lading from denying that the full amount of cargo stated therein was shipped.

THIS was an appeal from a judgment of Cave, J. The plaintiff was a shipowner, and brought the action against the defendants, the charterers of his vessel, for 44*l.* 18*s.*, balance of freight due under the charter-party. The defendants counter-claimed the same sum as damages for short delivery of cargo.

It appeared that, by a charter-party made between the plaintiff's agents and the defendants, the defendants chartered the plaintiff's vessel to carry a cargo of timber from Memel to Grangemouth. The charter-party provided that the vessel should load from the agents of the said affreighters as customary a full cargo of fir sleepers, that the cargo should be brought to and taken from alongside the ship at merchant's risk and expense, and that the bills of lading should be conclusive evidence against the owners of the quantity of cargo received as stated therein. The vessel was to be addressed to the freighters' agents at the port of loading. Evidence was given of a custom at the port of Memel according to which the captains of vessels took delivery of timber to be shipped at timber ponds more than a mile up the river, the timber being then rafted down to the vessel, the expense of the rafting being divided between the ship and the shipper, but the timber being during the process at the risk of the shipowner. The jury at the trial found that there was such a custom at the port, but that it did not apply to charter-parties in the form adopted in this case. The captain of the plaintiff's vessel had not seen the charter-party when he arrived at Memel, and he was informed by a clerk of the ship's brokers that he must take delivery of his cargo at the ponds. The captain, therefore, sent the mate up to the timber ponds, and the mate, after inspecting the timber, gave receipts there for a certain quantity, and the timber was then rafted down to the vessel.

The captain having afterwards seen a copy of the charter-party, went to the office of Fowler and Co., the defendants' agents at Memel, who were also the agents for the vendors of the cargo, and pointed out to them that by the terms of the charter-party the cargo was to be brought alongside the ship at merchant's risk and expense, but he was there told that he must take delivery according to the custom of the port, and nothing further was then done in the matter.

During the rafting to the vessel a quantity of timber was lost, and upon this coming to the knowledge of the captain he made a protest before a notary public in respect of such loss. Subsequently the captain attended at the office of Messrs. Fowler and Co. in Memel, for the purpose of signing bills of lading, and Messrs. Fowler laid before him bills of lading in which the quantity of timber shipped was stated to be the same as the quantity for which the mate had given receipts at the timber ponds. The captain pointed out that some timber had been lost in the rafting, and declined to sign. Mr. Fowler insisted that he should sign, and the clerk to the ship's brokers also pressed him to sign, stating that he had done all that was necessary by noting his protest of the loss. The captain thereupon signed the bills of lading as presented.

It was proved that all the timber actually shipped had been delivered.

Cave, J. at the trial gave judgment for the defendants on the counter-claim, holding that the bill of lading was by the terms of the charter-party conclusive as to the quantity of timber shipped.

The plaintiff appealed.

Gainsford Bruce, Q.C. and *J. L. Walton* for the plaintiff.—The defendants rely only upon the clause in the charter-party which provides that the statement of the quantity of timber shipped in the bill of lading shall be conclusive against the shipowner. That provision does not apply to such a case as the present. It is intended to apply to a case where the full cargo is believed by the captain to be on board, and then it is intended to prevent all disputes; but in this case everyone connected with the shipment knew of the real facts; the captain made a public protest and gave positive notice to the agents of the charterers that a quantity of the timber which was to have been shipped had been lost in the process of rafting: the proviso never could have been meant to have any application to such a case as this. There can be no estoppel as regards facts known to both parties, and in this case the defendants are relying upon the estoppel, when it was their agents who pressed the captain, in spite of his protests, to sign the documents upon which the estoppel arises. Further, the bills of lading are to be conclusive that the goods mentioned therein were "received," not "shipped." It may be conclusive that the mate received that amount at the ponds, but not that that amount was shipped.

Pyman v. *Burt*, 1 Cababé & Ellis, 207.

Under the circumstances of this case, the proviso should be very strictly construed. They also cited

Berkley v. *Watling*, 7 A. & E. 29;
Thorman v. *Burt*, 5 Asp. Mar. Law Cas. 563; 54 L. T. Rep. N. S. 349;
Grant v. *Norway*, 16 L. T. Rep. O. S. 504; 10 C. B. 665.

Waddy, Q.C. and *C. C. Scott*, for the defendants, were not called upon to argue.

Lord ESHER, M.R.—This is an action for a balance of freight, and the charterers counter-claim in respect of a short delivery of cargo, and they rest their case upon the charter-party and the bill of lading, which incorporates the charter-party. Inasmuch as a less quantity of timber has been delivered to the charterers than is mentioned in the bill of lading, there has *primâ facie* been a short delivery of cargo. Now, the shipowner seeks to prove that a smaller quantity than that mentioned in the bill of lading was all that was really shipped, and, if he is entitled to do so, he has no doubt shown as a fact that such was really the case. It was shown that there was a custom at Memel according to which timber to be shipped is taken possession of by the captain at the timber ponds, and the captain is responsible for bringing it down to the ship. Upon this charter-party I think evidence of that custom was inadmissible, as it is inconsistent with the clause which provides that the cargo is to be brought to and taken from alongside the ship at merchants' risk and expense; however, the jury ultimately found that the custom did not apply to charter-parties in this form, and so this case is to be dealt with upon the footing that the custom has no application. That being so, how does the matter stand? The captain signed a bill of lading, which stated that a certain quantity of timber had been shipped, which must mean that it was delivered to the ship and taken on board. In ordinary circumstances that statement would only be *primâ facie* evidence against the shipowner of the amount actually shipped; it would not be conclusive, and the shipowner might prove that a less quantity was actually shipped as a fact. That is to say, in other words, that the statement in the bill of lading would only be *primâ facie* evidence, and would not operate as an estoppel. But it is common knowledge among mercantile men engaged in the timber trade, that disputes are constantly arising as to the amount of timber put on board. Sometimes it is floated to the side of the ship, sometimes it is brought in barges. In the one case there is risk of loss from the rafts; in the other case disputes arise about the quantity put on board the barges, and the bill of lading is often signed without any very careful examination of quantities, and the consequence is that afterwards a dispute arises, the consignee complaining of short deliveries, and the shipowner saying he has delivered all that was delivered to him. I think it is just to obviate the inconvenience of these constant disputes, and to make the bill of lading negotiable for the quantities mentioned therein, that such a clause as this charter-party contains is inserted. The proviso is, that a bill of lading shall be conclusive evidence as against the shipowner of the quantity of cargo received as therein stated. The bill of lading states the cargo to have been shipped. Now, what can be the meaning of such a proviso except to get rid of the liberty of the shipowner to show that a less quantity of cargo was actually put on board, and to make the bill of lading operate against him as an estoppel? It is a good business proviso for the purpose of avoiding disputes as to quantity shipped where there is no dishonesty on either side. Of course it would not take effect against fraud, because fraud overrides all such provisoes; but in the absence of fraud it is meant to cover all *bonâ fide* mistakes. In this case it is not pretended that there was any want of *bona fides*, but it is urged that there was no mistake, because the captain knew and the shippers' agents knew that the full quantity of timber had not been put on board the ship. There is no ground here for assuming that the charterers knew that the full quantity was not shipped. The facts seem to point to a blunder on the part of the shippers' agents and the ship broker's clerks in thinking that the custom at Memel applied to such a charter-party as this; but a blunder is not a fraud, and there was nothing in the nature of fraud here. As to the case of *Pyman* v. *Burt* (*ubi sup.*), I can only say that I do not agree with it if it is anything to the contrary of what we are now deciding; but I do not know that it is, because the circumstances of that case seem to have been very different from these. I think that the appeal must be dismissed.

LINDLEY, L.J.—The question in this case turns entirely on the true effect of a short clause in the charter-party, by which it is provided that the bill of lading shall be conclusive evidence against the shipowner of the quantity of cargo received as stated therein. The reasons for the insertion of such a clause are tolerably obvious. Now the shipowner wants to do exactly what he has agreed not to do, namely, to show that the ship did not receive all the cargo that she is stated in the bill of lading to have received. I cannot see on what principle he can do so, except upon proof of fraud; but here there is no suggestion of fraud. The shipowner has agreed to be bound by the statement in the bill of lading, and his only answer is that in this case the facts show plainly that a less quantity was put on board. He must stand or fall by the statement in the bill of lading. The whole object of the provision in this charter-party was to prevent such disputes as this. I think the appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. It seems that all the cargo mentioned in the mate's receipts and in the bill of lading was not shipped, some of it having been lost in the transit from the timber ponds. A bill of lading is generally not conclusive evidence of the quantity of cargo shipped as against the shipowner, but it is made so in this case by the clause in the charter-party on which reliance is placed by the defendants. That provision is a solemn agreement between the parties, and is inserted, in my opinion, for the very purpose of preventing the sort of dispute which has arisen here, namely, the setting up of the inaccuracy of the statement in the bill of lading.

Appeal dismissed.

Solicitors for plaintiff, *Coote* and *Ball*, for *H. A. Adamson*.

Solicitors for defendants, *William Webb*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

March 11 *and* 30, 1887.

(Before Lord COLERIDGE, C.J., MATHEW, CAVE, and SMITH, JJ.)

REG. *v.* CUMING AND OTHERS. (*a*)

Navy—Naval Discipline Act 1866 (29 *&* 30 *Vict. c.* 109)—*Desertion—Right of officer to resign commission—Leaving ship without resignation having been accepted—Admiralty Regulations*, 160—*Arrest of officer without warrant.*

When a commissioned officer accepts an appointment to serve in one of Her Majesty's ships in commission, and enters upon the performance of his duties, he subjects himself to the provisions of the Navy Discipline Act 1866, *and cannot at his own will and pleasure resign his appointment, and may be tried by court-martial for any of the offences specified in the Act.*

Quœre, whether the mere acceptance of a commission would of itself and under all circumstances suffice to bring an officer within the jurisdiction of a court-martial for refusing to enter upon any particular service.

A naval officer "subject to the Navy Discipline Act 1866," *within the meaning of sect.* 51, *may arrest an offender against the Act without a warrant.*

The Admiralty refused leave to an officer of one of Her Majesty's ships in commission, to retire from the service, and thereupon the officer, having obtained permission to go on shore when the ship was at Simons Bay in South Africa, wrote a letter to his captain, informing him that he retired from the service, in accordance with the conditions laid down in article 160 *of the Admiralty Regulations and returned his commission. The officer then returned to England in a mail steamer, and upon his arrival at Plymouth he was arrested and taken on board the flagship to await his trial by court-martial for desertion.*

Held, that he had no right to resign without leave, and that he was liable to be tried by court-martial under the Naval Discipline Act, 1866.

THIS was a rule calling upon William H. Cuming, captain of the flagship *Royal Adelaide*, and the Master-at-arms, to show cause why a writ of *habeas corpus* should not issue directed to them to bring up Edward Brace Turville Hall, in order that he might be discharged from their custody. Lieutenant Hall had been arrested on a charge of desertion, and was in custody on board the flagship at Plymouth, awaiting his trial by court-martial under the 19th section of the Naval Discipline Act 1866 (29 & 30 Vict. c. 109). In 1886 Lieutenant Hall had been appointed to Her Majesty's ship *Orontes*, which was under orders to sail on Oct. 6, 1886, for a cruise in the southern seas, which was expected to terminate on April 27, 1887.

In Sept. 1886, Lieutenant Hall applied for an appointment in the London Salvage Corps, and having ascertained that the appointment would not be made until Oct. 15, which was nine days after the date fixed for the sailing of the *Orontes*, he wrote to the Secretary of the Admiralty, asking to be placed on the retired list of his rank, or, in the event of that being refused, to be allowed to resign his commission as a lieutenant in the Royal Navy; this letter he left with his agents in England with instructions for them to forward it to the Admiralty in case he should be successful in obtaining the appointment. He was selected by the committee of the London Salvage Corps, and thereupon his agents forwarded the letter to the Admiralty, to which a reply was sent on the 3rd Nov., stating that the request contained in the letter could not be complied with. On the 13th Nov., at Gibraltar, Lieutenant Hall received a letter from the Committee of the London Salvage Corps, informing him of his appointment, and stating that, as they understood the *Orontes* would return to England in April, they expected him to take up his duties at that time.

On the 17th Nov. information reached the *Orontes* by telegram that her cruise was to be extended, so that she would not return to England until July 1887, and thereupon Lieutenant Hall forwarded to the Admiralty through his commanding officer a telegram requesting leave to retire, which request was refused.

On the 1st Feb. 1887, when the *Orontes* was at Simons Bay in South Africa, Lieutenant Hall obtained permission from his captain to go to Cape Town until the following afternoon, and at 4 p.m. the next day he left Table Bay for Plymouth in the mail steamer *Grantully Castle*, but before leaving he wrote a letter to his captain in the following terms:

> I have the honour to inform you that, in accordance with the conditions laid down in article 160 of the Admiralty Regulations, I retire from the service, and I beg to hand you my commission.

The commission was inclosed in the letter. On the arrival of the *Grantully Castle* at Plymouth, Lieutenant Hall was arrested by a naval officer, without a warrant. Article 160 of the Admiralty Regulations 1879 is as follows:

> If any officer shall retire from his employment without the sanction of the Admiralty, except on good and sufficient reasons, to be judged of by the Admiralty, or shall refuse or avoid service, if found capable of serving, he shall not be allowed to receive half-pay, and his name shall be removed from the list of officers of the Royal Navy.

By the Naval Discipline Act 1866 (29 & 30 Vict. c. 109) it is provided as follows:

> Sect. 19. Every person subject to this Act who shall absent himself from his ship, or from the place where his duty requires him to be, with an intention of not returning to such ship or place, or who shall at any time and under any circumstances, when absent from his ship or place of duty, do any act which shows that he has an intention of not returning to such ship or place, shall be deemed to have deserted, and shall be punished accordingly, that is to say:
>
> (1.) If he has deserted to the enemy, he shall be punished with death, or such other punishment as is hereinafter mentioned.
>
> (2.) If he has deserted under any other circumstances, he shall be punished with penal servitude, or such other punishment as is hereinafter mentioned; and in every such case he shall forfeit all pay, head money, bounty, salvage, prize money, and allowances that have been earned by him, and all annuities, pensions, gratuities, medals, and decorations that may have been granted to him, and also all clothes and effects which he may have left on board the ship, or at the place from which he has deserted, unless the tribunal by which he is tried or the Admiralty shall otherwise direct.
>
> Sect. 86. In the construction of this Act, unless there be something in the context or subject-matter

(*a*) Reported by H. D. BONSEY, Esq., Barrister-at Law.

repugnant to or inconsistent with, such construction . . . . . 'Officer' shall mean an officer belonging to one of Her Majesiy's ships, and shall include a subordinate and a warrant officer, but shall not extend to petty and non-commissioned officers.

Sect. 87. Every person in or belonging to Her Majesty's navy, and borne on the books of any one of Her Majesty's ships in commission, shall be subject to this Act, and all persons hereby made liable thereto shall be triable and punishable under the provisions of this Act.

Sect. 50. Every officer in command of a fleet or squadron of Her Majesty's ships, or of one of Her Majesty's ships, or the senior officer present at any port, may, by warrant under his hand, authorise any person to arrest any offender subject to this Act for any offence against this Act mentioned in such warrant; and any such warrant may include the names of more persons than one in respect of several offences of the same nature; and any person named in any such warrant may forthwith, on his apprehension, if the warrant so directs, be taken on board the ship to which he belongs, or some other of Her Majesty's ships, and any person so authorised may use force, if necessary, for the purpose of effecting such apprehension, towards any person subject to this Act.

A. Staveley Hill, Q.C. (Judge-Advocate of the Fleet) and *A. T. Lawrence* showed cause against the rule.—The sole question is, whether when Lieutenant Hall left he was in the naval service of the Crown, and upon the facts it is quite clear that he was. His name was "borne on the books of one of Her Majesty's ships in commission," and therefore he was subject to the Naval Discipline Act 1866, and he had been guilty of desertion. There could be no doubt that Lieutenant Hall left the *Orontes* under circumstances that plainly showed he had no intention of returning. It cannot be contended that an officer can at any moment, and however inconvenient or prejudicial to the service, throw up his commission and leave his ship. It was a matter of vital importance to the State, because, if this could be done by one officer, it might be done by any number at the same time, and the State might be left defenceless. No warrant is necessary to enable a superior officer to arrest his inferior officer on a charge of desertion. Lieutenant Hall was arrested by order of the Lords Commissioners of the Admiralty.

Sir *Henry James*, Q.C. (*Charles*, Q.C. and *R. H. Simonds* with him) in support of the rule.—The case has been argued over rather narrow grounds. Leave to retire had been refused to Lieutenant Hall, and he would have lost the appointment he had obtained if he had remained on board the *Orontes*. I believe the question has never arisen before, because leave to resign has never been refused. My first contention is, that under all circumstances an officer in the navy has a right to resign; secondly, if he has not a right under all circumstances, he has under certain circumstances; and thirdly, such circumstances have arisen in this case. The 160th article of the Admiralty Regulations provides that if an officer retires without the sanction of the Admiralty he shall not be allowed to receive half-pay, and that, I submit, contemplates his right to resign without leave if he chooses to forfeit half-pay allowance. If the contention on the part of the Crown is right, an officer may be compelled to remain in the service, or servitude, of the Crown for life; the claim of the Crown is therefore for life service. [SMITH, J.—Only so long as his name remains on the ship's books.] But the Crown can keep his name on the books. I also contend that this arrest was illegal because Lieutenant Hall was arrested without a warrant: (29 & 30 Vict. c. 109, s. 50.)

Cur. adv. vult.

March 30.—The judgment of the Court (Lord Coleridge, C.J., Mathew, Cave, and Smith JJ.) was delivered by

SMITH, J.—His Lordship stated the facts, and continued:—The question raised for our determination is one of great importance, viz. whether a commissioned officer in the Royal Navy, who has accepted an appointment to serve on board one of Her Majesty's ships, is entitled, without permission from the Admiralty, to resign his commission and leave his ship. The Judge-Advocate of the Fleet, who showed cause against the rule, contended that the officer's commission bound him to serve in the navy so long as he remained fit to perform his duty and the State required his services. On the other hand, it was contended for the applicant that the commission might be resigned at any time, like an ordinary mandate to one required to act as an agent, and that the Crown had no right in time of peace to control the liberty of the subject, or insist upon the performance of duties from which the officer desired to escape. We are unable to agree with either contention. The cases of *Parker* v. *Lord Clive* (4 Burr. 2419), and *Vertue* v. *Lord Clive* (4 Burr. 2472) would seem to contain a complete condemnation of both propositions. Lord Mansfield, in delivering the considered judgment of the Court, said (4 Burr. 2422): "Upon the general abstract question we are all of opinion that a military officer in the service of the East India Company has not a right to resign his commission at all times and under any circumstances whatsoever whenever he pleases;" and *à fortiori* we would add, an officer holding a commission in Her Majesty's navy. But the learned counsel for Lieutenant Hall presented an alternative view of the matter, and insisted that, even though the commission could not be resigned under all circumstances, and at the pleasure of the officer, still his obligation went no further than to bind him to serve for a reasonable time and upon reasonable terms, and thus that he was free, upon due notice, and for such causes and under such circumstances as existed in this case, to leave his ship and surrender his commission. The cases relied upon in support of this view were *Parker* v. *Lord Clive* (4 Burr. 2419), and *Vertue* v. *Lord Clive* (4 Burr. 2472), above mentioned. These were actions in which officers of the East India Company sought to recover damages for having been wrongfully arrested and brought to court-martial upon a charge of having thrown up their commissions while on active service in the Company's army. The court was called upon to determine what was the nature of the engagement between the Company and their officers, and would seem to have rightly come to the conclusion that their acceptance of their commissions imposed upon them the obligation to serve as officers in the Indian army in a reasonable manner, so as not to defeat the purpose of their employment, and to submit themselves to the ordinary military tribunal for any alleged breach of discipline. In each case the court-martial had acquitted the officer. In the actions for false

imprisonment the question whether the plaintiffs had been guilty of a breach of duty was treated as one for the jury; and, upon a finding against the plaintiffs, the judgment was entered in each case for the defendants. These authorities have no direct bearing upon this application.

It is not necessary to deal with the case of Lieutenant Hall upon any suggestion of an express or implied contract between him and the Crown. His position seems clearly defined by the terms of the Naval Discipline Act 1866 (29 & 30 Vict. c. 109). Sect. 19 provides that "Every person subject to this Act who shall absent himself from his ship or from the place where his duty requires him to be with an intention of not returning to such ship or place, or who shall at any time and under any circumstances, when absent from his ship or place of duty do any act which shows that he has an intention of not returning to such ship or place, shall be deemed to have deserted, and shall be punished accordingly." Sect. 86 defines the word "officer" to mean "an officer belonging to one of Her Majesty's ships;" and sect 87 describes the persons liable to the Act: "Every person in or belonging to Her Majesty's navy, and borne on the books of any one of Her Majesty's ships in commission, shall be subject to this Act." Lieutenant Hall seems to us, at the time when he left the ship, without any intention to return, to come clearly within these sections. He was an officer of the *Orontes*, whose name was borne on the ship's books while the ship was in commission. But it was said that when he left for England he was not a person in or belonging to Her Majesty's navy within sect. 87, because he had sent his commission to his captain, and it was urged that every section of the Act which in terms applies to "persons subject to the Act," must be read as applying only to those who had not so resigned their commissions. If this were so, every officer of one of the Queen's ships might with impunity abandon the ship whenever he pleased. It is obvious that such a construction would be fatal to the spirit and object of the Act. It was further contended that the persons "liable to the Act" did not include those officers who after reasonable notice and under reasonable circumstances had resigned their commissions, and that the Act, as regards such persons, was imperative. But this mode of interpreting the statute would lead to the consequence that it would be always a matter of doubt whether an officer who had gone through the form of resigning his commission was still in the navy or not. If his reasons were sufficient, and he was entitled to leave the service, he would not be in the navy; if he were not in a position to resign his commission he would still be an officer. His superior officer would have no means of judging as to the sufficiency of the grounds upon which he claimed to resign. If the officer were right, he would be entitled to resist his detention by force, or to bring an action subsequently for false imprisonment. And so, if he were brought to a court-martial and imprisoned, he might in an action against the officers of the court question their jurisdiction, and submit to the jury that when placed under arrest he had ceased to be an officer in the navy. The difficulty and confusion that this mode of interpretation would give rise to may be illustrated by reference to the sections of the Act with respect to neglect of duty, mutiny, and insubordination. An officer on board one of Her Majesty's ships in commission might be guilty of the misconduct at which those sections are aimed, and be free from punishment, if he could afterwards satisfy a jury that at the time when he was alleged to have done wrong he had taken all reasonable steps for resigning his commission. Reference was made to article 160 of the Admiralty Regulations of 1879, under which Lieutenant Hall had acted. The regulation is in the following terms: "If any officer shall retire from his employment without the sanction of the Admiralty, except on good and sufficient reasons, to be judged of by the Admiralty, or shall refuse or avoid service, if found capable of serving, he shall not be allowed to receive half-pay, and his name shall be removed from the list of officers of the Royal Navy." The learned counsel for Lieutenant Hall did not rely upon this regulation as a justification of or authority for the resignation of Lieutenant Hall, but pointed to it in support of his contention as to the meaning of the statute. We are clearly of opinion that the regulation must be construed with the statute, and that it was not intended to control its operation. The regulation points out what may follow upon an officer resigning his commission without such sufficient cause as shall satisfy the Admiralty, or where he refuses employment offered him by the Admiralty, and his doing so is not otherwise punishable. It is not necessary for us to decide the very grave question whether the mere acceptance of a commission would of itself and under all circumstances suffice to bring an officer within the jurisdiction of a court-martial for refusing to enter upon any particular service. Some of us, as at present advised, are of opinion with Yates, J., in the case cited (*Vertue* v. *Lord Clive*, 4 Burr. p. 2477), that it would not. We leave the question, however, distinctly open to be argued and decided if in any case hereafter it should be necessary to decide it. But we are clearly of opinion that, when a commissioned officer accepts an appointment to serve in one of Her Majesty's ships in commission, and enters upon the performance of his duties, he subjects himself to the provisions of the Navy Discipline Act, and at his own will and pleasure cannot resign his appointment, and may be tried by court-martial for any of the offences specified in the Act. We were urged to depart from the plain meaning of the statute because of the consequences which it was said would otherwise result. It was argued that, if the Act applied to everyone in the Royal Navy whose name was borne on the books of one of Her Majesty's ships in commission, the result would be that the Lords of the Admiralty might impose upon an officer perpetual servitude, by directing his name for life to remain on the ship's books, But this difficulty seems to us remote and far-fetched. The Legislature cannot have contemplated a proceeding so unreasonable and entirely unlikely to be adopted. We are not disposed, in order to escape from a peril so remote and improbable, to adopt an interpretation which would entail the consequences above pointed out, *i.e.*, of Her Majesty's ships in commission being left unofficered and uncommanded, at the sole will and pleasure of the officers.

A further point was made by Sir Henry James for Lieutenant Hall, that the arrest of

Lieutenant Hall on board the *Grantully Castle* was illegal. According to Lieutenant Hall's affidavit, which is not contradicted, he was arrested by a naval officer, who exhibited no warrant, and who, it must be taken, had none. By sect. 50 of the Naval Discipline Act 1866, "Every officer in command of a fleet or squadron of Her Majesty's ships, or one of Her Majesty's ships, or the senior officer present at a port, may, by warrant under his hand, authorise any person to arrest any offender subject to the Act, for any offence against the Act mentioned in such warrant . . . . and any person named in such warrant may forthwith, on his apprehension, if the warrant so directs, be taken on board the ship to which he belongs, or some other of Her Majesty's ships." The contention on the part of Lieutenant Hall is, that he could only be arrested under such a warrant, and that there was no such warrant in this case. It is to be observed, however, that under such a warrant, not merely a person in Her Majesty's navy, but any person may make the arrest; and further, that, although the section authorises the person named in the warrant to be taken on board one of Her Majesty's ships, it does not authorise his detention on board. Such an authority, if it stood alone, would be a very imperfect instrument for the bringing to punishment of offenders against the Act. There is, however, another section of the Act, the 51st, of a far more effectual character. By that section, every person subject to that Act who shall not use his utmost endeavours to detect, apprehend, and bring to punishment all offenders against that Act, and shall not assist the officers appointed for that purpose, shall suffer imprisonment or such other punishment as is thereinafter mentioned. The words are not "every person to whom a warrant is directed," but "every person subject to the Act," and we think that the necessary inference is, that such a person has power to apprehend and bring to punishment any offender against this Act, for it would be manifestly unjust to punish a man with imprisonment for not doing that which he had no power to do. Moreover, it seems to us, looking at the number and nature of the offences dealt with in the first forty-five sections of the Act, that it would be quite impossible to maintain discipline on board amongst a ship's crew, if no offender could be arrested until a warrant had been obtained from the officer in command of the ship. In this case, the arrest was effected by a naval officer. It is not stated that he was not a person subject to the Naval Discipline Act, and we think we ought not upon the facts stated to us to infer that he was not so subject, and we infer that he was. Even if we considered the arrest to have been irregular, it is by no means clear that it would have been our duty under the circumstances to decree the discharge of the applicant before he had been brought to trial by the proper tribunal, viz., a court-martial: (see *Reg.* v. *Mount*, 32 L. T. Rep. N. S. 279; 44 L. J. 58, P. C.; L. Rep. 6 P. C. 283.) In holding, as we do, that Lieutenant Hall is subject to the jurisdiction of a court-martial, we think it right to add that he has acted, as it seems to us, in good faith, and in the honest belief that the terms of the regulation referred to entitled him without permission from the Admiralty to retire from the service. In dealing with this case, should it be brought to trial, we have no doubt that it will be borne in mind that the regulation in question has unfortunately been so framed as to leave considerable doubt as to its meaning. It seems to us that even a lawyer of some learning and experience might be excused if he failed to interpret it correctly; and, this being so, we are of opinion that, though the rule should be discharged, it should be discharged without costs. We accordingly discharge it without costs.

Solicitors for applicant, *Crowder* and *Vizard*.

Solicitor for defendants, *Solicitor to the Admiralty*.

June 27, 28, *and* 29, 1887.

(Before Lord COLERIDGE, C.J. and DAY, J.)

STEPHENS *v.* HARRIS AND Co. (*a*)

Charter-party — Exemptions from demurrage — Strikes—Weather permitting—Meaning of.

In a charter-party, containing the usual provision for payment of demurrage, with the exception "no demurrage to be paid the vessel in case of any hands 'striking work' which may hinder the loading of vessel," the word "strike" is to be understood in its ordinary meaning, that is, as a strike of workmen against their employers in the ordinary sense of the word. Abandonment of the work by the workmen through fear of cholera, which had broken out in the district, is not a "strike" within the meaning of "hands striking work."

Where the shipments are to be made "weather permitting," this means "sea weather" permitting. The weather which interferes to save demurrage in such a case must be weather which if there were cargo ready to load would be an obstacle to the loading of the vessel. Where thunderstorms, rains, and floods caused a delay in bringing the cargo from a distance to the port of loading, this is not such weather as brings the case within the charter-party, so as to save demurrage.

MOTION for judgment in an action brought against the defendants, shipowners, by the plaintiff, the charterer under a charter-party, to recover a sum of 75*l.* for demurrage which he had been compelled to pay to the defendants, the defendants having refused to deliver the cargo until the demurrage was paid. The charter was to carry iron ore from Bilbao in Spain to Middlesbrough, and the charter-party contained a mutual exception against "riots, strikes, or stoppages of pitmen or miners of whatever nature or kind soever," and the usual provision for payment of demurrage with the exception, "no demurrage to be paid the vessel in case of any hands striking work which may hinder the loading the vessel."

It also contained the provision that the shipments were to be made "weather permitting."

The mines from which the ore was taken are situated in the mountains at some distance from Bilbao, and the ore is brought down from the mines to a place within five miles of Bilbao, and there deposited in large heaps. Thence it is brought to Bilbao by railway, and the trucks are

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

brought alongside the wharf, and the ships loaded with the ore at this wharf by means of "spouts."

The evidence showed that at the time of loading there was bad weather, thunderstorms, rains, and floods, and that cholera existed in the district of the mines. The rains made it difficult to raise the ore, besides causing irregularity in the railway trains. In consequence of the cholera breaking out many of the miners left the work—in fact, abandoned it, and fled from the district through fear of the cholera. From these causes delay arose in loading the vessel.

The shipowner claimed demurrage in respect of this delay, alleging that the delay had not arisen from "strikes" or "bad weather" within the meaning of the charter-party, and he refused to deliver up the cargo to the plaintiff until the demurrage was paid. The plaintiff, in order to get delivery of the cargo, paid the demurrage, and now sued to recover the same.

The case was tried before Cave, J., and a jury. Amongst other findings not now material, the jury found: (1) That the state of the weather was such as to interfere with the bringing down of ore from the place of deposit, and that the delay in loading the ship was caused by such state of the weather; (2) That the delay in loading the ship was caused by men striking work by reason of the cholera: (3) That the delay was partly caused by irregularity in railway transit, and that such irregularity was caused partially by cholera.

Upon these findings the learned judge gave both parties leave to move for judgment, and both parties now moved accordingly.

Gainsford Bruce, Q.C. (with him *Strachan*) for the plaintiff.—"Striking work" simply means leaving the work. Here the delay arose from the miners leaving their work in consequence of the cholera, and this would be a "striking work" within the charter-party. Delay also arose in conveying the ore to the ship, in consequence of the rains, floods, and bad weather generally, and this would be sufficient to bring the delay within the exception "weather permitting," so as to save demurrage.

Gully, Q.C. and *Robson* (*Forbes*, Q.C. with them) for the defendants.—The meaning of the words "hands striking work" is striking work in the ordinary use of the word "strike"; that is, a strike against employers which would delay the loading of the vessel. There is no evidence here of any such strike. The evidence merely shows that the men left the work through fear of the cholera, which is not a "strike" in the ordinary meaning of the word. Secondly, "weather permitting" means "sea weather" at the port of loading, and not thunderstorms or rains, which, though delaying the transit of ore from the mines to the port, are not such weather as to save demurrage under the charter.

LORD COLERIDGE, C.J.—In this case various questions were argued before us. It is an action brought for breach of a contract contained in a charter-party, but the questions which have been argued before us turned exclusively upon two points. The contract was of the ordinary kind, containing the usual exceptions, and also containing the usual provision as to demurrage, with the following exception: "No demurrage to be paid the vessel in case of any hands striking work." The argument was this—it was founded to some extent upon the admitted and uncontradicted evidence of the case: There were during loading time storms and rains, and there was a good deal of evidence to show that there was bad weather, but nothing to show that there was any bad "sea weather." There was also evidence to show that the summer was hot, and the place unhealthy, and that there was considerable cholera, and a great number of the miners fled from their work—in fact, abandoned it through fear of the cholera. There was nothing in the nature of a strike, as against the masters, in the ordinary acceptation of the term. The ore at Bilbao is collected in the mountains, and brought down to a place within five miles of Bilbao, and there deposited in large heaps. There is a wharf, and ships are loaded at the wharf by "spouts," as at Cardiff. These are all the facts necessary to the case, which was tried before Cave, J. and a jury. The learned judge entered a verdict for the defendants, with leave to both parties to move for judgment. The real question, as it seems to me, was not asked in the case; the question should be, not whether they struck work by reason of the cholera, but whether they "struck." This was a question of fact which ought to have been left to the jury; but this question was not asked the jury. The two true questions which arose in the case, as it seems to me, were, first, "Was there any evidence of a "strike" which would emancipate the charterer?" Secondly, "Was there any evidence of a "strike," so as to disentitle the ship to demurrage?" In my judgment, the word "strike," in the expression "riots, strikes, or stoppages," must be "striking" in the ordinary sense of the word against employers, standing out for more wages on the part of the workmen. Of a strike in that sense of the word there was absolutely no evidence at all, no evidence which was proper to be submitted to a jury. The strike arose from the men flying from the cholera, but this is a totally different idea from a "strike" in the ordinary sense. Then is a different construction to be placed on the clause, "any hands striking work which may hinder loading of vessel?" I think not. If you cannot construe the expression strictly, what are you to fall back upon? "Any hands striking work" must mean any body of hands striking work as against their employers, and of such a strike there was no evidence. It is plain, therefore, that there was no case here of hands "striking work" within the meaning of the charter-party.

The next point is, what is the meaning of the expression "weather permitting?" Now, it has been argued that this includes thunderstorms. That is not the fair construction of those words. The fair construction of those words is "sea weather." The weather which interferes to save demurrage must be weather which if there were cargo ready to load would be an obstacle to the loading of the vessel; of such weather there is absolutely no evidence at all. These two facts being found against the plaintiffs—there being no evidence whatever of a "strike," or "bad weather," within the meaning of the charter-party—it would follow that the defendants would succeed. We think it right to say that we accede fully to the case in the House of Lords (*Grant* v. *Coverdale*, 51 L. T. Rep. N. S. 472; 9 App. Cas. 470; 5 Asp. Mar. Law. Cas. 353; 53 L. J. 462,

Q. B.) that was pressed upon us in argument, but the present case is different. We come to the conclusion that the loading was not interfered with by "strikes," and that there was no such "weather" as would bring the case within the charter-party, and this being our opinion of the case, judgment must be for the defendants with costs.

Day, J.—I entirely concur.

Judgment for the defendants, with costs.

Solicitors for the plaintiff, *Hollams* and *Co.*, for *Belt* and *Cochrane*, Middlesbrough.

Solicitor for the defendants, *Botterell* and *Roche*, Sunderland and London.

June 14, *and Aug.* 10, 1887.

(Before Mathew and Cave, JJ.)

Bethell and Co. *v.* T. and C. Clark and Co., W. W. Tickle and Co., and John Young. (*a*)

Sale of goods — Goods to be shipped on vessel loading for Melbourne—Delivery on board ship —Stoppage in transitu—End of transit—Destination — Constructive delivery to purchaser or agent.

A purchaser directed the vendor, who carried on business at Wolverhampton, to consign certain goods to a vessel then loading in the East India Docks for Melbourne. The vendor accordingly delivered the goods to the London and North-Western Railway Company at Wolverhampton, to be taken to the vessel and shipped, and this was duly done. The mate gave a receipt for the goods to the Railway Company, which they sent to the purchaser, but no bill of lading was applied for. When the goods were on board, but before the vessel left the port, the vendor, hearing that the purchaser was insolvent, gave notice to the master of the ship to stop the goods.

Held, that the master of the vessel having received the goods in the capacity of carrier only, and not to hold for the purchaser, there had been no constructive delivery to the purchaser; the transit, therefore, was not at an end when the notice to stop was given, and the vendor had properly exercised his right of stoppage in transitu.

Special case stated under Order LVII., r. 9.

1. On the 2nd June 1885 Messrs. T. and C. Clark and Co., ironfounders, of Wolverhampton, received from Messrs. W. W. Tickle and Co., of 20, St. Helen's-place, London, an order for ten hogsheads of hollow ware, in the words and figures following:

Order No. .—London, 1st June 1885. From W. W. Tickle and Co., Merchants and Colonial Agents, 20, St. Helen's-place, E.C.—Messrs. T. and C. Clark and Co., Wolverhampton. Pay-day last Saturday each month. Bankers: London and Westminster, Lothbury. Please pack the undermentioned goods for us in the usual way, and mark same as before, following numbers, invoice in duplicate. On receipt of invoice we will forward you shipping documents.—10 hogsheads hollow ware, usual assortment.

2. On the 25th June 1885, in pursuance of the said order, the said Messrs. T. and C. Clark and Co. forwarded to Messrs. W. W. Tickle and Co. an invoice of goods amounting to 99*l.* 6*s.* 8*d.*

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

3. On the 28th June 1885 Messrs. T. and C. Clark and Co. received from Messrs. W. W. Tickle and Co. a consignment note in the following terms:

Please consign the 10hhds. h'ware to the *Darling Downs* to Melbourne, loading in the East India Docks here. To come up at once.

4. On the 29th June 1885 Messrs. T. and C. Clark and Co. delivered the ten hogsheads of hollow ware to the carriers, Messrs. Pickford and Co., collecting agents for the London and North-Western Railway Company, at Wolverhampton, together with a consignment note, which was as follows:

290.—Shakespeare Foundry, Wolverhampton, June 29th, 1885.—Pickford and Co.—Please deliver the undermentioned packages in the same good condition as received from Thos. Chas. Clark and Co.

5. On the 30th June 1885 the London and North-Western Railway Company sent to Messrs. W. W. Tickle and Co. an advice note, of which the following are the material parts:

The undermentioned goods consigned to you on the conditions shown on the back hereof, having arrived at this station, I will thank you to instruct our agents, Messrs. Pickford and Co. as to their removal hence as soon as possible, as they remain here to your order, and are now held by the company, not as common carriers, but as warehousemen at owners' sole risk, and subject to the usual warehouse or wharfage charges in addition to the charges now advised. The goods advised by this note have been forwarded to our Poplar station for shipment per *Darling Downs*, East India Docks.

6. On or before the 2nd July 1885 the ten hogsheads arrived at Poplar, and on the 2nd July were put on board the lighter *Nile* at Poplar, by the London and North-Western Railway Company, to be towed alongside the *Darling Downs*, by the Thames Steam Tug and Lighterage Company Limited, the agents of the London and North-Western Railway Company. On the morning of the 3rd July the ten hogsheads were towed alongside the *Darling Downs*, and at noon of that day they were shipped on board the *Darling Downs*. Thereupon the mate's receipt for the ten hogsheads was given to the London and North-Western Railway Company, who at once forwarded it to Messrs. W. W. Tickle and Co.

7. On the 3rd July 1885 Messrs. T. and C. Clark and Co. received a letter, dated the 2nd July, from Messrs. Gush, Phillips, Walters, and Williams, solicitors for Messrs. W. W. Tickle and Co.'s creditors, announcing the insolvency of Messrs. W. W. Tickle and Co.

8. Upon receipt of the letter mentioned in the last preceding paragraph, at or about 10 a.m. of the 3rd July Messrs. T. and C. Clark and Co. sent by messenger to the agent at Wolverhampton of the London and North-Western Railway Company a letter, of which the following are the material parts:

Dear Sir,—Ten hhds., consigned June 29th, 1885, to the *Darling Downs*, @ Melbourne, loading in East India Docks, to W. W. Tickle and Co., 20, St. Helen's-place, London, E.C.—Please do your utmost to stop delivery of these hhds. Of great importance that delivery should not be effected. Will you kindly wire at once and let us have a reply, quick, where they are. The consignment to be transferred for our order. We depend upon your special attention.

At the time the above letter was received by the agent at Wolverhampton of the London and North-Western Railway Company, the ten hogsheads were on board the lighter *Nile*, in charge

of the Thames Steam Tug and Lighterage Company Limited, as agents of the railway company.

9. Immediately upon receipt of the letter set out in the last preceding paragraph, the agent at Wolverhampton of the London and North-Western Railway Company sent to the agent of that company at Poplar the following telegram:

Order, W. W. Tickle and Co.—Senders ask us to stop delivery; hold goods. Do not advise consignee. Can I accept indemnity? Wire how matters stand.

Immediately upon receipt of this telegram the agent at Poplar of the London and North-Western Railway Company sent orders to the Thames Steam Tug and Lighterage Company Limited not to ship the ten hogsheads, but that company did not receive these orders in time to prevent the shipment of the goods on board the *Darling Downs*.

10. At or shortly after the time when the mate's receipt for the ten hogsheads was made out as stated in paragraph 6 of this case, bills of lading in accordance therewith were prepared for the same, and signed ready for delivery, but were not applied for at the time, and have since remained, and now are, in the possession of Messrs. C. Bethell and Co., the owners or the agents of the owners of the *Darling Downs*, who are also the stakeholders in these proceedings.

11. Shortly after the shipment of the ten hogsheads the *Darling Downs* sailed from London for Melbourne with the ten hogsheads on board.

12. On the 11th July 1885 Messrs. W. W. Tickle and Co. presented a petition in bankruptcy, and on the same day a receiving order was made in the said bankruptcy proceedings.

13. On the 7th Aug. 1885 a scheme of arrangement of the affairs of Messrs. W. W. Tickle and Co. was presented to creditors of the firm, and the same was on the 26th Aug. 1885 duly confirmed by a resolution passed by a majority of creditors representing three-fourths in value of all the creditors who had theretofore duly proved their debts.

14. On the 8th Aug. Messrs. T. and C. Clark and Co., who had not paid the price of the ten hogsheads, wrote to Messrs. C. Bethell and Co. claiming as their property the ten hogsheads.

15. On the 15th Aug. 1885 Mr. John Young was appointed special manager of the estate and business of Messrs. W. W. Tickle and Co.

16. On the 15th Sept. the scheme of arrangement and the appointment of Mr. John Young as trustee to administer the said debtors' property and manage their business was duly approved by the court.

17. On the 16th Sept. 1885, Messrs. T. and C. Clark and Co., through their solicitors H. and J. E. Underhill and Lawrence, wrote to Messrs. C. Bethell and Co., again claiming the said hogsheads.

18. On the 21st Sept. Messrs. T. and C. Clark and Co. paid to Messrs. C. Bethell and Co. the freight upon the said hogsheads to Melbourne, but the same was received by Messrs. C. Bethell and Co. without prejudice to the question as to who was entitled to the ten hogsheads.

19. On the 15th Oct. 1885 the *Darling Downs* arrived at Melbourne with the ten hogsheads on board, and at the time of the commencement of these proceedings they were in the custody of Gibbs, Bright, and Co., shipping agents and consignees, at Melbourne, of the *Darling Downs*.

20. On the 9th Nov. Messrs. C. Bethell and Co. received a letter from Mr. John Young (as such trustee as aforesaid) claiming the bills of lading relating to the said hogsheads.

21. On the 13th Nov. Messrs. C. Bethell and Co. received a letter from Messrs. H. and J. E. Underhill and Lawrence, solicitors for Messrs. T. and C. Clark and Co., giving them notice that, if the ten hogsheads were handed over to Mr. John Young, Messrs. C. Bethell and Co. would be held responsible.

The question submitted for the opinion of the court was, whether, under the circumstances above set forth, Mr. John Young or Messrs. T. and C. Clark and Co. were entitled to the possession of or property in the said ten hogsheads.

Arthur Charles, Q.C. (*Lyon* with him) for John Young, the trustee of the estate of Messrs. W. W. Tickle and Co. (the vendees).—It is submitted that, under the circumstances of this case, the goods in question had arrived at their destination before the arrival of the notice to stop them, and therefore that there was no stoppage *in transitu*. As between the original consignor and consignee, the transit was at an end when the goods were on board the *Darling Downs*:

Ex parte Miles; Re Isaacs, 15 Q. B. Div. 39.

The general principle applicable is, that when goods have arrived at a place indicated by the purchaser to the vendor, and orders are given that they are to remain there in the possession of an agent of the purchaser, the transitus is at an end, although that may not be the ultimate destination of the goods. Therefore the transit in this particular case ended with the shipment. The following cases were also referred to:

Kendall v. *Marshall*, 48 L. T. Rep. N. S. 951; 11 Q. B. Div. 356;
Ex parte Rosevear China Clay Company; Re Cock, 40 L. T. Rep. N. S. 730; 4 Asp. Mar. Law Cas. 144; 11 Ch. Div. 560.

Underhill, Q.C. (*Plumptre* with him) for T. and C. Clark and Co. (the vendors).—It is submitted that the vendors had a right to stop the goods, as Melbourne was their destination, and that the goods were properly stopped. The owners of the *Darling Downs* received the goods in the capacity of agents to carry them only, and not in the capacity of agents to hold them for the buyers:

Dixon v. *Baldwen*, 5 East, 175.

The ultimate destination of the goods, namely, Melbourne, was in the contemplation of the purchasers when they ordered them to be shipped on board the vessel. Here there was no assignment of the bill of lading to a third party for value:

Ex parte Watson; Re Love, 36 L. T. Rep. N. S. 75; 3 Asp. Mar. Law Cas. 396; 5 Ch. Div. 35.

They also cited

Ex parte Golding; Re Knight, 42 L. T. Rep. N. S. 270; 13 Ch. Div. 628;

Charles, Q.C. in reply.—The case of *Ex parte Watson; Re Love* (36 L. T. Rep. N. S. 75; 5 Ch. Div. 35), is distinguishable, because there part of the original contract was that Love was to ship the goods direct to China, their ultimate destination. The vendee took constructive possession of the goods as soon as they were on board the *Darling Downs*, and in *Kendall* v. *Marshall*

(48 L. T. Rep. N. S. 951; 11 Q. B. Div. 356), Bowen, L.J. says that the transit lasts until the consignee, either himself or by his agent, takes possession of the goods. In *Ex parte Miles; Re Isaacs* (15 Q. B. Div. p. 46), Brett, M.R. says: "It was suggested that *Ex parte Watson* is a decision to the contrary. I cannot think it is. It seems to me that that case was decided upon the assumption that the purchaser, having made his arrangements for the transit, directed the vendor to send the goods, according to those arrangements, straight from the place of manufacture to Shanghai. There was nothing more to be done as to the transit after the vendor had directed the goods to be conveyed to Shanghai to the person to whom they were to be delivered there." Therefore that case is clearly distinguishable from the present one. The form of the mate's receipt for the goods shows that the vessel was the destination of the goods, as between the sellers and purchasers, and that the shipowners were the agents of the vendees to receive the goods. In *Ex parte Rosevear China Clay Company* (40 L. T. Rep. N. S. 730; 4 Asp. Mar. Law Cas. 144; 11 Ch. Div. 560) James, L.J. says: "The authorities show that the vendor has a right to stop *in transitu* until the goods have actually got into the hands of the purchaser, or of someone who receives them in the character of his servant or agent. That is the cardinal principle. In order that the vendor should have lost that right the goods must be in the hands of the purchaser, or of someone who can be treated as his servant or agent, and not in the hands of a mere intermediary." Here the goods got into the hands of the agent of the purchasers when they reached the *Darling Downs*, and it is submitted that from that moment the transitus was at an end.

Tatlock appeared for C. Bethell and Co., the shipowners.

Cur. adv. vult.

Aug. 10.—Mathew, J.—This is a special case stated to ascertain whether Mr. Young, as trustee of the estate of Messrs. Tickle and Co., or Messrs. Clark and Co., are entitled to the possession of ten hogsheads of hollow ware which had been forwarded on board the *Darling Downs* from London to Melbourne. On the 1st June 1885 Messrs. Clark and Co. received an order at Wolverhampton from Messrs. Tickle and Co. for the goods in question, and on the 25th June, in pursuance of the order, an invoice for the goods, amounting to 99*l.* 6*s.* 8*d.*, was forwarded by Messrs. Clark and Co. to Messrs. Tickle and Co. In the order nothing was stated as to the destination of the goods; but on the 28th June Messrs. Clark and Co. received from Messrs. Tickle and Co., directions to consign the goods to the *Darling Downs*, then loading in the East India Docks for Melbourne. On the 29th June the goods were accordingly delivered by Messrs. Clark and Co. to the London and North-Western Railway Company, at Wolverhampton, to be put on board the *Darling Downs*. On the 30th June the London and North-Western Railway Company notified to Messrs. Tickle and Co. that the goods had been forwarded to Poplar station for shipment, and on the morning of the 3rd July the goods were shipped by lightermen employed by the railway company and put on board the *Darling Downs*. The mate's receipt was sent to Messrs. Tickle and Co. while the goods were in course of transit to the *Darling Downs*. Messrs. Clark and Co. were informed that the buyers had stopped payment, and they immediately tried to stop the delivery of the goods, but before the notice to stop was received the goods had been shipped. The vessel shortly after sailed from the docks for Melbourne with the goods on board. No bills of lading were applied for in exchange for the mate's receipt, and it was arranged that the goods should remain in possession of the owners of the ship pending the settlement of the question whether or not the right to stop *in transitu* was gone.

It was contended for the trustee of the buyers' estate that the rule of law applicable to the case was this: that where goods have arrived at a place indicated by the buyer to the seller, and are to remain there in the hands of an agent of the buyer, there is an end of the transitus, although the place be not that of their ultimate destination. In this particular case it was said that the master or mate of the vessel was the agent of the buyers, who, as between them and the sellers, was to receive the goods for the buyers, and therefore that the transit ended with the shipment. But the principle to be gathered from the many decisions on the subject seems to me to be that, in determining whether there has been a constructive delivery of the goods to an agent of the buyer, it must be ascertained in what capacity the agent has received the goods, whether to carry or to hold for the buyer. In other words, the inquiry must be what is the exact nature of the contract between the buyer and the agent under which the latter has received the goods. In the case of *Dixon* v. *Baldwen* (5 East, 175) the evidence was directed to show that Metcalf received the goods as agent for the buyers, in order that he might hold them until he received further orders as to their destination, and that without such orders the goods in his hands would remain stationary. The court held upon this evidence that when the goods reached Metcalf the transit was at an end. In the case of *Kendall* v. *Marshall* (48 L. T. Rep. N. S. 951; 11 Q. B. Div. 356) the facts as presented to the Court of Appeal would seem to be different from those dealt with by the court below. At the trial it appeared that Marshall and Co. had entered into a contract with the buyers to forward the goods at a through rate from Bolton to Rouen. It was not suggested that there was any contract between the buyers and Marshall and Co. other than the contract to forward. There was no evidence that the railway company were the agents of the buyers. They were treated as having acted for Marshall and Co. In the Court of Appeal, it would appear from the judgment of all the Lords Justices that it was assumed or admitted that the railway company were the agents of the buyers to carry the goods to Garston, and there deliver them to Marshall and Co., to be held by them for the buyers until further orders were given. With this material alteration of the evidence submitted to the Court of Appeal, the case was readily brought into line with *Dixon* v. *Baldwen* (5 East, 175), and it was held that there had been a constructive delivery to the buyers. The judgments delivered in the Court of Appeal in this and the later case of *Ex parte Miles; Re Isaacs* (15 Q. B. Div. 39), seem to me to

involve the application of the principle that in determining whether the goods are still *in transitu* a sufficient inquiry into the facts must be made to ascertain what has been the contract between the buyer and the agent who has received the goods. The cases referred to are instances of constructive delivery to the buyer, and of consequent termination of the transit. But the numerous cases from *Smith* v. *Goss* (1 Camp. 282) to *Ex parte Watson; Re Love* (36 L. T. Rep. N. S. 75; 5 Ch. Div. 35), in which the receipt of the goods by the agent has been held not to be a constructive delivery to the buyer, indicate, it seems to me, with equal clearness the existence and application of the rule. These authorities show that, although the fact that a person has been named by the buyer to the seller to receive the goods is some evidence, it is by no means conclusive evidence that the receipt by that person is the end of the transit. The case of *Ex parte Rosevear China Clay Company* (40 L. T. Rep. N. S. 730; 11 Ch. Div. 560) presents a close analogy to this case. The buyer had purchased china clay, which was to be delivered by the seller free on board at a specified port. Afterwards the buyer named the vessel to the vendor, and the clay was shipped. Before the ship sailed the buyers stopped payment, and notice to stop *in transitu* was given to the master. No bill of lading had been signed. It was decided by the Court of Appeal that the transit was not at an end. Here it seems clear that the London and North-Western Railway Company, the lightermen, and the shipowners were all the agents of the buyers, not to hold, but to forward the goods. The reasons urged by the learned counsel for the trustee in support of the view that the delivery on board the ship to the mate was a constructive delivery to the buyer would apply as forcibly to the delivery to the London and North-Western Railway Company. But if this were a delivery to the buyers, the transit would have ended in law at the point where it commenced in fact. The contract with the shipowner was to forward the goods to Melbourne, and there deliver upon the terms of a bill of lading in the usual form. Until the bill of lading had been transferred to a *bonâ fide* holder for value, it seems to me that the sellers in this case would retain the right to stop *in transitu*. It was further urged for the trustee that the transit was over when the goods were shipped, because the goods might, on the demand of the buyers, have been taken out of the possession of the master of the ship; but this possibility—so remote in a business point of view—is no proof that the transit was terminated (see *The London and North-Western Railway Company* v. *Bartlett*, 7 H. & N. 400). The further point was made that the notice to stop was insufficient, because it had been served on the owners and not on the master of the ship. But the notice had been given to the owners under such circumstances as enabled them to communicate with the master, and prevent a delivery contrary to the terms of the notice to stop (*Whitehead* v. *Anderson*, 9 M. & W. 518). I am of opinion, for these reasons, that the sellers were entitled to stop the goods, and our judgment is for them with costs.

Cave, J.—In all cases of stoppage *in transitu* it is necessary, first of all, to ascertain what is the transitus or passage of the goods from the possession of the vendor to that of the purchaser. The moment the goods are delivered by the vendor to a carrier to be carried to the purchaser the transitus begins. When the goods have arrived at their destination, and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser, and no longer as carrier only, the transitus is at an end. The destination may be fixed by the contract of sale, or by directions given by the purchaser to the vendor. But however fixed, the goods have arrived at their destination, and the transitus is at an end when they have got into the hands of someone who holds them for the purchaser, and for some other purpose than that of merely carrying them to the destination fixed by the contract, or by the directions given by the purchaser to the vendor. The difficulty in each case lies in applying these principles. In the case now before us, the purchasers directed the vendors, who carried on business at Wolverhampton, to send the goods to the *Darling Downs*, then loading in the East India Docks for Melbourne; and the vendors accordingly delivered the goods to the London and North-Western Railway Company, at Wolverhampton, to be taken to and put on board the *Darling Downs*. The railway company carried the goods to their Poplar station, and then by means of lightermen put them on board the *Darling Downs*. The lightermen took from the mate and gave to the railway company receipts for the goods, which the railway company sent to the purchasers. Nothing more was done, and the *Darling Downs*, having the goods on board, sailed in due course for Melbourne. The vendors, during the voyage, gave the shipowners notice to stop delivery of the goods; and it was arranged that on their arrival at Melbourne they should remain in the custody of the shipowners, pending the decision of the question whether the right to stop *in transitu* was gone when the goods were put on board the *Darling Downs*. Now, if the purchasers, on getting the mate's receipts, had sent a clerk with them to the *Darling Downs* to exchange them for a bill of lading for the goods, I should have been of opinion that the goods had come into the possession of the purchasers, and that the transitus was at an end; because I should, from those facts, have drawn the inference that it was the intention of the vendors and purchasers that, as between them, the *Darling Downs*, in the East India Docks, should be the destination of the goods. For I think it is quite immaterial whether the purchasers do or do not intend, after the goods have got into their possession, to send them to a further destination, and that it is equally immaterial whether they do or do not communicate such intention to the purchasers. On the other hand, if the London and North-Western Railway Company had exchanged the mate's receipts for a bill of lading, making the goods deliverable to the order of the vendors, and had sent that bill of lading to the vendors, and if the purchasers had acquiesced in that course of conduct, I should have drawn the inference that, as between the vendors and purchasers, Melbourne was the destination of the goods. In this case neither of these courses was exactly followed. The railway company sent the mate's receipts to the purchasers, but they did nothing with them. No bill of lading was obtained by anyone, and the

goods went to Melbourne, because the direction of the purchasers to the vendors had put them on board of a vessel bound for that place. Under these circumstances, I am unable to distinguish this case from that of *Ex parte Rosevear China Clay Company* (40 L. T. Rep. N. S. 730; 11 Ch. Div. 560), which is binding upon me, although I am also unable to reconcile that case with some of the dicta in *Ex parte Miles; Re Isaacs* (15 Q. B. Div. 39). I agree, therefore, that judgment must be entered for the vendors.

Judgment for the vendors.

Solicitor for the plaintiffs, *J. R. Greening.*

Solicitor for the claimant John Young, *W. Beck.*

Solicitor for the claimants T. and C. Clark and Co., *G. R. Hubbard.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

May 10 *and* 11, 1887.

(Before Sir JAMES HANNEN.)

THE JUSTITIA. (*a*)

Seamen's wages—Agreement for service—Breach by shipowner—Defective food—General damages—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104) *ss.* 187, 223.

In an action brought by seamen for wages and breach of contract, where the plaintiffs proved breaches of contract by the shipowners, whereby the seamen were supplied with provisions defective in quantity and quality, and were exposed to great dangers and hardships, the Court awarded the wages as claimed, the maximum compensation of 1*s.* 8*d. per day under sect.* 223 *of the Merchant Shipping Act* 1854 *in respect of the food, and general damages in respect of the hardships suffered by the plaintiffs.*

THIS was an action *in personam* for seamen's wages and damages for breach of contract against Sir William Call and William Phillips, the owners, and Robert Robertson, the master, of the British steamship *Justitia.*

It appeared that the plaintiffs had been engaged by the master under articles by which they were to sail from London to Antwerp, and thence to Trinidad, where the plaintiffs were to be discharged within one month after the ship's arrival, and a passage was to be found for them to the United Kingdom, and wages were to be paid them till their arrival in the United Kingdom.

The *Justitia*, with the plaintiffs on board, left London on June 4, 1885, for Antwerp, where arms and ammunition were shipped. She then proceeded to Grenada, and thence to La Boca, where she was transferred by the owners to certain Venezuelan insurgents for the purpose of being used by them as a troopship against the Venezuelan Government. The plaintiffs refused to give their assistance to the insurgents, but were compelled to remain on board until the 26th July, 1885, when the *Justitia* was seized by the Dominican Government in San Domingo, and the plaintiffs were then sent home by the British Consul.

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

During the time the *Justitia* was in the hands of the Venezuelan revolutionists she was on several occasions engaged in conflict with the Venezuelan Government and the plaintiffs were exposed to great dangers and hardships, and were not provided with proper food and provisions.

The plaintiffs alleged that by reason of the defendant's breach of their agreement they suffered damage by not being discharged, by not having their passage home provided, by being detained on board the *Justitia*, and by being exposed to the dangers incident to the service in which the ship was used.

The plaintiffs had been paid one month's pay, and now claimed wages till date of final settlement, compensation under sects. 187 and 223 of the Merchant Shipping Act 1854, and general damages for the defendants' breach of the said agreement.

The following sections of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) were referred to, and are material to the decision:

Sect. 187. 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; and in the case of all other ships (except ships employed in the Southern whale fishery or on other voyages for which seamen by the terms of their agreement are wholly compensated by shares in the profits of the adventure) within three days after the cargo has been delivered, or within five days after the seaman's discharge, whichever first happens; and in all cases the seaman shall, at the time of his discharge, be entitled to be paid on account a sum equal to one-fourth part of the balance due to him; and every master or owner who neglects or refuses to make payment in manner aforesaid, without sufficient cause, shall pay to the seaman a sum not exceeding the amount of two days' pay for each of the days, not exceeding ten days, during which such payment is delayed beyond the respective periods aforesaid, and such sum shall be recoverable as wages.

Sect. 223. In the following cases (that is to say):

(1.) If during a voyage the allowance of any of the provisions which any seaman has by his agreement stipulated for is reduced (except in accordance with any regulations for reduction by way of punishment contained in the agreement, and also except for any time during which such seaman wilfully and without sufficient cause refuses or neglects to perform his duty, or is lawfully under confinement for misconduct, either on board or on shore);

(2.) If it is shown that any of such provisions are or have during the voyage been bad in quality and unfit for use;

The seaman shall receive by way of compensation for such reduction or bad quality, according to the time of its continuance, the following sums, to be paid to him in addition to and to be recoverable as wages (that is to say);

(1.) If his allowance is reduced by any quantity not exceeding one-third of the quantity specified in the agreement, a sum not exceeding fourpence a day;

(2.) If his allowance is reduced by more than one-third of such quantity, eightpence a day;

(3.) In respect of such bad quality as aforesaid, a sum not exceeding one shilling a day.

But if it is shown to the satisfaction of the court before which the case is tried that any provisions the allowance of which has been reduced could not be procured, or supplied in proper quantities, and that proper and equivalent substitutes were supplied in lieu thereof, the court shall take such circumstances into consideration and shall modify or refuse compensation as the justice of the case may require.

Sir *Walter Phillimore* (with him *Stokes*) for the plaintiffs.—The plaintiffs are entitled to judgment

against all three defendants. As to the food, it is submitted that the court should give them the maximum compensation of 1*s.* 8*d.* per day, 8*d.* a day in respect of the reduced quantity, and 1*s.* a day in respect of the bad quality. They are also entitled to general damages for the hardships which they have incurred by the defendants' breach of the agreement:

Wood v. *Germain*, Marsden's Admiralty Cases, 1648-1840, p. 311;
Drew v. *Hardwick*, Marsden's Admiralty Cases, 1648-1840, p. 315.

Nelson for the defendants.—The plaintiffs are not entitled on the facts to judgment against these defendants. The plaintiffs by their conduct have deprived themselves of any right of action. As to the food, no inferior quality or reduced quantity has been proved; and in any event the court ought not in this case to give the maximum compensation. As to general damages the plaintiffs have established no case entitling them to such.

Sir JAMES HANNEN.—I think this is an exceedingly clear case. Mr. Nelson has failed to raise any doubt in my mind as to what the nature of this transaction was. I have not the slightest doubt that these three persons, Sir Wm. Call, his valet Wm. Phillips, and Robertson, were in a combination to provide an armed vessel for the use of the insurgents, whom they expected would be in need of their assistance. I am also of opinion that Phillips and Robertson went out, as the agents of Sir Wm. Call, to give assistance to the insurgents, and I entertain no doubt that the plaintiffs knew nothing but what appeared in the articles. Although I have no doubt that it was intended by the defendants to render assistance to the insurgents by means of the men on board, yet I dare say they had not arranged in what way it was to be done. The fact is, that the ship went to the West Indies, and it is clear that the engagement that was entered into with the crew, which is binding upon all three of these defendants, was never carried out. They never were taken to Trinidad; they never were discharged there; and they were not brought home at the expense of the defendants. That being so, it lies upon the defendants to excuse themselves for breach of the contract. Sir Wm. Call has not put forward any defence. The others have, and I see, on looking at it again, that Phillips goes the length of saying that these men wrongfully broke their engagement with him, and remained on board after the change of ownership. Now, the view I take is this: It is plain that these men raised objections to serving on board the vessel with the insurgents. I believe their statement that they were requested to enter into some engagement on shore, but that they refused to do so. With regard to what occurred on board, it is clear from the evidence that the men were not called upon to sign any articles, and it is not pretended that they did sign any articles, but they were no doubt tempted with an offer of money. The question, however, is, whether they entered into any engagement to the effect that they voluntarily gave up their right under the articles under which they started, and whether they elected to throw in their lot with the insurgents. I look upon the offer of money as a bait to tempt them to assist in carrying out this very irregular transaction.

All these plaintiffs have been exposed to hardships, and very likely in many cases to injury to their healths, by the wrongful acts of the defendants in their attempt to carry out their common object, and I therefore hold that the defendants are jointly and severally liable. The question remains, what are the plaintiffs entitled to? They are entitled to their wages till final settlement. With regard to the food, it is left in some doubt, but I think, believing as I do that the plaintiffs were subjected to serious inconvenience from the insufficient quantity and defective quality of the food, that it must be taken strongly against those who have done the wrong; and therefore I shall allow the plaintiffs the maximum amount of 1*s.* 8*d.* a day until a time which I have fixed upon somewhat roughly, but to the best of my ability, upon the facts before me. It is impossible for me to say that I have any confidence that I am correct in fixing upon the number of days I have, but I shall say up to fourteen days after the plaintiffs' arrival in San Domingo. With regard to general damages, I am very glad to find that the authorities are in favour of the jurisdiction of the court to award general damages, and I shall do so. I am the better pleased to be able to do so, as confirming this as a general principle that, if sailors are subjected to wrongs of this kind, they are not without remedies capable of being enforced in this court. But it is obvious that the amount of damages is left in a great degree of obscurity. The amount must vary with the different men. Some of them have been ill, others have not; and hence the amount would depend on a variety of circumstances which I am not able to exactly estimate. I therefore cannot pretend to think that I could arrive at any exact figure which in each case would represent the injury that these men have sustained. I must therefore deal with it in what is undoubtedly an unsatisfactory manner, and I shall award a sum of 10*l.* to each of these men in respect of the general damages which they have sustained. There will be judgment for the plaintiffs with costs.

Solicitors for the plaintiffs, *Stokes*, *Saunders*, and *Stokes*.

Solicitors for the defendants, *Lowless* and *Co.*

Tuesday, July 5, 1887.

(Before BUTT, J.)

THE LYONS. (*a*)

Mortgage action—Priority of liens—Claim for wages—Admiralty Court Act 1861 (24 *Vict. c.* 10), *s.* 4.

A claim by the plaintiff in an action for necessaries brought under sect. 4 (*or, semble, under sect.* 5) *of the Admiralty Court Act* 1861, *even though it includes wages paid to the ship's crew at the request of the owner, is not entitled to precedence of a mortgagee's claim.*

Semble, precedence might have been gained by obtaining prior permission from the court to make the payment.

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

THESE were two motions in two mortgage actions instituted against the British steamship *Lyons*, asking for judgment in both actions and for payment out of the proceeds of the sale of the ship to the plaintiff.

The plaintiff in both actions was the same person, and sued in respect of two mortgages for 1000*l.* and 950*l.* respectively, held by her on the steamship.

The ship was, by order of the court, sold for 800*l.*, and after deducting the marshal's account there remained the sum of 416*l.* 1*s.* 1*d.*

The defendant, by his solicitor, signed consents to judgments for the claims indorsed on the writs in both actions. Subsequently to the institution of these two actions, one Henry Lafone instituted an action *in rem*, under sect. 4 of the Admiralty Court Act 1861, against the *Lyons*, to recover sums of money paid by him for alleged equipment and repairs of the vessel, including items paid by him for wages, pilotage, and towage; and filed a caveat against the payment of the proceeds out of court.

In opposition to the two motions the following affidavit was filed by Henry Lafone:

I, Henry Lafone, of Butler's Wharf, Southwark, in the county of Surrey, wharfinger, trading at Butler's Wharf, make oath and say as follows:

1. In April 1885, Mr. G. O. Lever, who was then the nominal owner of the *Lyons*, entered into negotiations on behalf of the owners with me, with a view to trading that vessel between London and Antwerp from my wharf. He lodged the ship's register with me, and I arranged to undertake the wharf arrangements of the vessel, and engaged a captain and crew, and had the ship brought from Newhaven, where she was lying, to Butler's Wharf. She was then sent to Antwerp on a trial trip, and certain expenses were incurred in introducing her to the trade, on account of which I paid a bill incurred with the London Tavern Company, for refreshments supplied on the trial trip, the sum of 71*l.* 12*s.* 6*d.* After the return of the vessel from Antwerp she was berthed off the wharf, where she remained a considerable time. I paid all the outgoings in connection with the said ship for wages, equipments, repairs, pilotage, and towage, and there is now due to me the sum of 456*l.* 9*s.* 9*d.* on account thereof, as appears by the account marked A. now produced to me. With the exception of the credit appearing in the said account I have received no payment or satisfaction of the amounts expended by me on behalf of the ship as detailed in the said account, nor have I received any security for the same, except the lien I claim on the said ship or the proceeds of the sale thereof.

J. P. Aspinall, for the plaintiff, moved for an order in the terms of the motion.

Stokes, for Henry Lafone, *contra*.—It is contended that the wages item takes precedence of the mortgagee's claim. It is admitted that the other items are postponed to the mortgagee's claim. My client's action is instituted under sect. 4 of the Admiralty Court Act 1861, which gives the Admiralty Court jurisdiction over claims for building, equipping, and repairing ships, provided at the time of the institution of the suit the ship or its proceeds are under arrest. The wages item is in the nature of a wages claim, and is entitled to the same priority:

The Wm. F. Safford, Lush. 69;
The St. Lawrence, 5 P. Div. 250.

[BUTT, J.—Those were actions for necessaries, for which it was then supposed there was a maritime lien. Here your action is instituted under a section of the Act which gives no maritime lien.] That is immaterial; wages are entitled to a maritime lien, and therefore a person who pays them should possess the same rights as the seamen themselves. [BUTT, J.—What have you to say to the decision of the House of Lords in *The Heinrich Bjorn* (55 L. T. Rep. N. S. 66; 11 App. Cas. 270; 55 L. J. 81, P. D. & A.; 6 Asp. Mar. Law Cas. 1)? Besides, you ought to have obtained permission of the court to make this payment before paying it.] To decide against my claim will be to overrule *The Wm. F. Safford* (*ubi sup.*) and *St. Lawreuce* (*ubi sup.*).

J. P. Aspinall, in reply, cited

The Cornelia Henrietta, L. Rep. 1 A. & E. 51;
The Turliani, 32 L. T. Rep. N. S. 841; 2 Asp. Mar. Law Cas. 603;
The Two Ellens, 26 L. T. Rep. N. S. 1; L. Rep. 4 P. C. 161; 1 Asp. Mar. Law Cas. 208.

BUTT, J.—There must be judgment in the terms of the two motions. It is quite clear, in the first place, that Mr. Stokes' client could have no right of action apart from the section of the Act of Parliament. But the section gives no maritime lien, but only a right to prove *in rem* for equipments and repairs where the ship is under arrest. His contention that he is entitled to precedence in respect of these wages is a strong proposition which I cannot accept. That being so, it is clear that he has no priority over the mortgagee.

Solicitors for the mortgagee, *McDiarmid* and *Tether*.

Solicitors for the plaintiff in the equipment action, *Thos. Cooper* and *Co.*

HOUSE OF LORDS.

Feb. 15, 17, *and July* 14, 1887.

(Before the LORD CHANCELLOR (Halsbury), Lords BRAMWELL, HERSCHELL and MACNAGHTEN.)

THAMES AND MERSEY MARINE INSURANCE COMPANY *v.* HAMILTON, FRASER, AND CO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance — General words in policy — Perils insured against—Splitting of chamber of donkey-engine.

A steamer was insured by a time policy in the ordinary form on the ship and machinery, including a donkey-engine. In the ordinary course of navigation the donkey-engine was employed in pumping water into the boiler, and in consequence of a screw-valve, which should have been open, being accidentally or negligently left closed, the water was forced into the air-chamber of the donkey-engine and split it open.

Held (*reversing the judgment of the court below*), *that the injury was not a peril insured against under the general words of the policy, not being ejusdem generis with those specially enumerated.*

West India Telegraph Company *v.* Home and Colonial Marine Insurance Company (43 *L. T. Rep. N. S.* 420; 4 *Asp. Mar. Law Cas.* 341; 6 *Q. B. Div.* 51) *disapproved.*

THIS was an appeal from a judgment of the majority of the Court of Appeal (Lindley and Lopes, L.JJ.), Lord Esher, M.R. dissenting, reported in 17 Q. B. Div. 195, who had affirmed a

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

judgment of the Queen's Bench Division (Mathew and Smith, JJ.), in favour of the plaintiffs, upon a special case.

The action was brought by the respondents against the appellants upon a policy of marine insurance.

The plaintiffs were the owners of the *Inchmaree*, a steam vessel of 1287 tons net and 1975 tons gross register. In Aug. 1883 the plaintiffs effected with the defendants a policy of marine insurance for 2500*l.* on the hull, masts, spars, sails, boats, materials, and all stores, valued at 20,000*l.*, and machinery, shafting, propeller, boilers and connections, including donkey-engine and boilers, pumps and all connections, valued at 11,000*l.*—total, 31,000*l.*—of the vessel for twelve months. The adventures and perils insured against were of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart, and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the aforesaid subject-matter of insurance or any part thereof.

On the 2nd March 1884, and during the continuance of the policy, the *Inchmaree* was at anchor off Diamond Island awaiting orders, and for the purposes of the voyage it was necessary to pump up the main boilers by means of the donkey-pump and engine in the usual way. At the time of effecting the insurance the donkey-pump and engine, and all pipes, valves, and machinery connected therewith, were efficient and in good condition, and worked satisfactorily up to the time of the occurrence hereinafter mentioned, and the engineers and men working under them were capable and efficient for their duties. A pipe led from the donkey-pump to the boilers, and at its junction with one of the boilers there was a check-valve, capable of being opened or closed by a screw. This valve should have been open and clear when the boilers were being pumped up. This valve was either closed or salted up at the time when the donkey-pump was set to work off Diamond Island, so that the water could not pass into the boiler, and the consequence was that when the donkey-pump was set to work at the time aforesaid the pipes and water-chamber in the donkey-pump and air-chamber therein became overcharged, and the water was forced up into the air-chamber, which, in consequence, split and the pump was thereby damaged. It was admitted that the check-valve was either allowed to remain closed or become and be salted up by the negligence of one of the engineers, or was accidentally salted up without notice. It was also admitted that the closing of the valve and the accident were not due to ordinary wear and tear. The question was, whether the damage was covered by the policy of insurance.

Feb. 15.—The *Attorney-General* (Sir R. Webster, Q.C.), Sir *C. Russell*, Q.C., *French*, Q.C., and *Synnott*, appeared for the appellants, and argued that the judgment of the Court of Appeal was wrong. The policy does not contain the words "perils of navigation." Policies used at one time to be drawn to include "all risks incident to steam navigation," but of late years these words have been designedly dropped. The courts below relied on *West India Telegraph Company* v. *Home and Colonial Marine Insurance Company* (43 L. T. Rep. N. S. 420; 4 Asp. Mar. Law Cas. 341; 6 Q. B. Div. 51); but the judgment in that case departed from the recognised principles of insurance law. In every case in which underwriters have been held liable upon general words, it has been because the peril causing the loss was *ejusdem generis* with the perils specially enumerated:

Phillips v. *Barber*, 5 B. & Ald. 161;
Cullen v. *Butler*, 5 M. & S. 461;
Butler v. *Wildman*, 3 B. & Ald. 398;
Bishop v. *Pentland*, 7 B. & C. 219;
Devaux v. *I'Anson*, 5 Bing. N. C. 519;
Davidson v. *Burnand*, 19 L. T. Rep. N. S. 782; 3 Mar. Law Cas. O. S. 207; L. Rep. 4 C. P. 117;
Merchants' Trading Company v. *Universal Marine Company*, 2 Asp. Mar. Law Cas. 431, n.; and cited in *Dudgeon* v. *Pembroke*, 31 L. T. Rep. N. S. at p. 39; L. Rep. 9 Q. B. at p. 596.

The injury in this case was not a "peril of the sea" in any sense; a similar accident might have happened to an engine on land from the same cause. See also

Taylor v. *Liverpool and Great Western Steam Company*, 30 L. T. Rep. N. S. 714; 2 Asp. Mar. Law Cas. 275; L. Rep. 9 Q. B. 546;
Taylor v. *Dunbar*, L. Rep. 4 C. P. 206

(where damage to cargo by delay was held not to be within the general words of a policy);

Pandorf v. *Hamilton*, (*a*) 55 L. T. Rep. N. S. 499; 6 Asp. Mar. Law Cas. 44; 17 Q. B. Div. 670; and the cases of *Rohl* v. *Parr*, 1 Esp. 445, and *Hunter* v. *Potts*, 4 Camp. 203, there cited. See also
Sailing Ship Garston Company v. *Hickie*, 55 L. T. Rep. N. S. 879; 6 Asp. Mar. Law Cas. 71; 18 Q. B. Div. 17.

Cohen, Q.C., *Myburgh*, Q.C., and *Barnes*, for the respondents, contended that an ordinary policy of insurance covered all dangers of navigation, and if this accident happened from the negligence of the engineer it was "improper navigation." This is the only principle which will reconcile all the cases. It excludes losses caused by the defect of the subject of the insurance, or by the act of the assured, or by wear and tear. The rule as to perils *ejusdem generis* is not correctly stated in the argument of the appellants. See

Fenwick v. *Schmalz*, 18 L. T. Rep. N. S. 27; L. Rep. 3 C. P. 313.

The authorities as to general words following specific words are collected in Maxwell on Statutes, p. 297. If the ordinary rules of construction are applied, the general words would cover all losses except such as are manifestly beyond the scope of marine insurance. A policy of marine insurance covers all losses, without risk of which navigation cannot take place—that is, all "perils of navigation:"

Woodley v. *Michell* (*b*), 48 L. T. Rep. N. S. 599; 5 Asp. Mar. Law Cas. 71; 11 Q. B. Div. 47.

If the words "perils of the seas" do not cover all

(*a*) The decision in this case has since been reversed in the House of Lords (57 L. T. Rep. N. S. 726; 6 Asp. Mar. Law Cas. 212; L. Rep. 12 App. Cas. 518).

(*b*) The decision in this case has since been overruled by the judgment of the House of Lords in *Wilson* v. *Owners of the Cargo of the Xanthe* (57 L. T. Rep. N. S. 701; 6 Asp. Mar. Law Cas. 207; L. Rep. 12 App. Cas. 503).

losses from the improper management of the ship during the voyage, the general words do so:

Carruthers v. *Sydebotham*, 4 M. & S. 77.

This was a case of improper navigation. The case of the *Merchants' Trading Company* v. *Universal Marine Company*, cited on the other side, does not affect the argument, for in that case the ship was unseaworthy: see the judgment of Brett, J. in

Anderson v. *Morice*, 31 L. T. Rep. N. S. 605; 2 Asp. Mar. Law Cas. 424; L. Rep. 10 C. P. 58; see also *Paterson* v. *Harris*, 1 B. & S. 336.

Taylor v. *Dunbar* and *Pandorf* v. *Hamilton*, cited on the other side, do not affect the question. The water in the boiler was essential to navigation, and therefore this was a "peril of navigation." In the case of a steamship the policy covers all such things as may happen connected with steam navigation. The case is governed by *West India Telegraph Company* v. *Home and Colonial Insurance Company* (43 L. T. Rep. N. S. 420; 4 Asp. Mar. Law Cas. 341; 6 Q. B. Div. 51).

The *Attorney-General* in reply.—The argument of the respondents goes to the length of saying that the underwriters guarantee the negligence of the crew. The direct consequences of a negligent act must be excluded, unless they lead to a sea peril.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 14.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case a policy of marine insurance for twelve months was effected upon, among other things, a pump on board the *Inchmaree* steamer. The adventures and perils which the capital stock and funds of the defendant company were made liable to by the policy of insurance were of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the aforesaid subject-matter of insurance or any part thereof. It is certain that a loss or misfortune has happened to the pump while the pump was being used for the purpose of filling the boilers of the *Inchmaree*, and the sole question is, whether the loss or misfortune which did happen was one of the losses or misfortunes against which the insuring company agree to indemnify the owners of the *Inchmaree*. If understood in their widest sense, the words are wide enough to include it; but two rules of construction now firmly established as part of our law may be considered as limiting those words. One is, that words, however general, may be limited with respect to a subject-matter in relation to which they are used. The other is, that general words may be restricted to the same genus as the specific words that precede them. There is perhaps a third consideration which cannot be overlooked, and that is that where the same words have for many years received a judicial construction, it is not unreasonable to suppose that parties have contracted upon the belief that their words will be understood in what I will call the accepted sense. And it is to be remembered that what courts have to do in construing all written documents is to reach the meaning of the parties through the words they have used.

Now, the facts here are very simple: a part of the pump was burst because a valve which should have let the water into the boiler was stopped up while the pump was being worked by a donkey-engine. On the one side it is said that filling the boiler was necessary to enable the ship to prosecute her voyage; on the other it is said that the accident, peril, or misfortune had nothing to do with the sea, and was in no sense of the like kind with any of the perils or misfortunes specifically enumerated. In the long line of cases quoted at the bar there was only one (with which I will attempt to deal presently) which enunciated any different principles of construction from those I have endeavoured to set forth above, although I think there is some difficulty in reconciling the facts with respect to which some of them are decided with the principle upon which they profess to be decided, conspicuously, I think, *De Vaux* v. *D'Anson* (5 Bing. N. C. 519), where Tindal, C.J. rests upon authorities which, as applicable to the particular facts of the cases to which he refers, hardly support the decision then arrived at. The great difficulty I have had in this case is the decision of Lord Selborne, L.C. and Cockburn, C.J. in the case of the *West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company* (43 L. T. Rep. N. S. 420; 4 Asp. Mar. Law Cas. 341; 6 Q. B. Div. 51). I cannot agree with the Master of the Rolls that that case does not, as matter of reasoning, cover the present case. With the utmost respect, I can draw no real distinction between the explosion of the boiler and the bursting of the air chamber of the pump, nor can any real distinction depend upon whether it was steam generated by fire which caused the explosion or air and water forced into the chamber by ordinary mechanical action. But before your Lordships that case is open to review, and I cannot think that that case is reconcilable with the principles upon which policies of marine insurance have hitherto been construed. It introduces analogy as the guide by which you are to ascertain the genus to which the different species are to be attributed; so that in the future one must introduce as the true exposition of general words not the genus you find as applicable to the species enumerated, but any analogous genus. Sea perils or the like become enlarged into perils whose only connection with the sea is that they arise from machinery which gives motive power to ships. I cannot think that even were the analogy perfect, which I do not think it is, this is a satisfactory mode of ascertaining what the parties meant by the words they have used; and, as I have said, this is the real function of a court in construing an instrument. It might be reasonable for the parties to provide for such a peril, and one knows that "dangers of and incident to steam navigation" are words which have been used to provide for such casualties; but I cannot think that such casualties were in the contemplation of the parties when using the old familiar words of this policy. I think the subject-matter, marine risks, limits

the meaning of the general words. I think the genus "perils of the sea" limits the meaning. I think the meaning attributed to these words for more than half a century by decision makes it probable that the parties used them in that accepted sense. I therefore think the judgment of the Court of Appeal wrong, and I move your Lordships that it be reversed.

Lord BRAMWELL.—My Lords: I cannot agree with the judgment in this case. The donkey-engine was insured. The adventures and perils which the defendants were to make good specified a great many perils, and "all other perils, losses, and misfortunes that shall come to the hurt, detriment, or damage of the aforesaid subject matter of insurance or any part thereof." Words could hardly be more extensive, and if the question, I ought to say *a* question on them, arose for the first time, I might perhaps give them their natural meaning, and say they included this case. But the question does not arise for the first time. It has arisen from time to time for centuries, and a limitation has always been put on the words in question. Definitions are most difficult, but Lord Ellenborough's seems right: "All cases of marine damages of the like kind with those specially enumerated, and occasioned by similar causes." I have had given to me the following definition or description of what would be included in the general words: "Every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of insurance." Probably a severe criticism might detect some faults in this. There are few definitions in which that could not be done. I think the definition of Lopes, L.J. in *Pandorf* v. *Hamilton* (54 L. T. Rep. N. S. 536; 5 Asp. Mar. Law Cas. 568; 16 Q. B. Div. 629) very good: "In a seaworthy ship damage to goods caused by the action of the sea during transit not attributable to the fault of anybody" is a damage from a peril of the sea. I have thought that the following might suffice: "All perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such." I put it forward with distrust, but it would comprehend all the cases cited where the assured has recovered, save perhaps the *West India Telegraph Company* v. *Home and Colonial Insurance Company*. For example, it would include the case of the ship blown over while in dock, of the ship damaged by its moorings giving way, of the ship fired into by another ship. It would not include the cases put by Lord Esher, M.R., nor the case I put of the captain seized with giddiness dropping the chronometer into the hold, nor would it include the present case. The damage to the donkey-engine was not through its being in a ship or at sea. The same thing would have happened had the boilers and engines been on land, if the same mismanagement had taken place. The sea, waves, and winds had nothing to do with it. As a matter of principle and reasoning, I think the decision wrong. I think the judgment in the *West India and Panama Telegraph Company* v. *Home and Colonial Marine Insurance Company* (*ubi sup.*) wrong on the reasoning I have used. With most sincere respect, though it is true that what the winds are to a sailing vessel, steam is to a steamer, that does not decide the question, for it is not every damage to sails that would be covered by the policy. Suppose damage by rats or mildew to spare sails. As to Lord Esher's judgment in that case, I concur in his criticism on it in the present case. And I agree with Lopes, L.J. that the word "fire" in the policy will not sustain that judgment. The Lord Justice puts the case of a spar falling on the deck, while getting under sail, and being broken, and says it would be within the policy. Perhaps; but if it would, it would be because it was a loss in navigation, a loss which could not have happened except on a ship. But suppose the spar was being used to erect an awning on deck to give shelter to dancers or the like, and was broken, the case would not be covered by the policy. It would not be a marine loss, not a loss with which the sea, or navigation, or the ship as a ship had anything to do. I do not like cutting down the natural meaning of words: there is always a great difficulty in saying what should be substituted. But it is admitted that some limit must be put on those in question here. I think a proper limit would exclude this loss; so that the judgment of Lord Esher, M.R., is, I think, right, and that of the other judges wrong, and their decision should be reversed.

Lord HERSCHELL.—My Lords: This action undoubtedly raises an important question. It turns on the construction to be put upon the general words which follow the specific enumeration of the risks against which the insurance is effected in an ordinary marine policy. The policy sued on was a time policy for twelve months, from the 20th Aug. 1883 to the 20th Aug. 1884; and the subject-matter of insurance, "the hull, masts, spars, sails, boats, materials, and all stores, valued at 20,000*l.*; and machinery, shafting, propellers, boilers and connections, including donkey-engines and boilers, pumps and all connections, valued at 11,000*l.*" The risks against which the insurance was effected are thus described: "And touching the adventures and perils which the capital, stock, and funds of the said company are made liable unto by this insurance, they are, of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the masters and mariners, and of all such perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof." The facts lie in a narrow compass. They are set out in a special case, stated by agreement between the parties. On the 2nd March 1884 the *Inchmaree* (the vessel insured) was at anchor off Diamond Island, awaiting orders, and for the purposes of the voyage it was necessary to pump up the main boilers, by means of a donkey-pump and engine, in the usual way. A pipe led from the donkey-pump to the boilers, and at its junction with one of the boilers there was a check-valve, capable of being opened or closed by a screw, which ought to have been kept open and clear when the boilers were being pumped up. This valve had either been left closed or had become salted up when the donkey-pump was set to work off Diamond Island, so that the water could not pass into the boiler. The

consequence was that, when the donkey-pump was set to work, the pipes and water chamber in the donkey-pump, and the air chamber therein, became overcharged, and the water was forced up into the air chamber, which, in consequence, split, and the pump was thereby damaged. It was admitted for the purposes of the case that the check-valve was either allowed to remain closed or to become salted up by the negligence of one of the engineers, or was accidentally salted up without being noticed, though reasonable care was taken by the engineers. It was also admitted that the closing or salting up and accident were not due to ordinary wear and tear. The cost of replacing the pump was about 72*l.* 10*s.* The ship and freight were warranted free from average under 3 per cent. unless the ship were stranded; but as she did become stranded during the voyage, the loss was not excluded from the warranty. The parties were unable to agree as to whether there was negligence in allowing the check-valve to remain closed or to become salted up; but as the plaintiffs contended that the defendants were liable, whether there was negligence or not, it was agreed to leave that question for trial (if material) after the decision of the case. The questions stated for the opinion of the court were, whether the defendants were liable under the policy in respect of the loss, (1) if it could have been avoided by proper care, and occurred through negligence; (2) if it occurred accidentally without negligence. The Queen's Bench Division gave judgment for the plaintiffs, and this judgment was affirmed by the majority of the Court of Appeal (Lindley and Lopes, L.JJ.), the Master of the Rolls dissenting.

It was not contended at the bar on behalf of the respondents that the loss was within any of the specific risks enumerated. Reliance was placed exclusively upon the general words: "All other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance or any part thereof." It cannot be denied that, if these words are to be taken without any limitation, a loss or misfortune did come to the damage of a part of the subject-matter of the insurance. But it is contended on behalf of the appellants that these general words, following a specific enumeration, must be limited to perils *ejusdem generis* with those specified, or, to put it in another way, that they must be construed with reference to the scope and purpose of the instrument in which they occur, viz., a policy of marine insurance. If the matter now presented itself for consideration for the first time, untouched by authority, I should not myself be inclined to construe these general words without some limitation. Indeed, the learned counsel for the defendants themselves did not contend for so wide an interpretation. The view which they put before the House was, that they should be confined to accidents happening to the subject-matter of the insurance in the course of, and incidental to, the navigation. I think it will be found, upon examination of the authorities, that the general words in a marine policy have received from the courts, for a long series of years, a construction to which your Lordships would do well to adhere. The instrument is one in daily use, and if your Lordships were to put a new construction upon it you would be likely to defeat, and not to give effect to, the intention of the parties. Nothing would be more dangerous, in my opinion, than to depart from a construction which the authorities have put upon words in common use in a mercantile instrument, even if the propriety of the decision might originally have been open to question. In a case which came before the Court of King's Bench, as long ago as 1816, Lord Ellenborough, C.J., in delivering the judgment of the court, in clear and unambiguous terms expressed their view as to the meaning of the words in question. I refer to the case of *Cullen* v. *Butler* (5 M. & S. 461). It was an action on a policy of insurance where the ship and goods had been sunk at sea by another ship firing upon her in mistake for an enemy. The court inclined to the opinion that the loss was not one by "perils of the sea," but held that it was covered by the general words. Lord Ellenborough said, "The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of the instrument, and this will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." No case was cited at the bar from the date when this opinion was expressed (unless it be the recent case of the *West India and Panama Telegraph Company* v. *The Home and Colonial Marine Insurance Company*, 43 L. T. Rep. N. S. 420; 4 Asp. Mar. Law Cas. 341; 6 Q. B. Div. 51, to which I will presently advert), which has proceeded upon a construction of the policy different from that enunciated by Lord Ellenborough.

I will briefly review the subsequent authorities. The first is *Butler* v. *Wildman* (3 B. & Ald. 398). There the captain of a ship had thrown a large quantity of dollars overboard, to prevent their falling into the hands of an enemy, by whom he was pursued. It was held that, if not a loss by jettison, it was covered by the general words. Abbott, C.J. says, "If not, strictly speaking, jettison, it is *ejusdem generis*, and therefore falls within the general words." The other judges concurred in this view, Holroyd, J. saying that the general words include "all losses of the same nature with those described in the enumerated risks." Next in order of time comes *Phillips* v. *Barber* (5 B. & Ald. 161). A vessel placed in a graving dock for repair was, by the violence of wind and weather, thrown over on her side, whereby she struck the ground with great violence and was bilged. Abbott, C.J. in a judgment holding that the underwriters were liable, after quoting the general words contained in the policy, said, "These general words are, indeed, restrained in construction to perils *ejusdem generis* with those more particularly enumerated in the policy. In this case, however, the loss was occasioned by the violence of the wind and weather in port, and it seems to me, therefore, to have been produced by a peril *ejusdem generis* with those specified, and to fall within the general

words of the policy." The next case, *De Vaux* v. *I'Anson* (5 Bing. N. C. 519), was much relied on by the counsel for the respondents. But, though I feel some difficulty in explaining the grounds of that decision, it certainly purported to be based upon the antecedent authorities, and not upon any different view of the law. The ship had, in that case, been put into a dry dock for repairs. These being completed, preparations were made for getting her afloat; she was for this purpose made fast by four cables, whilst the workmen removed the sand which was under the vessel, and which consolidated the shores upon which the ship was resting. The cables strained the vessel, forcing in the ribs. The stanchions of the kelsons having all fallen from the force of the lower masts upon the keel, the garboard strake gave way, and when at last the ship was no longer upon the shores she sank into a muddy sand. At the time of her sustaining the injury the depth of water in the dock was about four feet. She was abandoned as a constructive total loss, and the question arose whether she was lost by perils insured against. Tindal, C.J., in delivering the judgment of the court, held that she was. He said: "It is to be observed the words in the policy are very large; the policy not only enumerates 'perils of the sea,' but 'all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the subject-matter of the insurance.' And the cases cited and relied on by the plaintiff—*Carruthers* v. *Sydebotham*, *Fletcher* v. *Inglis*, and *Phillips* v. *Barber*—are sufficient authority to show that a loss occasioned by the endeavour to get the vessel afloat from the dock in which she had just been repaired, was a loss within the policy." It is not easy, I confess, to see how the authorities referred to were sufficient to establish the propositions they are supposed to support. In *Carruthers* v. *Sydebotham* (4 M. & S. 77) the pilot navigating a vessel had fastened her to the pier of a dock basin in the Mersey by a rope to the shore. She took the ground, and when the tide left her fell over on her side and bilged, in consequence of which, when the tide rose, she filled with water and her cargo was wetted. It was held that this was a stranding entitling the assured to recover for an average loss upon the goods. After a careful perusal of the judgments in this case, I am unable to see its bearing upon the point which had to be determined in *De Vaux* v. *I Anson*. Nor do I see the application of *Fletcher* v. *Inglis* (2 B. & Ald. 315). A vessel insured for twelve months was in a harbour with a hard, uneven bottom; the tide having left the vessel, on its return there was a considerable swell in the harbour and the ship struck the ground hard several times and was found to be considerably injured. It was held that this was a loss by peril of the sea. Still less am I able to perceive the applicability of *Phillips* v. *Barber* (*ubi sup.*), to which I have referred above. There was nothing in *De Vaux* v. *I'Anson* that I can see corresponding with the wind and weather in port which was held in *Phillips* v. *Barber* to be *ejusdem generis* with a storm at sea. It is unnecessary to inquire whether the decision in *De Vaux* v. *I'Anson* was correct. It cannot be regarded as throwing any doubt upon the canon of construction laid down by Lord Ellenborough, and more that once recognised and acted upon by Lord Tenterden. Nor is it possible to evolve any principle from it applicable to other cases. No reasons are given for the judgment, which is based solely on prior authorities, and when these authorities are examined they only determine the one, that a ship damaged by a storm when in dry dock is damaged by causes similar to perils of the seas; the others that vessels injured by ceasing to be waterborne, and being driven against the ground by the action of the tide, are injured by "perils of the sea."

The last case to which I need refer on this point is *Davidson* v. *Burnand* (19 L. T. Rep. N. S. 782; 3 Mar. Law Cas. O. S. 207; L. Rep. 4 C. P. 117), where Willes, J. expressly recognised the rule of construction laid down in *Cullen* v. *Butler*. He said: "The question is not whether the loss here was strictly one occasioned by perils of the sea, but whether it was such other loss within the policy, which of course must be a loss of the same or a similar kind to one happening from the perils of the sea." I think, therefore, that the case now before your Lordships must be determined by a consideration of the question whether the loss falls within the general words as construed by Lord Ellenborough; that is, whether it is a case "of marine damage of the like kind with those which are specially enumerated and occasioned by similar causes." When the facts are borne in mind it seems necessary only to state the question in this way to see that the answer must be in the negative. To which of the specially enumerated perils is it similar? The only one that could be suggested is "perils of the seas." The damage here arose from the air chamber of the donkey-pump giving way under an excessive pressure of water owing to the proper outlet being closed. It is, I think, impossible to say that this is damage occasioned by a cause similar to "perils of the sea" on any interpretation which has ever been applied to that term. It will be observed that Lord Ellenborough limits the operation of the clause to "marine damage." By this I do not understand him to mean only damage which has been caused by the sea, but damage of a character to which a marine adventure is subject. Such an adventure has its own perils, to which either it is exclusively subject or which possess in relation to it a special or peculiar character. To secure an indemnity against these is the purpose and object of a policy of marine insurance. The respondents placed their main reliance upon the case of the *West India Telegraph Company* v. *Home and Colonial Insurance Company* (43 L. T. Rep. N. S. 420; 4 Asp. Mar. Law Cas. 341; 6 Q. B. Div. 51), and naturally so, because the majority of the Court of Appeal thought the present case undistinguishable from it. Lord Selborne, L.C. and Cockburn, C.J. in that case held that the damage done by the explosion of the boiler of a steamer was covered by the general words of a marine policy. Lord Selborne, after referring to the effect given to these words in *De Vaux* v. *I'Anson* said: "I think it is at least as proper to hold that in the case of a steamship they cover damage occasioned by the explosion of the boiler in which the motive power necessary to her navigation is generated. What the winds are to a sailing vessel, steam is to a steamer; and it is as reasonable that marine insurers should bear the risks incident to a navigation by that kind of power,

whether from excess of pressure in the boilers, or from defects of safety valves, or from neglect or mismanagement, making that dangerous which otherwise would not be so, as that they should bear losses occasioned by excessive pressure of wind, and defects or mismanagement of a ship's sails or tackle." I have already given my reasons for doubting whether *De Vaux* v. *l'Anson* involved any principle which could possibly be extended by analogy to a case not precisely similar in its facts. Moreover, it is to be observed that in *De Vaux* v. *l'Anson* the damage done was done to the ship as such. It arose from her being constructed for the purpose of being waterborne, and thus needing some substituted support, if the support of the water was withdrawn; and the damage to the ship was due to her grounding, and the failure to keep her safely supported. It is on this view alone, I think, that the case can be sustained. But the explosion of the boiler on board the *Panama* had no marine character at all. It might have happened in precisely the same way and done the same kind of damage, if the steam engine had been in use for the purpose of moving manufacturing machinery on shore. The real ground of Lord Selborne's judgment appears to have been the analogy between damage done by the excessive pressure of the winds in the case of a sailing vessel, and the excessive pressure of steam in the boiler when the motive power used to propel the vessel is steam. I am not satisfied that this analogy is a sound one; but, even if it be so, I am unable to see how it can be treated as an authority in the present case, still less as concluding it. The water in the donkey-engine, the over-pressure of which caused the damage, was certainly not to the steamer "what the winds are to a sailing vessel," and the damage was not, as it seems to me, in any way similar to the injury done to a sailing vessel by a storm of wind. The present Master of the Rolls, although he concurred in the judgment of the majority of the court in the *West India Telegraph Company* v. *Home and Colonial Insurance Company*, differed in his reasons. He based his judgment solely on the ground that the explosion was *ejusdem generis* with fire, and therefore the loss was within the general words. In the case now under appeal he intimated that this reasoning was somewhat fanciful, and that he should not be sorry to see it dissented from. I am certainly disposed to prefer the later view of the learned judge; but it is not necessary to discuss the point, as it is obvious that such a ground of decision can have no bearing upon the case we have to deal with. I may add, however, that since the term "fire" has been added to the specially enumerated risks (which has taken place in comparatively recent times), I think the general words may properly be extended to similar risks which would not have been included before. Upon the whole, I have come to the conclusion that the judgment of the Master of the Rolls in the court below was correct. I believe it not only to have been in accordance with the authorities, but in harmony with the common understanding of those who enter into contracts of marine insurance. Several instances were put in the course of the argument of disasters which are of common occurrence, and would seem to be just as much within the general words as that which is now in question, but in respect of which it has never been suggested that the underwriters were liable. I accordingly concur in the judgment which has been moved.

Lord MACNAGHTEN.—My Lords: In March 1884 the *Inchmaree* was off Diamond Island lying at anchor, and about to prosecute her voyage. It was necessary to fill up her boilers. There was a donkey-engine and a donkey-pump on board, and the donkey-engine was set to pump up water from the sea into the boilers. Those in charge of the operation did not take the precaution of making sure that the valve of the aperture leading into one of the boilers was open. This valve happened to be closed. The result was that the water, being unable to make its way into the boiler, was forced back and split the air chamber and so disabled the pump. That was the beginning and the end of the misfortune. At this time the *Inchmaree* with her machinery, including the donkey-engine, was insured by a time policy. The question is, was the loss which resulted from this mishap covered by the policy or not? The policy contained the common clause describing the risks which the underwriters were content to bear. The clause begins in the usual way by specifying certain particular cases, perils of the seas and other well-known risks, to which the indemnity was to extend. Then follow general words apparently providing for every conceivable loss or misfortune that could happen to the subject-matter of the insurance. It was not contended that the mishap in question fell within any of the particular cases enumerated. The argument turned on the effect of the general words. According to the ordinary rules of construction these words must be interpreted with reference to the words which immediately precede them. They were no doubt inserted to prevent disputes founded on nice distinctions. Their office is to cover in terms whatever may be within the spirit of the cases previously enumerated, and so they have a greater or less effect as a narrower or broader view is taken of those cases. For example, if the expression "perils of the seas" is given its widest sense, the general words have little or no effect as applied to that case. If, on the other hand, that expression is to receive a limited construction, as apparently it did in *Cullen* v. *Butler* (5 M. & S. 461), and loss by perils of the seas is to be confined to loss *ex marinæ tempestatis discrimine*, the general words become most important. But still, ever since the case of *Cullen* v. *Butler*, when they first became the subject of judicial construction, they have always been held or assumed to be restricted to cases "akin to" or "resembling" or "of the same kind" as those specially mentioned. I see no reason for departing from this settled rule. In marine insurance it is above all things necessary to abide by settled rules, and to avoid anything like novel refinements or a new departure.

It was objected by Mr. Cohen that the rule of *ejusdem generis* does not apply unless you can find a common characteristic running through or underlying the previous words. I do not know that this is so—at any rate, where several cases are enumerated leading to a common result, or intended to be met by a common remedy. A familiar instance occurs in the Companies Act 1862 and the earlier Act of 1848, in the sections which provide for winding-up. There are several sub-sections specifying various cases in which a winding-up order may be made, and then there

is a sub-section providing that the court may make an order whenever it thinks it just and equitable. Under both Acts those general words have always been held to be restricted to cases *ejusdem generis* with those previously mentioned, and not to give the court a general power to make an order whenever it thinks right to do so. Your Lordships were asked to draw the line, and to give an exact and authoritative definition of the meaning of the expression "perils of the seas" explained or enlarged by or in connection with the general words. For my part, I decline to attempt any such task. I do not think it is possible to frame a definition which would include every case proper to be included and no other. I think that each case must be considered with reference to its own circumstances, and that the circumstances of each case must be looked at in a broad, common-sense view, and not by the light of strained analogies and fanciful resemblances. In the present case, although the Court of Appeal has properly treated the general words as restricted to cases *ejusdem generis* with those specially enumerated, the majority of the court has held the accident within the policy. I am unable to adopt their conclusion. The accident, in my opinion, was not due to the "perils of the seas," using that expression in the widest sense that I can give to it, nor did it result in sea damage of any kind. I am therefore of opinion that the view of the Master of the Rolls is correct, and that the judgment of the Court of Appeal must be reversed.

Order appealed from reversed; the respondents to pay the costs of the appellants in the courts below, and in this House.

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

Solicitor for the respondents, *T. W. Rossiter,* for *Hoyle, Shipley,* and *Hoyle,* Newcastle-on-Tyne.

March 17 *and July* 14, 1887.

(Before Lords BRAMWELL, HERSCHELL, and MACNAGHTEN.)

WILSON AND CO. *v.* OWNERS OF THE CARGO OF THE XANTHO. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bill of lading—Peril of the sea—Collision.

The words "perils of the seas" have the same meaning in a policy of insurance and in a bill of lading.

Loss of or damage to cargo by collision happening without any negligence on the part of the carrying ship is loss or damage by perils of the seas within the meaning of those words in a bill of lading.

Quœre, whether, where a shipowner is sued for loss of cargo carried by him under a bill of lading containing the exception perils of the sea, and the plaintiff proves non-delivery and the shipowner loss by collision, the onus of showing negligence is thrown upon the plaintiff, or whether the defendant must show that the collision occurred without any negligence on his part.

Judgment of the court below reversed.

Woodley *v.* Michell (48 *L. T. Rep. N. S.* 599; 5 *Asp. Mar. Law Cas.* 71; 11 *Q. B. Div.* 47) *overruled.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.), reported in 55 L. T. Rep. N. S. 203; 6 Asp. Mar. Law. Cas. 8; and 11 P. Div. 170, affirming a judgment of the President of the Admiralty Division (Sir J. Hannen) in favour of the plaintiffs.

The action was brought by the respondents, the holders of a bill of lading of the cargo shipped on board the steamship *Xantho,* against the appellants, who were the owners of that vessel, for non-delivery of the cargo in question.

At the trial it was admitted that a collision had occurred between the *Xantho* and another vessel, by which the former was sunk; that the cargo had been received, and had not been delivered; and that the bill of lading contained the usual clause excepting the shipowner from liability for the loss of cargo caused by perils of the sea. Upon these facts the respondents asked for judgment.

It was argued for the appellants that the burden of proof which was on them to show that the loss was caused by a peril of the sea, within the meaning of that term in the exceptions named in the bill of lading, had been discharged.

The President of the Admiralty Division gave judgment for the plaintiffs, upon the authority of the case of *Woodley* v. *Michell* (48 L. T. Rep. N. S. 599; 5 Asp. Mar. Law Cas. 71; 11 Q. B. Div. 47), and his judgment was affirmed as above mentioned.

Sir *W. Phillimore* and *Aspinall* (the *Attorney-General,* Sir R. Webster, Q.C., with them) appeared for the appellants, and argued that a collision was *primâ facie* a peril of the sea, and that it lay on the plaintiffs to show that there had been negligence:

Phillips v. *Clark*, 2 C. B. N. S. 156;
Czech v. *General Steam Navigation Company*, 17 L. T. Rep. N. N. 246; 3 Mar. Law Cas. O. S. 5; L. Rep. 3 C. P. 14;
Lloyd v. *General Iron Screw Collier Company*, 10 L. T. Rep. N. S. 526; 2 Mar. Law Cas. O. S. 32; 3 H. & C. 284;
Grill v. *General Iron Screw Collier Company*, 18 L T. Rep. N. S. 362; 3 Mar. Law Cas. O. S. 77; L. Rep. 3 C. P. 476;
Sailing Ship Garston Company v. *Hickie*, 55 L. T. Rep. N. S. 879; 6 Asp. Mar. Law Cas. 71; 18 Q. B. Div. 17;
Pickering v. *Barkley*, 2 Roll. Abr. 248, pl. 10.

Dangers met with on the sea are "perils of the sea" as much as dangers caused by the sea:

Smith v. *Scott*, 4 Taunt. 126;
The Norway, Br. & L. 404; 3 Moo. P. C. N. S. 245;
The Hélène, Bro. & L. 429; L. Rep. 1 P. C. 231;
Chartered Mercantile Bank of India v. *Netherlands India Steam Navigation Company*, 48 L. T. Rep. N. S. 546; 5 Asp. Mar. Cas. 65; 10 Q. B. Div. 521.

Woodley v. *Michell* (*ubi sup.*), from which this is in fact an appeal, was wrongly decided. See also the American case, *Hale* v. *Washington Insurance Company* (2 Story, 176).

Hollams (Sir *C. Russell,* Q.C. with him), for the respondents, contended that it was in fact only a question of form. Even if *Woodley* v. *Michell* be bad law, the appellants cannot succeed. They rested their case at the trial on the ground of onus of proof. It was admitted that this was not an inevitable accident; therefore there must have

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

been negligence somewhere, and the court cannot infer that the loss was by one of the excepted perils, as negligence of the carrier would take it out of the exception. There is a distinction between "perils of the sea" as used in a bill of lading and in a policy of insurance: see Pollock, C.B. in

Lloyd v. *General Screw Collier Company (ubi sup.)*;
Taylor v. *Liverpool and Great Western Steam Navigation Company*, 30 L. T. Rep. N. S. 714; 2 Asp. Mar. Law Cas. 275; L. Rep. 9 Q. B. 546.

The exceptions in a bill of lading are for the benefit of the carrier, and should be construed strictly against him, while those in a policy are for the benefit of the assured. In any case, there should be a new trial that the facts may be ascertained. *The Norway* and *The Hélène* are distinguishable on the facts. as also is *Woodley* v. *Michell*, if it be held to be wrongly decided; but we say it was right on the facts of that case. He also referred to

Buller v. *Fisher*, 3 Esp. 67;
Czech v. *General Steam Navigation Company (ubi sup.)*;
Merchants' Trading Company v. *Universal Marine Insurance Company*, 2 Asp. Mar. Cas. N. S. 431, n.;
Taylor on Evidence, ss. 364, 365;
Angell on Carriers, s. 202;
Story on Bailments, s. 512 (a).

The *Attorney-General* in reply.—If the judgment of the Court of Appeal is reversed, judgment should be entered for the defendants, without a new trial.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

July 14.—Their Lordships gave judgment as follows:—

Lord HERSCHELL.—My Lords: In order to render clear the exact point which has to be determined in this case it will be necessary to state with some minuteness the pleadings and the course which the case took at the trial. The owners of cargo by the steamship *Xantho*, who were the plaintiffs in the action, by their statement of claim alleged that they had suffered damage by breach of the contract contained in the bills of lading of goods shipped at Cronstadt on board the defendants' vessel *Xantho* for carriage to Hull, that the bills of lading were indorsed to the plaintiffs, to whom the property in the goods passed by such indorsement; and that the goods were not delivered. The statement further alleged alternatively that the plaintiffs had suffered damage from the loss of their goods while on board the defendants' vessel by a collision with the steamship *Valuta*, caused by the negligent navigation of the defendants' servants. The statement of defence denied the contract and the breach, and also that the bills of lading were indorsed to the plaintiffs, and that the property in the goods thereby passed to them. In answer to the alternative claim, it admitted that the *Xantho* came into collision with the *Valuta*, but denied that the collision was caused by the negligent navigation of the *Xantho*, alleging that it was solely caused by the negligent navigation of the *Valuta*. The defence further alleged that the loss was occasioned by perils which were excepted by the bill of lading. The action came on for trial before the President of the Probate and Admiralty Division. The learned counsel for the plaintiffs put in as his only evidence the bills of lading and admissions that the property in the goods and the right to sue on the bills of lading had passed to the plaintiffs, and that the goods had not been delivered. The bills of lading, which were in the usual form, contained an exception in these terms:—"The act of God, Queen's enemies, fire, machinery, boilers, steam, and all and every other dangers and accidents of the sea, rivers, and steam navigation of whatever nature and kind soever excepted." In opening his case the plaintiffs' counsel stated that the *Xantho* was lost by reason of a collision which took place between that vessel and the *Valuta* in a fog, and submitted that whether the collision arose from the negligence of those navigating the *Xantho* or of those navigating the *Valuta*, or from the negligence of both combined, the loss of the goods did not fall within the exception contained in the bill of lading, and that the plaintiffs were in either case entitled to recover. He relied in support of this contention upon the case of *Woodley* v. *Michell* (48 L. T. Rep. N. S. 599; 5 Asp. Mar. Law Cas. 71; 11 Q. B. Div. 47). The learned counsel for the defendants admitted that if *Woodley* v. *Michell* were good law he could not resist this view; that even if he proved that no negligence was to be imputed to the *Xantho*, and that the disaster was solely due to the negligence of the *Valuta*, as he could not prove that it arose from an inevitable accident, the result must be a decision for the plaintiffs. He considered, therefore, that the only course open to the defendants was to test the law laid down in *Woodley* v. *Michell* by appeal to your Lordships' House. The learned President thereupon gave judgment for the plaintiffs. I think the defendants' counsel was perfectly correct in the course which he took. If he had proved to demonstration that his vessel was free from blame and that the other vessel's negligence alone caused the disaster, he would have established no defence so long as *Woodley* v. *Michell* stood. He accordingly wisely abstained from the idle task of attempting to prove facts which the Court of Appeal had held to be wholly immaterial.

It appears to me that the only question which arises for your Lordships' determination in this case is whether the decision in *Woodley* v. *Michell* can be sustained. In that case an action was brought on a bill of lading. The goods were lost owing to a collision between the defendants' and another vessel. The jury found that there was no negligence on the part of the master or crew of the carrying vessel. The Court of Appeal held that the defendants were not protected by the exception of "perils of the sea" contained in the bill of lading, and gave judgment for the plaintiffs. Brett, L.J. said: "What I think it 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 negligence it could not have happened, is not a peril of the sea within the terms of that exception in a bill of lading." And Cotton, L.J. thus expresses himself: "There is no decision that is binding upon us that a collision occasioned by the negligence of one of the ships is a peril of the sea. Looking, then, upon it with reference to

decided cases, and according to the ordinary interpretation of words, I cannot see how, if there was no peril from sea or wind, and an accident is caused by the negligent act of one of the two ships which comes into collision, that can be said to be a peril of the sea." The question what comes within the term "perils of the sea" (and certainly the words "dangers and accidents of the sea" cannot have a narrower interpretation) has been more frequently the subject of decision in the case of marine policies than bills of lading. I will first notice the decisions pronounced with regard to the former instrument, and then inquire how far a different interpretation is to be applied in the case of the latter. I think it clear that the term "perils of the sea" does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril "of" the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the sea which were occasioned by extraordinary violence of the winds or waves. I think this is too narrow a construction of the words, and it is certainly not supported by the authorities or by common understanding. It is beyond question that if a vessel strikes upon a sunken rock in fair weather and sinks this is a loss by perils of the sea. And a loss by foundering, owing to a vessel coming into collision with another vessel, even when the collision results from the negligence of that other vessel, falls within the same category. Indeed, I am aware of only one case which throws a doubt upon the proposition that every loss by incursion of the sea, due to a vessel coming accidentally (using that word in its popular sense) into contact with a foreign body which penetrates it and causes a leak, is a loss by a peril of the sea. I refer to the case of *Cullen* v. *Butler* (5 M. & S. 461), where a ship having been sunk by another ship, firing upon her in mistake for an enemy, the court inclined to the opinion that this was not a loss by perils of the sea. I think, however, this expression of opinion stands alone, and has not been sanctioned by subsequent cases. But it is said that the words "perils of the sea" occurring in a bill of lading or other contract of carriage must receive a different interpretation from that which is given to them in a policy of marine insurance; that in the latter case the *causa proxima* alone is regarded, while in the former you may go behind the *causa proxima* and look at what was the real or efficient cause. It is on this view that the Court of Appeal acted in *Woodley* v. *Michell*. Now, I quite agree that in the case of a marine policy the *causa proxima* alone is considered. If that which immediately caused the loss was a peril of the sea, it matters not how it was induced, even if it were by the negligence of those navigating the vessel. It is equally clear that in the case of a bill of lading you may sometimes look behind the immediate cause, and the shipowner is not protected by the exception of perils of the sea in every case in which he would be entitled to recover on his policy, on the ground that there had been a loss by such perils. But I do not think this difference arises from the words "perils of the sea" having a different meaning in the two instruments; but from the context or general scope and purpose of the contract of carriage excluding in certain cases the operation of the exception. It would, in my opinion, be very objectionable, unless well-settled authority compelled it, to give a different meaning to the same words occurring in two maritime instruments. The true view appears to me to be presented by Willes, J. in his judgment in *Grill* v. *The General Iron Screw Collier Company* (14 L. T. Rep. N. S. 711; 2 Mar. Law Cas. O. S. 362; L. Rep. 1 C. P. 600). The question there arose whether, when a vessel was lost by a collision caused by the negligence of those navigating the carrying ship, the case fell within the exception of "perils of the sea." It was held that it did not. Reference having been made to cases on policies of insurance, and the interpretation there put upon these words, Willes, J. said: "I may say that a policy of insurance is an absolute contract to indemnify for loss by perils of the sea, and it is only necessary to see whether the loss comes within the terms of the contract, and is caused by perils of the sea; the fact that the loss is partly caused by things not distinctly perils of the sea does not prevent its coming within the contract. In the case of a bill of lading it is different, because there the contract is to carry with reasonable care, unless prevented by the excepted perils. If the goods are not carried with reasonable care and are consequently lost by perils of the sea, it becomes necessary to reconcile the two parts of the instrument, and this is done by holding that if the loss through perils of the sea is caused by the previous default of the shipowner, he is liable for this breach of his covenant."

So far as I am aware, until the case of *Woodley* v. *Michell* was decided, there was no authority for saying that a loss the proximate cause of which was a peril of the sea, and which did not result from the act or default of the carrier, was not within the exception. In the case of the *Chartered Mercantile Bank of India* v. *The Netherlands India Steam Navigation Company* (48 L. T. Rep. N. S. 546; 5 Asp. Mar. Law Cas. 65; 10 Q. B. Div. 521) the present Master of the Rolls suggested the view that a loss by a collision due to the negligence not of the carrying but of the other vessel, was not a loss by perils of the sea. He said: "If the collision is caused without any fault on the part of the carrying ship, but is caused by reason of the negligence of those who are conducting the other ship, it cannot be called an accident of the sea. An accident is that which happens without the fault of anybody, and consequently a collision which is the fault of somebody is not an accident of the sea." This was a dictum certainly not necessary for the decision of that case. But in *Woodley* v. *Michell* it was repeated and adopted as the ground of judgment. With the greatest respect for that learned judge, the weight of whose opinion on any question of maritime law I fully recognise, I am unable to perceive why a loss occasioned by an inroad of the sea owing to a casualty over which the ship-

owner and his servants had no control should not be held to be within the exception. If the distinction pointed out by Willes, J. between the rules governing the construction of policies of marine insurance and bills of lading be the true one, it is certainly not applicable to such a case. I am unable to concur in the view that a disaster which happens from the fault of somebody can never be an accident or peril of the sea; and I think it would give rise to distinctions resting on no sound basis if it were to be held that the exception of perils of the seas in a bill of lading were always excluded when the inroad of the sea which occasioned the loss was induced by some intervention of human agency. Take the case which I put in the course of the argument, of a ship which strikes upon a rock and is lost because the light which should have warned the mariner against it has become extinguished owing to the negligence of the person in charge. Why should this not be within the exception, while a similar loss arising from a vessel coming into contact with a rock not marked upon the chart admittedly would be? And what substantial distinction is there between this latter case and that of a vessel foundering through collision with a ship at anchor left at night without lights? For these reasons I have arrived at the conclusion that the case of *Woodley* v. *Michell* cannot be supported. It was contended by the learned counsel for the appellants that if your Lordships should take this view, the judgment ought to be entered for them. I cannot concur in this. With the authority of *Woodley* v. *Michell* in their favour, when once it was admitted that the accident was not inevitable, it was as fruitless for the respondents to give evidence of the negligence of the appellants as it was for the appellants to seek to cast the blame on the other vessel. Much argument was addressed to your Lordships on the question whether, when the plaintiffs had proved that the goods had not been delivered, thus throwing the onus on the defendants of excusing their non-delivery, proof by them that the vessel had been sunk in a collision would be sufficient to shift the onus, and render it incumbent on the plaintiffs to establish that the collision was due to the defendants' negligence, or whether the defendants, to bring themselves within the exception, must show that the loss was not due to a cause induced by their own negligence. I do not think this point is now before your Lordships for decision. Arguments of weight have been adduced in support of either view. I certainly must not be understood as deciding that the mere proof of loss by collision under circumstances as consistent with its resulting from the negligence of the carrying ship as from any other cause would exonerate the defendants. I move your Lordships that the judgment appealed from be reversed, and that there be a new trial of the action. I think the respondents must pay the costs in the Court of Appeal and in this House, and that the costs of the two trials already had should abide the event. And I move your Lordships accordingly.

Lord BRAMWELL.—My Lords: My noble and learned friend has been kind enough to read his opinion first, in consequence of its containing a fuller statement of the facts than what I am about to read to your Lordships. The plaintiffs' statement of claim is for the non-delivery of goods according to a bill of lading, with an alternative claim for loss of the goods therein mentioned, owing to the negligence of the defendants. It was admitted at the trial by the defendants that the goods had not been delivered according to the bill of lading. It was admitted by the plaintiffs that the vessel sank owing to damage received in a collision. It was admitted by the defendants that that collision was not the result of inevitable accident—*i.e.*, of winds, waves, or other natural causes. The plaintiffs contended, on the authority of *Woodley* v. *Michell*, that that being so they were entitled to judgment, whether the collision was attributable to the negligence of the defendants, with or without negligence on the other ship, or wholly to the negligence of that other. The President so ruled, considering himself bound by *Woodley* v. *Michell*. That case decided that a damage, including foundering occasioned by collision, was not a loss by perils of the sea within those words of exception in a bill of lading, unless occasioned by action of sea or wind, or inevitable accident, and therefore that a collision occasioned, whether by the negligence of the one ship or the other, or both, was not a loss by such perils. The now defendants appealed, but the ruling was upheld, the court giving reasons for their opinion, and also relying on the case of *Woodley* v. *Michell*. With great respect, I cannot agree. I think that case wrongly decided, and differ from the reasons given in support of the judgment in that and in this case. Was it by a peril of the sea that the defendants' ship foundered? The facts are that the sea-water flowed into her through a hole, and flowed in such quantities that she sank. It seems to me that the bare statement shows she went to the bottom through a peril of the sea. If the hole had been small, there being a piece of bad wood, a plank starting, or a similar cause, it would be called a leak, and no one would doubt that she foundered from a peril of the sea. Does it make any difference that the hole was large, and occasioned by collision? I cannot think it does. It is admitted that if the question had arisen on an insurance against loss by perils of the sea this would have been within the policy a loss by perils of the sea. Are the words to have different meanings in the two instruments? Why should they? Different consequences may follow. The insurer may be unable to defend himself on the ground that the loss was brought about by the negligence of the crew, while the freighter may maintain an action on the ground that it was. But how is the loss a loss by perils of the sea in one case and not in the other? The argument is, that wind and waves did not cause the loss, but negligence in someone. But surely, if that were so, a loss by striking in calm weather on a sunken rock not marked on the chart would not be a loss by perils of the seas within the bill of lading; or striking on a rock from which the light had been removed, or an iceberg, or a vessel without lights. I cannot bring myself to see that such cases are not losses by perils of the sea. Is not the chance of being run against by a clumsy rider one of the perils of hunting? It would be strange if an underwriter on cargo, suing in the name of the cargo owners on the bill of lading, should say, "I have paid for a loss by perils of the sea, and claim on you because the loss was not by perils of the sea."

The Court of Appeal, with great respect, argued

as though the collision caused the loss. So it did in a sense. It was a *causa sine quâ non*, but it was not the *causa causans*. It was *causa remota*, but not *causa proxima*. The *causa proxima* of the loss was foundering. It would be strange if a plank started, and the vessel went to the bottom in consequence, that it should be held, "Oh, the loss is not by perils of the seas, but by bad carpentering." Let there be no doubt. I do not say that in such case the freighter might not complain that his goods were carried in an unseaworthy ship: all I say is, that the loss would be by perils of the seas. It is only necessary for this House to say that if the foundering was occasioned by a collision, with no blame on the defendants, they ought to have succeeded. For this is what they offered to prove, and were told that it was useless to do so. Mr. Hollams argued that they ought to have insisted on their right to prove their case. I am clearly of a different opinion. I think when the judge says, "I shall decide against you, though you prove what you say," the party must acquiesce for the time, and seek his remedy by appeal. I think that the judge might properly refuse to hear the evidence, for he might truly say that in his opinion this evidence is irrelevant to any issue on the record; no one giving it would be liable to the penalty of perjury. The practice in my experience has always been in conformity with what I am now saying. The judgment, then, must be set aside. The Attorney-General contended that it should be entered for the defendants. That also is impossible. It could not have been done before the Judicature Act, and that Act does not authorise it. It would be most unjust to the plaintiffs. They, relying on the law as it had been laid down, proved what was a sufficient case, and did not give what would have been irrelevant evidence if the law had been rightly laid down. I say nothing about burthen of proof. All I say is, that if the collision was in no way the fault of the defendants' crew, they are entitled to judgment. As to costs, I do not remember whether my noble and learned friend made any mention of costs, but I will merely read what I have written, namely, that as to costs it seems to me that neither party is to blame, and that consequently the costs of the former trial, of the appeal in the court below, and in this House, should be costs in the cause for either party. I do not know whether that will meet your Lordships' view in the matter, but that can be settled afterwards.

Lord MACNAGHTEN.—My Lords: In this case the bill of lading on which the question arises is in common form. In the usual terms it states the engagement on the part of the shipowner to deliver the goods intrusted to his care. At the same time it specifies, by way of exception, certain cases in which failure to deliver those goods may be excused. So much for the express terms of the bill of lading. But the shipowner's obligations are not limited and exhausted by what appears on the face of the instrument underlying the contract, implied and involved in it there is a warranty by the shipowner that his vessel is seaworthy, and there is also an engagement on his part to use due care and skill in navigating the vessel and carrying the goods. Having regard to the duties thus cast upon the shipowner, it seems to follow as a necessary consequence, that, even in cases within the very terms of the exception in the bill of lading, the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss. Turning now to the facts of the case, we find that it was admitted at the trial that the vessel with the goods on board foundered at sea in consequence of a collision. The exception in the bill of lading includes "dangers and accidents of the sea." Is shipwreck by collision a danger or accident of the sea? I should say undoubtedly it is. Then comes the question, how was the collision brought about? Of that we know nothing, except that it was not due to inevitable accident. So much was admitted. It follows from that admission that one or both of the vessels that came into collision must have been to blame. In that state of things, I should have thought that the issue between the parties was reduced to this question, Was the carrying vessel in fault? If it was not, the shipowner is protected. If it was, though the loss occurred through one of the excepted perils, the shipowner cannot rely on the exception. Unfortunately that simple issue was obscured, and the trial of the action was rendered abortive by reason of the decision in *Woodley* v. *Michell*. In the face of that decision it would have been idle for the parties to have gone into the facts at the trial. It would have been a work of supererogation on the part of the plaintiffs to have proved that the carrying vessel was in fault. The defendants would have been no nearer winning if they had established by the clearest evidence that up to the moment of collision they had performed every duty cast upon them. Under these circumstances the parties have been compelled to come to your Lordships' House, appealing in form against the judgment of the Court of Appeal in the present case, but in reality against the decision in *Woodley* v. *Michell*. Your Lordships are therefore called upon to determine whether the rule laid down in *Woodley* v. *Michell* can be supported on principle or authority. Authority in its favour there is none. The industry of counsel could not produce any passage from any recognised treatise or from any reported judgment countenancing the doctrine, except one observation in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (48 L. T. Rep. N. S. 546; 5 Asp. Mar. Law Cas. 65; 10 Q. B. Div. 521), which was not necessary for the decision. It seems to me to be equally difficult to support the rule in *Woodley* v. *Michell* on principle. If the accident is brought about by the negligence of the owner of the carrying vessel or his servants, it would be contrary to common sense and against all sound principle to allow one who was the author of the mischief to avail himself of his own wrong. But, if the carrying shipowner is free from all blame, why should he suffer for the errors or misconduct of those over whom he has no control? As far as he and his vessel are concerned, what difference can it make in that case whether the collision is caused by a sunken rock, or by an iceberg, or by another vessel, or whether that other vessel is or is not in fault? It seems to me, if I may say so with all deference, that the error of the Court of Appeal in the present case is to be found in this: They start with the assumption that the same words have different meanings when used in policies of assurance, and

when used in bills of lading. For that assumption there is not, I venture to think, any foundation. Different considerations, no doubt, apply to the two contracts, a contract of indemnity and a contract of carriage, and the same event may have a different result in the one case from what it would have in the other; but in mercantile contracts so closely connected the same words must have the same meaning. Whatever the expression "perils of the sea" means in a policy of assurance, it means neither more nor less in a bill of lading. The result, in my opinion, is that the appeal must be allowed, and the litigant parties must begin over again.

Orders appealed from reversed; and a new trial ordered; the costs of the trial already had to be costs in the cause; and the costs in the Court of Appeal and in this House to be defendants' costs in the cause.

Solicitors for appellants, *Lowless* and *Co.*

Solicitors for respondents, *Hollams, Son,* and *Coward.*

May 12, 13, *and July* 14, 1887.

(Before the LORD CHANCELLOR (Halsbury), Lords WATSON, BRAMWELL, FITZGERALD, HERSCHELL, and MACNAGHTEN.)

HAMILTON *v.* PANDORF. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party — Bill of lading — Exceptions — Dangers and accidents of the seas — Damage caused by rats.

A cargo of rice was shipped under a charter-party and bills of lading, which excepted "dangers and accidents of the seas . . . of whatever nature and kind." During the voyage the cargo was damaged by sea-water entering through a pipe which had been gnawed by rats. It was admitted that the ship was seaworthy, and that there was no negligence.

Held (reversing the judgment of the court below), that the damage was within the exception, and that the shipowner was not liable.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Bowen, and Fry, L.JJ.) reported in 55 L. T. Rep. N. S. 499, 6 Asp. Mar. Law Cas. 44, and 17 Q. B. Div. 670, who had reversed a judgment of Lopes, L.J., upon further consideration of an action tried before him at the Liverpool Summer Assizes 1885.

The appellants were the owners of the steamship *Inchrhona,* and the respondents were merchants in London and the rice ports. The question for decision was, whether the respondents were entitled to recover from the appellants the sum of 1000*l.* by way of damages for breach of contract contained in certain bills of lading dated the 26th March 1884, on a cargo of rice shipped by the respondents at Akyab, on board the *Inchrhona,* and delivered in a damaged condition. It appeared that the damage to the rice was occasioned by sea-water which had got into the hold through a hole which had been made in a pipe by rats. The appellants relied on the exceptions in the bills of lading as freeing them from liability for the damage so occasioned. The perils excepted in the bills of lading were "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and steam navigation of whatever nature and kind soever excepted." There was a dispute at the trial as to whether the rats had been allowed to come on board by the shippers in the course of shipping the rice at Akyab. The jury found as to this, that the rats that caused the damage were not brought on board by the shippers in the course of shipping the rice. A second question was left to the jury—namely, whether those on board the vessel took reasonable precautions to prevent rats coming on board during the shipping of the rice. This question the jury did not answer, as the appellants' counsel at the trial admitted that it became immaterial, having regard to the finding on the first question. There was no dispute at the trial as to the fact of damage or the amount thereof, and it was further agreed that the damage was caused during the voyage home, after the ship had left Akyab, by sea-water passing through a hole made by rats in a leaden discharge pipe connected with a bath-room in the vessel. It was admitted that the effect of the finding of the jury, having regard to the evidence was, that the rats which ate the pipe were in the ship before the cargo was loaded. The appellants did not offer any evidence to show that it was impossible to exclude rats altogether from the ship, or that it was not possible by reasonable care and skill to prevent rats when on board from doing the mischief which caused the damage in this case.

Lopes, L.J. gave judgment for the defendants (the present appellants), but his judgment was reversed, as above mentioned.

Bigham, Q.C. and *Barnes* appeared for the appellants, and argued that any incursion of sea-water from natural causes which might be guarded against by ordinary care is an "accident of the sea." This loss was within the exception, being sea damage to cargo without negligence; and there is no difference in the construction of the words "dangers or perils of the seas" in policies of insurance, or in charter-parties and bills of lading, except that under the two latter the shipowner is bound to exercise reasonable care. The case is not covered by authority. Damage to a ship's bottom by vermin at sea is not within the exception:

Dale v. *Hall,* 1 Wils. 281. See also
Pickering v. *Barkley,* 2 Roll. Abr. 248; Style, 132;
Rohl v. *Parr,* 1 Esp. 445;
Hunter v. *Potts,* 4 Camp. 203;
Hazard v. *New England Marine Insurance Company,* 8 Pet. 557;
The Reeside, 2 Sum. 571, per Story, J.

Laveroni v. *Drury* (8 Ex. 166; 22 L. J. 2, Ex.) was a case of damage by rats, not by water, and is no authority in this case. So also was *Kay* v. *Wheeler* (16 L. T. Rep. N. S. 66; 2 Mar. Law Cas. O. S. 466; L. Rep. 2 C. P. 302). The latest cases are *Chartered Mercantile Bank* v. *Netherlands India Steam Navigation Company* (48 L. T. Rep. N. S. 546; 5 Asp. Mar. Law Cas. 65; 10 Q. B. Div. 521) and *Woodley* v. *Michell* (48 L. T. Rep. N. S. 599; 5 Asp. Mar. Law Cas. 71; 11 Q. B. Div. 47), which is distinguished in *Sailing Ship Garston Company* v. *Hickie* (55 L. T. Rep. N. S. 879; 6 Asp. Mar. Law Cas. 71; 18 Q. B. Div. 17). (*a*)

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

(*a*) *Woodley* v. *Michell* has since been overruled by the decision of this House in *Wilson* v. *Owners of the Cargo of the Xantho* (57 L. T. Rep. N. S. 701; 6 Asp. Mar. Law Cas. 207; 12 App. Cas. 503).

See also

Dixon v. *Sadler*, 5 M. & W. 405;
Busk v. *Royal Exchange Assurance Company*, 2 B. & Ald. 73;
Laurie v. *Douglas*, 15 M. & W. 746;
Grill v. *General Screw Collier Company*, 18 L. T. Rep. N. S. 362; 3 Mar. Law Cas. O. S. 77; L. Rep. 3 C. P. 476;
Davidson v. *Burnand*, 19 L. T. Rep. N. S. 782; 3 Mar. Law Cas. O. S. 207; L. Rep. 4 C. P. 117;
Garrigues v. *Coxe*, 1 Binney Pens. 592;
Carver on Carriage, 92;
Parsons on Shipping, 258;
Parsons on Insurance, 545.

Sir *C. Russell*, Q.C. and *J. Walton*, for the respondents, contended that the proposition was laid down too widely on the other side. See

Merchants' Trading Company v. *Universal Marine Insurance Company*, 2 Asp. Mar. Law Cas. 431, n.;
Dudgeon v. *Pembroke*, 31 L. T. Rep. N. S. 31; 2 Asp. Mar. Law Cas. 323; L. Rep. 9 Q. B. 581;

It confuses cause and consequence. There must be a peril of the sea causing an incursion of sea-water. The exception would not apply to barratrous scuttling by one of the crew. See

Woodley v. *Michell* (*ubi sup.*).

If water was let in by a loose plate which injured a pipe without negligence it would not be a peril of the sea. *Hamilton* v. *Thames and Mersey Marine Insurance Company* (17 Q. B. Div. 195) is distinguishable on the special wording of the policy in that case. (*a*) Damage by a stowaway would not be a sea peril, though it caused an incursion of sea-water. Where a ship was strained by lying on a mud-bank in the ordinary course of navigation, it was held that there was no remedy on a policy, as it was loss by ordinary wear and tear:

Magnus v. *Buttemer*, 11 C. B. 876. See Arnould, 6th edit. 755.

It is not the mere incursion of sea-water, or the fact of damage to a ship at sea which constitutes the liability. It must be shown that the damage arises from a "peril of the sea," a fortuitous or accidental thing:

The Chasca, 32 L. T. Rep. N. S. 838; 2 Asp. Mar. Law Cas. 600; L. Rep. 4 A. & E. 446;
Cullen v. *Butler*, 5 M. & S. 461;
Taylor v. *Curtis*, 6 Taunt. 608.

This case does not differ from that of a passenger who leaves the cock turned on in the bath-room, and allows the water to overflow. The rats were not a peril of the sea, though they were on the sea. Some bills of lading contain an express exception of damage by rats, and the House is asked to introduce the clause into this bill of lading. [The LORD CHANCELLOR referred to *Steel* v. *State Line Steamship Company*, 37 L. T. Rep. N. S. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72.] It is not a peril of the sea if the loss arises from the sea in its ordinary state in the ordinary course of navigation, such as a ship foundering in calm weather from a latent defect. A peril is what may, not what must, happen:

Fletcher v. *Inglis*, 2 B. & Ald. 315;
1 Phillips on Insurance, 6th edit. p. 678, s. 1132.

Bigham, Q.C. in reply.—An accident which cannot be attributed to any act of man, wilful or negligent, is an accident of the sea, as it would not produce damage if the sea was not there. The damage is from the sea-water getting in from nobody's fault: (see Arnould, 748.)

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 14.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case the admissions made at the trial reduce the question to this—whether in a seaworthy ship the gnawing by rats of some part of the ship so as to cause sea-water to come in and cause damage is a danger and accident of the sea. That this happened without any negligence of the shipowner is material in determining the rights of the parties in this particular case, but in my judgment has no relevancy to the question whether the facts, as I have stated them, constituted a danger or accident of the seas. With all respect to Bowen and Fry, L.JJ., they have not accepted the hypothesis of fact which the admissions at the trial render essential. It is admitted that the ship was seaworthy, and that there was no negligence, and these admissions are absolutely inconsistent with the reasoning of the Lords Justices, which suggests important difficulties in deciding those questions of fact to which I have referred, but seems beside the question if these facts are proved or admitted, as I think it is clear they were. The other question with which the Master of the Rolls dealt is one which must be determined upon the ordinary rules of construction, whatever the document is the meaning of which is under debate; and it must be admitted that words may receive a limited meaning by reason of the other words with which they are associated, or by reason of the subject-matter with which they deal, or by reason of the mode in which they are commonly used. It is clear that the parties do not mean by such an instrument as we are construing to except all accidents of any kind or description whatsoever which may happen during the particular voyage which both parties are looking forward to. Some effect must be given to the words "perils of the sea." A rat eating a cheese in the hold of a vessel is not a peril of the sea; the sea, or the vessel being on the sea, has nothing to do with the destruction of the cheese. This was the decision of the Court of Exchequer in *Laveroni* v. *Drury* (8 Ex. 166; 22 L. J. 2, Ex.). In the *Law Journal* report of that case Pollock, C.B. and Alderson, B. distinctly point out, after the judgment of the court had been given, that the decision at which the court had arrived did not touch the question of whether the sea being let in by a hole made by a rat was an accident or danger of the sea. One of the dangers which both parties to the contract would have in their mind would, I think, be the possibility of the water getting into the vessel from the sea upon which the vessel was to sail in accomplishing her voyage—it would not necessarily be by a storm; the parties have not so limited the language of their contract—it might be by striking on a rock, or by excessive heat, so as to open some of the upper timbers; these and many more contingencies that might be suggested would let the sea in; but what the parties, I think, contemplated was that if any accident (not wear and tear, or natural decay) should do damage by letting the sea into the vessel, that that should be one of the things contemplated by

(*a*) The decision has since been reversed by the House of Lords (57 L. T. Rep. N. S. 695; 6 Asp. Mar. Law Cas. 200; 12 App. Cas. 484).

the contract. A subtle analysis of all the events which lead up to and in that sense cause a thing may doubtless remove the first link in the chain so far that neither the law nor the ordinary business of mankind can permit it to be treated as a cause affecting the legal right of the parties to a suit. In this case the existence of the rats on board, their thirst, the hardness of their teeth, the law of gravitation, which caused the water to descend upon the rice, the ship being afloat, the pipe being lead, and its capacity of being gnawed —each of these may be represented as the cause of the water entering; but I do not assent to the view that this contract can have a different meaning attached to it according as you regard each step in the chain of events as the origin out of which the damage ultimately arises.

In the class of contract where the shipowner's negligence or misconduct prevents perils of the sea being relied upon, it is not that perils of the sea are different, or that the words ought to have a different meaning attached to them, but because in those cases an additional term exists in the contract, which makes the negligence of the shipowner, or of those for whom he is responsible, a material element; but it is also necessary to give effect to the words "dangers and accidents of the seas." Now, cases have been brought to your Lordships' attention in which the decision has turned, not, I think, upon the question of whether it was a sea peril or accident, but whether it was an accident at all. I think the idea of something fortuitous and unexpected is involved in both words, peril or accident; you could not speak of the danger of a ship's decay; you would know that it must decay; and the destruction of the ship's bottom by vermin is assumed to be one of the natural and certain effects of an unprotected wooden vessel sailing through certain seas. One ought, if it is possible, to give effect to all the words that the parties have used to express what this bargain is, and I think in this case it was a danger, accident, or peril, in the contemplation of both parties, that the sea might get in and spoil the rice. I cannot think it was less such a peril or accident because the hole through which the sea came was made by vermin from within the vessel, and not by a sword-fish from without—the sea-water did get in. I am therefore of opinion that the judgment should be reversed, and I move your Lordships accordingly.

Lord WATSON.—My Lords: The respondents sue for damages in respect of injury sustained, during transit, by a cargo of rice, which was carried in the appellants' steamship *Inchrhona* from Akyab to Bremen. The appellants plead, in defence, that the injury was occasioned by a danger or accident of the sea, within the meaning of the exception in the charter-party and bills of lading, which are in the usual terms. In point of fact, the rice was damaged by sea-water, which found its way into the hold of the *Inchrhona* through a hole gnawed by a rat in a leaden pipe connected with the bath-room of the vessel. If the respondents were preferring a claim under a contract of marine insurance, expressed in ordinary terms, I should be clearly of opinion that they were entitled to recover, on the ground that their loss was occasioned by a peril of the sea within the meaning of the contract. When a cargo of rice is directly injured by rats or by the crew of the vessel, the sea has no share in producing the damage, which in that case is wholly due to a risk not peculiar to the sea, but incidental to the keeping of that class of goods, whether on shore or on board of a voyaging ship. But in the case where rats make a hole, or where one of the crew leaves a porthole open, through which the sea enters and injures the cargo, the sea is the immediate cause of mischief, and it would afford no answer to the claim of the insured to say that, had ordinary precaution been taken to keep down vermin, or had careful hands been employed, the sea would not have been admitted, and there would have been no consequent damage. Your Lordships have now disapproved of the novel doctrine that, in a contract of sea carriage, a meaning must be attached to the expression "dangers and accidents of the seas," different from that which it bears in a contract insuring cargo against sea risks; (*a*) that, in the case of a charter-party or bill of lading, the court ought to look to what has been termed the remote, as distinguished from the proximate, cause of damage, whereas, in the case of a policy, the proximate cause can alone be regarded. The expression has precisely the same significance in both cases; but there is this difference between them: that when a shipowner, who is bound, by the implied terms of his contract, to carry with ordinary care, claims the benefit of the exception, the court will, if necessary, go behind the proximate cause of damage, for the purpose of ascertaining whether that cause was brought into operation by the negligent act or default of the shipowner or of those for whom he is responsible. As Lord Blackburn said in *Steel* v. *State Line Steamship Company* (37 L. T. Rep. N. S. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72): "Although the things perished by a peril of the sea, still, inasmuch as it was the negligence of the shipowner and his servants that led to it, they cannot avail themselves of the exception." I am of opinion that the appellants must prevail, because it has not been shown that the peril which was the immediate and efficient cause of damage owed its existence to their negligence. In the course of the trial before Lopes, L.J. it does appear to have been, at one time, suggested that the appellants' servants failed to exercise due diligence in extirpating the rats, and also that the bath-room pipe ought not to have been of lead, but of some other material which a rat could not or would not gnaw. Neither of these points was submitted to the jury, who negatived the only charge of negligence which was ultimately insisted on by the respondents. I accordingly concur in the judgment which has been moved.

Lord BRAMWELL.—My Lords: I am of opinion that this judgment must be reversed. This is the third case in which this House has had to consider whether a peril of the sea or other peril within the general words was shown. The arguments and discussions in all three have been very useful in helping to a conclusion. As I have said elsewhere, I think the definition of Lopes, L.J. very good—"It is a sea damage occurring at sea, and nobody's fault." What is the "peril?" It

(*a*) In *Wilson and Co.* v. *Owners of the Cargo of the Xantho* (*ubi sup.*) decided immediately before the present case.

is that the ship or goods will be lost or damaged; but it must be "of the sea." "Fire" would not be a peril of the sea; so loss or damage from it would not be insured against by the general words. So of lightning. In the present case the sea has damaged the goods. That it might do so was a peril that the ship encountered. It is true that rats made the hole through which the water got in; and if the question were whether rats making a hole was a peril of the sea, I should say certainly not. If we could suppose that no water got in, but that the assured sued the underwriter for the damage done to the pipe, I should say clearly that he could not recover. But I should equally say that the underwriters on goods would be liable for the damage shown in this case. Then I am of opinion that "perils of the seas" is a phrase having the same meaning in bills of lading and charter-parties as in policies of insurance. I repeat my illustration; if underwriters paid this loss as through a peril of the sea, how would they, in the name of the assured, claim from the shipowner, because it was not a peril of the sea. I do not go through the cases; I say there is none opposed to this opinion. The doubt or hesitation expressed in the case where the ship was sunk by being fired into is certainly a doubt the other way, but only a doubt: (*Cullen* v. *Butler*, 5 M. & S. 461.) An attempt was made to show that a peril of the sea meant a peril of what I feel inclined to call the sea's behaviour or ill-condition. But that is met by the argument that if so striking on a sunken rock on a calm day, or against an iceberg, and consequent foundering, is not a peril of the sea or its consequence. No question of negligence exists in this case. The damage was caused by the sea in the course of navigation with no default in anyone. I am therefore of opinion that the damage was caused by peril of the sea within the meaning of the bill of lading, that Lopes, L.J. was right, and that the judgment must be reversed.

Lord FITZGERALD.—My Lords: The damage to a portion of the cargo of rice carried by the defendants' ship was not occasioned either remotely or immediately by any negligence of the defendants, as alleged in the statement of claim, but they may nevertheless be liable, and the real question is, whether the defendants have established that it arose from a peril of the sea coming within the exception contained in the charter-party and in the bill of lading. I agree with Lord Watson that the exception, "peril of the sea," has the same meaning whether it occurs in a marine policy or in a charter-party, or bill of lading, and is to be so interpreted, but that when the action is on the contract of carriage you may look behind the proximate or immediate cause for the purpose of ascertaining whether the remote cause may not have been the negligence of the carrier, and indeed the carrier is usually under the necessity of establishing that no negligence of his had led to the calamity. Thus, for instance, if a ship is cast on the rocks by force of the winds or sea, that is a loss by a peril of the sea within the exception; but in an action against the carrier it would be open to consider whether the ship, being placed in that position, did not originate in negligent navigation. At the close of the argument I was slightly inclined to the opinion that the loss in question might be more accurately described as arising from a peril of the ship than caused by a peril of the sea; but on consideration of the very careful and elaborate judgments in the Court of Appeal, and the authorities referred to, and looking at the reason of the thing, I have come to a conclusion in accord with that announced by my noble and learned friends, adopting the reasons and the decision of Lopes, L.J. The accident was fortuitous, unforeseen, and actually unknown until the ship had reached her destination and commenced unloading. I do not, however, mean to suggest that to constitute a peril of the sea the accident or calamity should have been of an unforeseen character. The remote cause was in a certain sense the action of the rats on the lead pipe, but the immediate cause of the damage was the irruption of sea-water from time to time through the injured pipe, caused by the rolling of the ship as she proceeded on her voyage. There having been no negligence on the part of the defendants, I am of opinion that they have brought the case within the exception, and are protected.

Lord HERSCHELL. — My Lords: I have so recently expressed, in the case of *Wilson and Co.* v. *The Owners of the Cargo of the Xantho*, my views upon the interpretation to be put upon the words "dangers and accidents of the seas" occurring in a bill of lading, that I need trouble your Lordships with but few observations in this case. I take the facts to be that the damage occurred by the sea entering through a leak caused by rats, without any neglect or default on the part of the shipowner or those for whom he was responsible, and that this was not an ordinary incident of the voyage which he was bound to anticipate. In saying so, I am differing from the ground upon which two of the learned judges in the Court of Appeal (Bowen and Fry, L.JJ.) based their judgment. But when those learned judges say that "it was consistent with the findings that the mischief done to the pipe and the incursion of sea-water which followed would never have happened but for either a defect in the condition of the ship or some want of prudence in the shipowner," I think they overlook the course which the case took at the trial. It was suggested during the trial, by the learned counsel for the plaintiffs, that due care had not been taken to exclude or exterminate the rats, and that if the pipe had been made of some other material the accident would not have happened. But I think these points were distinctly and unequivocally abandoned by him. If intended to be insisted upon, they raised questions upon which the opinion of the jury ought to have been taken, and, with the assent of the plaintiffs' counsel, the only questions put were upon a totally different point. The Master of the Rolls rested his judgment altogether upon another ground. He considered that the rats were the real cause of the damage, and that it was therefore not due to a danger or accident of the seas. I quite concur with the view expressed in *Laveroni* v. *Drury* (8 Ex. 166; 22 L. J. 2 Ex.), that injury done to a vessel or its cargo by rats, is not damage by perils of the sea. But in that very case Pollock, C.B. said: "If indeed the rats had made a hole in the ship through which water came and damaged the cargo, that might very likely be a case of sea

damage." The Master of the Rolls says that the distinction is a very fine one between damage done by rats, which, it may be, so eat into the timbers of a ship as to render it unfit to proceed to sea, and the loss of the vessel owing to the incursion of water when its sides have been completely penetrated by the same cause. I own I think the distinction a substantial one, and it seems to me obvious that Pollock, C.B. shared this view. It has been held in the United States in the case of *Garrigues* v. *Coxe* (1 Binney Pennsylvania Rep. 592) that a leak occasioned by the eating of rats, without negligence on the part of the shipowner, was a risk covered in a marine policy by the words "perils of the seas." Taking the facts of this case to be as I have stated them, I entertain no doubt that the loss was one which would in this country be recoverable under a marine policy, as due to a peril of the sea. It arose directly from the action of the sea. It was not due to wear and tear, nor to the operation of any cause ordinarily incidental to the voyage, and therefore to be anticipated. And, inasmuch as it was not the result of any act or default on the part of the shipowner or his crew, I think, for the reasons I have given in my opinion in the case already alluded to, that it is within the exception in the bill of lading. I accordingly concur in the motion which has been made.

Lord MACNAGHTEN.—My Lords: I agree. The goods which were carried under the bill of lading were damaged during the voyage by the incursion of sea-water. The water came in through a hole gnawed by rats in a pipe connecting the bath-room with the sea. At the trial various charges and suggestions were made of negligence on the part of the shipowner; but they were all either withdrawn or negatived by the jury. Under these circumstances it seems to me, that the accident which caused the damage was one of the excepted perils or accidents, and there was no reason why the shipowner should not avail himself of the exception. It was an accidental and unforeseen incursion of the sea that could not have been guarded against by the exercise of reasonable care. I agree, therefore, with the judgment of Lopes, L.J. I do not think the case could be summed up better than it was by him in the words which have already been quoted, "Sea damage occurring at sea and nobody's fault." I concur in the motion which has been made.

Order appealed from reversed; order of Lopes, L.J. restored; the respondents to pay to the appellants the costs in both courts below and of the appeal to this House; cause remitted to the Queen's Bench Division.

Solicitors for appellants, *W. A. Crump* and *Son.*

Solicitors for respondents, *Hollams, Son,* and *Coward.*

April 28, 29, *and Aug.* 9, 1887.

(Before the LORD CHANCELLOR (Halsbury), Lords WATSON, FITZGERALD, and MACNAGHTEN.)

BLACKBURN, LOW, AND CO. *v.* VIGORS. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance — Principal and agent — Concealment of material fact by agent.

A policy of marine insurance is not vitiated by the concealment of a material fact by a broker employed by the assured to effect an assurance on the subject-matter, if he be not the broker through whom the assurance is ultimately effected; provided that there is no fraud or concealment on the part of the assured of facts which have come to his knowledge.

Judgment of the court below reversed.

Gladstone *v.* King (1 *M. & S.* 35) *discussed.*

THIS was an appeal from a judgment of the majority of the Court of Appeal (Lindley and Lopes, L.JJ.), Lord Esher, M.R. dissenting), reported in 54 L. T. Rep. N. S. 852; 5 Asp. Mar. Law Cas. 597; and 17 Q. B. Div. 553, reversing a judgment of Day, J. in favour of the plaintiffs, the present appellants. It appeared that the appellants carried on business at Glasgow as underwriters and insurance brokers, and that they had insured a steamship called the *State of Florida* for 1500*l.* from New York to Glasgow. The ship left New York on the 11th April 1884, and was due in ordinary course at Glasgow on or about the 25th April. On the 30th April, the ship being four or five days overdue, the appellants instructed their London brokers, Roxburgh, Currie, and Co., to reinsure the ship to the extent of 1000*l.*, at or not exceeding ten guineas. These brokers answered the same day that the insurance could not be done under twenty guineas, to which the appellants replied, "Not disposed to pay." On the next day the plaintiffs asked Rose, Murison, and Thomson to effect the re-insurance. Before receiving any answer information that the ship was reported to be lost had been brought to Liverpool, and this information reached the ears of Murison, but the fact was never communicated to the plaintiffs, or to Roxburgh, Currie, and Co. The negotiations with Rose, Murison, and Thomson having fallen through, the plaintiffs instructed Roxburgh, Currie, and Co. to insure, and the result was that the policy "lost or not lost," now sued upon, was effected. The question was, whether the appellants were entitled to recover upon the policy after the information as to the loss of their ship had reached their brokers.

The facts are set out in greater detail in the judgments of Lord Esher, M.R. and Lindley, L.J. in the court below.

Sir *C. Russell,* Q.C. and *Hollams* appeared for the appellants, and argued that Murison, the person who received the information that the *State of Florida* was probably lost, was not in fact the agent through whom the insurance was effected. He was neither the habitual agent of the appellants in relation to the subject-matter, nor their agent in this special instance. There is no authority for saying that an innocent non-communication of material facts avoids a policy except in the case of the agent who actually

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

effects the insurance. The authority given to Murison was determined before the policy was effected. They cited

Fitzherbert v. *Mather*, 1 T. R. 12;
Gladstone v. *King*, 1 M. & S. 35;
Proudfoot v. *Montefiore*, 16 L. T. Rep. N. S. 585; 2 Mar. Law Cas. O.S. 572; L. Rep. 2 Q. B. 511;
Stribley v. *Imperial Marine Insurance Company*, 34 L. T. Rep. N. S. 281; 3 Asp. Mar. Cas. 134; 1 Q. B. Div. 507;
Ruggles v. *General Insurance Company*, 4 Mason, 74, per Story, J.;
Phillips on Insurance, sects. 531, 543, 562, 564;
2 Duer on Marine Insurance, p. 415.

The *Attorney-General* (Sir R. Webster, Q.C.) and *Barnes*, for the respondent, contended that the relation of principal and agent existed with reference to the subject-matter, and the agent continued to act after he had received the information, and, as long as he was acting, he was bound to communicate what he knew. The broker had the information before the insurance was effected, and while the relation of principal and agent still existed, and that is not affected by the ultimate result of the negotiations: (see 2 Duer, p. 380.)

Hollams was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Aug. 9.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case the plaintiffs sue upon a policy of marine insurance, and the only question arises upon the statement of defence that the defendant was induced to enter into the contract by concealment of material facts by the plaintiffs and their agents. The facts are not in dispute. Neither the plaintiffs nor the agent through whom the policy was effected had any knowledge of the material fact the concealment or non-disclosure of which is relied on as vitiating the policy; but an agent who did not effect the policy at an earlier period received information, admitted to be material while he was acting as agent to effect an insurance for the plaintiffs, which he did not communicate. Day, J., before whom the case was decided without a jury, held that this did not affect the validity of the policy. A majority of the Court of Appeal reversed Day, J.'s judgment, and held that the non-disclosure was fatal to the plaintiffs' claim. So far as I understand the judgment of the Court of Appeal, it is intended to lay down a principle that would not, I think, be contested, but it applies that principle to a state of facts to which I think it is inapplicable. Lindley, L.J. says, I think correctly, "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." And Lopes, L.J., after stating the principle upon which the knowledge of the agent is the knowledge of the principal, explains it 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. To the propositions thus stated I think no objection could be made; but it is obvious that the words in the one judgment, "agent employed to obtain the insurance," or in the other judgment the words "the underwriter," import that the particular contract obtained was, in the language of the statement of defence, a policy which the defendant was induced to subscribe by the wrongful concealment by the plaintiffs and their agents of certain facts then known to the plaintiffs or their agents, and unknown to the defendant, which were material to the risk. I doubt very much whether the solution of the controversy as to what is the true principle upon which the contract of insurance is avoided by concealment or misrepresentation, whether by considering it fraudulent or as an implied term of the contract, helps one very much in deciding the present case.

If one were to adopt in terms the language of Lord Ellenborough, C.J. in *Gladstone* v. *King* (1 M. & S. 35) I do not think it could justify the judgment of the majority of the Court of Appeal. In that case a policy lost or not lost was effected on the 25th Oct. On the previous 25th July the ship had run upon a rock. On the 5th Aug. the captain wrote to his owners, the plaintiffs; they received his letter on the 25th Oct. Whatever may be said of the logic of that case, which acquitted the captain of all ill intention, but decided upon the ground that otherwise owners might direct their captains to remain silent, and which upon a policy lost or not lost assumes any antecedent damage to have been an implied exception out of the policy, it does not proceed upon any such ground as the Court of Appeal appear to rely on here. Lord Ellenborough says: "No mischief will issue" (a somewhat strange mode of enunciating a proposition of law) "from holding in this case that the antecedent damage was an implied exception out of the policy. If the principle be new, it is consistent with justice and convenience." Unfortunately his Lordship does not state what is the principle which he apparently admits to be new. I can quite understand that when a man comes for an insurance upon his ship he may be expected to know both the then condition and the history of the ship he seeks to insure. If he takes means not to know, so as to be able to make contracts of insurance without the responsibility of knowledge, this is fraud. But even without fraud, such as I think this would be, the owner of the ship cannot escape the necessity of being acquainted with the ship and its history because he has committed to others,—his captain, or his general agent for the management of his shipping business—the knowledge which the underwriter has a right to assume the owner possesses when he comes to insure his ship. With respect to agency so limited, I am not disposed to differ with the proposition laid down by Cockburn, C.J. in *Proudfoot* v. *Montefiore* (16 L. T. Rep. N. S. 585; 2 Mar. Law Cas. O. S. 572; L. Rep. 2 Q. B. 511). A part of the proposition is, "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, or in the ordinary course of business ought to have, knowledge." I think the last are the cardinal words, and contemplate such an agency as I have described above. I am unable, however, to see that the present case is

governed by any such principle. A broker is employed to effect a particular insurance; while so employed he receives material information; he does not effect the insurance, and he does not communicate the information. How is it possible to suggest that the assured could rely upon the communication to the principal of every piece of information acquired by any agent through whom the assured has unsuccessfully endeavoured to procure an assurance? I am unable to accept the criticism by the Master of the Rolls upon the proposition that the knowledge of the agent is the knowledge of the principal. When a person is the agent to know, his knowledge does bind the principal. But in this case I think the agency of the broker had ceased before the policy sued upon was effected. The principal himself, and the broker through whom the policy sued on was effected, were both admitted to be unacquainted with any material fact which was not disclosed. I cannot but think that the somewhat vague use of the word "agent" leads to confusion. Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal. Other agents may have so limited and narrow an authority both in fact and in the common understanding of their form of employment that it would be quite inaccurate to say that such an agent's knowledge or intentions are the knowledge or intentions of his principal; and whether his acts are the acts of his principal depends upon the specific authority he has received. In *Fitzherbert* v. *Mather* (1 T. R. 12) the consignor and shipper of the goods insured was the agent whose knowledge was in question; in *Gladstone* v. *King* (*ubi sup.*) the master of the ship was the agent; and in *Proudfoot* v. *Montefiore* (*ubi sup.*) the agent was the accepted representative of the principal, in effect trading and acting for him, in Smyrna, the owner himself carrying on business in Manchester. And though the decision in *Ruggles* v. *The General Insurance Company* (4 Mason, 74), before the Supreme Court of the United States, may not be very satisfactory in what they held under the circumstances of that case to be the relation between the captain of the ship and his owners, the principle upon which that case was decided was the supposed termination of the agency between them. Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is I think correct; but it is obvious that that formula can only be applied when the words "agent" and "principal" are limited in their application. To lay down as an abstract proposition of law that every agent, no matter how limited the scope of his agency, would bind every principal even by his acts, is obviously and upon the face of it absurd; and yet it is by the fallacious use of the word "agent" that plausibility is given to reasoning which requires the assumption of some such proposition. What then is the position of the broker in this case whose knowledge, though not communicated, is held to be that of the principal? He certainly is not employed to acquire such knowledge, nor can any insurer suppose that he has knowledge in the ordinary course of employment like the captain of a ship, or the owner himself, as to the condition or history of the ship. In this particular case the knowledge was acquired, not because he was the agent of the assured, but from the accident that he was general agent for another person. The reason why, if he had effected the insurance, his knowledge, unless he communicated it, would have been fatal to the policy, is because his agency was to effect an insurance, and the authority to make the contract drew with it all the necessary powers and responsibilities which are involved in such an employment; but he had no general agency—he had no other authority than the authority to make the particular contract, and his authority ended before the contract sued on was made. When it was made no relation between him and the shipowner existed which made or continued him an agent for whose knowledge his former principal was responsible. There was no material fact known to any agent which was not disclosed, at the point of time at which the contract was made; there was no one possessed of knowledge whose duty it was to communicate such knowledge. For these reasons I am of opinion that the judgment of the Court of Appeal should be reversed, and the judgment of Day, J. restored; and I move your Lordships accordingly.

Lord WATSON.—My Lords: This is a case of considerable nicety; but I have ultimately come to the conclusion, for the reasons already stated by the Lord Chancellor, that the appeal ought to be allowed. It is, in my opinion, a condition precedent of every contract of marine insurance, that the insured shall make a full disclosure of all facts materially affecting the risk which are within his personal knowledge at the time when the contract is made. Where an insurance is effected through the medium of an agent the ordinary rule of law applies, and non-disclosure of material facts, known to the agent only, will affect his principal, and give the insurer good ground for avoiding the contract. In the case of insurances by a shipowner it has been decided that he is affected by the knowledge of a class of agents other than those whom he employs to insure. In the ordinary course of business, the owner of a trading vessel employs a master, and ship agents, whose special function it is to keep their employer duly informed of all casualties encountered by his ship which would materially influence the judgment of an insurer. On that ground it has been ruled that the insurer must be held to have transacted in reliance upon the well-known usage of the shipping trade, and that he is consequently entitled to assume that every circumstance material to the risk insured has been communicated to him, which ought in due course to have been made known to the shipowner before the insurance was effected. Accordingly, if a master or ship agent, whether wilfully or unintentionally, fail in their duty to their employer, their suppression of a material fact will, notwithstanding his ignorance of the fact, vitiate his contract. I do not think it necessary to notice in detail the authorities which bear upon this point. I desire to say, however, that I have difficulty in comprehending the principle upon which the court in *Gladstone* v. *King* (1 M. & S. 35) and *Stribley* v. *The Imperial Marine Insurance Company* (34 L. T. Rep. N. S. 281; 3 Asp. Mar. Law Cas. 134; 1 Q. B. Div. 507) held that

the innocent non-communication of a material fact, by an agent who was the *alter ego* of the shipowner, merely created an exception from the policy. In both these cases the court appears to me to have undertaken the somewhat perilous task of settling the terms of the contract, which the insurer would have made for himself if the fact had been communicated to him.

In the present case it is sought to extend the imputed knowledge of the insured to all facts which, during the period of his employment, became known to any agent, other than the agent effecting the policy in question, who was employed at any time, successfully or unsuccessfully, to insure the whole or part of the same risk with that covered by the policy. This is a case of re-insurance; but it is obvious that the principle, if admitted, would be equally applicable to the original contract. I am of opinion, with your Lordships, that the responsibility of an innocent insured, for the non-communication of facts which happen to be within the private knowledge of persons whom he merely employs to obtain an insurance upon a particular risk, ought not to be carried beyond the person who actually makes the contract on his behalf. There is no authority whatever for enlarging his responsibility beyond that limit, unless it is to be found in the decisions which relate to captains and ship agents; and these do not appear to me to have any analogy to the case of agents employed to effect a policy. There is a material difference in the relations of these two classes of agents to their employer. The one class is specially employed for the purpose of communicating to him the very facts which the law requires him to divulge to his insurer; the other is employed, not to procure or give information concerning the ship, but to effect an insurance. There is also, as the Master of the Rolls pointed out, an important difference in the positions of those two classes with respect to the insurer. He is entitled to contract, and does contract, on the basis that all material facts connected with the vessel insured, known to the agent employed for that purpose, have been by him communicated in due course to his principal. So also, when an agent to insure is brought into contact with an insurer, the latter transacts on the footing that the agent has disclosed every material circumstance within his personal knowledge; but it cannot be reasonably suggested that the insurer relies, to any extent, upon the private information possessed by persons of whose existence he presumably knows nothing. In the circumstances of this case I have come to the conclusion that, whilst it might be the moral duty of Mr. Murison to communicate to the appellants the information which he received on the forenoon of the 1st May 1884, he was under no legal obligation to do so. There may be circumstances which impose upon agents in the position of Mr. Murison an express or implied duty to communicate their own information to their principal; but nothing of that sort occurs here. I must, in fairness to Mr. Murison, say that I can find no warrant for the inference of fact drawn by Lindley, L.J., that he purposely omitted to impart his knowledge to the appellants, in order that they might re-insure on more favourable terms. No such imputation was made at the trial; and, if it had been made, it ought to have been submitted to the jury, and their verdict taken upon it. I concur, therefore, in the judgment which has been moved.

Lord FITZGERALD.—My Lords: In this very interesting case I concur in the order which will presently be proposed by the Lord Chancellor. I adopt entirely the reasons which have been given by the Lord Chancellor and by Lord Watson. The judgment delivered by Lord Esher, M.R. was one of more than usual ability; it was a considered judgment, prepared with care and upon a critical examination of the authorities; and I am prepared to adopt that judgment, and substantially the reasons given by the noble and learned Lord for the conclusion at which he arrived, though not every portion of those reasons.

Lord MACNAGHTEN.—My Lords: I agree. It has frequently been said by great judges that the doctrine of constructive notice ought not to be extended. It seems to me that the decision under appeal involves a great and a dangerous extension of that doctrine. There is nothing unreasonable in imputing to a shipowner who effects an insurance on his vessel all the information with regard to his own property which the agent, to whom the management of that property is committed, possessed at the time and might in the ordinary course of things have communicated to his employer. In such a case it may be said without impropriety that the knowledge of the agent is the knowledge of the principal. But the case is different when the agent whose knowledge it is sought to impute to the principal is not the agent to whom the principal looks for information, but an agent employed for the special purpose of effecting the insurance. It is quite true that the insurance would be vitiated by concealment on the part of such an agent just as it would be by concealment on the part of the principal. But that is not because the knowledge of the agent is to be imputed to the principal, but because the agent of the assured is bound as the principal is bound to communicate to the underwriters all material facts within his knowledge. Concealment of those facts is a breach of duty on his part to those with whom his principal has placed him in communication: (*Lynch* v. *Dunsford*, 14 East 494.) It was said that in the present case Murison was under a legal obligation to communicate to the appellants the knowledge which he acquired while employed as their agent. But the learned counsel for the respondent produced no authority for that proposition, nor did they, I think, satisfy your Lordships that such a legal obligation flowed from Murison's employment. The majority of the Court of Appeal say that, whether there was a legal obligation on the part of Murison or not, there was a moral obligation on his part to communicate this information to his employers. But I apprehend that it is not the function of a court of justice to enforce or give effect to moral obligations which do not carry with them legal or equitable rights. Whatever may be thought of Murison's conduct from a moral point of view, it would, in my opinion, be a dangerous extension of the doctrine of constructive notice to hold that persons who are themselves absolutely innocent of any concealment or misrepresentation, and who have not wilfully shut their eyes or closed their ears to any means of information, are to be affected with the

knowledge of matters which other persons may be morally, though not legally, bound to communicate to them.

Order appealed from reversed; judgment of Day, J. restored; respondent to pay to the appellants the costs both here and below. Cause remitted to the Queen's Bench Division.

Solicitors for appellants, *Hollams, Son,* and *Coward.*

Solicitors for respondent, *Waltons, Bubb,* and *Johnson.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, July 1, 1887.

(Before Lord Esher, M.R., Lindley and Lopes, L.JJ., assisted by Nautical Assessors.)

The Star of Persia. (a)

ON APPEAL FROM BUTT, J.

Salvage—Amount—Appeal—Principles on which salvage is awarded.

The Court of Appeal will, in a salvage action, where it appears that the judge below has misapprehended the evidence, and consequently given a wrong award, increase or diminish the award as the justice of the case may require.

The barque S. of P., having taken up a foul berth in bad weather in the Downs, collided with another barque. The tug C. towed her clear after an hour's towing, during which time her anchor and chain were slipped. After she had been got clear the tug continued to tow ahead until another anchor had been brought off from the shore by other salvors, and she was ultimately saved. Her value and that of her cargo and freight amounted in all to 23,000*l.*

Butt, J., in a salvage action against the S. of P. having awarded 150*l., the Court of Appeal held that he had misapprehended the evidence as to the danger from which the S. of P. had been saved, and increased the award to* 300*l.*

This was an appeal by the plaintiffs in a salvage action from an award of Butt, J., given on the 15th Feb. 1887.

The action was instituted by the owners, masters, and crews of the steam-tug *Challenge* and the luggers *Albion* and *Sappho*, against the owners of the barque *Star of Persia*, her cargo and freight, to recover salvage for services rendered to the *Star of Persia* in the Straits of Dover on the 22nd and 23rd Dec. 1886.

The facts alleged by the plaintiffs were as follows: About noon, on Dec. 22, those on the *Challenge*, a tug of 137 tons register, sighted the *Star of Persia*, near Dungeness, coming up the Channel. The master of the *Challenge* having previously towed the *Star of Persia*, and thinking she might again require his services, followed her up the Channel. On coming up with her between 4 and 5 p.m. the master of the barque asked the tug to accompany him in case he should want to be towed to London. Owing, however, to the thickness of the weather the *Star of Persia* was lost sight of by those on board the tug. At about 7.30 p.m. on the same day, in answer to signals of distress, the lugger *Sappho* was launched at Deal, and with great risk and difficulty proceeded to the vessel exhibiting the signals, which proved to be the *Star of Persia*. Some of the crew of the lugger having boarded the *Star of Persia*, it was found that the *Star of Persia* was in collision with an Italian barque, the *Draguette*. The *Star of Persia* was riding to her port anchor and ninety fathoms of chain. The crew of the *Sappho* at once gave their assistance, and whilst so engaged the tug *Challenge* came up and was at once engaged to tow the *Star of Persia* clear. After an hour's towing, during which the anchor and chain of the *Star of Persia* were slipped, the *Star of Persia* was towed clear, and was then towed to a fair berth between Kingsdown and Deal, when her starboard anchor was let go. The tug, however, continued to tow ahead, as the master of the *Star of Persia* was unwilling to trust to one anchor in the then state of the weather. The *Sappho* was then sent ashore for a pilot, and on returning was again sent ashore for an anchor and chain, which was brought off by the lugger *Albion*. The tug continued to lie by the barque till 4 a.m. on the 24th, when the weather having moderated, the tug proceeded to tow the *Star of Persia*, under an ordinary towage agreement, to London, where they arrived in safety on Dec. 25.

The defendants admitted that the plaintiffs had rendered salvage services, but alleged that the same were exaggerated by the plaintiffs. They also alleged that, when the *Challenge* and *Sappho* came up after the collision, the *Star of Persia* was already clear of the barque and in no danger.

The value of the *Star of Persia* was 8000*l.*, and of her cargo and freight 15,442*l.*

Jan. 15.—Butt, J., having heard evidence, awarded 150*l.* His judgment, so far as is material, was as follows:—It does not appear with absolute clearness from the evidence whether the *Star of Persia* was already clear of the barque *Draguette* when the tug took hold of her. The Elder Brethren are disposed to think she was, but it appears to us evident enough that the *Draguette's* anchor holding—and there is no evidence whatever that it moved—the cutting of a rope or two and the paying out of cable by the *Star of Persia* would have taken her clear, as the captain said it did in fact take her clear. Therefore we do not think that there was any injury or any risk of serious injury at the time the tug took hold of her; but still she took her out of an uncomfortable position, and she was in attendance upon her for a considerable time. . . . . It is not asked that I should apportion the amount between these different salvors, and therefore I shall not do so. Having consulted the Elder Brethren I have come to the conclusion that, having regard to all the circumstances of the case, a fair award will be 150*l.*

From this award the plaintiffs now appealed.

July 6.—Sir *Walter Phillimore* and *Nelson* for the appellants.

Bucknill, Q.C. and Dr. *Raikes* for the respondents.

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

Lord Esher, M.R.—The rule has been correctly stated by Mr. Bucknill, that if this court cannot say that the learned judge has misapprehended the facts, or cannot say that he has acted contrary to any principle, then, if the amount does not seem to this court to be unreasonable, it cannot interfere. But these are divisible propositions, because, if the court can say, "In our opinion the learned judge has misapprehended the facts, either by considering facts which we think did not exist, or by overlooking facts which we think did exist, either of which is a misapprehension of facts," then the question whether the amount is reasonable or not hardly arises. If the learned judge, by leaving out material facts, comes to a conclusion, it is obvious that he, if he had taken those facts into consideration, would have given more or less. If he assumes or comes to the conclusion, for instance, that there was danger and fixes his award upon that basis, and then this court should be of opinion that he has misapprehended the evidence and that there was in fact no danger, it is obvious that we would give less than he did. Or, if the judge omits to take into consideration the question of danger which we think did exist, then we would give more than he did. How are those principles to be applied to the present case? I think myself that the learned judge here has considerably misapprehended the element of danger, and has underestimated the danger in which the *Star of Persia* was at the time the services of the tug were accepted. It has been suggested that the services of the tug were imposed and forced upon the defendants. In my opinion they were accepted. The captain of this ship had, when he came into the Downs, taken up an unfortunate position. He had taken up a foul berth with regard to an Italian barque. When the tide swung him the result was, that he came into collision with the barque. Mr. Bucknill has admitted that the defendants did wrong in taking up this berth. There was not only danger to the *Star of Persia* if she broke loose, but also of breaking the barque loose and thereby making her owners liable for all the damage that might ensue. I cannot think her position was merely uncomfortable, as the learned judge calls it. If she had slipped her anchor and there had been no tug there, what would have been her position? She would have been in the Downs with her anchor slipped and her sails furled, and it would have been difficult to bring her up with any certainty with the other anchor. Unless the other anchor was let go and held immediately, what would happen next? She ran great danger of setting the Italian vessel adrift, and then they both might have collided with other vessels. This I know not unfrequently happens in the Mersey. What was her captain's idea of his position? He burnt blue lights, which means, I want assistance and salvage assistance. He, in the witness-box, recognised the danger of his position, for, having said that he slipped his anchor, he continued, "Not only did I do that, but I did it for my safety, and I engaged the *Challenge* without agreement, not to tow me to London, but to a clear berth." Looking at the position of these two ships, I cannot help thinking that he came to the conclusion, and the right conclusion, that he required the assistance of the tug to take him into a position of safety. The tug took hold of the *Star of Persia* and towed her ahead, which was the best means of clearing her.

That the tug is entitled to some salvage is undisputed. The master of the *Star of Persia* kept the tug's rope on board all night, and it is not until he gets another anchor and chain on board that he throws off the tug's rope. The inference of any reasonable man is, that he did not think himself safe with one anchor, and that was the real reason why he kept the tug's rope on board. I think the learned judge has misapprehended the difficulties and dangers in which the ship and her cargo were, and what might have happened to her but for the arrival of the salvors, viz., the danger of becoming liable for damage to other vessels on the ground that she was the original sinner in taking up a foul berth on a stormy night. Therefore, I think the learned judge did not give full force to the element of danger or to the large value of the property saved, which is an element that must be taken into consideration. On these grounds I am of opinion that the amount of the award is too small, and we think the salvage should be 300*l.* instead of 150*l.*

Lindley, L.J.—I am of the same opinion. It is very difficult to differ from a judge on a mere question of salvage amount, but it appears to me, on consideration of the evidence, that Butt, J. has failed to realise the position in which this ship was. The position was, as a matter of fact, one of extreme difficulty and danger, and I do not think the learned judge has given sufficient attention to that fact. On that ground, and the other grounds to which the Master of the Rolls has alluded, it appears to me that we ought to say that this is a case in which the award is insufficient.

Lopes, L.J. concurred.

Appeal allowed.

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

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

July 6 *and* 7, 1887.

(Before Lord Esher, M.R., Lindley and Lopes, L.JJ., assisted by Nautical Assessors.)

The Banshee. (a)

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

Collision—Duty of overtaken vessel—Course—Regulations for Preventing Collisions at Sea, arts. 22, 23.

The Regulations for Preventing Collisions at Sea only apply at a time when two vessels have approached so near to one another that, if either of them does anything contrary to the Regulations, risk of collision will be involved.

Semble, that a vessel, which is being overtaken by another, is not to blame within art. 22 *of the Regulations if she alters her course at such a distance ahead of the overtaking vessel that the latter can, by the exercise of reasonable care, keep out of the way of the former.*

Quære, what is the duty of a vessel which is being overtaken as to keeping her course when it becomes necessary for her to manœuvre for another vessel.

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

This was an appeal by the plaintiffs in a collision action from a decision of Butt, J., finding their vessel the *Kildare* solely to blame for a collision with the defendants' steamship the *Banshee*.

The collision took place in Dublin Bay, about 8 p.m. on Jan. 27, 1886.

The facts alleged on behalf of the plaintiffs were as follows: Shortly before 8.10 p.m. on Jan. 27, 1886, the *Kildare*, a paddle-wheel steamship of 842 tons gross, owned by the City of Dublin Steam Packet Company, left the North Wall, in the river Liffey, with a general cargo and sixteen passengers bound for Liverpool. After the *Kildare* had passed the North Bar Buoy, at which time her course was S.E. by E., ½ E., and her engines were working full speed, those on board her saw on their starboard bow the flare-up light of a pilot cutter, and her engines were thereupon put half speed, and her helm was ported to enable her to pass under the stern of the pilot cutter. At the same time those on board saw the *Banshee* on their starboard quarter overhauling them rapidly. Subsequently the *Banshee* was seen to starboard her helm, thereby causing risk of collision, and although the helm of the *Kildare* was starboarded and her engines stopped, the *Banshee*, with her port quarter, struck the starboard bow of the *Kildare*.

The facts alleged on behalf of the defendants were as follows: Shortly before 8.5 p.m. the *Banshee*, a steamship of 246 tons, owned by the London and North-Western Railway Company, was proceeding down the Liffey on a voyage from Dublin to Holyhead. In these circumstances those on board the *Banshee* observed the *Kildare* preceding them down the river. The *Banshee* was shortly afterwards put on to a S.E. course to pass clear to the south of the *Kildare*. When the *Banshee* reached the South Bar Buoy her helm was starboarded half-point to clear a vessel whose light was slightly on the starboard bow. The *Banshee* continued this course, gradually bringing the *Kildare* abeam, when the *Kildare*, instead of keeping her course, came off to starboard and thereby brought about a collision, her stem striking the *Banshee* on her port side abreast the mainmast.

The defendants (*inter alia*) charged the plaintiffs with breach of art. 22 of the Regulations for Preventing Collisions at Sea, which is as follows:

> Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course.

At the trial before Butt, J., the learned judge held the *Kildare* solely to blame on the ground that she broke art. 22 in porting, and thereby throwing herself across the bows of the *Banshee*, and that she so ported without looking round to see where the *Banshee* was. The learned judge also found that at the last moment the *Banshee* starboarded—a manœuvre which in the circumstances was, in his opinion, imprudent but not negligent.

Sir *Walter Phillimore* and *Bucknill*, Q.C. (with them *Carson*), for the plaintiffs, in support of the appeal.—The *Banshee* was solely to blame for this collision. The learned judge was wrong in holding the *Kildare* to blame for porting when she did. Her porting was not a breach of art. 22 of the Regulations. Assuming art. 22 to have been applicable at the time when she ported, yet the circumstances were such that the porting would not be an infringement of the article. Where a vessel, which is being overtaken, has, in order to avoid a vessel in front of her, to manœuvre with her helm, she is nevertheless "keeping her course" within the meaning of the article. She is keeping her course so far as the existing circumstances will admit. In the same way a vessel which is beating up a river does not infringe art. 22 by going about when she gets near the bank:

> *The Priscilla*, 23 L. T. Rep. N. S. 566; L. Rep. 3 A. & E. 125; 3 Mar. Law Cas. O. S. 503.

Reliance is also placed upon art. 23, which provides for a departure from the Regulations where any special circumstances render a departure necessary in order to avoid immediate danger. Here it was absolutely necessary for the *Kildare* to port to avoid the pilot cutter. If it was a natural and reasonable manœuvre for the *Kildare* to port for the cutter, those on board the *Banshee* ought to have expected that manœuvre and acted accordingly. It is also contended that there was no breach of art. 22 because the *Kildare's* porting took place before the Regulations began to apply. The Regulations do not apply until the vessels are so close that departure from them may involve risk of collision. The starboarding of the *Banshee* was negligence for which she should be held solely to blame.

Kennedy, Q.C. and *J. P. Aspinall*, for the respondents, *contra*.—The decision of Butt, J. was correct. It is admitted that the *Kildare* was in fact being overtaken by the *Banshee*, and if so she was wrong in porting. On the evidence it is clear that the vessels were sufficiently near when the *Kildare* ported to make the Regulations applicable. The *Kildare* is not entitled to excuse her breach of the Regulations by saying she ported for the pilot cutter. It is not enough to say it was a reasonable manœuvre; the plaintiffs must go further and prove it was a necessary manœuvre before the court will excuse the breach. The *Kildare* might have stopped, by which manœuvre she would have both obeyed the regulation and avoided the pilot cutter. It is further contended that Butt, J. was right in exonerating the *Banshee* for starboarding.

Sir *Walter Phillimore* in reply.

Lord Esher, M.R.—This case arises out of a collision between two ships, the *Kildare* and the *Banshee*. The *Kildare* was the leading ship and the *Banshee* the overtaking ship, and at one time or another they were within the rules which are applicable to such navigation. Now at what period of time is it that the Regulations begin to apply to two ships? It cannot be said that they are applicable however far off the ships may be. Nobody could seriously contend that, if two ships are six miles apart, the Regulations for Preventing Collisions are applicable to them. They only apply at a time when, if either of them does anything contrary to the Regulations, it will cause danger of collision. None of the Regulations apply unless that period of time has arrived. It follows that anything done before the time arrives at which the Regulations apply is immaterial, because anything done before that time cannot produce risk of collision within the meaning of the Regulations. We therefore have to determine if anything was done by either of these vessels contrary to the Regulations at a

time when the Regulations were applicable. After the time when the Regulations become applicable, one of them clearly provides that the leading vessel is to keep her course. Now, a very important question has been raised as to what is the meaning of a vessel keeping her course; but on the present occasion it seems to me to be unnecessary to decide that matter. If what took place with regard to the *Kildare's* porting before this regulation as to keeping her course applied, the porting is immaterial. After the regulation applied she was bound to keep her course within the meaning of the regulation, and if after that time she never did alter her course, she has not been guilty of a breach of the Regulations. And if she has not been guilty of any breach of the Regulations it is obvious that the *Banshee* must be solely to blame, because it was her duty, if the *Kildare* was guilty of no breach of the Regulations, to keep out of her way. Therefore the first question is this: was the first porting of the *Kildare* at such a distance from the *Banshee* that it can be said that that porting was not within the Regulations. Now the evidence on the part of the defendants is, that when they starboarded the vessels were from 300 to 400 yards apart. They cannot give evidence as to the distance they were from the *Kildare* when she first ported. They could not see when she ported, and therefore can give no evidence as to it. Therefore the whole of the case as to what distance these two ships were apart when the *Kildare* first ported must rest upon the evidence of the *Kildare*. What is that evidence? It is not the evidence of sight, which would not be very valuable in this case. It is the evidence of time, and the time that is available on the point is the time in the engineer's log of the *Kildare*. Now, we take it that it was four minutes from the time when he was ordered to go half speed to the time of the collision. We infer from that that there were 800 yards between the two steamers at the time when the *Kildare* ported as she says she did, and we believe she did, on account of the pilot vessel. Whether, therefore, it was right for her to port and go under the stern of the pilot boat, or whether it would not have been better for her to have gone ahead of it, is wholly immaterial. Whatever she did then was before the Regulations began to apply. If so, it cannot be said that she has infringed the Regulations. If the Regulations had been applicable I should have thought that, when she was aware of a vessel coming up behind her, she had no right to break from her course without looking round to see where the other ship was at that time. I am clear upon this, that after the regulation is applicable she has a right to keep her course, whatever that may mean, without being bound to look round to see what the other vessel is doing. If she keeps her course the whole burden is thrown upon the overtaking ship.

Then comes the question, did the *Kildare* alter her course when the regulation was applicable? If she did so in the way described by the witnesses from the *Banshee* she behaved in a gross way. Their evidence is, that after they had come up alongside the *Kildare* and had taken a course which would have taken them clear of her without difficulty, she ported so as to come into them. All I can say is, I do not believe it. According to their evidence she must, with the other ship alongside of her and within a ship's length of her, have ported four or five points. I do not believe it, and therefore I assume it was not done, and I accept the evidence of those on the *Kildare* that she did nothing of the kind. If so, she did not alter her course during the time the rule was applicable. Butt, J., differing from his nautical assessors, came to the conclusion that she did port at that time. I think he did so from taking too strict a view of the variance between the statement of the *Kildare's* captain before the Receiver of Wreck and the evidence he gave in court. It seems to me that the learned judge's mind was unduly influenced with the fact that before the Receiver of Wreck the captain had said nothing about the *Banshee* starboarding into him. But I really think that, when he said, "she came up alongside me and shot across me," the meaning of that in sailor's language was, that she starboarded, and he did not mean that he ported into her. If my view be true the *Kildare* never broke the Regulations because she never did anything to take her off her course when the regulation was applicable. In that case the *Banshee* must be solely to blame. Butt, J. also came to another conclusion which I cannot accept. Even supposing the *Kildare* was wrong, what was the conduct of the *Banshee?* She comes up alongside the *Kildare*, and then, trusting to her superior speed, she starboards her helm for the purpose of going between the *Kildare* and the pilot boat. The learned judge said he could conceive nothing more rash than the conduct of the *Kildare;* but, if she did not port as is suggested, and the *Banshee* starboarded, I can conceive nothing more rash and unseamanlike than the conduct of the *Banshee*. In my opinion, even assuming the *Kildare* broke the Regulations, the *Banshee* did so also in attempting to get across the bows of the *Kildare*. I further do not believe that the *Kildare* ported at the last moment. I am therefore of opinion that the *Banshee* was solely to blame, and that the appeal must be allowed.

Lindley, L.J.—I cannot agree with the decision of Butt, J. finding the *Kildare* alone to blame. He has exonerated the *Banshee* from all fault, and has done that on a theory which is not supported by the evidence. It appears to me that the evidence shows that the *Banshee* was guilty of an amount of negligence which is somewhat startling. The doubt of my mind is in saying whether or not the *Kildare* is also to blame. I believe the evidence of the witnesses from the *Kildare* when they say that the *Kildare* ported in order to avoid a pilot cutter, and went half speed, and that it was four minutes from then to the time of collision, and I do not believe that she afterwards ported into the *Banshee*. My difficulty in connection with the overtaking rule is this, whether the porting of the *Kildare* was justifiable, having regard to the fact that the *Banshee* was behind her and overtaking her. If the *Banshee* was, when the *Kildare* ported, so far astern that with reasonable care she could by altering her course have kept out of her way, then the *Kildare* was not to blame. If, on the other hand, the *Banshee* was so near that she could not reasonably get out of the way when the *Kildare* altered her course, then the *Kildare* was to blame. I am somewhat struck with the fact that the master of the *Kildare* says he did not bother

himself to look round at the *Banshee*. But from the evidence I gather that at that time the *Banshee* was about 800 yards astern, and if that was so we are advised that there was ample time for the *Banshee* to have got out of the way of the *Kildare*. It therefore appears to me that we are justified upon the evidence in saying that the *Kildare* did not infringe the Regulations, while the fact that the *Banshee* was to blame seems to be too obvious to require argument.

LOPES, L.J.—A difficult and important question has been raised in this case as to the meaning of the provision in the Regulations that an overtaken vessel shall keep her course. It is, however, unnecessary in this case to express an opinion on the meaning of those words, because the evidence satisfies me that the *Kildare* did not alter her course after any of the Regulations became applicable, they only becoming applicable when there is danger of collision. In my opinion she ported before there was any danger, and therefore she is not brought within the Regulations. For these reasons I am satisfied that the *Banshee* was solely to blame.

Appeal dismissed.

Solicitors for the plaintiffs, *Carlisle, Unna,* and *Rider*.

Solicitor for the defendants, *C. H. Mason*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 26 *and Aug.* 9, 1887.

(Before the Right Hon. Sir JAMES HANNEN.)

STOCKKEBYE AND HVALSOE *v.* GORDON AND STAMP; THE GERTRUDE. (*a*)

Carriage of goods—Action for non-delivery—Admiralty Division—Measure of damages—Interest.

In an action brought in the Admiralty Division to recover unliquidated damages, the plaintiffs, if successful, are, in accordance with the practice of the Admiralty Division, entitled to interest on the amount recovered from the date of the loss on which their claim is based, even where the claim is one which, prior to the Judicature Acts, could not have been brought in the Admiralty Court.

THIS was a motion by the defendants in a damage to cargo action, asking the court to vary the registrar's report therein by directing that the plaintiffs were not entitled to recover interest against the defendants on the sum of 9800*l.*, as stated in the report and the schedule thereto.

The action was instituted *in personam* in the Admiralty Division by the owners of a cargo of corn against Messrs. Gordon and Stamp, the owners of the steamship *Gertrude*.

In the course of the voyage from New Orleans to Copenhagen the *Gertrude* and her cargo were lost, and the plaintiffs now claimed damages for the defendants' breach of the contract of carriage.

The defendants delivered a defence, but ultimately admitted liability, the amount of the damages to be assessed by the registrar and merchants.

At the reference the plaintiffs claimed the invoice value of the cargo, merchants' profit, and interest at 4 per cent. per annum from the date on which the bills given by the plaintiffs in payment for the cargo were met; and upon this basis the Registrar allowed 9800*l.* for value of cargo and merchants' profit, with interest, as claimed.

The defendants now moved to vary the report by having the interest disallowed.

J. G. Barnes, for the defendants, in support of the motion.—The plaintiffs are not entitled to interest from the date of the loss. This action is a purely common law action, and could not, before the Judicature Acts, have been brought in this division. It is therefore governed by the practice of the common law courts, and not by the practice of the Admiralty Court. If so, inasmuch as at common law this interest could not have been recovered, the registrar was wrong to allow it. The Judicature Acts were not intended to affect rights, but only procedure, and therefore, because a party has availed himself of the Judicature Act to bring a common law action in this division, the defendant should not be burdened with liabilities other than would attach in the common law courts. It is also contended that the Admiralty Court practice of allowing interest is confined to collision cases. Sect. 29 of 3 & 4 Will. 4, c. 42, shows that it requires a specific enactment to give juries power to allow interest in certain cases. This would seem to indicate that in all other cases of claims for unliquidated damages interest is not recoverable.

Sir *Walter Phillimore* (with him Dr. *Stubbs*), for the plaintiffs, *contra*.—The registrar, following the ordinary practice of this court, has rightly allowed interest. True, this is a class of action more commonly instituted in the common law courts, but after it was instituted here the defendants took no steps to remove it, and therefore they are bound by the practice of this division. It would be very undesirable that the registrar should, in each case, have to decide whether the Admiralty Court practice or the common law practice applied. Moreover the rule is a just and equitable one, and only affords the plaintiff a *restitutio in integrum*, which this court in the exercise of its equitable jurisdiction is always anxious to give:

The Northumbria, L. Rep. 3 A. & E. 6; 3 Mar. Law Cas. O. S. 314; 21 L. T. Rep. N. S. 681.

Barnes in reply.

Cur. adv. vult.

Aug. 9.—Sir JAMES HANNEN.—I was prepared to give judgment this morning on the court sitting in this case, but I deferred doing so until I had heard the arguments in *The Baron Aberdare* (*infra*, p. 225). I will first deal with the case of the *Gertrude*. That was a case not within the ordinary jurisdiction of the Admiralty Division, but it was as a matter of fact brought here, and no attempt was made to remove it, and it proceeded in the ordinary way before the registrar to decide the amount due with interest thereon from the time the claim arose as distinguished from the date of judgment. There is no doubt that it has long been the established practice in the Admiralty

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

Court to allow interest from the time when the claim arises, as distinguished from that which is done in the common law courts. That has been fully gone into by my learned predecessor in the case of *The Northumbria* (*ubi sup.*), and it would be useless for me to travel over the same ground. That decision establishes the principle upon which the Admiralty Court proceeds in these cases, viz., that a *restitutio in integrum* should be made as far as it can be, and that cannot be done unless interest is allowed on the amount that has, *ex hypothesi*, been retained from the plaintiff. That appears to me to be a sound and equitable rule, and if it is not a rule of the common law courts, it is in my judgment to be regretted. The action having been brought in this division, and having proceeded to reference in the ordinary way, the question is whether the registrar was bound to depart from the practice of the division of which he is an officer and apply this alleged rule of common law. I am of opinion that he was not. Reference has been made to the statute of Will. 4, but it is to be observed that that statute is purely permissive. It simply gives permission to the jury in certain cases to give interest, but it does not touch any cases other than those mentioned. It only applies to cases before a jury, and it leaves me, in my judgment, entirely free to say what rule should be applied in the Admiralty Division. I am of opinion that the registrar was quite right, and I therefore confirm his report.

Solicitors for the plaintiffs, *Stokes, Saunders,* and *Stokes.*

Solicitors for the defendants, *Botterell* and *Roche.*

Tuesday, Aug. 9, 1887.

(Before the Right Hon. Sir JAMES HANNEN.)

McCUNN *v.* THE LONDON AND ST. KATHARINE DOCKS COMPANY; THE BARON ABERDARE. (*a*)

Damage — Admiralty Division — Measure of damages—Interest.

Where an action is transferred to the Admiralty Division by consent of the parties to assess the amount of damages, the registrar and merchants are entitled, in accordance with the practice of the Admiralty Division, to give interest in addition to the actual damages, even where such interest would not be recoverable in the division from whence the action is transferred.

THIS was a motion by the plaintiffs in the above action to confirm the registrar's report therein.

The report was as follows:

In this case an action was brought in the Queen's Bench Division, on the 17th March 1884, against the London and St. Katharine Docks Company, by the owners of the barque or vessel *Baron Aberdare*, for damages by reason of the negligence of the defendants in and about the care and custody of the plaintiffs' ship while in the defendants' dock in Dec. 1883. The case was tried before a special jury, and a verdict was given for the plaintiffs on the 19th May 1886. It had been previously agreed that the amount of damages should be referred to an arbitrator. After this verdict and judgment a motion was made to a divisional court to enter judgment for the defendants, or for a new trial, which was rejected with costs. An appeal from this decision of the Divisional Court was then made to the Court of Appeal, which on the 11th May in the present year was likewise dismissed with costs. Immediately afterwards, on the 28th May, the action was transferred to the Admiralty by consent of parties, for the purpose of the assessment of the damages in the usual way. Since that transfer, however, the parties have come to an agreement that 7500*l.* shall be deemed to be the amount of damages the plaintiffs are entitled to recover, without prejudice to the question as to what interest is recoverable in addition; and that point is the only one which I have been called upon to consider. It is admitted that the whole amount of 7500*l.* was paid by the plaintiffs in or previous to the month of June 1884. The interest on that amount since that period necessarily represents a large sum, and if not recoverable from the defendants, also represents a heavy loss which they have had no means of obviating. The ordinary principles therefore of equity and justice would seem to require that compensation for this loss should be made. It is said that some technical rules of common law are against the allowance of interest before judgment, but I am not satisfied that those rules apply to a case of this description, or that, if they do, I am bound to act upon them when called upon as Registrar of the Admiralty Division to assess the amount of the plaintiffs' damages. I should rather assume that I am to apply the principles laid down for my guidance in assessing the damages occasioned by other acts of negligence, such as the negligent navigation of the ship by which another is injured. That the practice of the Admiralty Court is to allow interest on the loss so sustained from the date of such loss cannot be questioned, and I feel bound to follow the same rule in this instance. The judgment in *The Northumbria* (L. Rep. 3 A. & E. 6; 21 L. T. Rep. N. S. 681; 3 Mar. Law Cas. O. S. 314), and followed by a divisional court of the Queen's Bench in the case of *Smith* v. *Kirby* (1 Q. B. Div. 131), which was an action by the owners of cargo against the carrying ship, seem to me to justify the allowance of interest. The interest therefore will run from a date or dates in 1884 to be agreed between the parties.

The cause of action in respect of which the defendants were sued was their negligence in mooring the plaintiffs' vessel the *Baron Aberdare* in their dock, in consequence of which she broke loose from her moorings, and drifted across the dock, coming into collision with other vessels and barges, and thereby doing them and herself damage.

The plaintiffs' claim consisted of payments made in respect of raising the *Baron Aberdare*, of repairing her, and of settling claims made against them by the owners of the damaged vessels and barges.

F. W. Hollams, for the plaintiffs, in support of the motion, stated the facts.

J. G. Barnes for the defendants.—The registrar was wrong in allowing interest as he has done. This was a common law action tried on the common law side, and in accordance with the common law practice interest is not allowed. At common law interest is never allowed on unliquidated damages, except in certain cases fixed by statute. It actually required a specific enactment, viz., 3 & 4 Will. 4, c. 42, s. 29, to enable a jury to give interest in certain cases. This shows that, in cases other than those specified by the Act, interest cannot be recovered:

Calton v. *Bragg*, 15 East, 223;
Higgins v. *Sargent*, 2 B. & C. 348;
Straker v. *Hartland*, 34 L. J. 122, Ch.

The registrar in this case only filled the office of an arbitrator, and if so the defendants should not be burdened with a liability which by the common law practice does not attach to them. The case of *Smith* v. *Kirby* (1 Q. B. Div. 131), if looked into, does not show that interest was allowed on the plaintiff's claim. The arbitrator there

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

allowed a lump sum, but how it was made up does not appear. If interest is to be allowed in this case because the registrar of the Admiralty Division has happened to assess the damages, it will have to be allowed in such cases as breach of promise of marriage and the like, should they happen to be instituted in or transferred to this division.

Hollams in reply.—The justice of the case clearly entitles the plaintiffs to interest. For over three years have they, owing to the wrongful act of the defendants, been without this interest. The parties having transferred the action to this division are bound by its practice, and according to that practice the plaintiffs are entitled to interest. This practice has been recognised by the Courts of Chancery before the Judicature Acts and by the common law courts since the Judicature Acts:

The Northumbria, 21 L. T. Rep. N. S. 681; 3 Mar. Law Cas. O. S. 314; L. Rep. 3 A. & E. 6;
Straker v. *Hartland* (*ubi sup.*);
Smith v. *Kirby* (*ubi sup.*);
British Columbia Saw Mill Company v. *Nettleship*, 18 L. T. Rep. N. S. 604; L. Rep. 3 C. P. 499; 3 Mar. Law Cas. O. S. 65.

Sir JAMES HANNEN.—Having disposed of the case of *The Gertrude* (*supra*, p. 224), I will now deal with the case of *The Baron Aberdare*, the only distinction in which appears to be that the action was brought in the Queen's Bench Division, and the merits of the case were determined there. The action having gone to the Court of Appeal, the case was then transferred, with the consent of the parties, to the Admiralty Division for the assessment of damages in the usual way. It is said that for that purpose the Registrar of the Admiralty Court was treated as an arbitrator between the parties. I do not find it so stated, but, assuming it to be so, it appears to me to make no difference in the decision to which I ought to come. It must have been transferred to him because it was thought that he was a person who would be more competent to deal with it than an officer of the Queen's Bench Division. I am of opinion that he was quite right in thinking that he was to deal with it in accordance with those principles which have been, as I think, rightly established in this court. It is clear to me that the cases of *The Northumbria* (*ubi sup.*) and *Smith* v. *Kirby* (*ubi sup.*) have an important bearing on this case. The case of *Smith* v. *Kirby* (*ubi sup.*) decided, in accordance with the decision in *The Northumbria* (*ubi sup.*), that the limitation of liability operated only in respect of what I call the substantive claim of the party injured, but that it did not prevent the granting of interest by way of damages in respect of delay in obtaining the amount. That appears to me to have been a point distinctly brought to the notice of the court, and the court held that the Admiralty Court rule so applied, and interest was granted in addition to the amount of the substantive claim. It appears therefore to me that the registrar's report in this case is right, and I confirm it. As to the dates from whence the interest runs, that must be fixed by the parties.

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

Solicitors for the defendants, *Hacon* and *Turner.*

NEWCASTLE SUMMER ASSIZES.

Friday, July 22, 1887.

(Before MATHEW, J.)

THE OCEAN IRON STEAMSHIP INSURANCE ASSOCIATION *v.* LESLIE AND OTHERS. (*a*)

Mutual marine insurance association—Action for contributions—Managing owner—Principal and agent—Policy of insurance.

The managing and part owner of a steamship became a member of a mutual insurance association, and took out a policy on behalf of himself and his co-owners in respect of the ship. By the articles of association every person was deemed to be a member "who in his own name, or in his name as agent, insures any ship in pursuance of the regulations of the company," and they also provided that the funds required for the payment of claims should "be raised by contributions from all the members." By the policy it was agreed between the assured and the company, "that without prejudice to the rights and remedies of the company against the said person or persons effecting this insurance, as a member or members of the company, in respect of this insurance, the assured shall pay to the company, in lieu of premiums, all the sums and contributions which the company are entitled to call upon the said person or persons effecting this insurance, as a member or members of the company, to pay to the company in respect of this insurance according to the articles of association of the company, and that the provisions contained in the said articles of association shall be deemed and considered part of this policy, and shall, so far as regards this insurance, be as binding upon the assured as upon the said person or persons effecting this insurance." Certain contributions having, in accordance with the articles of association, become payable by the managing owner in respect of the ship, and the managing owner being bankrupt, the association sued the other owners to recover the contributions:

Held, that, under the terms of the policy, they were liable, although the policy was effected by the managing owner alone.

The United Kingdom Mutual Steamship Insurance Association Limited *v.* Neville (19 *Q. B. Div.* 110) (*b*) *distinguished.*

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

(*b*) COURT OF APPEAL.

Friday, May 27, 1887.

(Before Lord ESHER, M.R., FRY and LOPES, L.JJ.)

THE UNITED MUTUAL STEAMSHIP ASSURANCE ASSOCIATION LIMITED *v.* NEVILL.

THIS was an appeal from the decision of Grove, J., in an action by the United Mutual Steamship Assurance Association, against Nevill, a part owner of the steamship *Marquis Scicluna*, to recover calls or contributions in respect of the insurance of the steamship.

The plaintiffs were an association limited by guarantee for the purposes of mutual marine insurance.

One Tully was the manager and part owner of the steamship *Marquis Scicluna*, of which Nevill, the defendant, was also a part owner. Tully became a member of the plaintiff's association, and took out a policy with such association in respect of the *Marquis Scicluna*. Tully having become bankrupt, and being unable to pay the contributions due to the association in respect of the ship, the present action was instituted.

The plaintiffs sought to make Nevill liable as an

THIS was an action by the Ocean Iron Steamship Insurance Association against Andrew Leslie and others, part owners of the steamship *Howick*, to recover contributions by way of premiums in respect of the insurance of the steamship.

The plaintiffs also claimed, under the terms of the policies in question, interest at 7½ per cent. per annum on the contributions from the respective dates of the calls becoming due until payment or judgment.

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undisclosed principal of Tully in accordance with the rules of the association, and also upon a guarantee alleged to have been given by one Ormond on behalf of Nevill whereby he agreed, in consideration of certain policies of insurance, one of which was a policy upon the said steamer, to pay all calls made by the plaintiffs' association.

The memorandum of association stated that the association was established for the "mutual insurance by the association of the ships of members and of ships which the members may be authorised to insure in their own names and of ships in which they may be otherwise interested, and of the freights of such ships and of the individual members themselves, against any liabilities that may be incurred by them personally as owners or otherwise in respect of such ships and of all other interests or matters usually or properly covered by or included in insurances with respect to shipping, and to interests therein or liabilities in respect thereof."

The 4th article of association provided that, "Every person who on behalf of himself or any other person or persons insures or enters for protection any ship or ships, or share or shares of a ship in the association, shall as from the date of the commencement of such insurance or protection be deemed to have become a member of the association."

The 41st article provided that, "All claims in respect of insurance or protection shall be made and enforced against the association only, and not against any members thereof; but the association shall not be liable to any member or other person for the amount of any loss, claim, or demand, except to the extent of the funds which the association is able to recover from the members or persons liable for the same, and which are applicable to that purpose."

The 44th article provided that, "For the purpose of providing funds for making any payment necessary and proper to be made by or on behalf of the association for expenses connected with the business thereof or otherwise, it shall be lawful for the committee from time to time to direct that there shall be paid to the association by the members thereof rateably for the purpose of providing for or making good any such payments such sums as the committee may from time to time deem necessary."

The 45th and 46th articles provided for "calculating the rate of contribution to be paid by the members for their respective proportion of any loss, claim, or demand, or expenses," that payment might be enforced in the name of the association, and that, "in the event of any sums for the time being payable by any member of the association, or of the classes or clubs not being duly paid," the deficiency should be made good rateably by the other members of the association or classes as the case might be.

The association was divided into three different classes, each of which had its separate code of rules.

The policy made in respect of the steamship *Marquis Scicluna*, after reciting that Tully had become a member of the association, and had entered the ship in class 1, witnessed that, in consideration of the premises and of the observance by the insured of the rules and regulations, the association agreed that the members of the said association having ships in the said class should, according to the articles of association and the rules of the class indorsed on the policy, be liable to pay all such losses and damages to the steamship as hereinafter expressed; "provided always, that in accordance with the articles of association and the rules of the said class, this policy and the other policies of the association are granted on this condition, and it is hereby especially agreed, that the association under all their policies of insurance of the said class shall be liable in the whole only to the extent of so much of the funds as the said association is able to recover from the members of the said class and their respective heirs, executors, and administrators, liable for the same, and which under and by virtue of the rules of the said class are for the time being applicable for the purpose of paying claims under this and other policies issued in respect of the said class."

The 31st rule indorsed on the policy provided that, "A member shall be uninsured in respect of any ship or his share therein (*a*) from the date of the legal transfer of such ship; (*b*) if he do not pay when due and demanded any amount payable by him; (*c*) if his ship or shares therein be mortgaged or assigned at or after entry, unless before a claim accrues an approved undertaking registered by the managers has been given to pay all contributions due and to become due; (*d*) if he becomes bankrupt or insolvent, unless before a claim accrues an approved undertaking registered by the managers has been given to pay all contributions due and to become due; (*e*) if any person giving an undertaking under this rule fail to discharge his liability unless and until a fresh undertaking be tendered and accepted."

At the trial the jury found that Ormond had no authority from the defendant to sign the alleged guarantee, and that the defendant had not ratified it. Grove, J. gave judgment for the defendant on the ground that he was not a member of the association, and that the articles of association and policy imposed liability on members alone.

April 26.—*Bigham*, Q.C. and *Fox*, for the plaintiffs, in support of the appeal.

Finlay, Q.C. and *Harpers*, for the defendant, *contra*.

Cur. adv. vult.

May 27.—Lord ESHER, M.R.—The action is brought against the defendant, the part owner of a ship, as the undisclosed principal of Tully, the ship's manager, who had taken out a policy on the ship in his own name, and had become thereby a member of the plaintiffs' association according to its rules. The question therefore arises whether the plaintiffs can sue the defendant as Tully's principal. There is much complication and difficulty in connection with these mutual insurance associations. In the case of *Lion Mutual Insurance Association* v. *Tucker* (49 L. T. Rep. N. S. 764; 12 Q. B. Div. 176) I endeavoured to explain the business relation of the members of such an association to each other. It is necessary to consider the form in which the parties have carried out those business relations in order to ascertain what remedies are available for the purpose of enforcing them. The first question which it may be material to consider is, whether the different members of the association have any remedies or rights of action, and if so, what as between themselves. It is obvious, as explained in the case I have referred to, that members cannot sue other members in respect of payments due from the other members as such to the association. Only the association can sue in respect of such payments. Then can members sue other members in respect of claims arising out of the insurance of ships? In the case of *Lion Insurance Association* v. *Tucker* (*ubi sup.*) I stated that the business relation between the members was that they were in reality both insurers and insured; but that business relation is carried out by means of a policy given under the seal of the association. The members of each class are insurers and insured as between themselves and the other members of the class; they are insured not by the whole association, but by a part only of the association, viz., the members of the same class. A member who has suffered a loss must, however, sue on the policy given by the association. But that policy is made by the association. In order to sue the other members of the class who are really his insurers he would have to say that they were the principals of the association in giving him a policy under the seal of the association. I do not think he could do so. I think that, in the case of such a contract as this under seal, it is not allowable to go behind the instrument to make undisclosed principals responsible, because they are not parties, and have not attached their seals to the contract under seal. Moreover, it is to be observed that in this case the contract is that he is to be paid in respect of the loss he has

The defendants other than William Johnson, the managing owner of the *Howick*, delivered the following defence:

1. The now pleading defendants do not admit that their respective interests in the s.s. *Howick* were insured with the plaintiffs during any portion of the periods, and subject to any of the policies in the statement of claim mentioned.

2. If the said insurances or policies were effected in fact, which is not admitted, they were not effected by the said defendants or with their authority, nor were they

suffered only the amount which the association can collect from the other members of the class. There would be this difficulty in suing the other members, viz., that they might have satisfied their liability by payment of their contributions to the association; and the member is not to receive the payment direct from them, but is to receive the sum collected by the association. There is no contract, as it seems to me, between the member who has suffered the loss and the other members, but only between him and the association; and such member therefore cannot sue the other members although they are really his insurers. If the member could not sue, a person could not sue as his undisclosed principal. Then as regards any action against the person alleged to be the undisclosed principal of a member by the other members, it would be impossible to allege that a person is an undisclosed principal in respect of the contract, unless the parties who allege that he is a party to the contract as an undisclosed principal could be sued by him as well as he by them. It seems to me clear, therefore, that the members have no right of action as between themselves. Then in respect of what can the association sue or be sued by its members? A member can sue the association for a loss on his ship. That is expressly provided by the policy. In respect of what can a member be sued by the association? He cannot be sued as an insurer, though he is in business reality an insurer, by reason of the form in which the relation between the members is carried out. The association are in form the insurers, and make the policies. They therefore cannot sue him as an insurer. They can only sue the members in respect of what is really the premium. Here no premium properly so called is paid, but each member is liable to a contribution towards losses which may be suffered by the other members on their policies. Therefore the association can only sue the member as an assured for what is equivalent to the premium. It seems to follow that, if they cannot sue him as an insurer, neither can they sue the person alleged to be his undisclosed principal as an insurer. If such person can be sued at all, it must be as an assured for what is equivalent to the premium. But can he be so sued? Such an association as this can only enter into binding policies with members. When the policy is entered into, the person with whom it is so entered into becomes a member. If a person could be an undisclosed principal with regard to such a policy, it would really make him an undisclosed member. If he is not a member, the policy cannot be made with him so as to be binding. I do not think there can be such an undisclosed member or partner so far as the other members are concerned. If it were so, then the making of such a policy as this would make the alleged undisclosed principal of the person effecting it an associate with the members of the association without their knowledge and consent. I do not think this can be so. I do not think that a person actually interested in a ship who has authorised another person to enter into a policy in his own name with the association is a party to the contract as an undisclosed principal, because to make him so, it would be necessary to say that he is a member of the association to which he is wholly undisclosed and unknown. I do not think that he is a party to the contract as an undisclosed principal, although he may be a *cestui que trust* in respect of the proceeds the member may receive. Not being a party, he cannot sue or be sued on the contract. For these reasons I do not think this action will lie against the defendant as an undisclosed principal.

FRY, L.J.—In this case the plaintiffs are a company limited by guarantee formed for the purposes of mutual assurance. One Charles Tully became a member of this society in respect of a steam-vessel, the *Marquis Sciclwna*, of which the defendant was a part owner, and Tully also took out a policy on the ship. Tully has become bankrupt, and the association sues the defendant as an undisclosed principal on the contract of assurance; and the question in the case, as it presents itself to my mind, is whether by reason of the nature of the contract in this case the ordinary right of a contracting party to sue the undisclosed principal of the other party has or has not been repelled. Other questions were raised in the course of the discussion. It was argued that Tully was not authorised by the defendant to insure the ship in question in an association like the plaintiffs'; but, looking at the circular on the faith of which the defendant took shares in the ship in question and at the prevalence of insurance in mutual clubs, especially in the northern ports, I am of opinion that the defendant cannot successfully deny the authority of Tully to enter this ship in the plaintiffs' association. Another question was raised as to whether a certain Mr. Ormond signed an undertaking to the plaintiffs with the authority or subsequent ratification of the defendant. But this question was left to the jury, on which they found for the defendant. I see no sufficient reason to disturb their finding. The main question in the cause therefore appears to me to turn on the nature of the contract between Tully and the plaintiffs' association. This contract is to be found in three instruments, namely, the memorandum of association, the articles of association, and the policy of assurance issued by the plaintiffs to Tully in respect of the ship in question. The memorandum and articles of association of course constitute an agreement *inter socios*, and *inter socios* only, and they cannot of themselves give rights or create obligations to or in anyone except the members of the association, or those who, like legal personal representatives or trustees in bankruptcy, take their rights and assume their burdens. The memorandum and articles of association when examined appear to me to correspond with what might be expected from their general character and object. The 4th article makes every person who on behalf of himself or any other person insures or enters for protection any ship or share of a ship in the association a member during the period of the insurance. The 44th article defines the manner in which funds are to be raised for making any payment necessary or proper to be made by the association for expenses connected with the business thereof or otherwise (words which I conceive include all claims on policies), and it gives the committee the power to direct that contributions shall be paid to the association by the members thereof rateably. The 45th and 46th articles throughout treat the contributions as payments by members. It is true that in article 41 the expressions "or other person" and "or other persons" follow the words "member or members;" but these words are, I think, used as equivalent to executors, administrators, or assigns. It appears to me clear beyond argument that on the mere memorandum and articles of association the defendant could not be affected with liability. The object of such instruments is to regulate the rights of members, and decisions have long since shown that the fact that a share is held by a member in trust for a third person neither exonerates the member from liability, nor creates any liability in the *cestui que trust* to the company. The statute which avoids all contracts of assurance not embodied in a policy of insurance made it impossible for the whole of the relations between a member and the association (though those relations were strictly mutual) to be embodied in the memorandum and articles of association, and made it necessary for the association to issue a policy in respect of every ship insured by a member; and this policy of insurance I now proceed to consider. The policy, which is under the common seal of the association, recites that Tully having become a member of the association, and having entered for insurance in class No. 1 the steamship in question had become entitled to the policy. The considerations stated are the premises, *i.e.*, the membership of Tully and the observance by the insured of the rules and regulations of the class. Now what was that consideration? It was that Tully would pay his contributions towards claims against the association under article 44—a consideration which extends to Tully and

parties thereto or rendered liable in respect thereof as undisclosed principals or otherwise. The defendants were not members of the plaintiff association.

3. The said defendants do not admit that any portion of the contributions referred to in the particulars in the statement of claim, or of the interest in respect thereof, has in fact become due to the plaintiffs under the said insurances or policies. They deny that by the terms thereof or otherwise the same has become due and payable by them to the plaintiffs, or that they are liable to pay the same in lieu of premiums or otherwise.

The case was tried at the Newcastle Assizes, by Mathew, J., without a jury, when the following facts were proved:—

The plaintiffs were an association for the purposes of mutual marine insurance of iron steamships. One William Johnson was part owner and manager of the steamship *Howick*. He became a member of the plaintiffs' association in respect of the *Howick*, of which the defendants were part owners, and took out a

his representatives, but does not move from Nevill as an undisclosed principal or as a *cestui que trust* of Tully. Again, if the defendant is to be liable at all for the default of Tully to pay his contributions as a member of the company, I incline to hold that he must be liable on a guarantee to answer the default of Tully. But there is in the present case no guarantee signed by the defendant which would satisfy the Statute of Frauds. The obligation undertaken by the association with Tully according to the policy is this, that the members of the association having ships entered in the said class shall, according to the provisions of the articles of association and the rules of the said class, and subject to the proviso thereinafter contained, pay and make good the losses insured against. Here again we have the policy referring to the articles of association as the measure of liability, and, so far as mere expression goes, we therefore find a liability recognised as limited to members. The proviso incorporated in the operative part of the policy is in these words: "Provided always, that in accordance with the articles of association of the said association and the rules of the said class, this policy and the other policies of the association and class are granted on this condition, and it is hereby specially agreed, that the association under all their policies of insurance of the said class shall be liable in the whole only to the extent of so much of the funds as the said association is able to recover from the members of the said class, and their respective heirs, executors, and administrators, liable for the same, and which under and by virtue of the articles of association and of the rules of the said class are for the time being applicable for the purpose of paying claims under this and other policies issued in respect of the said class." Now here we have again words of reference to the articles of association as if they were the measure of liability; but furthermore, we have words declaring that the association shall be liable only to the extent of so much of the funds as the association is able to recover from the members of the said class, and their respective heirs, executors, and administrators, liable for the same. It was argued that these words are intended only to preclude liability of members of one class for losses in another, and all liability in respect of sums payable by members, but which the association could not recover by reason of the insolvency of the members or otherwise. But the words taken in their natural signification negative all liability except that stated. So taken the words appear to me to exclude liability for sums payable, but not capable of recovery by anyone except a member, and for sums payable by members of any class except the class insured in. I can see no reason for not giving the words of the proviso their full significance. The rules relative to class 1 are indorsed on the policy, and are by reference incorporated in it. They throughout refer to the liabilities and rights as those of members. But what is perhaps more important is, that the 31st rule provides that a member shall be uninsured in respect of any ship, or his share therein, in various contingencies, amongst others, if his ship or share be mortgaged or assigned at or after entry, or he becomes bankrupt, or unless in each of these cases before a claim accrues an approved undertaking registered by the manager has been given to pay all contributions due or to become due. Now the very object of this rule appears to me to be to enable the managers in the case of an undisclosed principal to drive that person into a direct obligation to the company, an obligation which would be needless if the general rule of law applied to this policy. The conclusion to which this examination of the documents brings me is this: that the primary object of the members of the association was mutual assurance, *i.e.*, an assurance of the property of or represented by the members with the members and with no one else; that the memorandum and articles of association carry this intention into effect; that the policy was needful under the statute to give effect to this mutual assurance, but was not intended to create any liability beyond that of the members; but that on the contrary the tenor of the policy and rules show an intention to confine the liability on the policy to the liability under the articles; and that the proviso in express language excludes any liability of the association for moneys recovered from anyone but members, which would be absurd and insensible if they had the right to sue persons who were not members but undisclosed principals. I therefore conclude that the ordinary principle of law which makes such principals liable was negatived, and that this appeal fails.

LOPES, J.—I have come to the conclusion that the defendant cannot be sued in this action, on short and simple grounds. The plaintiffs sue the defendant for contributions as an undisclosed principal, and also on a guarantee alleged to have been given with the authority or subsequent ratification of the defendant. On the guarantee the jury found against the plaintiffs, and I can see no reason why the verdict should be set aside. The material question is, whether the ordinary rule of law by which an undisclosed principal can be sued by a contracting party applies in the special circumstances of this case. This depends on the construction of the memorandum and articles of association, and the policy issued to Tully. If there is nothing in these documents which contain the contract negativing its application, then the ordinary rule of law attaches, and the plaintiffs can sue the defendant as an undisclosed principal and recover the contributions owing to them. The defendant, in answer to this portion of the plaintiffs' case, says that he was not a member of the association, and not being a member he was not responsible for the contributions sued for, and that by virtue of the rules of the plaintiffs' association and the contract made between Tully and the plaintiffs' association, the plaintiffs can only look to Tully for the contributions now owing. The facts have been stated, and I need not again refer to them. The memorandum and articles of association contemplate and provide for no rights and liabilities outside those of the members, and those upon whom the law in case of death or bankruptcy casts responsibility. Membership and mutuality are the essence and vitality of the concern. The defendant is not a member, and cannot be affected with liability by anything in the memorandum and articles of association which concerns members only. But is there anything in the policy creating a liability in the defendant to be sued as an undisclosed principal? I can find nothing extending the liability beyond the liability of members contemplated by the memorandum and articles of association. The proviso in the policy clearly points to the same liability as that created by the memorandum and articles of association, and the 31st rule would be unnecessary if an undisclosed principal could be sued. I believe the main reason why the 31st rule was incorporated into the policy was because the undisclosed principal could not be sued, and because, except for the rule in the circumstances contemplated by the rule, there would be nobody who would be liable to the company. I am of opinion that the contract contained in the memorandum and articles of association and policy negatives the ordinary rule of law, and that the defendant is not liable.

Appeal dismissed.

Solicitors for the appellants, *Parker*, *Garrelt*, and *Parker*.

Solicitors for the defendants, *Flux* and *Leadbitter*.

policy on the ship under the rules of the association. Johnson having become bankrupt, and being unable to pay the contributions due to the company in respect of the *Howick*, the present action was instituted.

The plaintiffs' memorandum of association stated that the company was established for the "mutual insurance of iron steamships insured with the company by members of the company."

The 2nd article of association provided that,

Every person shall be deemed to have agreed to become and to be a member of the company, who in his own name, or in his name as agent, insures any ship in pursuance of the regulations of the company.

The 36th article provided that,

The funds required for the payment of claims shall be raised by contributions from all the members in the proportions which the sums insured by them respectively bear to the amount of all the sums insured by the company at the respective times of the losses giving rise to the claims, provided that the member who insures a ship which is lost shall contribute not less than 4 per cent. on any one policy on the sum insured by him thereon, exclusive of his contributions in respect of other sums insured by him on other ships.

The 48th article provided that,

If a member shall . . . become bankrupt, file a petition for the liquidation of his affairs, compound with his creditors, or stop payment . . . the insurances effected by him shall expire at noon on the sixth day after the date of any such event as aforesaid, unless the legal representative . . . or other persons to be approved by the directors shall guarantee the payment of all contributions which are or may become due to the company in respect of the insurances, and the directors in their discretion shall accept such guarantee.

The 18th article provided that,

Every contract of insurance shall be by a policy in such form as the directors shall from time to time determine, provided that all policies existing at any one time shall be to the same effect, except that the hull and machinery may be valued in any policy either together or separately as the owner may require.

The policy made in respect of the steamship *Howick* began with the following words:

Be it known that William Johnson (hereinafter called the said person or persons effecting this insurance) as well in his or their own name or 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, subject to the provisions hereinafter contained, doth make assurance, and cause himself, or themselves, and them and every of them, to be insured.

There was also a clause providing as follows:

And it is mutually agreed between the assured and the company that, without prejudice to the rights and remedies of the company against the said person or persons effecting this insurance, as a member or members of the company in respect of this insurance, the assured shall pay to the company in lieu of premiums all the sums and contributions which the company are entitled to call upon the said person or persons effecting this insurance, as a member or members of the company, to pay to the company in respect of this insurance according to the articles of association of the company, and that the provisions contained in the said articles of association shall be deemed and considered part of this policy, and shall, so far as regards this insurance, be as binding upon the assured as upon the said person or persons effecting this insurance.

Gainsford Bruce, Q.C. and *Strachan* for the plaintiffs.

Walton and *Boyd* for the defendants.

Cur. adv. vult.

July 22.—MATHEW, J.—This action was brought by the plaintiffs, a mutual insurance association, incorporated under the Joint Stock Companies Act, against the defendants, who are the owners of a ship insured with the association, to recover certain contributions; in other words, to recover the premiums payable by the defendants in respect of the insurance of a ship effected with the plaintiff company. Now, it was quite clear, and indeed was not seriously disputed, that the ship had been insured through a Mr. Johnson, an agent, on behalf of the owners, with the plaintiffs, and insured upon the principle of mutual insurance, whereby those that were insured became liable to contribute to any losses that might be sustained by other members of the association. It was said that the defendants as owners of the ship had had the benefit of the insurance, and had their ship protected. It was assumed for the purposes of this part of the case that they had been paid the amount of the premiums, and it was said that in fairness and in justice they were bound to hand over to the plaintiffs the amount of the contributions that some of them it was admitted were liable to pay. On the other hand, it was said that there was a technical answer to the plaintiffs' claim. It was said that Johnson, the person through whom the insurance had been effected, was the person liable, and that the plaintiffs had contracted themselves out of the right to have recourse to anybody but Johnson, and reliance was placed upon recent decisions, particularly the decision in *The United Kingdom Steamship Association* v. *Neville* (19 Q. B. Div. 110).

Now, for the purpose of this insurance, Lloyd's policy in the old form has been made the basis of the contract, and before dealing with that form of contract in connection with this mutual insurance undertaking, it may be desirable to say a word as to the meaning of Lloyd's policy. If attention had been paid to that, I think we should have been spared a considerable amount of discussion with reference to the meaning of this policy—the policy issued by this mutual insurance association. In the ordinary form of Lloyd's policy, the policy is effected through a broker; but the contract is not with that broker, the contract is with the persons interested in the ship. In order that the policy should be effected, and in order that the underwriter should be made liable upon it, the broker must be proved to have been acting for a principal interested in the subject-matter of the insurance, and to have made the contract on his behalf. Without the authority to him to effect the policy on the principal's behalf, the policy is a nullity. It is a wager policy only. The necessary consequence and the essential character of a policy of insurance is that it is a contract of inedmnity, and if an agent, or the nominal person whose name was used for the purpose of the contract with the underwriters, were to insert in a policy that he should be deemed to have an interest, or that the policy should be the proof of interest, it is only necessary to refer to the statutes, which condemn that and make such a course of proceeding impossible. It is absolutely necessary to the contract of insurance in the ordinary form that it should be made with persons interested in the subject-matter of insurance. Now, mutual insurance is the simplest thing in the world if you have not to record it in written documents. It is the most laudable and the most excellent way of effecting insurance, and is a system by

which everybody insured is at once underwriter and assured—*i.e.*, entitled to recover for his losses against those associated with him, and they are entitled to contribution from him for any loss sustained by any one of them. This very simple principle was acted on very successfully for many years until technical difficulties began to be interposed. The first technical difficulty was this: all mutual insurance associations were ordered to be incorporated as joint stock companies. That was technicality number one. Technicality number two was that under statutes framed for different purposes which were positive in their terms, every contract of insurance had to be a written document; in other words, there must be a policy of insurance. Those two conditions having to be complied with, the mutual insurance associations set themselves to work, by various rules, to endeavour to reconcile those strict rules of law with the conduct of their business, and different rules have been adopted and have been framed to meet the decisions on the subject. Now, in *Neville's* case the court had before it a series of rules framed to enable the association conveniently to carry out the purposes for which it was constituted—the purpose of effecting the mutual insurance of the different members. The principle adopted was this: It was arranged that the agent was to be taken to be the person insured for all purposes, and the insurance association were to look to him for contributions, which contributions he of course was to collect from the owners of the ship he represented; but, on the other hand, he was to sue or make a claim on behalf of all the owners for whom he was acting. That was a very simple and a very excellent way of carrying out the purposes of the undertaking until there happened what people do not ordinarily anticipate, viz., the insolvency of somebody connected with the transaction. That happened in *Neville's* action (*ubi sup.*), where a person named Tully, the managing owner of the ship there in question, stopped payment. At the time he stopped payment he was largely indebted to the association in respect of the insurance of different ships, and particularly of the ship in question. The amount of the contributions in respect of that ship had never been paid by the owners of the ship. Naturally enough the insurance association, failing to recover the amount of these payments from Tully, through whose hands it was expected the payments would come, sued the principals, the persons who were bound to place Tully in funds to enable the payments to be made, and they were met with the usual technical difficulties. It was said that the scheme of the association and its rules which were incorporated with the policy came to this: that the understanding of everybody was that the association was to look to Tully alone, and not to look to Tully's principals. They were described in the case as undisclosed principals—a description which I should hesitate to adopt as strictly correct, because a man may be a principal and a disclosed principal although his name is not mentioned—but the owners of the ship were sued by the association upon the footing that they were the persons assured in the association, and therefore bound to pay the premiums. The objection was made that if you look at the terms of the policy and of the articles of association, it will appear that the plaintiffs had contracted themselves out of the right to go beyond Tully, and that they had no right to sue the defendants.

Now, I entirely concur in the reasoning of Fry, L.J. in that case, with this observation: it appears to me that the conclusion arrived at did not only depend upon the terms of the contract between the association and Tully, but upon the fact that the assured were parties to that arrangement. The owners of the ship took the benefit of the contract upon the footing that they were not to be looked to, but that their agent was, for the payment of the amount of contributions. That such an arrangement is not unknown to the law of insurance is clear when we refer to what occurs under Lloyd's policies with reference to premiums. Under the ordinary policy the underwriter looks for his premiums to the broker, and not to the assured. That result is brought about in two ways: first, by the insertion in the policy of a receipt for the premiums; and, secondly, by the course of business, which treats the broker as the person liable to the underwriter, and not the principal. If all that arrangement were expanded and set forth in the policy, and if it were part of the contract of insurance in respect of the premiums that the underwriter should look to the broker and not to the principal, it is quite clear that that would be operative. That is practically what was done in *Neville's* case. The contract there was that the insurance contributions—the premiums—should be paid by Tully, and not be paid by the assured. If I am right in the interpretation which I put on the decision in *Neville's* case, it is only necessary to contrast this case with that in order to see how completely they differ from each other. I do not go through the different clauses in the articles of association in *Neville's* case, and merely say that I entirely concur in the view taken by Fry and Lopes, L.JJ., and, as I understand, also taken by the Master of the Rolls, that the result of the stipulations there was that the plaintiffs had contracted themselves out of the right to look to the principal. As if in anticipation of those difficulties, we find a clause in this policy of insurance upon which the plaintiffs rely. That clause is in the following terms: "It is mutually agreed between the assured and the company"—there is no question that "the assured" are the persons interested, the persons for whose benefit the insurance is made, that is the ordinary meaning of the term "assured" in insurance law, and there is no reason for rejecting it, as far as I can see, in interpreting this policy—"it is mutually agreed between the assured and the company that without prejudice to the rights and remedies of the company against the said person or persons effecting this insurance" (that is, against Johnson) "as a member or members of the company in respect of this insurance, the assured" (that is, the party interested) "shall pay to the company in lieu of premiums all the sums and contributions which the company are entitled to call upon the said person or persons effecting this insurance as a member or members of the company to pay to the company in respect of this insurance according to the articles of association of the company, and that the provisions contained in the said articles of association shall be deemed and considered part of this policy, and shall, so far as regards this insurance, be as binding upon the assured as upon the said

person or persons effecting this insurance." Mr. Walton and Mr. Boyd did their best to struggle against the plain language of that clause, but it seems to me to be as clear as the light. The company, not content with the liability of the agent, as was the case in *Neville's* case, stipulate that they shall be entitled to look to the principal; in other words, they emphatically contract that the principal shall be liable to them as well as the agent. It is clear that that contract is binding on the assured, not from their being parties who sign the contract, or put their seal to it, but as being the persons to whom the policy is issued, and who are to have the benefit of it.

The first observation made by the learned counsel about this clause was that it was insensible and absurd, and that it had been inserted by some ignorant person who did not know what he was doing, and that there was a confusion as to the meaning of the words "assured" and "the persons effecting this insurance." I feel quite unable, notwithstanding the ability with which that view was presented, to adopt that conclusion. The clause was framed by a man who knew what he was about, and it appears to me that anyone who reads it will quite readily follow the object the person had in inserting this clause in the policy. The main object is to do that which is perfectly right, perfectly equitable, and perfectly fair, viz., to secure that the persons having the benefit of the contract should meet the liabilities, and that the company should not be compelled to have recourse to an agent, who may stop payment, who may abscond, who may die, or who may not choose to assist them. The next point made was that the clause was *ultra vires*. On this it appears to me it would be very desirable if counsel would refer to the essential character of the contract of insurance. It was said to be *ultra vires* because the scheme of this association was that the only persons with whom the association should deal were agents, and not principals. The principals, of course, were named, but when no principal was named, the agent might be either managing owner, with no interest in the ship, or ship's husband. It was said that for all purposes the contract is to be assumed to be a contract between the company and the agent and nobody else. That was insisting on what was impossible according to the rules of commercial and insurance law. The parties to the contract of insurance, whether it be mutual insurance or a contract effected at Lloyd's, are the persons interested on the one hand, and the persons underwriting it on the other. If you assume the object of the association to be to insure ships and to protect their owners, how is it possible to say it is *ultra vires* to stipulate that the owners shall be liable for the premiums on the ships insured with the association? The argument is an impossible one, and as soon as the true character of the insurance came to be considered, it was clear that it could not be adopted. The contract alone with Johnson, assuming him only to be managing owner, unless he was authorised to represent the owners, would be null and not binding on him. It would be a wagering policy, a policy with no interest, and a policy under which nobody could recover. The object of the insurance is not to protect the agent, or to make contracts with agents who choose to insure particular ships calling themselves agents, but to insure the shipowners. If you once arrive at that as the clear meaning of the parties, what can be more within the powers of the association, more equitable, or more clearly right, than that the association should stipulate that it should have a right to look to the real persons protected by the insurance, and not to an agent in the event of that agent's insolvency? In that view of the matter it appears to me that on that point the construction of the policy must be against the defendants. Sundry subordinate points were then raised.

In the first place, it was suggested that Johnson was only entitled to pledge the credit of each owner for his own share. There was evidence on this point, but the result of it was that Johnson was in the ordinary way acting on behalf of all the owners of the ship, and all the owners were therefore as liable for the premiums of insurance as they would be for necessaries. There was no indication of an intention that each owner in respect of his own share only instructed Johnson to effect the insurance. Then a further point was raised. It was said that there was a clause in the articles of association which affected the extent of the defendant's liability under the circumstances that had occurred, viz., a clause providing for the cesser of the insurance on the bankruptcy of the member, and as Johnson was clearly a member within the meaning of the rule, it was said that his bankruptcy exonerated the other owners in respect of his shares, which I think were twenty-three sixty-fourths. It appeared from Johnson's evidence that he had been a mortgagor of the ship from the very first, and when his mortgage came to be registered—by the time it came to the knowledge of the directors of this company, if they thought proper to exercise the power conferred by the articles against him, they had not done so—he said then there was a hope that everything would come right, and he continued to be insured, and he has been sued for the premiums and judgment recovered against him. I therefore see no ground for suggesting that any benefit could arise to his co-owners because of the existence of that rule in the articles of association. Then Mr. Boyd took this point: He said that, when the account comes to be taken, there may be an equity in favour of some of his clients. It may turn out that some or all of them have accounted to Johnson for the amount of their premiums, and therefore have an equity to decline to pay under the terms of the policy the present plaintiffs. Well, Mr. Gainsford Bruce had sufficient confidence in the position of his clients to agree that, if any such point should arise in taking the account, it should be dealt with hereafter. As at present advised, I think it extremely improbable that any such point will arise, and, if it does, it will be available for the defendants, because the terms of this policy seem to me to be so clear and strong. At the moment, I direct judgment for the plaintiff, with costs, for an amount to be settled by a person to be named by the parties in accordance with the agreement come to, or by me in the event of a difference. The point suggested by Mr. Boyd is reserved, and also the costs, and I give either party liberty to apply generally.

Solicitors for the plaintiff, *Leitch, Dodd,* and *Bramwell,* Newcastle-upon-Tyne.

Solicitors for the defendants, *H. C. Cook* and *Ball,* agents for *H. A. Adamson,* North Shields.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

July 12, 13, 14, *and Nov.* 15, 1887.

(Present: The Right Hons. Lords BRAMWELL, HOBHOUSE, and MACNAGHTEN, Sir BARNES PEACOCK, and Sir RICHARD COUCH.)

COSSMAN *v.* WEST.

COSSMAN *v.* BRITISH AMERICA ASSURANCE COMPANY. (*a*)

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Marine insurance—Barratry—Total loss—Salvage—Sale under decree of Court of Admiralty.

To constitute a total loss within the meaning of a policy of marine insurance it is not necessary that a ship should be actually annihilated. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been annihilated. In such a case no distinction can be drawn between a sale upon capture and a sale under the decree of a Court of Admiralty for the expenses of salvage services.

Judgment of the court below reversed.

A ship and her freight having been insured (inter alia) against barratry of the master was wrongfully abandoned by him. Salvors took possession of her, and having towed her into port instituted salvage proceedings against her. These proceedings were known to the owners, but they did not appear. The ship and cargo were sold by decree of the Court of Admiralty, and realised less than the salvage award. In an action on the policies:

Held, that the assured were entitled to recover, as the sale under the decree of the Admiralty Court constituted an actual total loss, and no notice of abandonment was necessary.

Roux *v.* Salvador (3 *Bing. N. C.* 266) *and* Stringer *v.* English and Scottish Maritime Insurance Company (*L. Rep.* 4 *Q. B.* 476; *L. Rep.* 5 *Q. B.* 599; 3 *Mar. Law Cas. O.S.* 440; 22 *L. T. Rep. N. S.* 802) *followed.*

Thornely *v.* Hebson (2 *B. & Ald.* 513) *and* De Mattos *v.* Saunders (*L. Rep.* 7 *C. P.* 570; 27 *L. T. Rep. N. S.* 120; 1 *App. Mar. Law Cas.* 379) *distinguished.*

THESE were consolidated appeals from two judgments of the Supreme Court of Nova Scotia in actions upon policies of marine insurance, in which the appellant was plaintiff and the respondents were defendants.

The actions were tried before Macdonald, C.J. without a jury, and he gave judgment for the plaintiff in both actions, but his judgments were reversed by a majority of the judges of the full court.

The facts are fully set out in the judgment of their Lordships, in which also the arguments and authorities sufficiently appear.

Romer, Q.C. and *R. M. Bray* appeared for the appellant.

Graham, Q.C. and *Jeune* for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Nov. 15.—The judgment of their Lordships was delivered by

Sir BARNES PEACOCK.—These are consolidated appeals from two judgments of the Supreme Court of Nova Scotia in actions in which the appellant was the plaintiff. The action against West was upon a time policy of insurance of the Ocean Marine Assurance Association, dated the 28th Nov. 1881, for $4000, upon the barque *L. E. Cann*, a British ship valued at $10,000, from the 28th of Nov. 1881 to the 28th Nov. 1882. The perils insured against were, amongst others, perils of the seas, barratry of the master (unless in case of loss on goods or specie when the master is the consignee or supercargo thereof), and of mariners, and all other perils, losses, or misfortunes that should come to the hurt, detriment, or damage of the said vessel, or any part thereof, subject to the conditions and provisions contained in or referred to by clauses in the policy, none of which affect the present case. It was stipulated that no particular average or partial loss, unless in case of general average, was to be paid unless the same should amount to 5 per cent., &c. The policy was underwritten for $100 by West, the defendant in the suit, who was a member of the Ocean Marine Assurance Association, and is the respondent in the first appeal. The policy on freight was effected by the plaintiff (appellant) on the 31st Jan. 1882, and was for $3000 on freight at and from Mexico to New York upon all kinds of lawful goods and merchandise laden or to be laden on board the said barque *L. E. Cann*. The policy contained the following words, "The said goods and merchandise hereby insured are valued at $6000." Their Lordships understand this policy to be a policy on freight of goods laden or to be laden valued at $6000. The perils insured against, so far as this case is concerned, may be treated as substantially the same as those in the other policy. The policy was effected with the British America Assurance Company, the defendants in the second action and the respondents in the second appeal. In the policy on the barque it was provided that all losses and damage which should happen to the vessel should be paid within sixty days after proof made and exhibited of such at the office of the association. In the policy on freight it was stipulated that all losses and damages which should happen should be adjusted in accordance with English practice and usage at Lloyd's, and should be paid within sixty days after proof of loss and adjustment, and proof of interest in the said freight. Each of the policies was effected in the name of the plaintiff, and was stated to be on behalf of whom it may concern; and in the policy on freight it was added, "In case of loss to be paid to him," *i.e.*, to the plaintiff. In neither policy was there any exemption of liability on the part of the insurers on account of charges, if any, which might be incurred for salvage. A charter-party, dated the 6th Jan. 1882, expressed to be made between Brooks, master of the British barque *L. E. Cann*, then lying in the harbour of Vera Cruz, of the first part, and Mr. Antonio Granes of the second part, was put in evidence in the second action. By that charter-party the said master agreed to the freighting and chartering of the whole of the said vessel, with the exception of the cabin and necessary room for the crew, and storage for provisions, sails, and

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

cables, unto Granes for the voyage from Vera Cruz and Tucolota to New York, and it was agreed that the vessel should load at Vera Cruz one part of the cargo, and after signing bills of lading should proceed to Tucolota for loading the balance of the cargo, and thence to New York. Granes engaged to furnish a cargo of assorted produce, the charterer to have the privilege of loading cargo for other parties, and captain to sign bills of lading for same without prejudice to the charter, and Granes was to pay for the use of the vessel during the voyage the lump sum of $6000 payable at New York in the United States currency or gold, to advance sufficient money to the master at current rate on New York for ship's ordinary disbursements, that amount to be insured by charterer's agents at owner's risk, and to be deducted from the freight with insurance and 5 per cent. commission. The plaintiff claimed for a total loss in each case.

The pleas set up several defences. The most material of them were, that there was not a total loss; that no proof, or no sufficient proof, of the loss was made before action brought; that there was concealment of material facts as to the condition of the vessel; and that the respondent was induced to subscribe the policy by the fraud of the appellant. In the action on the policy there was also a denial of interest as alleged. The following facts appeared in the evidence: In Nov. 1881 the *L. E. Cann* was at Vera Cruz. Her captain was W. W. Brooks, who had commanded her since 1879 or 1880, and who had acquired a one-sixteenth share in her from the appellant, the bill of sale being made to Ephraim Brooks, an uncle of W. W. Brooks. The interest of W. W. Brooks in the *L. E. Cann* was always kept insured by him, and in Feb. 1882 he wrote to his agents desiring that his interest in freight should also be insured for $500. This was, however, not done, because the insurance on freight was ordered early in 1882 by the appellant for Brooks' interest as well as his own. At Vera Cruz W. W. Brooks, as he himself gave evidence at the trial, made an arrangement with a Spaniard named Campos, who transacted the business of the vessel, that Campos should ship a bogus or sham cargo, and that Brooks should make away with the vessel. Accordingly a cargo was shipped worth only 40 per cent. of that represented by the bills of lading, and a draft for $1709 40 was given by a man named Villa, with Campos' knowledge, to Edmund Miller, Brooks' father-in-law, for him, the arrangement being that Brooks was to receive $2000 at Vera Cruz on signing bills of lading, $2000 on signing bills of lading at Tucolota in Mexico, and $2000 more when the protest was presented. Granes was a party to these proceedings, and went with the *L. E. Cann* to Tucolota, which place the *L. E. Cann* reached from Vera Cruz in January, and at Tucolota gave Brooks a further draft for $2000 in favour of Edmund Miller, and put on board further cargo of much less value than appeared on the bills of lading. On the 30th March 1882 the *L. E. Cann* left Tucolota, and on the 27th April 1882, in the Gulf Stream, Brooks having previously signalled a passing schooner, the *George W. Lockner*, went on board of her with all his crew, deserting the *L. E. Cann*, and proceeded in the *George W. Lockner* to Philadelphia, where they arrived on the 4th May. The *L. E. Cann* was, when deserted by her crew, rapidly filling with water. There can be no doubt that this was mainly caused by about fifteen auger holes having been bored in her on both sides, and the ceiling cut away over the auger holes. The *L. E. Cann* did not, however, sink, and on the 24th May she was found by the *Resolute*, belonging to the Baker's Salvage Company, and was, with the help of the *North America*, a vessel belonging to the Insurance Company of North America, towed to Lynnhaven Bay. The Baker Salvage Company afterwards took her to the Port of Norfolk. On examination of the vessel there, the auger holes and the cutting away of the ceiling above mentioned was discovered. In Aug. 1882 the vessel was hauled up on the ways at Grave's ship yard at Norfolk. She was then (subject to the damage she had sustained in several respects from the storms) found to be sound. A suit for salvage was brought by the Baker's Salvage Company in the District Court of the United States for the Eastern District of Virginia (the Insurance Company of North America having waived their claim for salvage), and under orders of the court in July and Aug. 1882 the *L. E. Cann* and cargo were sold, producing $3183 net, and the said proceeds were paid to the Baker's Salvage Company, it being stated in the later order that it appeared to the court that the actual cost of the salvage service amounted to at least $5000. The vessel was subsequently repaired and put into good condition. The actions were both tried before the Chief Justice of the Supreme Court, who gave a verdict for the plaintiff, without stating any reasons. In *Cossman* v. *West* he said: "I think the plaintiff has made out a case entitling him to judgment. I find there is a total loss by the perils insured against under the policy, and assess the damages at $100, with interest $14; total $114, for which judgment will be entered;" and judgment was entered accordingly. In the action on the policy on freight, the Chief Justice said: "The plaintiff has made out a case entitling him to recover for a total loss of freight under the policy declared upon. I find a judgment therefore for the plaintiff, and assess damages at $3000, with interest $295; total $3295, for which judgment will be entered." Judgment was entered accordingly. It should be mentioned that the plaintiff was wholly exonerated from any participation in, or knowledge of the disgraceful fraud on the part of Brooks, the master. Indeed, the Chief Justice stated that the villainous conduct of the master could not affect the owner, who is admittedly innocent of any collusion with his rascality. A motion was made to the full court to set aside the verdicts and judgments. After argument, the learned judges were divided in opinion, the majority holding that, as no notice of abandonment had been given, there was only a partial loss, and in each case the finding and judgment of the Chief Justice was set aside and reversed, and judgment entered for the defendants with costs, including the costs of the trial and the costs of the appeal. The Chief Justice adhered to his original opinion, and held that there was an actual total loss both of the ship and of the freight. The present appeals have been preferred against the decrees founded upon the judgments of the majority of the judges.

The principal questions in each case are

whether there was an actual total loss, and whether sufficient preliminary proof of loss was given. There seems to be no doubt that, after the abandonment of the barque by the master and crew, and when the owner first received notice thereof, the vessel was in such a hopeless condition that the risk and expenses of endeavouring to save her were such that no prudent uninsured owner would have incurred them. There was, consequently, a constructive total loss, and the plaintiff might, when he first received notice of the loss, or within a reasonable time afterwards, have given notice of abandonment to the underwriters, in which case he could have recovered for a total loss. It was admitted that no formal notice of abandonment was given, and it is unnecessary, in the view which their Lordships take, to determine whether what took place between the owner and the underwriters substantially amounted to such a notice. Their Lordships are of opinion that after the sale under the decree of the Court of Admiralty there was an actual total loss. By that sale, the property in the vessel and cargo was transferred to the purchaser, and the vessel and cargo ceased to be the property of and were wholly lost to the original owners thereof.

To constitute a total loss within the meaning of a policy of marine insurance, it is not necessary that a ship should be actually annihilated or destroyed; it may, as in the case of capture and sale upon condemnation, remain in its original state and condition; it may be capable of being repaired if damaged; it may be actually repaired by the purchaser, or it may not even require repairs. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated: (*Mullett* v. *Shedden*, 13 East, 304.) In that case saltpetre, which had been insured, was seized in the course of the voyage, and condemned. It was thereupon taken out of the ship and sold under a decree of condemnation for the benefit of the captors. The sentence of condemnation was afterwards reversed on appeal, and the property ordered to be restored, or its value paid, for the use of the owner on payment of the expenses, on behalf of the captor and of His Majesty in the office of Admiralty in both courts. It was held that the assured might recover as for a total loss, without notice of abandonment. In the course of the argument Lord Ellenborough remarked, "The assured stands upon the actual destruction as to him of the thing insured, which precludes the necessity of any notice to abandon it;" and Bayley, J., "No circumstance has happened since the seizure to make the original detention less than a total loss." In delivering judgment Lord Ellenborough, C.J., said: "Then, as to the point of abandonment, if instead of the saltpetre having been taken out of the ship and sold, and the property devested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought that there was much in the argument that in order to make it a total loss there should have been notice of abandonment, and that such notice should have been given sooner; but here the property itself was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away."

The case of *Stringer* v. *The English and Scottish Marine Insurance Company Limited* (L. Rep. 4 Q. B. 676; 3 Mar. Law Cas. O. S. 440) was referred to by the learned Chief Justice in the court below. In that case goods were insured on a voyage against, amongst other perils, "takings at sea, arrests, restraints, and detainment of all kings, &c." While on the voyage, the ship and cargo were seized by an American cruiser and taken to New Orleans, where a suit was instituted by the captors against the ship and cargo for the purpose of having them adjudged a lawful prize. The owners at that time elected to treat the seizure as a partial loss. On the 16th June 1864 the prize court gave judgment against the captors, and ordered restitution. On the 1st of July the captors appealed. On the 12th September the owners, who then for the first time knew that an appeal had been preferred, gave notice of abandonment, which the underwriters refused to accept. Subsequently, the owner informed the underwriters that the Prize Commissioner had offered to the court to sell the ship and cargo. The sale of the goods could have been prevented by depositing the full value of the goods, or giving bail for them in the Prize Court, estimated in paper currency; at this time the paper currency was at 150 to 180 per cent. discount, and subject to great and sudden fluctuations. The plaintiffs and defendants declined to take either of these steps, and on the 25th May 1865 the ship and cargo were sold by order of the court. It was held by the Court of Queen's Bench that the prolongation of the litigation by the captors appealing was not more than might have been reasonably anticipated when the ship and cargo were first libelled; that the appeal did not amount to such a change of facts as would justify the assured in changing their election; and that the assured could not, by their notice of abandonment, make the loss by the seizure and detention a total loss. But it was further held that the depositing of the full value of the goods in paper currency or the giving of bail for them were acts which a prudent uninsured owner would not have adopted to prevent a sale and that the sale, therefore, occasioned by the seizure, caused a total loss, for which the plaintiffs were entitled to recover. In delivering the judgment of the court, Blackburn, J. gave a clear and comprehensive view of the law. Speaking of the time when the cargo was detained under the seizure and the suit instituted in the Prize Court to have it condemned, he said, "It is clear that at this time the cargo was, by one of the perils insured against, entirely out of the control of the assured under circumstances which rendered it doubtful whether it would ever be restored, or if restored, at what period. Under such circumstances the assured had a right to elect whether he would retain the property in himself and treat the loss as a partial one or abandon it to the underwriters and claim for a total loss." Having then proceeded to discuss the question whether a notice of abandonment had been given in time, and held that it had not, he went on to say, "But we think the sale by the Prize Court stands on a very different footing. If the Prize Court in America had wrong-

fully condemned the goods and they had been sold under that sentence, the case would have been identical with that of *Mullet* v. *Shedden*, where the very point decided was that by the sale the property was wholly lost to the owner, and therefore that 'the necessity of any abandonment was altogether done away.'" Again he says, "But in the present case the sale was not under a condemnation, but because the assured did not give security to prevent the sale. The defendants (the underwriters) had the fullest notice of what was about to happen, and had ample opportunity to interfere and give security to prevent the sale; still the assured, if he by any means such as he could reasonably be expected to use could have prevented the sale, was bound to use them, and if the sale was directly occasioned by his default, though remotely by the seizure, he cannot recover against the underwriters on account of that sale. But the assured was not bound to use unreasonable exertions in order to preserve the thing insured, and if the giving of bail or deposit would have exposed them to expense, or risk of expense, beyond the value of the object, or, as the same idea is often expressed, if the steps necessary to prevent the sale were such as a prudent uninsured owner would not have adopted, we think they were not in default, and the sale was then a total loss occasioned by the seizure." Having then examined the evidence, his Lordship concluded: "We come, therefore, to the conclusion of fact that the assured could not, by any means which they could reasonably be called on to adopt, have prevented the sale by the American Prize Court, which at once put an end to all possibility of having the goods restored in specie, and consequently entitled the assured to come upon their insurers for a total loss. Even then the assured were not bound to do so. If they had thought it was more for their interest still to claim the proceeds of the sale in the hands of the American court as their money, and come upon the underwriters only for the partial loss, they might do so. It is clear as a matter of fact that they elected to come upon the insurers for an indemnity for a total loss, and that by so doing the insurers, when they have indemnified them, will be entitled to be subrogated for them and to get what they can out of the hands of the Americans for their own benefit." His Lordship then cited authorities in support of that right on the part of the insurers. The case was carried to the Exchequer Chamber by writ of error on a special case, and the judgment was affirmed (22 L. T. Rep. N. S. 802; 3 Mar. Law Cas. O. S. 440; L. Rep. 5 Q. B. 599). Kelly, C.B., in delivering his judgment, stated that, in his opinion, the Court of Queen's Bench were not only perfectly justified in coming to the conclusion, but that they could not have come to any other conclusion than that no prudent owner would have given the security necessary to prevent the sale. He then proceeded: "Such being the circumstances of the case, the decree for sale and the sale itself having taken place under circumstances in which there was no default on the part of the owner of the goods, we have to consider whether that sale justified the plaintiffs in treating the case as one of total loss. I am of opinion that the decree for the sale of the goods, and the sale of the goods under that decree, which for ever took out of the possession of the owner the goods themselves, and took away from him the power of ever repossessing himself of the goods in specie, entitled the plaintiff to treat the case as one of total loss. This loss of the goods arises, though not directly, out of the original capture (which was of itself, if so treated, a total loss), through a series of consequences, viz., the institution, the different steps, and the continuance of the suit until the decree was pronounced. The sale was, if I may use the expression, a completion of the total loss." Martin, B. observed: "When the sale took place, the property in the goods was taken out of the owner, so that it became impossible for him to take the goods under his original ownership to the port of discharge, and upon that taking place the goods I will not say were totally lost, because I have complained of that being an ambiguous expression, but were taken entirely out of the owner's dominion and control, and were absolutely taken away from him, and, in my judgment, after that event took place, the word 'abandonment,' in the sense in which I have used the word with regard to what took place anterior to this, does not apply at all. The consequence was that there was, in my judgment, a total deprivation of the ownership of the goods in the assured for the purpose of the adventure, and that he was, therefore, entitled to the whole value of his goods under the valued policy."

In *Holdsworth* v. *Wise* (7 B. & C. 794) and *Parry* v. *Aberdein* (9 B. & C. 411) there was an abandonment, and it was held that the subsequent recovery of the vessel did not convert that which had become a total loss by reason of a notice of abandonment into a partial loss. In *Roux* v. *Salvador* (3 Bing. N. C. 266) it was held by the Court of Exchequer Chamber that, where goods were so injured by the perils of the sea that they would have been destroyed by putrefaction before they could arrive at their destination, and were consequently sold, the assured was at liberty to treat the loss as a total loss, without giving notice of abandonment. In that case, which is a leading one, Lord Abinger, C.B., in a very lucid and learned judgment, pointed out the distinction between a total and a partial loss; gave a clear and exhaustive exposition of the law, and laid down the principles upon which the whole doctrine of abandonment in our law was founded, and the consequences resulting from it. He said: "It is indeed satisfactory to know that however the laws of foreign States may differ from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment. The underwriter engages that the object of the assurance shall arrive in safety at its destined termination. If in the progress of the voyage it becomes totally destroyed or annihilated, or if it be placed by reason of the perils against which he insures in such a position that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the letter of his contract to pay the sum insured." His Lordship then went on and pointed out intermediate cases, in which notice of abandonment would be necessary before the assured could treat the loss as a total one. Elsewhere in dealing with the

case then before the court, his Lordship said: "In the case before us the jury have found that the hides were so far damaged by perils of the sea that they never could have arrived in the form of hides. By the process of putrefaction and fermentation which had commenced a total destruction of them before their arrival at the port of destination became as inevitable as if they had been consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold; and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us therefore that this was not the case of what has been called a constructive loss, but of an absolute total loss of the goods. They never could arrive, and at the same moment when the intelligence of the loss arrived all speculation was at an end." Again, on referring to *Mellish* v. *Andrews* (15 East, 13), he said: "In the language of Lord Ellenborough, it is an established and familiar rule of insurance that when the thing insured exists in specie and there is a chance of its recovery there must be an abandonment; a party is not in any case obliged to abandon, neither will the want of an abandonment oust him of his claim for that which is, in fact, an average or a total loss, as the case may be." Then, referring to *Mullet* v. *Shedden* (13 East, 304), he says: "In that case the sentence under which the sale was made had been reversed, and the proceeds directed to be paid to the owner. So that there was a substitution of money for a portion at least of the matter insured." Again, his Lordship proceeds: "Both these cases are direct authorities that no abandonment is necessary when there is a total loss of the subject-matter insured, to which may be added the cases of *Green* v. *The Royal Exchange Assurance Company* (6 Taunt. 68); *Idle* v. *The Royal Exchange Assurance Company* (8 Taunt. 755); *Robertson* v. *Clarke* (1 Bing. 445); and *Cambridge* v. *Anderton* (2 B. & C. 697). This last is on all-fours with the present, and is an express decision that when the subject-matter insured has, by a peril of the sea, lost its form and species, where a ship, for instance, has become a wreck or a mere congeries of planks, and has been *bonâ fide* sold in that state for a sum of money, the assured may recover for a total loss without any abandonment. In fact, when such a sale takes place, and in the opinion of a jury is justified by necessity and a due regard to the interests of all parties, it is made for the benefit of the party who is to sustain the loss, and if there be an insurance the net amount of the sale, after deducting the charges, becomes money had and received to the use of the underwriter, upon the payment by him of the total loss. It may be proper to remark, however, that the assured may preclude himself from recovering for a total loss if, by any view to his own interest, he voluntarily does or permits to be done any act whereby the interests of the underwriter may be prejudiced in the recovery of that money."

Nothing can be clearer than the doctrine thus enunciated. It has been always acted upon, and was followed in *Farnworth* v. *Hyde* (18 C. B. N. S. 835), and in many other cases. The last-mentioned case was overruled in the Exchequer Chamber (15 L. T. Rep. N. S. 395; 2 Mar. Law Cas. O. S. 429; L. Rep. 2 C. P. 204), but merely upon a question of fact. The principle of law was not impugned. On the question as to the necessity of notice of abandonment, the Court of Exchequer Chamber expressly stated that they left the authority of the decision of the court below untouched, neither confirmed nor weakened. It would be impossible to comment upon all the cases which were referred to in the course of the argument before their Lordships. Many of them were wholly inapplicable to the present case. For instance, *Cory* v. *Burr* (49 L. T. Rep. N. S. 78; 5 Asp. Mar. Law Cas. 109; 8 App. Cas. 393), in which, in consequence of the barratrous act of the master, the ship was seized, it was held that the seizure and not the act of smuggling was the cause of the damage, and that, as "seizure" was excepted from the perils insured against, the insurer could not recover against the underwriters. In that case the barratrous act of the master in taking the goods on board would not have caused any loss or damage if the vessel had not been seized, but as seizure was excepted from the perils, there was no loss by a peril insured against. If in the present case the policy had excepted all charges, if any, which may be incurred for salvage (an improbable exception, no doubt), the case would have had a bearing upon the present; but there was no such exception, and consequently no similarity between the two cases. The cases above referred to of *Roux* v. *Salvador* and *Stringer* v. *The English and Scottish Insurance Company* are decisive upon the present case, unless a valid distinction can be drawn between a sale upon capture and the sale under the decree of the Court of Admiralty for the expenses of salvage services.

Two cases were cited to show that there is such a distinction; *Thornely* v. *Hebson* (2 B. & Ald. 513) referred to by Thompson, J., in the court below, and *De Mattos* v. *Saunders* (27 L. T. Rep. N. S. 120; 1 Asp. Mar. Law Cas. 379; L. Rep. 7 C. P. 570). In *Thornely* v. *Hebson* it was held, under the particular facts of the case, that the sale of a ship under a decree of a foreign Admiralty Court for salvage did not constitute a total loss. In that case, however, it appeared that the value of the vessel, even under a forced sale, exceeded the amount of the claim of the salvors, and that the owners were near enough to have acted in the business, and that it was not proved that they had used all the means in their power to prevent the sale. It is to be inferred from what fell from the learned judges that if they had done so and were not in default in not preventing the sale they might have recovered for a total loss. Abbott, C.J., said, "If, in this case, it had appeared that the owners had used all the means in their power, and were unable to have paid this salvage, it would have been very different; but that is not so." So Bayley, J., "Where a ship is captured she is taken possession of by persons adversely to the owner, and so it is in the case of barratry; but here the ship was taken possession of by persons acting not adversely but for the joint benefit of the owners, and the latter were never dispossessed of the vessel." In that case it appears that the crew of the *William* were on

board the *Hyder Ali*, from which the volunteer salvors were permitted to go on board the vessel which was saved by their exertions. The vessel, although the crew had left her, could not be treated as a "derelict" and out of the possession and control of the master, so long as he was keeping by her in the *Hyder Ali*. In another part of his judgment Bayley, J. says, "The sale (that is, the sale under the decree for salvage) in order to constitute a total loss, must have been found to have been necessary and wholly without the fault of the owners. Now, here a ship originally worth 1200*l.* is sold for 315*l.* only. It appears that the owners were near enough to have acted in the business at the time." Holroyd, J. also considered that the taking possession by the salvors was not adverse, but an act done for the benefit of the owners, and therefore did not dispossess them; that the custody of the vessel was in the salvors till the salvage was paid, but that the legal possession was still in the owners. His Lordship added, "I also think that the sale will not amount to a total loss if it was in the power of the owners to prevent it, and it lies upon them to show that they could not do so." In referring to this case in the case of *Stringer* v. *The English and Scottish Marine Insurance Company* (*ubi sup.*), Martin, B. says: "Holroyd, J. pointed out, as indeed did all the judges, that to hold that to be a total loss would be holding that which was really a partial loss to be a total loss, because the assured had not taken a step to prevent the sale which he ought to have taken." The present case differs materially from *Thornely* v. *Hebson*, for here the salvage greatly exceeded the value of the property saved, and no prudent uninsured owner would have paid the salvage in order to redeem the ship. Besides, the proceedings in the Admiralty Court were against the ship, which was within its jurisdiction, the plaintiff, the owner, was not, as in *Thornely* v. *Hebson*, near enough to have acted. He was in Nova Scotia, and the ship was at Norfolk, and the Admiralty Court in Virginia, and it did not even appear that he had notice of the proceedings in the Admiralty Court. He was not bound to follow his ship, in its then state in the hands of the salvors, wherever they might please to take it. Certainly the owner of the ship was not bound to redeem the cargo, which did not belong to him, in order that he might have a chance, a very remote one, that he might be able to send it to its destination by another vessel. Furthermore, the insurers, by their agents, were present at Norfolk; they had notice of all the proceedings, and the Ocean Assurance Company, the insurers of the ship, had informed the owner in their letter of the 8th June 1882, that they had sent their marine inspector to look into the matter and report, and they did not report before the sale of the ship. They might (as stated by Blackburn, J. in *Stringer's* case), if they had pleased, have redeemed the ship and cargo. For the reasons above advanced, it appears clear that the owner was not in default in not preventing the sale of the ship and cargo by giving bail, or paying the salvage expenses. In *De Mattos* v. *Saunders* (*ubi sup.*) it was held that a partial loss of cargo caused by perils of the sea was not converted into a total loss by a sale under a decree of a Court of Admiralty, in a suit instituted by salvors against the ship and cargo for the recovery of sums claimed for salvage services. The case was decided upon the ground that the acts and proceedings in the Admiralty Court were not, under the circumstances in that case, the natural consequence of a peril insured against. Willes, J., in delivering the judgment of the court, observed: "The contention that the loss, partial at the time it was incurred, was converted into a total loss by the acts of the salvors, and the seizure and sale under the orders of the Court of Admiralty must fail, because those acts and proceedings were not the natural and necessary consequence of a peril insured against. The assured is entitled to recover from the underwriters for a loss arising from sea damage and its proximate consequences; but it is not a proximate consequence of sea damage in general that there should be proceedings in a Court of Admiralty. A link is wanting. As well might it be said that a proceeding by salvors setting up a false claim would convert a partial into a total loss, which would be absurd. There was no natural connection between the sea damage here and the sale under the decree of the Court of Admiralty. The cases cited of hostile seizure and condemnation by a prize court have no application. In such a case, the original seizure is *primâ facie* a total loss; all that follows is only the necessary consequence of the seizure. It appears from the case that there was a considerable partial loss of the salt occasioned by perils of the sea. For the purposes of this cause we may call it either a total loss of part or a partial loss of the whole cargo; but whatever it is called it is not a loss within the policy so long as any substantial part of the salt remains, because of the memorandum whereby salt is warranted free from average, unless general, or the ship be stranded." But the present case goes further than a claim for salvage, where a ship has not been abandoned at sea. In this case the vessel had been abandoned by the master and the crew when she was discovered and taken possession of by the salvors.

Their Lordships are of opinion that this case is distinguished from that of *De Mattos* v. *Saunders*. The passage above quoted shows that at the time when the salvage service was commenced in that case, there was not any loss for which the insurers were liable under the terms of the policy. In that case also the vessel does not appear to have been abandoned by the master and crew, whereas in this case the vessel was a derelict. There can be no doubt that the barque was at that time, in the eye of the law, a "derelict," a term legally applied to a ship which is abandoned and deserted at sea by the master and crew without any intention on their part of returning to her. It is not like the case of a vessel which is left by her master and crew temporarily with the distinct intention of returning to it. In such a case the ship is not abandoned, and therefore is not derelict, though the master may have given up the entire management to the salvors. In the case of salvors there is a distinction between a derelict and a vessel which, though in great danger, has not been abandoned by the master and crew. In the case of a derelict, the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have the entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence; but in an

ordinary case of disaster, when the master remains in command he retains the possession of the ship, and it his province to determine the amount of assistance that is necessary, and the first salvors have no right to prevent other persons from rendering assistance if the master wishes such aid. So unless a vessel is derelict the salvors have not the right as against the master to the exclusive possession of it, even though he should have left it temporarily, but they are bound on the master's returning and claiming charge of the vessel to give it up to him. In the present case, the vessel being a derelict, the salvors had the exclusive possession and control of it up to the time of the sale, and were not bound to give it up until they had been remunerated for the salvage services. Assuming that their possession constituted a constructive total loss, but not an absolute total loss, and that there was still a chance that the vessel might be redeemed and restored, the sale under the decree of the court removed, as Lord Abinger remarked in *Roux* v. *Salvador* (*ubi sup.*), all speculation upon that subject, and entitled the plaintiff to treat the case as one of total loss without abandonment. As to the freight, the sale of the cargo clearly constituted a total loss, for after the sale the assured and underwriters in his place lost the right to carry on the cargo. The salvage services, if not a peril insured against, were an immediate and necessary consequence of a peril insured against, whether of barratry or a peril of the sea; the immediate consequence was that the ship was rendered liable for the salvage expenses and the proceedings in the Admiralty Court, the immediate and necessary consequence of the damages remaining unpaid.

It was urged at the bar that there was no valid or legal charter-party or contract for freight in consequence of the fraudulent arrangement made by Brooks, the master of the vessel; but this contention cannot be supported. There were two contracts—one the charter-party of the 6th Jan. 1882, made by the master on the part of the owner of the vessel; the other, the fraudulent agreement on the part of the master on his own account to accept a bogus cargo, and to make away with the vessel. The latter did not vitiate the former, which might have been enforced if the master had refused or neglected to cause the loss of the ship. Their Lordships concur with the Chief Justice that the defendants cannot rely upon want of preliminary proof of loss. It was only the fact of the loss of which preliminary proof had to be given. The production of the master and mate could not be legally insisted upon by the insurers, and, in West's case, they asked for nothing more. In the suit upon the policy on freight there was, in addition to the facts relied upon by the Chief Justice, the declaration of the owner of the 14th Feb. 1883. In the fourth plea, and in the grounds of appeal in the action on the ship policy, the defendants relied upon want of preliminary proof of interest, as well as of loss, but the policy on the ship did not provide for preliminary proof of interest. In the action on the policy on freight, though the policy required preliminary proof of interest, the third plea relied only upon the absence of proof of loss. Their Lordships are of opinion that the absence of preliminary proof of interest cannot avail either of the respondents. The defendants must also fail upon their defence founded upon the alleged fraudulent concealment that at the time of the insurance the ship was worm-eaten, unsound, and unfitted for the voyage. In the respondent's own case it is stated that when the vessel was hauled up at Norfolk she was then, subject to the damage she had in several respects sustained from the storms, found to be sound. The defendants, in their Lordships' opinion, must also fail on the defence that the plaintiff was not interested as alleged.

Upon the whole, their Lordships are of opinion that the judgments and orders of the full bench, dated the 4th Aug. 1885, ought to be reversed, and that the original judgments and decrees of the 6th Dec. 1884 respectively ought to be affirmed, and that the defendants in each of the actions ought to pay the costs incurred in the full bench, and they will humbly advise Her Majesty accordingly. The respondents must respectively pay the costs of the appeals to Her Majesty in Council.

Solicitors for the appellant, *Hill, Son,* and *Co.*
Solicitors for the respondents, *Bompas* and *Co.*

Supreme Court of Judicature.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 8, 28, *Dec.* 5, 6, *and* 19, 1887.

(Before CHITTY, J.)

WARD *v.* THE ROYAL EXCHANGE SHIPPING COMPANY LIMITED; *Ex parte* HARRISON.(*a*)

Company—Shipping company—Hypothecation of freight—Charge on particular asset—Debenture-holders—Priority.

The directors of a shipping company passed a resolution authorising its brokers to hypothecate the freight of two ships during their present voyages, to secure a present advance of sums not exceeding 5000l. Shortly afterwards the brokers transferred the freight of one of the ships to H. and Co., to secure an advance of 3000l. The transfer was signed by the brokers as managers of the company, who also gave an undertaking to collect the freight as agents to H. and Co. An action having been brought by the debenture-holders of the company for the enforcement of their securities, and the company having gone into liquidation, H. and Co. applied for an order that the liquidator of the company should pay to the applicants out of moneys representing the freight of the ship in question the sum of 3000l.

Held, that the company had power under its articles of association, and the resolutions passed pursuant thereto, notwithstanding the debenture debt, to specifically charge a particular asset for the purpose of carrying on the company's business; and that, therefore, H. and Co.'s security was prior to that of the debenture-holders.

ON the 16th Dec. 1886 a resolution was passed by the directors of the Royal Exchange Shipping Company Limited (the owners of the *Monarch* line of steamships) authorising its brokers, John Patton, jun., and Co., to hypothecate the freight

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

of the *Egyptian Monarch* and *Assyrian Monarch* during their then present voyages, to secure a present advance to the company of sums not exceeding 5000*l.*

By a memorandum, dated the 22nd Dec. 1886, John Patton, jun., and Co. transferred the freight of the *Egyptian Monarch* to J. and C. Harrison, who had been in the habit of coaling the company's steamers, to secure an advance from J. and C. Harrison of 3000*l.* for the use and necessary disbursements of that steamer.

The memorandum was signed by John Patton, jun., and Co., as the company's managers, who also gave an undertaking to collect the freight as agents for J. and C. Harrison. The memorandum did not bear the seal of the company.

It was a transferance and assignment to J. and C. Harrison, for their own use and benefit, of the freight on account of a particular voyage of the *Egyptian Monarch* from New York to London, after making provision for the captain's orders for New York disbursements.

Actions were subsequently commenced against the company by David Ward, on behalf of himself and all other the holders of debentures of the company; by William Utley, on behalf of himself and all other the holders of debenture stock of the company; by Hamilton Ramsay Buchanan, on behalf of himself and all other the holders of debentures of the first series issued by the company and by William Webster.

The actions were consolidated, and David Ward obtained the conduct of the consolidated actions. The object of the several actions was the enforcement of the plaintiffs' securities.

Edward Hart was appointed in the consolidated actions receiver and manager of the company.

The company afterwards went into liquidation, and Edward Hart was appointed liquidator of the company.

A motion was then made, on behalf of J. and C. Harrison, that Edward Hart might be ordered to pay to them the sum of 3000*l.*, and their costs of the motion, out of the balance of all moneys received by him as freight on account of the steamer *Egyptian Monarch* for her last voyage from New York to London, after making provision for captain's orders against such freight for New York disbursements of the vessel; or, in the alternative, that an inquiry might be made whether the applicants had any and what interest in the freight received by Edward Hart, as aforesaid, or in any and what part thereof.

The question was, whether the hypothecation of the freight of the *Egyptian Monarch* to J. and C. Harrison and whether the general letters on the freights were valid securities, giving priority to J. and C. Harrison's claims against the company.

Various objections were made to J. and C. Harrison's claim, amongst others that the resolutions requisite to the authorisation of the charge had not been passed by the company; that under the company's articles of association its borrowing powers at the date of the charge were actually exhausted; and that the charge was invalid as not made under the company's seal.

Maclean, Q.C. and *Levett* in support of the motion.—The applicants are entitled to assume as against the company that all acts necessary and proper for the validity of the charge have been performed by the company. The debenture-holders of the company hold a floating security from which the company is entitled to detach any specific asset to secure money advanced in the ordinary routine of business. The charge given to the applicants, although not under seal, is binding on the company, inasmuch as the company was constituted for the purpose of trading, and the charge was made for that purpose. There is nothing in the articles of association and special resolutions of the company with regard to the debenture-holders and the holders of debenture stock which prevented the company from making a specific and perfectly valid charge on a specific portion of the property of the company in order to carry on the business of the company. The claim of the applicants is opposed on the ground that their security is not a good and valid security, since it was not under the seal of the company; and that at the date of the charge the company had already exceeded its borrowing powers, and the directors consequently could not give the charge, neither could the managers. With regard to the first ground of objection, as to the security being bad because it was not under seal, the argument cannot be maintained that the company could not give a perfectly valid security without its being under seal. With regard to the second ground, as to the borrowing powers of the company being exhausted, by a special resolution of the company, dated the 25th July 1879, borrowing was authorised to the extent of 200,000*l.* But, even admitting that the borrowing powers of the company had been exceeded, the applicants were not bound to inquire whether that was the case or not. They were entitled to assume that the directors were exercising a power which they possessed.

Romer, Q.C. and *A. R. Kirby* for Hart and Ward.—The applicants were not justified in assuming that the directors of the company were entitled to give the charge on the freight. Moreover, there is no document relating to such charge, which on the face of it can be deemed binding upon the company. On the face of it, the charge actually given was not executed by the company at all. That in itself is a complete answer to the present application. The charge was only a memorandum purporting to have been signed by the company's managers. But such an instrument without the seal of the company cannot be treated as binding upon the company. In the absence of special instructions from the directors, the managers had no power to bind the company. The charge could only be binding on the company if the managers had received the necessary authority from the directors to execute it. But the only authority was a resolution of the directors of the 16th Dec. 1886, and a letter sanctioning the managers as brokers to hypothecate freights of two ships against a loan of 5000*l.* There was no authority to give to one creditor a charge securing his own debt, and giving him priority over the other creditors. The resolution of the directors refers to the "present voyages" of the two ships, and it was passed on the 16th Dec. 1886. The *Egyptian Monarch*, however, left London on the 1st Dec., and did not arrive at New York until the 21st or 22nd, and therefore the vessel was at sea at the

time the authority stipulating "present voyage" was given. Upon the appointment of the receiver the debentures became an absolute charge, and immediately he took possession of the vessel on her arrival in London he became entitled to the freight. That possession of the ship made good the debenture-holders' claims.

Maclean, Q.C. replied.

The following authorities were referred to in the course of the arguments:

The South of Ireland Colliery Company v. *Waddle*, L. Rep. 4 C. P. 617;
Re Hamilton's Windsor Ironworks; Ex parte Pitman and Edwards, 39 L. T. Rep. N. S. 658; 40 L. T. Rep. N. S. 569; 12 Ch. Div. 707, 712;
Royal British Bank v. *Turquand*, 12 Ell. & Bl. 327;
Fountaine v. *Carmarthen Railway Company*, L. Rep. 5 Eq. 316, 322;
Liverpool Marine Credit Company v. *Wilson*, 1 Asp. Mar. Law Cas. 323; 26 L. T. Rep. N. S. 717; L. Rep. 7 Ch. App. 507, 511;
Re Bank of Hindustan, China, and Japan; Campbell's case, 29 L. T. Rep. N. S. 519; L. Rep. 9 Ch. App. 1, 24;
Re County Life Assurance Company, 22 L. T. Rep. N. S. 537; L. Rep. 5 Ch. App. 288, 293;
Re Athenæum Life Assurance Society, 4 K. & J. 549, 559, 560;
Irvine v. *Union Bank of Australia*, 37 L. T. Rep. N. S. 176; 2 App. Cas. 366;
Mahony v. *East Holyford Mining Company*, 33 L. T. Rep. N. S. 383; L. Rep. 7 E. & I. App. 869, 883, 892, 894;
Re Pooley Hall Colliery Company, 21 L. T. Rep. N. S. 690; 18 W. R. 201;
English Channel Steamship Company v. *Rolt*, 44 L. T. Rep. N. S. 135; 17 Ch. Div. 715.

Cur. adv. vult.

Dec. 19, 1887.—The following written judgment was delivered by

CHITTY, J.—The first question is, whether the directors' powers to borrow were exhausted in Dec. 1886, when Messrs. Harrison took their security. The answer to this question depends mainly on the 108th and 55th articles, and the special resolution of the company passed on the 10th and confirmed on the 25th July 1879, pursuant to the 51st section of the Companies Act 1862. By the 108th article the directors had power to borrow at their discretion for the purposes of the company such sums as they might think proper, and to give security for the loans, but subject to a proviso that the aggregate amount borrowed by them should not at any one time, without the assent of an extraordinary meeting of the company, as specified in art. 55, exceed one-half of the amount paid up on the company's charges. By the 55th article an extraordinary meeting of the company had power to authorise the directors to borrow on such security as the meeting might think fit any sum of money beyond the sum mentioned in the 108th article. The directors laid statements before the meetings of the 10th and 25th July 1879, in reference to a proposed new line of steamers between America and Europe; and the special resolution passed and confirmed at those meetings ran thus: "This meeting, having heard the statements of the directors in reference to the acquisition of a controlling interest in three or four large steam vessels to commence a new line between America and Europe, hereby approves the same, and authorises the board to make the needful arrangements for making advantageous contracts for the construction of such vessels, and the raising of the necessary capital from 150,000*l.* to and not exceeding 200,000*l.* on debentures, or otherwise as they may elect on such terms as they may approve, to carry out the same." By virtue of the authority conferred on them by this special resolution, the directors raised 150,000*l.* by the issue of debentures for the purposes of the new line, and duly applied the money thus raised. Subsequently, at meetings held on the 27th March and the 12th April 1882, a statutory special resolution was passed and confirmed authorising the creation of debenture stock, and at an extraordinary general meeting held afterwards on the same 12th April, a resolution was passed authorising the directors at once to seal certificates for 300,000*l.* debenture stock, of which 150,000*l.* was to be issued as an additional loan, and 150,000*l.* was to be applied in the redemption of the outstanding debentures of the like amount; that is, the debentures issued under the authority of the statutory special resolution of 1879. The resolution authorising the directors to issue the 300,000*l.* debenture stock was not a statutory special resolution, but was a single resolution passed at one meeting only. Without going through the figures in detail, it is sufficient to state that in Dec. 1886 there had been raised by borrowing under the statutory special resolutions of 1879 and 1882, and the resolution passed at the extraordinary meeting of the 12th April 1882, sums which were represented in Dec. 1886 by outstanding debentures or debenture stock to an amount largely in excess of one half the amount which had in Dec. 1886 been paid up on the company's shares.

In these circumstances the precise question as to the directors' powers of borrowing in Dec. 1886 is this: Did the statutory special resolution of 1879 confer on the directors a new and independent power to raise money by the means and for the purpose mentioned in that resolution; or did it operate merely in reference to the proviso in the 108th article as an assent of an extraordinary meeting to the directors borrowing in excess of one-half of the paid-up share capital? I think that the special resolution of 1879 created a new independent power for the following reasons: When the company was incorporated it was foreseen that in the transaction of its business and the conduct of its shipping affairs, occasion would arise on which it would be reasonable and convenient to confer on the directors a power to borrow without the trouble and delay of calling an extraordinary meeting, and with this view the 108th article was inserted. It would not be right to hold that this reasonable and convenient power was taken away except upon solid and substantial grounds. Yet if the argument for the respondents is right, the directors lost this power immediately on the passing of the special resolution of 1879, or at all events so soon as it was acted upon. The directors would have had no power to borrow a sixpence for the general purposes of the company without the assent of an extraordinary meeting. Try the case in this way: Suppose the directors had exercised their power under the 108th article of borrowing money within the limit stated in the proviso, and had subsequently sought to exercise the powers conferred by the special resolution of 1879, must the amount borrowed under the 108th

article have been brought into account against the sum mentioned in the special resolution? I think not. The exact amount raised by shares when the special resolution was passed is not given in evidence; but it was evidently less than 300,000*l.*, and was stated at the bar to be 200,000*l.* The directors accordingly had at that time power under the 108th article to borrow without the assent of a meeting 100,000*l.*, but not 150,000*l.* It is admitted on both sides that the words in the special resolution "from 150,000*l.* to and not exceeding 200,000*l.*" relate to the amount to be raised under that resolution; that it was not to be less than 150,000*l.* nor more than 200,000*l.* The lower limit then of 150,000*l.* did not correspond with the limit of the directors' power to borrow without further assent. The special resolution does not in terms refer to the 108th article or the proviso contained in it; nor does it in point of form purport to give an assent to the directors borrowing in excess of the half of the paid-up share capital. It does not say that the directors may borrow from 50,000*l.* to 100,000*l.* in excess of their subsisting unconditional power to borrow. Further the special resolution authorised the directors to "raise the necessary capital on debentures or otherwise as they may elect on such terms as they may approve." It was contended by the respondents' counsel that the resolution authorised the raising of capital not merely by borrowing, but by the issue of new shares (see arts. 11 and 12), and this argument was admitted and adopted by the applicants' counsel in reply. Assuming this contention to be correct, and I think it is, the power was clearly a new and independent power to the extent of raising the capital by new shares. Further the necessary capital to be raised under the special resolution was to be raised only for the special purpose of the new line; whereas the power to borrow under the 108th article was for the general purposes of the company. Again the assent required under the 108th article might be well given by the resolution of one of the extraordinary meetings; it was not necessary that two meetings should be held or that a resolution should be passed in accordance with the provisions of the 51st section of the Companies Act 1862. The special resolution of 1879 (which was duly registered) became by virtue of the 50th section of that Act a new regulation of the company. An assent given by the resolution of an extraordinary meeting, under the 108th article, would not have been a new regulation or article—such a resolution would have left the articles unaltered and intact. There being no connection on the face of the special resolution with the 108th article, there is no necessity for reading the special resolution as merely giving an assent under the 108th, and I think it would be erroneous so to read it. The two articles or regulations may well be read as standing side by side, but independently one of another, as follows: The directors may raise capital from 150,000*l.* to 200,000*l.* for the specific purpose of the new line, and they may also borrow for the general purposes of the company within the limit of a half of the paid-up share capital without any further assent on the part of the company. As I am of opinion that the directors' power to borrow under the 108th article was not affected by the special solution of 1879, it is not necessary to express any opinion on the point, whether, having regard to the principle of the decision in the *Royal British Bank* v. *Turquand* (6 Ell. & Bl. 327), Messrs. Harrison were not entitled to presume that the assent required by the proviso had been given by a general meeting.

The next question relates to the meaning of the term "their present voyages" in the authority of the 16th Dec. 1886, given by the directors to the company's brokers, Messrs. Patton and Co., under which they gave to Messrs. Harrison the security of the 22nd of the same month on the homeward freight of the *Egyptian Monarch*. The *Egyptian Monarch* left London on the 2nd Dec. on her outward passage to New York, and arrived there on the 23rd. For the respondents it was contended that the terms must be confined to the outward passage only, as being the "present voyage" when the authority was given, because the authority was to hypothecate freight, and the freights for the outward passage and the homeward passage were separate and distinct freights. But it is established by the evidence that, in the case of a line of steamers plying regularly between London and New York, the expression "voyage" has a well-known and definite meaning amongst shipowners, brokers, and merchants in the city of London, and that it means the passages from London to New York and back again; and that the ship's accounts are made up on the return of the particular vessel to London when the crew are paid off. Further, it was the regular practice of this company to make out the ship's accounts on the return passage, and the log of the *Egyptian Monarch* for this particlar voyage treats the outward and homeward passages as one voyage, stating expressly that the voyage ended on the return of the ships to London. In these circumstances I hold that the term "voyage" in the directors' authority includes both passages, that being the meaning in which the directors of this company would naturally employ the term, having regard to their own practice. This conclusion is therefore strengthened by the evidence as to the general sense in which the expression is used in the case of line steamers, and also by a consideration of the circumstances under which the authority was given, such, for instance, as the short time which had to elapse before the *Egyptian Monarch* would terminate her outward passage, and the small amount of freight payable on the completion of that voyage, as compared with the sum which the directors contemplated might be obtained on the security authorised. It was further argued for the respondents that "present advances" in the authority meant an advance made at the time when the security, was executed, and that any advance made by Messrs. Harrison after the date of the security though made on the faith of it, was not within the authority given to the brokers. I decline to adopt so narrow a construction. I understand that all the advances claimed by Messrs. Harrison were made in Dec. 1886, or, at all events, before the 5th Jan. 1887, the date of the appointment of the first receiver, and consequently before the 12th Jan., the date when the *Egyptian Monarch* completed her voyage, and I think that all such advances constitute a "present advance" within the meaning of the authority. It is hardly necessary to add that Messrs.

Harrison can stand on the security only for advances and not for pre-existing debts.

Another point argued on behalf of the respondents was that Messrs. Harrison's security is bad because it was not under the company's seal, and it was argued that the directors had no power to give any security under the 108th article, except under the company's seal. This point cannot be maintained. The directors had power under that article to issue the security under the company's seal, but they were not prohibited from giving the security by any other lawful mode; and the contract under which Messrs. Harrison claimed was made in a manner binding on the company under the 37th section of the Companies Act of 1867, and it bound the company, or the directors on its behalf, to execute a further assignment under seal if Messrs. Harrison so required.

The next question is, whether Messrs. Harrison are entitled to priority over the holders of debentures and debenture stock. When Messrs. Harrison took their security and advanced their money the debentures and debenture stock constituted a floating security only. There is a proviso to that effect in the debentures under which, until default, the debentures are to operate as a floating security only, and are not to hinder any dispositions or dealings by the company of or with the ship's undertaking and effects charged; and a similar provision was made in the resolution under which debenture stock was assured. It is clear that there remained in the company power to create a specific charge on a particular asset for the purpose of carrying on the company's business.

A further argument raised by the respondents is, that being as they allege mortgagees of the ship itself, and having taken possession of the ship by their resolution on the completion of her voyage, they are entitled, as such mortgagees of the ship, to the freight which was then accruing due. But this argument assumes that they had a legal mortgage of the ship, whereas they had in fact only an equitable charge. The obtaining the appointment of a receiver and the taking possession by such receiver did not displace the priority which Messrs. Harrison had in equity to the mortgagees of the freight. But it is further contended by the respondents that the holders of debentures and debenture stock obtained priority over Messrs. Harrison by reason of their having given the first notice to the consignees. Now, the plain meaning of the correspondence which passed between the 6th and the 15th Jan. in relation to this subject was that the freight should be placed by the receiver to a separate account, to abide the order of the court as to the rights of the parties as they then stood. The receiver declined to give any personal undertaking, or to do anything which might appear to give up any right of the parties to the suit in which he was appointed by entering into the arrangement that the freight should be carried to a separate account at the bank which he selected. He gave up no right, indeed it was not competent for him to do so; but it was competent for him to enter into a reasonable arrangement which enabled him to collect the freight with greater convenience and dispatch, leaving the consignees unembarrassed by conflicting claims, and leaving the rights of the claimants for adjudication unaffected by the circumstance that he was to get in the freight. The argument for the respondents that the debentures gained an advantage through the arrangements is to my mind contrary to good faith. But assuming that the view I take of the correspondence is too favourable to Messrs. Harrison, there would still remain the question whether the holders of debentures and debenture stock could, as a matter of law, obtain priority over them by giving the first notice to the consignees. It appears to me they could not. The effect of the stipulation already stated, as to the security of the debentures and debenture stock being a floating security only, was to reserve to the extent already stated a power to the company to give a security on a particular asset in priority to the debentures and debenture stock. By virtue of this resolution Messrs. Harrison had priority at the time when they gave notice to the receiver of their security, namely, the 6th of Jan. 1887, which was before the receiver gave notice to the consignees. The result is that Messrs. Harrison had priority by virtue of the contract on the part of the holders of debentures and debenture stock in the company. If at the time when he advanced his money a mortgagee of a *chose in action* has notice of an existing mortgage, he cannot by giving the first notice to the debtor obtain any priority. If a charge were given on a debt with power for the mortgagor, notwithstanding the charge, to raise certain sums for certain defined purposes on the security of the debt in priority to the charge, and the power were exercised and notice of the subsequent advance were given to the persons entitled to the charge, the person so entitled could not gain priority by giving the first notice to the debtor, and for this simple reason, that he had contracted that the subsequent advance should have priority. That I believe disposes of the numerous questions, and I think there should be an order something to this effect: Declare that Messrs. Harrison are entitled by virtue of the instrument of the 22nd Dec. (in priority to the holders of debentures and debenture stock) to a valid equitable charge on the homeward freight of the *Egyptian Monarch* for advances made at the time or subsequently on the faith of the security prior to the date of the appointment of a receiver. That is, as I understand, the date of the default by the company. An account must be taken of what is due to Messrs. Harrison under and by virtue of their security. There will be liberty to apply for payment, but of course they will only obtain payment out of the separate fund. Then there had better be an inquiry as to whether there are any and what are the claims on the freight, and what is the amount of the charges. I will reserve the question of costs. Then, as this is only a motion *pro interesse suo*, the order had better be prefaced by a waiver of all questions of form or procedure. The receiver has no doubt done what is best for the debenture-holders.

Solicitors for the applicants, *Keene, Marsland,* and *Bryden.*

Solicitors for the receiver and liquidator, *William A. Crump* and *Son,* agents for *Broomhead, Wightman,* and *Moore,* Sheffield.

Solicitors for Ward, *McDiarmid* and *Teather.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, Oct. 25, 1887.

(Before BUTT, J.)

THE HULDA. (*a*)

Practice—Action in rem—Default proceedings—Statement of claim—R. S. C., Order XIII., r. 12.

Where the plaintiff in a default action in rem for necessaries had complied with all the formalities entitling him to judgment save service of a statement of claim, but it appeared that the writ, though not specially indorsed, contained particulars of the claim, the Court gave judgment for the plaintiff.

THIS was an action *in rem* by one John Stronach, for necessaries supplied to the foreign barque *Hulda*.

The writ was in the following terms:

The plaintiff's claim is 58*l.* 19*s.* for necessaries supplied to the vessel *Hulda*, at the port of Queenstown, in Ireland, on the 9th July 1887, and also at the port of Silloth.

Particulars.

July 9, 1887.—To amount of bill of exchange of this date drawn by the master and owner of the barque *Hulda* on the said John Stronach, and payable on demand to the order of G. M. Harvey and Sons of Queenstown, and stated to be for disbursements for use of the barque *Hulda* of Gothenburg, and which has been accordingly paid by the said John Stronach	£49	5	0
Cash advanced by the plaintiff at the port of Silloth, for use of the barque *Hulda* at the request of the master and owner	9	14	0
	£58	19	0

The defendants having made default, the action was set down for trial. It appeared that all the usual formalities had been complied with, save that no statement of claim had been delivered.

Order XIII., r. 12, is as follows:

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 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 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.

J. P. Aspinall for the plaintiff.—The plaintiff is entitled to judgment. This is a default action *in rem*, and therefore within the provisions of Order XIII., r. 12. By that rule a statement of claim is required to be filed, whereas it is to be noticed that that has not been done in the present case. It is, however, submitted that it may under the circumstances be dispensed with. The writ contains particulars of the claim, and is in itself sufficient notice to the parties of the nature of the claim.

BUTT, J.—I think that you have done all that is necessary, and that the plaintiff is therefore entitled to judgment.

Solicitors for the plaintiff, *Nye, Greenwood*, and *Moreton*.

( ) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

Tuesday, Nov. 22, 1887.

(Before BUTT, J.)

THE WEXFORD. (*a*)

Collision—Practice—Sale of ship.

Where the plaintiffs in a collision action in rem applied to the court to order a sale of their ship so as to bind the defendants on the question of damages hereafter, the Court refused the application.

THIS was a motion by the plaintiffs in a collision action *in rem* for an order for the sale of their vessel the *Mary Evans*.

The action was brought by the owners of the *Mary Evans* to recover damages for a collision which had occurred between the *Mary Evans* and the defendants' steamship *Wexford* at Santos, in South America. It was alleged by the plaintiffs that the *Mary Evans*, which was still abroad, had been so injured by the collision as not to be worth repairing. The writ, which was *in rem*, had not been served owing to the *Wexford* not having come within the jurisdiction.

The notice of motion had been served on the owners of the *Wexford*, and although they had not appeared in the action they were represented at the hearing of the motion.

J. G. Barnes, for the plaintiffs, in support of the motion.—The court ought in the circumstances to make this order. [BUTT, J.—Why? She is your own ship, and you can do what you like with her.] She is practically a total loss, and it is in the interest of all parties that she should be sold abroad. The plaintiffs are anxious to protect themselves from being afterwards charged with not having taken proper measures to secure a good price for the *Mary Evans*. This will not be open to the defendants if the vessel is sold by order of the court. It is to be noticed that in *The Columbus* (3 W. Rob. 166) Dr. Lushington was of opinion that this was the right thing to do under very similar circumstances.

J. P. Aspinall, for the defendants, was not called on.

BUTT, J.—I have no hesitation in refusing this motion. The applicants are the owners of a vessel which is not in the hands of the court, and over which they have full authority and control. If they wish to sell her, they can do so. The application is, in my opinion, quite unprecedented, and I dismiss it with costs.

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

Solicitors for the defendants, *Botterell* and *Roche*.

Tuesday, Nov. 29, 1887.

(Before BUTT, J.)

THE W. A. SCHOLTEN. (*a*)

Practice—Collision—Writ in personam—Foreign corporation—Service outside the jurisdiction—R. S. C., Order II., rr. 3, 4; *Order IX., r.* 8.

A writ in personam for service within the jurisdiction must contain the address as well as the name of the defendant, and consequently such a writ issued without any address against a foreign corporation having no place of business in this country is irregular and will be set aside.

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

Semble, that a writ for service in this country upon a foreign corporation having no address here, will not be issued without the leave of the judge, even if it contains the name and foreign address of the corporation.

THIS was a motion by the defendants in a collision action *in personam* to set aside the writ of summons and the service of it.

The collision occurred between the British steamship *Rosa Mary* and the steamship *W. A. Scholten*, owned by the Netherlands-American Steam Navigation Company, off Dover and outside the territorial waters of Her Majesty's dominions. The defendants, the Netherlands-American Steam Navigation Company, were a Dutch company resident in Holland and carrying on business at Rotterdam, and had no place of business in this country.

The writ was an ordinary writ *in personam* in the form set forth in Appendix A, part 1, form 1, to the Rules of Court of 1883, but it did not contain the address of the defendants. The subagent of the company in America and one of the managing directors being in England on the business of the company were served with the above writ.

Finlay, Q.C. (with him *H. Stokes*) in support of the motion.—The writ ought to be set aside. The defendants are a foreign company, having no place of business in this country, and therefore the writ should be in the form prescribed for service out of the jurisdiction. To issue such a writ leave must first be obtained, but here the writ has been issued without leave, and moreover is in the form prescribed for service within the jurisdiction. The address of the defendants is also omitted:

Sedgwick v. *Yedras Mining Company*, 35 W. R. 780; W. N. 1887, p. 94.

Sir *Walter Phillimore* (with him *J. G. Barnes*), *contra*.—This writ is not intended for service outside the jurisdiction. It is intended to be served within the jurisdiction, and is therefore perfectly regular in form. The plaintiffs took their chance of serving the defendant company within this country, and the service on the managing director is a good service within Order IX., r. 8. The managing director is a head officer, and it makes no difference that the defendant company is a foreign corporation:

Newby v. *Van Oppen*, 26 L. T. Rep. N. S. 164; L. Rep. 7 Q. B. 293; 41 L. J. 148, Q. B.;
The Carron Iron Company v. *Maclaren*, 5 H. of L. Cas. 416.

The absence of address does not invalidate the writ. The address is not an essential part of the writ, but merely identifies the defendant where identification is necessary:

The Helenslea, 47 L. T. Rep. N. S. 546; 4 Asp. Mar. Law Cas. 594; 7 P. Div. 57.

Finlay, Q.C. in reply.—The *Helenslea* (*ubi sup.*) is not in point. There the defendant was a private individual, here the defendants are a foreign corporation. The latter does not travel about wherever its officials go.

BUTT, J.—The question in this case is, whether the writ ought to be set aside. If the writ is not good, one need say nothing about the service of it. I have caused inquiries to be made at the writ office, and I am told that it is a most clear rule not to issue a writ against an individual or corporation with a foreign address without the leave of the judge. I am further told that the clerk who sealed this writ seeing a long string of names took part of them for an address, and did not notice that in fact there was no address. In fact the writ was sealed *per incuriam*, and would not have been sealed at all had the clerk noticed there was no address. In the form prescribed by the orders under the Judicature Act, the address as well as the name is part of the necessary form of the writ. I am perfectly aware that this is a writ for service not out of the jurisdiction but within the jurisdiction. Still it is clear that it never would have been sealed if the officer had observed that there was no address, or had there been given the true address, viz., the foreign address of this corporation. It is quite clear that the address was kept out on purpose. That being so, I shall certainly not allow this writ to remain. It is therefore not necessary to discuss the question as to the service. I am clearly of opinion that the party issuing this writ has contravened the express rules of court as to what the writ shall be and shall contain, and I think that the writ is irregular; the writ must therefore be set aside.

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *Stokes*, *Saunders*, and *Stokes*.

Nov. 22 *and* 29, 1887.

(Before BUTT, J.)

THE KARO. (*a*)

Collision — Limitation of liability — Shipowners and cargo owners — Measure of damages — R. S. C., Order LII., r. 23.

An action in rem by shipowners, for collision between the ships B. and K. having been settled by a written agreement that both ships were to be deemed to blame, this agreement was filed in the Registry under the provisions of Order LII., r. 23. *Other actions having subsequently been instituted by owners of cargo on the B. against the K., the owners of the K. obtained a decree limiting their liability. In the statement of claim in the limitation action, it was alleged that it had been agreed between the parties to the ship action that both ships should be deemed to blame. This allegation was not denied in the respective defences of the owners of the B. and her cargo. At the reference to assess the amount due to the various claimants against the fund paid into court in the limitation action, the owners of cargo on the B. claimed to prove for the whole of their loss. The Registrar allowed them a moiety. On appeal:*

Held, that the cargo owners were not precluded from proving for their whole loss, subject to proof by them that the K. was alone to blame, but that the owners of the B. were precluded by the agreement which was equivalent to a decree of the court from proving for more than a moiety.

Held, further, that the owners of cargo might take an issue to try whether the K. was solely or partly to blame for the collision.

THIS was a petition in objection to the registrar's report in a limitation of liability action.

The action arose out of a collision between the

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

steamships *Balnacraig* and *Karo*, in respect of which it was agreed between the shipowners that both ships should be deemed to be in fault.

The owners of the *Karo* having subsequently obtained a decree limiting their liability, paid the sum representing that liability into court. The Registrar having investigated the various claims against the fund made the following report:

In this case a point of some peculiarity and difficulty has been raised at the reference, which, I think, it is to be regretted was not raised on the pleadings, or in some more formal way to be disposed of by the court. On the 10th Dec. 1886 a collision took place between the two ships *Karo* and *Balnacraig*. The *Karo* was seriously damaged, whilst the *Balnacraig* with her cargo sank, and was totally lost. On the 11th and 14th of that month two actions *in rem*, subsequently consolidated, were brought against the *Karo* on behalf of the owners, master, and crew of the *Balnacraig*, and in those consolidated actions the owners of the *Karo* counter-claimed against the owners of the *Balnacraig* for the damage done to the *Karo*. On the eve of the trial in court, viz., on the 12th Jan. 1887, the parties in these actions agreed to a decree that both vessels were to blame for the collision. Subsequently, on the 18th and 21st Jan. respectively, two other actions were brought against the *Karo* by owners of certain portions of the cargo of the *Balnacraig*. Thereupon, namely, on the 31st Jan., the owners of the *Karo* brought this action to limit their liability, and on the 1st March obtained the usual decree limiting their liability to a sum representing 8*l*. per ton of the registered tonnage of their ship. In this last-named action appearances were then duly entered, not only for the owners of the *Balnacraig* but for the owners of her cargo, some represented by Mr. Greening, others by Mr. Toller, and others owning by far the largest portion of the cargo by Mr. Stokes. The claims of these several parties were duly investigated by me, with the assistance of merchants, on the 25th and 29th days of July. At this reference the owners of the *Balnacraig* claimed to prove against the fund in court in respect only of a moiety of the damages sustained by the owners of the *Karo*, and the owners of cargo, other than those represented by Mr. Stokes, also claimed to prove only in respect of a moiety of the loss they sustained; but the owners of cargo, represented by Mr. Stokes, and whose claims are numbered 44 in the schedule hereto, claimed to prove in respect of the whole loss sustained by them, as the *Karo* was solely to blame. This contention is based on the ground that they were not parties to the action in which the decree was made that both ships were to blame. On referring to the pleadings, it will be seen that the plaintiffs in this action have pleaded and admitted that their ship was only partly to blame for the collision, and, in effect, they plead that they are only liable for a moiety of the damages sustained by the owners of the *Balnacraig*: see paragraphs 5 and 9 of their statement of claim. The averments are not very distinct, but coupled with paragraph 4 they seem to me sufficient to have rendered it right that the defendants represented by Mr. Stokes, if they intended to raise the point in question, should have done so in their defence, by pleading to those paragraphs, instead of limiting their statement of defence to a non-admission of paragraphs 3, 6, and 8, which do not touch that point. In the absence therefore of any decree or proof on admission that the plaintiffs were solely to blame for the collision in question, I have come to the conclusion that I cannot recognise the right of Mr. Stokes' parties to claim in this action against the fund in court in respect of more than a moiety of their damage, or, in fact, on any different footing from the other defendants.

The agreement referred to by the registrar was as follows:

In the High Court of Justice. Admiralty Division. Folios 335 and 370.—*The Karo*.—We, the undersigned solicitors for the plaintiffs and defendants herein, hereby consent to this consolidated action being taken out of the paper for trial, and to a decree that both vessels are to blame, and for the usual reference to the registrar and merchants. Dated this 12th day of Jan. 1887.—*Robert Greening*, solicitor for the plaintiffs; *Downing, Holman, and Co.*, solicitors for the defendants.—To the Registrar.

This agreement was filed in the Admiralty Registry under Order LII., r. 23, which provides:

Any agreement in writing between the solicitors in Admiralty actions, dated and signed by the solicitors of both parties, may, if the Admiralty Registrar 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 if such order had been made by the judge in person.

The paragraphs in the statement of claim in the limitation action referred to by the registrar, were as follows:

4. On the 11th Dec. 1886 an action—1886 G., No. 2675—was brought in this division of the High Court of Justice on behalf of the Grampian Steamship Company, owners of the steamship *Balnacraig*, against the plaintiffs, owners of the steamship *Karo* and her freight, for the recovery of damages occasioned by the said collision, and on the 14th Dec. 1886 an action—1886 R., No. 2849—was also brought in this division on behalf of Jas. Ross and all others the master and crew of the steamship *Balnacraig*, for damages for the loss of their personal effects against the plaintiffs, owners of the steamship *Karo*. The said actions were consolidated by an order of court, dated the 18th Dec. 1886, and the owners of the *Karo* appeared as defendants in the consolidated cause.

5. The 12th Jan. 1887 was appointed for the hearing of the consolidated actions—1886 G., 2675—1886 R., 2849—but on or about the 11th Jan. it was agreed between the several parties to the above-mentioned actions that the said collision should be deemed to have been occasioned by the improper navigation of the *Karo* and by the improper navigation of the *Balnacraig*, and the plaintiffs admit that the said collision, and the losses and damages consequent thereon, were in part caused by the improper navigation of the *Karo*.

9. The plaintiffs apprehend that the said sum is insufficient to answer the moiety of the damages claimed against the plaintiffs in the said actions, and the other claims made or to be made against the *Karo* or her owners the plaintiffs, in respect of the said collision.

The respective defences merely contained an allegation that paragraphs 3, 6, 8 of the statement of claim were not admitted. These paragraphs stated what the tonnage of the *Karo* was, what 8*l*. per ton on that tonnage amounted to, and the fact that the collision occurred without the fault or privity of the plaintiffs.

In the petition filed by some of the owners of cargo on board the *Balnacraig*, it was alleged that the registrar was wrong in refusing to allow them to prove for the whole of their loss on the following grounds:

(*a*.) Because the petitioners, the plaintiffs in the action (1887 B., No. 285), were not parties to, and are not bound by, the agreement that the *Balnacraig* should be deemed in fault, and it has not been decreed or proved, and has not been admitted by the petitioners, that the *Balnacraig* was to blame for the said collision.

(*b*.) Because the petitioners have been prevented by the decree in the limitation action (1887 K., No. 103) from carrying on their action, and from obtaining a decree that the *Karo* was solely to blame for the collision, and because the petitioners were, and are therefore, entitled in law to claim against the fund in court as if such a decree had been made.

(*c*.) Because the registrar's opinion that the petitioners should have made their claim in their pleading in the said limitation action (1887 K., No. 103) was erroneous and ill-founded, since there was nothing alleged in the statement of claim to cause them to do so, and it would have been an improper time to make their claim, and such claim, if so made, would have been struck out as irrelevant or disregarded.

(*d*.) Because, whether or not the *Balnacraig* was partly to blame, the petitioners are entitled in law to claim against the fund in court in respect of the whole

of the damages they have suffered, and not only in respect of a moiety thereof.

To this petition two answers were filed, one by the owners, master, and crew of the *Balnacraig*, the other by owners of part of the cargo laden on board the *Balnacraig*. In the latter there was an averment that if the registrar was wrong all the cargo owners were entitled to be put in the same position as the petitioners and to prove for the whole of their respective damages. In the former it was averred that both ships were in fact to blame.

Nov. 22.—On the petition coming on for hearing it was arranged that it should be adjourned for a week. At the same time leave was given to the owners of cargo other than the petitioners to appear; and, in the event of the appeal being successful, the judge stated that all the cargo owners were entitled to be put in the same position as the petitioners, and to prove for the whole of their respective losses.

Nov. 29.—Sir *Walter Phillimore* (with him *Stubbs*) for some of the owners of cargo on the *Balnacraig*.—The owners of the *Balnacraig* are by the agreement precluded from claiming for more than a moiety of their loss. This agreement having been filed is, by reason of Order LII., r. 23, equivalent to an order of court, and has the same effect as if it had been made by the judge:

The Bellcairn, 53 L. T. Rep. N. S. 686; 10 P. Div. 161; 5 Asp. Mar. Law Cas. 503;
The Ardandhu, 54 L. Rep. N. S. 819; 12 App. Cas. 256; 5 Asp. Mar. Law Cas. 594.

The cargo owners are entitled to claim for the whole of their loss. They were not parties to the agreement, and therefore they are not bound by it. The fact that they made no claim in pleading in the limitation action is immaterial. Had they alleged that the *Karo* was solely to blame, they would have raised an immaterial issue, which would in that action have been no ground for the court refusing to grant the relief claimed. The effect of the decree in that action was to prevent them prosecuting their action, and proving that the *Karo* was solely to blame. [BUTT, J.—The difficulty arises out of shipowners being able to limit their liability before it is determined what was the cause of the collision. I always had some doubts about the case of *The Amalia* (Br. & L. 151; 32 L. J. 191, Adm.) I think in this case the court might have hesitated to grant limitation had this question as to which vessel was to blame been raised.] That was a question which was immaterial to the owners of the *Karo*. The point is also taken that, even if the *Balnacraig* was partly to blame, the cargo owners are entitled to claim the whole of their losses.

J. P. Aspinall, *Pollock*, and *Mansfield* appeared for other claimants.

Finlay, Q.C. (with him *Barnes*) for the *Balnacraig*.—The owners of the *Karo* have refused to consent to this agreement being rescinded. If, however, the court should be of opinion that the cargo owners are entitled to prove for the whole of their loss, the owners of the *Balnacraig* should be put in the same position. It would be obviously absurd to say that one set of claimants are to prove for half their damage on the basis that both ships are to blame for the collision, and to say that another set are to prove for the whole of their damage on the basis that only one ship is to blame. The cargo owners ought to have taken some steps to establish, in or before the limitation action, what the real facts of this collision were. Had they done so this difficulty would never have arisen:

James v. *London and South-Western Railway*, 27 L. T. Rep. N. S. 382; L. Rep. 7 Ex. 287; 1 Asp. Mar. Law Cas. 226;
The Amalia (*ubi sup.*).

They must now be taken to have admitted that both ships were to blame. In any event the cargo owners ought to show that they are entitled to prove for the whole of their loss before they are allowed to do so.

Sir *Walter Phillimore* in reply.—If my clients are to be precluded from proving for the whole of their loss because they did not raise this question in the limitation action, for the same reason claimants who have subsequently come in in answer to advertisements ought to be precluded—a result which is obviously unjust, and therefore exposes the fallacy of the contention put forward by the owners of the *Balnacraig*.

BUTT, J.—The question at present before me is whether the plaintiffs in action No. 285 and other persons who were owners of cargo on board the *Balnacraig* are entitled to prove against the fund in court for the whole or only half the damage they have sustained. Their goods were on board the *Balnacraig*, and were sunk with her in consequence of a collision with the steamship *Karo*. The *Karo* was in fault for that collision, either wholly or in part. That is an admitted fact. The consequence of that is that, on the collision occurring, *ipso facto* the plaintiffs in the damage actions became possessed of a maritime lien on the *Karo*. To enforce this lien the plaintiffs in action 285 brought their action in this court against the *Karo*. The owners of the *Balnacraig* also commenced an action in this court against the *Karo*; but that suit was settled by the solicitors of the plaintiffs and defendants respectively entering into the following agreement: "We, the undersigned solicitors for the plaintiffs and the defendants, herein consent to this consolidated action being taken out of the paper for trial, and to a decree that both vessels are to blame, and for the usual reference to the registrar and merchants." That agreement was filed in the registry, and the effect of that was, in my judgment, to make it equivalent to a decree of the court under Order LII., r. 23. Therefore the matter is to be considered as if there were a judgment of the court pronouncing both of these vessels to blame for the collision. Shortly after that agreement had been filed, the owners of the *Karo* instituted this action for the limitation of their liability, and they paid 8*l.* per ton into court. The result of that suit was to stay action No. 285. In that state of affairs the only remedy of the plaintiffs in action No. 285 was to claim against the fund in court. Now, what is that fund? Why, it is, in fact, for all purposes of the suit, the *res*, the ship herself. Unless the plaintiffs in action No. 285 have precluded themselves either by their pleadings or otherwise from making such a claim, it appears to me clear that they have just the same rights against the fund in court as they would have against the *res*, against the ship herself. That leads to the inquiry whether they

have so precluded themselves from making a claim for the full amount of the damage they have sustained, and whether they are only entitled to claim for one-half. It is said that they have precluded themselves from so doing by their pleadings, but I am utterly unable to see they have done anything of the sort. In the first place, there is no distinct allegation in the statement of claim in the limitation suit that both vessels were to blame. It is true that there was an admission that the damages and loss consequent on the collision were in part caused by the improper navigation of the *Karo*. Then, in another paragraph of the statement of claim, something is said about a moiety of damages. What were the plaintiffs in action No. 285 to do? Had they pleaded that they were entitled to recover the whole and not the moiety, it would have been an immaterial matter in the suit. The real question in the limitation action is whether the plaintiffs are entitled to have their liability limited according to the provisions of the statute. It made no difference, for the purposes of the decree in that suit, whether the plaintiffs in action No. 285 traversed the allegation of the *Karo* being partly to blame or not. But then it is said they ought somehow to have raised the question in the limitation action, if not by the pleadings, at all events by taking the objection. I ask myself why, and, if so, how? For the purposes of that suit it mattered not to them what was done. The fact of their asserting a claim at the hearing of that suit would not have affected the question of limitation at all. It would not have varied the amount which the owners of the *Karo* were bound to pay into court. Suppose the question had been raised, the answer would have been, "That has nothing to do with the present proceedings. You may claim that when you get before the registrar." But, further, when it is said that these claimants, who happen to have been parties to the limitation suit, are precluded by their pleading from obtaining full damages, I ask myself, am I to apply a similar rule to the claimants who were not parties to that suit and who have come in afterwards in consequence of the advertisements? It seems preposterous that these latter claimants are to be allowed to prove for their whole loss, while the former are to be allowed to prove for only a moiety. It may be that this difficulty has arisen from the decision in *The Amalia* (*ubi sup.*), from which it appears that a limitation suit may be carried to a successful issue by a shipowner without his admitting his liability. It would not be becoming in me to discuss the correctness of the decision in the case of *The Amalia* (*ubi sup.*); but I cannot help thinking that that decision has led to a good deal of the difficulty in this case.

Now, what under the circumstances is to be done? I hold that, apart from the question whether these cargo owners have precluded themselves from proving on the fund for the whole amount of their loss, they have a clear right to do so. I hold, also, that they have not so precluded themselves. It by no means follows that they are in fact entitled to the whole amount of the loss which appears in the schedule to the registrar's report. In my judgment they must first establish this, that the facts of the case are such as to entitle them to whole damages and not to half. If the case of *The Milan* (5 L. T. Rep. N. S. 590; Lush. 388; 1 Mar. Law Cas. O. S. 185) is right—and I say nothing to the contrary—then it may well be, on the facts of the case, that they never had a right to more than half of the damages. Under these circumstances some steps must be taken, before they can prove for the whole amount, to ascertain if they are so entitled. The obvious and simple way of enabling them to do it would be to raise the stay put upon their action by the decree in the limitation suit, and that, if necessary, I shall do. But I do not think that is all I ought to do. As has been pointed out, these claimants might proceed against the *Karo*, but the owners of the *Karo* have no interest in the matter, because whatever the result they would not be bound to pay a penny more, and therefore possibly would not defend the suit. I think the suit ought to be contested by those who have an interest in contesting it, and I think that the owners of the *Balnacraig* have that interest. I shall direct an issue between the owners of cargo in No. 285 and any other claimants who like to come in on the one side and the owners of the *Balnacraig* on the other, to ascertain what the real state of the case is, whether each vessel is partly to blame, or whether the *Karo* is alone to blame. I am asked, on behalf of the owners of the *Balnacraig*, to say that they are entitled to rescind what I regard as the order of the court, made in the collision action, and to allow them to claim the whole amount of their damages notwithstanding that order. I am unable to see how that that can be done. I think there is at this moment what is tantamount to a judgment of the court as between the owners of the *Karo* and the owners of the *Balnacraig*, that both vessels were to blame. I think that the course taken by the owners of the *Balnacraig* has precluded them from any such step, and I cannot but remark that in their pleadings in opposition to the objections to this report they allege distinctly, and as a matter of fact, that both vessels were in fact to blame for the collision. It is argued on the part of the owners of cargo that it is immaterial whether both these vessels were to blame, or whether the *Karo* was alone to blame, because, even if both vessels were to blame, they still, as owners of cargo, would be entitled to claim against the owners of the *Karo* the full amount of their damage. Apart from authority there would seem to be a good deal to be said in favour of that contention; but it is a matter upon which it is not necessary for me to express any opinion. I hold that I am clearly bound by the authority of *The Milan* (*ubi sup.*), which, if I recollect rightly, was approved of by the Court of Appeal, and therefore I can give no effect to that contention. The result will be, that I must hold these owners of cargo are entitled to put forward their respective claims for the whole amount of their damage; that the owners of the *Balnacraig* are not entitled to prove for more than half the amount of their damage; and that, if it be desired, there is to be an issue between the owners of cargo on the one hand and the owners of the *Balnacraig* on the other, to determine whether one or both of these vessels are to blame.

Solicitor for the owners of the *Balnacraig*, *Robert Greening*.

Solicitors for the petitioners, *Stokes, Saunders*, and *Stokes*.

Solicitors for other claimants, *Robert Greening*; *Oswald Clarkson*; *Toller* and *Sons*.

Tuesday, Dec. 6, 1887.

(Before BUTT, J.)

THE PARISIAN. (*a*)

Collision—Reference — Affidavit — Cross-examination of deponent—R. S. C., Order XXXVII., r. 2 ; *Order XXXVIII., r.* 28.

At a reference in an Admiralty action, where the plaintiff being resident abroad makes an affidavit in support of his claim and refuses to attend for cross-examination, it is in the discretion of the registrar to refuse to accept the affidavit until the plaintiff has been cross-examined, and it is further within his discretion to say whether the circumstances are such that the witness should attend in this country for cross-examination, or should be cross-examined abroad on commission.

THIS was a special case stated by the district registrar at Liverpool for the opinion of the court.

The case was as follows :—

1. This was an action brought to recover damages occasioned by a collision which took place between the *La Marie* and the s.s. *Parisian*, on the 30th March 1886, off the banks of Newfoundland.

2. On the 28th Jan. 1887 an order was made by consent that judgment should be entered for the plaintiff for 50 per cent. of the damages found to have been sustained by him, and that the accounts and vouchers relating to the plaintiff's claim should be referred to the district registrar and merchants to assess the amount thereof.

3. On the 11th June 1887 the plaintiffs lodged their claim, a copy of which is hereto annexed, and filed a number of affidavits in support, one of which was made by Prosper Villars, of Granville in France, who was the sole owner of the *La Marie*.

4. On the 18th Nov. 1887 an order was made appointing the reference to take place on the 2nd inst., and directing the said Prosper Villars to attend to be cross-examined on his affidavit.

5. On the 18th Nov. 1887 the defendants' solicitors also gave notice to the plaintiff's solicitors that they required the said Prosper Villars to be produced for examination at the said reference.

6. After the reference had been opened the plaintiff's solicitor stated that the said Prosper Villars was not in attendance owing to illness, and he contended that if the defendants wished to cross-examine him the proper course to be adopted was to issue a commission to France for the purpose. It was also submitted that, if the defendants wished to check the statements in the affidavits, they could do this by requiring production of the plaintiff's books and documents. The defendants' counsel contended that, if the said Prosper Villars did not attend to be cross-examined, his affidavit ought not to be used at the reference.

7. The merchants and I were strongly of opinion that, considering the nature and extent of the claim, it would be more satisfactory in the interests of justice that the said Prosper Villars should attend to be cross-examined on his affidavit and to produce his vouchers and explain the entries in his books.

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

The questions for the decision of the court are: (1.) Whether the said affidavit of Prosper Villars ought to be used on the reference, the said Prosper Villars having failed to attend for the purpose of cross-examination; (2) whether the proper mode of taking such examination is by issuing a commission to France for the purpose, or by his attending before the registrar and merchants; (3) how the costs of and incident to this special case are to be borne.

The registrar was of opinion that the plaintiff ought to attend for cross-examination, and had adjourned the reference until the court had decided the above questions.

C. Hall, Q.C. (with him Dr. *Stubbs*) for the plaintiff.—The registrar ought to have read and accepted the plaintiff's affidavit. Express provision is made by Order XXXVII., r. 2, that "in references in Admiralty actions, evidence may be given by affidavit." Order XXXVIII., r. 28, which deals with the cross-examination of deponents, does not apply to references. There is no power to compel a person resident abroad to come over to this country for cross-examination :

Concha v. *Concha*, 55 L. T. Rep. N. S. 522 ; 11 App. Cas. 541.

If the court should think that the plaintiff ought to be cross-examined, the proper procedure is to issue a commission for that purpose.

Joseph Walton, for the defendants, *contra*.—The registrar was entitled to say that in the circumstances he would not accept the plaintiff's affidavit. He has a discretion, and in the present case was justified in exercising it as he has done. Order XXXVIII., r. 28, is applicable to the present case. It is to be noticed that in this case the deponent is not a mere witness, but the plaintiff. No sufficient reason has been shown why the plaintiff is unable to attend.

Hall, Q.C. in reply.

BUTT, J.—I think the proper course in this case is for the registrar to receive the affidavit of the plaintiff, but I think he is perfectly within his rights if he refuses to find the facts alleged in that affidavit to be proved by it unless and until there has been a cross-examination in some way or another, either here or abroad, of this deponent. That I understand to be substantially the view that the registrar has taken. It may be doubtful whether the registrar has power to require the cross-examination, either here or in France, of the plaintiff. I am far from saying that it could not be done under the rules, but I do not think it necessary to decide whether it may. I think the practice — which to my mind is entirely conformable to common sense—is, that the registrar has power to say, "I am not satisfied with the evidence as it stands, and before I go any further I require the deponent's cross-examination." That, I think, is a matter within, and strictly within, the discretion of the registrar. If that be so, the next question which arises is, how is that discretion to be exercised? Is it to be exercised by issuing a commission to the place of residence of the plaintiff, which is Granville, in the north of France; or should it be exercised in the way the registrar preferred by requiring the cross-examination here? To my mind, in exercising that discretion there is a material difference when you are dealing with a party to

the suit and an ordinary witness in the suit. If the deponent is resident abroad, and is a mere witness for the plaintiff, it may be, and very likely would be, absolutely impossible for the plaintiff to produce him for cross-examination here. And then very great injustice would be done to the plaintiff in ordering him to do something which it would be wholly out of his power to do. The case is different where the plaintiff is the deponent, because he has it in his power, subject to one matter for consideration, to come or stay away.

There is another consideration to be kept in sight in exercising discretion of this sort, and it is convenience and expense. It is one thing to require a man, a party to a suit, to come, for instance, from Brazil, to submit himself for cross-examination; it is another where that man is resident in France, and within a few hours' distance. I think that again is a matter to be taken into consideration by the registrar, and I confess, if the plaintiff is in a position and state of health to allow of his coming, I think the registrar is exercising his discretion in a reasonable manner in saying, "I won't order him to come, but I won't give effect to his affidavit till he does come." The exact state of things with regard to the plaintiff I don't know. It is said he was ill, but I don't think any evidence of that was given, and that being so, I think the registrar was perfectly entitled to take the course which substantially he has taken and say, "I shall hold my hand in this matter until the plaintiff comes here and submits to cross-examination." In that view I concur, and if I made an order in the matter it would be a similar order, but always subject to an application to take the evidence abroad on the ground that the plaintiff is really unable to come, *i.e.*, too ill to come within a reasonable time. That being my view, I don't think there is anything that I have decided which is really in conflict with the decision of the Lords Justices in the case of *Concha* v. *Concha* (*ubi sup.*). Still less do I think so, having regard to the fact that the case has been to the House of Lords, and that they put it merely as a matter of discretion. It seems to me it is less expensive and more convenient, where a man resides in France, for him to come over and be cross-examined on his own affidavit than to issue a commission there. I think, therefore, the discretion is with the registrar, and that it has been properly exercised by his expressing an opinion that the plaintiff ought to come over. But it is entirely within his discretion to accept the affidavit or refuse it, or if the circumstances warrant it to say the cross-examination should take place under a commission in France.

Solicitors for the plaintiff, *Stokes, Saunders,* and *Stokes.*

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

Dec. 19, 20, 1887, *and Jan.* 17, 1888.

(Before BUTT, J.)

THE VINDOBALA. (*a*)

Co-ownership action—Freight—Marine insurance—Managing owner—Liability of trading owners.

The purchaser of shares in a ship during the progress of a voyage is only entitled to share in the net freight after all the expenses incidental to earning the freight on the voyage in question have been deducted from the gross freight.

The purchaser of shares in a ship, which have been insured in mutual insurance clubs by the managing owner with the authority of the vendor, is not liable in the absence of agreement to contribute to the payment of calls in respect of the insurance.

Where a ship is being worked by part of her owners, the remainder being dissentient, and losses result from her employment, such losses are to be borne, not in the proportion which each share of the working owners bears to the whole sixty-four shares, but in the proportion which each share bears to the number of shares held by the persons working the ship.

Where a managing owner with the authority of his co-owners entered into negotiations as to chartering their ship, and for that purpose signed and sent to the proposed charterers a form of charter fixing the ship for a certain voyage at a certain rate of freight, and the charter was returned finally signed by the charterers, but altered as to certain minor provisions, the fact that some of the co-owners gave notice in writing to the managing owner after he had signed the charter, but before it had been signed by the charterers, that they refused to be bound by it, did not relieve them from liability in respect of it.

Where part owners wrongfully institute an action of restraint and arrest the ship therein, it is the duty of the managing owner to take all reasonable steps to minimise the losses and expenses consequent on such arrest, and the arresting owners are not liable for such losses and expenses after a reasonable time has elapsed within which such steps could have been taken.

THIS was an action by E. J. and C. H. Walker as executors of Robert Dickinson, deceased, to recover contribution from the defendants as part owners of the s.s. *Vindobala,* in respect of expenses incurred by Dickinson and the plaintiffs as managing owners in relation to the management and insurance of the vessel.

The facts were presented to the court in the form of a special case, and on the 6th Aug. 1886 the claim was referred to the registrar and merchants to report on the accounts upon the facts stated in the special case.

The reference having been heard, the Registrar made the following report:—

The various questions raised in the action were originally presented to the court in the form of a special case on the 6th Aug. 1886. Butt, J., then, before entering upon a consideration of these questions, made the following order of reference to the registrar and merchants, viz.: To report on the accounts upon the facts stated in such special case, with liberty to the registrar to call for further evidence as he might think necessary.

In pursuance of that order the parties finally arranged to meet on the 10th March in the present year, and it

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

was then found necessary as a preliminary to going into various questions of account that I should consider several of the points of law raised in the special case, on which, if possible, I should have greatly preferred to have been guided by the previous decision of the court. A brief statement of the facts, which are fully set forth in the special case, is desirable, to indicate the nature of the points in dispute.

The plaintiffs are E. J. Walker and C. H. Walker, executors of R. Dickinson, who, to the date of his death, on the 9th Sept. 1884, was managing owner of the ship *Vindobala* and held twenty shares in her. The defendants are the remaining owners of that ship, some, viz., W. Dickinson and C. Leslie, by recent transfer of shares. The first question is whether a certain charter-party which bears date Amsterdam, the 17th July 1884, and which had been the subject of negotiation for many days previously, was binding on all the then owners of the ship, including the ten defendants, called the Bell defendants, who owned fourteen sixty-fourths of the ship, and who on the 19th July 1884 caused a notice to be given to the managing owner that they declined to continue sailing the vessel in the depressed state of trade, or to be bound in any way by any new charter. I came to the conclusion that such notice was given too late, and consequently that the charter of the 17th July 1884 was binding on all. That charter provided that the ship should proceed to Riga and there load a cargo of timber for Amsterdam, Zaandam, &c. When this charter was negotiated, the ship was on a voyage to Bilbao and thence to Rotterdam with cargo, and it was contemplated by the managing owner that, instead of proceeding to Riga in ballast, she should take out a cargo to the Baltic on owners' account, and leave for that purpose was given by the charter of 17th July. Accordingly on the 28th July the managing owner entered into a charter-party with Messrs. Pyman, Bell, and Co. for carrying a cargo of coals from the Tyne to Swinemunde in the Baltic, whence the ship was to proceed to Riga to load her timber. Viewing this second charter-party which, though of later date, was to be performed, first, as a proper and necessary complement to the charter of 17th July, I have determined that it also is binding on all the owners. On the 3rd Aug. the ship, having delivered the cargo from Bilbao to Rotterdam, arrived in the Tyne and proceeded to load the cargo of coals. On the 5th Aug. when the ship was cleared and about to sail she was arrested in an action of restraint at the suit of the Bell defendants, who had given the notice before mentioned. Many communications then took place between the solicitors for the Bell defendants and the managing owner, but without any agreement being come to for the release of the ship, and in fact she was not released until about the 23rd Dec. 1884 under the circumstances hereinafter stated. In consequence of these proceedings the greater part of the crew were discharged early in September. On the 9th Sept. R. Dickinson, the managing owner, died, and on the 18th Sept. the charter of the 17th July was cancelled by agreement between the charterer and E. J. Walker, one of the said R. Dickinson's executors. As regards the coal charter no arrangement was come to, and the coals remained on board the vessel. On the 16th Oct. Mr. E. J. Walker issued a circular to each of the then owners, giving notice of a meeting to be held on the 21st Oct. to appoint another managing owner in lieu of Mr. R. Dickinson, and to make arrangements for the future management. This meeting was attended by owners or representatives of owners holding fifty-six shares, of whom the holders of thirty shares voted for Mr. E. J. Walker as managing owner, the holder of twenty-one shares, voted against him, and the holders of five shares did not vote at all. No other person was proposed as managing owner. The Bell defendants gave written notice the same day that they did not recognise Mr. E. J. Walker as their agent in any way.

Under the circumstances stated, I am of opinion that Mr. Walker by this vote was entitled to assume the position of managing owner, and to act as such, though bound to recognise the notices received from the owners who dissented from the employment of the ship. A few days later, viz., on the 26th Oct., the cargo of coals on board the ship took fire by spontaneous combustion. The fire was afterwards extinguished, and on the advice of the surveyors the remainder was unloaded and landed at a wharf on the Tyne by direction of E. J. Walker. This misfortune also necessarily led to increased expense and loss. At length on the 2nd Dec. Mr. E. J. Walker instructed his solicitor to enter an appearance in the action commenced on the 5th Aug., and after much difficulty and delay bail for the safe return of the ship was eventually given on the 19th Dec. to the Bell defendants who were plaintiffs in that action, and the ship was released on the 23rd, and sailed under a charter-party entered into on the 10th Dec. by Mr. E. J. Walker as managing owner. The voyage was to Coosaw and back, and is known as voyage 15.

The above is a bare outline of this ship's history from July to Dec. 1884, and on these facts I have come to the following conclusions: As already stated, I have held that the notice given by the Bell defendants came too late to release them from responsibility for the engagements made for the ship by the charters of the 17th and 28th July respectively. It follows, if that conclusion is correct, that they were not justified in interfering with the execution of these contracts by arresting the ship on the 5th Aug., and refusing to release her without security for their interests being given by their co-owners, and consequently they are liable for the losses and expenses which naturally resulted from their action. The next question is, what is the limit of that liability? This would seem to depend upon what new duty was cast upon the managing owner by the arrest. We have considered that his best course would have been to consult the non-arresting owners and with their concurrence, if they would not bail the ship, to adopt with reasonable promptitude some other course that would minimise the loss and expense, such as to negotiate the cancellation of the charters, and failing in that to abandon them, throwing on the arresting owners in either case any loss that might ensue. Such a course, we think, allowing time for negotiations and communications, might have been decided upon by the 3rd Sept., on which day the greater part of the crew were in fact discharged. We hold therefore that the arresting owners are liable for all losses and expenses consequent on the arrest, which would have been incurred if these charters had been abandoned by that date, and that any other losses so resulting and subsequently incurred, other than the costs of the custody of the ship by the marshal during arrest, shall be borne by all the owners. In deciding, however, that the arresting owners are liable for losses as above stated, I am of opinion that such losses should not include damages, or, in other words, demurrage of the ship. Next, as to the losses arising from fire in the cargo of coals, considering the date of Mr. Dickinson's death, the 9th Sept., and the general circumstances of the case, including the fact that no managing owner was appointed in his place until the 21st Oct., a few days only before the fire, we consider that there is no evidence or presumption of such negligence as would render Mr. Dickinson's estate, or Mr. Walker as his successor, liable for those losses, and that they must fall rateably upon the holders of the whole sixty-four shares.

A separate question has arisen as to the defendant J. Bourne, owner of three shares. He was not one of the arresting owners, and security in respect of his shares was not given by the bail bond of the 19th Dec. 884, but, inasmuch as he had caused notice to be given on the 8th Aug. that he would not join in sailing the ship, we think he is to be considered a non-trading owner in respect of voyage 15, although no further notice was given on his behalf until after the voyage commenced. As regards three other defendants, namely, Messrs. John Dickinson, W. Renton, and W. Riley, who were present at the meeting of the 21st Oct., and voted against the appointment of Mr. E. J. Walker, as managing owner, inasmuch as they were not included in the non-trading notice given on behalf of the Bell defendants, or in any similar notice until the close of that year, they must be considered as participators in voyage 15. The trading owners for this voyage therefore held forty-seven shares. After the return of the ship from the fifteenth voyage in March 1885, a second action of restraint was brought on behalf of the Bell defendants in conjunction with Messrs. Bourne, Renton, and Riley before named, the two latter holding four shares, and subsequently bail was given to those plaintiffs for the safe return of the ship from her sixteenth voyage which was from the Tyne to Coosaw and back to Plymouth, which she reached on the 1st May 1885. In June 1885 further bail was given to the same plaintiffs in a further action

for the safe return of the ship from her seventeenth voyage, which terminated at Glasgow.

Again, under the circumstances stated in paragraphs 126 to 133 inclusive of the special case, I have concluded that Mr. Leslie, who is now the holder of the twenty shares originally held by R. Dickinson deceased, and afterwards by Messrs. Walker as his executors, is entitled on the one hand to twenty forty-thirds of the freight earned on voyage 18, and on the other hand, he is liable for twenty forty-thirds of the expenses of earning such freight. Another point specially mooted has been in what proportion the profits or losses of the four voyages 15 to 18 inclusive should be credited or debited between the trading owners for each voyage respectively. It has been contended that the trading owners other than the managing owners are only liable in sixty-fourths instead of in forty-sevenths or forty-thirds, as the case may be, on the ground that it is not proved that such owners consented to increase or vary their interest in the working of the ship. The conclusion, however, which we have come to is, that under the circumstances of this case such consent is to be inferred. The grounds for this conclusion are shortly these. On the 16th Aug. 1884, a few days after the arrest of the ship by the Bell defendants, a printed letter was sent by Mr. Dickinson, the then managing owner, to each of the other owners, informing them of the arrest, of the circumstances under which that step was taken and persisted in, and generally of the hostile action of the Bell defendants, and their refusal to join in navigating the ship. This was followed by the circular of the 16th Oct., which notified to each owner that, in consequence of Mr. Dickinson's death, it became necessary to appoint another managing owner, and to make arrangements for the further management of the ship, and invited each owner to attend the meeting of owners for the purpose named. That meeting took place on the 21st Oct., as previously stated, when Mr. E. J. Walker was appointed managing owner, and shortly afterwards, on the 8th Nov., Mr. E. J. Walker sent out a printed circular to the owners, in which he says: "You are aware the steamer has been laid up under arrest at the instigation of certain shareholders. However, I am making such arrangements as I hope will enable me to get the steamer under weigh again, and I trust you will favour me with your support to accomplish this. I have payable business in hand for the vessel." After these various notices, and in the absence of any objection to the course adopted by Mr. Walker, except from that limited number who have been termed non-trading owners, we consider it is right and equitable to assume that Mr. Walker had authority to trade with the ship on behalf of those who are termed trading owners, and that the profits or losses of each voyage must be credited or debited amongst them rateably according to the shares in the ship respectively held by such trading owners. By arrangement between the parties, the accounts have been made out by an accountant, in accordance with the views above stated, and the result, up to the date to which the accounts extend, is set forth in the statement hereto annexed, which shows the amount recoverable by the plaintiffs from each set of defendants in this action.

According to the special case it appeared that the charter-party of the 17th July differed in certain terms from the form of charter originally proposed by the managing owner to the charterer —viz. in this, that, whereas in the original draft the ship was to be cleared free of commission, and the owner and master were to have an absolute right of lien on the cargo for all freight, dead freight, and demurrage, and all other charges whatsoever, these provisions were not in the charter as signed. It also appeared that, whereas the charter was signed by the managing owner on the 17th July, it was not signed by the charterer till the 22nd July.

With regard to the defendant Leslie, it appeared that he had bought his shares during the prosecution of a voyage, but that the registrar had debited him with all the expenses incidental to earning the freight, including expenses incurred prior to his becoming owner of the shares. It also appeared that at the time he bought his shares they had been insured in mutual insurance clubs, and that the plaintiffs sought to make him liable in respect of calls. When he bought the shares nothing was said about the insurance. He after the purchase of these shares became managing owner.

The plaintiffs and defendants objected to the above report, and now applied to the court to vary the same.

The plaintiffs objected to the report for the following reasons: (1.) Because the Bell defendants were not held liable for the whole of the losses and expenses which ensued upon the arrest including the damage to the coals by fire. (2.) Because it was not found by the report whether Leslie should pay certain claims of insurance clubs in which his shares were insured when he bought them, and that it should have been found that he ought to pay them.

The Bell defendants, including Leslie and Bourne, objected to the report for the following reasons: (1.) Because they were not bound by the charters of July 1884, and were not liable to any losses and expenses incidental to the charters. (2.) Because they were entitled under the circumstances to arrest the vessel. (3.) Because, if not so entitled, they were only liable for the expenses of putting in bail. (4.) Because the losses, expenses, and damages should be borne by the estate of Robert Dickinson or by E. J. Walker. (5.) Because Leslie was not liable for any debts or liabilities incurred by the managing owners prior to the date of the purchase of his shares, and was entitled to receive his share of the freight without any deduction for the expenses of earning such freight prior to the purchase of the shares.

The Craven defendants objected to the report for the following reasons: (1.) Because the losses consequent on the arrest subsequently to the 3rd Sept. are debited to all the owners, whereas they should be borne either by the Bell defendants or by Dickinson. (2.) Because as to voyages 15 to 18 inclusive, the trading owners are made liable in forty-sevenths and forty-thirds, and not in sixty-fourths only.

Sir *Walter Phillimore* and *J. G. Barnes* for the Bell defendants.—The Bell defendants gave notice to the managing owner that they would not be bound by any new charter before the charter of the 17th July was concluded. True, it was signed by the managing owner before the notice was given, but it was not signed by the charterer till subsequently. Moreover the concluded charter differs in certain material provisions from the form of charter originally sent by the managing owner to the charterer, and therefore it was the duty of the managing owner to break off negotiations when he found that the charterer would not accept his terms. [BUTT, J.—Is there such a difference between the two forms of charter as would entitle a reasonable man without breach of faith to break off negotiations?] Yes; the provision in the first form that the ship was to be cleared free of commission is wanting in the concluded charter, and the very important provision giving the ship a lien on the cargo for freight, dead freight, and demurage is also left out in the concluded charter. It is admitted that, if the Bell defendants are bound by the

charter of the 17th July, they are also bound by the charter of the 28th July. But, if they are not bound by the charter of the 17th July, then they are not liable to bear any part of the losses and expenses incidental to the two charters, or in respect of the coals. For the same reason they were entitled to arrest the ship. Even assuming they were not entitled to arrest the ship the managing owner ought to have put in bail within a reasonable time, and had he done so much expense and loss would have been saved. It is also submitted that Leslie is not liable for any debts incurred by the managing owners prior to the date of his purchase of the shares, and that he is entitled to his share of the freight without any deduction for the expenses of earning it before such date. The managing owner was not his agent to incur such debts, and therefore he is not liable to pay them.

J. P. Aspinall for Leslie, one of the Bell defendants.

Carver for the plaintiffs.—The Bell defendants are liable for the expenses incidental to the charters. The charter-party of the 17th July was really in substance concluded before the Bell defendants sent their notice of objection. True, the precise form had not then been agreed upon, but the ship was in fact fixed for a certain voyage at a certain rate. [BUTT, J.—My view is, that if the state of affairs was such that the managing owner could not have withdrawn without breach of good faith, I ought to hold that these co-owners were bound by the charter.] It was only a question of form as to how the parties should carry out a binding engagement already made. The arrest was wrongful, and therefore these defendants are liable for all the consequences, including the loss by fire. But for the arrest those losses would never have occurred. Leslie is only entitled to a share in the net freight. A voyage is a partnership adventure and to arrive at the profits due to the partners it must be taken as a whole. The accounts must be taken, and each partner debited with his share of the expense of earning the freight:

Green v. *Briggs*, 17 L. J. 323, Eq.; 6 Hare, 395;
Doddington v. *Hallett*, 1 Ves. sen. 496.

To decide otherwise would be to say that the managing owner has not a first charge upon the freight, which according to all the authorities he has. The vendee buys from the vendor on the assumption that the managing owner will satisfy himself out of the freight before it is divided. Leslie is also liable for the claims of the insurance clubs in respect of his twenty shares. The policies were taken out for the benefit of all the co-owners, and to that benefit he succeeded on becoming a co-owner.

Bruce, Q.C., *Joseph Walton*, and *Simey* for the Craven defendants.—The Bell defendants were liable to the losses incidental to the two charters, and also to all the losses consequent on the arrest. Assuming them to be liable only up to the 3rd Sept., then the managing owner is liable for the losses subsequent to that date. It was his duty to take all the necessary steps to procure the release of the ship. Leslie is only entitled to share in the net freight:

Lindsey v. *Gibbs*, 22 Beav. 522;
Alexander v. *Simms*, 18 Beav. 80; 23 L. J. 791, Ch.;
Maclachlan's Merchant Shipping, p. 100.

The Craven defendants are not liable in forty-sevenths and forty-thirds, but only in sixty-fourths. The proper way of ascertaining their liabilities is to divide the losses into sixty-fourths. They never consented to work the ship so as to increase their liabilities in the way found by the registrar.

Sir *Walter Phillimore* and *Barnes* in reply.—The Bell defendants were in the circumstances entitled to arrest the ship:

The Talca, 42 L. T. Rep. N. S. 61; 4 Asp. Mar. Law Cas. 226; 5 P. Div. 169;
The England, 56 L. T. Rep. N. S. 896; 6 Asp. Mar. Law Cas. 140; 12 Prob. Div. 32.

Leslie is not liable to pay these expenses, because they were incurred without his authority. The managing owner made these disbursements on the authority of the then co-owners. It is a mistake to say the managing owner has a lien upon the freight. This was expressly pointed out by Wigram, V.C. in *Green* v. *Briggs* (*ubi sup.*). He has a right of set-off, provided that when the account is taken the owners are the same persons who were owners when he made the disbursements. Suppose the freight does not pass through his hands, then clearly his only remedy is to sue those owners on whose behalf the disbursements were made. Leslie is not liable for the insurance calls. He never authorised the insurance, nor did he get any benefit from it.

Carver in reply.—Leslie by buying shares impliedly agreed to indemnify the managing owner in respect of the liabilities attaching to those shares. One of those liabilities was the insurance on the shares which is part of the current expenses of working a ship. *The Talca* (*ubi sup.*) was wrongly decided, and is inconsistent with *The Maxima* (39 L. T. Rep. N. S. 112; 4 Asp. Mar. Law Cas. 21). [BUTT, J.—*The Talca* always was unintelligible to me.] In that case the managing owner had the plaintiffs' authority to charter the ship, and it is difficult to see how that authority could be withdrawn after the ship was chartered.

Cur. adv. vult.

Jan. 17.—BUTT, J.—This is an action between co-owners of the ship *Vindobala*. A special case was stated for the judgment of the court. It was stated at very considerable length, and the facts were somewhat involved. It therefore appeared to me that at that stage of the case it was impossible to know what the precise questions for the determination of the court were, until the accounts of a number of voyages which the ship had performed had been taken. I therefore made an order referring the matter to the registrar. He has gone into the accounts with the assistance of a professional accountant. While on the one hand it was impossible for me to ascertain what the questions for decision really were until the accounts had been taken, it was equally impossible for the registrar to settle the accounts without determining a number of matters of principle and questions of law which are now dealt with in his report. On that report the case now comes before me. The facts are sufficiently stated in the special case and in the report, and it is therefore unnecessary for me to recapitulate them. I shall therefore proceed to deal with the questions raised before me, assuming that the facts are such as appear in the special case and in the

report. The first question for consideration is this: Certain of the defendants, known as the Bell defendants because one of them has the name of Bell, contend that they were not bound by the terms of a certain charter-party dated the 17th July 1884, which had been entered into by the managing owner, Mr. Dickinson, on behalf of all concerned. Their contention was, that before the contract of charter was actually signed, they on the 19th July gave the managing owner notice that they declined to continue sailing the vessel or to be bound by the new charter. On the 17th, and perhaps before that date, the charter had been signed by the managing owner, but it had not been signed by the charterers. The contract of charter had then been concluded subject to certain minor questions, and in my judgment Mr. Dickinson could not have honourably refused to agree to it. In the words of the brokers, "the ship was fixed." I hold that the Bell defendants, having empowered him to contract for them, could not require him to hold his hand and refuse to sign when it was too late for him to do so without a breach of faith on his part. They therefore were, in my judgment, bound by the charter-party which bears date the 17th July 1884. With respect to the next charter-party, dated the 28th July, it is admitted that it being merely supplementary to the earlier one, the Bell defendants would be bound by it if parties to the earlier charter. These defendants being, as I hold, bound by the charter-party, had no right to arrest the ship as they did, and are liable for any damage resulting from their wrongful act. I think the registrar has exercised a reasonable and proper discretion in holding them liable for the loss up to the 3rd Sept., and in refusing to make them pay for the damages resulting from the fire which on the 26th Oct. broke out on board the ship and injured the cargo.

The next question relates to a co-owner called Leslie. He became the purchaser of certain shares which had belonged to Mr. Dickinson, the managing owner, in the first place, and afterwards to his executors. He was not a direct purchaser, but an intervening purchaser, during the prosecution of one of the later voyages. The first question raised in regard to Leslie is this: The voyage was in course of prosecution when he purchased his shares. It is contended, on the one side, that he is not liable to pay a share of the outfit and expenses involved in the preparation for that voyage. On the other hand, it is said that the proper way to ascertain the position of a shareholder purchasing after the commencement of a voyage is to state accounts, and to charge him with the expenditure incurred from the outset, and credit him with his share of the profit. What the registrar has done is this: he has dealt with that voyage by debiting Leslie with his share of the expenditure incurred for the prosecution of the voyage, and by crediting him with his share of the freight. I think that is the proper way of dealing with the matter. It is a question which has previously been discussed, and with reference to which there does not always appear to have been entire unanimity of opinion. In the case of *Doddington* v. *Hallett* (1 Ves. sen. 497) Lord Hardwicke had this question under consideration; and, when dealing with the proper mode of stating accounts in such circumstances, he observed that the court would never extend a partnership of this kind to affect purchasers beyond what the course of trade would do, which must govern in mercantile matters. But Lord Tenterden, in *Ex parte Harrison* (2 Rose, 76) and *Ex parte Young* (2 Vesey and Beames, 242), commenting on this passage, remarked that he apprehended that this usage of trade would not go so far as to carry back the charges against a purchaser to the expenditure on any antecedent adventure from which he could derive no profit. This seems to me to be an accurate exposition of the law, and I therefore am not inclined to interfere with this part of the registrar's report. It is in reference to Leslie that the question is raised as to his liability to pay certain calls to one or more insurance clubs. I tried to understand, during the argument, on what principle it was said he was to be liable for these calls, and I failed to see any reason for making him liable. At all events, I can find no evidence on which I think such liability arises.

I now come to the question raised with regard to certain other defendants, called the Craven defendants. Certain of the co-owners having declined to join in any further adventure of the ship, she was sent away in the ordinary course of business under charters by the managing owner, and the Craven defendants were not among the dissentient shareholders. The registrar, in dealing with the accounts, instead of following the usual plan in dealing with ships' accounts, and dividing the figures into sixty-fourths, has taken them in forty-thirds and forty-seventhss, this being the number of shares respectively owned at different times by the co-owners who had not dissented from the voyage. The Craven defendants contended that they are only liable for the proportion their shares bear to the whole number of sixty-fourths. But they had notice, and were perfectly well aware that the voyages were commenced, and that certain of the owners had disclaimed any part in the expenditure of those voyages. They allowed the matter to go on, and the managing owner sent the ship away in those circumstances on their behalf. It is perfectly clear to my mind that each and every one of them must be called upon to pay his quota of the total expenses; in other words, that they are liable in forty-thirds and forty-seventhss, as the case may be. It is clear that this question has arisen because there were no profits, and because there has been a loss. I think they intended to share the profits in forty-thirds and forty-seventhss if there had been a profit, and the same principle applies with regard to the expenditure. I therefore come to the conclusion that the view taken by the registrar was right, and I confirm the report. As the registrar has not dealt with the question of interest, the report must be referred back to him for that purpose, and also to enable him to state his recommendations as to costs.

Solicitors for the plaintiffs, *Williamson, Hill, and Co.*

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

Solicitors for the Craven defendants, *Hickin and Fox.*

Solicitors for Leslie, *Deacon, Gibson, and Metcalf.*

Wednesday, Aug. 10, 1887.

(Before the Right Hon. Sir JAMES HANNEN.)

THE LIFFEY. (*a*)

Salvage—Intention of salvor—Mistake of fact—Right to reward—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 450, 458.

Where a person renders services in the nature of salvage to a vessel which he at the time bonâ fide believes to be his own by purchase or otherwise, he is not precluded from recovering salvage reward in respect of such services because it turns out in fact that the vessel was not his property.

The provisions of sect. 450 *of the Merchant Shipping Act* 1854, *requiring a person who finds or takes possession of a wreck to give notice to the receiver, are not applicable to the case of a person who takes possession of a stranded vessel under the belief that he is the purchaser thereof, and in such a case these provisions do not operate to deprive him of his right to recover salvage.*

THIS was a mortgage action instituted by the mortgagees of the steamship *Liffey*, asking for judgment pronouncing for the validity of the mortgage, payment of the amount due under the mortgage, sale of the ship, and payment to the plaintiffs out of the proceeds.

In this action one W. H. Caple intervened and delivered a defence which, after denying that the plaintiffs were mortgagees, or that any money was due to them under the mortgage, alleged as follows:

4. Alternatively, prior to the 15th June 1887, one William McDougall, of Liverpool, was, with the authority, knowledge, and consent of the owners of the said steamship *Liffey*, and of the plaintiffs, manager and ship's husband of the said steamship, and acting as such.

5. On or about the 26th May last, whilst the said steamship was at anchor loading a cargo of iron she stranded at Marcross, in the Bristol Channel, in a dangerous position, and did herself so much damage that she was likely to become a total loss.

6. The said William McDougall, acting as manager and ship's husband as aforesaid, thereupon took steps to ascertain the position of the said vessel and the cost of attempting to get her off the beach, and of repairing the said steamship, and having discovered, as the fact was, that the said steamship was seriously damaged and in a most critical position, and that the costs of floating her and of repairing her in the event of her being got off would be very great, determined, with the authority of the said owners and with the knowledge and consent of the plaintiffs, to sell the said vessel as a wreck as she then lay for the benefit of all concerned, and the said vessel was thereupon put up to public auction as a wreck, but the bidding being insufficient she was not sold.

7. Subsequently, upon the 15th June 1887, the defendant entered into an agreement with the said William McDougall, acting with the authority, knowledge, and consent of the plaintiffs and the owners of the said ship, to purchase the said ship as she then lay wrecked for the sum of 120*l.*, and the said defendant intervening paid to the said William McDougall the said sum of 120*l.* and received therefor a receipt in the words and figures following:

"Cardiff, June 15, 1887. 120*l.* Received of Mr. William Henry Caple the sum of one hundred and twenty pounds, being the purchase money of the wrecked screw steamer *Liffey*, of Waterford, as she now lies wrecked on the bed near the Nash Point. For and by the authority of William McDougall, of 2, South Castle-street, Liverpool, SHORT and DUNN as agents."

8. The said defendant intervening thereupon took possession of the said wreck, and expended large sums of money in discharging the cargo and in fixing a false bottom in the ship, and in hiring tugs and men, and the said defendant intervening ultimately succeeded in floating the said ship and in bringing her into safety.

9. The plaintiffs always had full notice and knowledge of the facts stated in the foregoing paragraphs, and the said sale to the defendant was made with the knowledge and consent of the plaintiffs.

10. The said defendant intervening did not know that the plaintiffs had or claimed to have any title to or interest in the said steamship.

11. By reason of the premises, if the plaintiffs are entitled as mortgagees as alleged, which is denied, they have authorised and consented to the said sale to the defendant, and are not entitled to the relief claimed in this action.

12. Alternatively, the plaintiffs having the notice and knowledge aforesaid, and well knowing that the defendant was ignorant of their title, stood wilfully by and allowed the said ship to be sold, and allowed the said defendant intervening to pay the said purchase money, and to expend the moneys aforesaid and to do the work and labour upon the said ship, and the defendant is entitled against the plaintiffs to a confirmation of his title to the said ship, or to a full indemnity for the said sums so expended as aforesaid.

By way of counter-claim against the plaintiffs and the owners of the *Liffey*:

13. The defendant intervening repeats paragraphs 5 to 12 inclusive of his defence.

14. The defendant intervening has paid money and incurred expenses and done work and labour in and about the saving of the said steamer at the request of the plaintiffs and the defendants, the owners of the *Liffey*, or one or both of them.

15. Alternatively, the defendant intervening has rendered salvage services to the steamship *Liffey*, under circumstances set forth, whereby the said vessel was saved from total loss.

The defendant intervening counter-claims:

1. A declaration that the defendant intervening is entitled as purchaser under the agreement of June 15, 1887, to specific performance of the said agreement, and to a conveyance of the said steamship free from any charge or incumbrance in favour of the plaintiffs.

2. Possession of the said ship.

3. In the alternative an indemnity from the plaintiffs for the purchase money paid by the defendant intervening, and for the expenses incurred by floating the vessel and bringing her into safety.

4. In the alternative such an amount of salvage as may be just.

5. In the alternative 750*l.* for money paid by the said defendant intervening, and work and labour done by him at the request of and on behalf of the plaintiffs and the defendants, the owners of the said ship.

The plaintiffs at the trial having called evidence in support of their case, Sir *Walter Phillimore*, on behalf of Caple, stated that he abandoned the defence, but relied upon Caple's right to claim salvage.

Mr. Caple, whose testimony was confirmed by other witnesses, gave evidence to the effect that he believed a valid transfer of the vessel had been made to him, that he under the belief that he was owner had expended money in rescuing the vessel from her position, and had thereby saved her from total loss.

Sir *Walter Phillimore* (with him *J. P. Aspinall*) for Caple.—My client is entitled to salvage. The circumstances of the case bring it directly within sect. 458 of the Merchant Shipping Act 1854. The intention of the person saving the property is immaterial. [Sir JAMES HANNEN.—It strikes me thus: Suppose a derelict to be brought into harbour by persons who, in ignorance of the law, think that the vessel being derelict becomes

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

their property. Could it be said that because they saved the ship under the impression that she belonged to them they were to get no reward?] Exactly. If all the ingredients of a salvage service are present, as they are here, salvage reward ought to be given:

The Purissima Concepcion, 3 W. Rob. 181;
The Favourite, 2 W. Rob. 255.

J. G. Barnes, for the mortgagees, *contra*.—Caple is not entitled to salvage. The services were never meant to be salvage, and cannot now be treated as salvage services. No one authorised Caple to expend this money, and hence he must bear the loss. Caple is also precluded by statute from recovering salvage. Sect. 450 of the Merchant Shipping Act 1854 provides that all claim to salvage is forfeited if a person who finds or takes possession of the wreck does not give immediate notice thereof to the receiver. (*a*) Caple has not complied with the requirements of this enactment, and has therefore forfeited all claims to salvage.

Sir *Walter Phillimore*.— Sect. 450 of the Merchant Shipping Act 1854 was never meant to apply to such a case as the present:

Sir Henry Constable's case, 2 Inst. 167;
Rex v. *Property Derelict*, 1 Hagg. 383.

Sir JAMES HANNEN.—I am glad that the view which I take of this case has also been taken by others before me. In this court happily we deal with matters on equitable principles, and we are not tied down to the strict rules of the common law. It appears to me that, on every principle of justice, this man must be entitled to something in the nature of salvage. I believe what he did was salvage, and nothing else. It is perfectly true that what he did was under a complete mistake of fact, but it was an honest mistake of fact which would naturally lead him to think that the property which was put up for sale by the auctioneers was property which they had authority to sell, and he thought he had bought it. Unfortunately for him it turns out that that which he thought had taken place, namely, a transfer of the property to him, did not take place, because neither the owners nor the mortgagees had in fact authorised the sale. What was his position in these circumstances? I shall assume for this purpose that he has done that which was necessary for the purpose of rescuing this vessel from the position in which she was; and I am of opinion, as a matter of fact, that she was in a very dangerous position, and that if she had not been rescued from it she would have been lost to everybody. It is perfectly true that, if McDougall, whose name has been so often mentioned in the matter, had, as it would seem he has not, done his duty, the owners of the ship would have had an opportunity of exercising their judgment; but they had not that opportunity. That was no fault of the salvor, Mr. Caple, and he proceeded to do the best he could. I cannot enter into the question of whether his expenditure was proper or judicious. I shall assume that what he did was judicious. The best proof that it must have been so is, that what he did was done under the impression that he was the owner, and therefore it is inconceivable he would not have tried to save the vessel at the least possible expense. Why is he not entitled to salvage? Mr. Barnes says he is not because what he did was not done with the idea and intention of being a salvor. I am of opinion that that has nothing to do with the matter. It is perfectly plain that salvage does not depend upon any express contract, because the whole thing could be done without the shipowner having any knowledge on the subject; but once being done, then by reason of the facts the shipowner becomes liable to do that which is right and fair, viz., to make a compensation to the man who has restored to him property which but for his exertions would have been lost. In my judgment it makes no difference whatever with what idea the man has rendered the services. He renders them under the mistaken idea that it is for himself. He is entitled when the facts are discovered to say: "I made a mistake; I thought I was doing it for myself. But it is not fair or equitable that you should take possession of this property without making a proper compensation to me for the exertions which I have made on your behalf."

With regard to the Act of Parliament to which my attention has been called, I am of opinion that the facts of this case are not within it. That section was intended to apply to the case of a man finding property and not making it known to the Receiver of Wreck. But the salvor here did not find this property within the meaning of the Act. He thought he was taking possession of his own property. Nor did he in fact find it; it was handed over to him by somebody under the idea that there was a transfer made of the property, and there was no finding in the case. Therefore I am of opinion that Mr. Caple is entitled to salvage, but the exact amount I am not in a position to fix until I know what the value of the vessel is. As it is agreed by all parties I decree a sale of the vessel, and then when the proceeds are paid into court I will give my award. I of course decree the validity of the mortgage, but reserve all questions of priority.

The ship was subsequently sold for 195*l*., from which 48*l*. 16*s*. 5*d*. was deducted for marshal's expenses, and on Nov. 1 Sir James Hannen awarded 73*l*. as salvage.

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

Solicitors for the salvors, *Ingledew, Ince*, and *Colt*.

(*a*) By sect. 450 of the Merchant Shipping Act 1854, "The following rules shall be observed by any person finding or taking possession of wreck within the United Kingdom; that is to say, (2) if any person not being the owner finds or takes possession of any wreck, he shall as soon as possible deliver the same to such receiver as aforesaid; and any person making default in obeying the provisions of this section shall incur the following penalties; that is to say, (4) if he is not the owner and makes default in performing the several things, the performance of which is hereby imposed on any person not being an owner, he shall forfeit all claims to salvage; he shall pay to the owner of such wreck, if the same is claimed, but if the same is unclaimed then to the person entitled to such unclaimed wreck, double the value of such wreck (such value to be recovered in the same way as a penalty of like amount); and he shall incur a penalty not exceeding one hundred pounds."—ED.

HOUSE OF LORDS.

Dec. 8, 9, 1887, *and Feb.* 24, 1888.

(Before Lords HERSCHELL, BRAMWELL, WATSON, and MACNAGHTEN.)

MILLS *v.* ARMSTRONG AND ANOTHER; THE BERNINA. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Both ships in fault — Passenger — Loss of life — Liability of owners — Lord Campbell's Act 1846 (9 *&* 10 *Vict. c.* 93).

Where passengers and seamen off duty are killed in a collision between two ships, both of which are to blame, the deceased are not identified with their carrying ship so as to be deemed to be guilty of contributory negligence, and their personal representatives are entitled under Lord Campbell's Act to maintain actions against the owners of the non-carrying ship.

Thorogood *v.* Bryan (8 *C. B.* 115; 18 *L. J.* 336, *C. P.*) *overruled.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.), reported in 6 Asp. Mar. Law Cas. 75; 56 L. T. Rep. N. S. 258; and 12 P. Div. 58), who had reversed a judgment of Butt, J., reported in 5 Asp. Mar. Law Cas. 577; 54 L. T. Rep. N. S. 449; and 11 P. Div. 31, upon a special case.

The action was brought under Lord Campbell's Act (9 & 10 Vict. c. 93) against the owners of the ship *Bernina* by the personal representatives of two persons who were on board the *Bushire*, a British ship, and were killed in consequence of a collision with the *Bernina*, which was also a British ship. The collision was the fault of both ships, but the deceased persons, who were a passenger and engineer off duty, had nothing to do with the negligence which caused the accident.

The facts, which were not disputed, are fully set out in the reports in the courts below.

Butt, J. held that he was bound by the decision in the case of *Thorogood* v. *Bryan* (8 C. B. 115; 18 L. J. 336 C. P.), and gave judgment for the defendants, but his decision was reversed, as above mentioned.

The owners of the *Bernina* appealed to the House of Lords.

Sir *W. Phillimore* and *J. G. Barnes* appeared for the appellants.

Bucknill, Q.C. and *Nelson* for the respondents.

It was admitted that, if the case of *Thorogood* v. *Bryan* was good law, the present case fell within it, and the sole question in the argument was, as to whether that decision could be sustained.

In addition to the cases cited in the judgment, the following were also referred to:

Cattlin v. *Hills*, 8 C. B. 123;
Read v. *Great Eastern Railway Company*, 18 L. T. Rep. N. S. 82; L. Rep. 3 Q. B. 555;
Rigby v. *Hewitt*, 5 Ex. 240;
Greenland v. *Chaplin*, 5 Ex. 243;
Child v. *Hearn*, L. Rep. 9 Ex. 176;
Dudman v. *Dublin Port and Docks Board*, 7 Ir. Rep. Com. L. 518;
Lockhart v. *Lichtenthaler*, 46 Penn. 151;
Wabash, St. Louis, and Pacific Railway Company v. *Shacklet*, 44 Amer. Rep. 791;
Borough of Carlisle v. *Brisbane*, 57 Amer. Rep. 483, 488.

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

At the conclusion of the arguments their Lordships took time to consider their judgment.

Feb. 24.—Their Lordships gave judgment as follows:—

Lord HERSCHELL. — My Lords: This appeal arises upon a special case stated in actions in which the respondents are plaintiffs. They are both actions brought under Lord Campbell's Act to recover damages against the appellants for the loss sustained owing to the deaths of the persons of whom the respondents are the personal representatives; and it is alleged that they lost their lives through the negligence of the appellants. The appellants are the owners of the steamship *Bernina*, between which vessel and the steamship *Bushire* a collision took place, which led to the loss of fifteen persons, who were on board the latter vessel. It is admitted that the collision was caused by the fault or default of the master and crew of both vessels. J. H. Armstrong, whose administratrix one of the respondents is, was a member of the crew of the *Bushire*, but had nothing to do with its careless navigation. M. A. Toeg, of whom the other respondent is administratrix, was a passenger on board the *Bushire*. The question arises whether under these circumstances the appellants are liable. The appellants having, as they admit, been guilty of negligence from which the respondents have suffered loss, a *primâ facie* case of liability is made out against them. How do they defend themselves? They do not allege that those whom the respondents represent were personally guilty of negligence which contributed to the accident. Nor, again, do they allege that there was contributory negligence on the part of any third person standing in such a legal relation towards the deceased men as to cause the acts of that third person, on principles well settled in our law, to be regarded as their acts as, *e.g.*, the relation of master and servant or employer and agent acting within the scope of his authority. But they rest their defence solely upon the ground that those who were navigating the vessel in which the deceased men were being carried were guilty of negligence, without which the disaster would not have occurred. In support of the proposition that this establishes a defence, they rely upon the case of *Thorogood* v. *Bryan* (8 C. B. 115), which undoubtedly does support their contention. This case was decided as long ago as 1849, and has been followed in some other cases; but, though it was early subjected to adverse criticism, it has never come for revision before a Court of Appeal until the present occasion. That action was one brought under Lord Campbell's Act against the owner of an omnibus by which the deceased man was run over and killed. The omnibus in which he had been carried had set him down in the middle of the road instead of drawing up to the kerb, and before he could get out of the way he was run over by the defendant's omnibus, which was coming along at too rapid a pace to be able to pull up. The learned judge directed the jury that, "if they were of opinion that want of care on the part of Barber's omnibus in not drawing up to the kerb to put the deceased down, or any want of care on the part of the deceased himself, had been conducive to the injury, in either of those cases, notwithstanding the defendant, by her servant,

had been guilty of negligence, their verdict must be for the defendant." The jury gave a verdict for the defendant, and the question was then raised on a rule for a new trial on the ground of misdirection, whether the ruling of the learned judge was right. The court held that it was.

It is necessary to examine carefully the reasoning by which this conclusion was arrived at. Coltman, J. said: "It appears to me that, having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and his servants, that if any injury results from their negligence, he must be considered a party to it. In other words, the passenger is so far identified with the carriage in which he is travelling, that want of care of the driver will be a defence of the driver of the carriage which directly caused the accident." Maule and Vaughan Williams, JJ. also dwelt upon this view of the identification of the passenger with the driver of the vehicle in which he is being carried. The former thus expressed himself: "I incline to think that, for this purpose, the deceased must be considered as identified with the driver of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased." Vaughan Williams, J. said: "I think the passenger must for this purpose be considered as identified with the person having the management of the omnibus he was conveyed by." With the utmost respect for these eminent judges, I must say that I am unable to comprehend this doctrine of identification upon which they lay so much stress. In what sense is the passenger by a public stage coach, because he avails himself of the accommodation afforded by it, identified with the driver? The learned judges manifestly do not mean to suggest (though some of the language used would seem to bear that construction) that the passenger is so far identified with the driver that the negligence of the latter would render the former liable to third persons injured by it. I presume that they did not even mean that the identification is so complete as to prevent the passenger from recovering against the driver's master; though, if "negligence of the owner's servants is to be considered negligence of the passenger," or if he "must be considered a party" to their negligence, it is not easy to see why it should not be a bar to such an action. In short, as far as I can see, the identification appears to be effective only to the extent of enabling another person whose servants have been guilty of negligence to defend himself by the allegation of contributory negligence on the part of the person injured. But the very question that had to be determined was, whether the contributory negligence of the driver of the vehicle was a defence as against the passenger when suing another wrongdoer. To say that it is a defence because the passenger is identified with the driver, appears to me to beg the question, when it is not suggested that this identification results from any recognised principles of law, or has any other effect than to furnish that defence, the validity of which was the very point in issue. Two persons may no doubt be so bound together by the legal relation in which they stand to each other, that the acts of one may be regarded by the law as the acts of the other. But the relation between the passenger in a public vehicle, and the driver of it, certainly is not such as to fall within any of the recognised categories in which the act of one man is treated in law as the act of another.

I pass now to the other reasons given for the judgment in *Thorogood* v. *Bryan*. Maule, J. says: "On the part of the plaintiff it is suggested that a passenger in a public conveyance has no control over the driver. But I think that cannot with propriety be said. He enters into a contract with the owner, whom by his servant, the driver, he employs to drive him. If he is dissatisfied with the mode of conveyance he is not obliged to avail himself of it. But, as regards the present plaintiff, he is not altogether without fault; he chose his own conveyance, and must take the consequences of any default on the part of the driver whom he thought fit to trust." I confess I cannot concur in this reasoning. I do not think it well founded either in law or in fact. What kind of control has the passenger over the driver which would make it reasonable to hold the former affected by the negligence of the latter? And is it any more reasonable to hold him so affected because he chose the mode of conveyance, that is to say, drove in an omnibus rather than walked, or took the first omnibus that passed him instead of waiting for another? And when it is attempted to apply this reasoning to passengers travelling in steamships or on railways, the unreasonableness of such a doctrine is even more glaring. The only other reason given is contained in the judgment of Cresswell, J. in these words: "If the driver of the omnibus the deceased was in had by his negligence or want of due care and skill contributed to an injury from a collision his master clearly could maintain no action. And I must confess I see no reason why a passenger who employs the driver to convey him stands in any better position." Surely, with deference, the reason for the difference lies on the very surface. If the master in such a case could maintain no action, it is because there existed between him and the driver the relation of master and servant. It is clear that, if his driver's negligence alone had caused the collision, he would have been liable to an action for the injury resulting from it to third parties. The learned judge would, I imagine, in that case have seen a reason why a passenger in the omnibus stood in a better position than the master of the driver. I have now dealt with all the reasons on which the judgment in *Thorogood* v. *Bryan* was founded, and I entirely agree with the learned judges in the court below in thinking them inconclusive and unsatisfactory. I will not detain your Lordships further on this part of the case, beyond saying that I concur with the judgments of the learned judges in the court below, and specially with the very exhaustive judgment of Lord Esher, M.R.

It was suggested in the course of the argument that *Thorogood* v. *Bryan* might be supported on the ground that the allegation that the negligence which caused the injury was the defendant's was not proved, inasmuch as it was the defendant's negligence in conjunction with that of the driver of the other omnibus. It may be that, as a pleading point, this would have been good. It is not necessary to express an opinion whether it would or not. I do not think it would have been a defence on the merits if the facts had been properly averred. If,

by a collision between two vehicles, a person unconnected with either vehicle were injured, the owner of neither vehicle, when sued, could maintain as a defence, "I am not guilty, because but for the negligence of another person the accident would not have happened." And I do not see how this defence is any more available as against a person being carried in one of the vehicles, unless the reasoning in *Thorogood* v. *Bryan* be well founded. I have said that the decision in *Thorogood* v. *Bryan* has not been unquestioned. I do not think it necessary to enter upon a minute consideration of the subsequent cases, after the careful and accurate examination to which they have been subjected by the Master of the Rolls. The result may be summarised thus: The learned editors of Smith's Leading Cases, Willes and Keating, JJ., strongly questioned the propriety of the decision in the notes to *Ashby* v. *White* (1 Sm. L. C.). Parke, B., whose dictum in *Bridge* v. *The Grand Junction Railway Company* (3 M. & W. 244) Williams, J. followed in directing the jury in *Thorogood* v. *Bryan*, appears to have doubted the soundness of the judgment in that case. Dr. Lushington, in *The Milan* (Lush. 388), expressed strong disapproval of it; and though in *Armstrong* v. *The Lancashire and Yorkshire Railway Company* (33 L. T. Rep. N. S. 228; L. Rep. 10 Ex. 47) it was followed, and Bramwell and Pollock, BB., to say the least, did not indicate dissatisfaction with it, I understand that my noble and learned friend, Lord Bramwell, after hearing this case argued, and maturely considering it, agrees with the judgment of the court below. In Scotland the decision in *Thorogood* v. *Bryan* was pronounced unsatisfactory in *Adams* v. *The Glasgow and South-Western Railway Company* (3 Ct. Sess. Cas., 4th series, 215). In America it has been followed in the courts of some States, but it has often been departed from, and upon the whole the view taken has been decidedly adverse to it. The latest case that I am aware of in that country is *Little* v. *Hacket* (9 Davis Sup. Ct. U.S. 366). That was a decision of the Supreme Court of the United States, whose decisions, on account of its high character for learning and ability, are always to be regarded with respect. Field, J., in delivering judgment, examined all the English and American cases, and the conclusion adopted was the same as that at which your Lordships have arrived. I have only this observation to add. The case of *Waite* v. *The North-Eastern Railway Company* (E. B. & E. 719) was much relied on in the argument for the appellants; but the very learned counsel who argued that case for the defendants, and all the judges who took part in the decision, were of opinion that it was clearly distinguishable from *Thorogood* v. *Bryan*, and did not involve a review of that case. I think they were right. As regards the other questions argued before your Lordships, I have only to say that I think they were properly dealt with by the court below. I am requested by my noble and learned friend Lord Bramwell, who was unable to remain to read the opinion which he had prepared, to state that he concurs in the motion which I am about to make. (*a*) I move your Lordships that the judgment of the Court of Appeal be affirmed, and the appeal dismissed, with costs.

Lord WATSON.—My Lords: The appellants

(*a*) The opinion was as follows:—Lord BRAMWELL.—My Lords: These cases are to me cases of extreme difficulty. They are supposed to involve the same question as, and no other than, that in *Thorogood* v. *Bryan* (8 C. B. 115). I do not think so. I am reported, I have no doubt accurately, to have made some observations upon that case; but I can safely say, and it will be seen that I can consider those before us "loyally," to use an expression of Lord Esher, and unbiassed by anything I may have said before. Whether it was that that case could be or might be supported is immaterial. I think it was rightly decided, though not decisive of the cases before us. The plaintiff there was administratrix of a passenger in an omnibus who lost his life, we must take it, through the negligence of the driver of the omnibus in which he was a passenger, and the negligence of the driver of an omnibus belonging to the defendant. The negligence of the two drivers was not a joint act; the negligence of one was not the negligence of the other; each was separately guilty of an act of negligence, and the two acts caused the passenger's death. The plaintiff's case was, as stated in the declaration, that the defendant by her servant so carelessly drove and directed the carriage and horses, that by the negligence and improper conduct of her servants in that behalf they ran against the deceased and knocked him down, &c., and by reason of the premises he died. The plea was "not guilty," *i.e.*, that the deceased was not struck and killed by the negligence of the defendant's driver. That that is the meaning of the plea is shown by what was said in *Bridge* v. *Grand Junction Railway Company* (3 M. & W. 244). It was for the plaintiff to prove that the deceased was killed by a negligent act of the defendant's driver: he did not prove it by showing he was killed by such negligent act, and by a separate negligent act in the driver of the omnibus in which the deceased rode. As I have said, he was killed not by a joint act of negligence by two persons, but by two separate acts of negligence of those two. If the owner of the omnibus in which the passenger was had sued the defendant, and had said in his declaration, as he would have done, that by the defendant's negligence his (the plaintiff's) omnibus was damaged, he would have failed to prove it, if there was contributory negligence of his own driver. The plea would have been not guilty; but if not guilty to such a declaration raised the defence of, "You say I did it; I did not, for without your negligence, it would not have happened"—if it raised, I say, the defence in one case, so it would in the other, viz., the case of the passenger. I hope I speak with no undue confidence, but I had many years' practice in special pleading, happily abolished, and have not a doubt that the declaration in *Thorogood* v. *Bryan* was not proved. It was not by and through the defendant's negligence the passenger was killed. If there had been nothing but that negligence the man would not have been killed. If he would have been, then the other negligence was not contributory. This is the ground on which I have thought *Thorogood* v. *Bryan* (*ubi sup.*) was rightly decided. It is true it is not so put by the court. The expression they used is, that the passenger was identified with the omnibus that carried him. Whether that is a right expression may be doubtful. I shall have to examine it further on. At present I will only observe that the four judges were great lawyers, and I believe that an experienced lawyer may be instinctively right without at the moment being able to give a good reason for his opinion. I confess that, at the commencement of the argument of the present cases, I thought this consideration decided them, but I am now satisfied that it does not. It is obvious that my opinion that *Thorogood* v. *Bryan* was rightly decided turns on a question of pleading, viz., that the plaintiff alleged that the defendant's negligence caused the injury which was not proved. But in the case before us there are no pleadings, and we must see whether the facts show a cause of action against the appellants. Now the facts are different as to the two cases. In one the plaintiff's case is: I was a passenger in the *Bushire*; that vessel contracted to carry me without negligence, they failed—broke their contract; you were owner of another vessel, it was your duty towards the public to navigate without negligence; by your breach of duty

conceded in argument that, unless it can be shown that *Thorogood* v. *Bryan* (8 C. B. 115) is a valid precedent, they cannot succeed in this appeal. Although nearly forty years have elapsed since that case was decided, I think the rule which it established must still be dealt with upon

and the breach of contract in the *Bushire*, I was injured, and claim damages of you. The case of the engineer of the *Bushire* differs from this, for he could not say that the owners contracted to carry him safely, because he undertook the risk of negligence in fellow-servants. But I suppose he might say that there was a duty to him in the other sailors to be careful in the performance of their share of the navigation. I have used the word "negligence;" but suppose there was no negligence nor want of skill, but only an error of judgment. The outside public I suppose might rely on that. But could a fellow-servant? I doubt it extremely. These then are the facts of the cases: Take that of the passenger first. Is it a good cause of action to say, I was a passenger in a ship, the owners of which had agreed with me that she should be navigated with care, skill, and judgment; you were owner of another ship, by your negligence and their negligence or want of skill or error of judgment which contributed to it, and without which it would not have happened, there was a collision, and I was injured; I may maintain an action for the damage against them, but I prefer to sue you. Is this a good statement of claim? Is a good cause of action shown? The language of the judges in *Thorogood* v. *Bryan (ubi sup.)* says "No." I have been unable to think of any other possible case in which a man could be successfully sued for an act which would have caused no injury to the plaintiff, except for another act in breach of a contract with the plaintiff by the man guilty of it, and for which the plaintiff could maintain an action against him. It is clear that the passenger could maintain an action against those who failed in their contract to carry him without negligence. Why should he also be able to maintain one against the defendants? Without the negligence of the servant of the man who had contracted to carry him safely there would have been no collision, no damage. The servant of the carrier of the plaintiff contributed to it. He has therefore helped the plaintiff to a cause of action, helped to cause the damage, but the whole damage is to be paid by the defendant. Can that be? Further, if the passenger can maintain an action, why cannot the owner of the carriage for injury to it? I know it was said during the argument that there was no case where an action had been maintained by a man who was responsible for the act of his servant in respect of an injury to the causing of which his servant had contributed. That is true; but why, unless on principles that justify the decision in *Thorogood* v. *Bryan* (8 C. B. 115)? The maxim *Qui facit per alium facit per se* does not apply. That maxim applies where the tortious act has been commanded by the "se." As for instance, where A. tells B. to beat C., or to build a house such that it will obstruct C.'s ancient lights. It does not apply to a case of negligence. The negligence of the servant is not commanded by the master. It is a breach of duty in the servant to the master. How then can he have commanded it? I cannot see why, if a passenger can maintain this action, the owner being a passenger and injured cannot. But I will put another case. Suppose the owner's wife is a passenger and injured, can she maintain such an action? If not, why not? The driver is not her servant, and she is not responsible for his negligence. Take a case a little more remote, a friend of the owner of the carriage. Can he maintain the action? If the driver of the omnibus gives a friend a gratis lift, can he maintain an action against the other omnibus, being injured by the combined effect of acts of negligence in each driver of the omnibuses? Does it not seem absurd that, if a man hires a carriage for a month with horses and driver, he and his family and friends may maintain such action, but not if his own coachman drives? Suppose the horses are jobbed, can the jobmaster maintain such action? If not, again I ask, why not? Further, if the passenger can maintain the action, clearly the owner of goods being carried which are injured by the negligence of the owner and the negligence of a third person conjoined, could maintain an action against the third person, and we should have what seems to me the ludicrous case of a collision between railways A. and B., injury to goods in each, and actions maintainable by owners of goods carried by A. against B., and of goods carried by B against A. when possibly neither had any remedy against his own carrier. It is to be remembered that the negligence of the driving is not a joint act. There are two several acts of negligence. If judgment is recovered against one of two joint wrongdoers, no second action is maintainable against the other. If two men were driving a carriage negligently and damage resulted, if an action was brought and judgment recovered against one, no second action could be maintained against the other. But if a passenger in one omnibus recovered against the owner of another omnibus, it is certain he could maintain an action against the owner of the omnibus in which he had been carried. What damages he would recover, if he had received damages, whether recovered or voluntarily given, I will not stop to consider. I cannot see why he should not recover over again. He might say that his transaction with the other omnibus was *res inter alios*. But supposing he recovered yet did not get paid, he clearly would be entitled to get his damages from the owner of the omnibus in which he was a passenger. Should it be said, why of him, who also could say, I did not do it, it was the act of another added to mine? the answer would be, "You broke your contract with me to drive me with care, and not negligently." But take the case put in argument of injury not to a passenger but to one of the public by separate acts of negligence in two persons, which acts conjoined caused the injury. This is a case I suggested during the argument in *Armstrong* v. *Lancashire and Yorkshire Railway Company (ubi sup.)*. Such a case it is not easy to imagine, but let us suppose it. I should say an action might be maintained against the two jointly. If their conduct was wilful it clearly might be, and I do not know why its being negligent should make a difference. Let it be remembered that the defence is: I did not do it; my act alone did you no harm; you would not have been damaged but for the default of the man with whom you made a contract which he broke, and the breach of which made my act a danger and hurt to you. Had you yourself been guilty of the default, I should not be liable; why should I, when the default is that of the person you employ while he is acting in that employment? These considerations are applicable to the passenger. But what about the engineer? I suppose, as far as his employer is concerned, he could maintain no claim against him; he would be held to have taken the risk of negligence in his fellow-servants. But he might perhaps have a valid claim against the fellow-servant, and would be met with the same argument as the passenger, viz., "I did not do it, it was the result of two acts, mine and that of the other vessel." It seems impossible to suppose that the engineer, a person employed on the vessel, would have a better or worse case than the passenger. Further, it must be remembered that the cause of the damage may be, not negligence, no breach of duty, but error of judgment in one driver and negligence of the grossest kind in the other. Is the former to be liable for all the damage? These considerations seem to me of great weight, and raise difficulties that will have to be faced, but I will examine those on the other side. A plaintiff in a case like these says: Truly, you, the defendant or your servants, were guilty of a breach of your duty to the public. You drove or navigated negligently on the highway or high seas where I had a right to be. If not precisely the cause or sole cause of the harm that befell me, if not the *causâ causans*, your tortious act was the cause without which I should not have sustained harm. Why am I to seek further or prove more? Perhaps someone else is liable to me. How does that affect my right to complain of you? You are a wrongdoer. Suppose the other wrongdoer is insolvent or dead. You complain that you will be made liable for damage that you have only in part caused: but if you succeed you will pay no part of that damage. You have no right to be heard to confess that you are a wrongdoer, and yet contend there is no liability. If you had done wilfully what you did; that is, if you had wilfully driven hazardously, hoping the other driver would have avoided

its own merits. The decision has not met with general acceptance, and it cannot be represented as an authority upon which a course of practice has followed, or upon which persons guilty, or intending to be guilty, of contributory negligence are entitled to rely. When the combined negligence of two or more individuals, who are not acting in concert, results in personal injury to one of them, he cannot recover compensation from the others, for the obvious reason that, but for his own neglect, he would have sustained no harm. Upon the same principle, individuals who are injured, without being personally negligent, are nevertheless disabled from recovering damages if at the time they stood in such a relation to any one of the actual wrongdoers as to imply their responsibility for his act or default. That constructive fault, which implies the liability of those to whom it is imputable to make reparation to an innocent sufferer, must also have the effect of barring all claims at their instance against others who are *in pari delicto*, is a proposition at once intelligible and reasonable. If they are within the incidence of the maxim, *Qui facit per alium facit per se*, there can be no reason why it should apply in questions between them and the outside public, and not in questions between them and their fellow wrongdoers. But the facts which were before the court in *Thorogood* v. *Bryan* do not appear to me to bring the case within that principle. My noble and learned friend, Lord Bramwell, who is so conversant with the intricacies of English pleading, suggested in the course of the argument a technical ground upon which the decision in *Thorogood* v. *Bryan* might be justified. In that view, the case would not be an authority for the appellants, who accordingly supported the reason assigned for the judgment, which was simply this, that the deceased passenger, by taking his seat on the omnibus, became so far identified with its driver that the negligence of its driver was imputable to him in any question with the driver or owner of the other omnibus which ran over him and was the immediate cause of his death. Coltman and Cresswell, JJ. express themselves in terms which, if literally understood, would lead to the conclusion that he would also have been responsible for damage solely attributable to the fault of the driver. Coltman, J. said: "Having trusted the party, by selecting the particular conveyance, the plaintiff has so far indentified himself with the owner and her servants that, if any injury results from their negligence, he must be considered a party to it." Maule, J. was careful to limit his observations to the case before him. "I incline to think," said the learned judge, "that for this purpose (*i.e.*, recovering damages from the defendant) the deceased must be considered as identified with the owner of the omnibus in which he voluntarily became a passenger, and that the negligence of the driver was the negligence of the deceased." I do not think the very eminent judges who decided *Thorogood* v. *Bryan* intended to affirm that the deceased, by taking his seat in the omnibus, incurred the same responsibility for the negligent acts of the driver as if the latter had been his servant. If they did

you, there could be no doubt of your liability. But in point of law there is no difference between liability for wilfulness and for negligence or want of skill. Perhaps the suggested hardship of a part causer of the damage being made liable for the whole may be met by holding that he is not, that the right of action against the other lessens the damages against the one. These last arguments have prevailed with me. The defendant is a wrongdoer. Damage has resulted to the plaintiff which would not have resulted but for such wrongdoing. The plaintiff is not concerned with difficulties and hardships beyond his own. I think, therefore, that the judgment must be affirmed; but I cannot say confidently. As to the authorities, *Thorogood* v. *Bryan* (*ubi sup.*) was decided by a very strong court. They decided it on principle, and not on the pleadings. The expression used by them, "identified," is not satisfactory, but it represents and conveys an idea, I believe the same as that which I have elaborated, viz., the defendant's act or default did not cause the damage. It was preceded by *Bridge* v. *Grand Junction Railway Company* (*ubi sup.*), which points in the same direction. So also in *Vanderplank* v. *Miller* (Moo. & M. 169), which I think plain enough. There is also the case of *Armstrong* v. *Lancashire and Yorkshire Railway Company* (*ubi sup.*), which, as James, L.J. used to say of himself, is an authority though I joined in the decision. There is also the case of *Waite* v. *North-Eastern Railway Company* (E. B. & E. 719), where the child could maintain no action, because, as Lord Campbell said, "It was so identified with its grandmother," who was carrying it. It is true he offered no opinion on *Thorogood* v. *Bryan* (*ubi sup.*) and such cases, but I cannot see the difference. As to the judgments in the courts below, they have not, I consider, dealt with the question that I have elaborated, viz., Is the defendant guilty; did he cause the mischief? The Master of the Rolls argues: "If no fault can be attributed to the plaintiff, and there is negligence by the defendant and also by another independent person, both negligences partly directly causing the accident," the person injured can maintain an action for all the damages occasioned to him against either wrongdoer. Can he? If so, there is an end of the matter. Can he when his claim against one is for breach of contract and against the other for a tort? Can he where he is a gratuitous passenger in a carriage of one wrongdoer? Lindley, L.J. says, speaking of *Armstrong* v. *Lancashire and Yorkshire Railway Company* (*ubi sup.*): "If the proximate cause of the injury was the combined negligence of the two companies, I confess my inability to understand upon what principle the plaintiff could be held not entitled to sue either company, or, in other words, to be without a remedy." With submission, this is a mistake. If the plaintiff could maintain no action against his own company, it was because he had not bargained for care on their part, and they had done him no wrong. Lopes, J. is very hard on *Thorogood* v. *Bryan*, and says, "The theory of identification is a fallacy and a fiction contrary to sound law, and every principle of justice," and that the passenger may maintain an action against either wrongdoer, or "both." With great respect I venture to doubt the last statement. The judges then have dealt with the question I have stated. Whether it did not occur to them, or was not thought worthy of notice, I know not. The same may be said of the American cases. As to what Parke, B. said, I set the greatest value on everything from him, but his respect for Willes, J. would make him query anything that that learned judge queried. I may be permitted to meet this original style of authority by another and of the same kind, and say that he (Lord Wensleydale) once told me of a reported decision that he had written "wrong" against it, which he would done against *Thorogood* v. *Bryan* if he had thought it so. I am not much helped by the authorities. I will only say that, if the proposed judgment is right, for the reasons I gave *Waite* v. *Northern Railway Company* (*ubi sup.*) was wrongly decided. The abstract question must be decided on principle. I do not pretend to have a confident opinion on it, but I think the judgment right, and should be affirmed. I

think so on the ground that in such cases the defendant is a wrongdoer without whose wrongdoing the plaintiff would not have been damaged; that he cannot be heard to say that there is some other wrongdoer who contributed to the damage; that, as far as the sufferer is concerned, it matters not whether that other wrongdoer was so in a joint or separate act.—ED.

mean to do so their conclusion might be perfectly logical, but their premises would be directly at variance with the principles laid down in *Quarman* v. *Burnett* (6 M. & W. 499), which I have always regarded, and still regard, as a sound and authoritative precedent. If they did not, then they have affirmed that a passenger, travelling by a public conveyance, may be so unconnected with the driver as to be exempt from liability for his negligence, and yet be so identified with him as to lose all right of action against wrongdoers whose negligence, in combination with that of the driver, has occasioned personal injury to himself. That is a proposition which it is very difficult to understand. It must be a singular kind of relationship, and created by very exceptional circumstances, which results in the superior being affected by his inferior's negligence, in a question with wrongdoers, and not in a question with persons who are themselves free from blame. It humbly appears to me that the identification upon which the decision in *Thorogood* v. *Bryan* is based has no foundation in fact. I am of opinion that there is no relation constituted between the driver of an omnibus and its ordinary passengers which can justify the inference that they are identified to any extent whatever with his negligence. He is the servant of the owner, not their servant; he does not look to them for orders, and they have no right to interfere with his conduct of the vehicle, except, perhaps, the right of remonstrance when he is doing, or threatens to do, something that is wrong and inconsistent with their safety. Practically they have no greater measure of control over his actions than the passenger in a railway train has over the conduct of the engine-driver. I am therefore unable to assent to the principle upon which the case of *Thorogood* v. *Bryan* rests. In my opinion, an ordinary passenger by an omnibus, or by a ship, is not affected, either in a question with contributory wrongdoers or with innocent third parties, by the negligence, in the one case, of the driver, and, in the other, of the master and crew by whom the ship is navigated, unless he actually assumes control over their actions, and thereby occasions mischief. In that case he must of course be responsible for the consequences of his interference.

Counsel for the appellants endeavoured to support *Thorogood* v. *Bryan* upon a totally different principle from that assigned by the learned judges who decided the case. They argued alternatively that the maxim *Respondeat superior* does not apply, and that passengers are affected by the wrongful acts of the driver, not because he is in any sense their servant, or subject to their control, but by reason of their being, for the time, under his dominion. *Waite* v. *North-Eastern Railway Company* (E. B. & E. 719) was the authority relied on in support of this branch of the argument. But there is no analogy between the position of an infant incapable of taking care of itself and that of a passenger *sui juris*; and the theory that an adult passenger places himself under the guardianship of the driver, so as to be affected by his negligence, appears to me to be absolutely without foundation, either in fact or law. I therefore concur in the judgment which has been moved.

Lord MACNAGHTEN.—My Lords: I concur in the motion which has been proposed, and in the reasons upon which it has been founded.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for appellants, *Pritchard* and *Sons*, for *Bateson*, *Bright*, and *Warr*, Liverpool.

Solicitors for the respondents, *Lowless* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Dec. 12, 1887.

(Before Lord ESHER, M.R., BOWEN and FRY, L.JJ., assisted by NAUTICAL ASSESSORS.)

THE MARY LOHDEN. (*a*)

ON APPEAL FROM BUTT, J.

Collision — River Tees Conservancy Bye-laws, arts. 17, 18—*Breach of.*

Arts. 17 *and* 18 *of the River Tees Conservancy Bye-laws, providing that ships shall keep "the starboard side of the river so that the port helm may always be applied," and that a "steamship, when approaching another ship on an opposite course or from an opposite direction, shall before approaching within thirty yards slacken her speed, and keep as near as possible to the starboard side of the river," are to be observed even when vessels are approaching one another so as to show each other their green lights, and nothing will excuse the non-observance of these rules but extreme necessity.*

THIS was an appeal by the plaintiffs in a collision action from a decision of Butt, J., finding their vessel the *G. M. B.* solely to blame.

The collision occurred in the river Tees about 7 a.m. on the 15th Jan. 1887.

The facts alleged on behalf of the plaintiffs were as follows:

Shortly before 7.10 a.m. on the 15th Jan., the *G. M. B.*, a steamer of 382 tons, bound on a voyage from Middlesbrough to Grangemouth, with a cargo of pig iron and soda, was on the south side of the river Tees close to the buoys off the upper part of Eston Jetty. The weather was foggy and calm. The *G. M. B.* was heading down the river, and was stationary or nearly so, her engines having been previously and still being stopped on account of fog. She was under a slight starboard helm to keep her clear of the buoys off Eston Jetty, and her steam-whistle was being duly sounded. In these circumstances those on board the *G. M. B.* saw the green and masthead lights of a steamer (which proved to be the defendants' steamship the *Mary Lohden*) bearing between one and two points on their starboard bow at a distance of about 400 yards and close to the south shore. The *Mary Lohden* was taken to be a vessel going to Eston Jetty. The whistle of the *G. M. B.* was then blown two short blasts, but the *Mary Lohden* continued to come ahead, and when she got within 150 yards of the *G. M. B.*, opened her red light. Thereupon the *G. M. B.'s* engines were immediately reversed full speed

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

astern, but the *Mary Lohden* continued to come on at considerable speed, and with her stem and starboard bow struck the *G. M. B.* on the starboard side in the way of the foreriggging, cutting a large hole in her, and doing her so much damage that it was necessary to beach her. The *G. M. B.* was accordingly run ashore higher up the river, but the *Mary Lohden* coming on again struck the *G. M. B.* on her starboard quarter.

The facts alleged on behalf of the defendants were as follows:

Shortly before 6.40 a.m. on the 15th Jan., the *Mary Lohden*, a steamship of 875 tons register, whilst on a voyage from Bilbao to Middlesborough laden with a cargo of iron ore, was proceeding up the river Tees a little to the north of Mid-channel, at a speed of between two and three knots an hour. The weather was thick. In the circumstances those on board the *Mary Lohden* observed the masthead light of the *G. M. B.* from three to four hundred yards distant and about right ahead, and immediately afterwards the green light of the *G. M. B.* came into view on about the same bearing. The whistle of the *Mary Lohden* was blown one short blast, and her helm ported in order to pass the *G. M. B.* port side to port side, and when the *Mary Lohden* was close to the north side of the river her helm was steadied, but the *G. M. B.* was observed to be coming towards the *Mary Lohden* under a starboard helm, and thereby causing danger of collision. The engines of the *Mary Lohden* were immediately reversed full speed, her whistle blown three short blasts, and her helm put hard-aport. The *G. M. B.*, however, coming on with her starboard side struck the stem of the *Mary Lohden*, and did her great damage.

The plaintiffs (*inter alia*) charged the defendants with negligence in not navigating the *Mary Lohden* on the north side of the river, and also with improperly attempting to cross the bows of the *G. M. B.*

The defendants (*inter alia*) charged the plaintiffs with improperly starboading, and with improperly neglecting to keep the *G. M. B.* on her starboard side of the river, and to pass the *Mary Lohden* port side to port side.

By the River Tees Conservancy Bye-laws:

Clause 17. Every ship navigating the river shall keep the starboard side, so that the port helm may always be applied to clear vessels proceeding in the opposite direction.

Clause 18. Every steamship, when approaching another ship on an opposite course or from an opposite direction, shall, before approaching within thirty yards, slacken her speed and keep as near as possible to the starboard side of the river, so as to afford the greatest facility for passing the approaching ship.

The learned judge below found that both vessels were some distance to the north of the line of buoys along the south shore, and that, as they approached one another, the *Mary Lohden* ported and the *G. M. B.* starboarded, and for this starboarding, in contravention of the bye-laws, he found the *G. M B.* solely to blame.

Myburgh, Q.C. (with him *Hollams*), for the plaintiffs, in support of the appeal.—The *Mary Lohden* was solely to blame. True, the rules require vessels to pass port side to port side; but here the circumstances were such as to make the rule inapplicable. As a matter of fact, the *Mary Lohden* was within the line of buoys on the south shore, and therefore broad on the starboard bow of the *G. M. B.* If so, it was most improper to port out across the bows of the *G. M. B.* It was never intended that the port helm rule should be applied where vessels are broad on each other's starboard bows. Those on the *G. M. B.*, seeing a green light on their starboard bow, were justified in starboarding, and, but for the wrongful porting of the *Mary Lohden*, the collision would never have happened.

Hall, Q.C. and *J. G. Barnes*, for the defendants, were not called upon.

Lord Esher, M.R.—I think Mr. Myburgh has taken the only point which can excuse his clients. He contends that the *Mary Lohden* was coming up inside these buoys, and that she suddenly ported and came outside. I agree with the learned judge that, if that were so, the *Mary Lohden* would have acted wrongly. But I also think that even then the *G. M. B.* was not in the right; but I do not care to inquire into that. Mr. Myburgh puts his case upon this, that the *Mary Lohden* came out from the inside of these buoys, and he very rightly admits that unless he can make that out he must fail. With that I agree. If these vessels were navigating at all near the centre of the river, whether they were rather to the one side of mid-channel or to the other, or even much to the one side or much to the other, the rule of the river is clear, that the moment they are coming near to each other they shall both port. Now what did happen? Why one of them ported and the other starboarded. Therefore the one that starboarded broke the rule of the river, and the other that ported kept the rule of the river. Now, what shall excuse a ship on the Tees which breaks a rule of the river? I say nothing but extreme necessity. To argue that one was a little on the port bow of the other, or that one showed for a moment a green light or a red light on one bow or the other, is wholly immaterial. It is equally immaterial whether they were going on parallel courses, end on, or nearly end on. The rule of the river is, that unless there is extreme necessity they shall both of them port, so that one can go on one side and the other on the other side of the river. Now, the *G. M. B.* broke that rule and the other observed it.

Can the *G. M. B.* be excused on the ground of its being a wholly exceptional case? She cannot unless the *Mary Lohden* was inside the buoys. Now the learned judge below was advised by his assessors that they did not believe she was inside these buoys. It was not suggested that the *Mary Lohden* had gone in there purposely, but had done so inadvertently. There was a pilot on the bridge. It is not suggested he was neglecting his duty. He had his glasses in his hand, and the fog was not thick enough to make him blunder. I have asked the gentlemen who assist us, and they say they do not believe the ship was inside these buoys. It might be that we might differ from them. We should be very loth to do so, but as a matter of fact I agree with them. As to whether these two ships were more or less in the centre I have my own views. Probably they were neither of them so near the centre as is suggested. I want to lay down this rule with regard to the navigation of the Tees, that whether the green light was for a moment seen on the starboard side of the *G. M. B.* or not, unless the *Mary Lohden*

was so close to the shore as to justify the *G. M. B.* in breaking the rule, the rule is most distinct and clear.

As to the second collision, I am of opinion that the *Mary Lohden* was following to assist the other vessel, which was a proper and seamanlike thing to do, and would have been to blame if she had not done so. The other vessel stopping suddenly by taking the ground, the *Mary Lohden* had not a fair opportunity of seeing her before she touched her, and then touched her with extreme lightness. I am therefore of opinion that the judgment of the learned judge was right, and that this appeal must be dismissed.

BOWEN and FRY, L.JJ. concurred.

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

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

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Jan. 30, 31, *and Feb.* 28, 1888.

(Before CHITTY, J.)

Re THE MISSOURI STEAMSHIP COMPANY LIMITED; MONROE'S CLAIM. (*a*)

Contract of affreightment—Conflict of laws—Law of the flag — "Lex loci contractus"—Charter-party—Bill of lading—Special exemption.

A claim was made by an American citizen in the winding-up of a British steamship company for damages for the loss of his cattle arising through the negligence of the master and crew. The ship in which the cattle were carried was a British ship trading between Boston and Liverpool. The charter-party contained express stipulations exempting the company from liability caused by the negligence of the master and crew. The cattle were shipped at Boston, and bills of lading were given there, in conformity with the contract. The ship stranded on the coast of North Wales owing, as was admitted, to the negligence of the master and crew. According to the law of the State of Massachusetts, as at present ascertained, the stipulations exempting the owners from liability through negligent navigation were void; but according to English law such stipulations were good, and were usually inserted in English bills of lading. The question was whether the law of the flag (that is to say, the personal law of the shipowner) or the lex loci contractus should govern the contract of affreightment.

Held, on the authority of Lloyd *v.* Guibert (13 *L. T. Rep. N. S.* 602; 2 *Mar. Law Cas. O. S.* 283; *L. Rep.* 1 *Q. B.* 115), *that the stipulations were valid, first, on the general ground that the contract was governed by the law of the flag; and secondly, on the particular ground that from the special provisions of the contract itself it appeared that the parties were contracting with a view to the law of England.*

THE Missouri Steamship Company was a limited company registered in England, and owned the steamship *Missouri*, which was one of a line of steamers trading between United States ports and Liverpool, known as the "Warren Line."

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

The managers of the line were George Warren and Co. Their agents in America were Warren and Co., who did the business of the steamers there.

The s.s. *Missouri* was registered at the Custom-house at Liverpool, and sailed under the British flag.

On the 4th Jan. 1883 a contract was entered into between Albert N. Monroe, of Boston, a citizen of the United States of America, and Warren and Co., on behalf of the company, for the carriage by the s.s. *Missouri* of 400 sheep from Boston to Liverpool. The contract was signed at Boston, and contained the following clause:

When the animals are shipped bills of lading will be issued for them, and said bills of lading will contain stipulations to the following effect to which the shipper hereby agrees, viz.:

Ship not accountable for the acts of God, the Queen's enemies, pirates, robbers, or thieves, barratry of master, or mariners, restraints of princes, rulers, or people, loss or damage, mortality or injury resulting from any of the following perils, whether arising from the negligence, default, or error in judgment of the master, mariners, engineers, or others of the crew or otherwise howsoever, namely, accidents to fittings, disease, stress of weather, want of space, air, or water, accidents to condensing apparatus, tanks, or machinery, diminishing or injuring the supply of water or air, risk of craft, explosion, or fire, in port or at sea, in craft or on shore, before lading or after unlading, accidents from steam machinery or boilers, or any damage or injury thereto, however caused, nor for collision, stranding, or any other accident or peril of the seas, rivers, and steam navigation, of whatever nature or kind soever, howsoever such collision, stranding, or other accident or peril may be caused. Liberty is reserved to the ship, her agents, officers, and owners, in the event of the said ship's putting back to Boston, or into any port, or otherwise being prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the animals by any other steamer, and liberty is also reserved to sail with or without pilots, to call at any intermediate port or ports, and to tow and assist vessels in all situations.

The contract was a printed one. The form of it was prepared in England, and had been in use by the s.s. *Missouri*, and other steamships of the Warren line, for a number of years prior to 1883. It was the only form of contract adopted by the Warren line in carrying cattle.

The bills of lading for the 400 sheep shipped by A. N. Monroe on board the s.s. *Missouri* at Boston to be carried to Liverpool were signed on the 7th March 1883, and contained the clause as to exceptions mentioned in the contract and set out above.

On the 8th March 1883 the s.s. *Missouri* sailed from Boston, and whilst on her voyage to Liverpool she rendered salvage services to the s.s. *City of Chester*, which were subsequently the subject of a salvage action in the Admiralty Court in England.

Owing to the deviation and consequent delay caused by the rendering of such salvage services, the sheep were exposed to much additional wear and tear and knocking about upon the voyage, in consequence whereof eleven sheep died and the remainder were seriously damaged and reduced in value.

On the 6th Feb. 1886 a contract was made between J. A. Hathaway, who was an American citizen resident at Boston, and Warren and Co., on behalf of the company, for the carriage by the s.s. *Missouri* of cattle from Boston to Liverpool. The contract was exactly similar in form to the previous one.

A part of the space taken under such contract was sublet to A. N. Monroe, and an indorsement to that effect was made on the contract.

Under that contract A. N. Monroe, on the 17th Feb. 1886, shipped 264 fat cattle on board the s.s. *Missouri* at Boston to be carried to Liverpool. The bills of lading for the cattle were signed on the 17th Feb. 1886, and were exactly similar in form to the previous bills of lading.

The s.s. *Missouri* sailed from Boston on the 18th Feb. 1886, and in course of her voyage ran ashore on the coast of North Wales and became a total wreck. All the cattle went into the sea and were lost in consequence of such stranding. A Board of Trade inquiry was afterwards held at Liverpool to inquire into the cause of the stranding. The court found that it was due to negligent and careless navigation on the part of those on board and in charge of the vessel on behalf of her owners.

The company then went into voluntary liquidation. Frank Shaw, Frederick Massey, and Frederic Warren, jun., members of the firm of George Warren and Co., of Liverpool, were appointed liquidators.

The usual advertisements for claims were issued, and the only one sent in was that of A. N. Monroe, which was as follows:

Take notice, that Albert N. Monroe, of Boston, in the State of Massachusetts, one of the United States of America, claims to be entitled to 6751*l.* 17*s.* 3*d.* from the estate of the Missouri Steamship Company Limited for damages sustained by him owing to the wrongful acts and breaches of contract of the said company, or their servants, or agents, of which the following are the particulars:

(1.) 133*l.* 13*s.* 7*d.* damages for the loss of eleven and deterioration of the remainder of 400 sheep shipped by the said A. N. Monroe at Boston aforesaid for Liverpool on or about March 7, 1883, in the steamship *Missouri*, belonging to the said company, under a contract made at Boston aforesaid, between the said A. N. Monroe and the agents at that place of the said company on the 4th January 1883. The said loss and deterioration were caused by those in charge of the said steamship on behalf of the said company by wrongfully and in breach of the said contract deviating from and delaying upon the said voyage, and exposing the said sheep to improper hardships and risks.

(2.) 6618*l.* 3*s.* 8*d.* damages for the loss of 264 cattle shipped by the said A. N. Monroe at Boston aforesaid for Liverpool on or about the 17th of February 1886, in the said steamship, under a contract made on the 6th of February 1886, at Boston aforesaid, originally between one J. A. Hathaway, of Boston, and the said agents of the said company, and subsequently transferred by agreement with the said agents to the said A. N. Monroe so far as regarded so much of the said steamship as was afterwards occupied by the said 264 cattle. The said company wholly failed to deliver any of the said cattle to the said A. N. Monroe, or to his consignees. The cattle were destroyed by those in charge of the said steamship on behalf of the said company by wrongfully navigating the said steamship in a negligent and reckless manner.

The said A. N. Monroe holds no security whatever for his said claims, or any part thereof.

In support of A. N. Monroe's claim an affidavit was made by an attorney of Boston stating that, according to the law of the United States, the company was liable to A. N. Monroe for the claim which he had put forward. The reason for his opinion was stated to be that, according to decided cases in American law, a common carrier could not lawfully stipulate by special contract for exemption from responsibility for the negligence of the carriers or his servants.

The liquidators, on the other hand, obtained affidavits from attorneys at New York giving a *resumé* of the American decisions bearing on the point; also affidavits from several other attorneys in America. The result of them appeared to be that the American law applicable to the circumstances of the present case had never been finally settled; but that the point was being raised in the case of the *Montana*, which was at present under appeal to the Supreme Court of the United States.

The liquidators' answer to A. N. Monroe's claim was that it should be decided according to English law, and not according to the law of the United States; and that, according to the former law, the claimant would be bound by the terms of the contracts and bills of lading, by which the owners of the s.s. *Missouri* had liberty to tow vessels and were exempted from the consequences of the negligence of their servants.

The grounds upon which the liquidators contended that English law should govern the contract were:

1. That the s.s. *Missouri*, being a British owned steamer, and sailing under the British flag, the law of the flag should apply.

2. That the contract should be construed according to the law of the place of performance; and that the contract was one to be wholly, or at all events principally, performed in England, the object of the contract being the carriage of the cattle in an English ship, and delivery of them in an English port, the freight only being payable on the arrival of the steamer, or any of the animals, at the port of destination.

3. That if the contract was void, according to the law of one of the countries of the contracting parties, it should be construed according to the law of the country where it was valid, which in this case was England; and that if the contract contained stipulations which were illegal according to American law, it should be interpreted according to the law of England, as on entering into the contract the parties must be taken to have intended to give effect to the terms to which they mutually agreed, and not to treat them as null and void.

A summons, under sect. 138 of the Companies Act 1862, was taken out, on behalf of the liquidators, asking that it might be determined whether the claim against the company by A. N. Monroe ought, or ought not, to be allowed by the liquidators.

The summons was adjourned into court, and now came on to be heard. It was admitted for the purpose of the present claim that the stranding of the *Missouri* occurred through the negligence of the master and crew.

Arthur Cohen, Q.C. and *Frederic Thompson* for the applicants.

Sir *Walter Phillimore* and *T. G. Carver* for the claimant.

The following authorities were referred to in the course of the arguments:

The Bahia, 12 L. T. Rep. N. S. 145; 14 W. R. 411; Br. & L. 61;
Lloyd v. *Guibert*, 13 L. T. Rep. N. S. 602; L. Rep. 1 Q. B. 115; 2 Mar. Law Cas. O.S. 283;
Carver on the Carriage of Goods by Sea, pp. 202-207;
The Gaetano and Maria, 46 L. T. Rep. N. S. 835; 4 Asp. Mar. Law Cas. 470, 535; 7 P. Div. 137;

Down v. *Lippmann*, Tud. L. Cas. p. 613;
Robinson v. *Bland*, 2 Burr. 1077;
Este v. *Smyth*, 18 Beav. 112;
Van Grutten v. *Digby*, 31 Beav. 561;
The Peninsula and Oriental Steam Navigation Company v. *Shand*, 3 Moo. P. C. N. S. 272;
Cohen v. *The South-Eastern Railway Company*, 3 Asp. Mar. Law Cas. 248; 36 L. T. Rep. N. S. 130; 2 Exch. Div. 253;
Story on the Conflict of Laws, 7th edit., pp. 321, 366;
Re The Brantford City; *Hathaway and another* v. *The Brantford City*, 29 Federal Reporter, 373;
Bristow v. *Sequerille*, 5 Exch. Rep. (W. H. G.) 275;
Branley v. *The South-Eastern Railway Company*, 6 L. T. Rep. N. S. 458; 9 Jur. N. S. 329; 12 C. B. N. S. 63; 31 L. J. 286, C. P.;
Holman v. *Johnson*, Cowp. 341;
Huber v. *Steiner*, 2 Bing. N. Cas. 202;
Chamberlain v. *Napier*, 15 Ch. Div. 614;
The Halley; *The Liverpool, Brazil, and River Plate Steam Navigation Company Limited* v. *Benham*, 3 Mar. Law Cas. O.S. 131; 18 L. T. Rep. N. S. 879; L. Rep. 2 Priv. C. 193;
Philips v. *Eyre*, 22 L. T. Rep. N. S. 869; L. Rep. 6 Q. B. 1;
The Moxham, 34 L. T. Rep. N. S. 559; 1 P. Div. 107; 3 Asp. Mar. Law Cas. 95, 191;
Chartered Mercantile Bank of India v. *The Netherland India Steam Navigation Company*, 48 L. T. Rep. N. S. 546; 9 Q. B. Div. 118; 10 Q. B. Div. 521; 5 Asp. Mar. Law Cas. 65;
Jacobs v. *Crédit Lyonnais*, 49 L. T. Rep. N. S. 39; 12 Q. B. Div. 589;
Ellis v. *M'Henry*, 23 L. T. Rep. N. S. 861; L. Rep. 6 C. P. 228.

Cur. adv. vult.

Feb. 28.—The following written judgment was delivered by

CHITTY, J.—This is a claim by Mr. Monroe against the Missouri Steamship Company Limited for damages for loss of his sheep and cattle. Mr. Monroe is a citizen of the United States, domiciled there. The company is an English company, incorporated according to English law, and domiciled in England. The company is in voluntary liquidation. The contracts under which the claim is made were made at Boston, where the company had an agent by whom contracts were entered into on their part. The ship in which the goods were to be carried was a British ship (*The Missouri*), and one of a line of steamships trading regularly between Boston and Liverpool. The contracts were for the carriage of the sheep and cattle from Boston to Liverpool, and they contained express stipulations exempting the shipowners from liability for loss or damage arising from negligence of the master or crew, and they provided that bills of lading should be given containing stipulations to the same effect. The company's agent had no authority to bind the company by any contract not containing such stipulations as those which were actually inserted. The sheep and cattle were shipped on board at Boston, and bills of lading were given and accepted there in conformity with the contracts. The ship sailed and was stranded on the Welsh coast. It is admitted for the purpose of the present case that the stranding occurred through the negligence of the master and crew.

In these circumstances it is clear and is admitted by the claimant's counsel that he is not entitled to recover if the stipulations exempting the shipowners from liability arising from the negligence of their servants are valid. But it is contended for the claimant that the stipulations are invalid according to the law of the State of Massachusetts, where the contracts were in fact made, and the bills of lading given and accepted. There was no substantial contest before me as to the present state of the law of Massachusetts on the subject. According to that law the stipulations are invalid. The grounds upon which the decisions at present stand are that stipulations by which a common carrier endeavours to exempt himself from the consequences of the negligence of himself or his servants are considered to be extorted by the carrier without any real assent on the part of the person sending the goods, and are void as being contrary to public policy. In *The Brantford City* (29 Federal Reporter, 373), these principles were held to apply in favour of the shipper at Boston of cattle on board a British vessel for carriage to England, where the facts were substantially the same as those in the present case. The law in the United States on this subject, however, appears not to be finally settled. The question is apparently pending in the Supreme Court in the case of the *Montana*, on appeal from the circuit court. The Supreme Court has given leave to the appellants to adduce evidence to show what is the English law on the subject. The arguments have been concluded, and the judgment has been reserved. But, as after inquiry I am unable to ascertain that some considerabe time may not elapse before the judgment is given, and as it is not clear that the judgment will determine the point, I have not thought it right to any longer postpone my decision. Should the judgment of the Supreme Court be in favour of the shipowner on the question of the validity of the stipulation, Mr. Monroe's claim before me must fail. I proceed, then, to consider the question on the assumption that, according to the law of Massachusetts, the stipulations are void. The question to be determined is whether the law of England or the law of Massachusetts ought to be applied to the stipulations which purport to exempt the shipowners from liability for negligence. For the claimant it is argued that the question, being a question as to the validity of the terms of the contracts, ought to be determined according to the law of the place where the contracts were made. For the shipowners, on the other hand, it is argued that the question ought to be determined according to the law of the country to which the ship belongs.

As the stipulations in the contracts and the bills of lading are identical there is no occasion to treat these documents separately. Now, the question does not relate to the formal validity of the contracts, and the objection raised by the claimant does not go to the validity in matters of substance of the contract as a whole. So far as relates to all matters of form the contracts are valid according to the law of both countries. So far as relates to all matters of substance the rest of the contracts would, if the stipulations attached had not been inserted, stand valid according to the law of both countries. Further, the stipulations are not impeached on the ground that they are of a criminal or wicked or immoral nature, or such as ought not to be permitted according to the laws of civilised countries. They are impeached solely on the ground that they are void as being disallowed by the law of the place where the contracts were made, which law considers them contrary to its own view of the public policy that ought to prevail within the limits of its own territorial jurisdiction. Although by the law of Massachusetts, in the case of a contract

in Massachusetts by a common carrier for the carriage of goods wholly within the territories of the State, such stipulations would be held void, yet I cannot find any sufficient reason for saying that they would also be held to be void in the case of a contract made within the State for the carriage of goods where the performance of the contract was (as in the case before me) to take place mainly outside the State, if it were declared expressly on the face of the contract that for all purposes the contract was to be governed by the law of the country to which the ship belonged, and the law of such country allowed the stipulations to be valid. In other words, I apprehend that the law of Massachusetts would not prohibit the parties to such a contract from contracting expressly with a view to the law of England: (see Lord Mansfield's judgment in *Robinson* v. *Bland*, 2 Burr, p. 1077; and Story's Conflict of Laws, 8th edit., sects. 280 and 281.) The contracts before me do not contain any such express declaration. But I have examined and endeavoured to ascertain the precise nature of the objection raised, with this result as it appears to me, that it was within the competence of the parties according to the law of both countries to enter into the contracts.

Two cases of high authority were relied upon by the company's counsel in support of their contention: (*Lloyd* v. *Guibert*, 2 Mar. Law Cas. O. S. 283; 13 L. T. Rep. N. S. 602; L. Rep. 1 Q. B. 115; and *The Peninsular and Oriental Steam Navigation Company* v. *Shand*, 3 Moo. P. C. Cas., in the Exchequer Chamber, N. S. 272.) The actual decisions in these cases may not precisely govern the present case, but the question is whether the principle upon which these decisions were based does not apply. It is generally agreed that the law of the place where the contract is made is *primâ facie*, that which the parties intended or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of the circumstances indicating a different intention. Numerous instances of the exception are to be found in the books. A different intention—that is, an intention to be bound by some other law than the law of the place where the contract is made—may be inferred from the subject-matter of the contract and from the surrounding circumstances, so far as they are relevant to determine the character of the contract: (see the judgment of Willes, J. in *Lloyd* v. *Guibert* (*ubi sup.*), pp. 122-123.) The terms and stipulations found in the contract itself are matters of importance to be taken into consideration as to the true inference to be drawn. The general principle by which the Court of Exchequer was guided in the solution of the question as to what law ought to prevail was that "the rights of the parties to a contract are to be judged by that law by which they may justly be presumed to have bound themselves" (*Lloyd* v. *Guibert*, p. 123), and by the steady application of that principle the court arrived at the conclusion that where the contract of affreightment does not provide otherwise, then as between the parties to such contract, in respect of sea damage and its incidents, the law of the ship should govern. In *Lloyd* v. *Guibert* the ship was a French ship, the contract was made at a Danish West India port (St. Thomas), and the goods were shipped at Hayti to be delivered at Havre, London, or Liverpool, at the charterer's option. The court held that the law of France applied whereby the shipowners, on abandonment of the ship and freight, were exempt from any liability to the owner of the cargo, and rejected the law of Denmark and the various other countries put forward on behalf of the owner of the cargo. In the course of the judgment the various places in which the contract was to be performed were pointed out (see p. 122). But in adopting the French law the court relied on the subject-matter of the contract—the employment of a seagoing vessel for a service the greater and more onerous part of which was to be rendered on the high seas, where, for all purposes of jurisdiction criminal and civil, with respect to all persons, things, and transactions on board, she was, as it were, a floating island over which France had as absolute, and for all purposes of peace as exclusive a sovereignty as over her dominions on land, and which, even while in a foreign port, was never completely removed from French jurisdiction (see p. 127). These practical considerations formed the main ground of the judgment. The court declined to enter into any question as to the policy of the French law. I have quoted somewhat extensively from this judgment in order to shew that the principle upon which it proceeds is not confined to the particular facts of that case, but is applicable, and ought to be applied, not merely to questions of construction and the rights incidental to or arising out of the contract of affreightment, but to questions as to the validity of stipulations in the contract itself. Any distinction founded on the difference of these questions would not rest on substantial grounds, and would lead to uncertainty and confusion in mercantile transactions of this character. It is just to presume that in reference to all such questions the parties have submitted themselves to the law of one country only—namely, that of the flag—and so to hold is to adopt a simple, natural, and consistent rule: (see Westlake's Private International Law, 2nd edit., p. 201.) In *Lloyd* v. *Guibert* (*ubi sup.*) there were no express stipulations pointing to the law of one country rather than to the law of some other country. But in the *Peninsular and Oriental Company* v. *Shand* (*ubi sup.*), where also it was held that the contract was governed by the law of the flag, there were such stipulations. Turner, L.J., in delivering the judgment of the Privy Council, inquired into the actual intentions of the contracting parties as disclosed on the face of the contract. In that case the contract was made between British subjects in England substantially for safe carriage from Southampton to Mauritius. The performance was to commence in an English vessel in an English port; to be continued in vessels which for this purpose carried their country with them; to be fully completed in Mauritius; but liable to breach, partial or entire, in several other countries in which the vessel might be in the course of the voyage. Into this contract there was introduced a stipulation professing to limit the liability of the shipowner, which stipulation was valid according to the law of England but invalid according to the law of Mauritius. In discussing the intention of the parties, the Lord Justice asked (in substance) whether it was intended that the stipulation should be construed

according to English law (which would give effect to it) or according to French law or some other law (which would give no effect to it). And he held that the actual intention of the parties must be taken clearly to have been to treat the contract as an English contract to be interpreted according to English law, and that as there was no rule of general law or policy setting up a contrary presumption the court below was wrong in not governing itself according to those rules.

Now the difference in fact between that case and the present is that in that case the parties were both British subjects, and the contract was made in England, whereas in the present case one only of the parties is English and the contract was made in Boston. But these differences, though proper to be taken into consideration on the general question, have little or no bearing on the question of the intention of the parties to be inferred from the particular stipulations. "In determining a question between contracting parties" (to quote once more from the judgment in *Lloyd* v. *Guibert*, p. 120) "recourse must first be had to the language of the contract itself, and (force, fraud, and mistake apart) the true construction of the language of the contract (*lex contractus*) is the touchstone of legal right." The circumstance that the stipulations which the claimant asks to have struck out of the contracts are allowed by the law of one country and disallowed by the law of the other country affords a cogent reason for holding that the parties were contracting with reference to the law of the country which allowed, and not to the law of the country which disallowed, the stipulations. It is unreasonable to presume that the parties inserted in the contracts stipulations which they intended should be nugatory and void. But on the facts of this case a more limited proposition may be adopted. The loss accrued through the negligence of the shipowners' servants within the territorial waters, not of Massachusetts, but of Wales—that is, a country where English law prevails. Conceding that it would be possible (without saying that it would be reasonable) to presume that the parties contracted with reference to the law of Massachusetts in respect of any loss by negligence occurring within the territorial waters of that State, it appears to me that it would be unreasonable to presume that they contracted with reference to the law of that State in respect of a loss by negligence occurring outside the limits of the State. I hold that the stipulations are valid—first, on the general ground that the contracts are governed by the law of the flag; and, secondly, on the particular ground that from the special provisions of the contracts themselves it appears that the parties were contracting with a view to the law of England. It is unnecessary to consider any other grounds of defence raised on behalf of the company. I therefore dismiss the claim with costs.

Solicitors for the liquidators, *Robins, Cameron*, and *Kemm*, agents for *Bateson, Bright*, and *Warr*, Liverpool.

Solicitors for the claimant, *Rowcliffe, Rawle*, and *Co.*, agents for *Hill, Dickinson, Lightbound*, and *Dickinson*, Liverpool.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, Dec. 5, 1887.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE HANSA. (*a*)

Collision—Improper abandonment—Consequential damage.

Where in a collision action for which the defendants were held to blame the court found that after the collision the plaintiff's vessel had been improperly abandoned, and it appeared that in consequence thereof she sank and was afterwards raised by the plaintiffs, whereas she might have been beached, the Court directed the registrar in assessing the damages, that, as the only ascertainable extra cost arising from the abandonment was the cost of raising, he was to disallow that amount.

THIS was a collision action *in rem* by the owners of the steamship *Tom John Taylor* against the owners of the steamship *Hansa*.

The collision occurred in the river Elbe, at about 1.30 a.m. on the 18th April 1887.

At the time of the collision the *Tom John Taylor* was lying at anchor and swinging to the ebb tide. Her anchor light was up, and burning brightly. In these circumstances those on the *Hansa*, which was coming slowly up the river, did not observe the *Tom John Taylor* until they were within a ship's length off. It was then seen that the *Tom John Taylor* was athwart the stream, with her starboard side open to the *Hansa*, and although the engines of the *Hansa* were at once reversed full speed and her helm hard-a-ported, she with her stem struck the starboard side amidships of the *Tom John Taylor*.

The defendants alleged that the *Tom John Taylor* was not carrying and exhibiting an anchor light in such a position as to be visible to those on board the *Hansa*. They also alleged that after the collision her crew improperly abandoned her, and that if they had not neglected to take proper measures she might have been brought into a place of safety.

It appeared at the trial that the pumps of the *Tom John Taylor* had not been used; that she was abandoned within half an hour after the collision; that she had steam up; and that a pilot found her afloat one hour and a half after the collision.

Hall, Q.C. and *Raikes* for the plaintiffs.

Sir *Walter Phillimore* and Dr. *Stubbs* for the defendants.

BUTT, J. having found the *Hansa* to blame, proceeded as follows:—There is another question, and that is whether there should be any direction to the registrar in assessing the damages with reference to what he should or should not find. It is said by the defendants that the plaintiffs' ship was improperly abandoned by her officers and crew. Having regard to the comparatively small injury she had sustained, to the fact that within half an hour after the collision she only made a small quantity of water, and also having regard to the fact that so far as we can judge it was several hours before she sank, we cannot help thinking that it was very unseamanlike and

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

very negligent of those in charge of her to leave her in their boat as they did. It is by no means clear to my mind that she might not have been kept afloat by her own pumps. When she was left half an hour after the collision the water had not found its way into the engine-room, and when it did find its way in a great deal might have been done to keep it under. In that state of things I am not persuaded that she might not have been kept afloat till daylight, and until assistance could have been given her. Even apart from that, she surely could have been beached. A pilot who was on board a vessel anchored near the *Tom John Taylor*, says if she had had the use of her engines, which she had, he could have beached her. It is, however, said, as against that, that it is one thing for a pilot to know it, but another thing for the master of a ship. But the master of this ship knew that this pilot was on a vessel within 300 or 400 yards of him. He knew that this pilot would of all people be best able to judge what ought to be done, but he never communicated with him. It was only after her master and crew had left her that the pilot went on board, and then on his own account. It was a very negligent act indeed to leave this ship altogether without taking advantage of this assistance which was at hand and available. I cannot say positively on the evidence that this vessel would have been kept afloat by the aid of her own pumps. I do not know what, if any, less amount of damage she would have sustained if she had been beached. The only thing clear to me is this, that it would not have been necessary to incur the expense of raising her, and therefore I am of opinion, on the whole, that justice will be done by directing the registrar, in assessing the damages sustained by this vessel and her cargo, to deduct from the amount allowed all the expenditure incurred in raising her.

From this decision the defendants appealed and by their notice of appeal asked the court "to vary or alter the said judgment by directing that the plaintiffs are only entitled to recover from the defendants such damages as would have been occasioned by the collision if the plaintiffs or their agents had not improperly abandoned the said vessel *Tom John Taylor* after the said collision."

April 26.—The appeal came on for hearing, when by agreement a consent order was taken as prayed, upon the terms that the appellants were to pay the costs of the appeal if at the reference the only damages disallowed were the costs of raising the vessel.

Solicitors for the plaintiffs, *Gellatly* and *Warton*.

Solicitors for the defendants, *Stokes*, *Saunders*, and *Stokes*.

Friday, Dec. 16, 1887.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE CITY OF DELHI. (*a*)

Collision — Tug and tow — Gravesend Reach — Anchorage ground—Position of anchor—Rules and Bye-laws for the Navigation of the River Thames 1872, *arts.* 15, 19, *and* 20.

Where a vessel, intending either to moor at one of the buoys or anchor in the anchorage ground in Gravesend Reach, moves from buoy to buoy to select one, and, finding them all occupied, anchors a short distance above the last of the buoys, she does not navigate within the anchorage ground in contravention of art. 15 *of the Rules and Bye-laws for the Navigation of the River Thames* 1872.

Where a vessel, intending either to moor at one of the buoys or anchor in the anchorage ground in Gravesend Reach, finds all the buoys occupied, and, on passing the last buoy, gets her anchor a-cockbill for the purpose of bringing herself to anchor on finding a suitable place, and, after she has got a short distance above the buoys, a collision occurs and damage is done by the anchor, such anchor is only a-cockbill during such time as is "absolutely necessary" for bringing her to anchor within the meaning of art. 19 *of the Rules and Bye-laws for the Navigation of the River Thames* 1872.

THIS was a collision action *in rem* instituted by the owners of the steamship *Sir Robert Peel* against the owners of the tug *Challenge* and the owners of the ship *City of Delhi*.

The plaintiffs claimed damages in respect of a collision between their ship and the *Challenge* and the *City of Delhi* in the river Thames, on the 20th Nov. 1887.

The facts alleged by the plaintiffs were as follows: Shortly before 5.50 a.m. on the 20th Nov., the *Sir Robert Peel*, a steamship of 376 tons register, bound on a voyage from London to Dunkirk, was proceeding down Gravesend Reach within the space of white light shown from the beacon at Northfleet. Her engines were stopped in order to land the Custom House officer on board of her, and she was going with the ebb tide about three and a half knots an hour over the ground. In these circumstances those on board of her observed the two masthead lights and red light of the tug *Challenge*, which was towing the *City of Delhi*, distant about a mile, and bearing about half a point on the port bow. Shortly after the *Challenge* opened her green light, and shut in her red. Thereupon the helm of the *Sir Robert Peel* was ordered to be starboarded, but before it had any effect the *Challenge* opened her red and shut in her green light. The helm of the *Sir Robert Peel* was thereupon steadied with the red light of the tug on her port bow. Shortly after the tug opened her green light on the port bow of the *Sir Robert Peel*, and, although the engines of the *Sir Robert Peel* were immediately put full speed astern, the *Challenge* shut in her red light and with her stem struck the port bow of the *Sir Robert Peel*; and the *City of Delhi*, coming on, with her port bow and anchor struck the port quarter of the *Sir Robert Peel*.

The plaintiffs (*inter alia*) charged the defendants, the owners of the *City of Delhi*, with breach of arts. 19 and 20 of the Rules and Bye-laws for the Navigation of the River Thames.

The facts alleged by the defendants were as follows: Shortly before 5.45 a.m. on the 20th Nov., the *City of Delhi*, a ship of 1168 tons register, on a voyage from Rangoon to London, was in tow of the tug *Challenge*, in Gravesend Reach, within the space of red light shown from the beacon at Northfleet. It had been the intention of those in charge of her to moor her at one of the buoys off Gravesend, and accordingly she had been towed

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

along outside the line of buoys, but within the anchorage ground, for the purpose of selecting a suitable one. Finding them all occupied, she had slowly proceeded a little above the uppermost of the buoys for the purpose of coming to an anchor, when the masthead and red lights of the *Sir Robert Peel* were seen on the starboard bow distant about half a mile. As the *Sir Robert Peel* approached, the *Challenge* gave two blasts with her whistle, as she had been and was under a slight starboard helm in order to get the *City of Delhi* into her berth to drop her anchor, which had been ordered a-cockbill on clearing the last buoy. The *Sir Robert Peel* replied with one short blast, and soon afterwards shut in her red and opened her green light. The *Sir Robert Peel* continued to approach, and, when within about two ships' lengths, she shut in her green and opened her red light, and, although the engines of the *Challenge* were put full speed astern, the *Sir Robert Peel* with her port bow struck the stem of the *Challenge*, and with her port quarter struck the port bow and anchor of the *City of Delhi*.

The defendants (*inter alia*) charged the plaintiffs with breach of art. 15 of the Rules and Bye-laws for the Navigation of the River Thames 1872.

The Rules and Bye-laws for the Navigation of the River Thames 1872:

Art. 15. All vessels navigating Gravesend Reach are to keep to the northward of a line defined by a skeleton beacon erected upon the India Arms Wharf on with the high chimney with the Cement Works at Northfleet; and all vessels intending to anchor in the reach are to bring up to the southward of that line. A lantern is placed on the above beacon which shows (at night) a bright light to the northward of the same line, and a red light to the southward of it over the anchorage ground. All vessels so anchoring and remaining beyond a period of twenty-four hours are to be moored.

Art. 19. No vessel shall navigate or lie in the river with its anchor or anchors a-cockbill except while fishing such anchor or anchors, or during such time as may be absolutely necessary for getting such vessel under way or for bringing it to anchor.

Art. 20. No vessel shall be navigated or lie in the river with its anchor or anchors hanging by the cable perpendicularly from the hawse unless the stock shall be awash, except during such time as shall be absolutely necessary for catting or fishing the said anchor or anchors, or during such time as may be absolutely necessary for getting such vessel under way.

Sir *Walter Phillimore* and *Barnes* for the plaintiffs.—The collision occurred outside the anchorage ground, and was solely due to the negligence of the tug and tow. If it occurred within the anchorage ground, then the defendants are to blame for breach of art. 15 of the Thames Rules. They were admittedly navigating within the anchorage ground. They were in motion along the whole line of buoys, and for some distance beyond. The *City of Delhi* is also to blame for breach of art. 19. She was only entitled to have her anchor a-cockbill for such time as was "absolutely necessary" for bringing her to anchor. In other words, her duty was not to get her anchor a-cockbill until she had selected the place where she intended to anchor. But, as a matter of fact, the anchor had been a-cockbill for several minutes before the collision.

Myburgh, Q.C. and *Nelson* for the defendants the owners of the tug.—The plaintiffs are solely to blame. The collision occurred within the anchorage ground. The plaintiffs were unlawfully there. The defendants were lawfully there, and were not "navigating" there within the meaning of the word as used in the rule. They were there for the purpose of coming to an anchor, and were therefore justified in moving slowly along to find a suitable place.

Hall, Q.C. and *Kennedy*, Q.C. (with them *Pyke*) for the owners of the *City of Delhi*.—The plaintiffs are solely to blame. The anchor was only a-cockbill during such time as was absolutely necessary to bring the ship to anchor. Persons in charge of a ship are justified in getting the anchor a-cockbill within a reasonable time of the ship being brought to anchor. A reasonable time was not exceeded in this case.

Sir *Walter Phillimore* in reply.

BUTT, J.—These are cross claims for damages arising out of collisions between the steamer *Sir Robert Peel*, on the one hand, and the tug *Challenge* and the *City of Delhi*, which was in tow of her, on the other. The *Sir Robert Peel* first of all came into collision with the tug, and then with the tow. The collision happened at a time when the vessels had to manœuvre by lights. The *Sir Robert Peel* was going down the river with an ebb tide of two to two and a half knots an hour. She had come down the Northfleet Hope and got into Gravesend Reach, and very soon after she eased, and then stopped her engines. She had on board one or more Custom House officers, who would in ordinary course go ashore somewhere off Gravesend, and there was therefore every reason why she should go down at a very moderate speed, and I have no doubt her story in that respect is true. With regard to the other vessels, it appears that they had stopped off the Custom House for the purpose of the ship getting her clearances. Having got them, it was intended to moor her at one of the six buoys which are placed off Gravesend for that purpose, and, if that was not possible, to anchor her in the anchorage ground. Therefore it was not the intention of those in charge of the tug and tow to have gone much further up, and it is not to be expected, consequently, that they would have proceeded up at anything but a very moderate speed. It is not very material to fix the exact part of the shore opposite to which the collision occurred. But what is material is to determine whether it was on one side or the other of the line referred to in art. 15 of the Thames Rules. The rule says that vessels navigating Gravesend Reach are to keep to the northward of the line defined by a beacon at Northfleet, and that all vessels intending to anchor in the reach are to bring up to the southward of that line. A lantern is placed on the beacon which shows at night a bright light to the northward, and a red light to the southward of it over the anchorage ground. The question is, whether the collision occurred to the northward or southward of that line, and there has been a great conflict of evidence on the point. I am of opinion that the collision occurred in the red or to the southward of the line. There are many reasons, apart from the evidence, which tend to that conclusion. What reason was there for the tug and tow to have been to the northward of that line? The fact is clear that it was the intention of the pilot to moor her at any one of the buoys at which he found room. Accordingly the master of the steam

tug towed the *City of Delhi* along outside the line of buoys, examining each to see if there was room to moor the ship, but found them all occupied. He says that if he had gone to the northward of the line indicated in art. 15 he could not have ascertained whether there was room at the buoys or not. It has been said that this was a breach of the rule; but, assuming that she was going from buoy to buoy intending to bring up at the first one that was vacant, I am not persuaded that it was a breach of any of the Thames Rules. The *City of Delhi* at the time of the collision was manifestly just going to anchor, and therefore the pilot was right in being within—and, as we think, considerably within—the line of the anchorage ground at the time of the collision. I have said that the *Sir Robert Peel* was coming down slowly, probably with a two knots or two and a half knots tide, and some little way of her own. In that state of things she comes into the anchorage ground and runs first into the tug and then into the tow, as they were just holding their own with the view of the tow's anchor being let go. In other words, she infringed art. 15, and must be held to blame.

The further question is, whether any blame is attributable to those navigating the tug and the tow. We do not think that in the circumstances they could have done anything to avoid the collision. It is a fact that the anchor of the *City of Delhi* knocked a hole in the port quarter of the *Sir Robert Peel*, that water came in, and that they were obliged to beach her. Was there any impropriety with regard to the position of the anchor? It had been clear some hour or two before the collision. It had been got ready for lowering—that is to say, it was in a position for cockbilling—and the evidence is that as soon as the ship passed the last buoy the pilot gave the orders to cockbill it. Was that a contravention of art. 19, which says that no vessel shall have its anchor a-cockbill except while fishing such anchor, or during such time as may be absolutely necessary for getting such vessel under way or bringing it to anchor. It seems to me that as this anchor was got ready just before the ship was about to anchor, it was a-cockbill not before it was absolutely necessary. We think those in charge of the *City of Delhi* were quite right in getting the anchor a-cockbill at the time they did. We think, therefore, no blame attaches to the *City of Delhi* with reference to the damage done by the anchor. The result is that I pronounce the *Sir Robert Peel* alone to blame.

Solicitors for the plaintiffs, *W. A. Crump* and *Son*.

Solicitors for the defendants the owners of the *Challenge*, *Lowless* and *Co.*

Solicitors for the defendants the owners of the *City of Delhi*, *Gellatley*, *Son*, and *Warton*.

Dec. 12, 13, 14, *and* 19, 1887.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE PALINURUS. (*a*)

Collision—Stern light—Regulations for Preventing Collisions at Sea, arts. 2, 11.

The range of the stern light prescribed by art. 11 *of the Regulations for Preventing Collisions at Sea ought never to overlap that of the side lights, and if it is carried in any way other than is necessary to warn overtaking vessels it is an infringement of the regulations.*

Quære, Is it legal to carry a fixed stern light?

THIS was a collision action *in rem* instituted by the owners of the ship *E. F. Sawyer* against the steamship *Palinurus*, to recover damages occasioned by a collision between the two vessels.

The collision occurred on the 22nd Nov. 1887, in the English Channel.

The facts alleged by the plaintiffs were as follows: Shortly before 5.45 a.m. on the 22nd Nov., the *E. F. Sawyer*, an American ship of 1897 tons register, while proceeding on a voyage from San Francisco to Hull, laden with a cargo of grain, was in the English Channel, heading about south, and making about two knots. The wind was about E.S.E., and the ship was close-hauled on the port tack. In these circumstances those on board the *E. F. Sawyer* observed the masthead light of the s.s. *Palinurus*, about three points on the starboard bow, and distant about four miles. In about ten minutes the red light came into view, and shortly afterwards the green light was seen, and the red disappeared. Then the red opened, and the green disappeared; and again the green opened and the red was shut in, and afterwards both lights became visible, and continued so till the collision. The steamship continued to approach, and, instead of going clear, she with her stem and port bow struck the *E. F. Sawyer* on her starboard side, and caused her to sink. In addition to the regulation side lights carried by the *E. F. Sawyer*, she was carrying a fixed white stern light, which was fixed to a bracket over the stern under the taffrail. The plaintiffs' witnesses admitted that this stern light showed from half to three-quarters of a point forward of the stern.

The facts alleged by the defendants were as follows: Shortly before 6.5 a.m. on the 22nd Nov., the *Palinurus*, a steamship of 1536 tons register, whilst on a voyage from Port Said to London with cargo and passengers, was in the English Channel off Folkestone. She was heading N.E. by E. ½ E., making from six to seven knots an hour. In these circumstances those on board of her observed a white light about a mile off, and bearing about a quarter point on the port bow. Shortly after the helm of the *Palinurus* was ported, and her engines put to slow. The white light gradually came broader on the port bow, when the loom of a sailing vessel, which proved to be the *E. F. Sawyer*, carrying the white light, was seen ahead and close to. Immediately after a dim green light was seen slightly on the port bow, and, although the helm of the *Palinurus* was put hard-a-port, and her engines reversed full speed astern, the vessels collided, the starboard side of the *E. F. Sawyer*, near the forerigging, being struck by the stem of the *Palinurus*.

The defendants charged the plaintiffs with carrying a defective green light, and also with infringing the regulations as to the stern light.

The 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. 11. A ship which is being overtaken by another

(*a*) Reported by J. P. ASPINALL and BUTLER ASPINALL Esqrs. Barristers-at-Law.

shall show from her stern to such last-mentioned ship a white light, or a flare-up light.

Sir *Walter Phillimore* (with him *Bucknill*, Q.C. and *Pickford*) for the plaintiffs.—The *E. F. Sawyer* was carrying a good and proper green light, which ought to have been seen sooner by those on board the *Palinurus*. The *E. F. Sawyer* was not infringing the regulations in carrying a fixed stern light. Art. 11 by its terms does not prohibit it, and it answers the purpose for which the article was intended. [Sir James Hannen.—Was not the light in art. 11 intended for signalling? If so, is it permissible to carry it?] To carry a fixed light is merely taking precautions in excess of those required by the article. In this particular case it was of assistance to those in charge of the *Palinurus*, and did not mislead them.

Sir *Richard Webster*, Q.C., A.-G. (with him *Kennedy*, Q.C. and *J. P. Aspinall*), for the defendants, *contra*.—The green light of the *E. F. Sawyer* was deficient, and was not capable of being seen by those on the *Palinurus* till immediately before the collision. The stern light was also misleading, and was a breach of arts. 2 and 11 of the Regulations for Preventing Collisions at Sea. The language of art. 11 precludes the idea of a fixed stern light. Moreover, this light was visible over the area of the side lights, and was therefore not only calculated to mislead other vessels, but also to diminish the visibility of the side lights:

The Merchant Prince, 53 L. T. Rep. N. S. 914; 5 Asp. Mar. Law Cas. 520; 10 P. Div. 139;
The Franconia, 35 L. T. Rep. N. S. 721; 3 Asp. Mar. Law Cas. 295; 2 P. Div. 8;
The Main, 55 L. T. Rep. N. S. 15; 6 Asp. Mar. Law Cas. 37; 11 P. Div. 132.

Sir *Walter Phillimore* in reply.

Cur. adv. vult.

Dec. 19.—Sir James Hannen (after finding that there was a good look-out on the *Palinurus*, and that the green light of the *E. F. Sawyer* was defective, and the cause of the collision) proceeded as follows:—A question has been discussed in this case which, in the view I take of the facts, it is not necessary to determine, but in regard to which I think it well to give my opinion if only by way of warning for the future. It was contended by the defendants that it is contrary to the regulations to carry a fixed stern light; on the other hand, it was urged by the plaintiffs that it is not unlawful to do so. I abstain from saying that it is unlawful, but it is to be remembered that the object of the stern light is to assist overtaking vessels, and if it is carried in any other way than is necessary to give such assistance it appears to me that it is an infringement of the regulations. If, for instance, the stern light is above the taffrail, so that it is visible all round, it is then misleading and illegal. Again, though it be below the taffrail, if it is visible over a greater area than is necessary for the guidance of overtaking vessels, I am of opinion that it is illegal. The range ought never to overlap that of the side lights, and if it is fixed it ought to be so secured as to prevent the areas overlapping. In the present case I have no doubt that the stern light of the *E. F. Sawyer* was visible over a portion of the area of the green, and this was calculated to deceive and mislead the *Palinurus*. The white light can always be seen at a greater distance than the green, and so before the green becomes visible an approaching vessel which sees a white stern light may be led to suppose it is overtaking another vessel and act accordingly, when in fact it is approaching at a right angle. On this ground, also, I hold that the *E. F. Sawyer* was to blame for the collision.

Solicitors for the plaintiffs, *Rowcliffes, Rawle, and Co.*

Solicitors for the defendants, *Pritchard and Sons.*

Tuesday, Dec. 20, 1887.

(Before Butt, J.)

The Blanche. (*a*)

Mortgage — Right to possession — Charter-party — Equities — Release of ship.

Where the registered mortgagees of a ship instituted an action in rem as mortgagees for possession, and the ship was arrested therein before the mortgage money became due, and without any default on the part of the mortgagor, the Court, being of opinion upon the facts that the ship was not being dealt with so as to impair the mortgagees' security, ordered her release.

This was a motion by the owners of the steamship *Blanche* for her release from arrest in an action for possession instituted by the mortgagees.

The indorsement upon the writ was as follows: "The plaintiffs' claim is, as mortgagees having taken possession of the s.s. *Blanche*, her tackle, apparel, and furniture, for possession of the said vessel which they have been wrongfully dispossessed of by the owners thereof."

By a mortgage, dated the 3rd Nov. 1887, in the form prescribed by the Merchant Shipping Act 1854, the *Blanche* was mortgaged by her registered owner, John McDowall, to the plaintiffs, Joseph Weatherley and John Mead, as security for a loan of 1000*l.* to McDowall, to be repaid on the 5th Feb. 1888. This mortgage was duly registered on the 7th Nov. 1887.

By a charter-party, dated the 17th Nov., between McDowall and the South Coast Steamship Company Limited, the *Blanche* was chartered to the South Coast Steamship Company for six months for general coasting trade, the charterers to have the right of employing their own crew.

The mortgagees objected to this charter, and threatened to take possession. Thereupon McDowall entered into an arrangement with the mortgagees, undertaking to get the charter cancelled, and to obtain a new charter which should not be prejudicial to the mortgagees' interests.

Subsequently to this arrangement, McDowall sold the ship to the secretary of the chartering company subject to the mortgage, and gave notice thereof to the mortgagees. In consequence of inquiries, the mortgagees learnt that the original charter was still in existence, and thereupon, on the 30th Nov. they took possession in the port of London, under their mortgage, by putting a man on board, notice being given to the registered owner and to the master.

On the 2nd Dec. the mortgagees' man in possession was forcibly put off the ship, which was

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

immediately taken down the Thames on her way to Poole.

The mortgagees thereupon instituted the present action, and the ship was arrested therein.

The defendants now moved "for an order that the steamship *Blanche* be released from arrest, and that the plaintiffs, their agents and servants, be restrained from interfering with the said vessel and preventing her charter-party, dated the 17th Nov. 1887, being cancelled."

J. G. Barnes, for the defendants, in support of the motion.—The plaintiffs are not entitled to take possession. The money secured by the mortgage is not yet due, and the interest has been paid: (*The Cathcart*, 16 L. T. Rep. N. S. 211; L. Rep. 1 A. & E. 314; 2 Mar. Law Cas. O. S. 500.) The ship is under charter, and should be released to enable her to perform it. Although I must admit that she has really been bought on behalf of the charterers, she ought to be released so as to enable her to perform her engagements, which will not in any way prejudice the plaintiffs' security. [He was stopped.]

J. P. Aspinall, for the plaintiffs, *contra*.—The plaintiffs are entitled at any time to enter into possession of the mortgaged property. They are the owners of the security, and as such have the right of possession, although no default has been made by the mortgagor. This principle is always recognised and acted upon in the case of other mortgages, and there is no reason why any distinction should be made where the security is a ship. If so, the mortgage of a ship is subject to all the principles laid down at law and in equity relative to the mortgage of other chattels:

Keith v. *Burrows*, 35 L. T. Rep. N. S. 508; L. Rep. 1 C. P. Div. 722; 3 Asp. Mar. Law Cas. 280;
Bradley v. *Copley*, 1 C. B. 685;
Wheeler v. *Montefiore*, 2 Q. B. 133;
Fisher on Mortgages, 4th edit., pp. 408, 423, 430.

[BUTT, J.—In this case there are equities which prevent you taking possession.] The mortgagees are willing to carry out any engagements which the ship is bound to fulfil, and the enforcement of their right to possession as against the mortgagor will not prejudice the rights of third parties. [BUTT, J.—By sect. 7 of the Merchant Shipping Act 1854 the mortgagee is not to be deemed owner.] That was merely a provision for the benefit of the mortgagee, so as to relieve him from liability for debts with which he had nothing to do. To release the ship will be to deprive the court of being able to give the plaintiffs an effective remedy should they at the trial prove their right to possession. They are claiming for possession, and their right thereto cannot be determined till the hearing of the action. It is also contended on the facts that the mortgagees' security is being impaired. By the charter the ship is to be worked by a crew appointed by the charterers, and the charter is not at an end till after the time when the loan becomes due.

Barnes in reply.

BUTT, J.—I am prepared to hold that the mortgagee was not entitled to take possession before the money secured by the mortgage is due. True the property in the ship is his, but the equities interfere and prevent his taking possession. If, however, I saw any attempt to impair the security, so that it would not be available, I should say he was justified in doing what he has done. My only doubt has been whether the sale of the ship by the mortgagor is not some evidence of impairing the security. I shall order the release of the ship. I am quite satisfied that, unless there was some attempt to impair the security, the plaintiff had no right to take possession. Taking into consideration all the facts of this case, I order the ship to be released.

Solicitor for the plaintiffs, *O. H. Clarkson*.
Solicitor for the defendants, *R. Martin*.

Thursday, Jan. 19, 1888.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE PRINZ HEINRICH. (*a*)

Salvage—Ship and cargo—Primary liability of shipowner—Agreement for fixed sum.

An agreement made by the master of a vessel in distress to pay salvors a fixed sum is an agreement made on behalf of, and pledging the credit of, the shipowners, so as to make them liable to the salvors for the whole amount so agreed upon, and not merely for such proportion of such amount as the value of the ship and freight bears to the value of the cargo.

The Raisby (53 *L. T. Rep. N. S.* 56; 5 *Asp. Mar. Law Cas.* 473; 10 *P. Div.* 114) *distinguished.*

Where the master of the s.s. P. H., which was in a position of serious danger ashore on rocks, entered into a written agreement with the master of the s.s. F., whereby he agreed to pay 200*l. a day for every day the F. stood by and assisted, by towing, to remove the P. H., and "in the event of the P. H. being got off or coming off the rocks during the continuance of the agreement" to pay* 2000*l. beyond the daily pay of* 200*l., and the same day the P. H. came off, either owing to the jettison of her cargo or the towing of the F:*

The Court held that the service was a valuable one, that the agreement was reasonable, and that the salvors were entitled to recover 2200*l. from the shipowners.*

THIS was a salvage action *in personam* by the owners of the s.s. *Fei Lung* against the owners of the s.s. *Prinz Heinrich*, and Alfred Edwards and Arthur Holland.

The plaintiffs claimed 2200*l.* under an alleged salvage agreement; in the alternative such an amount of salvage as to the court should seem just; and a declaration against all the defendants, and that the plaintiffs were entitled to the sum of 2200*l.* deposited in the joint names of the defendants Alfred Edwards and Arthur Holland, or to such part thereof as the court might award.

The facts alleged by the plaintiffs were as follows:

At about noon on the 29th June 1886, the *Fei Lung*, a British steamship of 1180 tons register, whilst on a voyage from Nicolaviesk to Shanghai, with a valuable cargo, was passing Darras Point near Castraes Bay, in the Gulf of Tartary, when the steamship *Prinz Heinrich* was sighted. The *Prinz Heinrich* was ashore exhibiting a signal of distress. The *Fei Lung* bore down upon the *Prinz Heinrich*, when it was found

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

that she was hard and fast on the rocks, and that her bottom had large holes in it, through which the water was entering rapidly. The *Prinz Heinrich* was a German steamer of 1267 tons register, and was on a voyage from Europe to Nicolaviesk, laden with a general cargo, of which a portion had been jettisoned. The master of the *Prinz Heinrich* having come on board the *Fei Lung* the following written agreement was come to between the masters:

S.S. *Fei Lung*, Darras Point, June 29, 1888.—Memo. of agreement entered into this day between Robert Crawford, master of s.s. *Fei Lung* on the one part and Harmann Reinman, master of the German steamer *Prince Henerique* on the other part. Whereas the said Robert Crawford, master of the s.s. *Fei Lung*, agrees to stand by and assist, by towing, to remove the said steamer *Prince Henerique* from her present position, for which services duly performed Harmann Reinmann, master of the Geman steamer *Prince Henerique*, agrees to pay Robert Crawford, master of the s.s. *Fei Lung*, or his order, the sum of 200*l.* (two hundred pounds sterling) per day of twenty-four hours, dating from noon June 29th, 1886, and for every day or part of a day the s.s. *Fei Lung* is engaged in attendance, or, if necessary, absent obtaining stores or fuel to enable her to carry on the contract until the vessel is got off, or has given twenty-four hours notice that the services of the s.s. *Fei Lung* will no longer be required. And in the event of the stranded steamer *Prince Henerique* being got off or coming off the rocks during the continuance of this agreement, the sum of 2000*l.* sterling (two thousand pounds sterling) over and above the aforesaid daily pay of 200*l.* sterling (two hundred pounds sterling) to be paid to Robert Crawford, master of s.s. *Fei Lung* in same manner and at same time as daily pay. And it is further agreed by the master of the German steamer *Prince Henerique* that the s.s. *Fei Lung* shall at no time be required by him to expend either food or fuel that would leave less than three days of twenty-four hours supply of such on board.—ROBERT CRAWFORD (Master) s.s. *Fei Lung*; HERMANN REINMANN, Captain. Witnesses (signed), James Price, mate of s.s. *Fei Lung*; Clifton Allison, chief engineer s.s. *Fei Lung*.

The *Fei Lung* accordingly stood by the *Prinz Heinrich*, and at about 7.30 p.m. the *Fei Lung* was made fast ahead, but after she had been towing for a short time the hawser parted.

The *Fei Lung* then anchored for the night, and on the following day, at about six a.m., made fast again, and after towing for some time the *Prinz Heinrich* came off, and was towed to a place of safety. The master of the *Prinz Heinrich* then wrote and signed the following document:

Castrus Bay, June 30, 1886.—I hereby certify that Capt. Robert Crawford, s.s. *Fei Lung*, has finished this agreement to my entire satisfaction. — HERMANN REINMANN, Captain s.s. *Prinz Heinrich*.

At the same time the master of the *Prinz Heinrich* gave to the master of the *Fei Lung* the following order for 2200*l.* on the Anglia Steam Navigation Company, the owners of the *Prinz Heinrich*.

Castrus Bay, June 30th, 1886.—To the Directors Anglia Steam Navigation Company, Hamburgh. Gentlemen,—Please pay to Capt. Robert Crawford, s.s. *Fei Lung*, or his order, 2200*l.* sterling (two thousand two hundred pounds sterling) for services rendered in getting the German steamer *Prinz Heinrich* off the rocks as per agreement.—HERMANN REINMANN, s.s. *Prinz Heinrich*, Captain.

This order was indorsed by the master of the *Fei Lung* to the plaintiffs, and presented by them to the defendants, but was dishonoured. The defendants took a bond or deposit from the owners of cargo on the *Prinz Heinrich* to secure their share of the 2200*l.*, and in consideration that the plaintiffs would not arrest the *Prinz Heinrich*, her cargo, and freight, it was agreed between the plaintiffs and the defendants, acting for ship, freight, and cargo, that the plaintiffs' claim of 2200*l.* should be settled in London by arbitration, and that such sum should be deposited by the defendants with the manager of the Hong Kong and Shanghai Banking Corporation in London, pending the arbitrator's decision. In pursuance of the agreement the defendants remitted the sum of 2200*l.* to the manager of such bank, with instructions to hold it to the disposal of the arbitrators, and they appointed the defendant Alfred Edwards, and the plaintiffs appointed the defendant, Arthur Holland, the arbitrators. The 2200*l.* was thereupon deposited in their names, but the defendant company refused to proceed with the arbitration.

The facts alleged by the defendants were as follows: On the 26th June 1886, the *Prinz Heinrich* struck some rocks about two miles south of Castraes Bay. It was then found that the rocks had pierced her bottom, and that water was getting into No. 1 hold. The pumps were then set to work and part of the cargo was jettisoned, but the ship still remained fast. On the 29th June the *Fei Lung* came up, and the agreement above mentioned was then entered into. The *Fei Lung* thereupon attempted to tow the *Prinz Heinrich* off, but failed to do so. On the 30th June, sufficient cargo having been jettisoned by the defendants' servants, the *Prinz Heinrich* suddenly floated without any assistance by towing or otherwise from the *Fei Lung*. The *Prinz Heinrich* then steamed with her own engines astern, and was then brought to anchor. The defendants denied that their property was in danger of total loss, or that the *Fei Lung* had rendered any assistance in floating the *Prinz Heinrich*. They also gave evidence that their master, who had died subsequently to the salvage services, was in such a weak state of mind from ill-health and excessive use of stimulants as to be incapable of understanding the effect of the agreement, and that advantage was taken of his position to force him into signing the agreement. It was alleged that the arbitration was not proceeded with owing to the parties not being able to agree to the terms of the arbitration. The defence further alleged:

8. As to paragraphs 5, 6, and 7 of the statement of claim the said defendants say that when the *Fei Lung* came to the *Prinz Heinrich*, as before stated, negotiations took place between the masters of the said vessels as to the rendering of assistance and the price to be paid for the same, and the master of the *Fei Lung* refused to render assistance except upon the terms of the agreement set out in paragraph 5 of the statement of claim, and the master of the *Prinz Heinrich* was forced to acquiesce in the demand of the master of the *Fei Lung*, and to sign the said agreement.

9. The said defendants further say as to the said paragraph that the master of the *Prinz Heinrich* at the time of the signing of the said agreement and signing the certificate and order in paragraph 6 of the statement of claim set out was so ill from illhealth and excessive use of stimulants as not to be capable of understanding fully the purport and effect of the same.

10. The sums provided to be paid by the said agent were not reasonable for the services to be rendered by the *Fei Lung*, but were exorbitantly excessive amounts for such service, and if and so far as the said agreement provides for the payment of the sum of 2000*l.* to be made to the *Fei Lung* upon the *Prinz Heinrich* coming off, whether with or without the assistance of the *Fei Lung*, the said agreement is wholly unreasonable and inequitable, and the master of the *Fei Lung* in procuring the

master of the *Prinz Heinrich* to sign the said agreement took undue advantage of the position and condition of the master of the *Prinz Heinrich* and his said ship, and the said defendants further say that the said master had not any authority to enter into the said agreement on behalf of the said defendants, and that the said agreement is wholly unjust and inequitable, and is not binding on the said defendants.

11. The said defendants further say as to paragraphs 5, 6, 7 and 8 of the statement of claim that the plaintiffs are seeking to recover against the defendants in respect of services rendered to ship, cargo, and freight, whereas the said defendants are liable in respect of ship and freight only. The said defendants are ready and willing to pay to the plaintiffs in respect of ship and freight such reasonable amount as the court may think just.

J. P. Aspinall (with him *Myburgh*, Q.C.), for the defendants, was called upon.—The defendants are not bound by this agreement, as it is one which the master had no authority to make. His authority is limited to making any agreements necessary for enabling him to carry out the voyage:

Anderson, Tritton, and Co. v. *Ocean Steamship Company*, 52 L. T. Rep. N. S. 441; 5 Asp. Mar. Law Cas. 401; 10 App. Cas. 107.

This is not such an agreement, as by it the master purports to bind the defendants to pay money in any event, viz., whether the salvage be successful or not. An essential element of salvage is success or services contributing to ultimate success. The terms of the agreement are so unreasonable as not to make it binding on the defendants. The *Prinz Heinrich* came off solely owing to her cargo being jettisoned, and yet the plaintiffs, for standing by one day, are asking to be paid 2200*l*. It is also contended that the master was not in a fit state to enter into or understand the effect of the agreement. In any event the defendants are only liable for their proportion of the award. The agreement was entered into by the master, as agent for all the interests in his charge, viz., ship, freight, and cargo. The defendants are therefore under no liability to pay salvage in respect of the cargo:

The Raisby, 53 L. T. Rep. N. S. 56; 5 Asp. Mar. Law Cas. 473; 10 P. Div. 114;
The Renpor, 48 L. T. Rep. N. S. 887; 5 Asp. Mar. Law Cas. 98; 8 P. Div. 115;

Cohen, Q.C. (with him *Barnes*) for the plaintiffs.—Having regard to the circumstances of the case the defendants are liable for the whole of the salvage:

The Raisby (*ubi sup.*);
The Cumbrian, 57 L. T. Rep. N. S. 205; 6 Asp. Mar. Law Cas. 151.

The agreement was a perfectly reasonable one and the services of great value. The defendants have not established the incapacity of the master.

BUTT, J.—This is a suit to recover remuneration for salvage services rendered by the s.s. *Fei Lung* of 780 tons register to the s.s. *Prinz Heinrich* of over 1200 tons burthen. The *Prinz Heinrich* was found on the rocks on the 29th June 1886. She had been three days there, and an agreement was made between the masters of the two vessels by which the defendants' master agreed to pay 200*l*. a day as long as the *Fei Lung* stood by, and 2000*l*. in case the *Prinz Heinrich* came off. The services were rendered, and the *Prinz Heinrich* came off and was saved, but in such a damaged condition that she was subsequently sold for 3500*l*. She had a valuable cargo on board, consisting largely of sugar, of which a considerable portion was jettisoned. In dealing with this case I must not leave out of consideration the fact that at the time this agreement was made the value of the defendants' property was considerably greater. The first question I have to decide is, whether this agreement is so unreasonable and inequitable that it cannot stand. The sum absolutely secured by the agreement is only 200*l*. It might be increased by circumstances, but it appears to me clear that if, on the evening of the 29th June, when the services began, the *Prinz Heinrich* had filled with water so that she could not have been moved or had slipped off and sunk, the whole extent of remuneration the salvors could have recovered would have been 200*l*. What, again, was the position of this ship? She had been on the rocks for three days. Two or three large pieces of rock had pierced her bottom and were projecting some three feet into her. I understand that there was a water ballast tank which in effect formed a second bottom to that part of the ship, but it appears that the top of this tank had been forced up. Probably one of the rocks had projected high enough to do this. The result was that the water flowed into the forehold, and rose to the level of the surrounding water. In those circumstances there was some strain from the weight of water as well as the working of the ship. There must have been a strain on the bulkhead, and if that had given way and the next compartment had filled, it was not only possible, but very probable, that the ship herself would have filled. From the entries in the log it is clear that she was bumping on the rocks, which means severe straining and serious danger. The coast, too, was a barbarous and thinly inhabited one, and few, if any, ships would be likely to pass. There is evidence that the only ship that came in sight was one of the same nationality as the *Prinz Heinrich*, and that she had either not seen the signals or had disregarded them. In these circumstances the position of this ship was not hopeful when the *Fei Lung*, in answer to her signals, came up.

The question is, in that condition of things, is the agreement so inequitable and improper that I should set it aside, apart from the mental capacity of the master when he signed it. I have asked the opinion of the Elder Brethren, and they say that the danger to the salved ship was very serious and pressing indeed, and that, had they been in the position of her master, they would not have hesitated to enter into this agreement. I have, therefore, no hesitation in holding that this agreement is neither so inequitable nor so improper as to entitle me to set it aside. Then it is said that the master was incompetent, because at the time he signed the agreement he was so ill from the effects of illness and the excessive use of stimulants as to be incapable of understanding its purport and effect. I take that to mean that he did not know what he was about, and was an irresponsible person. It is urged, in another place, that the master of the *Fei Lung* took undue advantage of his position to get the agreement signed. I do not think there is any evidence of that, and I do not understand fraud to be relied upon. I do not doubt that this man had been drinking before the voyage, and that after getting on the rocks he did so again to some extent. I have watched the evidence on this point very closely. His wife did

not say he was drunk at the time. She said he was reduced and weak, and did not care what he did, and that he said he must have some drink to keep himself steady. One or two officers of the *Prinz Heinrich* have said he was drunk, but the evidence of the officers of the other ship was directly to the contrary. I have also looked at his signature to the agreement, and it is so good and so bold that I can hardly conceive that it was signed by a man who was hopelessly drunk. When one has already decided that the agreement is not unreasonable, it seems almost futile to pursue the inquiry further as to whether it was made by a man who was drunk. There has been a great deal of discussion as to whether the *Prinz Heinrich* floated off the rocks in consequence of the jettisoning of the cargo, or was towed off by the *Fei Lung*. I really do not think it is a very material question, because the agreement is that the sum of 2000*l.* should be paid, not in the event of the *Fei Lung* getting the *Prinz Heinrich* off, but in the event of the *Prinz Heinrich* being got off or coming off the rocks. It is not easy to say which is the true version, but, on the whole, I confess I lean to the belief that she was towed off. In any case, I cannot help thinking it was a valuable service.

It is said that the owners of the ship are not liable to pay the whole of this amount, because it is one agreed upon for the whole of the salvage, and that the shipowners have only to bear the proportion that 3500*l.*, the value of their ship, bears to 14,000*l.*, the value of the cargo. That is a proposition to which under no circumstances I could assent. Even if my opinion were different, I think that the owners of the *Prinz Heinrich* have so conducted themselves as to make themselves liable. I refer to the negotiations, the appointment of arbitrators, and the deposit of money in a bank, all of which circumstances would tend to make the defendants liable for the whole sum, even if they were not so originally. The result has been to put the plaintiffs to sleep in this matter, to lead them to imagine that their claim was secured, and then, some eighteen months or two years afterwards, to tell them to get the greater part of their claim by arresting such portions of the cargo as they might chance to find after this lapse of time. But, apart from that, I am of opinion that where the captain of a ship reasonably and properly enters into such an agreement for the salvage of his ship for a particular sum, he binds the shipowners to pay the agreed amount. The cargo is on board, and the shipowners need not part with it till they have obtained security for any payments which they have to make or have made in respect of it. As a matter of fact, in this very case the shipowners took a bond from the owners of the cargo for the payment of this salvage. It is said that the case of *The Raisby* (*ubi sup.*) is opposed to this view, but I am of opinion that it is not applicable to the facts of the present case. I entirely agree with every word Sir James Hannen there says, and as he points out, "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 which 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 matter 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." That points the whole difference and distinction between an agreement generally to tow or salve a ship and one for towage or salvage for a particular sum. I do not know whether the decision is, but certainly the dicta in the case of *Anderson and Co.* v. *The Ocean Steamship Company* (*ubi sup.*) are in favour of the view I am now expressing. I therefore hold that this ground of defence fails, and I give judgment for the amount stipulated in the agreement with costs.

Solicitors for the plaintiffs, *Waltons, Bubb*, and *Johnson*.

Solicitors for the defendants, *Botterell* and *Roche*.

Thursday, Feb. 9, 1888.

(Before the Right Hon. Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE ESSEQUIBO. (*a*)

Collision—Overtaking vessel—Flare-up light—Regulations for Preventing Collisions at Sea (*art.* 11).

Where the lights of an overtaking vessel are sighted about two miles off, and a flare-up light is exhibited for a short time from the vessel which is being overtaken, and a collision occurs about ten minutes after the extinction of the flare-up, without any further light being exhibited, art. 11 *of the Regulations for Preventing Collisions at Sea is infringed, as it is the duty of a vessel which is being overtaken to exhibit a white or flare-up light at reasonable intervals so long as the other vessel continues to be overtaking.*

THIS was a collision action *in rem*, brought by the owners of cargo on board the barque *Hoffnung* against the owners of the steamship *Essequibo*. The plaintiffs claimed for loss of their cargo, owing to the *Hoffnung* sinking shortly after the collision.

The collision occurred in the English Channel, off the Start Point, on Oct. 8th, 1888.

The facts alleged by the plaintiffs were as follows: At about 9 p.m. on Oct. 8th, the *Hoffnung*, a barque of 516 tons register, laden with a cargo of salt, on a voyage from Liverpool to Dantzic, was in the English Channel, about twenty-three miles S.S.E. of Start Point. The *Hoffnung* was on the starboard tack, heading about E. by N., and was making about a knot an hour. The wind was a light air from the S.S.E., and the weather was overcast, but clear, and not very dark. In these circumstances those on board the *Hoffnung* saw the masthead and green lights of the steamer *Essequibo* about two to two and a half miles off, and about two points on the port quarter. The barque was kept on her course, and as the *Essequibo* was seen to be overtaking her a flare-up light was shown over the stern once for a short time. The *Essequibo* overhauled and got about abeam of the

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

Hoffnung, as if intending to pass on her port side, but she was then seen to be closing in towards the *Hoffnung*, as if under a port helm; and although the barque's bell was rung and the steamer loudly hailed, she came and with her stem struck the port side of the barque, doing her so much damage that she shortly afterwards sank.

The defendants called no witnesses. From their defence it appeared that at the time of the collision the *Essequibo*, a steamer of 1,341 tons register, was on a voyage from Porto Rico to London with a general cargo. On the night in question she was in the English Channel, about twenty-seven miles S.S.E. of the Start, heading S. 80 deg. E., and making about eight and a half knots. In these circumstances those on board of her saw for a moment a faint white light, about two points on the starboard bow, from a quarter to half a mile off. Immediately afterwards a red light came into view at about the same bearing. Although the helm was immediately put hard-a-port and engines reversed full speed, the *Essequibo* with her stem struck the port side of the *Hoffnung*.

The defendants charged the *Hoffnung* (*inter alia*) with breach of art. 11. of the Regulations for Preventing Collisions at Sea, which 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.

From the evidence of the plaintiffs' witnesses it appeared that shortly after the lights of the *Essequibo* were seen about two miles distant on the port quarter of the *Hoffnung*, a flare-up light was shown once, for a short time. The exhibition of this light did not exceed two minutes. No other light was shown to the *Essequibo*. Between the exhibition of the flare-up and the collision an interval of ten minutes elapsed. The plaintiffs also alleged that the night was such that the *Hoffnung* could have been seen from the *Essequibo* in sufficient time to have avoided a collision, even if no light was exhibited.

Sir *Walter Phillimore* (with him Dr. *Stubbs*) for the plaintiffs.—The cause of this collision was bad look-out on the *Essequibo*. The plaintiffs have strictly complied with the requirements of art. 11. The article does not speak of a light being shown from time to time, but confines itself to requiring an overtaken ship to show "a white light or a flare-up light." The *Hoffnung* did this, and also kept her course in obedience to art. 22, and is therefore free from blame. As a matter of fact, the *Essequibo* had ample indication of the *Hoffnung*, and had she been keeping a good look-out the collision would never have occurred.

Bucknill, Q.C. (with him *J. G. Barnes*) for the defendants.—The *Hoffnung* was being overtaken by the *Essequibo*:

> *The Main*, 55 L. T. Rep. N. S. 15; 6 Asp. Mar. Law Cas. 37; L. Rep. 11 Prob. Div. 132.

Therefore it became her duty to give effect to the provisions of art. 11. This she has not done. An exhibition of a light ten minutes before the collision, and when the vessels are two miles apart, is not a sufficient compliance with the article. It is the duty of a vessel which is being overtaken to continue to show a stern light from time to time, so long as the overtaking vessel cannot see her side lights. If not, the article is useless, and an overtaking vessel would have no means of knowing how to manœuvre. The *Hoffnung* is therefore solely to blame for this collision.

Sir JAMES HANNEN.—As no witnesses have been called for the defendant vessel, the statements which have been made by those who have been called by the plaintiffs must be accepted, and I take it that they do in fact establish that a flare-up light of some description was exhibited some nine or ten minutes before the collision. It may be open to doubt whether or not it was an effective flare-up, as it does not appear to have been actually used for six or seven months previously. It is said that it was all right before the ship left Liverpool. But it must depend, I should imagine, on the extent to which the waste cotton had been calcined by previous use—whether it would absorb much turpentine, and therefore whether it would burn vigorously and long. It appears that the whole exhibition of the light was begun and completed in two minutes, and that it took place some nine or ten minutes before the collision. Now, during the whole of that time, the *Essequibo* was an overtaking vessel. So far as *The Main* (*ubi sup.*) has any bearing on the case, it simply amounts to this: I took what the Court of Appeal considered to be a mistaken view. In my definition of an overtaking vessel I thought that, if the aftermost vessel was broadening so as to indicate she was on another course from that of the overtaken vessel, she could not be considered to be an overtaking vessel. But the Court of Appeal, I think perhaps fortunately for the safety of those navigating the seas, found that that was not a correct view, but that it was rather a practical question, if one vessel was behind the other, either on a parallel or a slightly divergent course, whether she was an overtaking vessel, and whether she stood in need of that assistance which this rule was intended to give.

Apart from that decision, it is plain that this was an overtaking vessel, and I assume, as I have said, that a flare-up was shown to her ten minutes before the collision; and the simple question which now remains for my determination, and a very important practical question it is, is whether or not, in those circumstances, the exhibition of this light discharges the overtaken vessel, once and for all, from the duty of exhibiting it again. We are clearly of opinion that it is for the safety of vessels that the one exhibition should not be depended upon, but that the light should be exhibited from time to time, so long as the vessel continues to be an overtaken vessel. It is perfectly true that there may be a want of proper look-out on the overtaking vessel; but it is to guard against the defects not merely of men's sight, but of their minds and attention, that these rules are framed. It might well be that through negligence the flare-up was not seen, and I think there ought to have been a better look-out on the *Hoffnung*. That must be guarded against, and the flare-up must be exhibited again from time to time to guard against inattention on the part of the overtaking ship. It is not necessary to define an interval. That must be a practical question depending on the speed at which the vessel appears to be approaching. But it is not sufficient to rest content with the one exhibition. There might be

a great want of care on board the steamer, but, as I have already said, it is necessary to guard against those defects. I think, however, there is no doubt on the evidence that the *Essequibo* is to blame for not keeping a good look-out, and I also pronounce the barque to blame.

Solicitors for the plaintiffs, *Stokes, Saunders,* and *Stokes.*

Solicitors for the defendants, *Wilson, Bristowe,* and *Carpmael.*

Tuesday, Feb. 14, 1888.

(Before the Right Hon. Sir JAMES HANNEN.)

THE ARGENTINO. (*a*)

Collision—Loss of employment — Charter-party— Measure of damages.

Where it is verbally agreed between a ship's managing owner and certain shipbrokers that on the ship's return to London, where she was expected within a few days, the brokers would provide her with cargo for carriage to foreign ports, and in consequence of a collision with another vessel for which the other vessel was solely to blame, she is unable to fulfil the engagement, and her place is taken by another vessel, the owners are entitled to recover from the owners of the wrong-doing vessel damages for loss of the engagement, and in estimating such damages the registrar should take into consideration the difference between the freight she would have earned and the freight she earned on another voyage when repaired, and the fact that the number of days occupied in loading her on the substituted voyage exceeded the number of days that would have been occupied in loading her under the engagement she was unable to fulfil.

THIS was an objection by the defendants in a collision action *in rem* to the registrar's report therein.

The collision took place in the Thames on the 20th Feb. 1887, between the plaintiffs' steamship the *Gracie* and the defendants' steamship the *Argentino.* An action was thereupon instituted in which it was agreed that both vessels should be deemed to blame, and the damages were referred to the registrar and merchants.

In consequence of the collision the *Argentino* was under repairs for some days, and was unable to fulfil an engagement with Messrs. Westcott and Laurance to take a cargo from Antwerp to Batoum. Messrs. Westcott and Laurance thereupon engaged a smaller vessel, the *Beta,* in lieu of the *Argentino.* After the *Argentino* had been repaired she was employed by Westcott and Laurance to carry a cargo from Antwerp and London to Odessa.

At the reference the owners of the *Argentino* claimed (*inter alia*) 785*l.* 13*s.* 4*d.*, which was made up as follows: (1) 455*l.*, the difference between the gross freight earned by the *Beta* and that earned by the *Argentino*; (2) 93*l.*, the freight which the *Argentino,* being a larger vessel than the *Beta,* would have earned in excess of that earned by the *Beta,* had she been able to perform the voyage; (3) 237*l.* 13*s.* 4*d.*, demurrage for eight days, the number of days which it took to load the *Argentino* in excess of the days occupied in loading the *Beta.*

These items the registrar disallowed. His report was as follows:

The collision in this case between the *Argentino* and the *Gracie* took place in the Thames on the 20th Feb. 1887. It was agreed between the parties that both ships were to blame, and that the damages sustained by each respectively should be investigated by the registrar and merchants.

No difficulty exists in respect of the damage sustained by the *Gracie,* but the owners of the *Argentino* advance a claim for special damages under the following circumstances:

Messrs. Westcott and Laurance are shipbrokers in London, who collect cargo at Antwerp and London for conveyance to the Black Sea by two different routes, and the vessels employed for each voyage call at different specified ports on the way, one route or round ending at Batoum, the other at Odessa.

About a week or ten days previous to the collision above mentioned, when the *Argentino* was at sea on a voyage from Sebastopol, with a cargo of wheat for London, Mr. Westcott, a partner in the above-named firm, called at the office of Mr. Porteous, the managing owner of the *Argentino,* and inquired if he had a boat to load for the Batoum route, and, being informed of the expected arrival of the *Argentino,* it was verbally arranged that the *Argentino,* as soon as she arrived, discharged her cargo, and could be ready, should proceed to Antwerp to load for a Batoum route. Later on, after the *Argentino* had arrived in the Thames, and had collided with the *Gracie,* and in consequence needed repairs, which would take some considerable time, it was arranged between Mr. Westcott and Mr. Porteous that Mr. Westcott should engage another vessel in lieu of the *Argentino* for the contemplated voyage to Batoum, and accordingly Mr. Westcott engaged the ship *Beta,* which loaded at Antwerp and in London, and made the same round to Batoum which it was intended the *Argentino* should make.

The *Beta* commenced this round by leaving London for Antwerp on the 7th March, and, after loading some cargo there, returned to London for further cargo, and finally sailed from the Thames about the 20th March.

The repairs to the *Argentino* were finished on the 18th March, and a few days before that date Mr. Westcott proposed to Mr. Porteous to load the *Argentino* for the Odessa route, an offer which Mr. Porteous accepted, and accordingly on the 19th or 20th March the ship left London for Antwerp, where she loaded about 300 tons, sailed thence to London on the 27th, where she loaded 1000 tons more, and finally sailed from London on the Odessa round on the 10th April.

The result of the voyages of the *Beta* and *Argentino* respectively seems to be this: The *Beta* earned a gross freight on the Batoum round of 1536*l.*, the *Argentino* a gross freight on the Odessa round of 1081*l.*, showing a difference of 455*l.*, which sum is claimed as a loss or damage arising from the collision. It is further said that, had the *Argentino* made the same round the *Beta* did, she would have loaded a full cargo, and, being a larger vessel, would have consequently earned a larger gross freight than the *Beta* by 93*l.*, which is claimed as a further loss resulting from the collision.

Then again, in consequence of the *Argentino* being eight days longer loading than the *Beta,* which is attributed to her cargo not being equally ready for shipment as the *Beta's,* eight days demurrage of the ship is claimed at the extravagant rate of 29*l.* 14*s.* 2*d.* per day, equal to 237*l.* 13*s.* 4*d.*, thus making a total claim for consequential damages under this head of 785*l.* 13*s.* 4*d.* I am of opinion that the claim is too remote, and cannot be sustained. It seems to me there is a broad distinction between this case and that of *The Star of India* (35 L. T. Rep. N. S. 407; 1 Prob. Div. 466; 3 Asp. Mar. Law. Cas. 261), where the late judge of the Admiralty Court held that, in estimating damages arising from a collision, the loss of a beneficial charter-party under which the ship would have earned a specific amount of freight must be considered. The circumstances of that case were very different from those of the present. In this case there was a mere verbal arrangement to allow the *Argentino* to load for the Batoum route in the usual way without any promise of a full cargo, or guarantee as to the rate of freight. The shipowner had to take these risks. The arrangement had

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

not the force and effect of a definite charter-party, under which a specific amount of gross freight is contracted for. Then the substituted arrangement under which the *Argentino* went on the Odessa round was voluntarily made on the expectation, which both parties entertained, that it would prove as favourable in its results as the first arrangement for the Batoum round.

Mr. Porteous admitted that he took his chance as to the quantity of cargo the ship would get, and as to the rate of freight, and that he accepted the second offer because Mr. Westcott led him to think the ship would do as well with it. There is no evidence before us that the *Argentino* could not have got employment as profitable as the *Beta's* from other brokers or in other directions if it had been sought or inquired for, and it appears to me that, because in the result the employment the owner accepted for his ship accidentally proved to be less favourable than he was led to anticipate, and probably less favourable than if she had sailed on the Batoum route as originally intended, he is not thereby entitled to claim compensation for his disappointed expectations as if they were the necessary result of the collision.

From a printed advertisement put in at the reference the *Argentino* was advertised by Westcott and Laurance to follow the s.s. *Rome*, which was to sail on the 17th Jan.

Sir *Walter Phillimore* and *Boyd*, for the defendants, in objection to the report.—The registrar was wrong in disallowing the defendants' claim in respect of the loss of employment of the *Argentino*. There was a binding agreement between the defendants and Westcott and Laurance that she should be employed for a certain voyage. Owing to the collision she was not so employed, and her owners have thereby sustained a loss. If so, the defendants are entitled to recover that loss:

The Clarence, 3 W. Rob. 283;
The Star of India, 35 L. T. Rep. N. S. 407; 1 P. Div. 466; 3 Asp. Mar. Law Cas. 261;
The Consett, 5 P. Div. 229; 5 Asp. Mar. Law Cas. 34, n.

In estimating that loss the defendants have properly claimed the difference between the two voyages, the extra freight which the *Argentino* would have earned and the demurrage for delay in loading. Those items are the natural consequences of the collision, and are therefore recoverable.

Finlay, Q.C. and *Nelson*, for the plaintiffs, *contra*.—The registrar was right in disallowing this claim. No such loss has ever been allowed before, and to allow it would be to act contrary to the principles upon which the courts have acted in assessing damages:

The Parana, 36 L. T. Rep. N. S. 388; 2 P. Div. 118; 3 Asp. Mar. Law Cas. 399;
The Notting Hill, 51 L. T. Rep. N. S. 66; 9 P. Div. 105; 5 Asp. Mar. Law Cas. 241.

In the first place there was no binding engagement, and even if there was, the loss is too remote. All manner of contingencies might have happened to prevent the *Argentino* carrying out this engagement. The case of *The Star of India* (*ubi sup.*) is not in point, because there the ship was fixed by a definite charter-party for a certain cargo, a certain voyage, and a certain freight. Here everything is in uncertainty, and there were no materials before the registrar to enable him to estimate the amount of this alleged loss.

Sir *Walter Phillimore* in reply.

Cur. adv. vult.

Feb. 14.—Sir JAMES HANNEN.—In this case the facts are very clearly stated in the registrar's report, and it will not be necessary for me to state them. The *Argentino* came into collision with a vessel called the *Gracie*, and it was agreed that both vessels should be deemed to blame. No question arose as to the damages which the *Gracie* was entitled to recover, but a question arises as to those claimed by the *Argentino*. It appears that shortly before the collision an arrangement—I purposely use the expression—was come to between the owners of the *Argentino* and the firm of Messrs. Westcott and Laurence, shipbrokers of London, that the *Argentino* should take its place on a line of vessels which Messrs. Westcott and Laurence were in the habit of employing for the purpose of carrying cargo to ports in the Black Sea. The *Argentino*, in consequence of the collision, was under repair for a considerable time, and was unable to take her place in that line and earn the freight which she would have carried if she had gone on the voyage. When it was seen that it was impossible that she could take her turn, Messrs. Westcott and Laurence engaged another ship, called the *Beta*, which accordingly collected freight in London and in Antwerp, and proceeded on the voyage which the *Argentino* would have taken but for the accident, or unless other events had intervened. It was claimed on the part of the *Argentino* that she was entitled to compensation for the loss of the advantages which she would have derived from the arrangement made with Messrs. Westcott and Laurence. The learned registrar, assisted by merchants, has found that the *Argentino* was not entitled to make that claim, it being considered that the damage was too remote. The registrar says, with regard to what I have called an arrangement, that "it was verbally arranged that the *Argentino*, as soon as she arrived, discharged her cargo and could be ready, should proceed to Antwerp to load for a Batoum route;" and later on he says, "In this case there was a mere verbal arrangement to allow the *Argentino* to load for the Batoum route in the usual way." Now it was argued that the learned registrar seemed to base his judgment upon the fact that there was a mere verbal arrangement as distinguished from a written agreement. I doubt whether that was in his mind. I think it is more probable that he insisted on its being verbal in this sense, viz., that it did not lead him to the conclusion that it was a binding arrangement. If I agreed with him in that, which I take to be his finding, I should have nothing to say to his report. But I am of opinion that that is not a true view of the facts which occurred between Mr. Porteous, the managing owner of the *Argentino*, and Messrs. Westcott and Laurence. It appears that Messrs. Westcott and Laurence are in the habit of collecting from their customers freight which they send to the Black Sea, and that they have certain rates of freight which they charge, their profit being obtained by a commission upon these freights. This course of business was perfectly well known to both parties, for it appears that the *Argentino* herself had been employed on this line, and I also think other vessels owned by Mr. Porteous. The course of business was known, and the expectation which was held out of remunerative employment was present to the minds of the parties when they entered into this arrangement, which I take to be an agreement. In formal language it

might have been stated thus: In consideration that Mr. Porteous agrees to supply his vessel, the *Argentino*, for the purpose of carrying a cargo to be supplied by Messrs. Westcott and Laurence in its turn, Messrs. Westcott and Laurence agree to allow that vessel to collect that cargo and go on that voyage. I am of opinion that that would have been a perfectly binding agreement. If, for instance, the *Argentino* had not been ready, and Messrs. Westcott and Laurence had been obliged to engage another vessel, they would have had a ground of action against the owners of the *Argentino* for any loss they had sustained. What leads me strongly to the opinion that this was not mere vague talk is the fact that the *Argentino* was, to the knowledge of the owners, advertised to take its turn after the *Rome*, which was advertised to start on Jan. 17th. In the advertisement I have before me the *Argentino* is stated as the vessel to follow. I am therefore perfectly satisfied of the *bona fides* of the statement made by both parties that they had entered into an agreement. I am of opinion that there was a binding agreement, by which the *Argentino* was assured, as far as anything in business transactions can be assured—for in this world nothing is certain, and if a ship is not run down by one vessel she may be by another, or be burned or otherwise be lost—I say she was reasonably assured that she would obtain the advantage of this contract which had been entered into.

The learned registrar says he was referred to the case of *The Star of India* (*ubi sup.*), in which the loss sustained by the inability to fulfil a charter-party was allowed by the late judge of the Admiralty Court to be taken into consideration in estimating the amount of damages resulting from a collision. But the learned registrar distinguishes that case in this manner. He says this was a mere verbal arrangement to allow the *Argentino* to load, without any promise of a full cargo or a guaranteed rate of freight. The arrangement, he says, had not taken the form of a charter-party, and therefore had not the force of a definite charter-party under which a specific rate of freight is payable. On that I differ with him. There is no magic in the fact that the advantage is to be derived from a definite charter-party. It would be sufficient if there was something which, as I have said, leads to a reasonable assurance that advantage will be derived, whether it be by charter-party or by verbal contract. The case of *The Star of India* (*ubi sup.*) was followed in the case of *The Consett* (*ubi sup.*) in which Sir Robert Phillimore allowed loss from inability to fulfil a charter-party. I also find an earlier case in which the principle upon which the court proceeds is clearly laid down. I allude to the case of *The Clarence* (3 W. Rob. 283). There the damage claimed was not allowed, but the court, in giving judgment, explained the principle upon which it proceeds in these cases in the following words: "It does not follow as a matter of necessity that anything is due for the detention of a vessel whilst under repair. Under some circumstances undoubtedly such a consequence will follow, as for example where a fishing voyage is lost or where the vessel would have been beneficially employed. The onus of proving her loss rests with the plaintiff, and this onus has not been discharged upon the present occasion. Had the owners of the *Clarence* proved that the vessel would have earned freight, and that such freight was lost by the collision, the case would have fallen within the principle to which I have last adverted. I therefore pronounce against the objection, and confirm the report with costs." In this case, for the reasons I have given, I am of opinion that the owners of the *Argentino* have shown that their vessel would have earned freight, and that such freight was lost by the collision. The nature of the advantage which she has lost is not as exactly defined as it would have been under a charter-party. But its nature was clear, although the amount to which it might attain was uncertain. The *Argentino* was entitled to take her turn, and to receive for carriage such cargo as had been collected by Messrs. Westcott and Laurence. The rate of freight was ascertained. The only thing that remained in uncertainty was whether there would be a full cargo. A full cargo was got for the *Beta*.

I am of opinion that on these facts it can be said that a definite advantage which would have been derived from the agreement with Messrs. Westcott and Laurence was prevented being attained by reason of the collision, and that therefore it was necessary to take that loss into account. It was sought in argument to liken this to the case of the *Parana* (*ubi sup.*), where it was held that the loss of market could not be allowed, but that was for a reason very clearly expressed by Mellish, L.J. The reason is that the loss of market is purely speculative. But I think there is nothing speculative about this claim. Its nature was clearly defined, and the amount of loss was easily ascertainable. For this reason I am of opinion that the amount allowed is not sufficient, and that it is necessary to take into account what the *Argentino* has really lost. It does not follow that damages for the detention of the vessel would necessarily be allowed, because it is conceivable that the circumstances would be such as to show that the vessel would not have obtained employment. But it is usually assumed that a vessel will find employment. *Primâ facie* the *Argentino* lost all the profit she would have gained if she had been able to take her turn. But she is not on that account entitled to remain idle, and she will only be allowed such damages as would result from her being obliged to be employed in some less remunerative way than she would have been employed in if the original contract had been fulfilled. It is said by the registrar that there is no evidence that the *Argentino* could not have got employment as profitable as the *Beta's* from brokers in other directions if it had been sought and inquired for. Now, if the registrar and merchants with their great experience on this subject had been able to say, either from the evidence before them or from their own knowledge derived from their own general experience, that the *Argentino* was not properly employed in going on another route, viz., to Odessa instead of to Batoum, I should have had nothing to say against it. But I think it is a misapprehension to say that the owners of the *Argentino* were bound to show that she could not have got employment as profitable as the *Beta's* from other brokers. The question is, whether there was anything to show that this substituted voyage, which I cannot doubt was entered into in good faith, was not the best thing to do under the

circumstances. If it was, then the difference between the advantage derived from the two voyages must be taken as the natural result of the impossibility of fulfilling the contract. It appears to me, therefore, that this case must go back to the registrar for the purpose of ascertaining the amount of loss which the owners of the *Argentino* have suffered from being unable to fulfil the contract. In this particular case there was another voyage, which lasted somewhere about the same time as the voyage to Batoum would occupy, and therefore it naturally and easily presents itself as a subject of comparison. Great difficulties might have arisen if the *Argentino* had been employed on a totally different route and under different circumstances on a voyage which might have lasted a very much shorter or longer time. Fortunately this element of difficulty does not exist in this case, and I think there is an easy means of forming an opinion as to the real loss suffered by the owners of the *Argentino*.

There is another point to consider in connection with this. It is said that the cargo was in fact laden more expeditiously on the *Beta* than on the *Argentino* by eight days. That is asked as a specific amount of damage; but I am of opinion that it cannot be so treated, although it is a matter which must be taken into consideration. It will depend whether in the employment of a vessel in the ordinary way eight days' demurrage is something extraordinary. If the owners of the *Argentino* took a contract which enabled them to be detained for an unreasonable number of days, that is not a loss which should fall on the other vessel. But if eight days is the amount of demurrage which is properly understood in obtaining a cargo for a vessel of this sort, then that must be taken into consideration. As to the capacity of the *Argentino*, I am of opinion that it was greater than that of the *Beta*, and, if she could have obtained a full cargo, it would have been larger than that carried by the *Beta*. That also would be part of the loss which her owners have sustained, and must be taken into consideration. For these reasons I am of opinion that the report cannot be affirmed, and must go back for reconsideration on the principles I have laid down.

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

Solicitors for the defendants, *Downing, Holman,* and *Co.*

Tuesday, Jan. 24, 1888.

(Before Sir JAMES HANNEN.)

THE RIVER LAGAN. (*a*)

Collision—Tug and tow—Costs—Tort—Breach of contract.

Where the owners of a barge in tow of a tug having been damaged by collision with a steamship, instituted an action against the owners of both tug and steamer to recover damages, and the steamer, which alleged that the collision was due to the negligence of the tug, was found alone to blame, the Court ordered the owners of the steamer to pay the costs of the plaintiffs and of the successful defendants.

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

THIS was an action by the owners of the barge *Emily* against the owners of the steamship *River Lagan*, and the owners of the tug *Scorpion*, to recover damages for collision between the barge and the *River Lagan*.

Shortly before the collision the barge was proceeding down the river Thames in tow of the steam-tug *Scorpion*, when the steamship *River Lagan* was seen on the port bow of the barge to be coming away from the north side of the river, with her head angling towards the south shore. The *Scorpion* kept on at full speed, and shortly afterwards the *River Lagan* struck the barge on her side amidships, and caused her to sink.

The plaintiffs alleged that the collision was due to the improper navigation both of the *River Lagan* and of the *Scorpion*. They alternatively claimed damages from the *Scorpion* for breach of contract.

The owners of the *River Lagan* alleged that the collision was solely due to the negligence of the tug *Scorpion*, whereas the *Scorpion* alleged that it was occasioned by the negligence of the *River Lagan*, and was contributed to by the man in charge of the barge failing to cast her loose when he saw a collision was imminent.

The action was tried on the 23rd and 24th Jan. by Sir James Hannen, assisted by Trinity Masters, when the *River Lagan* was found alone to blame, whereupon

Bucknill, Q.C. (with him *Pyke*), for the plaintiffs, asked that the owners of the *River Lagan* should be ordered to pay all the costs, both of the plaintiffs and of the owners of the *Scorpion*. The plaintiffs acted reasonably in suing both defendants. The improper navigation of the *River Lagan* has been the cause of this litigation. Moreover, the owners of the *River Lagan* have throughout improperly maintained that the negligence of the *Scorpion* was the cause of the collision:

The Honduras Inter-Oceanic Railway Company v. *Lefevre and Tucker*, 36 L. T. Rep. N. S. 46; 46 L. J. 391, Ex.; L. Rep. 2 Ex. Div. 301.

J. G. Barnes (with him *Finlay*, Q.C.), for the owners of the *River Lagan, contrà*.—My client ought not to be made to bear the costs of the owners of the tug. The event shows that the tug ought never to have been sued at all. If so, the plaintiffs ought to pay the tug's costs. The plaintiffs for their own convenience sued both vessels in this action, and thereby avoided the possibility of having to bring a second action, which would have been the case had they unsuccessfully sued only one of the two vessels in the first instance.

J. P. Aspinall (with him *Hall*, Q.C.), for the owners of the *Scorpion*, referred to the case of *Green* v. *Goodyear* (*a*), which was an

(*a*) *April* 7, 1884.

(Before HAWKINS, J. and a Special Jury.)

GREEN AND BURLEIGH *v.* GOODYEAR AND THE GENERAL STEAM NAVIGATION COMPANY.

THIS was an action to recover damages occasioned by the steamship *Valencia*, owned by the defendant Goodyear, coming into collision with certain piles and works owned by the plaintiffs.

At the time of the accident the plaintiffs were engaged in repairing and adding to a steamboat pier in the river Thames, and for that purpose had put down certain piles. On Dec. 22, 1882, Goodyear's steamship *Valencia*

action by the owners of a pier against the owners of the steamships *Valencia* and *Alford*, for damage done to the pier by the *Valencia*. The *Valencia* admitted coming into contact with the pier, but alleged she was forced to do so by the negligent navigation of the *Alford*. The case was tried by Hawkins, J. and a special jury, who found that the damage was due to the negligence of the *Alford*, whose owners Hawkins, J. ordered to pay the costs of the plaintiffs and of the owners of the *Valencia*.

The PRESIDENT (Sir James Hannen).—I think it right that the owners of the *River Lagan* should pay all the costs, *i.e.*, those of their co-defendants and of the plaintiffs. Mr. Barnes has insisted all throughout that the tug was alone to blame, and the question which I have had to determine was, whether the tug or the steamer was in fault. I have found the *River Lagan* alone to blame. If the *River Lagan* had not attempted to throw the blame on the tug, things might have been different, but, as I have said, the real contention in the case was, whether the tug or the *River Lagan* was to blame. I think the plaintiffs, being in doubt as to which of these vessels was in fault, acted reasonably in joining them both as defendants. I shall therefore order the owners of the *River Lagan* to pay both sets of costs.

Solicitors for the plaintiffs, *J. A.* and *H. E. Farnfield*.

Solicitors for the owners of the *River Lagan*, *Thomas Cooper* and *Co.*

Solicitors for the owners of the *Scorpion*, *Keene*, *Marsland*, and *Bryden*.

collided with the piles, doing them damage, and thereby delaying the repairs and alterations.

The plaintiffs sued jointly Goodyear and the General Steam Navigation Company, the owners of the steamship *Alford*, alleging that the collision was caused by the negligent and careless navigation of the *Valencia*, or alternatively that the *Valencia* was driven into the piles in consequence of the negligence of the General Steam Navigation Company by their servants in and about the steering and navigation of the *Alford*.

Goodyear by his defence denied the negligent navigation of the *Valencia*, alleging that so far as she was concerned the collision was occasioned by inevitable accident, and alternatively pleaded as follows:

"Alternatively, if and so far as any damage was done to the piles and works mentioned in the statement of claim by and through the *Valencia* coming in contact with the same, the defendant alleges that such damages were caused by and through the mere careless, negligent, and improper navigation of the steamship *Alford*, belonging to the General Steam Navigation Company, and not otherwise."

The General Steam Navigation Company denied that the collision was in any way occasioned by the negligent navigation of the *Alford*, and alleged that it was solely due to the negligent navigation of the *Valencia*.

The action was tried before Hawkins, J. and a special jury, on the 31st March, and the 1st, 2nd, and 3rd April, when the jury found that the *Valencia* was in no way to blame, and that the *Alford* was solely to blame; *i.e.*, a verdict for the plaintiff against the General Steam Navigation Company, and for the defendant Goodyear against the plaintiff.

The Judge thereupon gave judgment for the plaintiffs with costs against the General Steam Navigation Company, but reserved the question whether judgment was to be entered for Goodyear with or without cost.

April 7.—Goodyear moved for judgment with costs.

Myburgh, Q.C. and *J. P. Aspinall* for Goodyear.—Goodyear is entitled to judgment, and also to costs either as against the plaintiffs or the General Steam Navigation Company: (*Rudow* v. *Great Britain Life Insurance Society*, 44 L. T. Rep. N. S. 688; 17 Ch. Div. 600; *Wilson* v. *Thomson*, L. Rep. 20 Eq. Cas. 459.)

Kemp, Q.C. (with him *Brenner* and *Stokes*) for the plaintiffs.—The General Steam Navigation Company ought to pay Goodyear's costs. The whole litigation has been occasioned by their negligence, and in the circumstances the plaintiffs were justified in suing both the defendants.

Hall, Q.C. and *Barnes* for the General Steam Navigation Company.—The plaintiffs have failed as against Goodyear, and therefore ought to pay his costs. The event shows that he ought never to have been made a party to the action.

HAWKINS, J. gave judgment for Goodyear, and ordered the General Steam Navigation Company to pay his costs.

Solicitors for the plaintiffs, *Blake* and *Snow*.

Solicitors for Goodyear, *Lowless* and *Co.*

Solicitor for the General Steam Navigation Company, *William Batham*.

Tuesday, Feb. 14, 1888.

(Before the Right Hon. Sir JAMES HANNEN.)

THE HARRINGTON. (*a*)

Collision—Wreck—Thames Conservancy Act 1857 (20 *&* 21 *Vict. c. cxlvii.*), *s.* 86.

The "charges and expenses" of raising wrecks to which the Thames Conservators are entitled under the Thames Conservancy Act 1857, *must be reasonable charges and expenses.*

In estimating such charges and expenses the Conservators are entitled to take into account the interest on the capital invested in the plant used in raising the wreck in question, repairs to and depreciation in, and insurance on plant; but they are only entitled to make such charges in each particular case in relation to the amount of plant used therein, and to the time for which it is actually used.

THIS was an action originally brought in the Queen's Bench Division by the Conservators of the River Thames against the owners of the steamship *Harrington* to recover 1570*l.* 18*s.* 2*d.*, the balance of an account for raising the wreck of the *Harrington*.

The action was subsequently transferred to the Admiralty Division, and the defendants having admitted liability the plaintiffs' claim was referred to the registrar and merchants to assess the same.

The *Harrington* had been sunk in the Thames on the 9th Nov. 1886, owing to a collision with the steamship *Caroline*, and the Thames Conservators under the provisions of the Thames Conservancy Act 1857, thereupon proceeded to raise the wreck. Having succeeded in doing so, the vessel was sold, and realised 1124*l.* 0*s.* 4*d.*, for which sum credit was given to the defendants, thereby reducing the plaintiffs' claim from 2694*l.* 18*s.* 6*d.* to 1570*l.* 18*s.* 2*d.* Of this the registrar allowed 1055*l.* 18*s.* 2*d.*, for reasons which are stated in the following report:

In this case the action was originally brought in the Court of Queen's Bench on behalf of the Conservators of the River Thames against R. Gordon and Co., the owners of the steamship *Harrington*, to recover 1570*l.* 18*s.* 2*d.*, the balance of an account for raising the wreck of that ship which had been ran into and sunk in the river Thames by the s.s. *Caroline*, on the 9th Nov. 1886. The action was subsequently transferred to this division, and thereafter the defendants admitted their liability, and consented to an order referring the claim to the registrar and merchants. The account for raising the wreck

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

amounted to 2694*l.* 18*s.* 6*d.* The net proceeds of the sale of the wreck amounted to 1124*l.* 0*s.* 4*d.*, which was received by the plaintiffs, leaving the balance now claimed of 1570*l.* 18*s.* 2*d.* The defendants have objected to the account as excessive, and that some of the charges are made on an erroneous principle, namely, that they secure a profit on the work done, and not a mere return of the "charges and expenses" incurred in weighing and raising the ship, which is all the plaintiffs are entitled to claim and recover under the Thames Conservancy Act 1857, sect. 86. Those words certainly create a difficulty. It is not denied by the plaintiffs that they exclude the idea of the conservancy being entitled to make a profit, whilst the defendants contend that they only include actual payments out of pocket. I consider, however, that I must view them as justifying in each instance such demands as will suffice to protect the plaintiffs from incurring financial loss by their operations in raising a wreck. No difficulty perhaps would arise if the conservancy on each occasion hired the necessary plant for raising a wreck, though it may be doubtful if such a plan would be more economical, or whether the plant to be hired would be equally efficient. But, as a matter of fact, the Thames Conservancy have provided their own plant for raising wrecks, occasionally supplementing it by the hire of tugs and lighters. The main question now is what charges in addition to the actual expenses or payments are the conservators entitled to make in this case? They have adopted a fixed scale, which provides a stated rate of charge per diem for the use of each lighter or tug employed, and it falls to us to consider whether in our opinion the application of that scale in this case does not make the amount demanded of the owners of the *Harrington* excessive. The scale was adopted in Jan. 1884 on the report and recommendation of their chief engineer, but we have no evidence of the calculations on which, or of the reasons for which, it was adopted. It has already been said that the plaintiffs' account for raising this wreck amounts to 2694*l.* 18*s.* 6*d.*, and it may be divided under the following heads:

	£	s.	d.	£	s.	d.
A. Expenses:						
Labour paid	742	9	9			
Superintendence	116	17	9			
Hire of tugs, hulks, &c.	327	10	0			
Sundries	3	6	0	1190	3	6
B. Charges:						
For use of plaintiffs' lighters	708	10	0			
Tug	198	0	0			
Diving dress	14	10	0			
Boats	17	5	0			
	938	5	0			
Ropes	400	0	0			
Insurance	166	10	0	1504	15	0
				£2694	18	6

A. Expenses paid 1190*l.* 3*s.* 6*d.* As regards these expenses satisfactory evidence has been produced to show that they were actually incurred, and that the accounts have been accurately kept in regard to them. Nor, considering the season of the year, and the great difficulty of the operations consequent on the position of the wreck and the depth of water over it, do we see any reason for objecting to this portion of the claim, except possibly to the high rate paid for the hire of the hulk *Hamburg*, and the length of time for which it was hired, which may be attributable to the fact that other wrecks more urgently needing the attention of the conservancy delayed or postponed operations on the *Harrington*. Possibly this additional expense and others arising from the same cause might in equity be charged to those wrecks, but I have not thought it necessary in this case to enter upon and decide such an issue as that. Neither have I sufficient materials for the purpose. I have therefore allowed 1190*l.* 3*s.* 6*d.* as expenses paid.

B. Charges, &c., 1504*l.* 15*s.* These charges appear to us disproportionate to the services rendered. They amount to 127 per cent. of the total expenditure. They may be subdivided under three heads, viz., charges of 938*l.* 5*s.* for the use of plaintiffs' lighters, tug, watch boat, and diving dress, apart from any payments or expenses; a charge of 400*l.* for the use, involving wear and tear of ropes, &c.; and a charge of 166*l.* 10*s.* for insurance. First, as regards the 938*l.* 5*s.* On examining the scale we observe that for the use of lighter No. 4, which is twenty years old, and of the value as estimated by the superintendent of 1000*l.*, 2*l.* per diem is charged, which would amount to 730*l.* per annum, or 73 per cent. per annum on her value. In the case of lighter No. 8, also valued at 1000*l.*, 4*l.* per diem is charged, equal to 1460*l.* per annum, or nearly 150 per cent. on her value. For the use of lighters 9 and 10, three years old, and which are said to have cost when new 6000*l.* each, 10*l.* per diem for each is charged, equal to rather more than 60 per cent. per annum. We have not the means of testing in this way all the rates charged in the scale, but looking at the scale as a whole, we find that the authorised charge for the use of the lighters, tug, and diving dress therein set forth amounts to 49*l.* 10*s.* per day, or close upon 18,000*l.* per annum. In the engineer's report of Dec. 1883, the value of the craft and machinery afloat for the purpose of raising wrecks belonging to the conservancy was estimated at 27,000*l.* We do not know exactly what was included in that estimate, but we are satisfied that 24,000*l.* would be a full value for the tug, lighters, and diving dress set out in the scale, and consequently the authorised charges for their use, if they were used daily for twelve months, would be equivalent to 75 per cent. on that value. Such a scale we consider has all the appearance of being excessive. It has already been stated that the *Harrington* was sunk on the 9th Nov. 1886. The conservancy took charge of the wreck forthwith, but being engaged in raising another wreck, the *Minerva*, did not take any active steps towards lifting the *Harrington* until the 5th Dec., and the first attempt to lift her was made on the 15th Dec., when she was raised and removed to Northfleet, a distance of about two miles. On the 18th she was further lifted, and moved a few feet into shallower water. On the 31st she was again lifted, and moved about fifty feet, but slipped back into deeper water. On the 11th Jan. 1887 the wreck was again moved, but again slipped back. On the 21st she was put into a more upright position. On the 26th she was moved a little into shallow water; and on the 31st she was again and for the last time moved into less water. During this time the superintendent was repeatedly called to several other wrecks in the river besides the *Minerva*, viz., the *Sultan*, the *Widgeon*, the *Western*, the *Martha*, the *Trader*, the *Fortunatus;* and it was admitted that after the *Harrington* had been placed on the bank at Northfleet, on Dec. 15, further operations upon her were considerably delayed by the operations in connection with the other wrecks named, as well as by the necessity for waiting for suitable tides. After taking all these circumstances into consideration, and also that subsequently to the 31st Jan. the conservancy had to watch the wreck until it was sold, for which about 50*l.* is charged, we have come to the conclusion that the charge of 938*l.* 5*s.*, which has been made for the mere use of such portions of the plant as were employed in raising and watching the *Harrington*, in addition to all expenses incurred, is excessive, and without pretending to fix an alternative rate for each lighter or boat used, we think that the above charge should be reduced to 650*l.* I have therefore disallowed 285*l.* 5*s.* under this head, a disallowance which includes an admitted error or overcharge of 8*l.* for the use of lighters Nos. 1 and 2. As regards the charge for ropes, &c., of 400*l.*, it now appears by a statement very recently supplied and subsequent to the reference, that it is made up as follows:

	£	s.	d.
Ropes, &c., said to have been used up and destroyed	124	1	7
Use and loss of tools	5	0	0
20 per cent. on value of wire ropes, chains, and appliances used in lifting the wreck	270	18	5
	£400	0	0

The first of these three items requires to be reduced to 101*l.* 15*s.*, as we find that the wire rope charged at 57*l.* 6*s.* 8*d.* by mistake for 42*l.* 6*s.* 8*d.* could be obtained new for 35*l.* With regard to the third item, the cost of new wire rope and their fittings is stated at 1160*l.*, and on that sum the charge of 20 per cent. is calculated, but we find that such ropes, &c., could be obtained for 950*l.* instead of 1160*l.*, and inasmuch as the first cost of one of those iron ropes is included in the first item, the 20 per cent. should be calculated on 915*l.* only, equal to

183*l*. On the remainder of the articles, consisting of chains, shackles, &c., estimated at 476*l*., being of a more durable nature, we consider 10 per cent. instead of 20 per cent. an ample allowance for their use, or say 50*l*. In lieu, therefore, of 400*l*., the sums we consider should be allowed stand thus:

	£	s.	d.
Ropes, &c., destroyed	101	15	0
Loss of tools	5	0	0
Percentages for use of other articles as above	233	0	0
Making a total	£339	15	0

Being a reduction of 60*l*. 5*s*.

As regards the insurance charge of 166*l*. 10*s*., which is a charge of 3*s*. per ton on the gross tonnage of the ship, we consider it untenable. It does not in our judgment come within the meaning of the words "charges and expenses of weighing and raising the vessel," which alone the plaintiffs can recover under sect. 86 of the Thames Conservancy Act 1857, and we think, moreover, that the amounts otherwise allowed fairly cover such charges and expenses. We consider also that such an insurance charge is objectionable in principle, and works unfairly, as it would obviously produce an insignificant sum in the case of a small laden vessel so injured and sunk in such a position as to make the operation of weighing and raising her one of great difficulty and expense, whilst it would produce a very large sum on a large unladen ship, which, after collision, might be run on the bank of the river to save her from sinking in deep water, and then might be temporarily patched, pumped out, and so weighed in a short time without requiring the use of any of the conservancy lighters.

The scale upon which the plaintiffs based their claim was arrived at on Jan. 7, 1884, by a resolution of the conservators.

The plaintiffs now moved to vary the above report.

Sect. 86 of the Thames Conservancy Act 1857 is as follows:

When and so often as any vessel shall be sunk or stranded in the river, it shall be lawful for the conservators, and they are hereby required in case the master of such vessel shall refuse or neglect to weigh and raise the same, after notice in writing requiring him so to do, and within the time to be mentioned in such notice to cause any such vessel to be weighed and raised, or if it shall be found impracticable to weigh and raise the same (of which impracticability the conservators shall be the sole judges), to cause such vessel to be blown up or otherwise destroyed, so as to clear the river therefrom; and in case such vessel shall be weighed and raised, to cause the same and the furniture tackle and apparel thereof or of any part thereof respectively, and also all or any part of the goods, wares, merchandise, chattels, and effects, which may be found on board the same, to be sold by public auction or otherwise, and by and out of the proceeds of such sale to pay the charges and expenses of weighing and raising such vessel, or the blowing up or otherwise destroying the same and clearing the said river therefrom, and also the charges and expences of such sale, rendering any overplus to the owner or other person who by law shall be entitled to the same; and in case the proceeds of such sale shall be insufficient to defray the charges and expenses of weighing and raising such vessel, or of the blowing up or otherwise destroying the same, and clearing the river thereof, the deficiency shall be paid to the conservators by the master or owner of such vessel upon demand, and in default of payment may be recovered in the same manner as any penalty imposed by this Act is directed to be recovered.

Sir *Walter Phillimore* and *Bankes* for the plaintiffs.—The registrar was wrong in reducing the plaintiffs claim. Under the Act of Parliament (20 & 21 Vict. c. cxlvii.) the plaintiffs are entitled to recover the "charges and expenses" of raising wrecks. The present claim is based upon a scale fixed by the conservators, and therefore the registrar was bound to accept the scale. Quite apart from the claim being based upon a scale fixed by the conservators, the charges and expenses are in themselves reasonable. In addition to out-of-pocket expenses incurred in raising any particular wreck, the conservators are entitled to claim in respect of insurance on plant, depreciation fund, and interest upon the capital invested in the plant.

Barnes and *Holman*, for the defendants, *contrà*.—The registrar was not bound by the scale of charges fixed by the conservators. The plaintiffs are only entitled to recover such charges and expenses as are reasonable. The registrar has rightly come to the conclusion that their claim includes charges which were not reasonable, and the court should uphold him in that finding:

The Clyde, Swa. 23.

Feb. 14.—Sir JAMES HANNEN.—This is a claim by the Thames Conservators against the owners of a wreck for the cost of raising her. The claim is preferred under the provisions of the Thames Conservancy Act 1857, sect. 86, by which the conservators are not only authorised, but required to raise wrecks, and to defray the charges and expenses thereof. The question is in what way these charges and expenses are to be estimated. It is clear that the commissioners may, if they thought fit, employ other persons to raise a wreck, and if they do so the charges and expenses they would have paid for raising the wreck or getting it out of the way would be recoverable against the owners, if the proceeds of the wreck were not sufficient to defray such expenses. But the conservators having the duty of ridding the river of obstruction by wrecks have not adopted the plan of employing other persons. They have provided themselves with very expensive and no doubt very efficient apparatus of various kinds for raising and getting rid of wrecks, and they by so doing have destroyed, as it were, the market, if there were a market, for such apparatus belonging to other people. They say, and say rightly, that the interest paid on the capital invested in providing this apparatus is to be taken into account in estimating their expenses and charges in raising a particular vessel. They further rightly say that the cost of repairs to that apparatus must be taken into account; that a depreciation fund must be provided; and that the insurance of their apparatus against the risks likely to arise in doing their work must be provided for. As to the insurance fund, they have charged at the rate of 3*s*. on the tonnage of the wrecks. The registrar has rejected that mode of computation, and I think rightly done so, for this reason: There is really no true relation between the tonnage of the wreck and the value of the plant engaged in raising it. The danger to the plant depends upon an infinite variety of circumstances wholly independent of the tonnage of the wreck. For instance, no risk may be run in the case of a very large vessel, and a great risk may be run in the case of a very small one. I think, therefore, the registrar has quite rightly rejected that method of computation. I am of opinion that the item of insurance should be included in the charge which is made for the use of the particular apparatus. With regard to that charge the registrar says that the amount which he has allowed has been estimated upon the assumption that it includes the cost of insurance. The registrar says, and I have read the evidence

which entirely bears out his statement, that no definite principle upon which the charge for the use of this apparatus is based was laid before him. Some sort of excuse was put forward for this, in that the engineer of the conservators was away, and therefore was not available as a witness. An attempt was made in the argument before me to supply what had been omitted in the inquiry before the registrar and the published accounts of three years, which had apparently not been used for that purpose before the registrar, were presented to me. One only had been touched upon. The other two had only been brought in, as it were accidentally. They were brought before me for the purpose of showing that during these three years the cost of raising wrecks had exceeded the amounts which had been recovered from the owners of the wrecks for raising them. But that, in addition to the fact that it was only brought before me and not before the registrar, is wholly insufficient to enable me to say that these rates have been fixed upon a solid and reasonable basis. Three years is not enough for the purpose. That is strongly illustrated by the fact that one of these expensive lighters had been in existence over twenty years. There has been no necessity to renew that vessel in twenty years. It may be, as regards the others, that there may be no necessity to renew them for twenty years. The proper estimate would have to be made upon a consideration of the operations over a much more extended period than three years. Therefore it still remains as before the registrar that there has been no statement of the principles upon which the several rates now charged have been arrived at. It is to be observed that this is really a most onerous charge upon the owners of wrecks. Of course it is contrary to my duty to make any adverse remarks upon that which has been done by the Legislature, but I may fairly point out the consequences. It is a very onerous charge indeed when a man has lost his property by the negligence of another, that he should be obliged to bear the whole expense of getting rid of the wreck, which would cause damage to shipowners generally. I must not make that burden greater than it naturally is. I think it would be most unfair that I should send this case back to be reconsidered upon the suggestion that the conservators might have made out a better case if their engineer had been there. I do not feel disposed to send it back to enable the conservators to amend their case, and I proceed therefore to consider whether on the evidence before them the registrar and merchants were right. It is to be remembered that this is a tribunal of experts thoroughly acquainted with such matters.

Having regard to all the circumstances I think these rates are excessive. I do not think that the registrar and merchants have proceeded upon any wrong principle, and, as to the amount allowed, I am not able to say that that which they have deducted is excessive. On the contrary it seems to me that a very considerable and handsome sum has been allowed, and I see no reason for altering their decision. I have already intimated and repeat that the conservators are entitled to make fair and reasonable charges under the several heads I have mentioned, viz., interest on capital invested, ordinary repairs, depreciation fund, and insurance. But these are to be considered in relation to each particular case. For instance, if very expensive apparatus is used, yet if the work could have been done with less expensive apparatus, then the charges should be based on the less expensive rate. In this particular case the apparatus was taken away for a time and used for the purpose of raising other wrecks which occasioned a delay in raising this wreck. That was rightly taken into account by the registrar and merchants in diminishing the amount which has been charged. I should further observe that the losses which may arise to the conservators by not being able to obtain payment from the owners of some wrecks is not to be taken into account, because if it were the effect would be that the owner of a particular wreck would not pay merely for the raising of his own vessel, but would also pay in part for the raising of other vessels. On the whole I come to the conclusion that there is no ground for disturbing the registrar's report, and I therefore affirm it. There remains the question of costs. It was argued before me that in this court there was some rule of proportion which determined the question of costs. The registrar has directed that each party should bear his own costs. I do not think there is any rule on the subject. The question is one of discretion. I was anxious to know on what principle the registrar proceeded in this case, and he has with great candour told me that on reconsideration he does not think each party should bear their own costs. He says so substantial a sum was recovered by the conservators that he does not think, if the matter were again before him, he would come to the conclusion he did. I at once act on his present view, and I think the report must be varied to this extent, that the defendants pay the costs of the conservators. Each party should, I think, pay the costs of the argument before me.

Solicitors for the plaintiffs, *Elmslie, Forsyth,* and *Elmslie.*

Solicitors for the defendants, *Downing* and *Holman.*

Monday, Feb. 20, 1888.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE PATROCLUS. (*a*)

Collision—Overtaking ship—Flare-up light—Binnacle light—Regulations for Preventing Collisions at Sea, art. 11.

Although the exhibition of an ordinary binnacle light may in some circumstances be a compliance with art. 11 *of the Regulations for Preventing Collisions at Sea, such a light, owing to its peculiar construction and form, is not calculated to give the warning required by the article, and ought not to be used for the purpose.*

THIS was a collision action *in rem* instituted by the owners of the sailing ship *Cromartyshire,* against the owners of the steamship *Patroclus,* to recover damages for a collision between the two vessels.

The collision occurred at about 11 p.m. on the 14th Jan. The defendants counter-claimed.

The facts alleged by the plaintiffs were as fol-

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

lows: Shortly before 11 p.m. on the 14th Jan. the *Cromartyshire*, a full-rigged ship of 1461 tons register, was about ten miles N.W. by N. ½ N. of the Longships, whilst in the prosecution of a voyage, in ballast, from Boston in Lincolnshire to Cardiff. The wind was blowing a fresh breeze from the east, and the *Cromartyshire* was heading about N.N.E. and making about two knots an hour. In these circumstances those on board the *Cromartyshire* observed the masthead light of the *Patroclus* about three points on the port quarter, and distant about three miles, and about five minutes after the red light came into view. Thereupon those on the *Cromartyshire* exhibited the binnacle light over the stern, and continued to do so for ten minutes, when, notwithstanding the exhibition of this light and loud hailing, the *Patroclus*, instead of keeping out of the way, with the bluff of her starboard bow struck the port quarter of the *Cromartyshire*, and did her considerable damage.

The facts alleged by the defendants were as follows: Shortly before 11 p.m. on the 14th Jan. the *Patroclus*, a steamship of 1386 tons register, was, whilst on a voyage from London to Liverpool, off the Land's End, heading N.E., and making about ten knots an hour. In these circumstances those on board the *Patroclus* saw within a ship's length, and about half a point on their starboard bow, a bright light, which had not been previously visible, suddenly appear. It was then seen that it was a light being shown from the stern of a ship (which proved to be the *Cromartyshire*) with no other lights visible. Although the helm of the *Patroclus* was instantly hard-a-starboarded, and her engines put full speed astern, she with her starboard bow and stem struck the port quarter of the *Cromartyshire*.

After the collision experiments were tried to test the efficiency of the binnacle light, for the purpose of showing it to be a light capable of giving the warning required by art. 11 of the Regulations for Preventing Collisions at Sea. For this purpose the light was taken out to sea on a tug and held towards the land, when it was found that the light was visible at a distance of three-quarters of a mile. On the part of the defendants it was alleged that, to make the light burn brightly in that position, it would be necessary to keep the glass open in order to admit more air, and that the effect of keeping it closed was to cause the glass to become covered with smoke.

The defendants charged the plaintiffs with breach of art. 11 of the Regulations for Preventing Collisions at Sea, which 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.

Hall, Q.C. (with him *Abel Thomas*) for the plaintiffs.—The *Patroclus* is to blame for a bad look-out and failure to keep out of the way of the *Cromartyshire*. The *Cromartyshire* discharged her duty by keeping her course and showing a white light, as required by art. 11. That article does not prescribe any particular light, and the article is complied with if the light sufficient for the purpose.

J. P. Aspinall (with him Sir *Walter Phillimore*) or the defendants.—The exhibition of a binnacle light is not a compliance with art. 11. Such a light is not suitable for the purpose of warning an overtaking vessel. Moreover, the light was not exhibited to the *Patroclus* until the last moment.

Sir JAMES HANNEN.—I agree with Mr. Hall's contention that art. 11 of the Regulations does not prescribe that any particular light is to be shown by the overtaken to the overtaking vessel. It only requires that the vessel which is being overtaken shall show from her stern to the overtaking vessel a white light or flare-up light. Of course it is obvious that, though the rule does not define what sort of a light it is to be, it must be a sufficient light for the purpose for which the rule was made, viz., to serve as a guide to the overtaking vessel of the position of the overtaken vessel. With regard to the light in this particular case I have already intimated that the lantern is one which is capable of being made to give a light which I should imagine would be sufficient, if all the circumstances favourably concurred. But I may say that the Trinity Brethren are very decidedly of opinion that this is not a proper light for the purpose, and that opinion commends itself to my judgment. In the first place, it is a light made for a totally different purpose. It is expressly made for the purpose of throwing the light down, and not for throwing it forward, which is the object for which it would be used in complying with art. 11. In addition to that it is made to hang up in a particular way, and is not made to be held in the hand except for the purpose of being carried to the place where it is used. If anybody takes it in his hand he will feel that the natural tendency of the lamp is to throw itself forward and downwards. The weight is forward and the tendency therefore would be for it, when in the hands of anyone not alive to the necessity of guarding against that tendency, to point downwards instead of upwards. If so, it may very well be that the light might not be seen at all except for a few yards distance. If, on the other hand, it is held upwards so as to make the light show, then there is a tendency for the chimney to be out of the perpendicular, and the glass to get smoked. It is also to be remembered that at best the scope of light is very small.

In this case I have to start with the very decided opinion of the Trinity Brethren that this is not a proper lamp for the purpose, although I am inclined to think that under favourable circumstances it might be capable of burning brightly. I have to consider whether on the present occasion it was a sufficient light to give the warning required of it. On the part of the *Cromartyshire* it is said that the plaintiffs were exhibiting this light for as long as ten minutes. On the part of the *Patroclus* it is said that this light, such as it was, was not seen until just before the collision. I have to decide whether that was due to a bad look-out, or by reason of its not being shown sooner and being a bad light. In my opinion the defendants' evidence has not been shaken under cross-examination. It is not in dispute that the light of a steamer was seen on the starboard bow of the *Patroclus*, and that she acted for that steamer by porting her helm. It appears that the *Cromartyshire* would be in about the same line as that steamer. That being so,

why should not the light of the *Cromartyshire*, if it were being shown, have been seen by those who were plainly alive to their duties on the *Patroclus*? It is suggested that the attention of those on the *Patroclus* was engaged in watching this steamer; but, on the evidence, I am of opinion that there is nothing to show that the look-out on the *Patroclus* was not sufficient. Mr. Aspinall, on behalf of the defendants, has contended that this light was only shown at a very late stage in the proceedings. There is the evidence of the apprentice from the *Cromartyshire*, who says that after seeing all three lights of the *Patroclus* the mate got the light from the binnacle. It seems to me in the highest degree probable that it was not until the three lights came into view that those on the *Cromartyshire* awoke to a sense of danger, and it was then that the mate took up the first light which he could lay his hands upon, which was the binnacle light. I am strengthened in this conclusion by the fact that there was a proper globe lamp hanging up in the companion, and yet the man, instead of going for it, immediately seized this binnacle lamp, which it would be obvious to anyone would not have been such a good lamp as the globe lantern. I think that fact therefore indicates hurry and confusion on the part of those on the *Cromartyshire*. I come to the conclusion that this light was only exhibited at the last moment, and that it was seen by those on board the *Patroclus* as soon as it could be. I also find that as regards the light, it was inefficient, and that if it should be sufficient as a stern light it would only be so by accident. I therefore hold the *Cromartyshire* alone to blame.

Solicitors for the plaintiffs, *Ingledew*, *Ince*, and *Vachell*, Cardiff.

Solicitors for the defendant, *Thornely* and *Cameron*, Liverpool.

LIVERPOOL ASSIZES.

Wednesday, May 9, 1888.

(Before CHARLES, J.)

THE SAILING SHIP ALLERTON COMPANY LIMITED *v.* FALK.(*a*)

Charter-party—Excepted perils—Lay days—Demurrage.

Where it was agreed by charter-party that the charterer should not be liable for delay in loading caused by neaps and stoppage of navigation and the lay days were exceeded in consequence of the lighters which were bringing the cargo (one of salt) down the rivers Weaver and Mersey to Birkenhead, the place of loading, being delayed by neaps of exceptional lowness at the junction of the Mersey and Weaver, and it was proved that it is the invariable practice for all salt intended for foreign exportation to be brought to Birkenhead from the Weaver by water; that there are no storehouses for salt at Birkenhead; and that it is never kept there to await the arrival of vessels, the charterer was held to be relieved from liability under the above exceptions, upon the ground that they must be taken to apply to bringing the cargo to Birkenhead for loading purposes.

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

Grant *v.* Coverdale (51 *L. T. Rep. N. S.* 472; *L. Rep.* 9 *App. Cas.* 470; 5 *Asp. Mar. Law Cas.* 353) *distinguished.*

THIS was an action by the Sailing Ship Allerton Company Limited against H. E. Falk to recover two days' demurrage of the ship *Allerton*, amounting to 67*l.* 12*s.* By a charter-party, dated the 18th Jan. 1888, it was agreed between the plaintiffs, the owners of the *Allerton*, and Falk that Falk should load the *Allerton* at Birkenhead with a full and complete cargo of salt in ten working days, or pay demurrage for each day beyond the said ten working days at the rate of 4*d.* per ton, the defendant not to be liable for delay in loading caused by the act of God, fogs, neaps, foul weather, stoppage of navigation, and all and every other dangers and accidents of the sea, rivers, and navigation. The defendant detained the ship two days beyond the ten working days, but pleaded that the delay was caused by perils excepted in the charter-party—viz., neaps and stoppage of navigation. The case was tried at the Liverpool Assizes by Charles, J. without a jury, when, in addition to the above, the following facts were proved: All salt shipped at Liverpool or Birkenhead for exportation comes either from Winsford or Northwich. The salt in question came from Winsford, which is situated on the river Weaver, which is a branch of the Mersey. The salt was stored at the defendant's storehouses at Winsford. There are no storehouses for salt at Birkenhead, and salt is never kept there to await the arrival of vessels. It is the invariable practice for salt shipped at Birkenhead or Liverpool to be brought down the Weaver and Mersey in lighters. Birkenhead is connected with Winsford by rail, but the rate for salt is prohibitory from a mercantile point of view. In consequence of neaps of exceptional lowness at the junction of the Weaver with the Mersey, one or more of the lighters was prevented bringing the salt down in sufficient time to complete the loading in ten days.

Henn Collins, Q.C. and *Pickford* for the plaintiffs.

French, Q.C. and *Joseph Walton* for the defendant.

Cur. adv. vult.

May 9.—CHARLES, J.—In this case the owners of the sailing ship *Allerton* seek to recover from the defendant a sum of 67*l.* 12*s.* in respect of two days' detention of the ship *Allerton*, at 4*d.* per ton per day. It is not disputed that the vessel in question was detained two days over and above the time during which she ought to have loaded her cargo. Therefore, if it were not for an exception in the charter-party relied upon by the defendant, the plaintiffs would clearly be entitled to recover this sum of 67*l.* 12*s.* The defendant, however, contends that this exception covers the case, but before dealing with it I will very shortly state what the facts are. The vessel commenced loading on the 11th Feb., and ought to have finished on the 22nd, but, as a matter of fact, did not do so till the 24th. The reason of the delay was this: During the period of loading there were exceptionally low neap tides, the result of which was to delay one or more of the flats in which the cargo, which was one of salt, was being brought down to Birkenhead, where the vessel lay, from Winsford, in Cheshire, where the salt was stored, and so prevent at least one

of the flats reaching Birkenhead in time to load on or before the 22nd Feb. Now the salt, as I have said, was stored by the defendant at Winsford, and his contention is that the exceptions as to loading in the charter-party covered the flat's voyage from Winsford down the river Weaver and into the Mersey, and so exonerated him from all responsibility. Now, the material clauses of the charter-party are these: It is agreed between the owners and Mr. Falk that "the ship shall proceed to such dock and crane in Liverpool or Birkenhead as ordered by the owners"—Birkenhead was selected by the owners—"and there, after being made ready, load in the usual and customary manner a full and complete cargo of salt, to be loaded in ten working days or demurrage to be paid as below," the demurrage being at the rate of 4*d.* per ton register. Then come these exceptions in favour of the shipper: "The act of God, the Queen's enemies, pirates, fire, fogs, floods, neaps, foul weather, stoppage of navigation, strikes of workmen, and accidents to machinery, and all and every other dangers and accidents of the sea, rivers, and navigation always mutually excepted." Those, I think, may be called the shipper's exceptions. The shipowners' exceptions are in some respects the same, and are as follows: "The act of God, the Queen's enemies, loss or damage from fire on board, in hulk or craft, or on shore; collisions; any act, neglect, or default whatsoever of pilots, master, or crew in the navigation of the ship in the ordinary course of the voyage; and all and every the dangers and accidents of the seas and rivers and of navigation of whatever nature or kind."

The question in these circumstances is, does a neap tide, which in fact did amount to a stoppage in navigation, at the place where the river Weaver flows into the Mersey—does a neap occurring there, and not at Birkenhead, exonerate the defendant from responsibility for delay. In considering that question I must look at the terms of the charter and the circumstances of the trade with reference to which the charter was made. The evidence is that the defendant's salt works are at Winsford, in Cheshire, and all the salt that is shipped by him at Liverpool or Birkenhead comes from Winsford. It is also proved that all salt shipped by anybody at Liverpool or Birkenhead for exportation comes either from Winsford or Northwich, a place in the neighbourhood of Winsford, and is brought down the Weaver into the Mersey by lighters to Liverpool or Birkenhead, as the case may be. Without exception, the practice is to bring the salt down the Weaver and the Mersey to Liverpool and Birkenhead from the storage place on the Weaver. It is true that it is physically possible to bring the salt by train, but I may say that to do so would be commercially preposterous. The evidence of the traffic manager of the London and North-Western Railway Company, who, by the way, was a witness called on behalf of the plaintiffs, is this: He says that, whilst it is quite true that salt can be brought by train, it is one of the heaviest of rough products; that over a million tons of it are in the year brought to Liverpool, and that the invariable custom is for salt to come by river. He further said—and this, I think, is a very material circumstance—that there is no storage place for salt at Birkenhead. He added that in the opinion of the salt trade the rate by rail was prohibitive. Of course there are warehouses where salt could be stored, but there are no special provisions for storing it. The state of things, therefore, is, that the charter-party is made with reference to an article of trade which is to be shipped at Birkenhead, and this article is by the invariable practice of the trade brought to Birkenhead by water. In these circumstances it is said that these exceptions are applicable, and that to read them as applying only to neaps or stoppages of navigation in the process of loading at Birkenhead would not be a reasonable construction. It is argued that, although it is perfectly true that the charter-party provides for the loading of salt *simpliciter*, without saying salt from Winsford, from Northwich, or any other place, yet still, in construing its provisions, I must look to what the trade is with reference to which it is made, and that in this case it is a trade with reference to the export of salt from Winsford by a ship loading at Birkenhead. On the other side, it is said that the exception must be construed as applicable only to events which happen during the process of loading, and are not antecedent to the arrival of the cargo at the loading place.

Reliance was placed by Mr. Collins, on behalf of the plaintiffs, on the case of *Grant* v. *Coverdale* (51 L. T. Rep. N. S. 472; L. Rep. 9 App. Cas. 470; 5 Asp. Mar. Law Cas. 353). There the ship was to proceed to East Bute Dock, and was to "load always afloat in the customary manner from the agents of the freighters a full and complete cargo of about 1800 tons of bar or bundle iron. . . . Cargo to be supplied as fast as steamer can receive. . . . 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 or unloading)." The ship arrived at the East Bute Dock and began to load her cargo. A frost then set in, and made a canal which communicated with the dock impassable, so that the remainder of the cargo, which was ready at a wharf on the canal, could not be brought in lighters to the dock. It was there argued that those circumstances were within the exceptions. But the House of Lords held otherwise, and said that the exception "frost" could not be applied to frost which prevented the cargo reaching the place of loading from some other place where it was stored. But the difference between that case and this is, as it seems to me, that in dealing with the facts of that case the House of Lords drew the inference that the cargo was one which might have been supplied from anywhere else besides from the places where in point of fact it was stored. Lord Watson, in giving his judgment, says at p. 478: "The exception which he (the defendant) 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 meaning as there were merchants or manufacturers of iron at Cardiff, who happened to select different localties in order

to store their iron for the purpose of shipment." Lord Selborne, at p. 477, after referring to the case of *Hudson* v. *Ede* (18 L. T. Rep. N. S. 764: L. Rep. 3 Q. B. 412; 3 Mar. Law Cas. O. S. 114), to which I will allude directly, said: "I understand that case as proceeding upon the same principles, but as containing an admission 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 down 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 contemplated that the goods should be loaded from that place in the usual manner unless there was an unavoidable impediment. And 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 cargo not only could be, but actually had been brought up by carts to the East Bute Dock and put on board 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 were to look at the interest of the charterer." Now, Lord Selborne there speaks of "inevitable necessity," and I was very much pressed by Mr. Collins as to these words. He said that this case of *Grant* v. *Coverdale* (*ubi sup.*) governed the present case unless I could say that there was an inevitable necessity that the salt should be brought down the rivers Weaver and Mersey from Winsford. But, on referring to the whole passage, I find that Lord Selborne is contemplating a case where practically, according to known mercantile usage, the only place from which the cargo could be brought to be loaded in such a place as Winsford in the present case is. He says, with reference to *Hudson* v. *Ede* (*ubi sup.*): "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 contemplated that the goods should be loaded from that place in the usual manner unless there was an unavoidable impediment." Now, in this case it seems to me that, according to known mercantile usage, as proved by witnesses on both sides, the only place from which a cargo of salt is brought to be loaded at Liverpool or Birkenhead is from the storehouses on the river Weaver, and that being so, the case of *Hudson* v. *Ede* (*ubi sup.*) applies. In that case the port of loading was Sulina. Thirty running days were to be allowed for loading and unloading, and ten days on demurrage over and above the lay days; detention by ice or quarantine not to be reckoned as laying days. The vessel proceeded to the port of Sulina, on the river Danube. On the seventh day of the lay days, and for a long time afterwards, from Sulina up as far as Galatz (a distance of 110 miles), from which port the grain was to be brought to be put on board the vessel, the river was frozen over, and so blocked with ice as to be impassable for lighters. According to the judgment in that case: "It appears upon the case as stated that Galatz is the nearest place to Sulina of the storing places on the Danube from which grain is brought for shipment there, and that there exists at Sulina no other storehouses or other places for keeping or storing grain, and that grain is never kept at Sulina to await the arrival of a vessel, except sometimes by the Greek and Oriental Steam Navigation Company for their own steamers. In those circumstances, we are of opinion that this was a detention by ice within the meaning of the charter-party. The conveyance by the river between Galatz and the ship at Sulina may be considered as a part of the act of loading, and, as there were no storehouses for grain at Sulina, the case seems to be the same as if the ice lay between the shore from which of necessity the grain must be brought and the vessel in which it was to be loaded, and so that the parties must have contemplated that portion of the river as a part of the waters through which the cargo was to be conveyed between the shore and the ship, and in which detention by ice was to be provided against and excepted in the charter-party. It was well known to persons in the grain trade that grain to be shipped at Sulina is brought down the river from Galatz or other places in lighters, and that such lighters, on their arrival at Sulina, are discharged directly into the ship intended to export the grain; and that when there is ice in the Danube between Galatz and Sulina the navigation in the river by these lighters is often rendered impossible; that this, therefore, although, as it happened, unknown to the plaintiff or his broker, having been well known to persons engaged in the grain trade between ports in the Lower Danube and Sulina, must be taken to have been the basis of the contract, and supports the construction of this exception in the charter-party contended for by the defendant."

Now, apply that case to this one. The vessel in question proceeded to the port of Birkenhead to take in a cargo of salt. After a certain number of lay days had elapsed the river Mersey at its junction with the river Weaver, the river on which the port was where the salt was stored to be put on board the vessel, was obstructed, and became impassable for lighters owing to neaps of exceptional lowness. The facts, as they appear to me in this case, are that Winsford is one of the chief storing places on the river from which salt is brought down for shipment at Birkenhead; that no storehouses or other places for storing or keeping salt exist at Birkenhead; and that salt is never kept at Birkenhead to await the arrival of a vessel. That is simply reading in the judgment in *Hudson* v. *Ede* (*ubi sup.*) with a view to the facts of this case, altering nothing in the legal principles upon which that case was decided, and simply substituting the facts proved before me. Under those circumstances, it seems to me that the conveyance by these lighters down the river to the ship at Birkenhead must be considered part of the act of loading, inasmuch as there was no storehouse for salt at Birkenhead, and the case is really the same as if the obstruction had occurred at Birkenhead itself. Under these circumstances, I think the case of *Hudson* v. *Ede* (*ubi sup.*), and not that of *Grant* v. *Coverdale* (*ubi sup.*) governs the present case, and, for the

reasons I have given, my judgment is for the defendant.

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

Solicitor for the defendant, *Thomas Etty.*

Supreme Court of Judicature.

COURT OF APPEAL

Feb. 11 *and* 13, 1888.

(Before Lord ESHER, M.R., FRY and LOPES, L.JJ.)

LEDUC AND Co. *v.* WARD AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bill of lading — Contract as to voyage — Parol evidence to vary voyage described in bill of lading—Deviation—Loss by excepted perils of the sea—Liability of shipowner.

The contract between the indorsee of a bill of lading and the shipowner is contained in the bill of lading.

A bill of lading stated that goods were shipped upon the steamship A., now lying in the port of F., and bound for D., with liberty to call at any port in any order and to deviate for the purpose of saving life or property, to be delivered at the port of D. to order or assigns, perils of the sea, &c., being excepted.

Held, that this was a contract to carry the goods from F. to D. by the ordinary sea track between those places, calling at any ports that were substantially on the line of that voyage in any order; that the conveying goods from F. to a port considerably out of the course between F. and D. before proceeding to D., was an unauthorised deviation; and that shipowners were liable to indorsees of the bill of lading for a loss occurring through perils of the sea during such deviation, notwithstanding the exception.

THIS was an appeal by the defendants (except Headley) from the judgment of Denman, J., at the trial before him without a jury.

The action was brought by the indorsees of a bill of lading against shipowners for non-delivery of goods. The defence alleged that the loss occurred owing to perils of the sea, which were excepted by the bill of lading. Reply, that the loss occurred during an unauthorised deviation.

The bill of lading in question commenced as follows:

Shipped in apparent good order and condition by Fruman Filiale de ingurischen Landesbank, in and upon the good steamship *Austria*, now lying in the port of Fiume, and bound for Dunkirk, with liberty to call at any ports in any order . . . and to deviate for the purpose of saving life or property 3123 bags of rape seed, being marked and numbered as per margin, and to be delivered in the like good order and condition at the aforesaid port of Dunkirk unto order or assigns, &c.

The *Austria*, which was a general ship, had goods on board for Glasgow, and went there before going to Dunkirk; and during this deviation the plaintiffs' goods were lost by perils of the sea. At the trial evidence was given for the purpose of showing that the shippers knew and assented to the *Austria* going to Glasgow before going to Dunkirk.

(*a*) Reported by ADAM H. BITTLESTON, Esq., Barrister-at-Law.

The learned judge held that the evidence did not prove any agreement on the shippers' part that the ship should proceed *viâ* Glasgow, and doubted whether it was admissible at all. He therefore gave judgment for the plaintiffs.

The defendants appealed.

Gainsford Bruce, Q.C. and *Lawson Walton* (*Finlay*, Q.C. with them) for the defendants.—The bill of lading is not to be construed as if it was a charter-party. A bill of lading is not a contract at all; it is only a receipt for the goods. If it is a contract, it is not a contract as to what the voyage is to be. Supposing it to be the contract as to the voyage, it in terms gives liberty to call at any ports. There is nothing unreasonable in construing that to mean, not any ports in a direct line between Fiume and Dunkirk, but any ports in the course of the adventure. [Lord ESHER, M.R.—You must go to this extent that a ship from London to Liverpool might go across the Pacific.] That would be unreasonable; but it is not unreasonable to provide for such deviation as is necessary for the delivery of the cargo that the vessel has on board. It is reasonable when a man is shipping goods that he should inquire what cargo the ship has on board, where it is bound for, and what the adventure is. If he puts his goods on board a general shid, he must be content to take the course of the adventure. If he desires to make particular stipulations as to the voyage, he can take a smaller ship and put the stipulations in the charter-party. The bill of lading in this case is not a contract that the goods shall be conveyed in a direct course from Fiume to Dunkirk. If the parties to a bill of lading contract at all, they contract simply as to the carriage of the goods, not as to the course of the voyage. [LOPES, L.J.—In *The Chartered Mercantile Bank of India* v. *The Netherlands India Steam Navigation Company* (46 L. T. Rep. N. S. 530; 5 Asp. Mar. Law Cas. 65; 10 Q. B. Div. 521) the present Master of the Rolls says: "The contract, no doubt, is a contract of carriage, but the contract has been by the consent of the parties reduced into the form of a bill of lading, and, therefore, the whole of the contract is contained in that bill of lading, and no terms of the contract outside of the bill of lading, can be looked at."] The evidence shows that the true contract in this case between the shipper and ship-owner was, that the ship should go to Glasgow before going to Dunkirk; and the bill of lading is not inconsistent with such a contract. They cited

Lowry v. *Russell*, 8 Pickering (Amer.), 360;
Crooks v. *Allan*, 41 L. T. Rep. N. S. 800; 4 Asp. Mar. Law Cas. 216; 5 Q. B. Div. 38;
Sewell v. *Burdick*, 52 L. T. Rep. N. S. 445; 5 Asp. Mar. Law Cas. 376; 10 App. Cas. 74;
Bragg v. *Anderson*, 4 Taunt. 229;
Ashley v. *Pratt*, 16 M. & W. 471.

Sir *Charles Russell*, Q.C. and *Gorell Barnes*, Q.C., for the plaintiffs.—The contract of carriage is contained in this bill of lading, and it is to carry from Fiume to Dunkirk. Liberty to call at any port must mean ports within that voyage. The argument on the other side, founded upon this being a general ship, is completely answered by the case of *Davis* v. *Garrett* (6 Bing. 716). [Lord ESHER, M.R.—We agree with what was said, but not acted upon, by Denman, J. at the trial, that none of the evidence for the defendants

was admissible. We think that the bill of lading contained the terms of the contract between the parties, and that one of those terms is that the voyage was to be from Fiume to Dunkirk by the usual and ordinary course.] They also cited

The Delaware, 14 Wallace (Amer.), 579;
May v. *Badcock*, 4 Ohio (Amer.), 334.

Finlay, Q.C. in reply.

Lord Esher, M.R.—In this case the plaintiffs were owners of goods shipped on board the defendants' ship; and they bring an action against the defendants, because they say that they were parties to a bill of lading, and put their goods on board the defendants' ship on the terms of the bill of lading, and were entitled by those terms to have their goods delivered to them at Dunkirk. The answer of the shipowners is, that the goods were lost by perils of the sea. The answer to that is that the goods were not lost by any perils of the sea that the shipowners are entitled to rely on; that they were lost while the shipowners were committing a breach of their contract; that they were lost in a place to which the exception of perils of the sea did not apply; that the shipowners are therefore liable. The case was tried before my brother Denman. It is clear that the plaintiffs were assignees of the bill of lading, and the persons to whom the contracts had passed strictly within the terms of the Bills of Lading Act. That Act passes the contract, and puts the assignee in a better position than the original shipper in some respects. The question in this case is, what is the contract contained in the bill of lading? It was suggested that a bill of lading is in all circumstances nothing but a receipt for the goods, and contains no contract, except that the goods have been received by the shipowners and are to be delivered by them at the place named. This is an instrument which has received one construction from the mercantile world and the courts for more than a hundred years. When a bill of lading is signed and given, where there is a charter-party and in contemplation of a charter-party, the bill of lading is only a receipt for the goods; because all the terms of the contract of carriage, as between the shipowner and the charterer, are contained in the charter-party, and the bill of lading is only given to enable the charterer to deal with the goods during transmission. But even where there is a charter-party, although the bill of lading is only a receipt as between the charterer and the shipowner, it is more than a receipt as between the indorsee and the shipowner; it contains the contract between them.

Then let us consider what a bill of lading is when it is to be regarded as a receipt for goods. It is not then a contract at all, nor is it conclusive as a receipt for the goods; treating it as a receipt, it can be contradicted by evidence. The question whether a bill of lading can be anything more than a receipt for goods depends upon whether the captain has received the goods, because the captain has no authority from the owner to make a contract of carriage except for goods put on board. If the bill of lading is wrong as to the goods put on board, its effect is destroyed for any other purpose. But if the goods have been received on board, the bill of lading is more than a receipt, it is a contract of carriage. The captain has authority not only to make a contract of carriage, but to reduce it into writing. The bill of lading is, between him and the shipper, the contract for the carriage of the goods reduced into writing. Whenever a contract is reduced into writing, that writing is the only evidence of the contract. It can only be varied by showing a usage so general that it must be taken to be imported into the contract. That is the only evidence that can be given outside the written contract. To show that the parties have agreed to some other terms outside the contract is to seek to vary the terms of a written contract, and that is not allowed with regard to a bill of lading any more than it is with regard to any other contract which has been reduced into writing as the evidence of the contract. It is startling to be told that this is new law. The law was certainly so stated by Blackburn, J., in *Fraser* v. *Telegraph Construction Company* (29 L. T. Rep. N. S. 373; 1 Asp. Mar. Law Cas. 421; L. Rep. 7 Q. B. 566). He said: "The bill of lading, notwithstanding some case that Mr. Cohen referred to in the Common Pleas, must be taken to be the contract under which goods are shipped, and until I am told different by a court of error, I shall so hold." In the case of *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (*ubi sup.*), I expressed the same view of the nature of a bill of lading as I had always expressed, and as I am now expressing. In the case of *Glyn, Mills, and Co.* v. *East and West India Dock Company* (47 L. T. Rep. N. S. 309; 4 Asp. Mar. Law Cas 580; 7 App. Cas. 591) Lord Selborne said in the House of Lords: "Everyone claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed. The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner." To say, therefore, except in the case I have before stated of its being given to a charterer who has also a charter-party, that a bill of lading is only a receipt for the goods is to maintain a proposition which cannot be supported. It seems to me impossible to say that the bill of lading does not contain the terms of the contract of carriage.

Then the next question is whether, assuming the bill of lading to contain the contract of carriage, it is part of that contract that the goods shall be carried on the particular voyage described. Now the bill of lading in the present case is in the ordinary terms that have been used in bills of lading since they were first established, and one might therefore expect that they had by this time received some construction. It is argued on the part of the defendants that the course of the voyage is no part of the contract; but it is not said why, if that is so, the voyage is put into the bill of lading at all. Consider the effect upon business, if that contention was right. Goods are bought by some one at the place where they are to send to some other place. The purchaser buys them at one place for the purpose of selling them at another. He does not want to buy things in the air. The goods are to be sold again at some particular market. If the purchaser does not know at all when the goods will be delivered, he will not buy them, because he cannot judge as

to whether he can make a profit by them or carry out a contract he may have entered into. Business could not be carried on upon those terms. Again, with regard to the insurance of the goods, what underwriters would insure a voyage, nominally from one port to another, but which might be all round the world? It would be impossible ever to insure under such circumstances. To suppose, therefore, that the voyage is no part of the contract, is to disregard the whole course of mercantile business. The voyage is a very important part of the contract of carriage. The contract is not simply to carry from one place to another, but to carry from the one place to the other by the ordinary and usual course. That is one part, and a very important part of the contract of carriage. If the ship is to go to other places besides the port of destination, that is provided for in the bill of lading, and that is put into the bill of lading as part of the contract of carriage. The bill of lading states that the goods are shipped on a named ship lying in the port of shipment and bound for the port of destination. That being the universal mode of describing the voyage in the bill of lading, what is the construction that has always been put on that form of words? That form has received one universal construction, both from merchants and courts of law. That is the ordinary description of a voyage from one point to another upon the ordinary sea track from the one place to the other on such a voyage. That course may vary with the winds, or according to circumstances; the ordinary sea track is not a direct line that is always the same. It is the ordinary track of the voyage according to a reasonable construction of the term. If that is the meaning of the bill of lading, how can the exception apply to the facts of the present case? The perils of a voyage from Rotterdam to Marseilles are not the same perils as the perils of a voyage from Liverpool to New York. This is a voyage from Fiume to Dunkirk by the ordinary sea track "with liberty to call at any ports in any order." It is argued that that means that there is liberty to call at any port in the world. Here, again, it is a question of what is the mercantile meaning of the words used. The meaning obviously is, liberty to call at any ports on the voyage. The ship may call at those ports for any purpose; in that respect she is not confined at all. Moreover, the meaning must be that she is at liberty, not only to call, but to stop for a time; otherwise it would be useless to allow her to call. Without such a provision, to stop at a port, even though the ship is in her course, would be a deviation within the meaning of a policy of insurance. Then, if a ship is allowed simply to call at any ports, that has been invariably held to mean in their geographical order: so a further power is given by adding the words "in any order." Those words give the power of going back to any port that has been passed. Therefore, the persons to whom the shipper gave this bill of lading would know that the ship was to go from Fiume to Dunkirk, calling at any ports substantially on the line of that voyage in any order. To go to any port beyond that line was to commit a deviation and a breach of contract. The defendants' ship went to Glasgow; a port not on the course of the voyage from Fiume to Dunkirk. Thereupon the exception in the bill of lading did not apply to relieve them. They have failed to deliver the goods at Dunkirk, and are not within any exception which excuses that failure. The principles I have stated seem to me to be plain and business-like. It is said that there is an American case in which it was held that, where the voyage is described in terms in the bill of lading, the shipowner may be allowed to show that the person to whom he gave the bill of lading knew that the ship was going on another voyage. If that was said at all, which I doubt, it was said in a case where it was not wanted for the decision, as there appears to have been proof of a custom to deviate. I am inclined to think that that case has been misreported. There are two other American cases in which the principles are laid down exactly as they have always been upon this subject in England. But I rest my judgment on what I think to be clear and recognised authority in the English courts.

FRY, L.J.—In my view a very large portion of the argument which we have heard in this case is concluded by the provisions of the Bills of Lading Act. The plaintiffs entered into a contract with merchants abroad for the purchase of goods to be shipped from a foreign port. The substance of that contract was, that the vendors were to deliver shipping documents to the purchasers, and that the purchasers were to pay the price in exchange for the documents. The Bills of Lading Act provides (sect. 1), that "Every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon, or by reason of the 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." Those words appear to me to be applicable to the present case. The plaintiffs are indorsees of a bill of lading to whom the property in the goods therein mentioned has passed upon or by reason of the indorsement. The Legislature have declared that there is a contract in the bill of lading, and that the benefit of that contract is vested in the indorsees. It seems to me to be impossible in the face of that section for the court to say that a bill of lading contains no contract. The Master of the Rolls has referred to the cases of *Fraser* v. *Telegraph Construction Company* (*ubi sup.*), *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company* (*ubi sup.*) and the language used by Lord Selborne in *Glyn, Mills, and Co.* v. *East and West India Dock Company* (*ubi sup.*). Lord Selborne says: "Everyone claiming as assignee under a bill of lading must be bound by its terms, and by the contract between the shipper of the goods and the shipowner therein expressed. The primary office and purpose of a bill of lading, although by mercantile law and usage it is a symbol of the right of property in the goods, is to express the terms of the contract between the shipper and the shipowner." The contract therefore is to be sought for in the terms of the bill of lading itself, and I cannot bring myself to think that such an important term as the description of the voyage is no part of the contract.

The question, therefore, simply becomes one of the construction of this contract. The contract says: "Shipped in apparent good order and condition on the steamship *Austria*, now lying in the

port of Fiume and bound for Dunkirk, with liberty to call at any ports in any order, and to deviate for the purpose of saving life or property." It appears to me that the only right of deviation is that described in those words; a right to deviate for the purpose of calling at any ports in any order, and for the purpose of saving life or property. Then, is Glasgow, which is hundreds of miles out of the course from Fiume to Dunkirk, a port within that provision? The answer is that which the Master of Rolls has given—viz., that it is not, and that the ports referred to are ports on the course of the voyage. But it is said that it has been laid down in an American case that notice to the shipper of the route by which the ship is going to sail will rebut the implied term in the contract that it shall proceed to the port of destination by the direct route. Now, in the first place, it is to be observed that this was a mere *obiter dictum* not necessary for the decision of the case. Apart from that, however, it is impossible to say that any effect can be given to a notice to the shipper of something affecting the contract, which contract can by statute be passed on to another person. The power to deviate contained in the written contract repels the possibility of the existence of any other power to deviate. And, lastly, I may say that I agree with the learned judge who tried the case, that the evidence falls short of showing that there was any understanding between the shippers and the shipowners that the vessel was to go to Glasgow before going to Dunkirk. I do not think it necessary to rely upon that, because, as I have said, where a statute has made the benefit of a contract assignable to a third party, it is inconsistent with the policy of the statute to allow anything which took place between the parties to the contract, but which is not embodied in it, to affect the contract. For these reasons I think the appeal should be dismissed.

Lopes, L.J.—I can add nothing to the exhaustive judgment of the Master of the Rolls, except to say that I think this bill of lading is clear and distinct, not only as to the place to which the goods were to be conveyed, but also as to the voyage; and I therefore think that the evidence which was given was inadmissible. The judgment of Denman, J. was right, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Stokes, Saunders,* and *Stokes.*

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

Monday, March 19, 1888.

(Before Lord Esher, M.R., Fry and Lopes, L.JJ.)

The Cella. (*a*)

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

Necessaries—Ship company—Liquidation—Action in rem—Admiralty Court Act 1861 (24 *Vict. c.* 10), *ss.* 4, 35.

The right to sue in rem under the Admiralty Court Act 1861, *where there is no maritime lien, gives the plaintiff a charge upon the res from the date of the arrest, and from that time he is a secured creditor in respect of his claim.*

This was an appeal from a decision of Sir James Hannen in an action instituted under sect. 4 of the Admiralty Court Act 1861.

In Feb. 1885 the British steamship *Cella*, the property of the Cella Steamship Company Limited, having put into Halifax, Nova Scotia, in a damaged condition, the plaintiff W. Roche effected certain repairs and supplied equipments to the *Cella*. The plaintiff's account amounted to 963*l.*, and for that sum and interest the master of the *Cella* drew a bill dated 14th Feb. 1885 upon the Cella Steamship Company in favour of the plaintiff. The bill was accepted but was dishonoured at maturity.

The plaintiff thereupon sued the company in the Queen's Bench Division upon the bill, and on 13th Aug. 1885 judgment was signed against the Company for the bill and interest amounting together to 974*l.* 11*s.* 2*d.* and cost. The company were unable to satisfy this judgment, and on the 8th Aug. the company was ordered to be wound-up.

In May 1885 the plaintiff commenced an action in the Queen's Bench Division against the master of the *Cella* as drawer of the bill, but proceedings therein were suspended in consequence of the master having determined to institute an action *in rem* in the Admiralty Division for his wages and disbursements, and having arranged with the plaintiff to include his account amongst his claim for disbursements or liabilities. Accordingly on the 28th May 1885 the master instituted his action in the Admiralty Division and the ship was arrested.

On the 8th June 1885 the plaintiff brought the present action *in rem* against the *Cella* to recover his claim for repairs and equipment. On the 5th June, James Marke Wood, the mortgagee of the *Cella*, intervened in the master's action and in the plaintiff's action, and a few days later the master's action was abandoned in consequence of Wood paying him 120*l.* in full discharge of his claim, and giving him an indemnity against any claim by the plaintiff. The plaintiff thereupon proceeded with his action in the Queen's Bench Division against the master, and on the 28th Oct. 1885 obtained a judgment for 984*l.* 17*s.* 1*d.* with costs. On this judgment execution was issued but only 75*l.* 12*s.* 2*d.* was recovered by the plaintiff.

The company had not appeared in the plaintiff's action, and in June 1885 an agreement was come to between the plaintiff and the mortgagee as to the release of the ship, which was embodied in an order of court, dated the 29th June 1885. The order of court was as follows:—"Upon agreement of counsel on both sides, and James Marke Wood, the intervener, having by counsel undertaken to pay the plaintiff whatever plaintiff could if arrest continued recover from the ship after satisfying all prior incumbrances, it is ordered that the ship *Cella* be forthwith released."

The mortgagee thereupon entered into possession of the ship and ultimately sold her.

After some lapse of time the plaintiff, having reason to believe that the mortgagee had realised by the sale of the ship more than was due to him under his mortgage, applied to the court for an

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

order that the mortgagee should account for the proceeds of sale. After considerable opposition by the mortgagee, based upon the ground that the plaintiff had not proved his claim, the judge directed the mortgagee to file an account of the sale, and to refer such account to the registrar to report thereon. Some time after this an account was filed purporting to show that the mortgagee had received less than the amount due under his mortgage, but at the reference to the registrar and merchants it appeared that the amount shown to have been received by such account was the amount of cash received, and that the mortgagee had omitted to give credit for a bill which he had taken from the purchaser in addition to such cash, such bill having been subsequently dishonoured.

In Nov. 1887 the registrar reported that the ship at the time the mortgagee took possession of her was of such a value that after satisfying all prior incumbrances the mortgagee had in hand a balance of 932*l.* 0*s.* 2*d.*, and that for this sum he must give credit. On the application of the plaintiff the court confirmed this report, and by order dated the 20th Jan. 1888 directed the 932*l.* 0*s.* 2*d.* to be paid into court.

This having been done the judge ordered the plaintiff's claim to be referred to the registrar without pleading for assessment.

Meanwhile the official liquidator of the company had appeared in the action on the 17th Dec. 1887, and unsuccessfully applied for a stay of proceedings. The liquidator then applied to Chitty, J., who had control of the liquidation proceedings, to transfer the action to the Chancery Division, but this application was dismissed with costs.

The plaintiff's claim came before the registrar for assessment on the 8th Feb. 1888, when it was found that he was entitled to the sum of 819*l.* 8*s.* 10*d.* and interest. The report stated that in the opinion of the registrar the plaintiff was entitled to costs. The intervener attended this reference, but the official liquidator declined to be present after due notice given him.

Feb. 21.—The plaintiff now moved to confirm the registrar's report finding him entitled to 819*l.* 8*s.* 10*d.* and interest, and to have the money in court paid out to him.

Sir *Walter Phillimore* (with him *J. P. Aspinall*), for the plaintiff, in support of the motion.

Hall, Q.C. (with him *Stokes*) for the official liquidator. — The liquidator is entitled to the money in court, and not the plaintiff. The plaintiff has already recovered judgment in the Queen's Bench Division in respect of the same debt, and cannot therefore bring this second action:

Cambefort and Co. v. *Chapman*, 57 L. T. Rep. N S. 625; 19 Q. B. Div. 229; 56 L. J. 639, Q. B.

The proceeds of the sale of the ship are the assets of the company. There is no maritime lien in respect of the plaintiff's claim:

The Two Ellens, 26 L. T. Rep. N. S. 1; L. Rep. 4 P. C. 161; 1 Asp. Mar. Law Cas. 208;
The Heinrich Bjorn, 6 Asp. Mar. Law Cas. 1; 5 Asp. Mar. Law Cas. 391; 52 L. T. Rep. N. S. 560; 10 P. D. 44; 11 App. Cas. 270.

He therefore obtains no right against the money in court until judgment, and if so his claim is postponed to that of the liquidator. By sect. 87 of the Companies Act 1862, after an order has been made for winding-up a company no action shall be commenced or proceeded with against the company except by leave of the Court of Chancery. No such leave has been obtained in this case, and therefore the plaintiff's proceedings are irregular. It is also to be observed that wherever a plaintiff has been allowed to sue in this court after he has obtained judgment *in personam* elsewhere a maritime lien has existed in respect of his claim.

Sir *Walter Phillimore* (with him *J. P. Aspinall*), for the plaintiff, *contra*.—The unsatisfied judgment in the Queen's Bench Division is no bar to the present proceeding *in rem*:

The Bengal, Swa. 468;
The Orient, L. Rep. 3 P. C. 696; 1 Asp. Mar. Law Cas. 108.

The rule of law acted upon in *Cambefort* v. *Chapman* (*ubi sup.*) and *Rendall* v. *Hamilton* (41 L. T. Rep. N. S. 418; 4 App. Cas. 504) only applies to cases of co-contractors. It is also contended that as this is an action *in rem* the plaintiff from the arrest of the ship becomes a secured creditor in respect of his claim, and the proceeding *in rem* gives him a right to the proceeds as against the owner. And inasmuch as the rights of the liquidator are merely the rights of the company, the plaintiff is clearly entitled to priority:

The Two Ellens (*ubi sup.*);
The Heinrich Bjorn (*ubi sup.*);
The Pieve Superiore, 2 Asp. Mar. Law Cas. 319; L. Rep. 5 P. C. 490; 30 L. T. Rep. N. S. 887;
Re Rio Grande Do Sul Steamship Company, 3 Asp. Mar. Law Cas. 424; 36 L. T. Rep. N. S. 603; 5 Ch. Div. 282.

The Companies Act, s. 87, has no application, as these proceedings were begun before an order for winding-up was made.

Myburgh, Q.C. and *Roscoe* for the mortgagee, contended that Wood, the mortgagee, ought not to pay the costs as recommended by the report.

Cur. adv. vult.

March 13.—Sir James Hannen.—This case arises out of a claim for repairs and necessaries supplied by the plaintiff at Halifax, Nova Scotia, to the ship *Cella*, as long ago as Jan. 1885. The master of the ship gave a bill for the amount of the claim for 963*l.* upon the Cella Company, the owners, which was accepted by them, but dishonoured. An action was brought on this bill against the owners, and judgment was recovered on the 13th Aug. 1885, for 974*l.* 11*s.* 2*d.* and costs. Nothing has been paid on this judgment. An action was afterwards brought against the master as drawer of the bill, and judgment was obtained in Oct. 1885 for 984*l.* 17*s.* 1*d.* with costs. On this judgment 75*l.* 12*s.* 2*d.* only was recovered. On the 8th June 1885, while the ship was under arrest in an action by the master for wages and disbursements, the plaintiff commenced an action under sect. 4 of the Admiralty Court Act of 1861. Mr. Wood, the mortgagee of the ship, intervened in this action on the 15th June, and soon after the following agreement was come to, and was embodied in an Order of Court: "Upon agreement of counsel on both sides, and James Marke Wood, the intervener, having by counsel undertaken to pay the plaintiff whatever plaintiff could, if arrest continued, recover from the ship, after satisfying all prior incumbrances, it is ordered that the ship *Cella* be forthwith released."

The ship was accordingly released. Wood, the mortgagee, thus became liable on his undertaking, and if the ship had been totally lost the next day that undertaking would still have been binding. It is not necessary for the present purposes to follow the mortgagee in his subsequent dealings with the ship, which are fully set forth in the registrar's report of the 21st Dec. 1887. But upon an order, or rather repeated orders, of this court, the mortgagee at length filed his accounts which were referred to the registrar, upon which it was found that after giving credit for all prior claims and incumbrances, including his mortgage and interest, he had in his hands the sum of 937*l.* 0*s.* 2*d.*, the balance of the value of the ship as ascertained by the registrar, at the time when she was released to the mortgagee in pursuance of his undertaking, and I ordered him to pay this amount into court pending an inquiry as to the exact amount of the plaintiff's claim. This was done, and the plaintiff's claim has been ascertained to amount to 819*l.* 8*s.* 10*d.*, and I find that sum with interest thereon as due from the defendant Wood to the plaintiff upon his undertaking. Upon application that this sum be paid out of court to the plaintiff, the liquidator of the Cella Company intervened and claimed to be entitled to the whole fund in court. It appears that the Cella Company was ordered to be wound-up on the 8th Aug. 1885, two months after the vessel had been released by the plaintiff, and a liquidator was appointed in Oct. 1885. I am of opinion that the liquidator is not entitled to oppose the payment of the plaintiff's claim out of the money paid into court by the defendant Wood. That payment, so far as it is applicable to the discharge of the plaintiff's claim, was made in fulfilment of Wood's undertaking, with which neither the liquidator nor the insolvent company had anything to do. At the time that undertaking was given, the plaintiff had a lien on the ship by virtue of the proceedings he had instituted against it. It was not indeed a maritime lien, which arises at the moment the claim comes into existence, but it was a lien accruing on the commencement of the action *in rem*. This distinction appears to me to be fully recognised in the judgment in the cases of *The Two Ellens* (4 P. C. App. 168), *The Pieve Superiore* (5 P. C. 491), and *The Heinrich Bjorn* (10 Prob. Div. 62). The rights of the plaintiff as against Wood must be determined by the rights which the plaintiff had against the ship at the time she was released, and the subsequent history of the ship and of the owners is irrelevant for the purposes of this inquiry. It was further contended for the liquidator that the judgments recovered against the company and the master on the actions on the bill of exchange precluded the present claim. But if this were an action against the ship an unsatisfied judgment *in personam* is no bar to proceedings *in rem*: (*The Bengal*, Sw. 468.) But the order which I am asked to make is not in an action against the ship or against the company, but against Wood. The same answer applies to the argument that no action can be brought against this company without leave of the court. I order, therefore, that the amount of the plaintiff's claim, with interest, be paid out to him as prayed; and I condemn the defendant Wood in the costs. I also condemn the liquidator in the costs occasioned by his intervention.

H. Stokes.—I am instructed to ask your Lordships for a stay of execution.

The President.—No, I think not. I think the plaintiff has been most shamefully ill-treated, and it really is a scandal to the administration of justice that he should have been kept out of his money so long. You will get no assistance from me.

March 19.—The official liquidator and mortgagee appealed from this decision.

Stokes, with him *Barnes*, Q.C., in support of the appeal.—The plaintiff's proceedings are irregular by reason of his non-compliance with sect. 87 of the Companies Act 1862. A mere proceding *in rem* apart from a maritime lien does not make a plaintiff a secured creditor till after he has obtained judgment. No case has decided that, although there may be *obiter dicta* which at first sight support the plaintiff's contention:

The Two Ellens (*ubi sup.*);
The Pieve Superiore (*ubi sup.*);
The Heinrich Bjorn (*ubi sup.*).

The right to sue *in rem* is only a question of procedure and does not affect the rights of the parties. This was expressly laid down by this court and the House of Lords in *The Heinrich Bjorn* (*ubi sup.*). If so, the arrest which is merely for the purpose of founding jurisdiction gives the plaintiff no better rights than he would have in an action *in personam*.

J. P. Aspinall for the plaintiff, *contra*.—The practice of the Admiralty Court in a proceeding *in rem* has always been to hold the *res* as security for the plaintiff's claim. The warrant of arrest is only issued upon the filing of an affidavit to the effect that the plaintiff has a good cause of action and is therefore in effect an order of the court for the arrest of the ship. It has been decided by this court that where money is paid into court to abide the event of the action, such money is held as security for the plaintiff's claim, even as against the trustee in bankruptcy:

Ex parte Barber; *Re Keyworth*, 30 L. T. Rep. N. S. 620; L. Rep. 9 Ch. 379;
Ex parte Bonchard; *Re Moojen*, 41 L. T. Rep. N. S. 363; 12 Ch. Div. 26.

[He was then stopped.]

Stokes in reply.

Lord Esher, M.R.—It seems to me that this case is decided by authority. The question is, what is the construction and effect of the Admiralty Court Act 1861? The facts are that repairs were done to this ship by the plaintiff, and that when she came within the jurisdiction she was seized by the Admiralty Court. After her arrest and before judgment the company owning her went into liquidation, and we have now to determine whether the plaintiff by virtue of his judgment is entitled to have the proceeds of the ship paid out to him. It is true that in respect of these repairs there is no maritime lien, according to the decisions which have somewhat strictly, in my opinion, construed the statutes on this subject. But the Admiralty Division nevertheless has jurisdiction over such a claim as this, and by sect. 35 of the Admiralty Court Act 1861 that jurisdiction may be exercised by proceedings *in rem*, as was done in this case. Now a maritime lien differs from a common law lien in this, that the common law lien does not attach until the

person claiming the lien has actual possession, whereas the Admiralty Court gives a claimant the benefit of a maritime lien, although the ship is not in his possession. As regards a maritime lien, the Admiralty Court and now the Admiralty Division of the High Court enforces it by seizing the ship; and it does so in order to enable the person who alleges he has a right against the ship to realise that right. How is this statutory jurisdiction to be construed? It is to be exercised by a proceeding *in rem*, and it gives the power to the Admiralty Division, upon the production of a proper affidavit, to issue a warrant of arrest, by virtue of which the marshal seizes the ship and the court adjudicates upon it. The commencement of the action and the taking into possession by the Admiralty Court are practically coincident. The warrant is served by the marshal nailing it on the mast. What is the ship taken possesion of for? In order that she may be sold, and the plaintiff's rights satisfied out of the proceeds. Those rights must exist before the ship is seized, for the court adjudicates upon the ship upon the ground that it had jurisdiction to seize her and realise her for the plaintiff on acccunt of something which happened before the seizure, which in this case was repairing her. She is in fact seized by the court in order that out of her and by her the plaintiff may get his rights. Even apart from the cases which have been cited by Mr. Aspinall, I should have thought from what I have said that whatever the judgment be it must take effect from the time of the writ. The function of the judge is to enforce the writ and to determine the rights of the parties at the time the writ was served. That is so it seems to me in every action. But, of course, in every action bankruptcy and I know not what may intervene, so that when judgment is given it cannot be effectually carried out. But in the case of the money being in court or the *res* under arrest, the court can give effect to its judgment as if it had been delivered the moment after it got possession of the *res*. It seems to me to be contrary to the principles of these cases that the rights of the parties are to depend not upon an act of theirs, but upon the other business that the court has to do, which may in consequence delay the judgment. That would be rank injustice, and therefore I hold that the judgment in regard to a thing or money in the hands of the court must be taken to have been delivered the moment the thing or the money came into the possession of the court.

The two cases to which we have been referred are very strong on this point. There are also the Admiralty cases of *The Two Ellens* (*ubi sup.*), *The Pieve Superiore* (*ubi sup.*), and *The Heinrich Bjorn* (*ubi sup.*), which are undoubtedly based upon the same rule as the above two cases, and which show that though there is no maritime lien, yet the moment the arrest takes place the ship is held by the court as security for whatever may be adjudged to be due to the plaintiff. Further, it is to be remembered that in the Admiralty Division in an action *in rem* the effect of the judgment is greater than in any other division in which money is paid into court. In the latter the judgment is only between the parties, whereas in the other the judgment is between the parties and binds all the world and cannot be disputed. I am therefore of opinion that according to the true meaning of the statute, and the true meaning and effect of arrest, that from the moment of arrest the ship is a security for the judgment of the court, and that nothing happening after the ship has come into the hands of the court can have any effect upon the judgment of the court. I think, therefore, that this appeal must be dismissed.

Fry, L.J.—I am of the same opinion. We have to inquire what are the rights of the parties under the Admiralty Court Act 1861. It appears to me that Dr. Lushington in *The Volant* (1 W. Rob. 383) explained the principle upon which the court proceeds when he said that "an arrest offers the greatest security for obtaining substantial justice in obtaining a security for prompt and immediate payment." The arrest enables the court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment. That is Dr. Lushington's decision and I think it is a right one. When the Legislature came to deal with the matter in 1861 there is no sign of dissent from the explanation previously given by Dr. Lushington. Recent decisions are also in accordance with his view. The cases of *The Two Ellens* (*ubi sup.*), *The Pieve Superiore* (*ubi sup.*) and *The Heinrich Bjorn* (*ubi sup.*) are decisions which are accurate, according to Dr. Lushington's judgment, but inaccurate if the appellant's contention is correct. It is also clear that the decision of the President in this case is in accordance with the decisions of other courts. Lastly, it is in conformity with what has been the uniform practice of the Admiralty Court, viz., that the effect of the arrest is to provide security for the plaintiff for the sum which he claims.

Lopes, L.J.—From the moment of the arrest the ship is held by the court to abide the result of the action and the rights of the parties must be determined by the state of things at the time of the institution of the action. The two cases cited by Mr. Aspinall appear to me to be very analogous to this case, and they and this are in entire accord with *The Two Ellens* (*ubi sup.*) and other cases that have been cited.

Solicitors for the plaintiff, *Botterell* and *Roche*.

Solicitors for the mortgagee, *Wynne, Holme*, and *Wynne*.

Solicitors for the liquidator, *Stokes, Saunders*, and *Stokes*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

March 1, 6, *and* 21, 1888.

(Before Stirling, J.)

Brooking *v.* Maudslay. (*a*)

Marine insurance—Policy—Insurance on freight—Unseaworthiness of ship—"Innocent shippers"—Action by underwriters to restrain proceedings on policy.

The owner of the steamship E. agreed with the defendants to carry certain machinery by that ship from L. to P. The E. made one journey, carrying part of the machinery safely, but whilst carrying the remainder she was lost with all on

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

board. An inquiry took place before the Wreck Commissioner, who found that the E. was sent to sea in an unseaworthy condition and that her owner was alone responsible for this. The plaintiff and others who had underwritten a policy of insurance on the machinery carried on the second voyage disputed their liability to pay, and brought an action for a declaration that the policy was void, and that it might be delivered up to be cancelled, or alternatively that it was not binding on them, and for an injunction restraining the defendants from taking any action on it. The defendants denied that they had intended to deal with the policy as a valid existing policy, or that they had threatened legal proceedings; but they alleged that, according to the universal practice of Lloyd's, underwriters, where a ship is unseaworthy, pay "innocent shippers."

Held, that a court of equity will not restrain parties to a contract from bringing an action on the contract if the other parties to the contract would have a good legal defence to an action brought, and that the practice at Lloyd's of paying innocent shippers, even if a moral obligation, is not a legal obligation, and could not be raised and tried in a court of law, and that consequently the plaintiffs' action must be dismissed with costs.

THE defendants are engineers, carrying on business at Lambeth. In Jan. 1884, they were desirous of procuring certain machinery, which they had made for one of Her Majesty's ships, to be conveyed from London to Portsmouth; and for this purpose they entered into a charter-party, dated the 8th Jan. 1884, with one Scott, the owner of the steamship *Elephant*, whereby it was agreed that the machinery in question, which weighed about 867 tons, should be carried by that vessel from Millwall Dock to Portsmouth Dockyard, in consideration of a lump sum, as freight. The machinery was to be loaded, stowed, and discharged by the defendants, and was to be carried in two voyages if the vessel could take all, the owner having the option of making a third voyage or supplying another vessel to take the balance, if any.

The vessel, loaded with 422 tons of the machinery, left Millwall Dock on the 28th of Jan. 1884, and reach Portsmouth in safety on the 3rd Feb.

On the 14th of the same month she again set sail from Millwall Dock, carrying the rest of the machinery, but on this occasion was lost with all hands on board.

On the 25th Jan. the defendants, through their insurance broker, procured an insurance to be effected on the machinery which constituted the cargo on the second voyage to the amount of 30,000*l.*, and on the 13th Feb. the amount was increased to 40,000*l.*; and a slip was initialled by the underwriters on these days. The policy in question was dated the 15th Feb., and included the whole 40,000*l.* and was made out in accorddance with the slip. The risk included "risk of barges, lighters, &c., from assured premises, and while waiting shipment on land or water."

Upon the occurrence of the loss some of the underwriters paid, but a large majority, of whom the plaintiff was one, disputed their liability.

An inquiry into the circumstances attending the loss of the vessel took place in the Wreck Commissioner's Court, and the judgment on that inquiry was given on the 14th May.

The Commissioner found that the *Elephant* had been sent to sea in an unseaworthy condition, and that Scott, the owner, and he alone, was responsible for the manner in which the ship went to sea.

The defendants, upon this, applied to the underwriters to pay, and a few did so, but a large majority still refused to do so; and on the 23rd May the present action was commenced by Marmaduke Hart Brooking on behalf of himself and the other underwriters of the policy.

The original statement of claim was delivered on the 24th May, and alleged that, by reason of the weight of the machinery, the mode of stowage, the weight intended to be carried on the deck, and the fact that part of the machinery would be carried in the hatchway, rendering it impossible to put on the hatches, the risk was of a special and dangerous character, as the defendants and their agents well knew, or ought to have known, that they failed to communicate these facts to the plaintiffs; and (paragragh 4) that the vessel with the machinery on board set sail "in a grossly unseaworthy state;" and they claimed a declaration that the policy was void, and that it might be delivered up to be cancelled. The defendants, in the first instance, met this by an application to strike out paragraph 4, relating to unseaworthiness, and upon this application an order was made giving the plaintiffs liberty to amend. The plaintiffs accordingly amended by alleging that the policy was void, "or the underwriters discharged from liability thereunder," retaining their former allegation that "the defendants nevertheless claim and intend to make use of the same, and treat it as a valid and existing contract on the part of the plaintiff, and those on whose behalf he sues," and adding a claim for a declaration that the policy was not binding on the plaintiff and those on whose behalf he sued, and that they were discharged from all liability for loss by the voyage, and for an injunction restraining the defendants from taking any action on the policy.

To this amended statement of claim the defendants put in a defence in which (as also amended) they admitted that the ship was unseaworthy, but stated that the unseaworthiness was owing to her being overladen, which was not known to them until after the ship had been lost, and they wholly denied the allegations of concealment and non-communication of facts. And they further alleged that the overloading did not take place until after the slip for the policy of insurance was initialed, so that the question of overloading did not arise until after the contract was entered into, and they asserted that the policy was valid and had not been avoided; and, further, that, although the vessel was unseaworthy, yet, according to the universal practice that has hitherto prevailed with all the leading underwriters at Lloyd's, the plaintiff and the other underwriters of the policy were bound in honour, though not in law, to pay; but the defendants denied that they had claimed or intended to deal with or make use of the policy as a valid existing policy, or that they had even threatened legal proceedings.

The plaintiff then put in a reply in which he joined issue generally, but stated that he "did not proceed further in this action with the charges in

the statement of claim as to concealment and non-communication by the defendants of material facts." The defendants objected to this pleading, and upon their motion, in July 1886, Kay, J. ordered that all allegations of concealment or non-communication of material facts should be struck out as scandalous and embarrassing. The plaintiff's claim was accordingly again amended, and the action now came on for trial.

Sir *Henry James*, Q.C. and *Graham Hastings*, Q.C. (*Gorell Barnes*, Q.C. and *Hurst* with them) for the plaintiff.—The plaintiff is entitled to a declaration that he and those on whose behalf he sues are under no liability with respect to the policy. It is not enough for the defendants to say that they do not intend to sue upon the policy; they may assign it, and if they do so the assignee will be able to sue in his own name and the plaintiff will be put to great disadvantage, and will have to begin *de novo* and prove the unseaworthiness which was admitted by the defendants. An undertaking on the part of the defendants not to sue upon or assign the policy would have been sufficient; but this they refused to give, except upon terms which could not be accepted. In a case like this a court of equity will order the policy to be delivered up and cancelled, it being an instrument which, though originally valid, has become by subsequent events *functus officio*, and yet its existence may subject the plaintiff to the danger of future litigation when the facts are no longer capable of complete proof through lapse of time. They cited

Hoare v. *Bembridge*, 27 L. T. Rep. N. S. 593; L. Rep. 8 Ch. 22;
Bromley v. *Holland*, 7 Ves. 3;
Simpson v. *Lord Howden*, 3 My. & Cr. 97;
Mitford on Pleading;
Story on Equity Jurisprudence, 13th edit. sect. 705, vol. 2, p. 19.

The *Attorney-General* (*Byrne*, Q.C. and *Bray* with him) for the defendants.—This action is unfounded and absolutely without precedent. We do not deny that under the old law, where there was an instrument in respect of which some claim might possibly be made, the person liable to such claim was entitled to come and ask for some such relief as is sought in this case. But where there is no threat of legal proceedings or any possibility of a legal claim being made, a plaintiff is not entitled to bring such an action as this. This action, moreover, has not been instituted for the purpose of preventing any legal claim the defendants may have against the plaintiff, but for the purpose of bettering the plaintiff's position with regard to the moral claim the defendants have against him. He cited

Duncan v. *Worrall*, 10 Price, 31;
Thornton v. *Knight*, 16 Sim. 509;
Cooper v. *Joel*, 27 Beav. 319; on appeal, 1 De G. F. & J. 240;
Lee v. *Lancashire and Yorkshire Railway Company*, 25 L. T. Rep. N. S. 77; L. Rep. 6 Ch. 527.

Hastings, Q.C., in reply, cited

Flower v. *Marten*, 2 My. & Cr. 459.

Duncan v. *Worrall* (*ubi sup.*) and *Thornton* v. *Knight* (*ubi sup.*), cited by the Attorney-General, are distinguishable because there there was an action pending. There is a veiled intention of keeping the policy in reserve with a view to taking action:

Bromley v. *Holland* (*ubi sup.*).

[STIRLING, J.—Suppose A. had a cause of action against B., could B. come into court for an injunction to restrain A. from suing on it on the ground that B. had a good defence?] Yes:

Lloyd v. *Fleming*, 25 L. T. Rep. N. S. 824; L. Rep. 7 Q. B. 299.

As to a representative action, see

Peruvian Guano case, 48 L. T. Rep. N. S. 7; 23 Ch. Div. 225.

STIRLING, J. (after stating the facts of the case and reading the whole of the pleadings) said:—On these pleadings the action has been brought to trial. At the trial it was admitted by counsel for the plaintiff that the policy was not void, and that judgment for cancellation cannot be given. But they insisted that they were entitled to relief in accordance with the alternative prayer in the statement of claim. The defendants, on the other hand, admit that the unseaworthiness of the *Elephant* constitutes a good defence to the action at law on the policy; but they deny the right of the plaintiff to the relief claimed, or any other relief. This question formed the main subject of argument before me. A correspondence between the legal advisers of the plaintiff and defendants was, however, put in evidence, from which it appears that the real issue between the underwriters and the defendants is one which is not and cannot be raised in this action. It is of this nature: It is the practice of underwriters, who may have a good defence to an action on a policy founded on the unseaworthiness of a vessel, to pay insurers who are "innocent shippers." Whatever may have been the case at first, it is not now asserted by the underwriters that the members of the defendants' firm are personally to blame for the condition in which the vessel left for sea; but it appears to be alleged that, through their servants or agents, they are in some way implicated in the unseaworthiness, and the real question between them is, whether Messrs. Maudslay are innocent shippers and entitled to the benefit of the practice to which I have referred. This issue cannot be tried in this action, nor, indeed, so far as I can see, by any legal tribunal whatever. It must be decided, if at all, by some court of honour, to be selected by the parties interested. Most certainly it cannot be affected one way or the other by the judgment I am about to pronounce. My decision depends upon the dry and technical, though not unimportant, question whether—regard being had to the rules which govern the procedure of the court—the plaintiffs are entitled to the relief for which they ask at the bar. The case stands thus: The defendants are entitled to the benefit of a policy of insurance on which they may sue at law. The plaintiff alleges, and the defendants admit by the pleadings, that the plaintiff has a valid defence to any action which may be brought at law on the policy. The defendants say that they have not threatened legal proceedings, but they have declined to give an undertaking not to take any, and they abstain from stating whether it is their intention to take proceedings or not.

Under these circumstances, can the underwriters bring the defendants before a court of equity and obtain a declaration and injunction according to the second alternative of the statement of claim? If the policy were liable to be completely avoided—if, for example, it had

been obtained by misrepresentation—a court of equity would have jurisdiction to direct the delivery up and cancellation of the instrument. This is clearly shown by *Duncan* v. *Worrall* (*ubi sup.*). On the other hand, where the policy cannot be avoided, but there is a good legal defence to an action upon it (as, for example, unseaworthiness or deviation), a court of equity cannot make a decree for cancellation: (*Thornton* v. *Knight*, *ubi sup.*, where the Vice-Chancellor, in a few words, draws the distinction between the two classes of cases). He says: "If the policy, though good on the face of it, had been proved to be void on the ground that the representation made by the insurers when they effected it as to the seaworthiness of the ship was false, I could have interfered, for then a case of fraud would have been made out against the insurers. But I cannot interfere on the mere ground of deviation, unless this court has a concurrent jurisdiction with a court of law in all cases in which relief is sought against instruments like the one in question. That, however, is not so, and therefore I shall dismiss the bill with costs." In that case, however, an action at law had been brought, and the decision does not cover the question before me—viz., whether the court can make a declaration that the underwriters are not liable on the policy, and grant an injunction against future proceedings at law. Prior to the Judicature Acts a plaintiff coming into equity to restrain proceedings at law was bound to show some equitable ground for relief. He had not, as a rule, a right to come into a court of equity to restrain proceedings in a court of law if he had a good defence at law. If authority for this is wanted I may refer to *Hardinge* v. *Webster* (1 Dr. & Sm. 101) and *Kemp* v. *Tucker* (28 L. T. Rep. N. S. 458; L. Rep. 8 Ch. App. 369). The present plaintiffs come before the court without alleging any case for equity jurisdiction, either exclusive or concurrent with the courts of law. The sole ground on which they claim the relief is that, although there is a good legal defence to any claim by the defendants against them, that defence depends on extrinsic facts, the evidence of which may not be forthcoming at all times and under all circumstances. The existence of such evidence is not alleged in the statement of claim nor proved at the trial; if it had been it would seem to me the appropriate remedy would be found in an action for the perpetuation of testimony rather than in proceedings such as the present. Upon this I may refer to two authorities. In *Angell* v. *Angell* (1 Sim. & St. 83), Sir John Leach lays down the law as to the cases in which the jurisdiction of courts of equity to perpetuate testimony is exercised. He says (p. 89): "If it be possible that the matter in question can, by the party who files the bill, be made the subject of immediate judicial investigation no such suit is entertained. But if the party who files the bill can by no means bring the matter into present judicial investigation . . . there courts of equity will entertain such a suit, for otherwise the only testimony which could support the plaintiff's title might be lost by the death of his witnesses. Where he is himself in possession the adverse party might purposely delay his claim with a view to that event." Obviously it did not occur to Sir John Leach that a person in possession of real estate, and threatened with an action of ejectment to which he had a good legal defence, might file a bill in Chancery to establish that defence, and obtain an injunction to restrain proceedings at law.

The other case is *Earl Spencer* v. *Peek* (L. Rep. 3 Eq. 415), where Lord Romilly decided that the pendency of an action in which the issue could be tried was an answer to a bill to perpetuate testimony. It could not, therefore, have been his opinion that a person threatened with proceedings at law to which he had a good legal defence could bring a suit in equity to restrain them on the ground that his evidence in support of his case might be lost. On principle it is difficult to see why the defendants, having a claim which they might assert in a court of law at any time within the period fixed by the Statute of Limitations, should be compelled to try the issue on which the validity of that claim depends in a court of equity, and at another time than that which they may select as the most convenient for themselves. The authorities mainly relied on by the plaintiffs were the judgment of Lord Eldon in *Bromley* v. *Holland* (7 Ves. 3), and certain paragraphs in the judgment of Lord Cottenham in *Simpson* v. *Lord Howden* (3 My. & Cr. at p. 102), and of Lord Selborne in *Hoare* v. *Bembridge* (*ubi sup.*, at p. 26.) These authorities are no doubt of great value, but they relate to the cancellation of void instruments (as is shown by the case of *Thornton* v. *Knight*, already cited), and do not necessarily apply to cases where, as here, the instrument is not void or voidable, and relief by way of cancellation cannot be given. In *Cooper* v. *Joel* (*ubi sup.*) the defendants claimed the benefit of a guarantee which was held by Lord Romilly, M.R. to be invalid, although the invalidity did not appear on the face of it. This appears to be an authority in favour of the plaintiffs. The case, however, was brought on appeal before the Lord Chancellor (Lord Campbell) (1 De G. F. & J. 240), and his judgment appears to me to amount to a reversal of the decision of the Master of the Rolls, so far as it is based upon any principle applicable to the present case, and that, too, although cancellation, and not an injunction, was the remedy sought. If in the present case the argument on behalf of the plaintiff is well founded, it appears to me that any person liable to have a claim made against him at law, and having a good defence to it, may bring the matter before a court of equity in the same way as the present plaintiff does; and, indeed, the case was put as high as this by the learned counsel of the plaintiff in the course of his reply. Such a right appears to be negatived by the words used by Lord Campbell in *Cooper* v. *Joel*. He said, p. 245 of the report: "If that was the rule, hardly any dispute could arise upon a contract"—or, indeed, as to any legal right—"which might not be drawn into a court of equity." In my opinion, no such rule exists. In my judgment, therefore, the claim of the plaintiffs are not warranted by principle or supported by authority. I think that this action is in the nature of an experiment, and as the experiment fails I see no reason why the costs should not follow the event.

Solicitors for the plaintiffs, *Walton, Bubb*, and *Walton*.

Solicitors for the defendants, *Hopgood, Foster*, and *Dawson*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, Feb. 21, 1888.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE NIOBE. (*a*)

Collision—Tug and tow—Sea towage—Duty of tow—Master and servant.

It is the duty of those in charge of a tow, which is being towed under an ordinary towage contract by night at sea, to control and superintend the navigation of tug and tow, and her owners are liable for damage occasioned by the negligence of the tug, unless it is the result of a sudden manœuvre which it is impossible for the tow to control.

The fact that a tow does not come into contact with, or do damage to, a vessel with which the tug collides will not release the owners of the tow from liability if the damage is occasioned by the negligence of the tow.

Whilst the ship N. was being towed under an ordinary towage contract by night at sea with a long scope of hawser, both she and her tug collided with the sailing ship V. The owners of the tug admitted liability. It was proved that there was a bad look-out on the tow, and that if those on board her had seen the approaching vessel and given the tug orders in due time, the collision might have been avoided.

Held, that the tug was under the control of the tow, and that the owners of the tow were liable for the damage.

The Stormcock (53 *L. T. Rep. N. S.* 53; 5 *Asp. Mar. Law Cas.* 470) *explained.*

THIS was a collision action *in rem* instituted by the owners of the sailing ship *Valetta*, her cargo and freight, against the owners of the tug *Flying Serpent* and the ship *Niobe*.

The collision occurred about 11.40 p.m. on the 23rd March 1887 in St. George's Channel, the *Niobe* at the time being in tow of the *Flying Serpent*.

The *Valetta* first collided with the *Flying Serpent* and then with the *Niobe*. The owners of the *Flying Serpent* admitted liability.

The facts alleged on behalf of the plaintiffs were as follows:

At about 11.30 p.m. on the 23rd March 1887 the *Valetta*, a sailing ship of 498 tons gross, whilst bound on a voyage from Point de Galle to Garston with a general cargo, was off the Lucifer Shoals Lightship in St. George's Channel. The night was fine, clear, and starlight, and the wind a moderate breeze from N.W. The *Valetta* was on a course N.E. by E., making about 7½ knots. In these circumstances those on board of her sighted the two masthead lights of the tug *Flying Serpent*, which had the ship *Niobe* in tow, distant about three miles, and bearing about three points on the port bow. Soon afterwards the green lights of these vessels came into view. The *Valetta* kept her course, but the *Flying Serpent* and the *Niobe*, instead of keeping out of the way, continued to approach, and, when a collision appeared inevitable, the helm of the *Valetta* was put hard-a-port to lessen the force of the blow, but the *Flying Serpent* with her stem and starboard bow struck the port bow of the *Valetta*, and the port quarter of the *Niobe* struck the port quarter of the *Valetta*, and did the *Valetta* so much damage that she shortly afterwards sank.

The defendants, the owners of the *Niobe*, pleaded that the collision was solely due to the negligence of the tug, for which they were not responsible, and alleged the following facts:

Shortly before 11.40 p.m. on the 23rd March 1887 the *Niobe*, a sailing ship of 1469 tons register, was on a voyage from Greenock to Cardiff, in ballast, in tow of the steam tug *Flying Serpent*. The scope of hawser between the two vessels was from 90 to 100 fathoms. The *Flying Serpent* and *Niobe* were in St. George's Channel off South Tuskar Light on a course S.W. by S. ½ S., and were making about 2½ to 3 knots an hour. In these circumstances those on board the *Niobe* observed a glimmer of bright light, apparently distant about half a mile, and bearing about three points on the starboard bow of the *Niobe*. Shortly afterwards the red light of a vessel, which proved to be the *Valetta*, came into view on the starboard bow of the *Niobe*. When the red light was seen, the helm of the *Niobe* was put hard-a-port. The *Flying Serpent* neglected to keep out of the way of the *Valetta*, and the *Flying Serpent* collided with the *Valetta*, striking her about 10 feet forward of the fore-rigging on the port side, and doing her so much damage that the *Valetta* afterwards sank. The *Niobe*, under a hard-a-port helm, almost cleared the *Valetta*, but the port quarter of the *Niobe* slightly touched the port quarter of the *Valetta*. The *Valetta* sustained no damage from the contact between her and the *Niobe*, and the damage to, and loss of, the *Valetta*, her cargo and freight, were solely due to the collision between the *Valetta* and the *Flying Serpent*.

The defendants (*inter alia*) pleaded as follows:

The defendants specifically deny that those on board the *Flying Serpent* were the servants of the *Niobe*, and were subject to the control and orders of those on board the *Niobe*, and say that those on board the *Niobe* could not exercise any control, or give any orders to those on board the *Flying Serpent*, and the defendants say that there was no negligence whatever on the part of the *Niobe*, or of those on board her, and they allege and submit that they are in no way liable for the negligence of the *Flying Serpent*, or those on board her, who were not their servants, but were independent contractors and over whom they had no control.

Myburgh, Q.C. (with him *Hollams*) for the plaintiffs.—The owners of the tow are liable. She had control of the navigation of the tug, and her owners are therefore liable for the negligence of the tug. This has been established by a long line of authorities:

The Gipsy King, 2 W. Rob. 537;
The Christina, 3 W. Rob. 27;
The Ticonderoga, Swa. 215;
The Sinquasi, 43 L. T. Rep. N. S. 768; 4 Asp. Mar. Law Cas. 383; 5 P. Div. 243;
The Bianca, 48 L. T. Rep. N. S. 440; 8 P. Div. 91; 5 Asp. Mar. Law Cas. 60;
The American and The Syria, 31 L. T. Rep. N. S. 42; L. Rep. 6 P. C. 127; 2 Asp. Mar. Law Cas. 350;
The Cleadon, 14 Moo. P. C. Cas. 97;
Smith v. *The St. Lawrence Tow-Boat Company*, 28 L. T. Rep. N. S. 885; L. Rep. 5 P. C. 308; 2 Asp. Mar. Law Cas. 41;

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

Spaight v. *Tedcastle*, 44 L. T. Rep. N. S. 589; L. Rep. 6 App. Cas. 217; 4 Asp. Mar. Law Cas. 406.

In this case the collision was caused by the negligent navigation of the tug and the tow. On the evidence it is clear that there was a bad look-out on the tow, and that this caused or contributed to the collision.

Sir *Walter Phillimore* (with him *Barnes*), for the defendants, *contra*.—It is admitted that there are circumstances under which it would be the duty of a tow to give the tug warning of an approaching vessel, but that is not so in this case. It is to be remembered that this was a sea towage by night, with a long scope of hawser between the tug and tow. In such circumstances it was decided in *The Stormcock* (53 L. T. Rep. N. S. 53; 5 Asp. Mar. Law Cas. 470) that it is not the duty of the tow to direct the movements of the tug. So in this case no duty was cast upon the *Niobe* to direct the navigation of the tug. In other words, those on board the tug were not the servants nor under the control of the *Niobe*, and were, in fact, in the position of independent contractors:

The Bernina, 56 L. T. Rep. N. S. 258; 12 P. Div 61; 6 Asp. Mar. Law Cas. 75;
Quarman v. *Burnett*, 6 M. & W. 499;
Reedie v. *London and North-Western Railway Company*, 4 Ex. 244;
Jones v. *Corporation of Liverpool*, 14 Q. B. Div. 890.

The *Niobe* was entitled to assume the tug would do right. The result of a constant interference on the part of a tow would be to hamper the navigation and perhaps bring about a collision:

The Duke of Sussex, 1 W. Rob. 27; 1 Notes of Cases, 161;
The Druid, 1 W. Rob. 391.

Myburgh, Q.C. in reply.—If the navigation in these cases is to be under the control of the tug, the provisions of the Merchant Shipping Acts, as to the qualifications of persons in charge of ships, would be contravened.

Cur. adv. vult.

Feb. 21.—Sir JAMES HANNEN.—The collision which was the subject of inquiry in this case occurred on the night of the 23rd March 1887, between the sailing vessel *Valetta* and the tug *Flying Serpent*, while the latter was engaged in towing the *Niobe* from Greenock to Cardiff. The *Valetta* was sailing on a course N.E. by E., with a N.W. wind, at a rate of 7½ knots, and her side lights were burning brightly, when the look-out man saw the two masthead lights of the tug *Flying Serpent* at a distance, estimated at three miles, and about three points on the *Valetta's* port bow. The green light of the tug and her tow soon after came into view. The *Valetta* kept her course, but the *Flying Serpent* continued to approach the *Valetta* until with her stem and starboard bow she struck the *Valetta's* port bow, doing her such damage that the *Valetta* shortly afterwards sank, and two of her crew were drowned.

On behalf of the *Niobe* it was contended that the collision was solely caused by the negligence of the *Flying Serpent*, and that she (the *Niobe*) is not responsible for the misconduct of the tug. I shall first consider whether there was any negligence on the part of the *Niobe*; and, secondly, whether that negligence, if it existed, contributed to the collision. The *Flying Serpent* and her tow were on a S.S.W. course, and had the *Valetta* on their starboard bow, while the *Valetta*, sailing a converging course of N.E. by E., had the tug and tow on her port bow. There can be no doubt that there was a bad look-out on the *Flying Serpent*, and that consequently she took no steps to get out of the way of the *Valetta*. Let us see what was the state of things on board the *Niobe*. The *Flying Serpent* was towing the *Niobe* with a scope of hawser of about 100 fathoms. The look-out man on the *Niobe* says that he first saw a dim bright light on the *Valetta*, two points on the starboard bow, at about four ships' lengths off. This, then, must have been when the *Flying Serpent* was close to the *Valetta*. This white light which the look-out saw was, as the captain of the *Niobe* conjectures, probably a companion or binnacle light. The look-out man reported this light, and immediately afterwards saw the loom of the *Valetta's* sails and then the red light, but before he had time to report it he heard the crash of the collision, which he says took place immediately after he saw the sails. Later on he stated that he only saw the red light after he heard the crash, and finally he said he almost "saw the lot at once." This evidence seems to show very clearly that there was a bad look-out on the *Niobe*. The evidence of the captain of the *Niobe* does not materially alter that of the look-out. The captain was below when he heard the report of a light. He immediately came on deck and saw a white light two or three points on the starboard bow, at a distance which he cannot estimate. He immediately ordered the helm hard-a-port. He did not hear the crash or know when the tow rope was cast off, but he thinks seven or eight minutes elapsed from giving the order hard-a-port till the *Niobe* struck the *Valetta*. Seven or eight minutes is probably more time than passed between the order hard-a-port and the collision of the *Niobe* with the *Valetta*; but this question of time is not material, as I think that all that could be done was done when the light of the *Valetta* was seen, but I consider it ought to have been seen sooner.

The next question is, whether this negligence of the *Niobe* contributed to the collision between the *Flying Serpent* and the *Valetta*. On this I think the evidence of the captain of the *Niobe* is decisive. He says that if he saw his tug taking a wrong course he certainly should endeavour to control her. If he saw her taking a direction leading to danger, he should apprise her of it by altering his own course, and this would be an effectual mode of warning her. He also said that if he had seen the red light of the *Valetta* sooner, he would have ported sooner, but that he would let the tug get within a mile, or about a mile, before he should think it necessary to port, and that, as it was, his porting was so late that the tug could not take the hint. If he had seen the red light about half a mile off, he could have girted the tug—that is, he could have checked her by sheering to the right under a port helm. "Girting" a tug, he says, is a common manœuvre. I have put the question to the Trinity Brethren, whether, if the red light of the *Valetta* had been sooner seen by those on board the *Niobe*, she could, by porting her helm, have checked the course of the tug and could have prevented a collision between the tug and the *Valetta*. I am advised that she could, and that that would have

been the proper and seamanlike thing to have done in the circumstances. And, as I find as a fact that there was nothing to prevent the red light of the *Valetta* being seen at the regulation distance, it follows that the bad look-out of the *Niobe* contributed to the collision. I am further advised that, if the *Valetta* had been seen sooner, the *Niobe* ought to have signalled by lights to the tug that she was rushing into danger. To the objection that this might have distracted the attention of the tug from looking ahead, the answer is that the *Niobe* would not have any right to assume that there would not be a sufficient look-out on the tug to look forward as well as astern. Taking this view of the facts, I doubt whether the questions of law which have been discussed before me arise in this case, but I will shortly state my opinion on the points raised. It was contended that the relation of the tug owner to the tow owner was that of an independent contractor, and that therefore the principle of *Quarman* v. *Burnett* is applicable, and that the tow owner and his vessel are not responsible for the negligence of the tug owner and his servants. The basis of the decision in *Quarman* v. *Burnett* is that the hirer of horses with a driver from a jobmaster has not, in ordinary circumstances, the management of the horses; but Parke, B. says: "It is undoubtedly true that there may be special circumstances which may render the hirer of job horses and servants responsible for the neglect of a servant, though not liable by virtue of the general relation of master and servant. He may become so by his own conduct, as by taking the actual management of the horses, or ordering the servant to drive in a particular manner which occasions the damage complained of, or to absent himself at one particular moment and the like." But it appears to me that the authorities clearly establish that the tow has, under the ordinary contract of towage, control over the tug. The tug and tow are engaged in a common undertaking, of which the general management and command belong to the tow, and, in order that she should efficiently carry out this command, it is necessary that she should have a good look-out, and should not allow herself to be drawn, or the tug to go, on a course which will cause damage to another vessel. As Dr. Lushington has pointed out, it is essential to the safety of vessels being towed, that there should not be a divided command, and convenience has established that the undivided authority shall belong to the tow. The pilot, if there be one, takes his station on the tow, and the officers of the tow are usually, as in the present case, of a higher class and better able to direct the navigation than those of the tug. The practice which experience has dictated has received the sanction of many legal decisions, and has been recognised in the House of Lords in *Spaight* v. *Tedcastle* (*ubi sup.*), where Lord Blackburn says that it is the duty of the tug to carry out the directions received from the ship, and in the Privy Council in *The American and The Syria* (L. Rep. 6 P. C. 127; 2 Asp. Mar. Law Cas. 350). Although in this latter case it was held, from the special circumstances, that the command belonged to the tug and not to the tow, I may observe that it is clear from the evidence in this case that it was perfectly well understood by the captains of the tug and tow that the latter had the control of their movements, and that it was the duty of those navigating the tow to keep a good look-out and check the tug if it were going wrong.

But it was argued that, whatever the relation of tug and tow may generally be, they were reversed in this case by special circumstances—first, by the contract of towage between the parties, but there is nothing in the contract but a bare agreement to tow; secondly, by the fact that the towage was at sea with a long scope of hawser, and that this gives rise to different duties on the part of the two vessels to those which exist in river towage with a shorter scope of hawser. I agree that in a towage at sea with a long scope it is more difficult for the tow to communicate with the tug, and if it had been shown that the *Flying Serpent* had by some sudden manœuvre, which those on board the *Niobe* could not control, brought about the collision, I should have held the *Niobe* blameless. Thus in *The Stormcock* (*ubi sup.*) I held the tug to be responsible, because the tug, which was originally steering a safe course, so suddenly departed from it that the tow could not check her or follow without striking another vessel. I think that the same result would follow in a river towage in like circumstances. But in the present case the action of the *Flying Serpent* was not sudden, and might have been prevented by those on board the *Niobe* if they had done their duty. Lastly, it was contended that the *Niobe* was not liable because the mischief was not done by contact with her. I am of opinion that this is immaterial where, as I find in this case to be the fact, the collision between the tug and the complaining vessel might have been avoided but for the contributory negligence of the tow.

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

Solicitors for the defendants, *Thos. Cooper* and *Co.*

Wednesday, Feb. 22, 1888.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE LONGNEWTON. (*a*)

Collision—River Thames—Barge and steamship—Rules and Bye-laws for the Navigation of the River Thames, Art, 21.

Where a steamship navigating the River Thames is in such a position, through no fault of those in charge of her, that it is unsafe or impracticable for her to keep out of the way of a sailing vessel, it is the duty of the sailing vessel under art. 21 *of the Rules and Bye-laws for the Navigation of the River Thames, on hearing the steamer's whistle sounded as therein provided, to keep out of the way of the steamer.*

Quære: Is a sailing vessel, on hearing such a signal, bound to keep out of the way of a steamer without knowing that it is in fact unsafe or impracticable for the steamer to keep out of her way?

THIS was a collision action in *rem* instituted by the owners of the sailing barge *Russell* against the owners of the s.s. *Longnewton* to recover damages occasioned by a collision between these two vessels in the river Thames.

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

The facts alleged on behalf of the plaintiffs were as follows: Shortly before 1.30 a.m. on Dec. 20 1887, the *Russell*, a sailing barge of 47 tons register, laden with a cargo of bricks, was proceeding up the river Thames on a voyage from Murston to Westminster. There was a light air from the N.W.; the weather was clear and starlight but dark, and the tide was flood of the force of about 3½ knots. The *Russell* was just below Tripcock Point, standing over from the south to the north shore close-hauled on the port tack. In these circumstances those on board the *Russell* observed the green and masthead lights of the s.s. *Longnewton* coming down the river a little to the north of mid-channel, slightly before the port beam of the *Russell*, and distant about 200 or 300 yards. The *Russell* kept her course, and the green light of the *Longnewton* was shut in and her red light opened, about abeam of the *Russell*. Shortly after the green light again came into view, and the steamer was seen to be approaching, with all three of her lights open, so as to render a collision imminent. Although the *Longnewton* was loudly hailed to port she came on, and with her stem struck the *Russell* on her port side, doing her so much damage that she shortly afterwards sank.

The facts alleged by the defendants were as follows: Shortly before 1.30 a.m. the *Longnewton*, a screw steamship of 1206 tons register, was in charge of a pilot, proceeding down the Thames on a voyage from Beckton gas works to Sunderland. Owing to a number of barges coming up the river, the *Longnewton* was kept on the north side of midstream, and was making about 1½ knots over the ground. In these circumstances those on board the *Longnewton*, after many lights, red and green, of barges beating up had been seen in the vicinity, observed the red light of a barge, which proved to be the *Russell*, about two to three ships, lengths off and bearing about three to four points on her starboard bow. It then being unsafe and impracticable for the *Longnewton* to keep out of the way of the *Russell* owing to a vessel at anchor on the port side of the *Longnewton*, and a number of barges on her starboard side, her engines were stopped and her steam whistle was sounded five or six times in rapid succession as a signal to the *Russell* to go about, in accordance with article 18 of the Rules and Bye-Laws for the Navigation of the River Thames. But immediately afterwards, as the *Russell* kept on, the engines of the *Longnewton* were reversed full speed, a manœuvre which caused great risk of fouling her with other craft; the *Russell*, however, kept on and with her port side struck the *Longnewton's* stem.

The defendants (*inter alia*) charged the plaintiffs with breach of arts. 2 and 21 of the Bye-Laws for the Navigation of the River Thames, which are as follows:

Art. 2. Nothing in the following rules shall exonerate any vessel, 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 precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Art. 21. If a sailing vessel and a steam-vessel are proceeding in such a direction as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel. If, owing to causes beyond the control of those navigating the steam-vessel, it is unsafe or impracticable for the steam-vessel to keep out of the way of the sailing vessel, she shall signify the same to the sailing vessel by four or more blasts of the steam-whistle in rapid succession, as mentioned in rule 18; the sailing vessel shall then keep out of the way.

Myburgh, Q.C. (with him Dr. *Raikes*), for the plaintiffs.—The steamship is solely to blame for this collision. It was her duty to keep out of the way of the barge, and that she failed to do. Moreover, if in fact the steamer was in such a position as to be incapable of getting out of the way of the barge, those in charge of her were wrong in bringing her into such a position. Art. 21 was never intended to allow steamers to bring themselves into positions of danger and then cast upon sailing vessels the duty of keeping out of the way.

Sir *Walter Phillimore* (with him *J. P. Aspinall*) for the defendants.—The position in which the steamship found herself was brought about by no negligence of those in charge of her. If so, the circumstances were clearly within art. 21, and it therefore was the duty of the barge to keep out of the way. Even assuming the steamer not to have been justified in getting into the position in which she was, the barge did wrong in not giving way after she knew the difficulty the steamer was in.

Myburgh, Q.C. in reply.

Sir JAMES HANNEN.—There can be no doubt that the ultimate cause of this collision was, that the signal given by the *Longnewton* was not heard and acted upon by those in charge of the barge *Russell*. I entertain no doubt whatever that the signal was given. That was deposed to by various witnesses of whose trustworthiness I have no doubt. I was especially influenced by the evidence of the man who was on the following barge, who says he heard the signal and acted upon it. Unfortunately it was not heard by those on board the *Russell*, or at any rate it was not acted upon. That gives rise to this question, whether or not the *Longnewton* had been brought into the position in which she was when she gave that signal by causes beyond the control of those navigating her, so as to make the 21st article of the Rules and Bye-Laws for the Navigation of the River Thames applicable. Of course she must not be brought into such a position merely by the act and will of those navigating her without justification. The question is, whether they were justified in bringing her into the position in which she was. I confess I have entertained some doubts upon the point, but even if they were stronger than they are I should not feel justified in setting them up against the opinion of my assessors. The question I have put to them is, whether the *Longnewton* was justified in coming out from behind the steamers in such a way as to bring herself into the position in which she was when she gave this signal. They are of opinion that she was. Their view of the matter appears to be this. They say that this steamer seems to have been properly and carefully navigated, and that she had below her a great number of vessels tacking across the river. I thought at first there was some exaggeration as to the number of these vessels, but the Trinity Brethren tell me that they are not at all surprised at the number. But they say that, having to encounter a number of craft under these circumstances is no reason why a steamer should not go down slowly and under such command that she can stop and reverse if exigencies require it. They

further tell me that they see no reason to think that there was anything to prevent that course being taken here. They say that it could not be foreseen that the steamer would be brought into dangerous proximity to this barge just at such a dangerous conjecture of circumstances as would make it difficult or impossible for the steamer to extricate herself from the embarrassment the barges might present; and also that it could not be foreseen that the *Russell* would take so long to tack towards the north shore as to bring about a dangerous proximity, and that she might, in fact, have gone about, as the barge following her did, at a point much further from the shore. They therefore come to the conclusion that the *Longnewton* was not to blame for bringing herself into the position in which she was when the signal was given.

The next question is, what could the *Longnewton* do which was safe and practicable for the purpose of keeping out of the way of the barge? She did stop and reverse, the effect of which was to lessen her way and so diminish the damage which would otherwise have been occasioned. She could not starboard, as that would have caused risk of her running into a vessel at anchor. It is indeed possible that she might have ported, and by so doing might have avoided the collision with the barge *Russell*, but such a manœuvre would have been attended with other danger. Her head would probably have been taken by the flood tide, and she would have got athwart the river, which would be a dangerous and unsafe position for a vessel of her size to be put into. Besides, if after porting she had remained under a port helm, there would have been danger of collision with either the following barge or one of the other barges. The Trinity Brethren therefore think that the circumstances were those contemplated by the rule, and that this steamer, finding herself in a position in which any steps to get out of the way of the barge would have been attended with an absence of safety and risk of damage, she was justified in calling upon the barge to alter her tack. The man on board the barge has said that if he had heard the signal he should have gone about. It was because he did not hear the signal that he did not do so. In these circumstances, the question of law which was discussed before me does not arise. All I now say upon it is, that when a sailing vessel hears a signal to keep out of the way, as in this case by altering her tack, it is a prudent course to adopt if it can be done, because it is impossible for a sailing vessel to form an opinion of what the circumstances are which have brought the steamer into the position in which she gives that signal. The prudent course, therefore, is to at once act upon it as the other barge did. On another point in the case I am of opinion that had I thought the Longnewton to blame, I should have considered her responsible for the whole of the damage, because I am advised that it was not an unnatural, and therefore not an improper thing, that the men on the barge when she was struck should get into their boat for safety. These questions, however, are not necessary to the determination of the case. I pronounce the barge alone to blame.

Solicitors for the plaintiffs, *Farlow* and *Jackson*.
Solicitor for the defendants, *William Batham*.

Monday, Feb. 27, 1888.

(Before the Right Hon. Sir JAMES HANNEN and BUTT, J., assisted by TRINITY MASTERS.)

THE ROSE OF ENGLAND. (*a*)

ON APPEAL FROM THE CITY OF LONDON COURT (ADMIRALTY JURISDICTION).

Collision—River Thames—Fog—Sailing and dumb barges—Rules and Bye-laws for the Navigation of the River Thames, No. 20.

Dumb barges in the Thames do not carry anchors, and have no means of bringing themselves up except by going ashore or fastening on to anything they may come in contact with, and hence a dumb barge starting on her voyage in clear weather and getting into a fog, is not guilty of negligence if she comes into contact with a vessel moored in the river, and if that vessel in breach of the Rules and Bye-laws for the Navigation of the River Thames has her anchor not stock-a-wash, and the barge is thereby injured, the vessel so moored is solely responsible for such damage.

THIS was an appeal from a decision of the judge of the City of London Court in a collision action *in rem*. The action was brought by the owners of the dumb barge *Edith* and of the cargo laden on board of her against the owners of the sailing barge *Rose of England* to recover damages for a collision between the two barges in the river Thames on the 25th Aug. 1887.

The facts alleged by the plaintiffs were as follows: At about 1 a.m. on the 25th Aug. the dumb barge *Edith*, laden with a cargo of coals, left Charlton to proceed up the river. At this time the weather was clear, but when the barge was off Blackwall Stairs the weather had become so thick that it was impossible to see the shore lights. Her oars were then taken in, and she was allowed to drift up on the flood tide. Shortly afterwards the riding light of a barge, which proved to be the *Rose of England* was seen about a barge's length ahead, and before anything could be done the starboard side forward of the *Edith* struck the port side of the *Rose of England*. The *Rose of England* was made fast to the barge *Ada*, which was at anchor, and, according to the plaintiffs' evidence, the anchor stock of the *Rose of England* was out of the water, the consequence of which was that the fluke was driven into the *Edith* and she subsequently sank. The *Edith* was not provided with an anchor or any other means of bringing herself up. According to the evidence dumb barges in the Thames are not usually provided with anchors, and have no appliances for raising them.

The defendants' witnesses alleged that their barge was made fast to the barge *Ada*, and that their anchor at the time of the collision was stock-a-wash.

Art. No. 20 of the Rules and Bye-laws for the Navigation of the River Thames, provides:

> No vessel shall be navigated or lie in the river with its anchor or anchors hanging by the cable perpendicularly from the hawse, unless the stock shall be awash, except during such time as shall be absolutely necessary for catting or fishing the said anchor or anchors, or during such time as may be absolutely necessary for getting such vessel underway.

The learned Commissioner having found that the anchor of the *Rose of England* was not stock-a-

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

wash, and having pronounced her to blame, proceeded as follows: "The only question that remains is whether there was negligence on the part of the plaintiff's witness in navigating this barge in the fog in the position he represented himself to be. He could not anchor because he had not an anchor. Nor would his not having an anchor amount to negligence. It would be a very strong thing to hold that, because an ordinary dumb barge has no anchor. Then the man seems to have navigated his barge with as much care as the circumstances permitted. Of course he cannot be made responsible for the fog coming on and leaving him in the position in which he found himself. Therefore, as I indicated before, I cannot consider there is any negligence on the part of the plaintiff which would disentitle him to recover."

From this decision the defendants now appealed.

Dr. *Raikes*, for the defendants, in support of the appeal.—The *Edith* was solely to blame for the collision. On the evidence the court should find that the anchor of the *Rose of England* was stock-a-wash, and, if so, she is free from blame. The *Edith* was improperly allowed to drift up the river in a fog, without any means of bringing herself up or taking her clear of any craft be they in motion or at anchor. The only means she had of keeping herself clear of the *Rose of England* were by using her oars, and these had improperly been taken in some time before the collision. A dumb barge has no right to be under way in a thick fog. It is negligence on the part of her owners in not providing her with an anchor, and so giving herself the means of bringing up when the weather becomes so thick as to make navigation dangerous. The fact that it is the practice not to provide these barges with anchors does not relieve barge owners from liability when, owing to the want of anchors, accidents happen.

Hall, Q.C. (with him *Gaskell*), for the plaintiff, was not called upon.

Sir JAMES HANNEN.—On the question of fact, the learned commissioner has had the advantage of hearing and seeing the witnesses, which we have not. We are not, therefore, in a position to say he was wrong, and although Dr. Raikes has put forward various suggestions to account for the way in which the damage was caused, I think they are wholly untenable. I therefore come to the conclusion that the anchor of the sailing barge was not stock-a-wash, and that the damage was thereby caused.

There then remains the further question, whether there was negligence on the part of the dumb barge. That is undoubtedly an important question, and it may well be that there ought to be some regulations as to the navigation of that class of craft. But we have to dealwith this case as things are at present. We have inquired of the Trinity Masters, and they tell us that it is the practice, and always has been the practice for dumb barges in the Thames to be without an anchor, and that they are provided with no means of getting up an anchor if they had one. In argument it was suggested that they ought to stop. But how are they to do that? There are only two ways. The first is to go ashore, the result of which, at some states of the tide, would be to simply wreck themselves, or tilt them up on one side. The second is to go on until they come in contact with something to which they can make themselves fast. That was just what was done here. This barge was being navigated in the usual recognised way, and we cannot impute any negligence to her. The result is that the appeal must be dismissed.

BUTT, J. concurred.

Appeal dismissed.

Solicitors for the plaintiffs, *Keene, Marsland*, and *Bryden*.

Solicitors for the defendants, *Farlow* and *Jackson*.

Wednesday, April 11, 1888.

(Before Sir JAMES HANNEN.)

THE TASMANIA. (*a*)

Collision—Tug and tow—Maritime lien—Action in rem—Liability of ship.

A ship is not liable to be proceeded against in rem for damage unless her owners at the time of the accident are personally liable, and could be proceeded against in personam for the damage.

Hence, where a tug company contract to tow upon terms exempting them from liability for damage caused by negligence, and they engage by charter a tug belonging to a third person to perform the towage, and the tug is by the charter placed under the charge of a servant of the company by whose negligence damage is done to a tow, the tug company by reason of the contract not being liable, and the owner of the tug not being personally liable, there is no liability in rem on the part of the tug for the damage done.

THIS was a collision action *in rem*, by William Harrison, the owner of the trawling smack the *Striver*, against William Watkins, the owner of the screw-tug the *Tasmania*.

The collision occurred about 9 a.m. on Oct. 25, 1887, at the entrance to Yarmouth Harbour.

At the time of the collision the *Striver* was in tow of the *Tasmania*, which was under charter to the Great Yarmouth Steamtug Company Limited, and was in charge of one of their servants, a man of the name of Offord. The *Striver* had fallen in with the *Tasmania* off the entrance to Yarmouth Harbour, and her rope having been hauled on board the *Tasmania*, the *Tasmania* commenced to tow her towards the harbour. In these circumstances a brig in tow of the tug *Gleaner* was seen entering the harbour ahead of the *Tasmania*. The *Tasmania* and the *Striver* were proceeding in a direction as if to pass to the northward of the brig, and for this purpose the *Tasmania* ran in between the brig and the north pier and then suddenly stopped. The helm of the *Striver* was put hard-a-starboard, but with her stem she struck the port quarter of the *Tasmania*, thereby sustaining such damage that she shortly afterwards sank.

The plaintiff charged the *Tasmania* with improperly and without warning stopping ahead of the *Striver*.

The defendant alleged that the collision was solely caused by the negligent navigation of

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

the *Striver*, and charged her with improperly neglecting to take in canvas, with overrunning her tow-rope, and with neglecting to starboard her helm to keep clear of the *Tasmania*.

They also alternatively pleaded as follows:

9. On the 18th Oct. 1887 an agreement in writing was made between Mr. William Watkins, of 121, Fenchurch-street, London, who was then the registered owner of the *Tasmania*, and the Great Yarmouth Steamtug Company Limited, who at that time and since owned a fleet of tugs used for towing purposes, in the following terms:

"121, Fenchurch-street, London, E.C., Oct. 18, 1887.—*Tasmania* hire at 30*l.* per week, payable in advance. Owners finding a crew of five and stores (four men and a boy). Charterers finding a pilot as captain, coals, and port expenses. All damages to be for charterer's account. Salvage and derelicts to be mutually shared. Vessels to be employed towing fishing boats in and out of Great Yarmouth Harbour. Hire to commence and end in London. Charterers to have option of purchasing the vessel at any time during continuance of this charter at 2850*l.*—Signed W. WATKINS; G. W. OWENS, for and on behalf of the Great Yarmouth Steamtug Company Limited."

10. Pursuant to the said agreement the *Tasmania* on the 21st Oct. 1887 arrived at Great Yarmouth, and was placed by the said company under the control and management of George Offord, a servant of the said company, and so remained down to and on the said 25th Oct. 1887, and was employed and used by the said company under the control and management of the said George Offord, as one of the company's fleet of tugs for the towage of vessels in and out of Great Yarmouth Harbour.

11. Before and on the said 18th Oct., and thence down to and on the said 25th Oct., the plaintiff William Harrison was a director of the said company, and was present at the meetings of the said company, at which resolutions for the hire of the *Tasmania* were passed, and was a party to the making of the said agreement of the said 18th Oct., and to the use and employment of the *Tasmania* as one of the company's fleet of tugs, and to the appointment of the said George Offord to the control and management of her.

12. For some time previously to the 25th Oct. the plaintiff William Harrison had employed the tugs of the said company when available for the towage of his vessels in and out of Great Yarmouth Harbour, and no other tugs, and the master of the *Striver* was before and on the said 25th Oct. under orders from the plaintiff to employ the tugs of the said company when so available, and no others, for such towage purposes; and the master did in obedience to such orders hire the *Tasmania* as and being one of the said company's tugs for the purpose of towing the *Striver* into the harbour.

13. For many years previously to the said 25th Oct. public notice had been given by the said company that they would tow vessels 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 the same, while such vessel, boat, or craft is in tow of either of the steamtugs 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 in the same steamtugs 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."

14. The plaintiff, as such director as aforesaid, and also as regularly employing the tugs of the said company, had notice and knowledge of such special contract, and the *Tasmania* was engaged to stow the *Striver* on the terms of the said special contract; and the towage service was performed by the *Tasmania* upon the terms of the said special contract, and not otherwise. The master and crew of the *Striver* had also notice and knowledge of the said terms before and at the time when they were engaged for the *Striver*.

15. If there was any negligent navigation of the *Tasmania*, which is denied, the same was negligence within the meaning of the said special contract, and was covered by the terms thereof.

It appeared that at the head of the notice referred to in paragraph 13 of the defence were certain named vessels of which the *Tasmania* was not one. The further facts of the case appear in the judgment.

March 9 and 11.—The action was heard by the President, assisted by Nautical Assessors, when it was found that the cause of the collision was the negligence of Offord, the servant of the tug company.

It was then arranged that the question of law should be argued on a subsequent date.

March 23.—The question of law came on for argument.

Cohen, Q.C. (with him *Witt* and *J. P. Aspinall*) for the defendants.—No action can be maintained by the plaintiff against the tug company by reason of the terms of the contract, and therefore no action can be maintained *in personam* against Watkins, whether the negligence complained of was that of his servant or the company's servant, because the benefit of the contract enures to the benefit of the defendant, and protects him from liabilities. Hence it follows that no action *in rem* will lie. The plaintiff being a director of the tug company, and having full knowledge of the terms upon which the *Tasmania* was engaged, and upon which she performed towage services, can have no right of action in contract against the tug company. The fact that the services of the *Tasmania* were engaged by the master of the *Striver*, and not by Harrison, makes no difference as to the liability of the tug company in contract. The knowledge of the principal is the knowledge of the agent:

Mayhew v. *Eames*, 3 B. & Cress. 601; 1 C. & P. 550; Lindley on Partnership, p. 287.

The plaintiff could maintain no action against the tug company in tort:

The United Service, 49 L. T. Rep. N. S. 701; 5 Asp. Mar. Law Cas. 171; 9 P. Div. 3;
Symonds v. *Pain*, 30 L. J. 256, Ex.;
The Chartered Mercantile Bank of India v. *The Netherlands India Steam Navigation Company*, 48 L. T. Rep. N. S. 546; 5 Asp. Mar. Law Cas. 65; 10 Q. B. Div. 521.

It further follows that, as the cause of the collision was the negligence of a person who was not the servant of Watkins, no action will lie *in personam* against Watkins. In this particular case this would be so even if Offord were held to be the servant of Watkins. Watkins, as to this contract, is either a principal or a sub-contractor, and a sub-contractor is entitled to the protection of the contract under which the service is rendered or act done, even where the action is brought in tort:

Bristol and Exeter Railway Company v. *Collins*, 5 Jur. N. S. 1367; 7 H. of L. Cas. 194; 29 L. J. 41, Ex.:
Hall v. *North-Eastern Railway Company*, 33 L. T. Rep. N. S. 306; L. Rep. 10 Q. B. 437; 44 L. J. 164, Q. B.

If no action *in personam* lies, then no action *in rem* lies:

The Parlement Belge, 42 L. T. Rep. N. S. 273; 5 P. Div. 197; 4 Asp. Mar. Law Cas. 234;
The Halley, 18 L. T. Rep. N. S. 879; L. Rep. 2 P. C. 193; 3 Mar. Law Cas. O. S. 131;

The Leamington, 32 L. T. Rep. N. S. 69; 2 Asp. Mar. Law Cas. 475; 23 W. R. 421.

Sir *Walter Phillimore* (with him *Baden-Powell* and *Fraser Macleod* for the plaintiff), *contrà*.—The defendant cannot rely upon the notice exempting from liability, as the *Tasmania* is not one of the named tugs. [Sir JAMES HANNEN.—The contract has to be collected from all the circumstances of the case.] The plaintiff has a maritime lien, and is therefore entitled to be indemnified out of the proceeds of the wrongdoing *res*. The owner gives up the possession of his ship to charterers for the purpose of earning freight, and still remains liable:

Fletcher v. *Braddick*, 2 B. & P. N. S. 182;
The Ticonderoga, Swa. 215;
The Ruby Queen, Lush. 266.

The plaintiff ought not to be deprived of his remedy because contractual relations with which he has nothing to do exist between the shipowner and the charterer:

The Julia, Lush. 224;
The Thetis, 3 Mar. Law Cas. O. S. 357;
The Nightwatch, Lush. 542.

Cohen, Q.C., in reply, cited

Quarman v. *Burnett*, 6 M. & W. 499; 4 Jur. 969;
Hodgkinson v. *Fernie*, 26 L. J. 217, C. P.;
The Druid, 1 W. Rob. 391;
The Volant, 1 W. Rob. 388.

Cur. adv. vult.

April 11.—Sir JAMES HANNEN.—The plaintiff Harrison is the owner of several fishing-smacks. These smacks from time to time engage the services of various tugs, and amongst others the tugs of the Great Yarmouth Steamtug Company Limited. The plaintiff is a director of this tug company, and gives his smack-masters general directions to employ the tugs of the company when available in preference to others. The course of business for several years between the tug company and Harrison has been for the tug company to send in quarterly accounts on which is printed the following notice: "The Great Yarmouth Tug Company Limited, owners of the steamtugs *Victoria*, *United Service*, *Express*, *Meteor*, *Sailor*, *Star*, *Pilot*, and *Yare*, respectfully give notice that they will tow vessels, boats, or other crafts by the above-named steamtugs 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 the same, while such vessel, boat, or craft is in tow of either of the steamtugs 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 in the said steamtugs 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 purposes 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." In the month of Oct. 1887 the directors of the tug company determined to engage on hire an additional tug for the purpose of rendering on their behalf similar services to those in which their own tugs were employed, and on the 18th Oct. they entered into the following agreement with the owner of the tug *Tasmania*: "*Tasmania* hire at 30*l*. per week, payable weekly in advance; owner finding a crew of five and stores; charterers finding a captain as pilot, coals and port expenses. All damages to be for charterers' account. Salvages and derelicts to be mutually shared. Vessel to be employed towing fishing boats in and out of Great Yarmouth Harbour. Hire to commence and end in London. Charterers to have option of purchasing the vessel at any time during continuance of this charter at 2850*l*.—W. Watkins; G. W. Owens." On the 21st Oct. the *Tasmania* arrived at Great Yarmouth, and in pursuance of the terms of the agreement that the charterers should find a captain as pilot, the tug company appointed in that capacity George Offord, a servant of theirs, who on their behalf had charge of the *Tasmania*, and had the control and management of it for the same purposes and to be employed on the same terms as the tugs owned by the company. In this character Offord steered and had command of the *Tasmania* at the time of the casualty which has occasioned this litigation. The plaintiff Harrison, as director of the tug company, was present at the meetings of the company at which resolutions for the hire of the *Tasmania* were passed, and was a party to the making of the agreement of Oct. 18, and to the appointment of Offord to the control and management of her, and to the employment of the *Tasmania* to render towage services on the same terms as the tugs of the company had rendered them. The company made the same charges for the services of the *Tasmania* as for its own tugs, the charge for towing a fishing-smack into Yarmouth Harbour being 7*s*. 6*d*. On the 25th Oct. the *Striver*, a fishing-smack belonging to the plaintiff, arrived off Yarmouth, and the master seeing the *Tasmania* headed the *Striver* towards her for the purpose of being towed in. This manœuvre was sufficient to indicate his wishes, and without a word passing on either side a line was thrown from the *Tasmania*, the *Striver's* hawser was hauled on board the tug, and she at once proceeded to tow the smack into Yarmouth. In the course of this towage Offord was at the wheel of the *Tasmania*, and ordered her movements, and by his sole negligence a collision was brought about between the *Tasmania* and the *Striver*, from which the *Striver* received such injuries that she foundered shortly afterwards.

The question is, whether in these circumstances the plaintiff Harrison is entitled to recover in respect of the loss of his smack the *Striver*. It is contended for him that the clause exempting the tug company from liability does not apply to negligence of the company's servants in the navigation of the *Tasmania* as distinguished from the tugs belonging to the company; secondly, that this being an action *in rem* the plaintiff is entitled to recover against the ship, and through the ship against Watkins, the owner of the tug, notwithstanding the chartering of the tug to the tug company, and the plaintiff's dealings with that company; thirdly, that there was contributory negligence on the part of Watkins' servants. This last is a question of fact which I find against the plaintiff, as I consider Offord solely to blame for the collision. With regard to the first point, that the clause exempting the tug company does not apply to the *Tasmania*, if the plaintiff had

not been a director of the tug company, and had not had previous dealings with it, it would have been necessary for the tug company, in order to free itself from liability for the negligence of its servants in the execution of a contract of towage, to show that the plaintiff had notice of the special terms on which the company did its business. But the plaintiff, both as a director and customer of the company, knew those terms. Suppose that, instead of the *Tasmania*, one of the tugs named in the printed notice had rendered the services, and the plaintiff, being on board his smack, had thrown the rope to the tug, which, from darkness or other cause, he did not recognise as one of the company's fleet, he could not in that case have been heard to say, on discovering that the tug he had employed belonged to the company, that he was not bound by the exempting clause because he did not know at the time that it was one of the company's tugs. His course of dealing created an agreement with the company that the company should not be liable for damage to his vessels while in tow of the company's tugs, and this would be incorporated into any contract of towage not specially excluding it which the plaintiff or his servants might enter into with the company. As to the *Tasmania*, the plaintiff knew of and sanctioned its employment by the tug company to render services to any vessel needing them on the same terms as its own tugs were authorised to render them. The plaintiff did not say, when he joined with his co-directors in sending out the *Tasmania* to tender its services generally on these terms, that he would not be bound by them; nor, if that would have been of no avail, could he have had any mental reservation to that effect, for it was as much to his interest to employ the *Tasmania* as the company's own tugs, and he stated—I do not doubt, truthfully—that he intended his smack-masters to give the same preference to the *Tasmania* which he had directed them to give to the company's own tugs over other people's. I come to the conclusion that the plaintiff implicitly agreed with the tug company that, in the event of his employing the *Tasmania*, it was to be on the same terms as those on which he had previously employed the company's tugs, and therefore that the clause exempting the company from liability was, in the circumstances of the case, binding on the plaintiff with reference to the *Tasmania* as well as the tugs specifically named in the printed notice.

The second question is, whether the plaintiff is entitled to recover against the tug, notwithstanding the chartering of it to the tug company and the plaintiff's dealings with that company. It was held in *The Bold Buccleugh* (7 Moo. P. C. 267) that where a maritime lien attaches to a ship by reason of collision with another, that lien continues valid against the ship though she may afterwards pass into the possession of a *bonâ fide* purchaser. But that decision does not define the cases in which the maritime lien arises. It is not an absolute lien on the ship which has caused the damage, irrespective of all other considerations. For instance, if a wrongdoer takes possession of a vessel, and negligently or wilfully brings her into collision with another, the owner is neither personally liable nor liable through his ship. In *The Druid* (*ubi sup.*) the master of a tug, in order to extract payment of a sum of money he demanded, recklessly towed a vessel into collision and damaged her, and it was there held that the tug could not be made responsible for the damage. Dr. Lushington, in an elaborate and learned judgment, stated his view of the law very emphatically: "In all causes of action which may arise from circumstances occurring during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where their personal liability had not been given up, as in bottomry bonds, by taking a lien on the vessel. The liability of the ship and the responsibility of the owners in such cases are convertible terms. The ship is not liable if the owners are not responsible, and, *vice versâ*, no responsibility can attach upon the owners if the ship is exempt and not liable to be proceeded against." With the addition of a definition, supplied by subsequent cases, of the persons who are to be regarded as the owners, I think that this passage from Dr. Lushington's judgment contains a correct statement of the law at this time. In *The Orient* (3 Mar. Law Cas. O. S. 321; 21 L. T. Rep. N. S. 761) a similar conclusion was arrived at under somewhat different circumstances. The result of these decisions is, that though a ship is commonly spoken of metaphorically as if it had a personality of its own, it is not to be treated as if it were itself capable of doing a wrong. It is an instrument in the hands of its navigators, and its liability will depend on whether those navigators can be identified with the owners or their agents. This was very clearly laid down in the judgment of the Privy Council in the case of *The Halley*, where Selwyn, L.J. says: "In cases like the present, where damages are claimed for tortious collisions, a chattel such as a ship or carriage may be, and frequently is, figuratively spoken of as the wrongdoer; but it is obvious that although redress may sometimes be obtained by means of the seizure and sale of the ship or carriage, the chattel itself is only the instrument by the improper use of which the injury is inflicted by the real wrongdoer." In *The Ticonderoga* (Swa. 215) Dr. Lushington had to deal with the case of a vessel under charter-party, by which the charterers had the exclusive control of the vessel, and he held that the vessel might be proceeded against *in rem* for damage done by the charterers' servants. He says: "Supposing a vessel is chartered so that the owners have divested themselves for a pecuniary consideration of all power, right, and authority over the vessel for a given time, and have left to the charterers the appointment of the master and crew; and suppose in that case the vessel had done damage and was proceeded against in this court. I will admit, for the purpose of argument, that the charterers, and not the owners, would be responsible elsewhere, although I give no opinion on that point; but still I should have to say to the parties who had received the damage that they had, by the maritime law of nations, a remedy against the ship itself." And he adds that compulsory pilotage is the only exception that he is aware of. There is nothing in this judgment which leads to the conclusion that Dr. Lushington intended to retract what he had said in *The Druid* (*ubi sup.*). It amounts only to this,

that he thought that, whatever might be the case at common law, by the maritime law of nations charterers to whom the government of the ship is voluntarily handed over represent the owners so as to bind the ship in cases of collision, and the generality of his remarks must be controlled by the particular circumstances of the case before him. *The Ticonderoga* (*ubi sup.*) was followed by Sir Robert Phillimore in *The Leamington* (2 Asp. Mar. Law Cas. N. S. 475; 32 L. T. Rep. N. S. 69); and he rests his decision on the ground that "a vessel placed by its owners wholly in the control of charterers or hirers, and employed by the latter for the lawful purposes of the hiring, is held by the charterers as *pro hac vice* owners. Damage wrongfully done by the vessel whilst in possession of the charterers is, therefore, damage done by owners or their servants, although those owners may be only temporary. Vessels suffering damage from a chartered ship are entitled *primâ facie* to a maritime lien upon that ship and to look to the *res* as security for restitution." This, so far from supporting the theory that the liability of the chartered ship is absolute, without reference to any limitation of the rights of the owners of the injured ship resulting from a collision, tends absolutely in the opposite direction, for, if the charterers are to be regarded as the owners *pro hac vice*, they may by contract limit their liability and that of the ship. The question of common law on which Dr. Lushington abstained from expressing an opinion had, in fact, been determined in the same way that he decided it by the maritime law. In *Fletcher* v. *Braddick* (*ubi sup.*) Sir James Mansfield held that the owners of a ship chartered to the Government were liable for injury done by the misconduct of those on board, though done by order of a Government officer in command. Sir James Mansfield dwells much on the difficulty of the injured person knowing in whose charge a ship is. "No person," he says, "can be supposed to know of any private agreement between the owners and the commissioners." If anything does, indeed, turn on the knowledge of the parties, the present case differs from *Fletcher* v. *Braddick* (*ubi sup.*) in this, that the plaintiff here was fully aware of the terms of the charter to the tug company. It is unnecessary for me to express an opinion whether the law as laid down in *Fletcher* v. *Braddick* (*ubi sup.*) is modified by *Quarman* v. *Burnett* (*ubi sup.*) and the cases which have followed that decision. The case of *Hodgkinson* v. *Fernie* (2 C. B. N. S. 415), cited in argument, seems rather to turn on the delay of those under charter to the Government in a common warlike undertaking to obey the orders of the Government officer.

The result of the authorities cited appears to me to be this, that the maritime lien resulting from collision is not absolute. It is a *primâ facie* liability of the ship which may be rebutted by showing that the injury was done by the act of someone navigating the ship not deriving his authority from the owners, and that by the maritime law charterers in whom the control of the ship has been vested by the owners are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers, who are *pro hac vice* owners. These propositions do not lead to the conclusion that where, as between the charterers and the persons injured, the charterers are not liable, the ship remains liable nevertheless. On the contrary, I draw from these premises that whatever is a good defence of the charterers against the claim of the injured person is a good defence for the ship, as it would have been if the same defence had arisen between the owners and the injured person. Let me now shortly recall the facts of this case. The plaintiff agreed that the tug company should not be answerable for damage happening to his smack when being towed by any of the company's tugs. It is, of course, not suggested that he would, notwithstanding this agreement, be entitled to proceed against one of the company's tugs employed by him for damage done by the tug. For the reasons I have stated, I hold that the plaintiff in effect agreed that, if he employed the *Tasmania*, it should be on the same terms as applied to the company's tugs. One of the implied terms is that the tugs themselves shall not be liable any more than the company, and this will also apply to the *Tasmania*. If not, this result will follow—that the plaintiff will recover against the *Tasmania*, and through it against Watkins, the owner; but Watkins, under his agreement with the tug company, will be entitled to be indemnified by the tug company, and so the loss will fall on the tug company. Thus the very object of the printed notice given by the company, and accepted by the plaintiff as the basis of his contract with them, would be defeated. The result will be but little more absurd if, as I understand the concluding words of the printed notice, the plaintiff in his turn would be bound to indemnify the tug company against the claim of Watkins. The plaintiff's action therefore fails, but he will be entitled to the costs of the issues of fact upon which he succeeded.

Solicitors for the plaintiff, *Chamberlin* and *Leech*.

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

Tuesday, March 20, 1888.

(Before the Right Hon. Sir JAMES HANNEN.)

THE ORWELL. (*a*)

Collision—Loss of life—Assessment of damages — Registrar and Merchants — Jury — Lord Campbell's Act (9 & 10 *Vict. c.* 93) — *R. S. C., Order XXVII., r.* 4.

Where, in an action for loss of life by collision under Lord Campbell's Act instituted in the Admiralty Division, the defendant makes default in pleading, the plaintiffs are entitled, under Order XXVII., r. 4, *to enter interlocutory judgment, and to have the damages assessed and apportioned by a jury, and a writ of inquiry will be issued accordingly.*

THIS was a summons in an action under Lord Campbell's Act, referred by the registrar to the judge, and by him adjourned into court.

The action was instituted on behalf of May Ann Hughes, widow, and her four children, against the owners of the *Orwell*, to recover compensation in respect of the death of her husband and the children's father in a collision between the *Orwell* and the schooner *Margaret Lewis*.

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

The defendants appeared, but delivered no defence, and paid 600*l.* into court.

On Dec. 7, 1887, the *Orwell* was found solely to blame for the collision in an action *in rem* by the owners of the *Margaret Lewis*.

The plaintiffs now took out a summons calling upon the defendants to show cause why they should not be at liberty to enter up interlocutory judgment for damages to be assessed, and why such damages should not be assessed on a writ of inquiry directed to the sheriff of Middlesex.

By sect. 2 of Lord Campbell's Act 1846, an action under that Act

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 before-mentioned parties in such shares as the jury by their verdict shall find and direct.

By Order XXVII., r. 4, of the Rules of the Supreme Court:

If the plaintiff's claim be for detention of goods and pecuniary damages, or either of them, and the defendant, or all the defendants if more than one, make default as mentioned in rule 2, the plaintiff may enter an interlocutory judgment against the defendant or defendants, and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only as the case may be. But the court or a judge may order that instead of a writ of inquiry the value and amount of damages, or either of them, shall be ascertained in any way which the court or judge may direct.

Barnes, Q.C., for the plaintiffs, in support of the summons.—Order XXVII., r. 4, gives power to this division, as to any other, to refer the assessment of damages to a jury. Lord Campbell's Act prescribes a jury as the proper tribunal to assess and apportion the damages, and if therefore it is a matter in the discretion of the court its discretion should be guided by such statutory provision.

Raikes, for the defendants, *contra*. — The plaintiffs having selected this division, should be bound by its procedure. The regular tribunal for the assessment of damages is the Registrar and Merchants, and therefore the plaintiffs' claim ought to be assessed by them:

The Baron Aberdare, 57 L. T. Rep. N. S. 884; 6 Asp. Mar. Law Cas. 225; 12 P. Div. 204;
The Gertrude, 57 L. T. Rep. N. S. 882; 6 Asp. Mar. Law Cas. 224; 12 P. Div. 204; 56 L. J. 106, P. D. & A.

In former days the Court of Chancery used, in limitation of liability actions, to assess and apportion damages in claims like the present one, and, as this court has now got that jurisdiction, there is no reason why it should not do the same.

Barnes, Q.C. in reply.

Sir JAMES HANNEN.—I am of opinion that this application should be granted. It is now established that these actions under Lord Campbell's Act were not at the time of the passing of the Act within the jurisdiction of the Admiralty Court, but they have now been brought within the jurisdiction of the Admiralty Division by reason of the statutory provision that any action may be instituted in any division of the High Court. If it is not part of the business assigned to that division it may be transferred to a more appropriate division. Here an action under Lord Campbell's Act has been begun in this division, which the defendants have not asked to have transferred to the Queen's Bench Division. Therefore I am entitled to entertain this application, although the action does not properly fall within the special business of this division. The question now arises, how am I to deal with this application? My decision in *The Gertrude* (*ubi sup.*) has been pressed upon me, but I do not feel in the least shackled by that decision. I there held that, if the parties agreed to come into this division, it must be assumed that they agreed to have the action tried according to the law and practice administered in this division. If I found that this assumption was wrong I should certainly not allow the transfer of actions to this division, or should transfer them if brought here unless the parties agreed to abide by the practice of the division. In *The Gertrude* (*ubi sup.*) the sole question was how the damages were to be assessed. In that case the Registrar and Merchants were not fettered by any Act of Parliament, and I thought they were right in giving the plaintiffs damages upon the principle acted upon in this division as distinguished from the principle in force in the Queen's Bench Division. Here, however, I am not left free. I am exercising the jurisdiction arising under Lord Campbell's Act, and am as much bound by its terms as the Queen's Bench Division. On referring to the Act I find that it was contemplated that the damages should be found and apportioned by a jury. Neither is there in this case any assent on the part of all parties to the case being governed by the special practice of this division. I am therefore bound to send the damages to a jury, unless there is such consent. With regard to the practice in limitation of liability actions to which reference has been made, it is sufficient to say that what was there done was done under the special provision of the Merchant Shipping Act 1854. I therefore give the interlocutory judgment as prayed, and I direct a writ of inquiry to issue for the assessment of the damages.

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *Gellatley*, *Son*, and *Warton*.

Tuesday, June 5, 1888.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE ROSETTA. (*a*)

Collision—Fog—Speed—Steam-whistle.

Where an officer in charge of a steamship in a dense fog hears a whistle apparently two to three points on the bow, but cannot be sure of the bearing within a point or two, and does not know the heading of the vessel whistling, it is his duty to diminish the speed of his vessel to the utmost to give him time to ascertain the manœuvres of the other vessel, and for that purpose he must either reduce the speed until the engines are only just moving, or he must stop them, but he need not necessarily continue to

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

keep them stopped, but only sufficiently to diminish his way, and when he is beginning to lose steerage way, then and only then, may put them on again, but as slowly as is possible.

The fact of a steam-whistle alleged to have been blown in a fog not being heard by those on an approaching ship is not necessarily proof that there was a bad look-out on the approaching ship, as the direction in which and the distance from which the sound would be heard is uncertain.

THIS was a collision action instituted by the owners of the steamship *Arago* against the owners of the steamship *Rosetta*.

The collision occurred in the English Channel on the 20th May 1888.

The facts alleged on behalf of the plaintiffs were as follows:—Shortly before 2.45 p.m., on the 20th May, the *Arago*, a steamship of 1061 tons net, laden with a general cargo, was in the English Channel a little below Dungeness, on a voyage from London to the river Plate. The wind was a light breeze from the W.S.W., and there was a thick fog. The *Arago* was heading W. by ½ S. magnetic, making about three knots an hour, with her engines working slow, and her steam-whistle was being duly sounded. In these circumstances the whistle of a steamship, which proved to be the *Rosetta*, was heard on the port bow apparently at a considerable distance, and was answered by the whistle of the *Arago*. After an interval during which the whistle of the *Arago* was again sounded, the whistle of the *Rosetta* was heard again apparently in about the same direction, but nearer than before. The engines of the *Arago* were thereupon stopped, and her whistle blown in answer. After the engines had been stopped for some little time the whistle of the *Rosetta* was again heard on about the same bearing, but much closer. The engines of the *Arago* were at once set full speed astern, her whistle was sounded three short blasts to signify that she was going astern, and her helm was put hard-a-port. Just as she was gathering sternway the *Rosetta* came on at great speed, and with her stem struck the port bow of the *Arago*, doing her great harm.

The facts alleged on behalf of the defendants were as follows:—Shortly before 2.45 p.m. on the 20th May, the *Rosetta*, a steamship of 814 tons register, was in the English Channel between eight and ten miles S.W. by S. of Dungeness, on a voyage in ballast from Rouen to Hull. There was a dense fog, and the *Rosetta* with her engines going dead slow, and her steam-whistle being duly sounded, was heading N.N.E. In these circumstances those on board of her heard the faint whistle of a steamship, which proved to be the *Arago*, on their starboard bow. The engines were at once stopped. About two minutes afterwards the *Arago* was seen two to three ship's lengths off, and five to six points on the starboard bow, approaching very fast. The engines of the *Rosetta* were at once put full speed astern, her helm hard-a-ported, and her steam-whistle blown three blasts, but the *Arago* came on without slackening her speed, and with the bluff of her port bow struck the starboard side of the stem of the *Rosetta*, and thereby did her great damage.

The master of the *Arago* said that he heard the first whistle of the *Rosetta* two or three points on his port bow, that in a fog it is difficult to tell to a point or two how a whistle in fact bears, that there is no certainty, and that the first whistle of the *Rosetta* gave him no idea where she was going.

Barnes, Q.C. and *H. Stokes* for the plaintiffs.—The *Rosetta* was proceeding at an immoderate rate of speed, and never reversed her engines. The *Arago* was entitled to hold on till she heard the second whistle. She was going at a moderate speed, and in such circumstances it has never been held that a vessel is bound to stop on hearing one whistle some distance off. The fact that our earlier whistles were heard is evidence of bad look-out.

Hall, Q.C. (with him *Pike*) for the defendants.—It was the duty of the *Arago*, on hearing our first whistle, to either stop or reduce her speed to as slow as possible. She in fact did nothing till she heard the second whistle.

Stokes in reply.

Sir JAMES HANNEN.—In this case those on the complaining vessel, the *Arago*, allege that she was off Dungeness on a course W. by S. ½ S. when the fog came on; that her speed was reduced to slow, which gave her about three knots an hour: and that in those circumstances they heard a whistle on her port bow. One question is, how broad on the port bow was it heard. They further allege that she answered that whistle, which proved to be the whistle of the *Rosetta*; that the *Rosetta* was then heard to be whistling nearer; that on the second whistle the *Arago's* engines were stopped; that on the *Rosetta* being heard again for the third time the *Arago* was put full speed astern, and her whistle blown three short blasts to show what she was doing; and that immediately afterwards the *Rosetta* was seen at one to two ship's lengths off bearing two to three points on the port bow, and that then the collision took place. The first question is, to what speed had the *Arago* reduced her engines in consequence of the weather setting in thick? It is clearly proved that no other order was given than that the engines should go slow, whatever that may mean. Two witnesses have given different statements as to what her real speed was, one speaking to twelve to fourteen revolutions, and the other fourteen or fifteen. It is evident that this is a mere estimate, or there would not be this discrepancy between them. But we have this fact, that slow may mean anything from twelve revolutions, which is the minimum which has been given, up to twenty-five, which is the maximum that has been given. We therefore have no assurance that in obedience to the order to slow the speed would be any slower than twenty-five revolutions would give her. Therefore I have no assurance of what was the exact speed at which the *Arago* was going. In this state of things a whistle is heard on her port bow. Her captain, in examination in chief, says he heard it two to three points on his port bow, but in cross-examination he puts it at four points. I however take it that his first statement is the one which is to be relied upon. We must now look to what his state of mind was in considering whether he did what he ought to have done. He says: "It is very hard to tell to a point or two how a whistle bears. We soon know if it is right ahead. I can tell when it is three or four points. There is no certainty. You can tell within two

or three points. You cannot be sure, but only guess at it. I had no idea where it was going. It did not occur to me that it might be coming straight towards me."

It appears to me that the very simple question I have to determine is, what is the duty of a man in a fog who hears a whistle which he takes to be two or three points on his bow, but which he cannot be sure of within a point or two and can only guess, and when he has no idea where the vessel whistling is going, and when it does not appear to him that the very thing may occur which did occur, viz., that the vessel was coming straight to him. It is his duty to diminish the speed of his vessel to the utmost, in order that he may wait till his mind is better informed, and he has an idea where the other vessel is coming from, and where she is going to. There are two ways of doing that. He may reduce his speed until his engines are only just moving, or he may stop them. He need not continue to keep them stopped, but stop them sufficiently to diminish his way, and when he is beginning to lose steerage way, then and only then, put them on again, but as slowly as it is possible to do so. I therefore am clearly of opinion that in this state of things it was the duty of the master of the *Arago* when he heard this whistle at the angles which he describes—two or three points on his port bow, and not knowing where it was going—it was his duty then to diminish his speed to the utmost in one or the other of the ways I have mentioned. As a matter of fact he did neither till he heard the second whistle. I am therefore clearly of opinion that the *Arago* was to blame in that respect. [The learned Judge then found that the *Rosetta* was properly and carefully navigated.]

There remains only this further question which has been discussed at considerable length, viz., whether it is to be assumed that the *Rosetta* is to blame because those on board her did not hear any whistle from the *Arago* before the one for which she stopped. I desire to say emphatically that it is impossible to infer from the fact that a whistle is not heard in a fog, that therefore there is an inefficient look-out on the vessel which does not hear it. It depends on other circumstances. It is not to be inferred that, because from a particular distance at which in clear weather a signal could be heard it is not heard at that distance in a fog, there is a bad look-out. I have specially consulted the Trinity Brethren on this subject. They have given me the benefit of their large knowledge and experience, and they say that what may be called the vagaries of sound in a fog are of a most astonishing character. They tell me that sometimes where a signal has been given which it was expected would be heard at a distance of four or five miles, it is not heard at a distance beyond a couple of cable's lengths. I have heard illustrations given by men of the highest eminence in science of a more extraordinary character even than that. It cannot therefore be taken that, because a fog signal is not heard at the particular distance it is expected to be heard, there is a bad look-out. There is nothing in this case but the fact that those on board the *Rosetta* stopped her at the first signal they heard, from which I am asked to infer that they ought to have heard some signals which were given sooner. I utterly refuse to draw any such inference. There is nothing which would justify me in doing so. The result is, that I come to the conclusion that the *Arago* is alone to blame.

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

Tuesday, July 17, 1888.

(Before the Right Hon. Sir JAMES HANNEN and BUTT, J.)

THE ZEUS. (*a*)

Jurisdiction—"Use or hire of any ship"—Demurrage — Loading agreement — County Courts Admiralty Jurisdiction Amendment Act 1869 (32 *&* 33 *Vict. c.* 51), *s.* 2.

A loading agreement between a colliery company and the charterers of a ship, by which the colliery company undertake to load the ship in a certain time, and pay demurrage if that time is exceeded, is not an "agreement made in relation to the use or hire" of a ship within the meaning of sect. 2 *of the County Courts Admiralty Jurisdiction Amendment Act* 1869, *and hence the County Court has no jurisdiction on the Admiralty side to entertain a claim for demurrage against the colliery company.*

THIS was an appeal by the plaintiffs from a decision of the County Court judge of Northumberland sitting in Admiralty.

The plaintiffs were the owners of the s.s. *Zeus*, and sued the defendants to recover 54*l.* 3*s.* 4*d.* as demurrage for detention of the said steamship.

The defendants were William Milburn and Co., the charterers of the *Zeus*, and the Ashington Coal Company, who had entered into an agreement with the charterers to load the *Zeus* with coal.

The charter was made between the plaintiffs and William Milburn and Co., and after providing that the *Zeus* should proceed to Blyth, and there load a cargo of coals for Cronstadt, contained the following clauses:

The vessel to be loaded in forty-eight hours, and discharged as fast as steamer can deliver (Sundays and close holidays excepted), the loading to be on conditions of colliery guarantee herewith, which owner agrees to accept and settle with the colliery agent for payment of any demurrage that may be due. The time for discharging to count from the vessel's being reported at the Custom House, and ready to deliver, and if the steamer is not despatched within the stipulated time, she is to lay five days on demurrage at and after the rate of 16*s.* 8*d.* per hour.

On the 19th Aug. 1887 the charterers entered into the following agreement with the Ashington Coal Company:

Bothal West Hartley Fitting Office, Newcastle, Aug. 19, 1887.—Messrs. William Milburn and Co.—We undertake to load the *Zeus* s.s. 1100 tons with Bothal West Hartley Best Coals in (48) forty-eight hours (Sundays, pay Saturdays, cavilling days, and colliery holidays excepted), after the said steamer is wholly unballasted and ready in Blyth to receive her entire cargo—strikes of pitmen or workmen, frosts and storms, and delays at spout caused by stormy weather, and any accidents stopping the working, loading, or shipping of the said cargo, always excepted. Time to count from 6 a.m. after berthed following the receipt of notice (in writing) of readiness by our staithman if the steamer is actually ready as above stipulated, and not before. Any time occupied in the shipment of bunker coals not to count. Any extra time consumed in loading cargo

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

caused by the shipment of bunker coals to be allowed for in reckoning the time for cargo. In case the steamer is not ready to complete her loading when she has once begun, any time thus occupied in partial loading not to count. A telegram to be sent from the last port of sailing as soon as the steamer leaves; the same to be handed to the Fitting Office on its receipt. Despatch money per hour. Demurrage for each hour exceeded—usual. The date of loading to be 24th inst., and if the steamer is not ready within forty-eight hours thereafter twenty-four hours extra loading time to be allowed, and for every twenty-four hours the steamer is delayed beyond the forty-eight, six hours additional to be added to the time allowed for loading. Should any of the cargo be shipped during the above excepted periods, only the time actually occupied in shipping coals to be reckoned in computing the steamer's time of loading.—For the Ashington Coal Company, RICHARD LATIMER.

In these circumstances the Ashington Coal Company moved the County Court judge to dismiss them from the suit upon an affidavit setting out the above facts, and also stating in paragraph 4 as follows:

The only connection my said company had with the said steamship *Zeus*, in the month of Aug. 1887, was that they in furtherance of a contract between them and Messrs. William Milburn and Co., one of the above-named defendants, for the sale of 20,000 tons of coal, undertook to load the *Zeus* as a vessel nominated by the said William Milburn and Co.

The County Court judge thereupon dismissed the Ashington Coal Company from the suit on the ground that the County Court had no jurisdiction, the loading agreement not being an agreement made in "relation to the use or hire" of a ship within the meaning of the County Courts Admiralty Jurisdiction Amendment Act 1869, and the claim for demurrage, which as against the Ashington Coal Company was founded on the loading agreement, not being a 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.

The County Courts Admiralty Jurisdiction Amendment Act 1869, sect. 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 respect of goods carried in any ship, provided the amount claimed does not exceed 300*l*.

The plaintiffs now appealed from the above decision.

Sims Williams, for the plaintiffs, in support of the appeal.—The loading agreement was an agreement to pay demurrage, and is therefore an "agreement made in relation to the use or hire" of a ship within the meaning of sect. 2 of the County Courts Admiralty Jurisdiction Amendment Act 1869. The words of the section are "in relation to the use or hire," and not "for the use and hire," and inasmuch as this was a statute to confer jurisdiction the words are to be given a wide and liberal interpretation. In the case of *The Glendevon* (not reported), the Divisional Court recently held that an agreement to pay demurrage was an agreement made in relation to the use or hire of a ship:

Gunnstad v. *Price*, 32 L. T. Rep. N. S. 499; L. Rep. 10 Ex. 69; 2 Asp. Mar. Law Cas. 543;
The Alina, 42 L. T. Rep. N. S. 517; 5 Ex. Div. 227; 4 Asp. Mar. Law Cas. 257;
The Swan, 23 L. T. Rep. N. S. 633; L. Rep. 3 A. & Ec. 314.

J. P. Aspinall, for the Ashington Coal Company, was not called upon.

Sir JAMES HANNEN.—The question before us arises out of an agreement to deliver on board a ship a certain quantity of coals, and we have to say whether or no that agreement is one in "relation to the use or hire" of the ship. I think it would be a violent distortion to the natural meaning of the words of the statute to say that it has relation to the use or hire of the ship. It is merely an engagement to deliver coals at a particular place. But then reliance is placed upon the fact that it provides for the payment of demurrage. But we must look at what are the real facts, and also remember that demurrage is a word of different meanings. For instance, it is a word which has been transferred from carriage by ships to carriage by railway trucks, and a charge is made for their detention under that name. What it means here is, that it is a penalty to be paid if the contract is not performed within a limited time. But unless it can be established that the agreement is one in "relation to the use or hire" of the ship, the fact that the word demurrage is used has no bearing upon it. It is clear to my mind that, in the case which has been referred to, the facts were different from these. There there was a charter-party which did not relate to the use or hire of the ship, and the claim arose out of an agreement made in relation to that contract for the use or hire of the ship. Therefore it was an agreement made in relation to the use or hire of a ship. For these reasons I think this appeal must be dismissed.

BUTT, J.—I am of the same opinion. I do not think that these defendants were in any sense either the hirers or users of this ship.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Thomas Cooper* and *Co.*

June 25 and 26, 1888.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE PINNAS. (*a*)

Salvage—Work and labour done—Misconduct—Costs.

Where salvors have brought a damaged vessel into a position of safety they are bound, on demand by the owners, to deliver up possession of the salved property, and have no right to retain it for the alleged purpose of completing the repairs.

Semble, if the vessel is at the time of the demand in such a critical position that there may be risk of loss or damage to her unless the salvors are allowed to complete their operations, the salvors may be entitled to retain possession pending their performance.

THIS was a salvage action *in personam* by the Strand Slipway Company, shipbuilders at Sunderland, against the owners of the s.s. *Pinnas*, to recover salvage for services rendered to the *Pinnas* at Sunderland.

The facts alleged by the plaintiffs were as follows:—At about 2.15 a.m. on the 8th Feb. 1888, John Crown, the managing partner of the plaintiff firm, was informed that the s.s. *Pinnas* had

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

shortly before stranded off the harbour of Sunderland. Crown at once proceeded to the pier, and then learnt that the *Pinnas*, a German steamship, of 1047 tons gross, had, whilst attempting to enter the harbour, struck and lay upon the s.s. *Saltburn*, which had stranded two days previously, close to the harbour entrance. The *Pinnas* was thereby holed in several places, and although she had been got clear, and towed further in towards the harbour, she had filled and sunk about 100 yards outside the entrance. Crown, having boarded the *Pinnas*, returned ashore and gave information of the casualty to Lorenzen, the English agent of the owners of the *Pinnas*. At about 8 a.m. Crown again went off to the *Pinnas*, and was then, with the concurrence of Lloyds' representative, employed by the master to salve her. He at once engaged the services of the steam-tug *Rescue* which was alongside, put a large number of men on board the *Pinnas* to make preparations for shipping pumps and rigging derricks to lift the pumps on board, and took the necessary steps to obtain steam-pumps and other salvage gear. Divers were also employed to fix pads on the places where the *Pinnas* was worst holed. Shortly after Crown had commenced to take the necessary steps to salve the *Pinnas*, Lorenzen, the defendants' agent, came on board and acquiesced in what was being done. On the pumps being got to the ship they were set going, and on the 10th the water was so reduced that the tugs *Rescue*, *Hetton*, and *Pilot* (which had been engaged by the plaintiff) succeeded in towing the *Pinnas* inside the harbour to the Polka Hole, where it became necessary to moor and beach her, as the water in the after hold was rapidly gaining on the pumps. The pumps were kept constantly working during the day, and the plaintiffs were engaged in stopping leaks. By 3.30 a.m. on the 11th the water in the vessel had been sufficiently reduced to enable the tugs *Rescue* and *Snowdrop* to tow her some fifty or sixty feet higher up on the beach, when further repairs were effected to the ship's bottom, and at high water on the same day she was towed from the Polka Hole into the South Dock Basin, and there delivered to the defendants' agent.

The plaintiffs alleged that they had necessarily incurred expenses in rendering the services, which amounted to 655*l.* 12*s.* 8*d.*

The defendants admitted that the plaintiffs performed certain work on and about the *Pinnas*, but alleged that the work was not of a nature or done under such circumstances as to entitle the plaintiffs to salvage reward. They also alleged that the work done by the plaintiffs was done contrary to their wishes and without their authority, and that the expenses incurred in performing the work were unreasonable and unnecessary.

It appeared that on the 10th, when the *Pinnas* had been towed into the Polka Hole, the defendants wished to take possession of her, in order that any further necessary repairs might be effected by workmen whom they had engaged for the purpose. The plaintiffs, however, refused to give up possession or to allow the defendants' workmen on board. On the 11th the defendants again sent workmen to the vessel, but the plaintiffs refused to allow them on board, and insisted on doing the necessary work.

On the 13th possession was given up to the owners of the ship upon their undertaking to be responsible for the pumps and other gear which had been hired by the plaintiff Crown, and in respect of which he had been obliged to give a guarantee for their safe return to their owners.

The value of the *Pinnas* was 3000*l.*

Barnes, Q.C. and *J. P. Aspinall* for the plaintiffs.

Sir *Walter Phillimore* and Dr. *Raikes* for the defendants.

Sir JAMES HANNEN.—I have already intimated my opinion in this case that the defendants have not succeeded in establishing that the work done upon the *Pinnas* was done without authority, and gives rise to no claim upon them. I think that position might, in the first instance, have been taken up by Mr. Lorenzen, the defendants' Sunderland agent, but that for prudential reasons probably he abstained from asserting what I think were his rights. I have no doubt that he did not authorise Mr. Crown, the plaintiffs' managing partner, to do anything for him. I have no doubt that what Mr. Lorenzen says is true, that he only intimated that he should be down there as soon as possible, and it is evident from what Mr. Lorenzen did that he intended to employ somebody else than Mr. Crown, viz., Mr. Simey. But when Mr. Lorenzen appeared on the scene, as he found that Mr. Crown was already in possession of the job, he did not assert his rights and allowed the operations to go on without objection. Therefore he must be taken to have acquiesced in Mr. Crown, on behalf of the Slipway Company, doing what was necessary to get the vessel into a place of safety. I think that what was done up to the time of the vessel being brought into Polka Hole was a valuable service, and was salvage. No doubt Mr. Lorenzen could have got the work done as well by anybody else, and as ordinary tradesman's work instead of as salvage. However, it was acquiesced in, and it must be treated as salvage until the time when the ship was brought into the Hole. I am advised that the vessel was then removed from immediate danger. It is, of course, conceivable that a state of things might have happened which would have exposed it to danger, but I am advised that there was nothing to show that that was probable. The vessel was no loner exposed to the violence of the sea, and it was in a protected place where it was subject to the rise and fall of the tide, but not to the violence of the waves. It was then seen that Mr. Simey's workmen could be employed to do all that remained to be done. Men were accordingly sent to take up the work that was necessary to bring her into dock, but Mr. Crown thought he had a right to exclude the owner from his own vessel, and insisted on doing what he thought necessary to be done up to the time of getting the vessel into dock. I have no hesitation in saying that I am of opinion that he had no such right. I can conceive the possibility of such circumstances that would morally excuse a man for saying, "You must not interfere; it is a critical moment, and if you interfere in the way you propose we shall lose the ship." Circumstances of that kind might arise, but in this case it was simply an assertion by Mr. Crown of his assumed right to complete the job, and on salvage terms and not on ordinary tradesman terms. I must add that I am greatly struck by the most

improper manner in which Mr. Crown asserted his assumed rights. He not only refused on one occasion to allow the men to go on board and pump, but on another occasion he admits that he shook the ladder by which the men proposed to climb to the vessel. There being only four men he thought himself in a position to use violence which he says he hesitated to do on the previous occasion because there were then thirty men. I have already pointed out that such conduct would be first of all at the risk of a breach of the peace, and also would cause risk of loss of life. One of these men might have been shaken into the water, and there might have been no means of saving him. It was therefore a most outrageous proceeding on Mr. Crown's part. But, as I have said, I must deal with the case on the footing of his having up to this time rendered salvage services.

In order to render those services considerable expense no doubt had to be gone to, but the means adopted were of the most incautious kind, such as no reasonable man would have had recourse to if he had only his own interests at heart. But this was treated, as I am afraid salvage cases very frequently are, as an opportunity of extracting as much money as possible from the pockets of the owners and underwriters. Consequently we have such a specimen of charges as the item of 120*l.* paid for a diver. I am advised that there was nothing particular in what he did, and yet for it he brings in a bill of 250*l.* It is true it was cut down to 120*l.*, but even then it was regarded as a salvage service. In my view it was not a salvage service at all. The diver was only employed to do his ordinary business, and he had no right to make this charge. I therefore dismiss from my consideration the greater part of the charge for the diver, which I think was improperly paid. There are several other items that I need not go through in detail, because I must remind the learned counsel that though it has been held that items of expenditure by salvors may be given in evidence, they are not to be the subjects of discussion in the same way as if the action were for work and labour done. They may be dealt with generally by the court, but this case has been fought as if the claim were for work and labour done, which is not the case. The expenses in this case are items which are to be taken into account in considering what amount of salvage ought to be awarded, and from that point of view I am of opinion that a very considerable number of them cannot be supported. I have accordingly reduced them, in my mind, to a particular figure, and then considered what should be awarded for salvage services up to the time when Simey's men were refused permission to do the work they were sent to do. On the whole, I come to the conclusion, with the advice of the Trinity Brethren, that 700*l.* is the amount which should be allowed for the whole of the services, and as the defendants have paid into court the sum of 655*l.* 12*s.* 8*d.*, a balance of less than 50*l.* remains due. Having regard to the misconduct of Mr. Crown, I shall not allow the plaintiffs any costs.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Waltons*, *Bubb*, and *Johnson*.

Supreme Court of Judicature.

COURT OF APPEAL.

March 15, 17, *and* 26, 1888.

(Before Lord ESHER, M.R., FRY and LOPES, L.JJ.)

THE GERTRUDE.

THE BARON ABERDARE. (*a*)

Practice—Carriage of goods—Damage—Admiralty Division — Measure of damages — Interest — Judicature Act 1873, *s.* 24, *sub-sect.* 6.

Where an action is transferred to the Admiralty Division by consent of the parties for the assessment of damages, the registrar and merchants are entitled, in accordance with the practice of the Admiralty Division, to give interest in addition to the actual damages, even where such interest would not be given in the division from whence the action is transferred.

Where an action was brought in the Admiralty Division to recover unliquidated damages, which prior to the Judicature Act could not have been brought in the Admiralty Court, and the defendants made no attempt to have it transferred, the plaintiffs were held to be entitled, in accordance with the practice of the Admiralty Division, to interest on the amount recovered from the date of the loss.

Per Fry, L.J.: Semble, common law actions transferred without the consent of the parties from the Queen's Bench Division to another division are, under sect. 24, *sub-sect.* 6, *of the Judicature Act* 1873, *to be determined by the same common law principles as would have been applicable to them in the Queen's Bench Division.*

THESE were appeals by the defendants from two decisions of Sir James Hannen, confirming two reports of the registrar and merchants (57 L. T. Rep. N. S. 883, 884; 6 Asp. Mar. Law Cas. 224, 225; 12 P. Div. 204).

THE BARON ABERDARE.

March 15.—This was an action instituted in the Queen's Bench Division by the owners of the barque *Baron Aberdare* against the London and St. Katharine Dock Company, to recover damages occasioned by the negligence of the defendants in so mooring the *Baron Aberdare* in their dock that she broke loose, and came into collision with other vessels and barges, thereby doing them and herself damage.

The action was tried before a special jury, who gave a verdict for the plaintiffs, which was upheld by the Divisional Court and Court of Appeal.

The action was then by consent of parties transferred, under Order XLIX., r. 3, to the Admiralty Division for the assessment of damages by the registrar and merchants. The parties subsequently came to an agreement that 7500*l.* should be deemed to be the plaintiffs' damages without prejudice to the question whether interest was recoverable in addition to such damages. The registrar, having considered the question, reported that the plaintiffs, in accordance with the practice in the Admiralty Registry, were entitled to

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

interest at the rate of 4 per cent. from the date of the loss to the time of payment.

The defendants thereupon appealed to the court to have the report varied by disallowing the interest. The Court upheld the report, and from that decision the defendants now appealed.

Hurst (with him *Barnes*, Q.C.), for the defendants, in support of the appeal.—This is an ordinary common law action in which the liability of the defendants has been determined by a common law court. The only matter done outside the Queen's Bench Division has been the assessment of damages. The measure of damages is therefore regulated by the practice of the Queen's Bench Division. The registrar of the Admiralty Division was in the circumstances of this case practically an arbitrator, and has therefore no power to give the plaintiffs more than they are entitled to by the practice of the courts in which the action was tried and determined. It is further submitted that the practice of allowing interest in the Admiralty Registry is unjust and unreasonable, and that this court being a court of appeal should overrule it. It is very desirable that there should be uniformity of practice in the different divisions with regard to the amount of damages recoverable by a successful plaintiff.

Hollams for the respondents.—An arbitrator may award interest; and, if so, why should not the registrar have the same power? The practice is a just and reasonable one, and only affords the plaintiff a *restitutio in integrum*:

The Northumbria, 21 L. T. Rep. N. S. 681; 3 Mar. Law Cas. O. S. 314; L. Rep. 3 A. & E. 6;
Smith v. *Kirby*, 1 Q. B. Div. 131.

The Court stated that they would give judgment after the case of the *Gertrude* had been argued.

The Gertrude.

March 17.—This was an action instituted *in personam* in the Admiralty Division, by the owners of a cargo of corn laden on the s.s. *Gertrude*, against Messrs. Gordon and Stamp, the owners of the said steamship, who were residents in England.

In the course of the voyage from New Orleans to Copenhagen the *Gertrude* and her cargo were lost, and the plaintiffs thereupon claimed damages from the defendants for breach of the contract of carriage.

The defendants delivered a defence, but ultimately admitted liability, the amount of the damages being referred to the registrar and merchants.

At the reference the plaintiffs claimed the invoice value of the cargo, merchants' profits, and interest at 4 per cent. per annum from the date on which the bills given by them in payment for the cargo were met. Upon this basis the registrar allowed 9800*l.* for value of cargo and merchants' profit, with interest as claimed.

The defendants thereupon moved the court to vary the registrar's report by disallowing the interest. Sir James Hannen upheld the report, and from his decision the defendants now appealed.

Barnes, Q.C. and *Hurst*, for the defendants, in support of the appeal.—The plaintiffs are not entitled to interest as allowed. This is a purely common law action, which prior to the Judicature Acts could not have been brought in the Admiralty Division. It is therefore governed by the practice of the common law courts, and not by that of the Admiralty Court. Inasmuch as the Admiralty Division now refuses to transfer this class of action to the Queen's Bench, a plaintiff has only to institute his action in the Admiralty Division to ensure his recovering more than he would be entitled to by instituting the action in the Queen's Bench Division to which it properly belongs. The Judicature Act was meant to affect procedure, and not the rights of parties, and therefore, if owing to the various divisions having concurrent jurisdiction a plaintiff brings a common law action in the Admiralty Division, the defendant ought not to be burdened with liabilities greater than would attach in the common law courts. It is also contended that the Admiralty Court practice of allowing interest is confined to pure Admiralty cases (*The Northumbria*, 21 L. T. Rep. N. S. 681; 3 Mar. Law Cas. O. S. 314; L. Rep. 3 A. & E. 6), and that the Admiralty Court ought to follow the common law rules in cases which are governed by common law principles:

The St. Cloud, Br. & L. 4.

There can be no Admiralty practice applicable to the present class of action, because it is only since the Judicature Act that the Admiralty Division has had jurisdiction to entertain them. Even assuming the practice applicable to this action, it is then submitted that it should be overruled as being unjust and unreasonable.

Stubbs (with him Sir *Walter Phillimore*), for the respondents, *contrà*.—The fact that this is a class of action more commonly instituted in the Queen's Bench Division does not make the Admiralty practice less applicable. The defendants took no steps to remove it, and are therefore bound by the practice of the division; even if it had been tried in the Admiralty Division by a judge and jury, the damages would have been referred to the registrar and merchants. [Fry, L.J.—What do you say as to sect. 24, sub-sect. 6, of the Judicature Act 1873? Might it not be argued that the result of that provision is that the Admiralty Division is bound to deal with the liability of the defendants in the same way as it would be dealt with by the Queen's Bench Division?] The Queen's Bench Division itself has acted upon the Admiralty practice in fitting cases, and allowed interest as in the present case:

The British Columbia Saw Mills Company v. *Nettleship*, 18 L. T. Rep. N. S. 604; L. Rep. 3 C. P. 499; 37 L. J. 235, Ch.; 3 Mar. Law Cas. O. S. 65.

Barnes, Q.C. in reply.

Cur. adv. vult.

March 26.—Lord Esher, M.R.—In the first of these cases the action might have been brought in the Admiralty Division, but in fact was tried in the Queen's Bench Division, and then after judgment there was a consent order transferring the case to the Admiralty Division for the assessment of damages. The registrar assessed the damages according to the practice of the Admiralty Court, by which practice interest is always given from the time when the loss takes place. In the other case, that of the *Gertrude*, the action was originally instituted in the Admiralty Division, though prior to the Judicature Act it could not have been instituted there, and the matter of damages

was referred in the usual way to the registrar and merchants for assessment. In both cases objection has been taken to the Admiralty practice of giving interest in the way I have mentioned. It is admitted that this practice has prevailed in the Admiralty Court for many years, but it has been argued that it is a wrong practice, and that we, as a court of appeal, ought to overrule it. In the case of the *Baron Aberdare* one objection is, that as the action was tried in the Queen's Bench Division, the rule applicable at common law to the assessment of damages should be followed. In the case of the *Gertrude* it was said that, as it was a case which prior to the Judicature Act could only have been tried in one of the common law courts, it was tried in the Admiralty Division as a branch of the High Court of Justice, and by the Admiralty judge as a judge of the High Court, and that therefore the practice which belonged to the peculiar jurisdiction of the old Court of Admiralty was not applicable, and that the common law rule ought to be followed. The argument therefore is, that as in both cases damages by way of interest could not *eo nomine* be given in the Queen's Bench Division, the plaintiffs ought not to have recovered them in the Admiralty Division.

It has been also urged, as I have said, that this practice of the Admiralty Division should be overruled, and assimilated to that which exists in the Queen's Bench Division. That is an argument to which we cannot accede. There is nothing unjust in the mode in which the Admiralty Court has always assessed damages. I believe it is the mode of assessing damages that is followed in all Admiralty courts. So far from thinking it unjust, I am inclined to think it more just than the common law rule. It is a matter which was discussed by Lord Selborne in the case of *The Khedive* (7 App. Cas. p. 803), and to my mind he does not seem in any way to disapprove of this mode of assessing the damages. The question, however, does not really arise, for in the case of *The Baron Aberdare*, I have communicated with the President of the division, and he states that the case was transferred to and undertaken by the Admiralty Division on the assumption that the parties had agreed that it should go before the registrar and merchants to be dealt with according to their rule. It seems to me to be obvious that that was so, and that the parties instead of having the damages assessed by an arbitrator or an official referee, as would have been the case had they proceeded in the Queen's Bench Division, took advantage of the special knowledge of the registrar and merchants to get a cheap and satisfactory arbitration. That being so, one of the parties now turns round and says he will not agree to what has happened. That seems to me to be a breach of faith, and we would be allowing him to commit it if we permitted him to turn round and object to the mode in which the damages have been assessed. In the case of *The Gertrude* it was stated to us that the President and Butt, J. had made it known that they would not transfer such cases to the Queen's Bench Division, even if application were made to them to do so. It is said that for that reason the defendant did not object to the case being tried in the Admiralty Division, because he knew it would be tried there whatever he might do. But the President tells me that it never entered into his mind to say anything of the sort, and he is certain he never did, and he says on the contrary that, if either of the parties had taken objection, and had pointed out to him that the difference between the practice of the two divisions would lead to the assessment of the damages in a different way, he would have taken the matter into consideration with a view to the transfer of the case. The fact is, that the plaintiff brought the action in the Admiralty Division, and the defendant made no objection because both parties thought that an advantage would be gained by the consideration of the nautical questions being undertaken by the judge of the Admiralty Division, assisted by assessors instead of the case coming before a jury. Therefore I take it that both parties consented to have the case tried in the Admiralty Division according to the Admiralty practice, and it is not now open to one of the parties to object to that practice. I therefore think both appeals must be dismissed.

Fry, L.J.—These actions would properly have been tried in the Queen's Bench Division, and under sect. 24 of the Judicature Act 1873, if tried in another division without the consent of the parties, they should have been determined in that division in the same manner as they would have been determined in the Queen's Bench Division, that is, on common law principles. Had these actions been tried out in the Queen's Bench Division I have great doubts whether these judgments, so far as relates to the interest, could have been given in that division. But in both cases the parties have really proceeded by convention. They really intended in proceeding in the Admiralty Division to have their cases determined by Admiralty rules. In both cases the matter was argued in the Admiralty Court in a way which leads me to the conclusion that the parties were proceeding in that court by convention so as to avail themselves of its practice and procedure.

Lopes, L.J.—I am of opinion that the parties proceeded on the understanding that the Admiralty practice was to apply.

Appeal dismissed.

Solicitors for the plaintiffs in *The Gertrude*, *Stokes, Saunders*, and *Stokes*.

Solicitors for the defendants in *The Gertrude*, *Botterell* and *Roche*.

Solicitors for the plaintiffs in *The Baron Aberdare*, *Hollams, Son*, and *Coward*.

Solicitors for the defendants in *The Baron Aberdare*, *Hacon* and *Turner*..

Wednesday, April 25, 1888.

(Before Lord Esher, M.R., Lindley and Bowen, L.JJ., assisted by Nautical Assessors.)

The Memnon. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Collision—Crossing ships—Risk of collision—Regulations for Preventing Collisions at Sea, arts. 18, 22, 23.

Where two steamships are approaching so as to

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

involve risk of collision, and it is the duty of one to keep out of the way and of the other to keep her course, the latter is bound to comply with art. 18 *of the Regulations as to slackening her speed or stopping and reversing, notwithstanding the fact that by continuing her speed may be the best and most seamanlike manœuvre for the purpose of avoiding a collision.*

The steamship M. sighted the masthead and green light of the steamship S., distant about three miles, and bearing about two and a half points on the port bow. When the S. got within three ship's lengths of the M., still showing her masthead and green lights at a bearing of four points on the port bow, she suddenly starboarded, and although the M. immediately stopped her engines, a collision occurred. The Court, having held that the S. was to blame, further found that the respective courses of the vessels were such that had the S. kept her course and not starboarded she would have passed one and a half ship's lengths astern of the M., and that the best and most seamanlike manœuvre for the M. was to continue her speed as she did, but that there was in fact risk of collision before the S. starboarded, and that the M. was to blame for breach of art. 18 *in not stopping sooner.*

This was an appeal by the defendants in a collision action *in rem* from a decision of Butt, J. finding both ships to blame.

The collision occurred off the coast of Brazil at night, on the 20th Aug. 1885, between the plaintiffs' paddle-wheel steamer the *San Salvador* and the defendants' screw steamship the *Memnon*.

At the time of the collision the *San Salvador* was on a voyage from Estancia to Bahia, laden with a general cargo, and was heading about S.W. The *Memnon* was on a voyage from Bahia to New York with a cargo of coffee, and was heading about E. by N. ½ N. In these circumstances those on the *Memnon* sighted the masthead and green lights of the *San Salvador*, distant about three miles, and bearing about two and a half points on her port bow. It being the duty of the *San Salvador*, under art. 16 of the Regulations for Preventing Collisions at Sea, to keep out of the way, the *Memnon* kept her course. When the *San Salvador* got within three ship's lengths of the *Memnon*, still showing her masthead and green light, on a bearing of four points on the port bow, she suddenly starboarded, and, although the engines of the *Memnon* were immediately stopped, the *San Salvador* with her stem struck the port quarter of the *Memnon*.

Butt, J. found that the *San Salvador* was to blame for not keeping out of the way of the *Memnon*, and also held the *Memnon* to blame for infringement of art. 18 in not acting with her engines until the *San Salvador* starboarded.

The material parts of his judgment are as follows:

"Now, it is a fact that no relaxation of the speed of the *Memnon* occurred until she was within about three lengths of the *San Salvador*. The officer in charge of the *Memnon*, who gave his evidence very intelligibly, and who I have no doubt is a very competent seaman, and whose skill, ability, and reputation I hope will not be affected by the judgment I am about to give, says that having seen the masthead and green lights of the *San Salvador* at a considerable distance, about two and a half points on his port bow, he took her bearing by a compass which was at hand, and watched her carefully, and that as the vessels approached one another the bearing of the *San Salvador* altered, and broadened on his port bow till it got about four points on the bow, and it was about at that bearing on his port bow when within about three ship's lengths of him. He says that he judged by the broadening of the bearing of that vessel's lights that she would go under his stern, even if she did not port her helm, although it would have been rather a near thing, and he says, forming, as he did, that opinion, he thought it right to keep, not only his course, as the rule enjoined him, but that when the *San Salvador* got to the bearing and distance I have described on his port bow, he observed her starboarding, and he at once ordered his helm hard-a-port and gave an order to stop the engines. . . . That being the state of the case, I have thought it best to put to the Elder Brethren the question which the Court of Appeal in *The Beryl* (51 L. T. Rep. N. S. 554; 5 Asp. Mar. Law Cas. 321; 9 P. Div. 137) put to its assessors, and in doing so I have been careful to point out to them what I consider a distinction between the facts in *The Beryl* (*ubi sup.*) and the facts in this case—I mean the fact pointed out by Sir Walter Phillimore in his argument that, whereas it would have been a very difficult matter when the vessels approached in the case of *The Beryl* (*ubi sup.*) for the other vessel, the *Abeona*, to have kept out of the way, it would have been a comparatively easy matter, when the *San Salvador* and the *Memnon* got within a similar distance, for the *San Salvador* to have kept out of the way by a very slight touch of port helm. Pointing out that difference, and telling the Elder Brethren that they must make that allowance in favour of the officer of the *Memnon*, I put this question to them, 'Was the officer in charge of the *Memnon* justified as a sailor in supposing until he was three ship's lengths from the *San Salvador* that the *San Salvador* would keep out of the way, and could do so without difficulty?' They advise me that he was not so justified. As I do not dissent from that opinion, I shall, of course, act upon it, and I must, although with great reluctance, pronounce the *Memnon* also to blame."

The Regulations for Preventing Collisions at Sea:

Art. 16. If two ships under steam are crossing so as to involve risk of collision, the one 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. 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.

Sir *Walter Phillimore* and *J. P. Aspinall*, for the defendants, in support of the appeal.—Risk of collision never existed until the *San Salvador* starboarded when within a short distance of the *Memnon*, and, as the *Memnon* then stopped, there has been no infringement of art. 18. The courses were such that but for the alteration by the *San Salvador* at the last moment she must have gone under the stern of the *Memnon*. So long as that

state of affairs continued there could be no risk of collision. [Lord Esher.—You must take into account the possibility that a ship so approaching you may do wrong.] True, in *The Beryl* (*ubi sup.*) this court decided that the article is applicable from the time when the circumstances are such that it is probable that risk of collision may be involved. But in that case it was seen for an appreciable time that the ship whose duty it was to keep out of the way was neglecting to do so. Here the *San Salvador* had a right to take any effectual steps she liked to keep out of the way, and until she starboarded her manœuvres were such as would have taken her clear. There was no duty upon the officer in charge of the *Memnon* to assume that the *San Salvador* would suddenly do wrong. As a matter of fact, had the *San Salvador* kept her course, to have stopped would have been to bring about collision. It is therefore clear that the action of the *Memnon* in keeping on was in the circumstances the best and most seamanlike manœuvre. If so, the *Memnon* was relieved from obedience to art. 18 by the terms of art. 23:

The Benares, 48 L. T. Rep. N. S. 127; 5 Asp. Mar. Law Cas. 171; 9 P. Div. 16;
The Khedive, 43 L. T. Rep. N. S. 610; 4 Asp. Mar. Law Cas. 360; L. Rep. 5 App. Cas. 876.

Myburgh, Q.C. and *Raikes*, for the respondents, were not called upon.

Lord Esher, M.R.—If we were not bound by the Act of Parliament, we are advised, and entirely agree, that, as a matter of simple navigation, the best thing for this officer to have done was what he did. But the Act of Parliament has tied the hands of sailors and has tied the hands of the court, and has said: "You must not do what a sailor would say is the best thing; you must do what the Act of Parliament tells you to do." It has been carried so far in the House of Lords as to say that, whatever may be the consequence, you must do what the Act of Parliament tells you to do. We must obey the House of Lords, and they have put that interpretation upon the statute. Then the question is, was there a time when this officer was not justified in supposing that there was any risk of collision? Was there not a time before he did what he did when he ought to have supposed that there would be, not a collision, but a risk of collision? These vessels were approaching one another in a very awkward position. I take it to be the most awkward position in which two vessels can approach, and which I still think, and which I shall probably always think, is a position which those who drew this Act of Parliament had not foreseen and provided for. The *San Salvador* was approaching the *Memnon* on the *Memnon's* port side, showing her green light on that port side, which I take to be about as awkward a position as can be. We have asked the gentlemen who assist us this question: "Supposing there were no Act of Parliament, was it safe and seamanlike navigation for the *San Salvador* to approach the *Memnon*, seeing her red light on such a course as to show to the *Memnon* her green light?" Their answer is what one might anticipate: It was not safe and seamanlike navigation for the *San Salvador* to keep on the course she did. She ought, if she had exercised proper seamanship, to have ported so as to show her red light, and to have gone astern of the *Memnon*.

It is true that the wording of the Act of Parliament is such that she may go ahead if she pleases. The Act of Parliament merely says that she is bound under the circumstances to keep out of the way. But, unless you have plenty of time to go ahead, you ought to go astern. But again, the Act of Parliament says you are not liable for trying to go ahead if you escape. If you ought to go astern to escape, you ought not to cut the thing as fine as you can. There may be circumstances which do not give you room, but surely if there is plenty of room you ought to go clear astern. The materiality of these observations in this case is, that the officer in charge of the *Memnon*, seeing how the *San Salvador* was behaving, knew that she was exercising her legal rights if she escaped him, but must also have known that she was being managed by a seaman who was acting towards him in a very risky manner. He knew the ship was not being navigated carefully, even if she was being navigated legally. We are advised that, if the *San Salvador* had kept the course which she was keeping without porting or starboarding, she would have gone a length and a half astern of the *Memnon*; that is, there would have been no collision. But is a sailor justified, when he sees another man navigating his ship in a hazardous manner, and though not illegally, yet in an unsafe way—is he justified in supposing that that man will only go to the extent he is then going in doing that which is risky and hazardous? He sees the man is doing wrong as a sailor. Is he justified in supposing that he will do wrong only so far as he is doing at that moment? The gentlemen who assist us agree that an officer is not justified in supposing that. If you see a cabman coming down Piccadilly letting his horse go from one side of the road to the other, you are not justified in supposing that he will not come nearer to you. You must suppose that something is wrong, and that he may run into you. So, if you see a sailor doing that which as a matter of navigation is wrong, but doing it so that he may only come within a length and a half of your stern, are you justified in assuming that he will in fact come no nearer to you? At that moment in our view there is risk of collision, and therefore we are obliged to agree with Butt, J., and say that, however hard it is upon this officer, and however clear it is that as a sailor he did no wrong, yet as a subject bound to obey the Act of Parliament he did not obey it, and therefore most unhappily his owners must take the consequences. The result is, that we must hold both ships to blame, and the appeal is dismissed.

Lindley, L.J.—I am of the same opinion. This is an illustration of the effect of attempting to navigate ships by Act of Parliament, the effect being to saddle a man, who has done nothing wrong in point of seamanship, with damages for a collision which, but for the Act of Parliament, could not be said to have been brought about by his act. I think it is pretty obvious that Butt, J. exonerated the officer from all blame as a seaman, but felt himself bound by these rules.

Bowen, L.J.—The question is, whether the officer in charge of the *Memnon* ought not, at some time prior to the time when he did stop, to have come to the conclusion that there was risk of

collision, the *San Salvador* being so manœuvred as to show any reasonable man that there was risk of collision? Had the officer in charge of the *Memnon* any right to assume that from and after that moment the *San Salvador* would do what was right? It seems to me contrary to common sense to maintain that, when you are watching a person who is doing something that is wrong and unseamanlike, you have a right to assume that at some given moment he will cease that course of conduct and adopt another. If there is a reasonable chance of his not being right at the last, which is suggested to your mind by the observations of what he is doing, then there is a reasonable chance of danger.

Appeal dismissed.

Solicitors for the plaintiffs, *Walton, Bubb,* and *Johnson.*

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

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Jan. 30, 31, *Feb.* 4, *and Aug.* 11 1888.

(Before Lord Coleridge, C.J. without a Jury.)

The Mogul Steamship Company Limited *v.* McGregor, Gow, and Co. and others. (*a*)

Conspiracy — Combination of shipowners — Restraint of trade—Unlawful object—Illegal means —Public policy.

The defendant shipping companies and owners had combined together and formed a "conference" or "ring," and their agents in China had issued circulars to shippers there to the effect that exporters in China who confined their shipments of goods to vessels owned by members of the "conference," should be allowed a certain 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 such shipment should have been made. The plaintiffs, who were owners of vessels in the same trade, had thereby suffered damage.

Held, that such combination of the defendants was not in restraint of trade; that the object of the combination was not to effect an unlawful end, and that the means used by the defendants to attain such end were not unlawful; and that, although the motive of the defendants was to exclude the plaintiffs from the trade if they could, and to do so without any consideration for the results of such exclusion to the plaintiffs, that was not enough to render the combination wrongful or malicious. Therefore, under the above circumstances, an action for wrongful combination or conspiracy to prevent the plaintiffs carrying on their trade would not lie.

Action tried by Lord Coleridge, L.J. without a jury.

The plaintiffs were a shipping company, incorporated in 1883, owning shares in certain steamships, viz., the *Sikh, Afghan, Pathan,* and *Ghazee,* trading between Chinese and Australian ports and London, and the defendants, McGregor, Gow, and Co., T. Skinner and Co., D. J. Jenkins and Co., the Peninsular and Oriental Steam Navigation Company, William Thomson and Co., and others, were shipping companies and owners trading in the same seas.

The facts appear sufficiently from the pleadings, which were substantially as follows:—

The plaintiffs, in their statement of claim, alleged that they had suffered damage by reason of the defendants, as and being owners of numerous steamers trading between ports in the Yangtse-Kiang river and London, conspiring together to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs, from shippers, to be carried from ports in the said river to London, for reward to the plaintiffs in that behalf. That the said conspiracy consisted of a combination and agreement by and amongst the defendants, as and being owners of steamers trading as aforesaid, and having, by reason of such combination and agreement, control of the homeward shipping trade, pursuant to which shippers were bribed, coerced, and induced to agree to forbear, and to forbear, from shipping cargoes by the steamers of the plaintiffs. It was alleged, in the alternative, that the said conspiracy consisted of a combination and agreement by and amongst the defendants, as and being owners of steamers as aforesaid, pursuant to which the defendants, with the intent to injure the plaintiffs, and to prevent them from obtaining cargoes for their steamers trading between the said ports, agreed to refuse, and refused, to accept cargoes from shippers, except upon the terms that the said shippers should not ship any cargoes by the steamers of the plaintiffs, and by threats of stopping the shipment of homeward cargoes altogether, which threats they had the power and intended to carry into effect, did prevent shippers from shipping cargoes by the plaintiffs' steamers, and threatened and intended to continue so to do. The plaintiffs claimed damages, and an injunction to restrain the defendants from continuing the wrongful acts above mentioned.

In particulars delivered by the plaintiffs, they stated that the combination and agreement consisted of a combination and agreement by and amongst the defendants, as being a number of wealthy shipowners and shipping companies, formed and entered into for the purpose of creating a "conference" or "ring," and thereby acquiring the control of the shipping trade between China and England, and for the purpose of compelling their agents in China and Hong Kong not to load any cargoes on the plaintiffs' vessels, and for the purpose of preventing shippers and merchants from shipping by the plaintiffs' vessels, by imposing penalties on those who did so, by granting a rebate of 5 per cent. on the freight charged to such shippers as had not made any shipments for certain six-monthly periods by the plaintiffs' vessels, and generally for the purpose of boycotting and ruining the plaintiffs as shipowners, and of driving them out of the trade, thus preventing the plaintiff company from carrying on their lawful business as shipowners and carriers in the said trade. With this object the defendants had widely distributed among the China merchants circulars to the following effect:

Shanghai, 10th May 1884.

To those exporters who confine their shipments of

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

tea and general cargo from China to Europe (not including the Mediterranean and Black Sea ports) to the P. and O. Steam Navigation Company, Messagerie Maritime Company, Ocean Steamship Company, McGregor, Gow, and Co., Glen, Castle, Shire, and Ben Lines, and to the steamships *Copack* 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 or been interested in any shipments of tea or general cargo to Europe (excepting the ports above named) by any other than the said lines.

Shipments by the steamships *Afghan*, *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 the 30th Oct. next.

Shipments by an outside steamer at any of the ports in China or 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 although its other branches may have given entire support to the above lines.

The foregoing agreement on our part to be in force from the present date till the 30th April 1885.

In May 1885 the defendants caused to be issued to the shippers and merchants in China another circular, as follows:

Shanghai, 11th May 1885.

Referring to our circular, dated the 10th May 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.

In consequence of these circulars and the conduct of the defendants, the plaintiff company complained that they had been unable to obtain freights for their ships, and had been virtually driven out of the China trade.

The defendants, in their defence, contended that, as matter of law, the statement of claim disclosed no cause of action against the defendants, and they denied any conspiracy, as alleged, or that shippers were bribed, coerced, or induced to abstain from shipping cargoes by the plaintiffs' steamers; and they alleged the real facts of the case to be that, in the year 1884, an agreement or conference was entered into by the defendants, for working the homeward carrying trade in steam-vessels sailing from China by regular departures of such vessels during the years 1884 and 1885, and so affording inducements to merchants and shippers in and from China to support such vessels, and, in order further to induce such support, to give to such merchants and shippers as should ship only by the conference vessels a return or rebate of 5 per cent. of all freights paid by such shippers by such vessels; and that the vessels *Pathan* and *Ghazee*, belonging to the plaintiffs, were actually admitted to the benefit of this agreement for one voyage each in the tea season of 1884 from Hankow to London; but that the plaintiffs, in breach of their agreement, prior to the Hankow tea season of 1885, threatened the defendants that, unless their vessels were admitted to the privileges of the conference for the tea season of 1885, they would oppose and enter into competition with the conference vessels, and cut down and smash the rates of freight to such a low rate as would cause great loss to all the conference vessels; and that the defendants, declining to accede to the plaintiffs' demands, the plaintiffs did carry out their threat and so cut down the rates of freight that the defendants were compelled to accept rates of freight largely below the then prevailing rates.

The evidence, so far as is material to the decision, appears sufficiently in the judgment.

Sir *Henry James*, Q.C. and *Crump*, Q.C. (*J. Gorell Barnes*, Q.C., and *Sims Williams* with them) for the plaintiffs.—It is submitted that it is clear from the evidence that the defendants, acting in common, combined for the purpose of preventing the plaintiffs and others trading from China to Europe, and from and to ports in China, and that such combination inflicted direct loss on the plaintiffs, who were thereby prevented from earning money in the course of their trade, and from doing lawful acts. The action of the defendants amounts to restraint of trade, whereby the plaintiffs have been injured, and such action, if it had been committed by each of the defendants alone, would have rendered them severally liable to the plaintiffs. It is submitted, first of all, that a combination to do an unlawful act is an indictable conspiracy; secondly, that a combination to effect any result by unlawful means is a conspiracy also; and, thirdly, that an action lies under the name of conspiracy, but which is really what was formerly an action on the case, although those acts which constitute the cause of action may not be ground for an indictment. The word "unlawful" in this sense does not mean a criminal act, but it includes injury to an individual, such as inflicting upon him money losses, or preventing him from exercising a legal right, such as pursuing his trade; and also, under this word "unlawful," acts are included which produce results which are injurious to the public, as, for instance, acts in restraint of trade. In Hawkins Pleas of the Crown, vol. 1, p. 446, it is said that "there can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law." "A conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it, as appears in the case of *The Tubwomen* v. *The Brewers of London*:"

Rex v. *Journeymen Tailors of Cambridge*, 8 Mod. Rep. 11, 12.

Lord Mansfield said, in the case of *Rex* v. *Eccles* (1 Leach Cr. Cas. 274): "The illegal combination is the gist of the offence; persons in possession of any articles of trade may sell them at such prices as they individually may please, but if they confederate and agree not to sell them under certain prices, it is conspiracy." The case of *Rex* v. *Turner* (13 East, 228) is certainly against this contention, but that decision has been frequently in later cases unfavourably commented on; for instance, in *Reg.* v. *Rowlands* (17 Q. B. Rep. 671), where Lord Campbell said that he had no doubt that it was wrongly decided. In a note to *Clifford* v. *Brandon* (2 Camp. at p. 372), Lord Campbell, the reporter, refers to *Macklin's case*, and Sir James Mansfield, C.J., in giving judgment, said: "If any body of men were to go to the theatre with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt but that such a deliberate and preconcerted scheme would

amount to a conspiracy, and that the persons concerned in it might be brought to punishment." Conspiring to do a thing is an offence, although the act itself, when done by one person, may be a lawful act:

Rex v. *Mawbey*, 6 Term Rep. 619;
Vertue v. *Lord Clive*, 4 Burr. 2476.

In *Reg.* v. *Warburton* (L. Rep. 1 Cr. Cas. Res. 274) Cockburn, C.J. said: "It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which, if done, would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, that is, amount to a civil wrong." A dictum of Erle, J. in *Reg.* v. *Duffield* (5 Cox Crim. Cas. 404, 429) is also to the same effect. The bonus given by the defendants in this case for not dealing with the plaintiffs is the overt act to prove that the object and intention of the defendants was to cause shippers to abstain from dealing with the plaintiffs. What the defendants have in fact done has been to impose a penalty upon persons dealing with the plaintiffs. Their object was to damage the plaintiffs, and that is a wrong:

Carrington v. *Taylor*, 11 East, n., at p. 574;
Keble v. *Hickringill*, 11 Mod. Rep. 75.

An action in respect of such conduct would lie by the plaintiffs as against each and every one of the defendants, apart from the combination:

Bowen v. *Hall*, 44 L. T. Rep. N. S. 75; 6 Q. B. Div. 333;
Lumley v. *Gye*, 2 El. & Bl. 216; 22 L. J. 463, Q. B.

This crime of conspiracy has been defined as consisting in "an agreement of two persons or more to commit a crime, or fraudulently or maliciously to injure or prejudice the public or any individual person:" (7th Report of the Criminal Law Commissioners 1848, p. 275.) The words "fraudulently or maliciously" in that definition are, it is submitted, unnecessary. A confederacy of two or more persons to accomplish some unlawful purpose, or a lawful purpose by some unlawful means, is indictable:

O'Connell v. *The Queen*, 11 Cl. & Fin. 155;
The State v. *Buchanan*, 5 Maryland Rep. 317;
Rex v. *Cope and others*, 1 Str. 144;
Rex v. *Berenger*, 3 Man. & Sel. 67;
Reg. v. *Druitt*, 16 L. T. Rep. N. S. 855; 10 Cox Crim. Cas. 593.

Moreover, apart from actual damage to the plaintiffs, the effect of the combination is to operate in restraint of trade, and so is opposed to public policy. For these reasons it is submitted that the plaintiffs are entitled to judgment.

Sir *Charles Russell*, Q.C. and Sir *Horace Davey*, Q.C. (*Finlay*, Q.C. and *Pollard* with them) for the defendants.—The cases referred to on the other side were cases of indictments for conspiracy, and not civil actions in the nature of conspiracy. It is submitted that there is no such proceeding at law as an action for conspiracy as such; in other words, conspiracy as such is not a cause of action. It is necessary, for such an action to lie, to show that a tort has been committed—a legal wrong resulting in legal damage. Conspiracy may be a ground for aggravation of damages, and may be evidence of malice where evidence of malice is necessary, but the gist of the act is in the legal damage resulting from a legal wrong. It is clear that the combination which is alleged against the defendants in the present action would not amount to an indictable conspiracy. In the cases of *Rex* v. *Eccles* (2 Leach's Cr. Cas. 274) and *Macklin's case* (2 Camp. 372) the indictments contain words such as "fraudulently, maliciously, and unlawfully confederated and conspired to injure the prosecutor in his business," and the gist of the offence was that the acts complained of were done maliciously; that is to say, done not for the legitimate protection of the defendants themselves, but "with the primary purpose of injuring the plaintiffs in their business." A sufficiently accurate expression of what the law is with regard to combinations is contained in the case of *Reg.* v. *Rowlands* (17 Q. B. Rep. 671). It appears from that case that Lord Campbell thought that Lord Ellenborough wrongly applied the law in the case of *Rex* v. *Turner* (13 East, 228), but not that the principle laid down by him was wrong. In *Reg.* v. *Rowlands* (17 Q. B. Rep. 671), Erle, J., in summing up, said: "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 party 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." When once the primary object of the combination is ascertained to have been for the purpose of obtaining a lawful benefit, that combination is not the subject of an indictment, although it may have the effect of obstructing or inflicting some *damnum* or loss upon the plaintiffs, and it cannot be said that the combination alleged to have been entered into by the present defendants would have been an indictable conspiracy. The case of *Reg.* v. *Druitt* (16 L. T. Rep. N. S. 855; 10 Cox Crim. Cas. 593) does not affect the broad proposition of the defendants, which is that, apart from fraud or misrepresentation, or physical interference, or intimidation, or molestation, the defendants can take any means which they think fit to secure to themselves the trade in any port or place. The combination of the defendants was for the purpose of protecting their legitimate interests, and was not for the primary purpose of injuring the plaintiffs, although indirectly it may have had the effect of consequent loss to the plaintiffs. The question to be decided in the present case is, whether the combination or agreement between the defendants is the proper subject of a civil action. It is submitted that no action will lie on the pleadings and evidence before the court, first, because no legal wrong has been inflicted upon the plaintiffs; and secondly, because whatever be the character of the acts of the defendants, they have occasioned the plaintiffs no legal damage. What is sometimes inaccurately called an action of conspiracy is really an action on the case against joint tort feasors, in which a legal wrong, resulting in legal damage, must be shown:

Savile v. *Roberts*, 1 Raymond's Rep. 374;
Skinner v. *Gunton*, 1 Saunders' Rep. 269;
Barber v. *Lessiter*, 7 C. B. N. S. 175.

In the case of *Gregory* v. *The Duke of Brunswick* (6 M. & G. 953) the court were of opinion that in

point of law the conspiracy was material only as evidence of malice, but that in point of fact there was no other such evidence, and therefore the jury were directed that without proof of it the plaintiffs' case must fail. There is no case in which the allegation of conspiracy has ever been treated as anything more than aggravation or evidence of malice. The legal wrong, and not the conspiracy, is the cause of action:

Hutchins v. *Hutchins*, 7 Hill's Reps. of the Supreme Court of New York, 104.

The forfeiture of the rebate, promised by the defendants to shippers upon certain conditions, if such conditions are not carried out, is in no sense a penalty. The shipper is not entitled to the rebate, according to the contract, unless a certain condition is fulfilled, and so he is not deprived of the benefit of any contract which he would otherwise be entitled to have the benefit of. The case of *Bowen* v. *Hall* (44 L. T. Rep. N. S. 75; 6 Q. B. Div. 333) is a limitation of *Lumley* v. *Gye* (2 El. & Bl. 216; 22 L. J. 463, Q. B.) The latter of these cases broadly decided that, if a person is persuaded to break a contract of service, an action lies for the damage sustained by the loss of that person's services. *Bowen* v. *Hall* qualified that doctrine by adding that, in order to make an action maintainable, the persuasion must have been with a view to injuring the plaintiff and with a view to benefiting the defendant himself. The principle of those cases would not apply where there was no contract, and therefore they are not applicable to the present action, which is not an action for inducing persons to break their contract with the plaintiffs. The complaint of the plaintiffs really amounts to this: that, owing to the competition of the defendants, and owing to the terms offered by the defendants, they did not get as good a freight as they hoped to get for their cargoes. There can be no complaint that the plaintiffs were not allowed to load; no evidence has been given of any illegitimate acts or coercion by the defendants. It is therefore submitted that this action ought to be dismissed, and judgment entered for the defendants.

Sir *Henry James*, Q.C. in reply.—The circulars issued by the defendants establish that the combination of the defendants was, as a fact, to deprive the plaintiffs of their legal right of trading. The means used by the defendants were illegal. The circulars of May 1885 imposed a penalty or offered a bribe, and the rebate is not money paid by way of fair consideration. The object of the defendants was primarily to drive off all competition, and then to take the whole trade in their own hands, and so to take away the benefit of general trade from the public. The plaintiffs have a complete cause of action: the combination of the defendants is criminal; the means used are unlawful, and the damage to the plaintiffs is admitted. The combination is criminal, because it is in restraint of trade. The following cases were cited:

Reg. v. *Duffield*, 5 Cox C. C. 405;
Reg. v. *Parnell*, 14 Cox C. C. 508;
Ashley v. *Harrison*, 1 Esp. 47.

Cur. adv. vult.

Aug. 11.—Lord Coleridge, C.J.—This case has stood over, from causes not under my control, for much longer than I could have desired; but at last I am able to give my opinion on it. The plaintiffs are a company of shipowners, trading, or desirous of trading, between Australia and this country, taking China by the way, and desirous, in particular, of sharing in the transport of what has been called the "tea harvest," the time of which is in the late spring and early summer months, and the places for loading which, as far as this case is concerned, are Shanghai, at the mouth of the Yangtse-Kiang, and Hankow, a place about 600 miles up the stream of that great river. The defendants are a number of great shipowners, companies, and private partnerships, trading, for the most part, from this country to China, and from China to this country direct, and who, being desirous to keep this very valuable trade in their own hands, and to prevent, if they can, the lowering of freights—the ruinous lowering, as they contend—which must follow, as they say, from absolutely unrestricted competition, entered into what they called a "conference" for the purpose of working the homeward trade, by offering a rebate of 5 per cent. upon all freights paid by the shippers to the conference vessels, such rebate not to be paid to any shipper who shipped any tea at Shanghai or Hankow (the rebate was not confined to these ports, but I think that an immaterial circumstance) in any vessels but those belonging to the conference. The agreement between the members of the conference was entered into in April 1884, and during that year the now plaintiffs were admitted to share in its benefits. They were excluded in 1885. They refused to acquiesce in the exclusion, and a commercial conflict was the result, in which, as I understand, both sides suffered heavily; and it is for the loss which the plaintiffs say they suffered by the proceedings of the conference who, they allege, "bribed, coerced, and induced" shippers to forbear from shipping cargoes in the plaintiffs' vessels, that this action is brought. The question is, will the action lie? If I hold that it will, the damages are to be inquired into and settled elsewhere. It may, perhaps, be material—at all events, I desire to show that I have not forgotten—that there is, from the defendants' point of view, some moral and sensible defence for their conduct, whatever legal view may at last be taken of it. They run—or at the time of the conference they did run—steamers regularly all the year round from England to China, and back again, conferring, as they say, thereby a considerable benefit on the mercantile community of both countries. Further, they allege—and I think upon the evidence before me truly allege—that they could not do this at a profit, and that they would therefore probably cease to do it at all, unless they can practically monopolise the carrying trade of the tea at Shanghai and Hankow during the Chinese tea harvest. It is the large profit they make by keeping up the rate of tea freights—so to call them—which enables them to give a regular line of communication during the other months of the year. They contend, therefore, that what they did by the rules of the conference was not purely selfish, though, of course, self-interest guided them, but that there were real and large public benefits accruing to the inhabitants of China and England from the course which they pursued. I think there is ground for this contention, and it should be kept in mind. The complaint then is this, that the defendants unlawfully combined or conspired to

prevent the plaintiffs from carrying on their trade, that they did prevent them by the use of unlawful means in furtherance of such unlawful combination or conspiracy, and that from such unlawful combination or conspiracy therefore damage has resulted to the plaintiffs. The defendants answer that neither was their combination unlawful in itself nor were any unlawful means used in furtherance of it, but the damage, if any, to the plaintiffs was the necessary and inevitable result of the defendants carrying on their lawful trade in a lawful manner. These are the contentions on the two sides. Is there anything in the law applicable to this subject in which they are agreed? In the statement of the law, as might be expected from the counsel who argued the case, there was often a close apparent agreement; but when it came to the application of it, the same words were evidently not always used on both sides in the same sense. I have carefully read over again and considered the arguments, and it seems to me it will be better that I should endeavour to state what I conceive to be the law upon the matter in dispute, and then apply it to the facts before me, which, as most of them depended upon written documents, can hardly be said to have been much disputed.

It cannot be, nor indeed was it, denied that, in order to found this action, there must be an element of unlawfulness in the combination on which it is founded, and that this element of unlawfulness must exist alike whether the combination is the subject of an indictment or the subject of an action. But whereas in an indictment it suffices if the combination exists and is unlawful, because it is the combination itself which is mischievous and which gives the public an interest to interfere by indictment, nothing need be actually done in furtherance of it. In the *Bridgwater case*, in which I was counsel, nothing was done in fact; yet a gentleman was convicted because he had entered into an unlawful combination from which, almost on the spot, he withdrew, and withdrew altogether. No one was harmed; but the public offence was complete. This is in accordance with the express words of Bayley, J., giving judgment in *Rex* v. *Berenger* (3 Mau. & Sel. 67). It is otherwise in a civil action. It is the damage which results from the unlawful combination, and not the unlawful combination itself, with which the civil action is concerned. It is not every combination which is unlawful, and if the combination is lawful—that is to say, for a lawful end pursued by lawful means—or, being unlawful, there is no damage from it to the plaintiff, the action will not lie. In these last sentences, "damage" means legal injury; mere loss or disadvantage will not sustain the action. Once more, to state the proposition somewhat differently with a view to some of the arguments addressed to me, the law may be put thus: If the combination is unlawful, then the parties to it commit a misdemeanour, and are offenders against the State; and if, as the result of such unlawful combination and misdemeanour, a private person receives a private injury, that gives such person a right of private action. It is, therefore, no doubt necessary to consider the object of the combination as well as the means employed to effect the object, in order to determine the legality or illegality of the combination; and in this case it is clear that, if the object were unlawful, or if the object were lawful but the means employed to effect it were unlawful, or if there were a combination either to effect the unlawful object or to use the unlawful means, then the combination was unlawful, then those who formed it were misdemeanants, and a person injured by their misdemeanour has an action in respect of his injury. If this statement of the law, clear, as I hope, be also accurate, as I believe, there is no need to enter into the historical inquiry as to how the action on the case in the nature of a conspiracy grew out of the old, and for many years disused, writ of conspiracy, which was very limited in its operation, and the judgment in which was followed by very terrible consequences. Those who desire to follow out an interesting but otiose inquiry may find all the materials for it in Fitzherbert, "De Natura Brevium," p. 260 (edit. of 1730, enriched with Lord Hale's notes), and in the judgment of Lord Holt in *Savile* v. *Roberts*, reported in various books, but best and most fully in 1 Raymond, 374, and very well in Carthew, 416, where especially the distinction between the ordinary judgment in an action on the case and a villanous judgment as explained in Jacobs' and Tomline's dictionaries is pointed out and insisted on. The whole law on this subject may be found in a most convenient form in the notes to *Hutchins* v. *Hutchins*, a case decided in the Supreme Court of the State of New York in 1845, and published by Mr. Melville Bigelow in his very valuable collection of Leading Cases on the Law of Torts, p. 207. (I cite from the Boston edition of 1875.) The first paragraph of the judgment of Nelson, C.J. in that case contains an admirable statement of the law; and Buller's Nisi Prius, 13*a* and 14, and Selwyn's Nisi Prius, 1062, may also be usefully referred to, as also the note to *Skinner* v. *Gunton* (1 Wms. Saund. 269, 6th edit. 1845), and "Termes de la Ley," title Conspiracy.

It will appear from the statement which I have given of what I believe to be the law that I cannot assent without some qualification to the propositions which were pressed upon me by the learned counsel for the contending parties in this case. For the same reason I do not propose to enter into a detailed examination of the many cases which were cited in argument. I believe that, fairly considered and rightly looked at, every case, including the much-canvassed *Rex* v. *Turner* (13 East, 228), will be found to be consistent with those principles, although there are isolated dicta of very great judges, probably in their very terms (if the terms are rightly reported) going beyond the law, certainly quite irreconcilable with each other. On one side are extreme cases such as *Keble* v. *Hickringill*, in which at first, in the 11 Modern, p. 75, Lord Holt doubted, but finally, at p. 131 of the same volume, gave judgment for the plaintiff; and *Reg.* v. *Druitt* (10 Cox Crim. Cas. 593), in which, unless he is misreported, Bramwell, B. said he thought a combination to treat a man with "black looks" was an indictable misdemeanour (a decision, if it be one, which might assuredly land us in unexpected and singular results), and the very broad dictum of Pratt, C.J. in *Rex* v. *Journeymen Tailors of Cambridge* (8 Mod. Rep. 11), that a conspiracy of any kind is illegal, though the matter they conspired about might have been quite lawful for them to do.

These are, perhaps, as extreme as can be found on one side. On the other is the questioned and possibly overruled case of *Rex* v. *Turner* (13 East, 228), decided by Lord Ellenborough, and Grose, Le Blanc, and Bayley, JJ. The view which Lord Ellenborough took of the facts of that case appears rather from his interlocutory observation at p. 230, than from his judgment on the page following. It is difficult not to acquiesce in the good sense of Lord Ellenborough's observations; and speaking, as I wish, and indeed ought to speak, with grateful respect of Lord Campbell, I do not feel so sure that Lord Ellenborough was wrong simply because Lord Campbell in *Reg.* v. *Rowlands* (17 Q. B. 686) says he has no doubt he was so. Be that as it may, and if it were that Lord Ellenborough and the court did wrongly apply the principles of law in *Rex* v. *Turner* (*ubi sup.*), those principles are clearly and forcibly stated, in accordance with what I have endeavoured to express, by Lord Ellenborough himself. The case of *Rex* v. *Eccles* before Lord Mansfield and Willes and Buller, JJ., and reported in 1 Leach Cr. Cas. 274, turned upon pleading; the motion was in arrest of judgment. The decision was, that after verdict the indictment was good; and the case itself is expressly commented on, explained, and distinguished by Lord Ellenborough in *Rex* v. *Turner* (*ubi sup.*). There were a number of cases, of which *Wensmore* v. *Greenbank* (Willes, 577), *Lumley* v. *Gye* (2 E. & B. 216), and *Bowen* v. *Hall* (6 Q. B. Div. 333), are examples, in which the question of conspiracy did not arise; but they were cited to show what cases of interference, with what sort of contracts, had been held actionable by the courts at the suit of one individual against another.

Now, all these cases bind me sitting here, and I neither question nor desire to evade their authority. But they do not help me much. I do not doubt that the acts done by the defendants here, if done wrongfully and maliciously, or if done in furtherance of a wrongful and malicious combination, would be ground for an action on the case at the suit of one who suffered injury from them. The question comes at last to this: What was the character of these acts, and what was the motive of the defendants in doing them? The defendants are traders with enormous sums of money embarked in their adventures, and, naturally and allowably, desirous to reap a profit from their trade. They have a right to push their lawful trade by all lawful means. They have a right to endeavour by lawful means to keep their trade in their own hands, and by the same means to exclude others from its benefits if they can. Amongst lawful means is certainly included the inducing, by profitable offers, customers to deal with them rather than with their rivals. It follows that they may, if they think fit, endeavour to induce customers to deal with them exclusively by giving notice that only to exclusive customers will they give the advantage of their profitable offers. I do not think it matters that the withdrawal of the advantages is, as it is no doubt, out of all proportion to the injury inflicted. It is a bargain which persons in the position of the defendants here had a right to make, and those who are parties to the bargain must take it or leave it as a whole. Of coercion, of bribery, I see no evidence. Of inducing in the sense in which that word is used in the class of cases to which *Lumley* v. *Gye* (*ubi sup.*) belongs, I see none either. One word in passing only on the contention that this combination of the defendants was unlawful, because it was in restraint of trade. It seems to me it was no more in restraint of trade, as that phrase is used for the purpose of avoiding contracts, than if two tailors in a village agreed to give their customers 5 per cent. off their bills at Christmas, on condition of those customers dealing with them, and with them only. Restraint of trade, with deference, has in its legal sense nothing to do with this question. But it is said that the motive of these acts was to ruin the plaintiffs, and that such a motive, it has been held, will render the combination itself wrongful and malicious, and that if damage has resulted to the plaintiffs an action will lie. I concede at once, and in the fullest way, that if the premises are established the conclusion inevitably follows. It is too late to dispute, if I desired it, as I do not, that a wrongful and malicious combination to ruin a man in his trade may be ground for such an action as this. Was, then, this combination such? The answer to this question has given me much trouble, and I will own to the weakness of having long doubted and hesitated before I could make up my mind upon it. There can be no doubt that the defendants were determined, if they could, to exclude the plaintiffs from this trade. Strong expressions were drawn from some of them in cross-examination, and the telegrams and letters showed the importance they attached to the matter, and their resolute purpose to exclude the plaintiffs, if they could, and to do so without any consideration for the results to the plaintiffs if they were successfully excluded. This, I think, is made out, and I think no more is made out than this. Is this enough? It must be remembered that all trade is, and must be, in a sense selfish. Trade not being infinite—nay, the trade of a particular place or district being possibly very limited—what one man gains another loses. In the hand-to-hand war of commerce, as in the conflicts of public life, whether at the bar, in Parliament, in medicine, in engineering, men fight on without much thought of others, except a desire to excel or to defeat them. Very lofty minds, like Sir Philip Sidney with his cup of water, will not stoop to take an advantage if they think another wants it more. Our age, in spite of high authority to the contrary, is not without its Philip Sidneys, but these are counsels of perfection which it would be silly indeed to make the measure of the rough business of the world as pursued by ordinary men of business. The line is difficult to draw, but I cannot see that these defendants have passed the line which separates the reasonable and legitimate selfishness of traders from wrong and malice. In 1884 they admitted the plaintiffs to their conference; in 1885 they excluded them, and they were determined, no doubt, if they could, to make the exclusion complete and effective, not from any personal malice or ill-will to the plaintiffs as individuals, but because they were determined, if they could, to keep the trade to themselves; and if they permitted persons in the position of the plaintiffs to come and share it, they thought, and honestly, and, as it turns out, correctly thought, that for a time at least there would be an end of

their gains. The plaintiffs' conduct cannot affect their right of action if they have it, but it is impossible not to observe that they were as reckless of consequences in regard to the defendants as they accuse the defendants of being in regard to themselves, that they were as determined to break in as the defendants were determined to shut out, and that they made their threats of smashing freights and injuring the defendants a mode of rather forcible suasion to the defendants to let them into the conference. If they have their right of action, why, they have it; if they have it not, their own conduct disentitles them to much sympathy. On the whole, I come to the conclusion that the combination was not wrongful and malicious, and that the defendants were not guilty of a misdemeanour. I think that the acts done in pursuance of the combination were not unlawful, not wrongful, not malicious, and that, therefore, the defendants are entitled to my judgment.

Judgment for defendants, with costs.

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

Solicitors for the defendants, *Freshfields* and *Williams.*

April 13, 14, 16, *and June* 4, 1888.

(Before Pollock, B. and Charles, J.)

Blackburn, Low, and Co. *v.* Haslam. (*a*)

Marine insurance—Concealment of material fact—Principal and agent—Concealment by agent from broker through whom policy effected.

The plaintiffs instructed a firm of brokers to re-insure an overdue ship. Whilst acting for the plaintiffs one of the firm of brokers received information material to the risk. The brokers did not inform the plaintiffs of the news, but communicated by telegraph with their own London agents in the plaintiffs' own name for the purpose of effecting the re-insurance. The London agents communicated with another London broker, who effected a re-insurance for the plaintiffs on the overdue ship. The plaintiffs' brokers did not charge any commission, as the negotiations for the re-insurance were not completed by them. The overdue ship had, in fact, been lost some days before the plaintiffs tried to re-insure, but neither the plaintiffs nor the London agents, nor the broker who actually effected the re-insurance, knew of such loss.

Held, that the policy of re-insurance was effected through the agency of the original brokers and was void on the ground of concealment of a material fact by the agents of the assured.

Blackburn, Low, and Co. *v.* Vigors (57 *L. T. Rep. N. S.* 730, 6 *Asp. Mar. Law Cas.* 216; 12 *App. Cas.* 531) *distinguished.*

This was a motion by the plaintiffs in the action to set aside the verdict and judgment for the defendant, and to enter judgment for the plaintiffs, or for a new trial on the ground of misdirection, and that the verdict was against the weight of evidence.

The action was upon a policy on the hull and machinery of the ship *State of Florida,* underwritten by the defendant for 800*l.*, which was tried before Day, J. and a special jury, in which the jury gave a verdict for the defendant, and Day, J. entered judgment for him.

The facts were shortly as follows: The plaintiffs, who were underwriters and insurance brokers at Glasgow, insured the steamer *State of Florida* for 1500*l.*, from New York to Glasgow. She left New York on the 11th April 1884, and was due at Glasgow about the 25th April. Upon the 1st May the plaintiffs sought to cover their liability, and instructed Messrs. Rose, Murison, and Thomson, another firm of insurance brokers at Glasgow, to effect a re-insurance on the steamer for 1500*l.* Acting upon those instructions, the Glasgow firm telegraphed at 11.29 a.m. to their London agents, Rose, Thomson, Young, and Co., to effect the re-insurance; the latter sent back a message, reaching Glasgow at 1 p.m., that 20 guineas was the premium asked. Up to midday nothing was known either by the plaintiffs or the other Glasgow firm of the ship, except that she was overdue. At 12.30 p.m. on that day, Mr. Murison, a partner of the said firm, was informed in confidence, as it was stated, that a vessel had been reported to have been spoken having on board some of the shipwrecked crew of the *State of Florida.* On receiving the telegram at 1 p.m., the Glasgow brokers notified its contents to the plaintiffs, who said they would pay the 20 guineas; and at 1.19 p.m. Murison telegraphed in the name of the plaintiffs to his London agents to pay that amount. Other telegrams were received, showing that the London market price had gone up to 25 and 30 guineas, and the plaintiffs sent off a telegram to the London brokers to effect the insurance at 25 guineas, which was done through the agency of another firm of brokers to the amount of 800*l.* The Glasgow brokers did not charge any commission for effecting this re-insurance, as it had not been completed by them. The defendant, with whom the re-insurance was effected, on learning the above facts declined to pay.

Day, J. at the trial left two questions to the jury. First, were Rose, Murison, and Thomson, the Glasgow brokers, employed to effect an insurance? Next, was the insurance, the subject-matter of the action, effected through their agency? The jury answered both questions in the affirmative, and Day, J. directed that a verdict and judgment should be entered for the defendant.

Sir *Charles Russell,* Q.C., *Cohen,* Q.C., and *Hollams,* for the plaintiffs.—The plaintiffs are entitled to judgment on the facts of this case. The summing-up of the learned judge was faulty and ambiguous. This case cannot in principle be distinguished from that of *Blackburn, Low, and Co.* v. *Vigors* (57 L. T. Rep. N. S. 730; 6 Asp. Mar. Law Cas. 216; 12 App. Cas. 553). The distinction, no doubt, on which the defendant relies is that in the former case the firm of Rose, Murison, and Thomson, of Glasgow, one of whom possessed the concealed information, did not place the plaintiffs in communication with Roxburgh, Currie, and Co., through whom the re-insurance was effected, whereas in the present that same Glasgow firm did by a telegram, though sent in the name of the plaintiffs, bring the plaintiffs into communication with Rose, Thomson, Young, and Co., of

(*a*) Reported by W. P. Eversley, Esq., Barrister-at-Law.

London, through whom the present re-insurance was effected. The Glasgow firm and the London firm were independent firms, and neither the plaintiffs nor the London firm had any knowledge of the concealed facts. The last act of the Glasgow firm which brought the plaintiffs and the London firm into direct communication was a telegram conveying the plaintiffs' authority to re-insure at 20 guineas premium. This authority was never acted upon. Now, there is no pretence for saying that the Glasgow firm had any general authority to effect re-insurance on behalf of the plaintiffs. The latter, without any intervention of the Glasgow firm, gave the London firm a different and independent authority —namely, to re-insure at a premium of 25 guineas. It was under this authority only that the present policy was effected; and the court cannot look beyond the information possessed by the plaintiffs and the London firm—the plaintiffs' agents to effect the policy. The preceding employment of the Glasgow firm is immaterial. There was never any means of communication between the Glasgow firm and the defendant. An insurance agent cannot conceal facts from an underwriter whom he does not know. The case is the same as if the London firm, in reply to the telegram sent by the Glasgow firm in the plaintiffs' name, had telegraphed that they were unable to effect the reinsurance in London, and the plaintiffs had then gone up to London and set about the re-insurance on their own account. The proper question for the jury was, who effected this re-insurance? The only answer was, the London firm. The reasoning of the House of Lords in *Vigors*' case applies equally to this case. None of the learned lords in that case, nor Day, J. in this, thought there was any legal obligation on Mr. Murison to communicate his knowledge to the plaintiffs. Indeed, Lord Macnaghten points out the danger of extending the doctrine of constructive notice so as to affect the plaintiffs in such circumstances with knowledge of the concealed information.

Sir *R. E. Webster*, Q.C. (A.-G.) and *Gorell Barnes*, Q.C., for the defendant.—It is submitted that the finding was right, and the direction correct. The material difference between the present case and that of *Blackburn, Low, and Co.* v. *Vigors* (*ubi sup.*) is, that here the reinsurance was effected through the Glasgow firm, which possessed, in the person of Mr. Murison, the concealed information, while in Vigors' case it was effected through a totally different firm and without the intervention of the Glasgow firm. This difference was insisted on on behalf of the plaintiffs in *Blackburn, Low, and Co.* v. *Vigors* (*ubi sup.*). Here the re-insurance was effected by the Glasgow firm of Rose, Murison, and Thomson. As the risk was intended by the plaintiffs to be covered in London, and they were in Glasgow, the firm of Rose, Murison, and Thomson employed as their sub-agents the London firm of Rose, Thomson, Young, and Co., who, in their turn, employed the insurance broker in London, who actually effected the policy. The telegram in the plaintiff's name was a mere stratagem of Mr. Murison, of the Glasgow firm, in order to save the policy about to be obtained from being void at law; and the negotiation which followed only contained the original negotiation. Day, J. rightly asked the jury the question whether the subsequent negotiation was a new contract, or whether it was one built on the old negotiation. The instruction by the plaintiffs to the London firm could not be a new and independent instruction, unless the plaintiffs knew that Rose, Murison, and Thomson were retiring from the negotiations, which they could not know. The alteration in the rate of premium to be offered did not constitute a fresh and independent contract; and, apart from this alteration, there could be no pretence for treating the whole negotiation which led to the effecting the policy sued upon as being anything but one transaction.

Sir *C. Russell*, Q.C. in reply.

Cur. adv. vult.

June 4.—The judgment of the court was delivered by

POLLOCK, B.—This is an action upon a policy on the hull and machinery of the ship *State of Florida*, underwritten by the defendant for 800*l*. At the trial, which took place before Day, J. and a special jury of London, it was proved that Messrs. Blackburn, Low, and Co., who were underwriters and insurance brokers at Glasgow, insured the steamer *State of Florida* for 1500*l*., from New York to Glasgow. She left New York on the 11th April 1884 and was due at Glasgow about the 25th April. Upon the 1st May Messrs. Blackburn, Low, and Co. being desirous of covering their liability instructed Messrs. Rose, Murison, and Thomson, another firm of insurance brokers at Glasgow, to effect a re-insurance upon the *State of Florida* for 1500*l*. Acting upon these instructions Messrs. Rose, Murison, and Thomson, at 11.29 a.m., telegraphed to their agents Messrs. Rose, Thomson, Young, and Co., who were insurance brokers in London, as follows: "Blackburn, Low wish to reduce *Florida* lines, cover for them 1500*l*. at 15 guineas net." In reply to this they received a telegram sent at 12.35, and received at 1 p.m., from Messrs. Thomson, Young, and Co.: "*State Florida* 20 guineas, paying freely and market very stiff, likely to advance more before day is out." Up to midday nothing was known either by Blackburn, Low, and Co. or Rose, Murison, and Thomson, of the *State of Florida*, except that she was overdue. About 12.30, Mr. Murison, a partner in the firm of Rose, Murison, and Thomson had an interview with the manager of the State Line Company, who owned the *State of Florida*, and he informed Mr. Murison in confidence that his directors in London had received intelligence that the *City of Rome* steamer on her way to Liverpool had seen a vessel having on board some of the shipwrecked crew of the *State of Florida*. Upon receiving the last telegram at 1 p.m., Messrs. Rose and Co. communicated its contents to Messrs. Blackburn, Low, and Co., who said they might pay 20 guineas. Mr. Murison considered that as he had received the intelligence about the shipwrecked crew in confidence he was not entitled to communicate it to Messrs. Blackburn, Low, and Co., but afterwards, at 1.19, he telegraphed in Blackburn, Low, and Co.'s name to Rose, Thomson, Young, and Co.: "*Florida*, pay 20 guineas." In reply to this the latter firm at 2.14 telegraphed direct to Blackburn, Low, and Co., "*State Florida*, market now worked out at 20 guineas; no chance under 25 guineas and for to-day only." This was

received by Blackburn, Low, and Co., at 2.29, and at 3.2 they replied "*State Florida*, if you cannot do better pay 25 guineas and wire instanter." To this Messrs. Rose, Thomson, Young, and Co. replied at 4.37: "*State Florida* done, 800, 25 guineas, no chance more to-day under 30 guineas." As the negotiations for this insurance were not completed by Messrs. Rose, Murison, and Thomson, they did not charge any commission to the plaintiffs. After the receipt of the last telegram, Messrs. Rose, Thomson, Young, and Co. communicated with another London broker, who effected the insurance in question with the defendants, and they, upon becoming acquainted with the above facts, declined to pay.

At the conclusion of the case, Day, J., after calling the attention of the jury to the material facts, directed them as follows: "Now, the question I leave to you is, first of all, were Rose and Co. employed to effect an insurance? I do not mean whether their authority was limited to the insurance of 15 guineas, the first telegram, because they were afterwards, as we know, authorised to go to 20 guineas, but were they generally authorised to act on behalf of the plaintiff? The next question is, was this insurance effected through their agency? I think it will make it abundantly clear if I substitute for "their" the word "that," and relieve it of all possible ambiguity. Was this particular insurance effected through that agency? Who introduced the London firm? Rose and Co., it is true, are the people who go and see the underwriters in London, it may be still acting as the correspondents or agents of Rose and Co. of Glasgow. Was it effected through that agency? Did Rose and Co. of Glasgow put the matter in the hands of Rose and Co. of London for the purpose of carrying out the insurance effected through their agency? Was it all one negotiation, or was it really taken out of the hands of Rose and Co. of Glasgow and put into the hands of the plaintiffs, irrespective of Rose and Co. of Glasgow? Was it taken out of their hands and, as it were, a new negotiation commenced, or was the policy effected in pursuance of the original agency? Was it all one transaction or not? That is what I substantially mean by the question I put to you. In the second place, was the insurance effected through that agency?" The jury found a verdict in the affirmative as to both questions, and the learned judge thereupon directed that a verdict and judgment should be entered for the defendant with costs. The plaintiffs moved that the verdict and judgment should be set aside, and that judgment might be entered for the plaintiffs or a new trial had, on the ground that the verdict was against the weight of evidence, and that the learned judge at the trial ought to have directed the jury that Rose, Murison, and Thomson were not the agents of the plaintiffs to effect the insurance in question, and that the non-communication of material information within the knowledge of Rose, Murison, and Thompson, but not known to the plaintiffs or their brokers, was not a concealment which would affect the policy, and ought to have directed judgment to be entered for the plaintiffs upon the facts proved or admitted at the trial. These questions are so closely connected that the better mode of dealing with them will be to consider whether taken as a whole the true conclusion of law and fact has been arrived at. For this purpose it will be convenient to follow the events in order of time. Starting with the telegram of the 1st May, 11.29 a.m., there can be no doubt that when that was sent Messrs. Rose, Murison, and Thomson were agents for Messrs. Blackburn, Low, and Co. to effect the insurance proposed thereby, and that any knowledge by them of facts material to the risk would be equivalent to a knowledge by their principals, and would vitiate any insurance based upon such proposal. Up to this time, however, both principals and agents were ignorant of any such facts. Before any further step was taken Rose, Murison, and Co. became aware of the report brought by the *City of Rome*. They thereupon determined to go no further with the matter in their own names, but having received the intelligence in confidence they did not communicate it to Messrs. Blackburn, Low, and Co. What they did was this. Having previously obtained the authority of Blackburn, Low, and Co. to go as far as 20 guineas, they telegraphed in Blackburn, Low, and Co.'s own name to the London brokers, who answered direct to Blackburn, Low, and Co. that there was no chance under 25 guineas, upon which Blackburn, Low, and Co. telegraphed back "Pay 25 guineas," and upon this the policy in question was effected by the London brokers through the agency of another firm of brokers. Under these circumstances it is clear that up to the time when Messrs. Rose, Murison, and Co. received the last telegram addressed to themselves they were the agents for the plaintiffs to effect not merely a re-insurance but the particular re-insurance which the plaintiffs had ordered, namely, upon the ship *State of Florida* for 1500*l*., and that any knowledge possessed by them which was material to the risk would be equivalent to a knowledge by the plaintiffs themselves. It seems to be equally clear that the agents, being incapacitated from continuing the negotiation, in the sense that no valid policy could be founded upon it, they could not put themselves in a better position by telegraphing in the name of their principals instead of their own name. Having so telegraphed, and the answer having been sent to the principals, what is the position of the latter? That they might have effected a valid policy by a fresh and independent negotiation, carried on through another agent, is established by the decision of the House of Lords in the case of *Blackburn, Low, and Co.* v. *Vigors* (*ubi sup.*). And for the purposes of this case it may be further conceded that the principals might themselves have opened a new and independent negotiation with the brokers in London by giving a fresh order for the policy. This, however, was not done. Messrs. Blackburn, Low, and Co. merely telegraphed to Rose, Thomson, Young, and Co.: "*State of Florida*, if you cannot do better pay 25 guineas." And upon the basis of this telegram the negotiation continues. The offer is put forward at the increased premium; this is accepted, and the policy in question is signed.

Upon this state of facts the question arises, was the original negotiation given up and a new and distinct negotiation entered upon, or was it a mere handing over by the agents to their principals of an existing negotiation, in order that the principals might take it up at the

point where the agents left off, and continue it until it resulted in a contract? This is practically the question which was left by Day, J. to the jury, and they have found that the latter is the true view of what occurred. In considering this finding it is important to remember that the only instructions as to the name of the ship and the amount to be insured were those contained in the first telegram from the Glasgow agents to the London agents. Without these no proposals could have been forwarded. They are never mentioned again by the plaintiffs, and the effect is the same as if such telegram had reiterated all that had gone before. This also affords an answer to one of the arguments pressed on behalf of the plaintiffs. A merchant, it was said, who sends his agent into a market on Monday with a limited authority as to price is not prohibited from going into the same market on Tuesday and bidding higher by reason of his agent having acquired some information, such as that the goods were stolen, which would prevent any bargain which he might make resulting in a valid contract. But the reason of this is that the principal in the proposed case only employed the agent *pro hâc vice* on the Monday, and when he himself went into the market on Tuesday he commenced independent operations, in no way based upon the earlier exertions of his agent. In the present case the name of the vessel, the amount to be insured, and the whole object of the bargaining were the same, and the only change was in the advanced premium, so that the plaintiffs not merely continued a negotiation begun by their agents, but they availed themselves of it by using and adopting what they had done up to a certain point. It is truly said, no doubt, that when once the agents ceased to negotiate their authority was at an end; but this leaves untouched the position that the negotiation was handed over to the principals to complete and that the London brokers were entitled to treat the matter as one entire transaction. It was also urged that the negotiation was not vitiated by the fact that the principal made use of the information as to the name of the ship and the amount of the policy. As this was done merely by way of reference, had there been no question of agency this would be true. If all that the plaintiffs had done had been to telegraph to the London agents: "Effect for me the same insurance that you have effected for A. B.," with whom the plaintiffs had had no dealings, the reference to A. B. would not vitiate the ultimate policy, because A. B. improperly withheld information which he ought to have communicated. The distinction, however, between this and adopting the previous acts of an agent and carrying out a contract in part based upon them is obvious, as was said by Lord Watson in *Blackburn, Low, and Co.* v. *Vigors* (12 App. Cas. p. 541): "When an agent to insure is brought into contact with an insurer the latter transacts on the footing that the agent has disclosed every material circumstance within his personal knowledge, whether it be known to his principal or not." When the matter was taken up by the plaintiffs themselves, and the further negotiations were carried on in their own name, the right of the London agents, founded upon the negotiation as a whole, to act upon the assumption referred to does not seem to have been displaced. Another argument much urged by the plaintiffs' counsel was rested upon the assertion that all that passed before the first telegram by the plaintiffs amounted merely to offers and negotiation, and that, in considering the right of the defendant, the only question which should have been submitted to the jury was, What ought the London brokers to have communicated to the defendant or to the intermediate broker by whom the policy was ultimately procured? The answer to this is, that, if the negotiation by the plaintiffs and the Glasgow brokers was one and the same—as the jury have found it to be—the argument fails, because in all cases where a policy has been held to be avoided by reason of concealment the concealment occurs some time before the actual policy is signed. It is the negotiation that is tainted, and the contract is void because it is founded upon the negotiation; and through however many hands the offers of an insurance may pass, if there be a concealment by the assured or his agents, the policy is voided. If this view which we have taken of the facts and of the law which arises out of them be the true view, this judgment in no way conflicts with the decision in *Blackburn, Low, and Co.* v. *Vigors* (*ubi sup.*) in the House of Lords. Although the opinion was expressed in that case that it was not the duty of the agents to communicate to their principals the information which they had received, we take that opinion as applying to the particular facts before the House, which showed that before the negotiation for the policy sued upon had commenced all connection of the plaintiffs with their former brokers had ceased, and we cannot suppose it would be intended to apply to the facts proved in the present case, which showed that so far from the connection with the principals and their brokers ceasing, the brokers used the names of the principals to continue the negotiations, and the principals adopted this act and themselves continued and carried out what their brokers had commenced. It is not for us to enter upon the question whether Messrs. Rose, Murison, and Thomson acted contrary to the rule of morality in failing to communicate to Messrs. Blackburn, Low, and Co. the information which they had received. Whatever may have been their moral duty, the fact that the information was given in confidence could not affect or lessen the legal rights of the defendant, and could not justify Messrs. Rose, Murison, and Thomson in continuing the negotiation in the plaintiffs' name, and enabling the plaintiffs themselves to continue it in innocence of that information. To hold otherwise would be to afford a great temptation to all brokers who may be placed in the same or a similar position, and would cut down to an important extent the rule as to good faith which has hitherto been applied by our courts and by commercial usage to the contract of insurance. We think that the summing-up and verdict were correct; therefore, the verdict and judgment for the defendant must stand, and the motion must be dismissed with costs.

Motion dismissed.

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

Solicitors for the defendant, *Waltons, Bubb,* and *Johnson.*

Tuesday, May 29, 1888.

(Before WILLS and GRANTHAM, JJ.)

ROBSON *v.* THE OWNER OF THE KATE. (*a*)

County Court—Admiralty jurisdiction—"Damage by collision"—Damage to machine on land by mainsail gear of sailing barge—Whether such damage is "damage by collision"—County Courts Admiralty Jurisdiction Act 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-sect.* 3—*County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 & 33 *Vict. c.* 51), *s.* 4.

Sect. 3, *sub-sect.* 3, *of the County Courts Admiralty Jurisdiction Act* 1868, *gives a County Court, having Admiralty jurisdiction, jurisdiction to try and determine: "As to any claim for damage to cargo or damage by collision—any cause in which the amount claimed does not exceed three hundred pounds"; and by the 4th section of the County Courts Admiralty Jurisdiction Amendment Act* 1869, *this jurisdiction is extended to "all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed three hundred pounds." A claim was made in a County Court having Admiralty jurisdiction, in respect of an injury to a pile-driving machine, used at a wharf on the bank of the river, which had been fouled and injured by the mainsail gear of a sailing barge, while the barge was sailing in the river Thames near Blackwall.*

Held, that the damage in question was not "damage by collision" within the meaning of sect. 3, *sub-sect.* 3. *of the County Courts Admiralty Jurisdiction Act* 1868, *and that the County Court had no jurisdiction.*

APPLICATION under the 43rd section of the County Courts Act 1856 (19 & 20 Vict. c. 108), for a rule calling upon the judge of the City of London Court to show cause why he should not entertain a cause for "damage by collision," within sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71).

The affidavit in support of the application stated that the claim was made in respect of an injury to a pile-driving machine, the property of the plaintiff, which was being used at a wharf on the bank, and which had been fouled and injured by the mainsail gear of the sailing barge *Kate*, of which the defendant was the owner, while the barge was sailing in the Blackwall Reach of the Thames.

The learned judge of the City of London Court held that the alleged injury was not "damage by collision" within the meaning of the Act, and that therefore he had no jurisdiction to entertain the claim.

By the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), s. 3, sub-sect. 3, it is provided:

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 the Act, the following causes (in the Act referred to as Admiralty causes), amongst others: "As to any claim for damage to cargo, or damage by collision—any cause in which the amount claimed does not exceed 300*l*."

And by sect. 4 of the County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51), it is provided:

The 3rd section of the County Courts Admiralty Jurisdiction Act 1868 shall extend and apply to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed 300*l*.

Edward Pollock in support of the application.—I submit that this case comes within the Admiralty jurisdiction of the County Courts. The facts set out in the affidavit show that there was damage, and that that damage was the result of "collision." The injury to a pier or other object on shore by a vessel in the water constitutes a "damage by collision" within the meaning of sect. 3, sub-sect. 3, of the County Courts Admiralty Jurisdiction Act 1868. This is extended, by the 4th section of the County Courts Admiralty Jurisdiction Amendment Act 1869, "to all claims for damage to ships, whether by collision or otherwise." As this section extends the jurisdiction to damage to ships, it may fairly be assumed that the former Act applies to any damage caused by ships, and that the Legislature intended that, as the earlier Act applied to damage, that is to any damage, caused by ships, this liability should be extended by the later Act to any damage to ships. In the case of *The Malvina* (8 L. T. Rep. N. S. 403; 9 Jur. N. S. 527; 11 W. R. 576; 1 Mar. Law Cas. O. S. 218, 341; Lush. 493) the Judicial Committee of the Privy Council held that the Court of Admiralty had jurisdiction (under the 7th section of the 24 Vict. c. 10), in cases of damage by collision between a barge and a seagoing vessel, and they condemned the *Malvina* for sinking a barge in the Thames near Blackwall.

WILLS, J.—I am of opinion that this rule should be refused. The jurisdiction that has been conferred on certain County Courts by the County Courts Admiralty Jurisdiction Act 1868 is essentially an Admiralty jurisdiction, limited as regards amount. We need not now define the word "collision." The words "damage by collision," used in this Act, the object of which was to give an Admiralty jurisdiction to the County Courts, cannot be held to include damage which has been caused on land outside the limits of the ebb and flow of the tide, a damage which would not have fallen within the original jurisdiction of the Court of Admiralty in respect of collision. It seems to me that these statutes do not extend, either in express terms or by inference, the jurisdiction of the County Court to the particular damage of which the applicant here complains. I think, therefore, that this application must be refused.

GRANTHAM, J.—I am of the same opinion. In the case of *Everard* v. *Kendall* (22 L. T. Rep. N. S. 408; 3 Mar. Law Cas. O. S. 391; L. Rep. 5 C. P. 428) it was held that the 31 & 32 Vict. c. 71 and 32 & 33 Vict. c. 51, do not give the County Court, which has an Admiralty jurisdiction under those Acts, jurisdiction to try cases of damage by collision between vessels of a different class from those over which a Court of Admiralty has jurisdiction, and therefore a County Court is not empowered by those Acts to try a question of collision between barges propelled by oars only. In that case Montague Smith, J. said: "What is the meaning of 'damage by collision?' We have nothing to guide us as to what damage by collision is within the Act, except the general scope and object of the Act. In common understanding, and as understood in the Court of Admiralty, damage by collision is damage sus-

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

tained by a ship from another ship coming into contact with it." It seems to me that this explanation is well founded, and I think that the preceding words "damage to cargo," that is, damage to cargo while on board ship, shows that the intention of the Legislature was to confine this jurisdiction to cases of collision between ships.

Rule refused.

Solicitors for plaintiff, *Keene, Marsland,* and *Bryden.*

Monday, June 4, 1888.

(Before CHARLES, J.)

MEEK *v.* WENDT AND CO. (*a*)

Measure of damages—Warranty of authority—Breach of such warranty—Liability of agent.

The plaintiff was the holder of a policy of marine insurance for 1000*l. on a certain ship, effected with an insurance company in San Francisco, called the "Sun." The policy provided for payment thus: "Loss, if any, hereunder payable by the Anglo-Californian Bank in London, three days after sight of the certificate of loss approved by E. E. Wendt of London, or Richard Lowndes of Liverpool." A loss occurred, and the company having repudiated liability, an action was commenced in England, and judgment by default was signed for* 1000*l.*

An offer of 300*l. was then made to the plaintiff by the defendants as representing the company. This offer the plaintiff at first refused, but afterwards accepted. The defendants then telegraphed to America, and received an answer which they supposed authorised them to accept the terms on behalf of the "Sun." This telegram had not in fact been sent with the authority of the "Sun." The defendants then wrote to the plaintiff: "We have heard from our clients in San Francisco, who are prepared to abide by the offer made some time ago. Will you please send up the policies, and we can then doubtless arrange for an early settlement. Our clients insist that the judgment you obtained must be cancelled in a formal manner." The plaintiff then executed and sent a release of the judgment to the defendants, who thereupon wrote that the plaintiff could obtain payment at the bank. Payment was however refused by the bank, acting on instructions from the "Sun." Correspondence took place and the mistake was explained, and it was admitted that the defendants had acted bonâ fide in the matter. The plaintiff then notified to the defendants, that he held them liable for the* 300*l. and expenses thrown away, for which the present action was brought. The defendants paid into court a sum for expenses, and denied further liability.*

Held (following Re National Coffee Palace Company; *Ex parte* Panmure, 50 *L. T. Rep. N. S.* 38; 24 *Ch. Div.* 367), *that the plaintiff was entitled to the full sum of* 300*l. in addition to the sum paid into court, as the measure of damages in such a case was what the plaintiff had lost by losing the particular contract which was to have been made by the alleged principal, if the defendants had had the authority they professed to have, and the expenses thrown away.*

ACTION tried at Liverpool, on the 10th May 1888, by Charles, J., without a jury, in which the plaintiff sought to recover damages from the defendants for breach of a warranty of authority.

The facts of the case are sufficiently set out in the judgment.

Bigham, Q.C. and *Joseph Walton* for the plaintiff.

Barnes, Q.C. and *Butler Aspinall* for the defendants.

June 4.—CHARLES, J. delivered the following written judgment:—In this case, which was tried before me without a jury at Liverpool on the 10th May, the plaintiff sought to recover damages from the defendants for breach of a warranty of authority under the following circumstances: The plaintiff was, in 1887, the holder of two policies of insurance on the ship *Mindora* effected with two insurance companies in San Francisco, called the "Union" and the "Sun." Each policy was for 1000*l.*, and provided thus for payment of any loss: "Loss, if any, hereunder payable by Messrs. the Anglo-Californian Bank in London, three days after sight of the certificate of loss approved by E. E. Wendt, of London, or Richard Lowndes, of Liverpool, accompanied by this policy." A loss having occurred, and the companies having repudiated liability, an action was commenced in England against each company, and proceedings were duly taken for service of the writs out of the jurisdiction. The defendant companies did not appear, and judgment by default was signed for 1000*l.* against each company. Negotiations for a settlement thereupon took place between the plaintiff and the defendants, Messrs. Wendt and Co., of London, who represented the two companies in this country. A sum of 300*l.* was, in the early part of 1887, offered by each company, but was refused. In August, however, the plaintiff expressed his willingness to accept that sum, and on the 26th the defendants wrote to the plaintiff's solicitors, Messrs. Simpson and North, as follows: "As a long time has now elapsed since the offer of our clients was first made, we cannot go further with the matter just now, but have at once written to San Francisco for instructions." On the 13th Sept. the Union Company wrote to the defendants stating that they would adhere to their offer, but no answer was received from the Sun. The defendants thereupon telegraphed on the 30th Sept. to San Francisco, and received an answer on the 1st Oct., which they supposed authorised them to accept the plaintiff's offer. The telegram of the 1st Oct. had not in fact been sent with the authority of the Sun. On receipt of this telegram the defendants wrote to the plaintiff's solicitors in these terms: "We have now heard from our clients in San Francisco, and the Union and Sun Insurance Companies are prepared to abide by the offer they have made some time ago, although the same was not accepted at the time. Will you please send us up the policies, and we can then doubtless arrange for an early settlement. Our clients insist that the judgments you obtained against them must be cancelled in a formal manner." The policies and judgments were forwarded on the 3rd Oct. On the 7th the defendants' solicitors sent the judgments to the plaintiff's solicitors, with releases indorsed for the plaintiff's execution. The plaintiff executed them, and they were returned

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

on the 8th. On the 10th the defendants' solicitors wrote to the plaintiff's solicitors: "We have received the judgments with the releases indorsed thereon, and now forward you the policies with the certificates, and on presentation at the bank, the Anglo-Californian Bank in London, you will obtain payment. We should say you will be able to present the policies through your own bankers. The bankers have already had notified to them that the certificates have been granted." Payment in respect of the Sun policy certificate was refused to the plaintiff by the Anglo-Californian Bank, on instructions from the Sun company cabled from America. Some correspondence between the solicitors of the plaintiff and the defendants took place in November and December, and the mistake under which the defendants had acted was fully explained. It was in no way disputed that the defendants had throughout acted *bonâ fide* in the matter. On the 18th Jan. the plaintiff's solicitors wrote to the defendants: "Since the Sun Company repudiate your action in settling this matter, Mr. Meek instructs me to apply to you for the amount agreed to be paid to him as the consideration for releasing the judgment against the company." In reply, the defendants' solicitors returned the release, as Messrs. Wendt and Co. had never parted with it, and pointed out that Mr. Meek could cancel it, and remain with his remedy under his judgment for 1000*l.* The plaintiff's solicitors returned the release, notifying that Mr. Meek held the defendants liable for the sum of 300*l.*, to recover which and certain expenses thrown away this action was brought.

At the trial it was not seriously contested that the defendants had, in their letter dated the 1st Oct., innocently represented themselves as having the authority of the Sun Company to settle the claims of the plaintiff for 300*l.*, and the question principally discussed was as to the proper measure of damages for the defendants' false representation of authority. The plaintiff contended that he was entitled to the full sum of 300*l.*, and the expenses he had incurred in negotiating the compromise. The defendants paid into court a sum sufficient to meet such expenses as had been incurred subsequent to Oct. 1, but denied any further liability. The matter therefore to be decided is, whether the plaintiff is entitled to any, and what, additional damages. Now he is entitled to all the damage which is the natural and proximate consequence of the false assertion of authority. "The measure of damages," says Lord Esher, M.R., in *Re National Coffee Palace Company* (50 L. T. Rep. N. S. 38; 24 Ch. Div., at p. 371), "in actions for breach of warranty is always the same in every case. I will not consider what theoretically it ought to be, but I say we must decide it according to the rule which has been followed for a series of years. *Spedding* v. *Newell* (L. Rep. 4 C. P. 212; 38 L. J. 133, C. P.) and *Godwin* v. *Francis* (22 L. T. Rep. N. S. 338; L. Rep. 5 C. P. 295; 39 L. J. 121, C. P.) are cases in which the plaintiff was the intended purchaser; and *Simons* v. *Patchett* (29 L. T. 88; 7 E. & B. 568; 26 L. J. 165, Q. B.; 3 Jur. N. S. 742) was a case in which the plaintiff was the intended vendor, and in all these cases the Court laid down that the measure of damages was what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal, if the defendant had had the authority he professed to have; in other words, what the plaintiff would have gained by the contract which the defendant warranted should be made." Applying this rule to the present case, the plaintiff, by losing the particular contract which was to have been made, has *primâ facie* lost the expenses thrown away, and the sum of 300*l.*, which I have no doubt he would have obtained without delay or difficulty in London from the Anglo-Californian Bank, within three days after sight of the approved certificates. But then it is contended by the defendants that the plaintiff is in a position to enforce all his original rights against the company on the judgment and on the policy, and that these are worth at least as much as 300*l.*, so that the plaintiff has in truth lost nothing beyond the expenses thrown away. But with regard to the judgment, it was not disputed that the law as to enforcing foreign judgments is the same in the courts of the United States as in our own, and according to our law the judgment could not be effectively put in suit in the courts of the United States, inasmuch as the defendant company were not English subjects, or resident in England, either when the policy was issued or the suit commenced. This seems clear from the case of *Schibsby* v. *Westenholz* (24 L. T. Rep. N. S. 93; L. Rep. 6 Q. B. 155, per Blackburn, J., at p. 160). And in this country the judgment has no present value, inasmuch as the defendant company have no property here available for execution. With regard to the claim on the policy, no doubt the plaintiff has a claim which he may or may not be able successfully to enforce at San Francisco; a claim however which has been wholly repudiated, and will be strenuously resisted. I cannot fix any pecuniary value on this claim, and I do not think that its existence ought to affect the amount which is *primâ facie* the proper amount to be awarded to the plaintiff for the loss of the particular contract which was to have been made by the alleged principal. I therefore give judgment for the plaintiff for 300*l.*, in addition to the money paid into court.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Wynne, Holme,* and *Wynne,* for *Simpson* and *North,* Liverpool.

Solicitors for the defendants, *Stokes, Saunders,* and *Stokes.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Jan. 21 *and June,* 19, 1888.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE ROTHBURY. (*a*)

Merchant Shipping (*Carriage of Grain*) *Act* 1880, (43 *&* 44 *Vict. c.* 43), *s.* 4, *sub-sect.* (*c*)—*Board of Trade Regulations* 1881—*Improper stowage—Shifting boards.*

Where a ship has two decks, and carries barley in bulk from a Mediterranean port, the duty imposed by the Merchant Shipping (*Carriage of Grain*) *Act* 1880, *and the Board of Trade Regu-*

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

lations made thereunder, is to have bulkhead or shifting boards not merely in the 'tween decks, but in the lower hold also.

The Board of Trade Regulations 1881, 4 (*b*), *requiring feeders to "be fitted to feed the grain carried in the 'tween decks, such feeders to contain not less than 2 per cent. of the compartments they feed," requires the feeders to contain 2 per cent. of the grain in the 'tween decks, and in the holds below the 'tween decks, and is not limited to the grain in the 'tween decks.*

THIS was a rehearing of an investigation into the circumstances attending the abandonment of the British steamship *Rothbury*.

The investigation was held at Middlesbrough by the stipendiary magistrate, assisted by assessors, and was now ordered to be reheard by the Board of Trade "as to a certain part thereof, that is to say, whether the said vessel was loaded in accordance with the provisions of the Merchant Shipping (Carriage of Grain) Act 1880, as modified by the regulations made by the Board of Trade thereunder."

The *Rothbury* was an iron screw-steamship belonging to the port of South Shields, she had two decks, was 604 tons net, and at the time of her abandonment was on a voyage from Oran to Dunkirk, laden with a cargo of barley. The barley was stowed in bulk in the 'tween decks and lower holds.

During the voyage the *Rothbury* experienced bad weather, and whilst in the Bay of Biscay her cargo shifted in the fore and main holds, and on the 4th Sept. 1887 she was abandoned about sixty-six miles to the westward of Brest.

The space in the 'tween decks was divided by longitudinal shifting boards extending from deck to deck, but there were no shifting boards in the holds below the 'tween decks or in the hatches. The lower deck hatches were not put on, and there were some openings made through the deck in the wings for the purpose of feeding the cargo in the lower holds from the 'tween decks.

The hatches of the upper deck, which were used as feeders for the 'tween decks, contained less than 2 per cent of the grain in the 'tween decks and in the holds.

The Board of Trade alleged that, under the Merchant Shipping (Carriage of Grain) Act 1880, and the regulations made thereunder, the *Rothbury* should have been provided with shifting boards in the lower holds as well as in the 'tween decks, and that the feeders for the 'tween decks should contain at the least 2 per cent. of the grain carried both in the 'tween decks and in the lower holds conjointly.

Merchant Shipping (Carriage of Grain) Act 1880:

Sect. 4. Where a British ship laden with a grain cargo at any port in the Mediterranean or Black Sea is bound to ports outside the Straits of Gibraltar, the following particulars to prevent the cargo from shifting shall be adopted; that is to say, (*a*) there shall not be carried between the decks, or, if the ship has more than two decks, between the main and upper decks, any grain in bulk, except such as may be necessary for feeding the cargo in the hold, and is carried in properly constructed feeders; (*c*) where grain is carried in the hold or between the decks, whether in bags or bulk, the hold or the space between the decks shall be divided by a longitudinal bulkhead, or by sufficient shifting boards which extend from deck to deck, or from the deck to the keelson and are properly secured, and if the grain is in bulk are fitted grain-tight with proper fittings between the beams.

Sect. 5. The precautions required by this Act to be adopted by ships laden with a grain cargo at a port in the Mediterranean or Black Sea, or on the coast of North America, shall not apply to ships loaded in accordance with regulations for the time being approved by the Board of Trade, nor to any ship constructed and loaded in accordance with any plan approved by the Board of Trade.

Board of Trade Regulations 1881:

2. In the case of ships having two decks and loading a grain cargo at a port in the Mediterranean or Black Sea, barley may be carried in bulk in the 'tween decks, provided that

3 (*a*). The between deck hatches shall not at any time be put on; and (*b*) that strakes of the deck be lifted, or if the deck is an iron deck, sufficient openings be made through the deck in the wings, which with the open hatches shall admit of the cargo in the between decks feeding the lower hold.

4 (*a*). There shall be longitudinal grain-tight shifting boards in accordance with sub-sect. (*c*) of sect. 4 of the said Act, and the grain shall be properly stowed, trimmed, and secured, as required by sub-sect. (*d*) of the said sect. 4. (*b*) Feeders shall be fitted to feed the grain carried in the between decks, such feeders to contain not less than 2 per cent. of the compartments they feed.

Jan. 21, 26, *and May* 10.—*Danckwerts* for the Board of Trade.

J. Gorell Barnes for the owner of the *Rothbury*.

Cur. adv. vult.

June 19.—BUTT, J.—This is the rehearing of an investigation into the circumstances attending the abandonment of the s.s. *Rothbury*, held at Middlesbrough, by the stipendiary magistrate assisted by two nautical assessors, the question for my determination being whether the vessel was loaded in accordance with the provisions of the Merchant Shipping (Carriage of Grain) Act 1880, and the regulations made by the Board of Trade thereunder. The *Rothbury*, which was a screw-steamship of 604 tons net and 950 tons gross register, left the port of Oran for Dunkirk, on the 23rd Aug. 1887, with a cargo of 1080 tons of barley. In the course of her voyage the ship met with bad weather, the cargo shifted, and she was abandoned by her crew in the Bay of Biscay on the 4th Sept. The grain was stowed in bulk in the 'tween decks on the lower holds. The space in the 'tween decks was divided by longitudinal shifting boards extending from deck to deck, but there were no shifting boards in the hatches, the top of the shifting boards ceasing on a level with the deck. There were no shifting boards at all below the 'tween decks. The lower deck hatches were not put on. There were some openings made through the decks in the wings for the purpose of feeding the cargo in the lower holds, but the evidence goes to show that those openings were deficient in number and in size. The carriage of grain in bulk in the 'tween decks, except such grain as may be necessary for feeding the cargo in the hold, and which is carried in properly constructed feeders, is prohibited by sect. 4, sub-sect. (*a*) of the Act of 1880, unless it is loaded in accordance with the regulations for the time being approved by the Board of Trade as provided by sect. 5.

The question then arises, was this ship loaded in accordance with the Board of Trade regulations? In Aug. 1881 the Board of Trade issued certain regulations still in force, among which the follow-

ing apply in this case: "Ships having two decks. 2. In the case of ships having two decks, and loading a grain cargo at a port in the Mediterranean or Black Sea, barley may be carried in bulk in the 'tween decks provided—3 (*a*). That the between deck hatches shall not at any time be put on; and (*b*) that strakes of the deck be lifted, or if the deck is an iron deck, sufficient openings be made through the deck in the wings which with the open hatches shall admit of the cargo in the between decks feeding the lower hold. 4 (*a*). There shall be longitudinal grain-tight shifting boards in accordance with sub-sect. (*c*) of sect. 4 of the said Act, and the grain shall be properly stowed, trimmed, and secured, as required by sub-sect. (*d*) of the said sect. 4 (*b*). Feeders shall be fitted to feed the grain carried in the between decks, such feeders to contain not less than 2 per cent. of the compartments they feed." It is therefore clear that the above regulations are not complied with unless shifting boards prescribed by sect. 4, sub-sect. (*c*) of the Act of 1880, are provided. Sub-sect. (*c*) is as follows: "Where grain is carried in the hold or between the decks, whether in bags or bulk, the hold or the space between the decks shall be divided by a longitudinal bulkhead, or by sufficient shifting boards which extend from deck to deck, or from the deck to the keelson, and are properly secured, and if the grain is in bulk are fitted grain-tight with proper fittings between the beams." It is contended by the Board of Trade that this cargo was improperly stowed, because, although there were shifting boards in the 'tween decks, there were none in the hold below. On the other hand, the shipowner says that sub-sect. (*c*) does not require shifting boards in the holds where grain is carried in bulk in the 'tween decks, if provision is made for feeding the cargo in the holds in the manner prescribed by the regulations above set forth, that such provision for feeding the lower holds renders shifting boards in those holds unnecessary, and that all that the statute requires is the use of the shifting boards from deck to deck in the case of a vessel having two decks, or from deck to keelson in vessels that have only one deck. I do not agree with this latter view of sub-sect. (*c*). I think the true interpretation of it is this. It is an enactment dealing separately with the spaces in the ship, whether 'tween decks or holds, in which grain is carried. Its meaning is, that in each of the spaces in which grain is carried there shall be shifting boards provided. That appears to me to be the natural meaning of the words, and unless there are some considerations pointing to a different construction, I must give them that effect. But it is said that such considerations do exist; that if proper provisions be made for keeping the lower holds full by feeding them from above, the grain in those holds cannot shift. No doubt, if by such means the lower holds can be kept absolutely full, little or no shifting of the cargo will take place, but I very much doubt whether anything of the sort can be done. Having the advantage of the Elder Brethren to assist me, I have asked them this question: "Are shifting boards in the hold of any use in a two-decked ship carrying barley in bulk in the 'tween decks and the holds, when sub-sect. *a* and *b* of article 3 of the Board of Trade Regulations are complied with?" Their answer is, "We consider that they still continue to be desirable." The facts of the present case seem to bear out this view, for the holds were not kept full, and the cargo did shift. I hold, therefore, that this vessel was improperly loaded, inasmuch as she had no shifting boards in her lower holds.

There is another respect in which I find that the statutory requirements have not been complied with. One of the regulations set out above prescribes that the feeders used in feeding the grain in the 'tween decks shall contain not less than 2 per cent. of the compartments they feed. It appears by the evidence that two of the hatches of the upper deck used as feeders were not capable of containing 2 per cent. of the grain in the compartment of the 'tween decks which they were respectively meant to feed, and that the other 'tween deck hatches were not capable of containing 2 per cent. of the grain in the compartment of the 'tween decks which they were designed to feed, and of the grain in the holds below such compartments respectively. It was contended by the shipowners that the true construction of the regulation in question is that the feeder used need only contain 2 per cent. of the grain in the compartment of the 'tween decks into which it leads, and not 2 per cent. of the grain in such compartment, and of the grain in the hold below which is fed by such compartment. I think that this is a construction opposed to what those who framed the regulations must have intended to express, and I cannot say that I think it is properly the meaning of the words used. Again, the evidence before the stipendiary magistrate showed the forehold was not full, the grain being trimmed on a slant under the bulkhead, and spare gear placed on top of the cargo. This was obviously improper stowing. For the above reasons I decide that the *Rothbury* was improperly loaded.

Solicitor for the Board of Trade, *W. Murton.*

Solicitors for the shipowner, *W. A. Crump* and *Son.*

Friday, June 29, 1888.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE ERATO. (*a*).

Salvage—Amount of award.

Where three steamships rendered valuable salvage service to a stranded vessel, and one of them sustained very considerable damage in rendering the services, the court on a value of 3750*l. awarded* 2000*l.*

THIS was a salvage action in which the owners, masters, and crews of the steamships *Pheasant*, *Midge*, and *Somali* claimed salvage remuneration for services rendered to the steamship *Erato*, in the Red Sea.

The *Erato*, a steamship of 1137 tons net register, whilst on a voyage from Calcutta to London, laden with a cargo of wheat, stranded on the 21st Aug. 1887, on the Parkin Rock, in the Red Sea.

On the 25th Aug. the *Somali*, a steamship of 383 tons register, belonging to Liverpool, sighted the *Erato*, and at once proceeded to her. On coming up with her a band of Arab wreckers,

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

who were proceeding to pillage the ship, were forced to leave. The *Somali* then proceeded to Aden for a gang of labourers and salvage appliances. On returning, the *Somali* was taken alongside the *Erato*, and her crew proceeded to jettison the cargo.

Later in the same day the *Midge*, a steam-tug of 35 tons gross and 19 tons net register, belonging to Aden, came up, and, having taken part of the *Erato's* cargo on board, proceeded with it to Perim, and on the 28th returned with forty coolies and a donkey pump.

On the 29th Aug. the *Pheasant*, a steamship of 253 tons net and 400 tons gross register, trading in the Red Sea, arrived with pumps and 136 labourers, who at once proceeded to jettison the cargo and make the necessary preparations for getting the vessel off. On the 6th Sept., by which time a considerable quantity of water had been pumped out of the *Erato*, an attempt was made to move her, but it proved unsuccessful. During the attempt the *Pheasant*, which was lashed alongside, was forced on to a rock, and at once settled down till the water was level with her deck. Later on the same day the *Erato*, with the assistance of a kedge anchor which had been laid out by the *Midge*, came off under her own steam.

Meanwhile the *Somali*, after giving general assistance in salving the ship and cargo, had left laden with sound cargo for Aden. The *Pheasant* did not come off till the 16th Sept., and, in consequence of her stranding, had to pay a considerable sum to the *Midge* and the steamship *Tuna*, for their assistance. The cost of her repairs amounted to 4700*l*.

The value of the *Erato* was fixed at 3750*l*. The defendants tendered and paid into court the sum of 1500*l*.

Sir *Walter Phillimore* (with him *J. P. Aspinall*) for the owners of the *Pheasant*.

Joseph Walton for the owners of the *Midge*.

Kennedy, Q.C. for the owners of the *Somali*.

Barnes, Q.C. (with him *Raikes*) for the defendants.

BUTT, J.—In this case we are clearly of opinion that a salvage service of great merit has been rendered by each one of these respective claimants. But I regret that, from the want of an adequate fund, I am unable to make the award which I should like to do. I have to deal only with the salved ship, for, though some cargo has been saved, the chief salvor, the *Pheasant*, had nothing to do with it, and her owners cannot proceed against it. The salvage was commenced by the *Somali*, and no doubt her salvage was a very valuable one. But it was rendered principally to the cargo which she carried away and saved. But there is no doubt that at the time she came up, or just preceding it, the Arabs had been in possession of the *Erato*, and they would not have left her if the *Somali* had not then arrived. Having to deal with a fund amounting to no more than 3750*l*., the question arises, how much of it should I award to the salvors? It is said by the defendants that 1500*l*., the amount which they have tendered, is sufficient, because it is considerably more than a third of the value of the salved property. That is very true, and I must not forget in dealing with these matters that the court must not, so to speak, confiscate the whole of the salved property. On the other hand, I hold that there is no hard-and-fast rule as to the proportion of the salved property which ought to be awarded to the salvors. I have considered what portion of the fund I should give to the salvors, not as an adequate remuneration, but as the lowest amount which in justice they ought to receive, and we think that we cannot award them less than 2000*l*. As regards the apportionment of that sum, the first of the salvors in point of time was the *Somali*. Her services, as I have said, were meritorious, but her efforts were principally directed to saving the cargo, though no doubt they had some effect in the saving of the ship. But her owners are in this advantageous position, that they have a lien on nearly 500 tons of cargo, and will no doubt receive a handsome award out of it in which the others cannot share, excepting the owners of the *Midge*, which may get a very small proportion. Therefore, in apportioning the amount due to the *Somali*, I do so having in view the award she will get elsewhere, and under the conviction that in the result she will be the best off of the salvors; I shall therefore award her 150*l*. Now, with regard to the *Midge*, she is small, but was engaged a long time, and her pump played a very important part in rendering these services. I shall award her 500*l*. That leaves 1150*l*. for the *Pheasant*, which was undoubtedly the great salvor. It is a matter of great regret that in rendering her valuable services she sustained injuries amounting to several thousand pounds. The question of her insurance has been brought before me, but that is a matter into which I decline to go.

Solicitors for the owners of the *Pheasant*, *Thomas Cooper* and *Co.*

Solicitors for the owners of the *Somali*, *Stokes*, *Saunders*, and *Stokes*.

Solicitors for the owners of the *Midge*, *Pritchard* and *Sons*.

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

Tuesday, July 3, 1888.

(Before BUTT, J.)

THE VICTORIA.(*a*)

Limitation of liability—Loss of life—Damage to goods—Priority of claims—Merchant Shipping Act Amendment Act 1862 (25 *&* 26 *Vict. c.* 63), *s.* 54.

Where in an action for limitation of liability the plaintiffs' liability is fixed at 15*l. per ton in respect of life and cargo claims, and the life claims exceed* 7*l. a ton, and the cargo claims* 8*l. a ton,* 7*l. per ton is to be applied exclusively towards the payment of the life claims, and the balance of such claims and the cargo claims are to rank pari passu against the balance of the* 15*l. per ton.*

THIS was a summons by the life claimants in a limitation of liability action to confirm the registrar's report therein.

The report was as follows:

On the 13th April 1887 the steamship *Victoria*, whilst proceeding from Newhaven to Dieppe, stranded on rocks off the French coast, and became a total wreck. Several passengers and two of her crew lost their lives,

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

and the goods, merchandise, and other things on board were lost, destroyed, or damaged. On the 18th May 1887 proceedings were commenced in this division of the High Court of Justice by the owners of the steamer for the purpose of limiting their liability according to the provisions of the Act passed in that behalf. And on the 25th Oct. the court was pleased by its decree or order to pronounce the owners of the said steamship *Victoria* to be answerable in damages in respect of loss of life, personal injury, loss or damage to goods, merchandise, or other things, caused by reason of the improper navigation of the said steamship on the occasion of the aforesaid stranding, to an amount not exceeding 7696*l.* 4*s.*, exclusive of interest, being at the rate of 15*l.* per ton on the registered tonnage of the *Victoria*, without deduction on account of engine-room. Accordingly, on the 29th Oct. 1887, a sum of 7862*l.* 0*s.* 10*d.* was paid into court by the owners of the steamship *Victoria*, being the amount of their statutory liability, inclusive of interest. And whereas all claims filed, or to be filed in this action, are by order of the court duly referred to the registrar assisted by merchants to assess the amount thereof:

Now I do humbly report that I have, with the assistance of Messrs. Sidney Young, and Montagu C. Wilkinson, of London, merchants, carefully examined the various claims filed in this action, together with all accounts and vouchers, and the papers and proceedings produced and brought in, and having on the 23rd, 25th, and 27th days of April 1888 heard evidence of witnesses, and also what was urged by counsel and solicitors, I find that claims have been established as under, viz.:

	£	s.	d.
For compensation for loss of life and for personal injury	8975	0	0
For loss of goods, merchandise, and other things.....	7678	1	4

In this case the sums allowed for claims for loss of life and personal injury exceed the amount equal to 7*l.* per ton on the tonnage of the *Victoria* which in the terms of the Act is appropriated exclusively to such claims. And further, the sums allowed for loss of goods, &c., exceed the further amount equal to 8*l.* per ton which is applicable, but not exclusively, to payment of such claims. I am therefore of opinion that the balance of the claims for loss of life and for personal injury, which the amount equal to 7*l.* per ton is insufficient to cover, must be entitled to rank *pari passu* with the claims for loss of goods, merchandise, &c., against the further amount equal to 8*l.* per ton.

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, (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 such ship or boat; (4) Where any loss or damage is by reason of the improper navigation of such ship as aforesaid caused to any other ship or boat, or to any goods, merchandise, or other things whatsoever, on board any other ship or boat, be answerable in damages in respect of loss of life, or personal injury either alone or together, with loss or damage to ships, boats, goods, merchandise, or other things, to an aggregate amount exceeding 15*l.* for each ton of their ship's tonnage, nor in respect of loss or damage to ships, goods, merchandise, or other things, whether there be in addition loss of life, or personal injury or not, to an aggregate amount exceeding 8*l.* for each ton of the ship's tonnage.

July 3.—The summons was adjourned into court.

To save expense it was agreed that the question whether the registrar had rightly distributed the fund in court as between the claimants should be raised in opposition to the summons without more formal proceedings.

J. P. Aspinall for the goods claimants.—The report is erroneous, and ought not to be confirmed. It is first submitted that the goods claimants are entitled to the whole 8*l.* per ton. The words of the Act point to this specific sum as being appropriated to the goods claimants. All the Act does is to limit a shipowner's liability, and say what shall be the corpus against which claims shall rank; and inasmuch as the goods claimants have a maritime lien, and the life claimants have not, there seems no reason why the rights of the goods claimants should be interfered with by the life claimants. In the Merchant Shipping Act 1854, sect. 510, there is an express provision that the life claims shall be a first charge upon the fund, and inasmuch as there is no such provision in the present Act, it is submitted that the Legislature intended to take away that right:

Leycester v. *Logan*, 26 L. J. 306, Ch.;
Nixon v. *Roberts*, 30 L. J. 844, Ch.; 1 J. & H. 739.

Assuming the above contention to be incorrect, it is then submitted that the 15*l.* per ton should be divided rateably among both sets of claimants, care being taken that the goods claimants do not get more than 8*l.* per ton. The section makes no distinction between the two classes of claimants, and therefore at least they should have equal rights, and the only limit upon the goods owners is that they cannot get more than 8*l.* per ton.

Pyke for the life claimants.—The object of the Act was to favour life claimants. There is nothing in the Act limiting the life claims to 7*l.* a ton. All the Act says is that the shipowner shall not be liable in respect of goods claims to an amount exceeding 8*l.* per ton. It does not say that goods claimants are to have 8*l.* a ton:

Glaholm v. *Barker*, 13 L. T. Rep. N. S. 653; 1 Ch. App. 223; 2 Mar. Law Cas. O. S. 298;
Burrell v. *Simpson*, 4 Ct. Sess. Cas. 4th series, 177.

Aspinall in reply.

BUTT, J.—This case raises a question of some nicety as to the interpretation of the limitation of liability clauses in the Merchant Shipping Acts of 1854 and 1862. The question arises in this way: On the 13th April the steamship *Victoria* stranded on the French coast, and several of her passengers and some of her crew were lost, and her cargo was lost or damaged. Proceedings were thereupon instituted in this court, and ultimately a decree for limitation of liability was granted. In pursuance of that decree the sum of 7862*l.* 0*s.* 10*d.* was paid into court. At the reference the registrar found that there was due in respect of loss of life the sum of 8975*l.*, and in respect of loss of goods the sum of 7678*l.* 1*s.* 4*d.*, making in all a sum nearly double that paid into court. Now 8*l.* a ton is insufficient to pay the goods claims, and 7*l.* a ton is insufficient to pay the loss of life claims. In these circumstances what the registrar has done is this: he has applied the 7*l.* a ton as far as it goes to the loss of life claims, but inasmuch as that sum is insufficient to cover the whole of those claims, he has said they must come in and rank with the goods claims against the 8*l.* per ton. That seems to me to be a rational and equitable proceeding. If the court has power to marshal these assets, then I think the registrar has done right; but the cargo owners say that that apportionment is wrong, and that the court has no right to apply any part of the 8*l.* per ton

to the life claims until the goods owners' claims have been satisfied. In other words, they claim priority to the life claimants upon this amount.

The question is, does the Act of Parliament give them any such right? It seems to me that such a construction is doing violence to the words of the Act. The Act confers no rights on the claimants either in respect of loss of goods or of life. It simply says that, where claimants have certain rights against the shipowner, the court can limit the amount they shall recover. What is there in the Act which says that the life claims are to be cut down to 7*l.* per ton? I can see nothing which does so. Mr. Aspinall says the concluding words of the section do. They certainly do not say so expressly, and I refuse to think that they have the effect of entitling the goods owner to take the whole 8*l.* per ton. I therefore think it would be doing violence to the language of the section to hold in a case like the present, where the life claims exceed 7*l.* per ton, that they are not to rank against the 8*l.* per ton. The statute does not say that goods owners are to recover the whole of the 8*l.* per ton, but only that the amount of their claim to be allowed shall not exceed that sum. I am unable to accede to the argument that goods owners are entitled in priority to the 8*l.* per ton. I confirm the report, and direct the costs of this summons to be costs in the cause.

Solicitors for the life claimants, *Ingledew, Ince,* and *Colt.*

Solicitors for the goods claimants, *Rollit* and *Sons.*

Tuesday, July 17, 1888.

(Before Sir JAMES HANNEN and BUTT, J., assisted by TRINITY MASTERS.)

THE AGLAIA. (*a*)

Salvage — Pilotage — Fishing smack—Right to reward.

Where a ship, otherwise uninjured, is short of provisions, and some of her crew are disabled by exposure to bad weather, and her master, being anxious to get to the nearest port, engages out of pilotage waters the services of a fisherman to pilot him to the nearest port, the services of the fisherman are to be rewarded as salvage, and not as mere pilotage.

THIS was an appeal by the plaintiffs in a salvage action from the decision of the judge of the County Court of Norfolk.

The action was instituted *in rem* by the owner, master, and crew of the fishing smack *Mizpah* against the owners of the barque *Aglaia,* her cargo and freight, to recover salvage for services rendered to her in the North Sea.

At the hearing of the action before the judge and assessors, the following facts were alleged by the plaintiffs:—On the 20th March 1888 the *Mizpah,* a dandy trawler of 51 tons, manned by a crew of five hands all told, was about forty miles E.S.E. of Lowestoft, when those on board of her sighted the barque *Aglaia* flying a Union Jack in her mizzen rigging. The weather was very rough, and the wind about E.N.E. The master of the *Mizpah,* having brought her within speaking distance of the *Aglaia,* asked her master what he wanted? The master of the *Aglaia* said he wanted a pilot to take him to the nearest port. The master of *Mizpah* replied that he could take him to Yarmouth, to which he assented. The master of the *Aglaia* also asked the master of the *Mizpah* to bring some fish on board, as they were starving. The *Mizpah's* boat was thereupon launched, and her master went on board the *Aglaia,* taking with him some biscuits and about 1 cwt. of fish. He was then informed that the *Aglaia* was on a voyage from Australia to Hamburg; that having met with adverse winds when off Terschilling Light, she had put back for the Downs; and that she had run short of provisions, each man having only had ½lb. of biscuit per meal per day for the last six weeks. It also appeared that nine out of a crew of nineteen were ill from frost bites and want of provisions, and the rest were so weak that they could do little or no work. The *Aglaia* was also short of oil. The master of the *Mizpah* remained on board the *Aglaia* to steer and help to navigate her, and the *Mizpah,* having sailed ahead on a course for Yarmouth, the *Aglaia* followed her, and at about 11 p.m. came to an anchor in Yarmouth Roads. The smack then provided the *Aglaia* with two gallons of oil, some coals, and beef.

At the close of the plaintiffs' case the learned County judge dismissed the suit on the ground that the services were not salvage.

From this decision the plaintiff appealed.

Sir *Walter Phillimore* for the plaintiffs in support of the appeal.—The facts of this case entitle the plaintiffs to salvage. The *Aglaia* undoubtedly was in distress when the smack fell in with her, and was, by the plaintiff's assistance, brought into a place of safety.

The Hedwig, 1 Spinks, 19;
The Rosehaugh, 1 Spinks, 267.

J. P. Aspinall, for the defendants, *contra.*—The only distress the *Aglaia* was in was shortness of provisions, of which there were enough for two days. She was perfectly seaworthy, and had a fair wind for the Downs. The plaintiffs merely supplied her with local knowledge which her master did not possess:

Akerbloon v. *Price,* 44 L. T. Rep. N. S. 837; 4 Asp. Mar. Law Cas. 441; 7 Q. B. Div. 129.

Sir JAMES HANNEN.—We are of opinion that the learned judge of the County Court has not given sufficient weight to the evidence as to the condition of this vessel at the time when the services were rendered. Undoubtedly, to lay the foundations to a claim for salvage there must be distress on the part of the salved vessel, and the danger which may be anticipated as a possible consequence of that distress must be an element in considering the amount of award to be given. It appears to us that this vessel was in distress. A large number of the crew were suffering from frost bites, and were actually ill from that ailment. The man at the wheel was disabled in one of his arms by frost bite, and was actually steering with one hand. It is inconceivable that that would have been allowed if the crew had not been reduced to some straits by their previous hardships, and it is beyond doubt that their condition was such that they were glad to have such provisions as the smack could provide them

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

with. I think that lays the foundation for a salvage claim. It is said by the defendants that the *Aglaia* was then bound for the Downs, which she would in all probability have reached, and there got all she wanted. But we must not forget the condition of those on board of her. They did not think it all plain sailing. On falling in with the smack, they express a desire to be taken anywhere, to the nearest port, wherever it might be, and this at a time when they were out of pilotage waters. It has been said by Mr. Aspinall that the result shows that she could have navigated into Yarmouth. But if so, why did she, as she was not in pilotage waters, want pilotage assistance? It looks very much as though they were not so secure of their position as they might have been, and that they availed themselves of the opportunity which they saw of saving themselves from a position of difficulty and danger.

Now, with regard to the Union Jack, it is plain that it was not a signal for a pilot. It was an ambiguous signal, meaning that assistance of some kind was wanted, and, I think, we must look to the facts, as has been said by Dr. Lushington, to see what an ambiguous signal means. What was it the *Aglaia* was in need of? To be relieved, as I have already said, from her position of difficulty and danger, that she might not become more disabled, and might not, before she reached the Downs incur greater distress. No doubt the chief advantage which she derived from the assistance of the smack was the guidance into Yarmouth; but it is not worth while to discuss whether this comes more accurately under the description of pilotage or salvage. It was pilotage, not of a pilot, under extraordinary circumstances. It appears to me to be pilotage of that character which entitles the plaintiffs to salvage, whatever you call it. The guidance of a vessel under extraordinary circumstances rises to the rank of salvage, and I am of opinion that those conditions existed here.

BUTT, J. concurred.

After the hearing in the court below the defendants had obtained leave to examine their witnesses before an Admiralty examiner, so that, in the event of the Divisional Court overruling the decision, such evidence might be available, and the witnesses were examined accordingly; but before such evidence was gone into, it was agreed by the parties that the plaintiffs should have 50*l.* and costs, including the costs of the appeal.

Solicitors for the plaintiffs, *Ingledew, Ince,* and *Colt,* agents for *Chamberlin* and *Leech,* Great Yarmouth.

Solicitors for the defendants, *Dubois, Reid,* and *Williams,* agents for *Diver* and *Preston,* Great Yarmouth.

HOUSE OF LORDS.

July 17, 19, *and* 23, 1888.

(Before the LORD CHANCELLOR (Halsbury), Lords FITZGERALD and MACNAGHTEN.)

MERSEY DOCKS AND HARBOUR BOARD *v.* HENDERSON. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Dock tonnage rates — Mersey Dock Acts Consolidation Act 1858 (21 *&* 22 *Vict. c. xcii.*), *s.* 230.

The respondents were owners of a line of steamships trading from Glasgow to Bombay, and their practice was to begin loading at Glasgow; the ship then sailed to Liverpool partly laden, entered the appellants' docks, and there completed its loading, discharging no cargo at Liverpool. It then sailed to Bombay, there discharged, and loaded a complete cargo; thence sailed to Liverpool, entered the docks and discharged cargo, and then proceeded with the remainder of the cargo, or in ballast, to Glasgow.

Held (reversing the judgment of the court below), that under sect. 230 *of the Mersey Dock Acts Consolidation Act* 1858 (21 *&* 22 *Vict. c. cxii.*) *the appellants were entitled to charge on the outward voyage dock tonnage rates as on a vessel trading outwards to India, not only as on a vessel trading inwards from Glasgow, and on the return voyage rates as on a vessel trading inwards from India.*

THIS was an appeal from a judgment of the Court of Appeal (Bowen and Fry, L.JJ., Lord Esher, M.R. dissenting), who had affirmed, with a variation, the judgment of Mathew, J. at the trial, in favour of the respondents, the plaintiffs below.

The case is reported in 6 Asp. Mar. Law Cas. 156; 57 L. T. Rep. N. S. 173, and 19 Q. B. Div. 123.

The question was what dock tonnage rates the appellants, the Mersey Docks and Harbour Board, were entitled to charge the respondents, shipowners, in respect of steamers starting from and partly loading at Glasgow and entering the docks at Liverpool to complete their loading and to take in coal before starting on their voyage to India, and also what tonnage rates were to be paid on such vessels on the return voyage when they called at Liverpool to discharge a portion of their cargo before proceeding to Glasgow.

By the 230th section of the Mersey Docks Consolidation Act 1858 (21 & 22 Vict. c. xcii.) it is enacted that

> All vessels entering into or leaving the docks shall be liable according to the tonnage burden thereof to pay to the board the rates hereinafter called dock tonnage rates, mentioned in schedule B. to this Act annexed, according to the several and respective classes of voyages described in such schedule; that is to say, to or from the port of Liverpool from or to any ports or places in such schedule mentioned, and such rates shall be paid to the board by the masters or owners of such vessels, and shall be charged as follows:—
>
> Vessels trading inwards shall be liable to the rates payable in respect of the most distant of all the ports from which such vessel shall have traded to Liverpool.
>
> Vessels arriving in ballast, but trading outwards, and also vessels built within the port of Liverpool or trading outwards, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards; and vessels built within the said port

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

on first trading outwards shall be liable to one moiety only of such rates, but shall thereafter pay full rates.

Vessels arriving in ballast and departing in ballast from the said port shall be liable to one moiety only of the rates payable to the most distant of all the ports for which such vessels shall clear out or depart.

One arrival with one departure of a vessel shall be considered as one voyage, whether such vessel shall have traded both inwards and outwards or arrived or departed in ballast, and without regard to any intermediate ports between which she may have traded whilst absent from Liverpool; but such vessel shall be liable to the rates payable in respect of the most distant of all the ports to which such vessel shall have traded. Vessels arriving in ballast and trading outwards, and vessels built in the port of Liverpool and trading outwards, and having paid the rates payable on such trading outwards, shall afterwards, on trading inwards, be liable to the rates payable on vessels trading inwards.

The appellants contended that they were entitled to charge in respect of the respondents' vessels the following dock tonnage rates:—(1) As upon a voyage from Glasgow to Liverpool, and from Liverpool outwards, the rate payable in respect of the most distant of the ports to which the vessel traded outwards — that is to say, 1*s.* 5*d.* per ton under sched. B, class 7; and (2) upon the homeward voyage from the Indian port to Liverpool and thence to Glasgow, the rate payable in respect of the most distant port from which the vessel had traded to Liverpool, that is to say, a second rate of 1*s.* 5*d.* per ton under the same class of sched. B.

The respondents, on the other hand, contended that at the most the appellants were entitled to charge—(1) in respect of the voyage from Glasgow to Liverpool and from Liverpool to the Indian port, the coastwise rate of 4½*d.* per ton; and (2) in respect of the voyage from the Indian port to Liverpool and from Liverpool to Glasgow, the foreign rate of 1*s.* 5*d.* per ton. The respondents in 1886 brought this action against the appellants to recover the sum of 24,381*l.*, being the amount which they alleged they had under protest overpaid the latter and had been wrongfully charged and received by the appellants. The case was tried before Mathew, J. without a jury, when the learned judge held that the dues which the appellants were entitled to charge were the coastwise dues in respect of the voyage from Liverpool to Glasgow and back, and the foreign dues in respect of the outward voyage to the foreign port and back, and that the excess paid by the respondents should be returned to them by the appellants.

The appellants appealed to the Court of Appeal, when Bowen and Fry, L.JJ. (the Master of the Rolls dissenting) ordered that the judgment should be varied by declaring that the appellants were entitled to charge in respect of every ship of the respondents arriving at Liverpool from Glasgow and sailing for India the dock tonnage rates as on a ship trading inwards from Glasgow, and in respect of every ship of the respondents arriving at Liverpool from India and sailing for Glasgow the dock tonnage rates as on a ship trading inwards from India.

Sir *H. James*, Q.C., *Finlay*, Q.C., *French*, Q.C., and *Squarey* appeared for the appellants.

The *Attorney-General* (Sir R. Webster, Q.C.), *Cohen*, Q.C., and *J. Walton* for the respondents.

The arguments, which turned entirely upon the wording of the sections of the Act, appear sufficiently from the judgments of their Lordships.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 23.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: The decision of the question before your Lordships is important, not only to the dock company and the shipowner, but to the trade of Liverpool. I do not think anyone can reasonably complain that a question so important has been raised, since three different views have been entertained by the four judges before whom the question has come. It certainly was most reasonable in Messrs. Henderson to show if they could that charges were being imposed upon them greater than the law allowed. It was equally reasonable in the dock company to show if they could that they were acting strictly within their rights. I think there is nothing in the conduct of either of the parties to this litigation which calls for or justifies complaint. The question turns on the true construction of the 230th section of the Act of 21 & 22 Vict. c. xcii. The respondents, who own vessels which start from Glasgow, send their vessels to Liverpool to take in goods in addition to what they have already loaded in Glasgow, and for the purpose of this loading in Liverpool they enter the appellants' docks, but unload no part of the cargo. The first question which arises is, whether a vessel arriving in Liverpool under such circumstances is a vessel trading inwards. I confess, even without the assistance to be derived from a class of statutes which I will mention presently, I should not be able to place upon the words the sense which the majority of the Court of Appeal have attached to them. It certainly is not a satisfactory mode of arriving at the meaning of a compound phrase to sever it into its several parts, and to construe it by the separate meaning of each of such parts when severed. Many examples will occur to the mind where such a process would lead to absurdity; but in truth, when one considers what is the matter with which the statute under construction is conversant, the phrase is, as it appears to me, free from all doubt. The statute is imposing rates for the use of the docks, and is undoubtedly dealing with the export and import of goods. Now, in this, as in most countries, export and import are regulated by law in their mode of administration. No vessel can bring cargo to this country or take it away, or even carry it by sea from one port in this country to another, without being submitted to a whole system of supervision which has been imposed by law. The statutes which created the machinery and regulated the trade and commerce of this country in respect of export and import are those from which the Legislature would naturally adopt the phraseology when imposing dock rates in respect of trade conducted by vessels bringing goods to a port or taking goods away. I quote, for convenience, the Customs Consolidation Statute of 1876 (39 & 40 Vict. c. 36), but the nomenclature upon which I rely is to be found in Customs statutes long before 1858 (21 Vict. c, 12.)

Upon a review of the statutes, of which the Act of 1876 is a consolidation, it is apparent that all sea traffic is exhaustively divided into import, export, and coasting trade, and

the phraseology of the Dock Act becomes perfectly intelligible. I will take only one section, though many might be quoted. That section is sect. 101 of the Act of 1876, and is as follows: "The master of every ship in which any goods are to be exported from the United Kingdom to ports beyond the seas (or his agent) shall, before any goods be taken on board (except as is hereafter provided) deliver to the collector a certificate from the proper officer of the due clearance inwards or coastwise of such ship of her last voyage," containing certain particulars. It then provides that if the vessel shall have commenced her lading at some other port the master must deliver to the proper officer the clearance, and enacts a penalty of 100*l.* upon any master who shall take on board any goods unless the vessel shall have first entered outwards. Then there is an exception in favour of ships with what is called a "a stiffening order," which appears to be an order permitting a vessel to take on board heavy goods to steady the ship in lieu of ballast, which, when necessary, appears to be given without a regular entry outwards. Then there is a permission to allow a vessel to be "entered outwards" before the whole of the goods imported in such ship shall have been discharged therefrom, the complete separation of such goods from the inward cargo being effected to the satisfaction of the proper officer. Here we have inward clearance, inward cargo, and by the light of such a system, as well as by the use of the particular words, I cannot doubt that "trading inwards" does not mean "a trading vessel going into a port," but means that not only the vessel is to be going in, but the trading and not the vessel is to be inwards, a trading inwards by way of import as contra-distinguished from trading outwards by way of export. Without, therefore, the aid of the 10th section of 51 Geo. 3, c. 143, I come to the conclusion that these vessels, under the circumstances stated, are not trading inwards. It will be observed that in the section I have already quoted the vessel is described as entering outwards, which has already partly laden at another port, and, as the Master of the Rolls points out, these vessels, in accordance with the system described, enter outwards at Glasgow for India *vid* Liverpool, and would not be permitted to load on board a single bale of goods, unless they produced that outward clearance from Glasgow.

Having arrived at the conclusion that these vessels are not trading inwards at Liverpool, the next question arises whether they are vessels in ballast, and I think they are not. The statute says nothing about cargo used as ballast, or about vessels so laden as to be stiff enough to be moved as if they were vessels in ballast. The words are perfectly intelligible used in their natural and proper sense, and therefore I cannot give them an artificial and non-natural sense in order to effect what I may consider a more just rule than the statute has enacted. It is admitted by the respondents that if these vessels are not in ballast, and are not trading inwards, there is, according to their construction of the statute, no provision made for them at all—a sufficiently startling supposition in respect of a practice that the evidence in this case proves to exist, and which the Customs statute I have quoted shows to have been known to the Legislature. But the 5th and 7th sections of 51 Geo. 3, c. 143 impose duties on all vessels coming into or going out of the docks, and the argument to show that the Legislature omitted to consider the particular case in question only arises when provisions against a vessel being called upon to pay both for going in and coming out in the prosecution of the same voyage are being considered. I agree with Fry and Bowen, L.JJ., though I think the argument leads to a different result from that at which the Lords Justices arrived, that "no *casus omissus* can be admitted where the section declares that all vessels" entering or leaving the docks are charged. I have suggested the last word instead of those actually used since the sense requires it, and I think that is what their Lordships meant. I believe that no case can be found to authorise the construction of the majority of the Court of Appeal altering a word so as to produce a *casus omissus*. The statute is admittedly enumerating the classes of vessels which are to pay various rates according to circumstances enumerated in the statute, and it is part of the argument that this is being done so as to arrange for the class of rates which are to be applied to all vessels coming in or going out of the docks. Vessels trading inwards are to pay one rate; vessels trading outwards which have arrived in ballast—and now I quote the exact words of the statute—"Vessels arriving in ballast, but trading outwards, and also vessels built within the port of Liverpool or trading outwards, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards, and vessels built within the said port on first trading outwards shall be liable to one moiety only of such rates, but shall thereafter pay full rates; vessels arriving in ballast at and departing in ballast from the said port shall be liable to one moiety only of the rates payable to the most distant of all the ports for which such vessels shall clear." According to the natural meaning of the language, the statute enumerates vessels arriving in ballast but trading outwards, vessels built in Liverpool (which therefore must and can only trade outwards on their first voyage), vessels trading outwards without specifying how they got to Liverpool, and within that class would come the vessels in question unless the judgment of the Court of Appeal is right; but that judgment turns "or" into "and," and absorbs the classes into one. In the first place, I know no authority for such a proceeding unless the context makes the necessary meaning of "or" "and," as in some instances it does; but I believe it is wholly unexampled so to read it when doing so will upon one construction entirely alter the meaning of the sentence unless some other part of the same statute or the clear intention of it requires that to be done, as in the case of *Fowler* v. *Padgett* (7 T. Rep. 509), where the Act of James 1, c. 15, made it an act of bankruptcy for a trader to leave his dwelling-house to the intent or whereby his creditors might be defeated or delayed. These words if construed literally would have made every trader commit an act of bankruptcy if he casually left his dwelling-house and some creditor called for payment during his absence. It may indeed be doubted whether some

of the cases of turning "or" into "and" and *vice versâ* have not gone to the extreme limit of interpretation, but I think none of them would cover this case. Here not only is "or" changed into "and," but the whole sentence is practically struck out, since the construction insisted on reads it thus (leaving out the words altogether): "Vessels arriving in ballast, but trading outwards, and also vessels built within the port of Liverpool, shall be liable to the rates payable in respect of the most distant of all the ports to which they shall trade outwards." It may be said that the words "but trading outwards," as above given, are unnecessary also; but though I will not say that in very strict construction they would not be implied, yet they form a natural antithesis to vessels arriving in ballast and departing in ballast. If, however, I am right in saying that these vessels are trading inwards or in ballast, then the change of "or" into "and," or the striking out of the whole sentence, actually produces a *casus omissus* which seems to me, as it did to the two Lords Justices, entirely inadmissible. With respect to the unity of the voyage, and the judgment of Mathew, J., I only wish to say that in no proper technical sense are the goods from Glasgow to Liverpool carried coastwise, and that they might have been so carried is nothing to the purpose, nor if they had been would it have affected the question since the voyage of the vessel would have been what the Master of the Rolls has decribed. For these reasons I am of opinion that the appellants have charged no more than they were entitled to charge, and I move your Lordships that the order appealed from be reversed, and that the respondents do pay to the appellants the costs both here and in the courts below.

Lord FITZGERALD.—My Lords: The plaintiffs in the action are the representatives of an extensive steamship company, proprietors of a line of steamers commonly known as "The Anchor Line." The defendants (appellants) are a body of trustees controlling under statutable powers in one public trust the port of Liverpool and the Mersey Docks. The question relates to the dock tonnage rates paid under exceptional circumstances possibly not actually contemplated in 1858, when the Mersey Docks Act (Consolidation) was passed (21 & 22 Vict. c. xcii.) The plaintiffs claim a return of alleged overpayments. There is no fact in dispute. The question is one of law arising wholly on the proper construction of sect. 230 of that Act, but on that question your Lordships may derive some assistance by reference to the language of some sections in the repealed Act of 1811. The code, portions of which have been amended and consolidated in the Act of 1858, extends over a period of 179 years, commencing so far back as 1709. The undisputed circumstances may be taken from the appellants' case: "The defendants' steamers commence loading goods at Glasgow, where they take in a portion only of their cargo, the amount so loaded at Glasgow varying from time to time according to circumstances; never being a full cargo, but ordinarily sufficient to enable them to proceed to Liverpool without other ballast. All the goods so loaded at Glasgow are shipped under a bill of lading in which the vessel is stated to be 'lying in the port of Glasgow and bound for Bombay *viâ* Liverpool,' and the ship is cleared from Glasgow "for Bombay *viâ* Liverpool.' The said goods so loaded at Glasgow are intended to be and are in fact carried to and discharged at Bombay, and are not taken out of the said ship after leaving Glasgow until her arrival at Bombay. Upon leaving Glasgow the said steamer proceeds to the port of Liverpool, where she enters one of the appellants' docks. The steamer is not cleared or entered at the Custom House at Liverpool as a vessel trading inwards. She does not discharge at Liverpool any of the cargo taken on board at Glasgow, nor do the appellants receive rates of any kind in respect of that cargo. In one of the appellants' docks the steamer loads for Bombay such cargo as may be ready for her, and then leaves the dock, clears at the Customs House as a vessel trading outwards and departs from Liverpool to Bombay. At Bombay she discharges the whole of the goods so carried from Glasgow and Liverpool respectively, and then loads homeward cargo." It is, however, to be borne in mind that as the plaintiffs' vessel would be under no obligation to return to Liverpool, and frequently brings her return cargo to some other port and does not come to Liverpool, she might thus evade the Liverpool Dock tonnage rates altogether if she did not pay at Liverpool on the outward voyage. The terms of the 230th section of the statute of 1858, and the questions for the decision of your Lordships which arise on it, have been stated by the Lord Chancellor. The 11th part of the statute applies in the first instance to "dock tonnage rates," commencing in sect. 230, the rating clause, and declares that "All vessels entering into or leaving the docks shall be liable to pay dock tonnage rates;" that is to say, "to or from the port of Liverpool, from or to any ports or places mentioned in the schedule, and such rates shall be paid, &c." The schedule is referred to only for the purpose of fixing the scale. The obligation is imposed in language as clear as could be used for the purpose. There can be no doubt that the plaintiffs' vessel comes within the charge as a vessel entering into the docks, unless there is to be found in the statute some provision which makes her liable to the $4\frac{1}{2}d.$ rate as a vessel trading inwards to Liverpool, or unless the statute has omitted to provide for the exceptional circumstances. Sect. 230 then declares that "such rates shall be paid by the masters or owners, and shall be charged as follows: It deals with, "First, vessels trading inwards." The respondents (plaintiffs) contended that their ship, which had left Glasgow with part of her cargo, and cleared from Glasgow for Bombay, *viâ* Liverpool, became on her arrival at Liverpool a vessel "trading inwards," although she carried no cargo for Liverpool—discharged no goods there—made no entry "inwards" as of a ship trading inwards, and called at the port of Liverpool solely for the purpose of taking in cargo already provided for her to be carried to Bombay, the port of her final destination. I am of opinion that the appellants' vessel was not under the circumstances stated a vessel "trading inwards" within the meaning of the statute.

We have received in the course of the argument abundant assistance from reference to other sections of the particular statute, and also in the Customs Act. I may supply an additional

example. In the Mersey Act, s. 166, provision is made for "landing and depositing the inward cargo," and several other sections have been referred to which clearly to my mind show what is meant by "trading inwards," and indicate that the appellants' ship did not come within that description. Mathew, J., dealing with the contention of the appellants that the plaintiffs' vessel arriving at Liverpool with part of her cargo for Bombay on board ought not to be considered to be a vessel "trading inwards," says, "The position seems to me altogether untenable," and disposes of the case on the basis that she was a vessel trading inwards. Fry, L.J. in dealing with the same question puts it thus: "The words 'trading inwards' would, we think, most naturally and therefore primarily apply to the case of a vessel entering the docks for the purpose of discharging her cargo; but we think that the words may without violence describe also any vessel laden with goods in the course of trade entering the docks for the purposes of her trade, whether loading or unloading, and thus include one of the plaintiffs' vessels arriving from Glasgow; for she is a vessel on a trading voyage; she is a trader, and she enters inwards." I am unable to follow Mathew, J., and whilst I accept the interpretation which the Lord Justice describes as "most naturally, and therefore primarily" to be adopted, I cannot accept the interpretation which he says may be "applied without violence," as descriptive of the plaintiffs' vessel. If not "violent," it would seem to be forced and contrary to the ordinary grammatical and statutable interpretation of "trading inwards." Sect. 230 next deals with vessels "trading outwards" thus: First, "vessels arriving in ballast, but trading outwards." It was contended for the appellants, but rather feebly, that the respondents' ship was a ship that arrived in ballast. None of the judges gave any countenance to this suggestion; and it seems to me that, according to the ordinary signification of the words, she could not be deemed to be a vessel arriving at the port of Liverpool in ballast. Secondly, "also vessels built within the port of Liverpool." The respondents' vessel was not such. Thirdly, "or trading outwards." She was a vessel trading outwards, but the respondents contend that "or" must be read "and," and the provision would run thus: "and also vessels built within the port of Liverpool, and trading outwards," so that the respondents' vessel would not come within this portion of the charging definition of the section. But the word is "or," and has a sensible meaning in its position, and why should we take the great liberty of blotting it out and substituting another word, the result of which might be to create a *casus omissus?* We ought not to create a *casus omissus* by interpretation, save in some case of strong necessity. The appellants contended that it was necessary to take this strong step in order to prevent a contradiction with a similar passage to be found subsequently in the same section, where the word used is "and," but I have been unable to discover the contradiction or the repugnancy. The passage alluded to is at the conclusion of the section, thus: "Vessels arriving in ballast and trading outwards, and vessels building in the port of Liverpool and trading outwards, and having paid the rates payable on such trading outwards, shall afterwards on trading inwards, be liable to the rates payable on vessels trading inwards." But, in this passage, the words "and trading outwards" are essential to provide for the eventuality and give it proper effect, and are not in the least in contradiction with the words "or trading outwards," or the provision in the earlier part of the section.

The appellants' vessel then not having been a vessel "trading inwards," nor "arriving in ballast," nor built in Liverpool, we should probably have been obliged to consider it a *casus omissus*, as to which Fry, L.J. properly says: "No *casus omissus* can be admitted," or I should rather observe ought to be created. We find other words which, without any strain, are applicable, and may have been introduced as an amendment to meet an exceptional case. If it was a *casus omissus*, it would seem to follow that, on the outward voyage from Glasgow to Bombay, *viâ* Liverpool, the respondents' vessel would not be within the charge for any dock tonnage rates at Liverpool, although she entered the docks and used them whilst taking on board a substantial portion of her cargo for her outward voyage. The words in the earlier part of the section, "or trading outwards," seem to me to meet the case that has arisen, and to be applicable. The respondents' vessel entering the docks, and trading outwards, was as such liable on that outward voyage to the outward dock rates charged on her. The 230th section declares that "one arrival with one departure shall be considered as one voyage." The plaintiffs' vessel was a vessel arriving at Liverpool, though not in ballast, nor trading inwards, and she departed thence to Bombay. That arrival and departure constituted one voyage, in respect of which she became liable to dock tonnage rates. She took on board at Bombay a fresh cargo, and left bound for Liverpool and Glasgow. She arrived at Liverpool, discharged part of her cargo, and departed from Liverpool for Glasgow. That arrival and departure constituted a second voyage in respect of which the respondents' became equally liable to dock tonnage rates. The Attorney-General stated that the real contest was a fight against what he called the double payment. I am of opinion that this real question should be ruled against the respondents, and their action dismissed.

Lord MACNAGHTEN.—My Lords: If I were compelled to determine this case solely on consideration of the arguments presented to and accepted by the learned judges of the Court of Appeal, I should still have some difficulty in agreeing with their decision. I cannot see any reason for substituting the word "and" for "or" in the 2nd sub-section of sect. 230 of the Act of 1858. And I am rather disposed to think that, according to the true construction of the Act, a vessel is not within the description of vessels "trading inwards" or "trading to Liverpool," unless she comes to Liverpool with cargo for the purpose of dealing with it there in the way of trade. But this question is one I think of some difficulty, and it may not be unimportant to observe that the Act which originally imposed tonnage dues at Liverpool (8 Anne, c. 12, s. 3) uses the expression "trading or coming into or out of the said port with any goods or merchandise," and it imposed the dues on vessels "so trading" to and from the said port. Nor can I accept the proposition

advanced by the learned counsel for the appellants, that a vessel coming to Liverpool with nothing but cargo destined for some other port is to be deemed a vessel "arriving in ballast." It seems to me, however, that these questions one and all are rather beside the point. It cannot indeed be denied after the course which this action has taken that there is some apparent difficulty in sect. 230. But the solution of the difficulty, if difficulty there be, is, I think, to be found in sub-sect. 4, not in sub-sects. 1 and 2. Apart from the rules contained in its sub-sections, sect. 230 is perfectly clear. All vessels entering into the docks and all vessels leaving the docks are made liable according to their tonnage to pay dock tonnage rates. The rates are specified in a schedule which classifies all possible voyages. The rates vary with the class of the voyage in which the vessel is engaged, and they are to be paid to the dock board by the master or owner of the vessel liable. Nothing more, it will be observed, could be required to complete the imposition of these rates. But the section goes on to say that such rates "shall be charged as follows," and then follow four sub-sections or rules. These rules impose no further duties. They merely explain and limit charges already imposed. Rule 1 provides that "vessels trading inwards" (whatever that expression means; "shall be liable to the rates payable in respect of the most distant of all the ports from which such vessels shall have traded to Liverpool." That is the whole of rule 1. Your Lordships will observe that so far there is nothing whatever to exempt a vessel trading inwards, which pays according to this rule, from the liability imposed by the earlier part of the section on vessels "leaving the docks." A vessel paying on entering the docks would, if there were nothing more, have to pay again on leaving. Rule 2 applies the same method of reckoning voyages (1) to the case of "vessels arriving in ballast but trading outwards;" (2) to the case of "vessels built within the port of Liverpool" (in which two cases there is no "trading inwards" at all); and (3) as a general provision to the case of all vessels "trading outwards." Again, it will be observed that there is nothing in rule 2 to exempt a vessel which pays according to that rule from the liability imposed by the earlier part of the section on all vessels "entering into the docks." It was argued that the word "or" in rule 2 must be read "and." The Court of Appeal so held. One is tempted to ask, why? The change is not required by any rule of grammar, or by the sense of the particular passage, or, with all deference to the Court of Appeal, by "the general drift" of the section, or "the general scheme of the enactment" on which two of the learned judges rely. The most singular thing about this controversy is that the proposed change would not make the very slightest difference in the effect of the section. Still, I can hardly doubt that the words "or trading outwards" must have been introduced purposely. They do not occur in the Act of 1811, in sect. 6, which corresponds with the first three rules of sect. 230. It is obvious that one and the same method of reckoning ought to be applied to all voyages inwards or outwards. If the most distant point is taken as the terminus in the one case it ought also to be taken as the terminus in the other. Probably the framers of the Consolidation Act were struck by the apparent omission in clause 6 of the earlier Act, and inserted the words in question in rule 2 without observing that they were not required, because a general provision to the same effect was to be found in clause 7, which they have reproduced as rule 4 in sect. 230 of the Act of 1858.

I may pass over rule 3. It applies to the case of vessels arriving in ballast and departing in ballast—a case where there is no trading voyage at all. Rule 4 is the most important of all the rules. It declares that "one arrival with one departure of a vessel shall be considered as one voyage, whether such vessel shall have traded both inwards and outwards, or arrived or departed in ballast." The place where the voyage is to be taken into consideration is Liverpool, where the rates are collected. But it will be observed that the expression "shall have traded" is not accurate as applied to a vessel in Liverpool which has traded inwards and is about to trade outwards. The framers of the Act, treating the inward voyage and the outward voyage as one, seem to contemplate the voyage as completed. Now if a vessel coming from Glasgow to Liverpool to fill up for Bombay is a vessel which has traded inwards we have precisely the case mentioned first in rule 4. We have a vessel at Liverpool which has traded inwards and is about to trade outwards, and the voyage from Glasgow to Liverpool and thence to Bombay is to be considered as one voyage. To what rates then is such vessel liable? The rule itself answers the question in the plainest terms, "Such vessel shall be liable to the rates payable in respect of the most distant of all the ports to which such vessel shall have traded." Again we have the same expression, "shall have traded." It must have the same meaning there as it had in the earlier part of the same sentence. It must mean "has traded or is about to trade;" and I agree that the word "to" must be read "from or to." It does not mean you are to take the outward voyage only—you are to take the furthest, whether it be the inward or the outward voyage. The consequence, is that as Bombay is the more distant port from Liverpool the vessel must pay the Indian rate. The result is precisely the same if the voyage from Glasgow to Liverpool is not a "trading inwards," though the case would not in that view fall within any of the cases specially mentioned in rule 4. The rule is perfectly clear—"one arrival with one departure of a vessel shall be considered as one voyage," and "such vessel shall be liable to the rates payable in respect of the most distant of all the ports to which such vessel shall have traded." Bombay would be the most distant port, though it is the only port to which the vessel trades. And so the Indian rate is payable. I cannot agree with the majority of the Court of Appeal that "the inward rates are to be paid preferentially" in the sense that an inward rate, however small, clears the outward rate on the same voyage, however large. It is true that the rates are collected on arrival. For obvious reasons that must be the more convenient course. The practice apparently had varied before the Act of 1811, and it was settled by that Act on the ground of expediency (51 Geo. 3, c. 143, s. 11). But the mode of collection cannot nullify the plain directions of rule 4 as to the amount to be

collected. The result is that in my opinion the dock board are entitled to the charges which they claim the right to make, though they may have defended those charges on wrong grounds. I think therefore that the appeal must be allowed and the action dismissed with costs.

Order appealed from reversed, and judgment entered for the appellants (defendants in the action); the respondents to pay the appellants their costs both in this House and below. Cause remitted to the Queen's Bench Division.

Solicitors for appellants, *Rowcliffes, Rawle,* and *Co.*, for *A. T. Squarey*, Liverpool.

Solicitors for the respondents, *Rowcliffes, Rawle,* and *Co.*, for *Hill, Dickinson, Lightbound,* and *Dickinson*, Liverpool.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

March 21 *and* 22, 1888.

(Present: The Right Hons. Lord HOBHOUSE, Lord MACNAGHTEN, Sir BARNES PEACOCK, and Sir RICHARD COUCH.)

THE GLAMORGANSHIRE. (*a*)

ON APPEAL FROM THE SUPREME COURT FOR CHINA AND JAPAN.

Collision—Lights—Right to sue—Regulations for Preventing Collisions at Sea—Merchant Shipping Act 1873 (36 *&* 37 *Vict. c.* 85), *s.* 17.

An infringement of the Regulations for Preventing Collisions at Sea, which by no possibility could have anything to do with the collision, will not render a ship liable.

It is not an infringement of art. 3 *of the Regulations for Preventing Collisions at Sea, to carry side lights in the rigging.*

Where plaintiffs in an action for loss of cargo by collision prove that the cargo was shipped to their order, and that the bill of lading is indorsed to a bank to secure advances, they retain sufficient interest in the cargo to entitle them to sue.

THESE were two consolidated appeals from the judgments of the Supreme Court for China and Japan at Shanghai, dated the 10th April 1886, and the 31st May 1886, affirming judgments of Her Britannic Majesty's Court for Japan, dated the 12th Oct. 1885 and the 20th Oct. 1885, in two suits instituted in the said court by the owners of the American ship *Clarissa B. Carver* and S. D. Warren and Co. respectively, against the owners of the British steamship *Glamorganshire*, the present appellants.

The actions arose out of a collision between the two ships in the Gulf of Osaka about 10.45. p.m. on June 7, 1885. In the first the owners of the *Clarissa B. Carver* sought to recover damages for the loss of their vessel; and in the second Warren and Co. sought to recover damages for the loss of their cargo laden on board the *Clarissa B. Carver*.

The facts alleged by the plaintiffs were as follows:—At about 10.30. p.m. on June 7, 1885, the *Clarissa B. Carver*, a steamship of 1100 tons register, bound on a voyage from Yokohama to Kobe, and laden with a cargo of rags, was off the harbour of Kobe some four or five miles from Wada Point. The wind was E.N.E., the tide was flood, and there was a whole-sail breeze. The ship was on the port tack, heading S.E., and making a speed of from six to seven knots an hour, the 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 *Clarissa B. Carver* saw the masthead light of a steamer which proved to be the *Glamorganshire* distant about four or five miles and bearing about four points on the starboard bow. Shortly afterwards her red light came into view. The *Glamorganshire* continued to approach, and instead of keeping out of the way of the *Clarissa B. Carver* collided with her, crushing in her bow and causing her shortly afterwards to sink.

The facts alleged by the defendants were as follows:— At about 10.45. p.m. on June 7 the steamship *Glamorganshire* was in the Gulf of Osaka heading N.E. by N. ½ N., and was making about eleven knots an hour. In these circumstances, those on board of her saw the dim green light of a sailing ship which proved to be the *Clarissa B. Carver* at about two to three ship's lengths off and about three points on the port bow. The helm was immediately ported as the only means of avoiding a collision, but nevertheless the *Clarissa B. Carver's* jib-boom caught in the *Glamorganshire's* main rigging, and then her stem struck the steamer on her port side.

The further material facts are set out in the judgment.

The actions were tried together in the court of Japan, which gave judgment for the plaintiffs, a decision which was affirmed by the Supreme Court for China and Japan.

At the trial a clerk in the employ of Messrs. Heinemann and Co., was called on behalf of Warren and Co., and proved the following facts: that Heinemann and Co. by order of Warren and Co. shipped on the *Clarissa B. Carver* a cargo of rags which had been purchased by Warren and Co.; that 22,000 dollars were advanced against the rags; that they were deliverable to Baring Brothers, and that the bill of lading was indorsed to the Hong Kong Bank.

Having regard to the above evidence the Supreme Court directed "that the money which may be awarded under the reference herein be not paid to the plaintiffs (Warren and Co.) until it shall have been satisfactorily established that the payment will release the owners of the steamship *Glamorganshire* from all claims on behalf of any consignees or indorsees of the bills of lading."

The plaintiffs submitted that the decision of the Supreme Court for China and Japan was wrong for the following among other reasons:

1. Because a good look-out was being kept on board the *Glamorganshire*.
2. Because the fact that the green light of the *Clarissa B. Carver* was not seen earlier was not, in the circumstances, proof of negligence on the part of those on board the *Glamorganshire*.
3. Because the lights of the *Clarissa B. Carver* did not comply with the regulations.
4. Because the green light of the *Clarissa B. Carver* was not burning brightly.
5. Because the green light of the *Clarissa B. Carver* was obscured.
6. Because the green light of the *Clarissa B. Carver* was improperly placed.

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

7. Because the *Clarissa B. Carver* took no steps to avoid the collision or to diminish the force of the collision.

8. Because it was not proved that S. D. Warren and Co. had any title to the goods in respect of which they sued, and on the contrary it appeared that they had no title to them.

9. Because the court of Japan was not an Admiralty court, and even supposing that in an Admiralty court the plaintiffs might have been allowed to postpone the proof of their title till the reference as to damages (which supposition the appellants dispute), no such course could be taken in the court for Japan.

10. Because in any event S. D. Warren and Co. ought only to be allowed to recover for the loss actually sustained by them.

The respondents the owners of the *Clarissa B. Carver* by their case submitted that the decree appealed from should be affirmed for the following among other reasons:

1. That the collision and consequent damage were solely due to the negligence of those on board the *Glamorganshire*.

2. That a good look-out was not kept on board the *Glamorganshire*.

3. That the *Glamorganshire* did not keep out of the way of the *Clarissa B. Carver*.

4. That the *Glamorganshire* did not slacken her speed nor stop, nor reverse her engines prior to the collision.

The respondents Warren and Co. by their case submitted that the decree appealed from should be affirmed for the following among other reasons:

1. That the evidence shows a *primâ facie* title to sue to be in the said respondents.

2. That the evidence did not show that there was any title to sue in any person other than Warren and Co., who were the shippers of the cargo.

3. That the said decree is legal and valid.

4. That under the circumstances the said Supreme Court was justified in making the said decree in the form thereof.

Sir *Walter Phillimore* and *H. Stokes*, for the appellants, the owners of the *Glamorganshire*, cited

The Fanny M. Carvill, 32 L. T. Rep. N. S. 646; 2 Asp. Mar. Law Cas. 565;

The Stoomvaart Maatschappy Nederland v. *The Peninsular and Oriental Steam Navigation Company*, 43 L. T. Rep. N. S. 610; 4 Asp. Mar. Law Cas. 360; 5 App. Cas. 893.

Myburgh, Q.C. and *Melsheimer* for the respondents.

Stokes in reply.

The judgment was delivered by

Lord HOBHOUSE.—In this case two actions have been brought in Her Majesty's Court of Japan, sitting as an Admiralty court, against the steamship *Glamorganshire* or her owners. One is by the owners of the American sailing ship *Clarissa B. Carver*, for damage done to that ship; and the other by S. D. Warren and Co., who say that they are owners of the cargo on board the *Clarissa B. Carver*, for damage done to the cargo. The contention is, that the *Glamorganshire* is solely in fault for a collision that took place between the two ships. The *Glamorganshire* contends either that she was not in fault, or that the *Clarissa B. Carver* contributed to the collision. By arrangement between the parties the evidence has been taken in both actions together, and though there are separate judgments given in the actions they were in effect tried together. The same arrangement has been pursued before their Lordships. The appeals have been consolidated, the same counsel appeared for the respondents in the two cases, and their Lordships are dealing with the cases *uno flatu*. The Court of Japan decided both actions in favour of the plaintiffs The defendants, the owners of the *Glamorganshire*, appealed to the Supreme Court for China and Japan, and that court affirmed both the decrees, the decree in the ship case absolutely, and the decree in the cargo case with a modification which will be mentioned presently.

To take first the ship case. There are many questions raised in the actions as to the conduct and handling of the ships, which have been settled by the concurrent decisions of the two courts in a way which the counsel for the *Glamorganshire* have felt that they could not dispute, having regard to the rule which prevails in this tribunal respecting the effect of concurrent decisions on pure questions of fact. But there is one question left on which it is argued that this tribunal should review the decisions of the courts below, though they are in effect concurrent. It is said that there was some variation of the ground taken by the courts below, and that the matter is open to their Lordships now. The contention amounts to this: that the ship *Clarissa B. Carver* committed a breach of the maritime regulations, and, having committed that breach, her case falls within the principle which was laid down in the case of *The Fanny M. Carvill* (*ubi sup.*), that where there was a breach, the presumption of culpability on the part of the vessel committing it can only be met by proof that the disaster in question could not by any possibility be attributed to the breach. But then, in order to attract that principle, and to get the benefit of it, there must first be shown that there was in fact a breach of the regulations, and that must be proved like any other fact in the case. It is not sufficient to say that from the facts proved there might possibly have been some breach of the regulations. Proof must be given leading up to the conclusion that there was a breach, and then, if that breach could possibly have led to the disaster, the ship must be held to blame on the principle laid down in *The Fanny M. Carvill*. Now the regulation which is said to be infringed is art. 3 (*b*). It provides that a steamship shall carry "on the starboard side a green light so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass; so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side; and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles." By art. 5 that regulation is extended to sailing vessels. It is said that that regulation has been infringed in two particulars. First, it is said that the light was too dim; that it was not "of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles." Upon that point both courts have elaborately examined the evidence, and they have come to the conclusion that the witnesses on board the *Clarissa B. Carver*, who all spoke one way, and who gave clear testimony that there was a bright light which they calculated would be visible at three miles, were to be believed, and that there was no infringement of the regulation upon that point. Their Lordships think it neces-

sary to say nothing further upon that point, excepting that, as the evidence has been brought before them, they consider that the courts came to a right conclusion. But then another point was made. It is said that the light was fixed in the rigging, and that that is an improper place to fix the light. The answer is, that the regulation does not say it shall not be fixed in the rigging; and not only is it not contrary to the regulation; it is a common practice; and in American ships appears to be a very common practice—it would seem almost to be the common practice. The naval officers who have assisted their Lordships in this case concur with the evidence given on this point. Then it is alleged that the light was so fixed that the foresail or some portion of the foresail would interfere so as to prevent the lamp showing a uniform and unbroken light over an arc of the horizon of ten points of the compass. [After hearing the evidence, their Lordships came to the conclusion that, even if it could be held that an occasional obscuration of the light by sail under exceptional circumstances was a breach of the regulation, the evidence in this case is to the effect that there never could be any interference at all by the sail with the lamp; that therefore there was no breach of the regulation, and continued:] The *Clarissa B. Carver* is not to be held to blame in any way, and the judgment appealed from is a right judgment.

Now with respect to the cargo action. The objection there is, that the plaintiffs have not proved their title to maintain the action. The evidence given of their title was that of Galtzow, who was the clerk or in the employ of Messrs. Paul Heinemann and Co. His evidence is that the cargo was shipped by Messrs. Paul Heinemann and Co., and shipped by the order of the plaintiffs; that it was deliverable to Barings; that 22,000 dollars had been borrowed—he does not say by whom, probably by Heinemann and Co.—of the Hong Kong bank, and that the bill of lading was indorsed over to the bank. No doubt that does not show a clear title to the money in the plaintiffs, but it does show that they had an interest in the cargo, and their Lordships hold that that interest is sufficient to enable them to maintain the suit. The judge of the court of Japan passed a decree that the plaintiffs do recover from the defendants damages to be ascertained on the usual reference to the registrar. At the same time he offered to the defendants a modification of that decree to the effect that the money should not be paid until the various claims against it were ascertained. Apparently they refused that modification, and they appealed to the Supreme Court to get the decree reversed. The Supreme Court affirmed the decree on the merits, but at the request of the appellants appended this modification: "That the money which may be awarded under the reference herein be not paid to the plaintiffs until it shall have been satisfactorily established that the payment will release the owners of the steamship *Glamorganshire* from all claims on behalf of any consignees or indorsees of the bills of lading." That seems to their Lordships to meet exactly the justice of the case. They think that the plaintiffs have an interest to maintain the suit to recover the money for the benefit of those persons who on the inquiry are proved to be entitled to it, and under circumstances in which the money will not be paid out till the owners of the *Glamorganshire* are completely freed from all claims. The result is that, in their Lordships' opinion, the appeals fail and should be dismissed and the respective decrees affirmed, and they will humbly advise Her Majesty to that effect. The appellants must pay the costs of the appeals.

Solicitors for the appellants, *Stokes, Saunders,* and *Stokes.*

Solicitors for the respondents, *Bowman* and *Crawley-Boevey.*

Supreme Court of Judicature.

COURT OF APPEAL

Thursday, March 15, 1888.

(Before Lord ESHER, M.R., FRY and LOPES, L.JJ.)

BETHELL AND CO. *v.* CLARK AND CO. (*a*)

Sale of goods—Goods for shipment abroad—Stoppage in transitu—Delivery on board ship—End of transit.

The purchasers of goods directed the vendor, who carried on business at Wolverhampton, to consign the goods to a vessel then loading in the East India Docks for Melbourne. The vendor accordingly delivered the goods to a railway company as carriers to be forwarded and shipped. Subsequently the vendor, hearing of the insolvency of the purchasers, gave notice to the carriers to stop the goods, but too late to prevent shipment, and the vessel left the port for Melbourne with the goods on board. Before her arrival the vendors claimed the goods from the shipowners as their property.

Held (affirming the judgment of the Queen's Bench Division), that the transit was not at an end till the goods reached Melbourne, and that the vendors were, till then, entitled to stop them in transitu.

THIS was an appeal from a judgment of the Queen's Bench Division (Mathew and Cave, JJ.), reported at 57 L. T. Rep. N. S. 627; 6 Asp. Mar. Law Cas. 194; 19 Q. B. Div. 553.

The special case, stated under Order LVII., r. 9, is fully set out in the report in the court below, and shortly the facts were as follows:

On the 1st June 1885 Messrs. Tickle and Co., of London, ordered from Messrs. Clark and Co., of Wolverhampton, ten hogsheads of hollow ware, and on the 28th June 1885 wrote to the vendors asking them to consign the goods "to the *Darling Downs* to Melbourne, loading in the East India Docks here." The vendors delivered the goods to the North-Western Railway Company to be forwarded to the ship, and the railway company carried them to Poplar and forwarded them thence by a lighterage company as their agents to the vessel, receiving and forwarding to the purchasers the mate's receipt on shipment.

The vendors, being informed that the purchasers were insolvent, gave notice to the railway company to stop the shipment, but the notice was

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

too late, the goods being already on board the vessel. The *Darling Downs* sailed to Melbourne with the goods on board, but before her arrival the vendors wrote to Messrs. Bethell and Co., her owners, claiming the goods in question as their property. The goods being also claimed by the trustee of the estate of the purchasers, Messrs. Bethell and Co. interpleaded, and the question for the court was, whether the trustee or the vendors were entitled to the possession of or property in the goods.

The Divisional Court (Mathew and Cave, JJ.) gave judgment in favour of the vendors (57 L. T. Rep. N. S. 627; 6 Asp. Mar. Law Cas. 194; 19 Q. B. Div. 553).

The trustee appealed.

Willis, Q.C. and *Lyon* for the trustee.—All right of the vendors to stop *in transitu* was determined as soon as the goods were put on board the vessel. They were then delivered to the purchasers, and were at their orders. The words "to Melbourne" in the letter of the 28th June must not be read as providing for a consignment to Melbourne, but merely as describing the vessel to which they were to be consigned. They cited

Kendall v. *Marshall, Stevens, and Co.*, 48 L. T. Rep. N. S. 951; 11 Q. B. Div. 356;
Valpy v. *Gibson*, 4 C. B. 837;
Ex parte Miles, 15 Q. B. Div. 39;
Ex parte Watson, 36 L. T. Rep. N. S. 75; 3 Asp. Mar. Law Cas. 396; 5 Ch. Div. 35;
Dixon v. *Baldwen*, 5 East, 175.

R. T. Reid, Q.C. and *Plumptre*, for the vendors, were not called on.

Lord ESHER, M.R.—In this case, purchasers having become insolvent, the unpaid vendors had, according to the law merchant, a right to stop the goods *in transitu*, even though the property in them might have passed to the purchasers. The rule as to stoppage *in transitu* has been often stated, and the doctrine has always been liberally construed in favour of the unpaid vendor. When the goods have not been delivered to the purchaser himself, nor to any agent of his to hold for him otherwise than as a carrier, but still remain in the hands of the carrier as such for the purposes of the transit, then the goods are still *in transitu*, and may be stopped, even though the carrier was the agent of the purchaser to accept delivery so as to pass the property in the goods. The difficulty that has arisen in some cases has been that a question has arisen whether the original transit had ended and a fresh transit begun, and that difficulty has been dealt with in this way: where the transit still exists which was caused either by the terms of the contract or by the orders of the purchasers to the vendor, then the right of stoppage *in transitu* still exists; but if that transit is over, and the goods are in the hands of the carrier in consequence of fresh directions given by the purchasers for a fresh transit, then the right to stop *in transitu* has gone. Similarly, if the purchaser orders goods to be sent to a particular place, there to be kept till he gives fresh orders respecting them to another carrier, the original transit ends when they reach that place, and any further transit is new and independent.

Now, in the case before us the contract does not determine the destination of the goods; but it is argued on behalf of the vendors that the purchasers directed that the goods were to be forwarded to Melbourne, so that while they were in the hands of any of the carriers who would forward them to Melbourne, and until they arrived there, they were still in transit, and the right to stop them existed. The question turns on the true construction of the letter of the purchasers of the 28th June, which is as follows: "Please deliver the ten hogsheads of hollow ware to the *Darling Downs*, to Melbourne, loading in the East India Docks here." The argument on the part of the purchasers was, that those directions were directions to deliver on board a particular ship and nothing more; but that argument amounts to saying that the goods were to be delivered on board the ship, there to be kept as in a warehouse, subject to further orders from the purchaser as to further carriage or discharge. Surely that cannot be the business meaning of the transaction. The ship is loading for Melbourne, goods are to be received on board for carriage to Melbourne, the captain would have no authority to receive them on board as a warehouseman, and the meaning is that these goods were to be delivered on board to be carried to Melbourne. A mate's receipt was given, and a bill of lading was signed which showed that the goods were received for carriage to Melbourne, and therefore what was actually done bears out my construction of the document. It therefore follows, in my opinion, that these goods were in the hands of carriers as such, and in the course of their original transit from Wolverhampton until they reached Melbourne. I think the letter of June 28 gave all the necessary directions, and that the case does not fall within that class of cases where a fresh transit begins in consequence of fresh directions by the purchasers as to a further transit. I need not refer to all the cases cited. Mr. Willis's argument is directly met by the judgment of Bowen, L.J. in *Kendall* v. *Marshall, Stevens, and Co.* (*ubi sup.*), where he says: "Where goods are bought to be afterwards despatched as the vendee shall direct, and it is not part of the bargain that the goods shall be sent to any particular place, in that case the transit only ends when the goods reach the place ultimately named by the vendee as their destination. In *Cootes* v. *Railton* (6 B. & C. 422) several cases were cited by Bayley, J. in the course of his judgment, and the principle to be deduced from them is, that where goods are sold to be sent to a particular destination, the transitus is not at an end until the goods have reached the place named by the vendee to the vendor as their destination." In *Ex parte Miles* (*ubi sup.*) I cited the test laid down by Lord Ellenborough in *Dixon* v. *Baldwen* (*ubi sup.*), where he says, "The goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that without such orders they would continue stationary." I applied that rule to the case then before me, and held that in that case the goods had arrived at their destination when they got to Southampton. Such is not the case here, no fresh orders would be necessary in this case until they arrived at Melbourne. I therefore think that the vendors rightly exercised

their right to stop *in transitu*, and that this appeal must be dismissed.

Fry, L.J.—I am of the same opinion. The trustee of the purchasers relies on a constructive delivery, that is, a delivery to an agent of the vendees, as terminating the transit. No doubt the transit is at an end when delivery is made to an agent to hold for the vendee, or to await further instructions for the despatch, but when the sole duty of the agent is to transmit, then nothing can be clearer than that the transitus continues whilst the goods are in the hands of such transmitting agents, however many they may be. I will refer to only one authority on the subject. In *Berndtson* v. *Strang* (16 L. T. Rep. N. S. 583; 3 Mar. Law Cas. O. S. 154; L. Rep. 4 Eq. 481) Lord Hatherley says: "In the ordinary case of chartering it appears to me that the captain or master is a person interposed between vendor and purchaser in such a way that the transitus is not at an end, and the goods will not be parted with, and the consignee will not receive them into his possession until the voyage is terminated, and the freight paid according to the arrangement in the charter-party." I can only come to the conclusion in this case that the railway company, the lightermen, and the shipowners, were all agents to receive the goods for the purpose of carrying them to Melbourne, and that the transit was not at an end until they reached that place.

Lopes, L.J.—I think that the law applicable to this case is to be found in the words of Lord Ellenborough in *Dixon* v. *Baldwen* (*ubi sup.*). Applying that law to this case, the only direction given by the vendees was contained in the letter of the 28th June, and the case really depends on the true construction of that letter. I can only read it as meaning that the goods are to be sent to the shipowners to be forwarded to Melbourne. If so, no fresh orders were required until they reached that place, and the transitus continued until that time. I think the decision of the court below was right, and must be affirmed.

Appeal dismissed.

Solicitor for trustee, *W. Beck.*
Solicitor for defendants, *C. A. Bannister.*

Thursday, Aug. 9, 1888.

(Before Lord Esher, M.R., Lindley and Bowen, L.JJ.)

The Argentino. (*a*)

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

Collision—Charter-party—Loss of employment—Measure of damages.

Where it is verbally agreed between a ship's managing owner and certain shipbrokers that on the ship's return to London, where she is expected in a few days, the brokers will provide her with cargo for carriage to foreign ports, and in consequence of a collision with another vessel, for which the other vessel is to blame, she is unable to fulfil the engagement, and her place is taken by another vessel, in estimating her owners' damages evidence of the profits made by the other vessel is inadmissible, and their legal damage is such a sum as represents what a vessel like theirs might ordinarily and fairly be expected to earn having regard to the fact that she is under contract for employment at the time of the collision.

This was an appeal by the plaintiffs in a collision action *in rem* from a decision of Sir James Hannen, on an objection by the defendants to the registrar's report (58 L. T. Rep. N. S. 643; 6 Asp. Mar. Law Cas. 278; 13 P. Div. 61).

The collision took place in the Thames on the 20th Feb. 1887, between the plaintiff's steamship the *Gracie* and the defendant's steamship the *Argentino*. It was subsequently agreed between the parties that both vessels should be deemed to be to blame, and the damages were referred to the registrar and merchants.

In consequence of the collision the *Argentino* was under repairs for some days, and was unable to fulfil an engagement with Messrs. Westcott and Laurance to take a cargo from Antwerp to Batoum.

Messrs. Westcott and Laurance therefore engaged a smaller vessel, the *Beta*, in the place of the *Argentino*. After the *Argentino* had been repaired she was employed by Westcott and Laurance to carry a cargo from Antwerp and London to Odessa.

At the reference the defendants, the owners of the *Argentino*, claimed (*inter alia*) 785*l.* 13*s.* 4*d.*, which was made up as follows; (1) 455*l.*, the difference between the gross freight earned by the *Beta* and that earned by the *Argentino*; (2) 93*l.*, the freight which the *Argentino*, being a larger vessel than the *Beta*, would have earned in excess of that earned by the *Beta* had she been able to perform the voyage; (3) 237*l.* 13*s.* 4*d.*, being demurrage for eight days, the number of days which it took to load the *Argentino* in excess of the days occupied in loading the *Beta*.

The registrar disallowed these items of claim. His report, so far as is material, was as follows:

Messrs. Westcott and Laurance are shipbrokers in London, who collect cargo at Antwerp and London for conveyance to the Black Sea by two different routes, and the vessels employed for each voyage call at different specified ports on the way, one route or round ending at Batoum, the other at Odessa.

About a week or ten days previous to the collision above mentioned, when the *Argentino* was at sea on a voyage from Sebastopol with a cargo of wheat for London, Mr. Westcott, a partner in the above-named firm, called at the office of Mr. Porteous, the managing owner of the *Argentino*, and inquired if he had a boat to load for the Batoum route, and, being informed of the expected arrival of the *Argentino*, it was verbally arranged that the *Argentino*, as soon as she arrived, discharged her cargo, and could be ready, should proceed to Antwerp to load for a Batoum route. Later on, after the *Argentino* had arrived in the Thames and had collided with the *Gracie*, and in consequence needed repairs which would take some considerable time, it was arranged between Mr. Westcott and Mr. Porteous that Mr. Westcott should engage another vessel in lieu of the *Argentino* for the contemplated voyage to Batoum, and, accordingly, Mr. Westcott engaged the ship *Beta*, which loaded at Antwerp and in London, and made the same round to Batoum which it was intended the *Argentino* should make.

The *Beta* commenced this round by leaving London for Antwerp on the 7th March, and after loading some cargo there returned to London for further cargo, and finally sailed from the Thames about the 20th March.

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

The repairs to the *Argentino* were finished on the 18th March, and a few days before that date Mr. Westcott proposed to Mr. Porteous to load the *Argentino* for the Odessa route, an offer which Mr. Porteous accepted; and, accordingly, on the 19th or 20th March the ship left London for Antwerp, where she loaded about 300 tons, sailed thence to London on the 27th, where she loaded 1000 tons more, and finally sailed from London on the Odessa round on the 10th April.

The result of the voyages of the *Beta* and *Argentino* respectively seems to be this: The *Beta* earned a gross freight on the Batoum round of 1536*l.*, the *Argentino* a gross freight on the Odessa round of 1081*l.*, showing a difference of 455*l.*, which sum is claimed as a loss or damage arising from the collision. It is further said that had the *Argentino* made the same round the *Beta* did, she would have loaded a full cargo, and, being a larger vessel, would have consequently earned a larger gross freight than the *Beta* by 93*l.*, which is claimed as a further loss resulting from the collision. Then, again, in consequence of the *Argentino* being eight days longer loading than the *Beta*, which is attributed to her cargo not being equally ready for shipment as the *Beta's*, eight days' demurrage of the ship is claimed at the extravagant rate of 29*l.* 14*s.* 2*d.* per day, equal to 237*l.* 13*s.* 4*d.*, thus making a total claim for consequential damages under this head of 785*l.* 13*s.* 4*d.* I am of opinion that the claim is too remote, and cannot be sustained.

The defendants having objected to this report, the learned President upheld the objection, and sent the report back.

From that decision the plaintiffs now appealed.

May 17 *and* 29.—*Nelson* and *Meager* (*Finlay*, Q.C. with them), for the plaintiffs, in support of the appeal.—The registrar was right in disallowing this claim. In the first place it is contended that there was no binding engagement between the parties; and secondly, assuming there was the loss is too remote. The claim is for freight which is to be earned on a subsequent voyage, a claim which has never been allowed before. In the cases of *The Star of India* (35 L. T. Rep. N. S. 407; 3 Asp. Mar. Law Cas. 261; 1 P. Div. 466), and *The Consett* (5 Asp. Mar. Law Cas. 34 n.; 5 P. Div. 229) the voyage had begun in respect of which the freight was claimed, and the ship in each case was fixed by a definite charter-party for a certain cargo, a certain voyage, and a certain freight. In the present case all manner of contingencies might have happened to prevent the *Argentino* carrying out this alleged engagement, and therefore the damage is too remote to be allowed. Where a vessel is sunk instead of being only injured her owners are not entitled to recover demurrage:

The Columbus, 3 W. Rob. 158;
The Clarence, 3 W. Rob. 283;
The Betsy Caines, 2 Hagg. 28;
Hadley v. *Baxendale*, 9 Ex. 341.

The doctrine that a plaintiff is entitled to a *restitutio in integrum* does not apply where the loss claimed is too remote, even if the alleged loss be caused by a tort as in the present case:

The Notting Hill, 51 L. T. Rep. N. S. 66; 5 Asp. Mar. Law Cas. 241; 9 P. Div. 105;
The Parana, 36 L. T. Rep. N. S. 388; 3 Asp. Mar. Law Cas. 399; 2 P. Div. 118;
Sharp v. *Powell*, 26 L. T. Rep. N. S. 436; L. Rep. 7 C. P. 253;
Horne v. *Midland Railway Company*, 28 L. T. Rep. N. S. 312; L. Rep. 8 C. P. 131;
Jebsen v. *East and West India Dock Company*, 32 L. T. Rep. N. S. 321; L. Rep. 10 C. P. 300; 2 Asp. Mar. Law Cas. 505.

Sir *Walter Phillimore* and *Boyd*, for the defendants, *contrà*.—The President was right in allowing this claim. There was in fact a binding engagement that the *Argentino* should be employed on a certain voyage. The loss is the result of the collision, and ought to be allowed. This is not a case of breach of contract, but of tort, and the claimant is entitled to a *restitutio in integrum*:

Hadley v. *Baxendale* (*ubi sup.*);
France v. *Gaudet*, L. Rep. 6 Q. B. 199;
The Gazelle, 2 W. Rob. 279;
Bodley v. *Reynolds*, 8 Q. B. 779;
Wood v. *Bell*, 5 E. & B. 772.

This class of claim has long been recognised in the Admiralty Court, and is in consonance with justice and equity:

The Clarence (*ubi sup.*);
H.M.S. Inflexible, Swa. 200;
The Gleaner, 38 L. T. Rep. N. S. 650; 3 Asp. Mar. Law Cas. 582;
The Risoluto, 48 L. T. Rep. N. S. 909; 8 P. Div. 109; 5 Asp. Mar. Law Cas. 93;
The Yorkshireman, 2 Hagg. 30, n.

This is a stronger case than a claim for demurrage, inasmuch as demurrage is always problematical, whereas this is a claim for a certain profit.

Nelson in reply.

Cur. adv. vult.

Aug. 9.—Lord Esher, M.R.—In this case the question is, whether certain damages ought to be allowed against the owners of the *Gracie*. It must be taken on the decision of facts by the President of the Admiralty Division, that, at the time of the collision caused, for the purpose of this inquiry, by the fault of the *Gracie*, the owners of the *Argentino* had an existing profitable contract with certain parties for the hire of their ship for a future voyage, and that by reason of the collison they lost the advantages of that contract. But it is also apparent that at the time of the collision the *Argentino* was not sailing under that contract at all; that the voyage on which she was sailing at the time of the collision was under a wholly different and independent contract. The question is, whether any loss in respect of the future contract can be allowed as damage consequent upon the collision. It is argued on behalf of the *Gracie* that such damage is too remote. It is argued on behalf of the *Argentino* that she is entitled to a *restitutio in integrum*.

The first point raised is, whether there is or is not upon these propositions a different rule in the Admiralty from that in the common law courts. The second point is, what is the true meaning of the phrase *restitutio in integrum*? The third point is, what is the true definition of the phrase that the damages must not be too remote? The fourth question is, whether the damages under consideration are or are not too remote? As to the first point, it would be deplorable if there were any difference, but I am of opinion that there is not. In the case of *The Gazelle* (*ubi sup.*), Dr. Lushington, speaking of damages claimed under the rule of *restitutio in integrum*, says: "And if I find that in the courts of common law the principle has been applied to any case *ex delicto* in the manner to which I have referred, it will be my duty to adopt and apply the same principle in this and future cases of the like kind, more especially as I do not find that in the practice of this court there has been any such consistent and uniform course of prac-

tice as would militate against its introduction." And Dr. Lushington then examines and adopts a ruling of Cresswell J. in the then Court of Common Pleas. And in the case of *The Columbus* (*ubi sup.*) he says, again treating of the rule as to damages, "And not only in this court, but in all other courts, the general rule of law is;" and again, "but, although this is the general principle of law, all courts have found it necessary to adopt certain rules for the application of it." Again, in the case of *H.M.S. Inflexible* (*ubi sup.*), the same learned judge, on the same matter, says, "Such, I apprehend, are the general principles which a judge at Nisi Prius would lay down for the direction of a jury in a case in which it was their duty to assess the damage." As to the second point, it is often argued as if this rule and the rule as to remoteness were two co-ordinate and inconsistent rules, but, in truth, this is a rule subordinate to the rule as to remoteness. It is a rule as to the measure of damage which is allowed; it does not deal with a damage which cannot be allowed. This rule does not come into play with regard to any claimed head of damage until it has been determined by the rule as to remoteness whether that head of damage can be brought into consideration at all. This is the true effect of what is laid down by Dr. Lushington in *The Columbus* (*ubi sup.*). "Under this assumption," he says, "what is the ground upon which he rests his claim for more than the full value of his vessel in the present instance? It has been argued on his behalf that the principle upon which the court proceeds in all matters of this kind is a *restitutio in integrum*; in other words, the principle of replacing the party who has received the damage in the same position in which he would have been provided the collision had not occurred. As a general proposition, undoubtedly the principle in question is correctly stated, and not only in this court, but in all other courts, I apprehend the general rule of law is that where an injury is committed by one individual to another, the party receiving the injury is entitled to an indemnity for the same; but although this is the general principle of law, all courts have found it necessary to adopt certain rules for the application of it, and it is utterly impossible in all the various cases that may arise that the remedy which the law may give should always be to the precise amount of the loss or injury sustained." Anyone who considers the subsequent part of that judgment will see that the certain rules to which Dr. Lushington refers include the rule as to the remoteness of damage. The rule as to remoteness of damage does no doubt limit the literal application of the rule as to *restitutio in integrum*, yet in my view the two rules are independent, and the first matter for consideration in any particular case is whether the damage claimed is or is not too remote. This brings me to the third question. As to this it seems to me, as was said in *Hammond and Co.* v. *Bussey* (20 Q. B. Div. 79), that it is useless to go further back than to *Hadley* v. *Baxendale* (*ubi sup.*). That case states the rules which have been always since recognised as applicable both to cases of contract and tort. This is the view of the author of Mayne on Damages, and he deduces (p. 44, 4th edit.) the rule as follows: "Having examined the principles by which the assessment of damages is governed, we have next to inquire what ground of damage will in no case be admissible. These grounds may be classed under the general head of remoteness. Damage is said to be remote when, although arising out of the cause of action, it does not so immediately and necessarily flow from it as that the offending party can be made responsible for it." This rule is further explained thus (p. 45): "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. Where neither of these elements exists, the damage is said to be too remote." In Sedgwick on Damages there are several phrases used to express the idea. In chapter 2 "the law refuses to take into consideration any damages consequentially or remotely resulting from the act complained of . . . This general principle pervades the civil as well as the common law, and applies equally to cases of breach of contract and of violation of duty; to all cases in short where no complaint is made of any deliberate intention to injure." Citing a French commentator on the French code he says: "The code does not require that the non-performance of the contract should be the immediate and direct cause of the damage, but only that the damage should be the immediate and direct result of its violation, which is a very different thing." He afterwards approves of the definition of Mr. Greenleaf: "The damage to be recovered must always be the natural and proximate consequence of the act complained of." He afterwards points out that the damage relied on must be an actual damage proved in the particular case. It must beside that be the reasonable natural consequential result of the act complained of; but, even though it be in some sense all these, it must moreover be the necessary direct immediate proximate result of the act complained of. A great many of these words seem to be almost, if not quite, synonymous; "reasonable" and "natural" seem to be so, "immediate" and "proximate" seem to be so. The damage then must be an actual damage proved to have occurred in the particular case. It must be the reasonable and natural result of the act complained of. If it can be shown that the result which has occurred is such as would be the consequence of the act in the ordinary course of things, this requirement is satisfied. If the result is such as would not be the consequence of the act in the ordinary course of things, there must be some special circumstances which make it the reasonable and natural result in the particular case. If the result in the particular case fails to satisfy all these conditions, the case fails; the damage cannot be recovered. If the result satisfies these conditions, it must still further be the direct and immediate or proximate result of the act complained of. And it is not so if it is only brought to be the result of the act complained of by reason of some intermediate act or circumstance, which might or might not have happened between the act complained of and the result relied on.

The fourth question is, whether in this case the requisite conditions are satisfied. The act

complained of is the wrongful collision. The result relied on is the failure of the agreement as to the future hire of the ship. Is the existence during a voyage of an agreement as to a future independent hiring of a ship, or an existing charter as to a future independent voyage, an ordinary occurrence in shipping business? And more, is it an ordinary consequence of a damaging collision occurring on a voyage that an existing agreement or charter as to a future independent voyage should be frustrated? Neither proposition can be answered in the affirmative. Knowledge of business tells one so; but more conclusive, perhaps, is the fact that there is no trace of damage so resulting being allowed either in the Admiralty or at common law. There are no special circumstances as to this point in the present case. The claim in this case therefore fails to satisfy the necessary condition as to the result being an ordinary result, and cannot be allowed; and also the existence of the agreement as to the future voyage is a circumstance which might or might not happen, as joining the damage relied on to the act complained of, so that the condition as to the damage being the direct and immediate result of the act complained of is not fulfilled. This decision does not conflict with the authorities which have allowed the loss of freight to be earned on the voyage on which the ship is at the time of the collision. A damage preventing the earning of such freight necessarily and in ordinary course leads directly to the result that such freight is lost. This decision therefore does not conflict with the decision in *The Star of India* (*ubi sup.*). In that case the *Cheviot* was heaving short to proceed on the chartered voyage, and the learned judge relied on that fact, reading the evidence of the captain, that "we were actually heaving short on board the *Cheviot*, for the purpose of getting under weigh for the purpose of proceeding to the said port of Gopalpore." The learned judge then continues: "So the voyage may therefore be said to have begun." So, in the case of *The Consett* (*ubi sup.*), the ship was sailing on the chartered voyage. The case of *The Risoluto* (*ubi sup.*) is really to the same effect the ship there being injured whilst fishing. The cases of *The Parana* (*ubi sup.*) and of *The Notting Hill* (*ubi sup.*) are not to the exact point raised in the present case, though useful samples of the application of the rule as to the remoteness of damages. I cannot gather that the point elaborately argued before us was presented in the same way to the President of the Admiralty Division. The main points argued before him were on questions as to the facts on which we have adopted his decision. I am of opinion that the existence of a head of damage which is found to be too remote ought not to be regarded at all. It ought to be treated as not existing. I am of opinion that the appeal must be allowed, so far as the judgment of the learned President directs an inquiry as to any allowance in respect of the loss of the agreement for the future hiring of the vessel.

Bowen, L.J.—In the judgment which I am about to read Lindley, L.J. concurs. I regret not to be able to agree with the judgment of the Master of the Rolls, though I feel considerable diffidence in differing from any view of his. At the time of the collision in question the *Argentino*, according to the finding of the learned President (which I adopt), was under an engagement with Messrs. Westcott and Laurance, a firm of shipbrokers in London, to call at Antwerp to collect cargo for a Batoum route, and to take a turn for that purpose as one of a line of steamers actually advertised. In consequence of the collision she was necessarily put under repair, and was obliged to abandon her engagement, the *Beta*, another vessel belonging to other owners, taking her place and earning the profit for the ship she would have received. The learned President has held that the case must be referred to the registrar to ascertain the amount of loss which the owners of the *Argentino* have sustained by their vessel not being able to fulfil their contract, and has intimated that his calculation is to be made from the profit actually earned on the same voyage by the *Beta*, after allowing for the difference of capacity, &c., between the two vessels. The owners of the *Gracie* have appealed from the President's decision, and the question before us is as to the principle on which the damages for this collision should be assessed.

The damages recoverable from a wrongdoer in cases of collision at sea must be measured according to the ordinary principles of the common law. Courts of Admiralty have no power to give more, they ought not to award less. Speaking generally as to all wrongful acts whatever arising out of tort or breach of contract, the English law only adopts the principle of *restitutio in integrum* subject to the qualification or restriction that the damages must not be too remote; that they must be, in other words, such damages as flow directly and in the usual course of things from the wrongful act. To these the law superadds in the case of a breach of contract (or, so to speak, according to the view taken by some jurists, the law includes, under the head of these very damages, where the case is one of breach of contract), such damages as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of its breach. With this single modification or exception, which is one that applies only to cases of breach of contract, the English law only permits the recovery of such damages as are produced immediately and naturally by the act complained of. A collision at sea, caused by the negligence of an offending vessel, is a mere tort, and we have only therefore to consider what has been in the particular case its direct and natural consequence. This consequence (in the case of an innocent ship which is disabled by an accident) is that its owner loses for a time the use which he otherwise would have had of his vessel. There is no difference in principle between such a loss and the loss which the owner of a serviceable threshing machine suffers from an injury which incapacitates the machine, or the loss which a workman suffers who is prevented from saving money by the wrongful detention of plant which cannot at once be replaced. A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be, what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits) the ship-

owner, but for the accident, would have earned by the use of her? It is on this principle alone that it is habitual to allow, in ordinary cases, damages for the time during which the vessel is laid up under repair, in addition to the cost of the repairs themselves. But this is merely an application of the general principle, and is not the measure in all cases of the loss. It might conceivably, upon the one hand, be the fact that the damaged ship would not and could not have earned anything at all while laid up for repairs, though such a case must necessarily be exceptional. In such circumstances, nothing ought to be allowed for demurrage. Upon the other hand, the direct consequence of the accident might be that the injured vessel was necessarily thrown out of her employment, not merely during the period of repair, but for a longer period still. In such a case the loss could not properly be measured by the time taken in repairs alone. The questions, therefore, to be inquired into are two. The first, to what extent (if any) the vessel has been thrown out of employment by the accident; the second, what would have been the fair earnings of a vessel such as the *Argentino* advertised to sail, as was the *Argentino*, on Messrs. Westcott and Laurance's line to Batoum, excluding, as I have said, everything in the nature of uncertain and speculative profits? When a ship, at the time of collision, is under a charter-party that is lost in consequence of the collision, the existence of the charter-party is admissible and material to show (what otherwise might have been a matter of doubt) that the ship has been thrown out of employment; but I cannot see that for the purpose of such proof the existence of an actual charter-party is essential, since other evidence may be equally cogent to establish the loss of employment. A whaling vessel which loses her season is thrown out of employment just as surely as if she had been a cargo-carrying vessel under a charter that has to be abandoned.

In the present case the *Argentino* was under an engagement to take her turn at Antwerp to collect cargo. The existence of such an engagement is evidence to show that, but for the accident, she would not have remained idle, but would have been employed, and she must be treated for the purposes of damages, in my opinion, as if she were a ship about to trade on Messrs. Westcott and Laurance's line, and advertised to sail from Antwerp for that purpose, and the extent to which such profitable employment has been lost must be a question of fact, to be decided by the tribunal whose duty it is to assess the damages. It remains, however, still to be considered what is the value at which this loss of employment is to be calculated in the case of a vessel which but for the accident would have been serviceably used by her owner in a particular manner. This is a difficult matter to calculate, but the difficulty is only, after all, one of fact. Where there is an actual charter-party such difficulty is reduced to a minimum. Where there is no charter-party, but merely a reasonable certainty of employment, the matter is left more at large. Probably the most accurate mode of proof would be the opinion of persons acquainted with the trade and with the capacity and condition of the ship, who ought to be able to say what, under the circumstances, would be the ordinary earnings of such a vessel engaged to sail upon, and about in a short time to sail upon such an adventure as distinguished from all uncertain and all special profits which might or might not be reaped in a particular speculation. I do not think that the loss of such average and ordinary earnings in respect of a vessel which was advertised to sail, as the *Argentino* was, would be other than the direct and natural consequence of the collision. The question is not what would have been the damage that might have been anticipated in the case of other ordinary ships, but what was the direct and actual damage done in the case of the *Argentino*. We have not to consider, in other words, whether seagoing ships ordinarily have such engagements as the *Argentino* had at the time of the collision, but what was the direct and natural consequence of a collision to a ship, which in fact enjoyed such prospects of employment. The above reasoning appears to me to be correct on principle, and conformable to authority. In *Heard* v. *Holman* (19 C. B. N. S. 1) Erle, C.J. says, "Loss by collision is, amongst other things, loss of the freight which the ship would have earned if she had not been crippled by the collision." See also per Lord Cairns, in *The Trent and Humber Company; Ex parte Cambrian Steamship Company* (20 L. T. Rep. N. S. 301; 3 Mar. Law Cas. O. S. 119; L. Rep. 4 Ch. App. 112) and *Wilson* v. *General Iron Screw Colliery Company* (47 L. J. 239, Q. B.). It is as it appears to me on the above grounds, and no other, that loss of a beneficial charter-party has been allowed in the Admiralty Court. See *The Star of India* (*ubi sup.*); *The Consett* (*ubi sup.*); *The Steamboat Narragansett* (Olcott's Ad. Rep. 388); and *The Stromless* (1 Lowell, 153). On these grounds loss of a fishing adventure was allowed in *The Risoluto* (*ubi sup.*). In the case of *The Clarence* (*ubi sup.*) Dr. Lushington says as follows: "It does not follow as a matter of necessity that anything is due for the detention of a vessel while under repair. Under some circumstances undoubtedly such a consequence will follow, as, for example, where a fishing voyage is lost or where the vessel would have been beneficially employed. Had the owners of the *Clarence* proved that the vessel would have earned freight, and that freight was lost by the collision, the case would have fallen under the principle to which I have last adverted." So, in the *Black Prince* (Lush. 568) the measure of the length of demurrage caused by a collision was held to be the length of time during which, by reason of the collision, the vessel had been thrown out of employment. I agree, therefore, generally with the view taken by the learned President below, to the effect that the loss of the future adventure on which the *Argentino* was advertised to sail must be taken into account. The point at which I part from him is in that part of his judgment in which he considers that the profits earned by the *Beta* might be given in evidence as a mode of arriving (after due allowance for the differences of the two ships) at the value of the loss by the *Argentino* of her intended adventure. I cannot help thinking, with all deference to the judgment of so experienced a judge, that this evidence as to the profits of the *Beta* is, strictly speaking, inadmissible, though, probably, the difference between our two views is important in

theory only. I do not think there is any authority for the reception of such evidence, and on principle I am of opinion it is not strictly receivable. What profits the *Beta* made is really *res inter alios acta*, and special instances of profits made by other ships cannot be given, I think, in examination in chief any more than in an inquiry into the value of land it would be permissible to offer in examination in chief special instances of the sale of other such land in the vicinity. I propose to vary the direction of the learned President in this respect only, and to direct that the matter go back to the registrar to allow such damages in respect of the collision as would represent the ordinary and fair earnings of such a ship as the *Argentino*, having regard to the fact that she was put up as one of Westcott and Laurance's line of steamers trading to the Black Sea, and advertised to sail as such. There ought to be no costs of this appeal; the costs of the reference and the costs in the court below ought to be reserved and dealt with by the court below.

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

Solicitors for the defendants, *Downing* and *Holman.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Tuesday, Jan. 15, 1889.

(Before HUDDLESTON, B. and WILLS, J.)

ARMSTRONG AND Co. *v.* GASELEE AND OTHERS. (*a*)

Practice—Damage by collision—Action by tow against tug — Preliminary acts — Rules of Supreme Court 1883, *Order XIX., r.* 28.

The plaintiffs, the owners of the barge H. and of her cargo, employed the defendants' tug W. to tow the H. from one place to another in the Thames. While being so towed the H. was brought into collision with another vessel, and was lost together with her cargo. In an action for damages for negligence against the owners of the tug:

Held, that an order that preliminary acts should be filed under Order XIX., r. 28, *was properly refused.*

ACTION brought by the owners of the barge *Hesperus* and of her cargo against the owners of the tug *Wasp*. The plaintiffs employed the *Wasp* to tow the *Hesperus* to a point on the Thames. While being so towed the *Hesperus* was brought into collision with another vessel with the result that the barge and her cargo were lost.

The indorsement on the writ of summons was as follows:

The plaintiffs claim damages to their barge *Hesperus*, and the cargo of seed thereon, caused by the negligence of the defendants or their servants whilst such barge and cargo were in their custody or under their control.

The master having refused to order that preliminary acts should be filed under Order XIX., r. 28, the defendants appealed, and Denman, J. referred the application to the court.

Order XIX., r. 28, provides that,

In actions in any division for damage by collision between vessels, unless the court or a judge shall otherwise order, the solicitor for the plaintiff shall within seven days after the commencement of the action, and the solicitor for the defendant shall within seven days after appearance, and before any pleading is delivered, file with the registrar . . . a document, to be called a preliminary act, which shall be sealed up, and shall not be opened until ordered by the court or a judge, and which shall contain a statement of certain particulars.

J. P. Aspinall for the defendants.—The object of requiring preliminary acts to be filed is to prevent one party from shaping his case to meet the case put forward by the other party:

The Inflexible, Swa. 32;
The Vortigern, Ib. 518; 1 L. T. Rep. N. S. 307.

The present case is clearly within the words of Order XIX., r. 28, and there is nothing in the circumstances to take it out of the rule.

Joseph Walton for the plaintiffs.—The present is in substance an action for damages for breach of contract, and is therefore not within the rule at all. The words "damage by collision between vessels" do not apply to a case of this description. The rule only applies as between colliding vessels:

The John Boyne, 36 L. T. Rep. N. S. 29; 3 Asp. Mar. Law Cas. 341.

The object of the preliminary act is that each of the colliding vessels should describe the position of the other. Several of the particulars to be given in the preliminary act can only be applicable to colliding vessels.

J. P. Aspinall replied.

HUDDLESTON, B.—The circumstances of this case render it a difficult one. The plaintiffs' vessel was a barge, and the defendants' tug so towed the barge that it came into collision with another vessel. No doubt it may often be very useful to file a preliminary act. That was said by Dr. Lushington in *The Inflexible*, and afterwards in *The Vortigern*. In the latter case he said: "Preliminary acts were instituted for two reasons—to get a statement from the parties of the circumstances *recenti facto*, and to prevent tha defendant from shaping his case to meet the case put forward by the plaintiff. In practice they have been found very useful, and neither party is allowed to depart from the case he has set up in his preliminary act. Some of the facts stated in the preliminary act are facts absolutely within the knowledge of the party making the statement, some are matters of opinion only. The court will expect correctness where correctness is in the power of the party." That view of Dr. Lushington is carried out by Order XIX., r. 28. In the case of *The John Boyne*, Sir Robert Phillimore pointed out that, unless there is a mutuality between the plaintiff and the defendant in regard to the information they are able to furnish, preliminary acts should not be ordered to be filed.

The present case is an action in which the plaintiffs sue for damages from the owners of a vessel which did not collide with the plaintiffs' vessel. It is, I think, obvious that what is required in preliminary acts is the view of each of the colliding parties as to what brought about the collision. Can the rule apply then to the present case? Some of the statements required to be made in the preliminary act might present no difficulty; but the statement, for example, as to the course and speed of the

(*a*) Reported by FITZROY COWPER, Esq., Barrister-at-Law

vessel when the other was first seen must have reference to the colliding vessel. The vessel in tow cannot know anything about the speed. Then again, the statement as to the lights carried must refer in the present case to those of the tug. Then the tow cannot state what measures were taken to avoid the collision, though the tug can. It is obvious that the statements were intended to be made by the two colliding vessels, and that the rule applies only to them, and not to a case where one of the vessels is forced to collide with a third. The present, therefore, is not a case in which we can order preliminary acts to be filed.

WILLS, J.—I am of the same opinion. One cannot, I think, help seeing that Order XIX., r. 28, applies only to a question arising between two colliding vessels. It is true that the words of the rule are large, but it was necessary to use comprehensive language in order to cover claims by cargo-owners as well as those by shipowners. I should be sorry to say that there might not be cases of this description in which the court could properly order preliminary acts to be filed; but at all events this is not a case in which such an order ought to be made. Either, therefore, the rule does not apply at all to the present case, or, if it does, the court has a discretionary power, and should refuse the order.

Order refused.

Solicitor for the plaintiffs, *G. E. Philbrick.*

Solicitors for the defendants, *Keene, Marsland,* and *Bryden.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, June 26, 1888.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE CARGO EX ULYSSES. (*a*)

Salvage—Queen's ship—Duties of—Right to salvage.

Where a British ship is wrecked with cargo in the Red Sea and one of H.M. ships is employed to protect the ship and cargo from plunder by the Arabs, and the commander and crew also assist in saving the cargo by getting it out of the hold and carrying it a considerable distance to lighters, although it may be that the commander and crew are not entitled to salvage in respect of the protection which they give to the ship and cargo by their presence, they are entitled to salvage in respect of anything done outside the ordinary scope of their duties, which would include the placing of sentinels and carrying the cargo.

In a salvage action against cargo, where the ship and cargo had been wrecked in the Red Sea, it appeared that the cargo was carried under a bill of lading exempting the shipowner from liability for loss caused by negligence of the master and crew. The shipowners claimed salvage for services to the cargo and brought in a claim for demurrage of certain of their ships which had rendered services.

The Court referred these matters to the registrar to report how much was due to the salving of the ship and how much to the cargo.

THESE were two salvage actions, tried together, in which the plaintiffs, the commander, officers, and crew of H.M.S. *Falcon*, and the Ocean Steamship Company, sought to recover salvage for services rendered to the cargo laden on board the steamship *Ulysses*.

The services were rendered in the Red Sea in Aug. and Sept. 1887 under the following circumstances:

The steamship *Ulysses*, of 1300 tons net register, whilst bound on a voyage from London to Port Said and Chinese ports, and laden with a cargo of quicksilver and general merchandise, ran on a coral reef, north of the island of Jubal Sereea, in the Red Sea, on Aug. 17. The cargo was being carried under bills of lading which exempted the owners of the *Ulysses* from liability for loss or damage caused by stranding or wreck however caused, misfeasance, negligence, or default of master and crew. Being unable to get the vessel off it was determined to jettison part of the cargo in shallow water. During these operations a number of armed Arabs appeared upon the scene and began plundering the jettisoned cargo.

On the 19th two lighters and labourers arrived from Suez, and H.M.S. *Falcon* came up and lent some of her crew to assist in getting the cargo out of the ship's hold. Part of the *Falcon's* crew were also landed to guard the jettisoned cargo and prevent it from being looted by the Arabs. On subsequent days other steamships belonging to the plaintiffs, the Ocean Steamship Company, came up and gave assistance in attempting to tow the *Ulysses* off and otherwise. The plaintiffs, in order to save the jettisoned cargo, had to haul it a considerable distance over the coral reef before it could be put into the boats. It was also necessary to keep a number of sentries from the *Falcon* on guard, by day and night, to protect the cargo from the Arabs.

As to the Ocean Steamship Company the defendants denied that they were entitled to any salvage, on the ground that they were bound to take due care of the cargo after the stranding; and that the alleged services were principally for the purpose of saving the s.s. *Ulysses*.

As to the *Falcon* claim the defendants admitted that some services had been rendered by the plaintiffs, but alleged in paragraph 3 of the defence as follows:

> The services rendered by the plaintiffs in guarding and patrolling in the neighbourhood of the wreck are not such services as can or ought to be treated as salvage services. The said services were rendered by the plaintiffs in the course of their ordinary duties as the officers and crew of one of Her Majesty's ships of war towards British subjects and property which were in peril of attack from hostile tribes, and from robbers and pirates.

Sir *Walter Phillimore* and *Nelson* for the officers and crew of H.M.S. *Falcon*.—The officers and crew of the Queen's ship are entitled to salvage. Their services were very valuable, and clearly outside the scope of their duty:

The Rosalie, 1 Spinks, 188;
The Dalhousie, 1 P. Div. 271, n.

Kennedy, Q.C. and *Pickford* for the Ocean Steamship Company.—The officers and crew of H.M.S. *Falcon* are not entitled to salvage. They merely

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

did their duty in affording protection to the property of a subject:

The Francis and Eliza, 2 Dods. 115.

Myburgh, Q.C. and *Raikes* for the defendants.

Sir *Walter Phillimore* in reply.

Sir JAMES HANNEN.—I regret to say that I can scarcely be said to be about to give my judgment in this case, because I am not in a position to give a final judgment in the matter. There is, however, one part of the claim as to which I think it desirable that I should give my decision promptly; I mean the claim on behalf of the officers and crew of H.M.S. *Falcon*. But the observations I shall have to make on the other claim, that of the Ocean Steamship Company, will show that I am in a great state of uncertainty as to what is the true amount of the salvage which I have to deal with. Therefore I feel that I am to some extent taking a leap in the dark, even with regard to the *Falcon* claim. If, notwithstanding this, it is desired that I should dispose of the *Falcon* claim at once, I will do so, because I think I have arrived at a conclusion which is satisfactory to my own mind, and which I hope will be satisfactory to those whose claims I shall have to deal with. [Counsel having assented to the course proposed, the learned President continued:] I must shortly state sufficient of the facts to make my observations intelligible. The *Ulysses*, a large steamship belonging to the Ocean Steamship Company and having on board a valuable cargo, estimated to be worth 60,000*l*., ran on a reef fringing an uninhabited island in the Red Sea on Aug. 17. The Arabs and some Maltese swarmed on to the island, seeing that there was a ship in danger, and there undoubtedly was great danger that the cargo would be looted. Assistance was at once sent for, and on the 19th the agent of the company at Suez arrived with a lighter and a tug. On the same day H.M.S. *Falcon* was requested to give assistance in protecting the cargo, and also in doing what was necessary to save it. There can be no doubt that the services rendered by the *Falcon* were of a very valuable kind. There was not merely the protection afforded by the presence of one of Her Majesty's ships, but also by the posting of sentinels on shore, to prevent the Arabs taking possession of the cargo. In addition to that, the men of the *Falcon* were engaged on board the *Falcon* in getting the goods out of the hold, which was full of water which had been fouled to an extraordinary extent. The foulness of the water was not only a source of great annoyance to those engaged in getting out the cargo, but possibly a source of danger, and as the cargo got down lower the men had to stand up to their armpits in this water, and occasionally put their heads under it. Then again, as the cargo was jettisoned in shallow water, there was the labour of getting it from the water to the shore, and then of transporting it about one-third of a mile to the place where it was put into the lighters—very troublesome work when one bears in mind the heat of that season of the year in the Red Sea. The *Falcon* ceased work at the end of August, but did not leave till the 6th Sept., and then took a large portion of the cargo with her.

With regard to the value of the cargo I am still in very great uncertainty. It seems to have been carried under bills of lading which exempted the Ocean Steamship Company from liability under any possible circumstances. I do not know what the circumstances were that brought about the stranding, but the result now is, that the Ocean Steamship Company treat the matter as though they were strangers who had rendered a salvage service to the whole venture, including their own ship and the whole of the cargo on board. They bring in a claim for the general work which they did during a period from the 17th Aug. to some time in November. They go so far as to bring in as part of that claim a sum of 4000*l*. as demurrage for those vessels which were stopped from time to time in their transit through the Red Sea, in order to assist in getting the *Ulysses* off. It appears to me to be clear that they have themselves admitted that the whole of these claims are not to be debited to the cargo. The materials for dissecting their claim were furnished very late in the hearing before me. They were subjected to criticism, and it was shown to my satisfaction that many things were charged against the cargo which ought not properly to be charged against it. I was in hopes that by patience I should have been able to unravel the difficulties, but I now propose to refer the matter to the registrar, suggesting that he should divide the account into three parts: First, which of these charges are clearly attributable to the cargo alone? Secondly, which of them are clearly attributable to the ship alone? And thirdly, which of them are attributable to ship and cargo? These seem to me to be broadly the heads of account which have to be determined, and when I know these figures I shall be able to say how much should be assigned to the Ocean Steamship Company for what they did in respect of the cargo. Therefore, as regards that part of the case, I direct it to go to the registrar.

With regard to the *Falcon* I will now deal with it as best I can. The claim is put forward on behalf of the captain and crew by the authority of the Admiralty. It is to be observed that it is not a claim by the Admiralty which would involve a claim for the use of the ship, but simply a claim by the captain and crew. They are therefore not entitled to bring into consideration the value of the *Falcon*, as is usually the case in salvage actions. Now arises the question, in what way are the services of the captain and crew to be estimated? It appears to me that there is a certain amount of protection which is so clearly within the duty of one of Her Majesty's ships that it would not give any claim for salvage services. I do not think the Admiralty has sanctioned a claim which is based simply upon the protection offered by the presence of one of Her Majesty's ships against piracy or land robbers. The case is altered when the officers and crew are called upon to do something which is not within the ordinary scope of their duties. That remark applies to the posting of sentinels on this island for the purpose of protecting the cargo, exposed as it was to very great risk. But that alone would not, in my judgment, give rise to a high standard of service. It would be but a reward rather in the spirit in which a generous master gives a gratuity to servants who have been called upon to do something a little outside the scope of their ordinary function. But the getting out of the cargo, and the rescuing of it from the shallow water into which it was first

thrown, appears to me to lie entirely outside the scope of Her Majesty's ships, and to entitle those engaged to a substantial reward. I come to the conclusion that 1000*l.* should be awarded to the crew of the *Falcon*. I do not think the usual course should be followed of giving so large a proportion to the captain, but, as I am told that there are Admiralty regulations upon the subject, I will say no more about it.

The amount of salvage to be paid to the Ocean Steamship Company was ultimately arranged by the parties out of court.

Solicitors for the officers and crew of H.M.S. *Falcon*, *Lowless* and *Co.*

Solicitors for the Ocean Steamship Company, *Pritchard* and *Sons*.

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

Thursday, July 5, 1888.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE APOLLO. (*a*)

Damage—Dock—Grounding of vessel—Harbour master.

The plaintiffs' vessel having fouled her propeller whilst entering the port and harbour of Port Talbot, was with the authority of the foreman docksman of the defendants (the owners of the dock) placed in a lock leading into the dock for the purpose of being put upon the ground for repairs. On the vessel taking the ground she sustained damage to her bottom by sitting upon the sill of the old lock gates, which had not been removed when the lock was lengthened. In an action by the shipowners against the dock authority:

Held, that there was no duty on the defendants to have the bottom of the lock in the same condition as that of a dry dock; that the user of it for such purpose was an extraordinary user; that the docksman had no authority to allow such user; and that the master of the ship was guilty of negligence in allowing his vessel to be placed in the lock without informing himself of its condition, as he might have done.

THIS was an action *in personam* by the owners of the steamship *Apollo* against the Port Talbot Company to recover damages for injury occasioned to the *Apollo* as hereinafter stated.

The defendants were incorporated by Act of Parliament (4 Will. 4, cxliii., and 4 Will. 4 c. xcviii.) for the purpose (*inter alia*) of making and maintaining the harbour of Port Talbot, and of making and maintaining docks, locks, and other works at the said port. The defendants were also authorised to and did demand and receive dues in respect of vessels entering and using their docks.

On the 24th Dec. 1887 the *Apollo*, laden with a cargo of railway iron and tin plates, entered the said dock, and in getting to her berth her propeller fouled a rope stretched across the dock, and was damaged.

For the purpose of repairing the injured propeller the *Apollo* was placed in the lock leading from the sea to the dock, and the water was let out so that it might be used as a dry dock. The lock had since its original construction been lengthened, and the gates and sill of the old lock gates had never been removed. When the water was drawn off the *Apollo* rested on this sill, and sustained the damage complained of.

The plaintiffs alleged that a man named Johns, whom they said occupied the position of deputy harbour master, had placed the *Apollo* in the lock, and represented that its bottom was safe for the vessel to lie upon.

The defendants denied that Johns was deputy harbour master, or that he had made any representation to the plaintiffs as to the lock being a proper place for the *Apollo* to lie in. Johns was in fact foreman docksman at a weekly salary. It also appeared that at the time in question the harbour master was confined to his bed by an attack of gout, but it was alleged that, as his house was on the quay, the master of the *Apollo* might have asked his opinion as to whether the *Apollo* should be allowed to use the lock for the purpose of repairing her propeller.

Johns was called, and the effect of his evidence appears in the judgment.

Barnes, Q.C. (with him *Synnott*) for the plaintiffs.—The defendants are liable for the injury to the *Apollo*. It was their duty to see that their docks and locks were in a condition fit for the purposes for which they were used, and the plaintiffs had a right to expect that they would be informed if any hidden danger existed, as was the case here:

Indermaur v. *Dames*, 16 L. T. Rep. N. S. 293; L. Rep. 2 C. P. 311.

Instead of being told, the defendants' servants represented that this lock was a safe place for the *Apollo* to lie in. The placing of the *Apollo* was a matter within the authority of Johns, who in the absence of the harbour master was in charge of the dock, and was therefore held out by the defendants as clothed with authority to control the movements of vessels using it.

Bucknill, Q.C. (with him *Moulton*, Q.C. and *Macrae*) for the defendants.—The user of the lock as a dry dock was never authorised by the defendants or their servants. If Johns purported to do so, he was acting beyond the limits of his authority. As a matter of fact he never did represent that it was a safe place for the *Apollo* to lie in. Moreover her master was guilty of negligence in allowing her to sit on the bottom without first finding out whether there was a sill.

Barnes, Q.C. in reply.

BUTT, J.—In this case the plaintiffs, the owners of the steamship *Apollo*, sue the Port Talbot Dock Company for damages occasioned to their vessel by reason of her grounding in the lock at the entrance to the harbour of Port Talbot. The claim of the plaintiffs is formulated in several different ways, and they have endeavoured to make use of several strings to their bow. The substance of their case is this: They allege that the Port Talbot Company is authorised by Act of Parliament to carry out certain works, and in consideration of the execution of those works is entitled to charge certain dues. Stopping there, I quite agree with the proposition that when a dock or harbour board is authorised to make works and to levy tolls or dues, it is bound so to construct the works that they shall not cause

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

danger to shipping using them in the ordinary way, but I do not agree with the proposition as a general proposition that the board is bound to make provision for the safety of ships making an extraordinary use of their premises. For instance, I do not for a moment agree with such a proposition as this, that is the duty of a harbour board or dock authority to have the bottom of its lock through which vessels are floated into the docks in the same perfect state as they would have it if it was a dry dock. I say so for this reason: a lock is meant for a vessel to pass through, not to remain in. I therefore hold clearly that there was no duty or obligation whatever on the part of these defendants to have the bottom of this lock perfectly smooth, or to have removed the sill which existed half way along it. The use made by this vessel of the lock at the time she sustained the damage was altogether an extraordinary use, and the question is, the damage having been done in the course of that user of the lock, are the defendants liable?

That question turns first of all upon the consideration as to whether Johns either was or was not held out by the defendants to be a person having authority to allow such user of the lock; and, secondly, upon the consideration of what actually occurred between Johns and the captain of the ship. It is said that Johns was at the time in question the *locum tenens* of the harbour master, Captain Fitzmaurice, who was laid up with an attack of gout. Now I very much doubt whether, as a matter of law, if Captain Fitzmaurice himself had told the captain of this ship all that Johns is said to have told him whether the defendant company would be liable; and I say so because I think that Captain Fitzmaurice would, in so doing, have been acting entirely beyond the scope of his duty in taking upon himself to put upon his employers the serious responsibility involved in such an operation as that performed on this ship. I certainly should have been prepared to hold that view of the law. But was Johns in the same position as Captain Fitzmaurice, that is to say, had third parties like the captain of this ship a right to assume that Johns was acting there clothed with all the authority of the harbour master? He was in fact not harbour master; he was not deputy harbour master. He was really foreman dockman, paid as such not a salary, but weekly wages. It may be that a servant may be held out by an employer to the world at large as a person occupying a position, and clothed with an authority which he really does not possess, and if the employer so holds him out, the law says he shall be liable for his acts. But on consideration of the evidence in this case I do not think it shows at all that Johns was held out in any way as a person having the same authority as Captain Fitzmaurice, the harbour master. Therefore, I find that Johns did not represent for all purposes, or for anything like all purposes, the harbour master of this port. It is true that Captain Fitzmaurice was ill at this time, but his house is on the quay, and he says he was during the illness consulted frequently by Johns and his clerk about the business of the harbour, and there can be no doubt that if the captain of this ship had chosen to ask Captain Fitzmaurice's opinion as to whether it was safe and advisable to permit this ship loaded as she was to be placed in the lock, he might have had that opinion. But he does not choose to take it, and prefers to rely on Johns, assuming that he has all the necessary authority. I hold, therefore, on this part of the case, without any hesitation, that, assuming Johns said and did all the captain of the ship has asserted, there is no liability on the defendants. Further than that, I do not believe that Johns did say and do anything like as much as the captain of the ship asserts he did.

Now, on another part of the case I am of opinion that there was contributory negligence on the part of the captain of the vessel. I have consulted the Elder Brethren on the point, and they agree with me in thinking that it was negligence on the part of the captain to allow his ship to go into the lock. He knew that she must take the ground, and that the weight of the ship and cargo must practically rest upon the ship's keel. Halfway along this lock are gates which were originally the outside gates of the lock, and I should have thought that any competent master would, before he put his ship across this place, have made careful inquiries as to whether there was a sill or not. But the real truth is this, the captain admitted that he never saw the gates were there, and he took this steamer, loaded with 400 tons of cargo, into the lock, trusting entirely to what he was told by the man who he says was acting as harbour master, and never taking the trouble before his ship went in to walk round and inspect the lock she was going into. I think that was very gross contributory negligence, and it was negligence which contributed directly to this damage. The captain says in his evidence that if he had noticed the middle lock gates he would have suspected a sill, and made inquiries before letting his vessel go in. For all these reasons I have no hesitation in coming to the conclusion that the case against the defendants fails, and that the suit must be dismissed with costs. (*a*)

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

Solicitors for the defendants, *Maples, Teesdale*, and *Co.*

Wednesday, July 18, 1888.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE MOORCOCK. (*b*)

Damage—Bed of river—Grounding of vessel—Liability of wharfinger.

Where an agreement is entered into between shipowners and wharfingers that a ship shall proceed to a wharf in the Thames for the purpose of discharging and loading cargo, and it is necessary that she should take the ground when the tide ebbs, there is an implied representation by the wharfingers that they have taken reasonable care to ascertain that the bottom of the river at the wharf is in such a condition as not to injure the ship on her taking the ground; and if by reason of the uneven nature of the bed of the river she is injured, the wharfingers are liable.

THIS was an action *in personam*, by Robert

(*a*) See *The Moorcock*, (*supra*); and *The Calliope*, p. 359.

(*b*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

Thomson, the owner of the steamship *Moorcock*, against Middleton, Son, and Co. Limited, wharfingers, to recover damages for injury to the *Moorcock*, caused as hereinafter stated.

The defendants were the owners of a wharf and pier abutting on the River Thames, known as St. Bride's Wharf. In Nov. 1887 it was agreed between the plaintiff and the defendants that the *Moorcock* should be discharged and loaded at St. Bride's Wharf. Prior to this agreement there was some conversation between the plaintiff and the managing director of the defendant company as to the suitability or safety of the place for the *Moorcock* to take the ground when the tide ebbed, and on one occasion at high water the plaintiff had seen the place himself. The plaintiff alleged that the defendants had expressly represented that the place was safe. The defendants denied this. The effect of the evidence on this point is stated in the judgment.

On the 14th Dec. the *Moorcock* was accordingly moored alongside the said wharf by the direction of the defendants for the purpose of discharging her cargo; but as the tide fell and she ceased to be waterborne she took the ground, and in consequence of its uneven nature she sustained the damage complained of.

The bed of the river at the place where the *Moorcock* took the ground was vested in the Conservators, and the defendants had no control over it.

Barnes, Q.C. and *Robson* for the plaintiff.—It is contended that the defendants must be taken to have warranted that the bed of the river alongside the wharf was in a reasonably fit and proper condition for the *Moorcock* to take the ground, whereas the event shows it was not. It is further contended that the evidence shows there was an express representation to the like effect; and, lastly, it is submitted that there was a duty on the defendants to the plaintiff to keep the ground in a proper state, or at any rate to ascertain its condition before allowing the plaintiff's vessel to ground upon it:

White v. *Phillips*, 15 C. B. N. S. 245; 33 L. J. 33, C. P.

Finlay, Q.C. and *Hollams* for the defendants, *contra*.—There was no warranty or representation that the place was safe. The ground was vested in the Thames Conservators, who alone had control over it. The plaintiff might and ought to have ascertained for himself whether the place was safe before mooring his vessel at the wharf. The defendants did all that reasonable men could do, and have been guilty of no breach of duty to the plaintiff.

BUTT, J.—This is a case not free from difficulty, the facts of which, shortly stated, are these: The plaintiff, the owner of the steamship *Moorcock*, whilst casting about for suitable conveniences for discharging the cargoes which his vessel was in the habit of bringing from Antwerp to London, came to the conclusion that for many purposes St. Bride's Wharf, in the city of London, belonging to the defendants, was a good and convenient place for his purpose, and he accordingly put himself in communication with the defendants, and the result was a negotiation between the parties as to the discharge and loading of this vessel at St. Bride's Jetty. No doubt the arrangement come to was one intended for the mutual benefit of the two parties to it, and therefore whatever the promises or engagements on the one side or the other were, there was good consideration for them. The vessel arrived at the jetty on the 14th Dec. 1887, and was moored apparently properly alongside. She had a cargo of considerable weight on board, and as the tide ebbed she settled down on the ground, becoming less and less waterborne. A strain was put on her from the uneven nature of the ground, a crack or a loud noise was heard, and it turned out that if she had not broken her back she had injured herself in some similar way. In these circumstances the plaintiff says he is entitled to recover these damages from the defendants, and he puts his case in several ways. He says, in the first place, there was a warranty that the place was safe and suitable for his vessel to be in. I do not agree with that. I do not think that there was any such warranty. Certainly there was no express warranty, neither do I think any such warranty was implied. Then he says there was an express representation by the managing director of the defendant company that the place was a suitable place, and therefore a safe place for the vessel to take the ground. Upon this there has been a conflict of evidence, the result of which is that I am by no means satisfied that there was a representation the place was safe or suitable. I think, so far as representation went, it came pretty much to this: "Is the place a good one?" Perhaps the word "suitable" was used. Answer: "Well, there is a vessel of the same size as yours, or thereabouts, lying there now—come and see," and they went and saw a vessel of very nearly the same size, fully the same length, although not quite the same dimensions in other respects. In my opinion, both on the alleged warranty and express representation of the suitability of the place, the plaintiff fails. But now comes a question which, to my mind, is much more difficult. It is clear that the plaintiff could not use these premises without mooring his vessel alongside the jetty, and without her taking the ground at the ebb, and it seems, therefore, to me that the defendants must by implication be taken to have represented at least this much, viz., that they had taken reasonable care to ascertain that the bottom of the river at the wharf was in such a condition as not to injure a vessel using the wharf in the ordinary way. This they have not done, and must therefore pay the penalty. I therefore hold the defendants liable, and refer the damages to the registrar for assessment. (*a*)

Solicitors for the plaintiff, *Thomas Cooper* and *Co.*

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

(*a*) This decision was affirmed on appeal. See *The Calliope*, p. 359; and *The Apollo*, p. 356.

July 24 *and* 25, 1888.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE CALLIOPE. (*a*)

Damage — Wharfingers — Representation — Warranty.

The plaintiff's ship the C. was ordered by the defendant company, the consignees of the C.'s cargo, to proceed to the defendants' wharf to discharge. On her arrival the defendants' traffic foreman wrote to her master saying he could bring the C. to the wharf at a certain time, and stating the then depth of the water, and asking him to inform the pilot thereof. On the C. proceeding to the wharf, but before she got into her berth, she grounded on a ridge of mud which had been formed between the berth next the quay and another outside it, and sustained the damage in respect of which her owners now sued the wharfingers.

Held, that the wharfingers were not liable, the representation in the letter being true, and there being no warranty or representation as to the condition of the approaches to the wharf; and that the cause of the damage was the default of the pilot in approaching the wharf when there was not sufficient water, and further that even if there had been any misrepresentation the traffic foreman had no authority to make it.

THIS was an action *in personam* by the owners of the steamship *Calliope* against the Tredegar Iron and Coal Company Limited, to recover compensation for damage occasioned to the *Calliope* as hereinafter stated.

The defendants were the consignees of the cargo laden on board the *Calliope*, and also the owners of a wharf called the Tredegar Wharf, in the River Usk, at the port of Newport. By the terms of a charter-party dated the 24th March, 1886, the *Calliope*, after having loaded a cargo of iron ore at Dicido, was to proceed therewith to Newport, and deliver the same where and as directed by the consignees or their agents.

The *Calliope* arrived off the Alexandra Dock, in the Usk, on Saturday, the 29th May, 1886, with a pilot on board for the purpose of berthing her at the defendants' wharf, where she had been ordered to go.

On the same day one Griffiths, the traffic foreman of the defendant company, wrote the following letter to the captain of the *Calliope*:

Captain Tucker. Dear Sir,—You can bring your steamer to the Tredegar Wharf Monday morning's tide. You can tell the pilot that we have two feet more water at Tredegar Wharf than at Bathurst Basin.

According to the published tables, assuming the height of water as given at Bathurst Basin to have been correct, there ought to have been enough water to have enabled the *Calliope* to get alongside the wharf on the day in question.

Accordingly, on Monday preparations were made for berthing the *Calliope* at the defendants' wharf, but just before reaching the berth she took the ground, and received the injury complained of.

The plaintiffs alleged that Griffiths, the traffic foreman, took upon himself the duty of berthing the vessel, and gave the necessary orders as to the operations to be performed. The defendants denied that Griffiths had given any orders. The effect of this evidence is set out in the judgment.

It was proved by the defendants that there was a notice to pilots, that they were to take upon themselves the responsibility of putting vessels alongside wharfs. It appeared that there were two berths off the defendants' wharf, one immediately alongside it, and another outside the inner berth. Between the two was a ridge, and it was upon this that the *Calliope* grounded.

Barnes, Q.C. (with him *Robson* and *Holman*) for the plaintiffs.—The damage complained of was solely occasioned by the wrongful conduct of the defendants or their servants. The plaintiffs had a right to expect that there would be sufficient water to enable the *Calliope* to get alongside, and also that the bed of the river would not be in such a condition as to injure the vessel. The defendants in fact warranted the fitness of the berth and its immediate approaches for such purpose. It is also submitted that the defendants expressly represented that the berth was a fit place. Their servant Griffiths, in express terms, represented that there was sufficient water. Moreover Griffiths took upon himself the responsibility of berthing this vessel, and it was through his negligence that the accident happened:

White v. *Phillips*, 33 L. J. 33, C. P.:
The Moorcock, 13 P. Div. 157.

Finlay, Q.C., *Walton*, *McLaren*, and *Carvell*, for the defendants, *contra*.—The plaintiffs are not entitled to recover. The berth was in fact a fit one for the purpose. The cause of the accident was the negligence of the pilot in attempting to berth the vessel at a time when there was not sufficient water. If Griffiths made any representations as to the depth of the water, or took upon himself the responsibility of berthing this vessel, he did so in excess of his authority. He was the traffic manager, not a berthing master:

Peek v. *Derry*, 37 Ch. Div. 541.

It was the duty of the pilot to have ascertained the depth of water before attempting to bring his ship alongside.

BUTT, J.—In this case the shipowner sues the defendant company for injury caused to his ship by the negligence or other improper conduct of the defendants or those in their employ. I have no doubt whatever that this ship was injured, and at the place where she took the ground in the immediate neighbourhood of the defendants' wharf. The damage appears to have been caused in this way: There were two berths off this wharf, one immediately alongside it and another outside, so that if there were two vessels there one would be lying between the outer berth and the wharf. And as is always the case where vessels are in the habit of lying alongside each other, there must be more or less of a ridge between the two, and there is no doubt that such a ridge existed in this case. What was its height there is no evidence to show. All we know is that in the then depth of the water there was not enough of it to enable this vessel to pass over. The result was that in endeavouring to get to the inner berth, when her head was pointing into the wharf and her stern out, she took the ground and lay across the ridge. In these circumstances when the tide receded she was strained and

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

injured, and for that injury the plaintiffs claim to make the defendants liable.

First of all, as I read the plaintiffs' pleadings, they say that there was a warranty as to the fitness of the wharf or berth for the purpose for which it was used. There is no proof whatever that either of these two berths was not in a fit and proper condition for receiving this vessel, and no evidence whatever that if she had been safely got into either of these berths she would have suffered any damage. Therefore even if there were a warranty I do not think there has been a breach of it. The real truth of the matter is that they attempted to take this vessel in when there was not sufficient water for her. Passing from the question of warranty, which I do not think has been established, the next point I deal with is this: The plaintiffs say that there was negligence on the part of the defendants through their servant Griffiths, who played an important part in this matter, and had authority as they say from the defendants to do what it is alleged he did, viz., arrange the time at which the vessel was to come into the berth, practically take upon himself the responsibility of bringing her into the berth, give orders as to the ropes and so on, and thus bring about the accident which happened. In the first place, there is a conflict between the witnesses as to what Griffiths did. The captain and pilot and other witnesses called by the plaintiffs say that he practically took charge of the vessel and gave orders as to how the ropes were to be fixed, as to how the engines were to be moved, and as to how the vessel was to be brought in. Griffiths absolutely denies anything of the sort, and says he never gave any orders. The conclusion to which I have come is that the truth of the matter lies somewhere between the two stories. That Griffiths very likely did interfere to some extent with advice and suggestions, possibly assertions about the depth of water, I know not, but that he did it to anything like the extent the pilot and captain would have us believe I do not accept for a moment, because I do not think it would be within the scope of his ordinary duties to do so. But on this point I am very clear, that whether he took charge of the vessel or not he had no authority from his employers to do so. In the first place, wharfingers would be very ill advised to put a weekly servant into the position to take charge of a vessel out of the hands of her pilot. That consideration leads to the question whether it is likely that a captain or a pilot would depute the charge of his vessel to a servant in the position of Griffiths. The fact is that the pilot was to blame and very much to blame, and that being so he tells a story which he thinks will shift the responsibility on to other shoulders. There is a distinct notice to pilots that they are to take upon themselves the responsibility of putting vessels alongside wharves, and to take his own evidence he acted in contravention of that notice. I do not understand what business he had to let Griffiths interfere, and on his own showing he took the vessel there when he did not believe there was water enough. Then it is said that there was misrepresentation by the defendants through Griffiths of the actual facts existing, and which might be expected to exist at the wharf when this vessel went alongside. This contention is based on a letter written by Griffiths in answer to one from the captain of the ship. The letter dated May 29th is this: "Captain Tucker. Dear Sir,—You can bring your steamer to the Tredegar Wharf, Monday morning's tide. You can tell the pilot that we have two feet more water at our wharf than at Bathurst Basin." What is the effect of that? To my mind it is no more than a representation that there generally was or would be two feet more water at Tredegar Wharf than at Bathurst Basin. I think that is true. Certainly there is no evidence which convinces me that it is not true. Therefore it is not a misrepresentation. But apart from that there comes the old question of authority, and on that I do not think that Griffiths was authorised to make a representation as to when it was safe or otherwise to bring a vessel alongside the wharf. As I have already said, the real cause of this accident was that the pilot chose to try to take this vessel to her berth when there was not enough water for her to get there, and at a time when upon his own evidence he himself doubted whether there was enough. In these circumstances I must hold that the defendants are not liable, and must dismiss the suit with costs. (*a*)

Solicitors for the plaintiffs, *Downing, Holman, and Co.*

Solicitors for the defendants, *Pritchard and Sons*, agents for *Vaughan and Hornby*, Newport.

Tuesday, Nov. 13, 1888.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE BENLARIG (*b*)

Salvage—Unsuccessful efforts—Agreement—Right to remuneration.

In a salvage action the plaintiffs were obliged by stress of weather to leave the defendants' vessel in a worse position than that in which they found her. In the statement of claim it was alleged, and admitted in the defence, that there was an agreement between the masters that the salving ship should attempt to tow the defendants' ship to a port of safety. The defendants' ship was ultimately saved by another vessel.

Held, that the plaintiffs were not entitled to salvage in the proper sense of the term, but that, as they had performed the agreement to attempt to save the ship, they were entitled to adequate remuneration for what they had done.

THESE were two salvage actions *in rem*, in which the owners, masters, and crews of the steamships *Vesta* and *Admiral Rooke* respectively sought to recover salvage for services rendered to the steamship *Benlarig*, her cargo and freight.

At the time of the services the *Benlarig*, a steamship of 1482 tons register, had broken down off the coast of Spain, and was in need of assistance. In these circumstances the *Vesta*, a steamship of 647 tons register, while on a voyage from Fiume to Bordeaux, fell in with the *Benlarig* on the 25th Dec.

According to paragraph 7 of the statement of claim, "the master of the *Benlarig* requested the master of the *Vesta* to tow the *Benlarig* to

(*a*) See *The Moorcock*, p. 357; and *The Apollo*, p. 356.

(*b*) Reported by J. P. ASPINALL and BUTLER ASPINALL, Esqrs., Barristers-at-Law.

Gibraltar, which the latter agreed to attempt to do."

The *Vesta* thereupon made fast ahead of the *Benlarig*, and began towing her in the direction of Gibraltar. On the 27th Dec., when the vessels were off Trafalgar Light, the *Vesta*, in consequence of stress of weather, was obliged to leave the *Benlarig*. The *Vesta* thereupon proceeded to Gibraltar alone, where she gave information of the *Benlarig*, which was subsequently towed into Gibraltar by the steamship *Admiral Rooke*.

The *Vesta* towed the *Benlarig* about 130 miles in very bad weather. The plaintiffs in their statement of claim claimed "such an amount of salvage as may be just."

The defence of the *Benlarig* in the *Vesta's* action, so far as is material, was as follows:—

1. The defendants admit that paragraphs 2 to 14 inclusive are substantially correct, except that the damage spoken to in paragraph 8 is greatly exaggerated. At the time the vessels came together as there alleged the sea was calm, and the contact between the vessels very slight.

2. The defendants say that when the *Vesta* proceeded to Gibraltar as alleged in the 15th and 16th paragraphs of the statement of claim, she abandoned all attempts at salving the *Benlarig*, and proceeded to Gibraltar for her own safety and for her own purposes, and that she left the *Benlarig* in a position of the greatest and most imminent danger close to the Mecca Shoal, over which the *Benlarig* soon after they left beat, and in a far worse position than that in which she was when the *Vesta* came up and took her in tow, and from which she was preserved by her own anchors and cables, four of which were used holding her after she had been beaten over the said Mecca Shoal.

6. The defendants say that by reason of the precedents that which was done by the *Vesta* did not constitute a salvage service, and that the plaintiffs are not entitled to salvage reward in respect thereof,

The value of the *Benlarig*, her cargo and freight, was 78,000*l*.

Kennedy, Q.C. and *Barnes*, Q.C. for the owners, master, and crew of the *Vesta*.—The plaintiffs are entitled to a substantial salvage reward. The *Benlarig* was in fact saved in consequence of the services of the *Vesta*. She was towed 130 miles on her way to Gibraltar, and the *Vesta* gave information in Gibraltar of her whereabouts. The fact that the *Vesta* was obliged to leave her by stress of weather does not deprive her of a right to salvage;

The Jonge Bastiaan, 5 C. Rob. 322;
The E. U., 1 Spinks, 63.

Even assuming the position in which the *Benlarig* was left by the *Vesta* to be as bad as, or even worse than, that in which she was found, nevertheless in other respects the *Vesta* rendered her salvage services for which she is entitled to remuneration:

The Santipore, 1 Spinks, 231;
The Melpomene, 29 L. T. Rep. N. S. 405; L. Rep. 4 A. & E. 129; 2 Asp. Mar. Law Cas. 122.

Alternatively it is contended that there was an agreement between the masters that the *Vesta* should do her best to tow the *Benlarig* to Gibraltar. This she has done, and is therefore entitled to be paid for it. This agreement is alleged in paragraph 7 of the statement of claim, and is admitted by the defence:

The Aztecs, 21 L. T. Rep. N. S. 797; 3 Mar. Law Cas. O. S. 326;
The Cargo ex Schiller, 33 L. T. Rep. N. S. 714; 2 P. Div. 145; 3 Asp. Mar. Law Cas. 439.

Sir *Walter Phillimore* and *Barnes*, Q.C., for the owners, master, and crew of the *Admiral Rooke*, contended that they had rendered valuable services.

Myburgh, Q.C. and Dr. *Raikes* for the defendants.—The *Vesta* is not entitled to salvage. She in fact left the *Benlarig* in a worse position than that in which she found her:

The Cheerful, 54 L. T. Rep. N. S. 56; 11 P. Div. 3; 5 Asp. Mar. Law Cas. 525;
The Edward Hawkins, Lush. 515.

The alleged agreement which is alternatively relied upon is merely the usual salvage agreement, and was never meant to confer any right to remuneration in the event of the *Vesta* being unsuccessful.

Kennedy, Q.C. in reply.

BUTT, J.—This is a case in which two claims are brought for salvage. I will deal with the case of the *Vesta* first. The *Vesta*, when on a voyage from Fiume to Bordeaux, fell in with the *Benlarig*, and was asked by her to render assistance. She accordingly took her in tow, and towed her for some miles. She then left her through stress of weather and proceeded to Gibraltar, and indirectly was the means of sending out the *Admiral Rooke* to the *Benlarig*. On the first occasion when the *Admiral Rooke* went out she did not succeed in finding the *Benlarig*, but on the second occasion she was successful, and brought her into Gibraltar. Now it is contended on behalf of the defendants that, although the *Vesta* did what she could and towed the *Benlarig* 130 miles on the way to Gibraltar, where the captain was anxious to be taken, yet leaving when and where she did she left her in really a worse position than when she fell in with her; that is to say, in a more dangerous position. Whether we consider the position of the *Benlarig* when the *Vesta's* tow rope parted, or one rope parted, and she was obliged to cut the other adrift, or her position when she had drifted over the Mecca reef, and at the time when the *Vesta* started for Gibraltar, the position of the *Benlarig* was more dangerous than the one from which she had been taken by the *Vesta*. That has been my view throughout the evidence in this case, and I find it is entirely in accord with the opinion of the Elder Brethren. It is said, and rightly said, that if that is the state of the case the *Vesta* cannot recover salvage in the ordinary acceptation of the word. So I have held in another case which I consider to be a binding authority on me, and so I must hold again.

But then arises another question. It is said that, apart from mere salvage remuneration which this court awards to successful services, there is here an express contract between the parties, and that that contract has been performed. Let us see how that matter stands. In paragraph 7 of the *Vesta's* statement of claim it is alleged that "the master of the *Benlarig* requested the master of the *Vesta* to tow the *Benlarig* to Gibraltar, which the latter agreed to attempt to do." The first paragraph of the defence is in these words: "The defendants admit that paragraphs 2 to 14 inclusive are substantially correct, except that the damage spoken of in paragraph 8 is greatly exaggerated." Therefore they admit the allegation, which I regard as an averment of a contract made between

the two parties, not a contract merely to render salvage services, and certainly not a contract to take the vessel into Gibraltar; but a contract between the two masters that the master of the *Vesta* would attempt to do so. The master of the *Vesta* writing to his owners says: "The captain wanted to be towed to Gibraltar. I promised to do my best for him; terms to be settled by owners and underwriters." Now did the master of the *Vesta* attempt to tow this vessel to Gibraltar? I think he did, and he has therefore performed the contract mentioned in the pleadings. The question is, what remuneration should be given for this work. The plaintiffs in this action are clearly not entitled, as I have already said, to the rate of salvage remuneration which salvors receive who take their chance of saving a vessel; but still they are entitled to remuneration for hard and dangerous work properly if not effectively done. I am prepared to hold that they are entitled to some payment, and I am glad to be able to so hold, because I think, on grounds of public policy, it would be very unfortunate to discourage vessels from rendering assistance to other vessels in distress. In this, as in some recent cases, I am sorry to see a decreasing tendency to aid vessels that are broken down. Before fixing the amount of salvage the *Vesta* is to get, I will deal with the case of the *Admiral Rooke*. [The learned Judge having dealt with the services of the *Admiral Rooke*, and awarded her 3500*l*, then proceeded:] As regards the *Vesta* I assess the sum to which she is entitled at 400*l*. I would again point out that the *Benlarig* was not saved by the *Vesta*, and that this sum is awarded for fulfilling her contract. The interests of the plaintiffs were so antagonistic that I shall allow costs to both sets.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

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

Thursday, Dec. 13, 1888.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE INDIAN CHIEF. (*a*)

Collision — Lights — Sailing barge — Dredging — Rules and Bye-laws for the Navigation of the River Thames, arts. 6 *and* 7.

A sailing barge at night dredging down the Thames stern first on the ebb tide with her anchor touching the ground, and her mast lowered, is neither a "sailing vessel under way," nor a vessel at anchor within the meaning of arts. 6 *and* 7 *of the Rules and Bye-laws for the Navigation of the River Thames, and is therefore neither bound to carry side lights nor anchor light, and if she shows a white globe light she does all that prudence requires.*

THIS was a collision action *in rem*, instituted by the owners of the sailing barge *Marian* against the owners of the steam-tug *Indian Chief* to recover damages for a collision between the *Marian* and a barge in tow of the tug.

The collision occurred on the evening of the 17th Nov. 1887, in the Thames, near the Albert Bridge.

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

The facts alleged by the plaintiffs were as follows:—Between 5 and 6 p.m. on the 17th Nov. the sailing barge *Marian* was dredging down river stern first, with her anchor touching the ground. Her mast was down, and had been down for some time. She carried a white globe light on the mast casing, which was four feet from the deck. The weather was dark and hazy, and the tide was first-quarter ebb. In these circumstances those on board the barge saw the steam-tug *Indian Chief* coming down the river ahead of her, and distant about 300 yards. The white light was thereupon waved to her, but the tug, instead of keeping out of the way, came on and with the stem of the first starboard barge in tow of her struck the port bow of the *Marian*.

The facts alleged by the defendants were as follows:—At about 5.30 p.m. on the 17th Nov. the tug *Indian Chief* was coming down the river with barges in tow, at a speed of about four knots. In these circumstances, as the tug neared the Albert Bridge, the barge *Marian* was seen 200 feet off showing no light, with her head falling off to the northward. The tug's helm was at once starboarded, but before anything could be done the collision occurred.

Sir *Walter Phillimore* and *Gaskell* for the plaintiffs.—The *Indian Chief* is solely to blame. It was her duty to keep out of the way of the barge, and she failed to do so. There was no duty upon the barge *Marian* to carry any other light than the light in question. Art. 6 of the Rules and Bye-laws for the Navigation of the River Thames says that, "a sailing vessel under way" shall carry side lights. But she was not a sailing vessel under way. Her mast was lowered, and had been lowered for some time, and she was merely dredging down the river. Neither can she be called a vessel at anchor within the meaning of art. 7. Her case is therefore not covered by the rules, and in exhibiting the white light she did all that reasonable prudence required.

Bucknill, Q.C. (with him *Pyke*) for the defendants.—The *Marian* was a sailing vessel, and was moving over the ground. She was therefore a "sailing vessel under way," and ought to have carried side lights. According to the repealed rule, viz., No. 1 of the Rules of 1875, "all vessels under sail" were to carry side lights. The words of the present rule are much more comprehensive, and clearly cover the present case. It is unlikely that such a case as the present, which is constantly happening in the Thames, should not be covered by any of the rules:

The George Arkle, Lush. 382;
The Smyrna, Lush. 385.

To release a vessel under these circumstances from the obligation to carry side lights would be very misleading to other vessels, and would be productive of collisions.

BUTT, J.—The first question in this case is, whether this barge had any lights exhibited at all. Now I have seen and heard the witnesses, and I have not the slightest hesitation in saying that she was carrying the light we have heard of. Then the next question is, was it right or wrong to exhibit a white light and not side lights? If the barge *Marian* was at the time of the collision "a sailing vessel under way"

within the meaning of art. 6 of the Rules and Bye-laws for the Navigation of the River Thames, then undoubtedly the white light was not a right light for her to carry; but I am very clearly of opinion that she was not a sailing vessel under way. She had lowered her mast for the purpose of coming down the river through the bridges, and in the ordinary course of things she would not have raised that mast until she had got below London Bridge. She had started from Wandsworth, and was coming down the river as I have described. In such circumstances I do not think this barge was a sailing vessel under way within the meaning of the rule. It has been said by Mr. Bucknill on behalf of the defendants that it may lead to great inconvenience, and be misleading, if a barge in such circumstances exhibits only a white light. I do not think so. Take the case of a dumb barge. So far as I know there is nothing wrong in her doing so. But whatever amount of inconvenience there may be, I ask myself, what would be the amount of inconvenience if a barge dredging down stern first were to carry side lights? Why the practical result would be that all vessels approaching her from ahead would be under the impression that she was a sailing vessel under way coming towards them. Whereas they would have in fact to deal with practically a dumb barge going away from them. I am therefore of opinion that this barge was not within art. 6.

Now, was she a vessel at anchor, and therefore within art. 7? I do not think she was. I do not think it would have been right for her to carry the light of a vessel at anchor. Therefore she is not within the rules, and that being so, the Elder Brethren tell me that the best thing was for her to carry such a light as she did; that is to say, as a matter of prudence, she ought to have carried the light she did. As to whether she ought to have ported her helm or not, I think nothing of that. If there had been a good look-out on board that tug, he would have seen that barge's light sufficiently soon to have enabled the tug to keep out of the way. I therefore give judgment for the plaintiffs.

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

Solicitors for the defendants, *J. A.* and *H. E. Farnfield.*

Saturday, Jan. 26, 1889.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE RESOLUTION. (*a*)

Collision—Fog—Speed — Helm — Regulations for Preventing Collisions at Sea, art. 13.

If a steamer in a fog cannot reduce her speed sufficiently to comply with art. 13 *of the Regulations for Preventing Collisions at Sea, without occasionally stopping her engines, it is the duty of those in charge of her to stop them.*

Where those in charge of a steamship in a dense fog hear the whistle of another steamship on either bow, but not so broad that they may reasonably infer that she will clear their vessel, they ought not to manœuvre with the helm before seeing the other vessel.

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

THIS was a collision action *in rem* instituted by the owners of the steamship *Sesostris* against the owners of the steamship *Resolution*. The defendants counter-claimed.

The facts alleged by the plaintiffs were as follows:—Shortly before 8.30 p.m., the *Sesostris*, a steamship of 1562 tons register, was in the Straits of Gibraltar, laden with a general cargo, on a voyage from Gibraltar to Liverpool. There was a thick fog, and a strong current setting to the eastward at the rate of between three and four knots. The *Sesostris* was between Carnero Point and Tarifa Point, heading W.N.W. with her engines working slow, and she was making about 3½ knots through the water. In these circumstances those on board heard the whistle of a steamship, which proved to be the *Resolution*, apparently a little on the port bow. The helm of the *Sesostris* was thereupon ported and her whistle blown one short blast. Shortly after, the masthead light and immediately afterwards the green light of the *Resolution* were sighted about two points on the port bow, and distant from one to two cables' lengths. The engines of the *Sesostris* were thereupon stopped and reversed full speed astern, and the helm put hard-a-port, but the *Resolution*, coming on at great speed, with her starboard bow struck the port bow of the *Sesostris*, doing her great damage.

The facts alleged by the defendants were as follows:—Shortly before 8.30 p.m. on the 1st July the *Resolution*, a steamship of 1269 tons register, was in the Straits of Gibraltar, laden with a cargo of wheat. She was putting back to Gibraltar, having met with an accident, and was between Tarifa and Europa Point, heading about E. There was a dense fog, and she was making about 2 to 2½ knots an hour, with her engines working dead slow. In these circumstances those on board heard a steamer's whistle well on the starboard bow, whereupon the whistle of the *Resolution* was blown one short blast, and her helm starboarded a little and then steadied. Shortly afterwards the whistle was heard broader on the starboard bow, and almost immediately after the masthead light of a steamship, which proved to be the *Sesostris*, was seen about three points on the starboard bow, and distant from two to three ships' lengths. The engines of the *Resolution* were at once stopped and reversed full speed astern, but the *Sesostris* came on at great speed, and with her stem struck the starboard bow of the *Resolution*, doing her damage.

Barnes, Q.C. and *Joseph Walton* for the plaintiffs.

Sir *Walter Phillimore* and *J. P. Aspinall* for the defendants.

BUTT, J.—This is a case of collision between two steamers on the early morning of the 1st July in the neighbourhood of Gibraltar. It is common cause that the collision occurred during a dense fog, so dense as to prevent the vessels sighting each other until they had got to very close quarters. The ships were in a general way on opposite but, at the same time crossing, courses. It is clear that the *Sesostris* was going through the water at the rate of at least five knots an hour, and probably more. I know it is said that there was a strong current against her, and that therefore she could not otherwise hold her own and keep proper steerage way on her. That is a pro-

position with which I do not agree. I could not agree with it even if the current had been nearer four knots, as it was stated, than it really was. But, taking it at 2½ knots, I am clear that it does not justify her speed. But, whether the speed in itself is justifiable or not, it is perfectly clear, to my mind, that, going at five knots an hour through the water, she ought immediately in the fog to have reduced that speed. She could have reduced it and still had steerage way. I know it is said, and nearly always said in these cases, that large steamers cannot go below a certain rate, because, apart from the question of steerage way, the revolutions would be so slow that the engines would stop on the centre. It is not now suggested that this was the case with the *Sesostris*, because, according to her engineer's evidence, he could have worked the engines two or three revolutions per minute slower than he did. But if a vessel cannot reduce her speed sufficiently with the continuous action of her engines, and therefore cannot go at what would be a reasonable speed in a fog without occasionally stopping her engines, it is her duty to occasionally stop them. Masters can always carry out the manœuvre in that way, and I will not yield to what I know is the strong disinclination of the masters of these large vessels to stop their engines. They hate and abhor the very idea, but it is, to my mind, their duty to do so, if they cannot otherwise reduce their speed sufficiently. I therefore think the *Sesostris* was going considerably too fast, and that that had a very material effect in bringing about this collision. For that she must be held to blame. But there is a further question. The master of the *Sesostris* having as he thought, and thinks still, the whistle of the *Resolution* on his port bow, he ported his helm. The extent of that porting has been warmly contested, but, whether continuous or not, I think it was wrong. Therefore, on both these grounds, the *Sesostris* must be held to blame.

Now comes the question whether the *Resolution* was to blame. I think the evidence establishes that the *Resolution*, when the whistle of the *Sesostris* was first heard, was going at a moderate speed—a speed of about 2½ miles an hour. In these circumstances she hears the whistle of the *Sesostris* on her starboard bow. The witnesses say it was broad, 2½ points on the bow, and her helm is starboarded. I think that was wrong. I have more than once given my reasons why I think that a wrong action. I do not think it possible to tell to a nicety the bearing of a ship whose whistle is heard in a fog, and if you cannot tell to a nicety and alter your helm, you are acting in the dark. I think in any case that would have been wrong. But it was more wrong on the part of the *Resolution*, for this reason: she was not steering a course straight through the Straits of Gibraltar; she was putting back to Gibraltar, and had to get to the northward of what would be the ordinary course. As a matter of fact we know now that the courses were crossing courses. Her master must have known, or ought to have considered that, in the position in which and the course on which he was, that unless a vessel whose whistle he heard was so broad on his starboard bow as to put them in the position of what is called passed ships, she was a crossing ship, and that the action of his starboard helm would be dangerous. Further, we have some doubt as to whether the *Resolution* really did not starboard more than she admits. But she is in this further difficulty: she ought to have known that in all probability she was crossing the course of other vessels. That being so, the Elder Brethren advise me that she ought to have stopped as soon as she heard the first whistle. We therefore think that upon both points she was to blame, and therefore hold both vessels in fault.

Solicitors for the plaintiffs, *Field, Son, and Hannay.*

Solicitors for the defendants, *Thos. Cooper and Co.*

Tuesday, Feb. 19, 1889.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE EARL WEMYSS. (*a*)

Collision — Sailing ships—Close-hauled ship—Luffing—Regulations for Preventing Collisions at Sea, arts. 14, 22.

The decisions holding that a vessel close-hauled, with her yards braced sharp up, may luff close to the wind, does not justify a vessel close-hauled, but rather off the wind, in luffing to the extent of 2½ points when approaching a vessel whose duty it is to get out of her way.

THIS was a collision action *in rem* instituted by the owners of the sailing ship *Ardencaple* against the owners of the sailing ship *Earl Wemyss*. The defendants counter-claimed.

The collision occurred about 8 p.m. on the 8th Sept. 1888 in the South Atlantic.

The facts alleged on behalf of the plaintiffs were as follows:—Shortly before 8.10 p.m. on the 8th Sept., the *Ardencaple*, a sailing ship of 1737 tons register, whilst laden with a cargo of salt, on a voyage from Liverpool to Calcutta, was in latitude 2° 56′ S. and longitude 27° 27′ W. There was a moderate S.E. wind true (or S.E. southerly magnetic.) The *Ardencaple* was on the port tack, sailing by the wind with all sail set, the sails lifting. She was heading S.W. by S. ½ S. true (or S.W. ¼ W. magnetic), and was making from six to seven knots. In these circumstances those on board the *Ardencaple* observed at a distance of about two miles, and bearing about a point on the port bow the green light of a vessel, which proved to be the *Earl Wemyss*. The *Ardencaple* kept her course, but when the *Earl Wemyss* was right ahead and crossing the bows of the *Ardencaple*, so as to pass starboard to starboard, the *Ardencaple* luffed a little to check her way. Very shortly afterwards, when the *Earl Wemyss* was on the starboard bow of the *Ardencaple*, she shut in her green light and opened her red light, rendering a collision inevitable. As the only chance of avoiding a collision, the helm of the *Ardencaple* was at once put hard-up, and the weather cross-jack braces and the mizzen halyards were let go to assist her in paying off, but the two vessels immediately came into collision, the stem of the *Ardencaple* striking the port side of the *Earl Wemyss* between the main and mizzen masts.

The facts alleged by the defendants were as follows:—At about 8 p.m. the *Earl Wemyss*, an iron sailing ship of 1411 tons register, whilst on

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

a voyage from San Francisco to Queenstown or Falmouth, laden with a cargo of wheat, was in latitude 2° S., longitude 27° W. The wind was a fresh S.E. trade, and the *Earl Wemyss* was under all sail, making about 7½ knots on the starboard tack, and heading N. by E. true. In these circumstances those on board the *Earl Wemyss* observed the red light of a vessel, which proved to be the *Ardencaple*, distant about two miles, and about 1½ to 2 points on the starboard bow. From the position of the ships the light was assumed, as the fact was, to be that of a vessel close-hauled on the port tack, and the helm of the *Earl Wemyss* was at once ported. But as the *Earl Wemyss* was answering her port helm, and after she had brought the *Ardencaple* ahead, the latter suddenly opened her green and shut in her red light. The *Earl Wemyss* was rapidly coming up to the wind under her port helm, and the helm was kept to port and hard-a-port as the only possible way of avoiding a collision or lessening its effects. And as the *Ardencaple* approached the bell of the *Earl Wemyss* was loudly rung, but the *Ardencaple* came on, still showing her green light, until the vessels were in very close proximity, when her red light again opened to those forward, and shortly afterwards the bowsprit of the *Ardencaple* struck the mizzenmast of the *Earl Wemyss*, and immediately afterwards her stem struck the *Earl Wemyss* on her port quarter.

The defendants charged the plaintiffs with neglecting to keep a good look-out and to keep their course.

The following Regulations for Preventing Collisions at Sea were referred to:

Art. 14. When two sailing ships are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz.: (*a*) A ship which is running free shall keep out of the way of a ship which is close-hauled.

Art. 22. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course.

It was proved at the trial that there was half a point westerly deviation on the steering compass of the *Ardencaple*, and 19° westerly variation. The course she was actually steering was in dispute, and the fact is found by the learned judge in the judgment.

Sir *Walter Phillimore*, *Barnes*, Q.C., and *Leck*, for the plaintiffs.—The *Earl Wemyss* is solely to blame. It was her duty to keep out of the way of the *Ardencaple*, and this she has not done. The *Ardencaple* was justified in luffing, and by so doing she does not infringe art. 22 as to keeping her course:

The Aimo, 29 L. T. Rep. N. S. 118; 2 Asp. Mar. Law Cas. 96;
The Marmion, 27 L. T. Rep. N. S. 255; 1 Asp. Mar. Law Cas. 412.

Myburgh, Q.C. and *Raikes* for the defendants, *contra*.—The collision was solely caused by the improper luffing of the *Ardencaple*. The measures taken by the *Earl Wemyss* were sufficient to have taken her clear of the *Ardencaple* had they not been counteracted by the luffing of the *Ardencaple*. The *Ardencaple* was not sailing absolutely close-hauled, and luffed more than two points—an alteration which is not justified by any previous decisions.

Sir *Walter Phillimore* in reply.

BUTT, J.—This is a case of a collision of a very serious character between two large sailing ships on the night of the 10th Sept. last in the South Atlantic. The vessels at the time in question were both sailing at considerable speed; the wind was somewhere about S.E.; the *Ardencaple* was on the port tack, and her magnetic course seems to have been about S.W. by W. ¾ W. The course of the *Earl Wemyss*, which was steering a compass course, was, I think, N.E. by N. ½ N. magnetic. The commanders of both ships seem to agree upon what were their relative duties. The *Ardencaple*, being what is called close-hauled in these latitudes and in the trade winds, was bound to keep her course. The *Earl Wemyss*, having the wind quite free, was bound to keep out of the way of the *Ardencaple*. There is no doubt that, acting on that view of his duty, the master of the *Earl Wemyss* determined to pass the other vessel on her port side; that is to say, he ported, and intended to bring the vessels port to port, instead of crossing the *Ardencaple's* bows. For that purpose he ported and hard-a-ported, and there is no doubt that he had ported a considerable number of points by the time the collision occurred. Now, the officer of the watch and the master of the *Ardencaple* have given evidence that an order was given to luff on board the *Ardencaple*. The main question is therefore this: Was the collision brought about by the starboarding or the luffing of the *Ardencaple*, or was it brought about by the fact that the *Ardencaple* was not seen by the *Earl Wemyss* at a proper distance, and that the porting of the *Earl Wemyss* was too late? There are certain facts practically beyond dispute. The first is that the *Ardencaple* luffed. Whether she merely luffed so as to bring herself a little closer to the wind, or whether she did something more than that, is perhaps not very clear. But it is rather curious that the officer of the *Ardencaple* gave an order not to luff merely, but to starboard. The helmsman says he did not hear that order. The captain says he was standing by and said, "Don't starboard; luff;" and says he countermanded the order to starboard. Now, how much did the *Ardencaple* come to under that order, whatever it may have been? I cannot help thinking that there is strong reason to believe that she came to more, and considerably more, than the point which her master and officers are willing to admit. Her helmsman gives a very different account of the matter. He says that his compass course being S.W. by W. ¼ W., he luffed to S.W. by S.—that is to say, he luffed up 2¼ points. Then he says the sails on her mizzenmast were aback. There is perhaps an attempt on his part to discount his own evidence by saying, "I saw by compass she was heading S.W. by S., but whether the compass was steady or not, I cannot say." The Elder Brethren, however, tell me that they see no reason to believe that the compass would be so unsteady in the weather as it then was as to have misled the man. Therefore it is clear that the *Ardencaple* luffed, and at a time when the green light of the *Earl Wemyss* was open on her port bow, and after the *Earl Wemyss* ported. That is the result of the evidence given by the defendants, and is strongly corroborated by the look-out of the *Ardencaple*.

If that evidence is true, it seems to me clear that the helm of the *Earl Wemyss* was ported in sufficient time to have avoided this collision, had

not the other ship luffed up under a starboard helm. It is said, and authorities have been cited in support of the contention, that a vessel close-hauled, approaching another whose duty it is to give way to her, does not contravene the statutory rules if she luffs up without losing her way. But those are cases of vessels really close-hauled by the wind — actually and positively close-hauled—with their yards practically as sharp as they can get them, and sailing within about six points of the wind. The *Ardencaple* was doing nothing of the sort—she was sailing close-hauled, as they call it, no doubt in the trade winds, but really going a point or two free, and therefore she would be able to come up $2\frac{1}{4}$ points under a starboard helm without getting her sails aback. As to the *Earl Wemyss*, I have some doubts whether her look-out was what it ought to be. It also occurred to me whether, if the *Earl Wemyss* had ported and hard-a-ported at anything like the distance which her captain says — nearly two miles—she must not have got a good deal more up in the wind and had all her sails flat aback, and been practically head to wind at the time of the collision. Her master's explanation was that she came up slowly at first, then faster under a hard-a-port helm, till she got to about the heading in which the collision occurred, and then hung in the wind. On that the Elder Brethren tell me that there is no difficulty in believing it to have been the state of affairs. Under all the circumstances, I have, with the advice of the Elder Brethren, come to the tolerably clear conclusion that steps for keeping out of the way were taken by the *Earl Wemyss* in sufficient time and at a sufficient distance, and that really the collision was brought about by the starboarding of the *Ardencaple*. I therefore pronounce the *Ardencaple* alone to blame.

Solicitors for the plaintiffs, *Stokes, Saunders*, and *Stokes*.

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

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 16 *and* 17, 1889.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

The Reinbeck. (*a*)

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

Lis alibi pendens—Action in rem—Bail—Election.

The owners of the British ship R. and the owners of her cargo sued the German steamship R. in the German Consular Court at Constantinople for damages for injury to the cargo caused by collision between the two vessels. An order was made therein for the arrest of the R., or for bail, subject to the plaintiffs giving security for a certain sum. The action was proceeded with, but the plaintiffs never gave the required security, and consequently the R. was never arrested. The R. left Constantinople during the pendency of the action and came to England, where she was arrested in the present action in rem instituted by the owners of cargo in respect of the same cause of action. Previously to the institution of the present action the defendants had given bail in the action at Constantinople, to which port the R. was a constant trader, although the plaintiffs in that action had never given the required security. The limit of the defendants' liability in the German Consular Court was the value of the R., a sum considerably less than the limit of their liability in this country. Upon motion by the defendants to release the R. without giving bail, or to stay the action:

Held (*affirming Butt, J.*), *that bail having been given without the plaintiffs having deposited the required security, was given voluntarily and not under compulsion, and that the plaintiffs were not proceeding vexatiously in instituting a second action in this country, and that the ship ought not to be released.*

Semble (*per Butt, J.*), *that the master of a ship carrying cargo where his ship and cargo have been damaged by collision in or near a foreign port, has authority to institute an action in rem in the foreign port against the offending ship on behalf of both ship and cargo, and the owners of the cargo cannot, so long as that suit is pending in their names, be allowed to deny his authority.*

This was an appeal by the defendants in an action *in rem* from a decision of Butt, J., refusing to release their ship without bail, and stay all further proceedings in the action.

The action was instituted by the owners of cargo lately laden on board the British steamship *Red Jacket*, against the owners of the German steamship *Reinbeck*, to recover compensation for damage occasioned to the cargo by reason of a collision between the two vessels.

The collision occurred on the 5th Aug. 1888 in the Bosphorus, and a few days subsequently the owers of the *Red Jacket* and her cargo formally submitted themselves to the jurisdiction of the Imperial German Consular Court, and instituted an action therein against the *Reinbeck*.

An application was made therein by the plaintiffs to arrest the *Reinbeck*, and on the 21st Aug. her arrest was decreed by the German Consular Court under a document, the following being a translation of the material parts thereof:

In behalf of the pretended claim of 25,000*l*. (literally, twenty-five thousand livres sterling), belonging to the plaintiff, against the defendant, on subject of the damage caused to the British steamer *Red Jacket* by the steamer *Reinbeck*, the real arrest of the German steamer *Reinbeck*, mark of distinction L. C. M. Q., now being in the circuit of the German General Consulate of Constantinople, shall be ordered to the amount of its value, and previously for three months, provided that the plaintiff, on account of the damage impending to the defendant in consequence of the arrest, furnishes a security of 55,000*l*. (literally, fifty-five thousand) marks. At the expiration of the three months, if circumstances are unchanged, the arrest will be further ordered on the plaintiff's motion provided that the plaintiff furnishes further security at the rate of 18,000 marks (literally, eighteen thousand marks) a month. After this arrest having been ordered, the execution of it shall be suspended by deposition of 180,000 marks (literally, hundred eighty thousand marks), and the debtor shall be enrightened to make a motion for taking the arrest.

The action was then proceeded with, but the plaintiffs took no steps to deposit the required security, and consequently never were in a position

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

to arrest the *Reinbeck*, and in October she left Constantinople.

On the 25th Oct. the plaintiffs gave notice to the defendants that they intended to abandon all further proceedings in the Constantinople suit. The defendants at once repudiated their right to do so, and it appeared by affidavit that according to German law the plaintiffs could not do so without the consent of the defendants.

On the 7th Nov. the case again came on for hearing in Constantinople, when the plaintiffs attended and took part in the proceedings.

On the 12th Dec., although the plaintiffs had not given the required security, the defendants put in bail in the Constantinople suit for 180,000 marks, which was the appraised value of the *Reinbeck*, and according to German law the limit of the defendants' liability.

In the same month the *Reinbeck* arrived in England, and was then arrested by the owners of cargo on the *Red Jacket* in the present action.

In an affidavit filed on behalf of the plaintiffs it was alleged that the suit in Constantinople was not instituted with their authority on their behalf; that no security was given in the German Consular Court to entitle the plaintiffs therein to arrest the *Reinbeck*; that the bail given at Constantinople was not given for the purpose of releasing the *Reinbeck*, or in pursuance of any order of court; and that the appraised value of the *Reinbeck* was several thousand pounds below the statutory liability of the defendants according to English law.

In these circumstances the defendants in the English action moved the court to release the *Reinbeck*, and stay all further proceedings.

Dec. 21.—The motion came on before Butt, J.

J. P. Aspinall, for the defendants, in support of the motion.

Sir *Walter Phillimore*, for the plaintiffs, *contra*.

Butt, J.—In this case I am asked to discharge the vessel from arrest, and to stay all further proceedings in this action on the ground that there is another suit pending in the German Consular Court at Constantinople between the same parties, so far as a suit *in rem* can be said to be a suit between the parties. Now, the first question is, have the plaintiffs in this action, who are the owners of the cargo on board the *Red Jacket*, instituted a suit in Constantinople against the steamship *Reinbeck*? I have heard the affidavit of one of the members of the firm, who I think are owners or consignees of the cargo, read, and that has produced no impression on my mind at all to the effect that they have not instituted an action there. They have intrusted their goods to the captain of the ship, they have made him bailee of them, and such a bailee as that is clothed with their authority to institute a suit for a collision happening in this way; and I hold, without hesitation upon the evidence, that the suit at Constantinople is a suit instituted by these owners of cargo, and therefore I think the difficulty about the identity of the parties does not exist. If this had been an action *in personam* in which there were no means of compelling bail, and in which no bail had been given in the suit at Constantinople, I should not think of stopping it in a summary way upon these affidavits. The question is, it being an action *in rem*, and bail having been given, ought I to stop it? My view is this that, if the plaintiffs had really compelled the defendants to give bail at Constantinople, and if they had done so under pressure and not voluntarily, with a view of avoiding giving bail here, then I think the defendants would have been entitled to the major part of their motion. But it appears to me the state of things is this: they may have made an offer to give bail at Constantinople, but they did not do so until after their ship had left, and then under a fear that she would be arrested here, and with a view to obviating that they give bail at Constantinople. They have chosen to give bail, and having so chosen, I do not think they are entitled to call upon me in a summary way to release their ship in this suit, and I decline to do so. I say nothing more than that at present; I leave the matter open. Of course they may plead *lis alibi pendens*, or take any course they think fit, but upon these affidavits I decline to release the ship.

From this decision the defendants now appealed.

Jan. 16, 17.—*Bucknill*, Q.C. and *J. P. Aspinall*, for the defendants, in support of the appeal.—The circumstances of this case make it vexatious for the plaintiffs to proceed with their suit in this country. Bail has been given in both suits, and although the ship was never arrested in the foreign suit the defendants were practically obliged to give bail therein. So long as that suit is pending, the plaintiffs might upon giving the required security arrest the ship, were she to come within the jurisdiction of the German Consular Court. The ship is a constant trader to Constantinople, and therefore the defendants, in order to protect their ship from potential arrest, were obliged to give bail. The fact that the plaintiffs might recover more in this country is immaterial, inasmuch as they by instituting their suit there have elected to be bound by its procedure; and, moreover, on bail being given in the foreign suit, the maritime lien on the ship is extinguished, and she is released from all liabilities in respect of that lien:

The Christiansborg, 53 L. T. Rep. N. S. 612; 10 P. Div. 141; 5 Asp. Mar. Law Cas. 491;
McHenry v. *Lewis*, 47 L. T. Rep. N. S. 549; 22 Ch. Div. 397.

Barnes, Q.C. (with him *Walton*), for the respondents, was not called upon.

Lord Esher, M.R.—In this case an action was instituted in the German Consular Court at Constantinople, against this ship. The ship was not in fact arrested there. Something happened there; that is to say, in my opinion the owners of the ship paid into court the value of the ship without being compelled to do so. In that suit the court had made an order that, if the plaintiff fulfilled certain conditions, the ship might be arrested. Now, in the Admiralty, when a ship is arrested it comes to this, that she must either remain under arrest, or bail must be given. But the plaintiffs in Constantinople could not unless they fulfilled the condition arrest the ship, and could not therefore enforce any obligation on the owners of the ship. They were never in a position which would have enabled them to do so. What the defendants did therefore in Constantinople was to voluntarily make a payment into court of the value of the ship. The ship comes to England,

and if what the plaintiffs say is true they have a maritime lien on her. Therefore the English court could enforce that lien when she came within the jurisdiction. It is said that the English court has no jurisdiction to enforce this maritime lien, because the plaintiff by instituting his suit in Constantinople has elected to enforce it there. Now, is there anything which says that in the case of an action *in rem*, the commencement of a suit in a foreign court is to oust the jurisdiction of an English court which would otherwise have jurisdiction, and prevent it adjudicating? I know of no distinction in that respect between an action *in rem* and any other action. The general rule is, that the commencement of an action abroad does not prevent the plaintiff suing in an English court for the same cause of action. He is not prevented from suing on the ground that the English court has no jurisdiction, and I know of no difference in that respect in the case of an action *in rem*.

Now, the English courts have always exercised another jurisdiction, which they could not exercise unless they had jurisdiction to entertain the case, viz., that, if the bringing of the action is in their opinion contrary to good faith or vexatious, then they will stop the proceedings in their court although they have jurisdiction to go on with it. That raises the question whether the proceedings of the plaintiffs here were contrary to good faith or vexatious. There is no allegation in the affidavits that they are contrary to good faith. The plaintiffs never engaged with the defendants at Constantinople that they would not sue in England, and so did not mislead them. Now, where a ship is arrested in a foreign court, and bail is actually taken, and the plaintiffs for the same cause of action arrest the ship in England while bail is standing in the foreign court, if there are no other circumstances, I should say that *primâ facie* the taking of the same bail twice over is vexations, because it puts the defendant into this position, that in two different places he has to find bail, that is twice over. *Primâ facie* at all events it would be vexatious. But even then I am not all prepared to say that there might not be other circumstances which would entitle the court to say it was not vexatious. It seems to me that the plaintiffs might prevent it from being vexatious by doing what I have suggested before, by withdrawing their action in the foreign court, and by paying all the costs and expenses incidental to it. Even though they had compelled bail in a foreign court—a course which, so long as the ship was there, was the only proper remedy they had—and the ship was afterwards to come to England where they could compel bail to a larger amount, I am not prepared to hold that the court would necessarily say that the proceedings in England were vexatious. The plaintiffs would have a good business motive for so acting, inasmuch as they would be able to get a more effective remedy here than in the foreign court. But this is a weaker case than either of those I have suggested. Here, the plaintiffs did not compel the defendants to give bail at Constantinople, and could not do so because they never put themselves into a position to demand it. The payment was therefore a voluntary payment. This was in fact a fair stand-up fight between the plaintiffs and the defendants as to whether the defendants by paying money into court at Constantinople, or the plaintiffs by enforcing their maritime lien in England, could get the greater relief. There was no vexation on either side. Both parties have merely acted like business men, and must take the consequences of the law. I am therefore of opinion that this appeal must be dismissed.

Bowen, L.J.—I am of the same opinion. The pendency of a foreign action, according to ordinary law, does not oust the jurisdiction of the English courts to try the same cause of action between the same parties. It may well be that in actions *in rem* there may be circumstances which make it an abuse of the process of the court to proceed with the case, but it is material in each case to see whether it is in fact an abuse of the process of the court or contrary to good faith. That is the law laid down in *McHenry* v. *Lewis* (*ubi sup.*), which has always been followed. I therefore agree with the Master of the Rolls in hesitating to say that wherever bail is given abroad there must necessarily be vexation in suing in this country. I think the judgment in the case of *The Christiansborg* (*ubi sup.*) expressed the same view. For instance Fry, L.J. said: "Therefore, without saying that it is impossible that a second action should be allowed where such a release has been obtained, I think that the existence of such a release is the most cogent circumstance against allowing the prosecution of a second action." It is a matter which requires to be explained, and in some cases the plaintiff may give a satisfactory explanation which shows that it is no hardship at all. Here there has been no arrest of the ship, and the bail was given designedly, without compulsion, and voluntarily, and it is obvious that the one object of the defendants was to force the plaintiffs to litigate in the foreign court. How can it be said that these circumstances make it vexatious to sue in this country? I am therefore of opinion that the decision of Butt, J. was right.

Fry, L.J.—I entirely agree. The order which was made for the arrest of the ship was to be in force for three months, and "at the expiration of the three months if circumstances are unchanged the arrest will be further ordered on the plaintiff's motion, provided that the plaintiff furnishes further security at the rate of 18,000 marks a month." At the time when the ship was arrested in England this order had ceased to be operative, which is a further reason for making me think the decision of Butt, J. was right.

Appeal dismissed.

Solicitors: for the appellants, *Botterell* and *Roche*; for the respondents, *Thos. Cooper* and *Co.*

Monday, Jan. 28, 1889.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

Hart v. Standard Marine Insurance Company Limited. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Insurance, marine — Policy on ship — Warranty against iron cargoes—Cargo of steel—Onus of proof—Evidence.

A policy of insurance upon a ship contained the

(*a*) Reported by Adam H. Bittleston, Esq., Barrister-at-Law.

following clause: "Warranted no iron, or ore, or phosphate cargoes exceeding net register tonnage across the Atlantic." In an action upon the policy, the defendants contended that they were relieved from liability, as the ship at the time of the loss was carrying a cargo of steel blooms, exceeding in weight the tonnage of the ship across the Atlantic.

Held, that the word "iron" being capable of including steel in its meaning, the onus lay upon the plaintiff to show that the commercial meaning of the word "iron," when used in the particular warranty amongst persons engaged in the business of insurance, did not include steel; and that evidence to show that the use of the word "iron" in other commercial documents would not be understood by men of business to include steel was insufficient.

Judgment of Mathew, J. affirmed.

THIS was an appeal by the plaintiff from the judgment of Mathew, J. in favour of the defendants, at the trial of the action before him without a jury in Middlesex.

The action was brought upon a policy of insurance on a ship. The policy contained the following clause: "Warranted no iron or ore, or phosphate cargoes exceeding net registered tonnage across the Atlantic."

During a voyage across the Atlantic the ship in question suffered a partial loss. She was at that time carrying steel blooms, the weight of which exceeded her net registered tonnage.

The learned judge at the trial held that the plaintiff could not recover, as the carrying of steel blooms was a breach of the warranty not to carry iron.

The plaintiff appealed.

Bigham, Q.C. and *J. Gorell Barnes*, Q.C. for the plaintiff.—The warranty is express, and must be so construed:

Marshall on Marine Insurance, 4th edit. p. 280;
Arnould's Marine Insurance, 6th edit. p. 605.

In business iron and steel have different meanings:

Scott v. *Bourdillion*, 2 B. & P. (N. R.) 213);
Blacket v. *Royal Exchange Assurance Company*, 2 C. & J. 244;
Moody v. *Surridge*, 2 Esp. 633.

Kennedy, Q.C. and *Joseph Walton* for the defendants.—Iron is a generic word, and includes steel. The purpose of the warranty is as much applicable to steel as iron.

LORD ESHER, M.R.—I do not regret at all the lengthened discussion that has taken place in this case, of which perhaps I was the cause. I have always great hesitation in deciding insurance cases. It is a branch of the law as much considered and applied in America as here; and our decisions with regard to it have to be criticised by lawyers in that country as well as in this. I was at first afraid that we were going to be hurried into the doctrine that descriptive words in a policy of insurance must necessarily have their exact scientific meaning. If I had been asked to say that, because among men of science iron means steel, therefore it must necessarily have that meaning in a policy of insurance, I should have said that the one thing had nothing to do with the other. What is the rule of construction in the case of a warranty of this sort in a policy? There is no rule of construction in the case of a policy of insurance different from the rule in the case of any other written document. The rule is laid down in the works of Marshall, of Arnould, and of Phillips, on marine insurance. The rule laid down by Arnould (6th edit. p. 605) is word for word the same as that laid down by Marshall (4th edit. p. 280): "A warranty is construed according to the understanding of merchants, and does not bind beyond the commercial import of the words." The same rule is laid down by Phillips (3rd edit. sect. 766): "Though a strict compliance with a warranty is required, yet the construction of the language is determined, as in other cases, by usage and common acceptation." That is to say, the meaning of the words is to be determined, not by the sense in which they would be used amongst men of science, but by usage and common acceptation among people engaged in the particular class of business. Usage may enlarge or narrow the ordinary meaning of the words used.

The first question is, therefore, what is the ordinary meaning in which these words, as used in such a context, would be read by men engaged in insurance business. If the words are capable of two constructions you may look to the object with which they are inserted in order to see in which of those senses men engaged in that business would use them. The case of *Moody* v. *Surridge* (2 Esp. 633) is a decision to that effect. That was a case in which the policy of insurance contained a clause that "corn" was to be free from particular average. It was contended that malt did not come within the meaning of the term "corn" in the policy. Lord Kenyon said that the usual clause in policies of insurance to be free from average losses was that underwriters should not be subjected to trifling losses in the case of articles insured which were of a perishable nature; corn was of that description; but that it more strongly applied to the case of malt, which was certainly corn, though in a manufactured state, but which was of a still more perishable nature. He was therefore of opinion that this loss came within the exception of the policy, and that the defendant was discharged. The report goes on to say that the jury were of the same opinion, and found a verdict for the defendant. Therefore Lord Kenyon must have left to the jury the question whether "corn" would amongst business men include such a thing as malt. He clearly held that he had a right to consider the purpose of the warranty. Applying that to the warranty in this case, I think that it is possible for the word "iron" in the warranty to include steel. I do not think that it does as used in ordinary life. But I am not prepared to say that in business "iron" is not capable of including steel. If so, the judge who tried this case without a jury has found that steel is within the primary meaning of the word "iron." There was evidence in support of that finding that could not have been withdrawn from a jury. I think that it was not sufficient for the plaintiff to show that in business of a different kind iron and steel had a distinct meaning, whether that business was buying and selling, or whether it was carrying, nor even that they would have a distinct meaning in the body of the policy. The learned judge finding that the primary meaning of iron was one that would include steel, to displace that

there must be a usage with regard to warranties of the same kind. It would have to be shown that, in such a warranty, there had come to be an acknowledged and almost invariable usage that the words "iron" and "steel" should have distinct senses. I do not think that the questions were put to the witnesses at the trial so closely to the point as that the answers are sufficient to enable us to differ from the learned judge, who thinks that there was no evidence of any such usage. If the witnesses had been asked whether this particular warranty had become common and usual in the business, I expect that the answer would have been that it had not. If so, there could have been no usage. If they said that it had, then they would have to be asked whether the word "iron" had acquired a distinct meaning in such a warranty. I do not think that they would have said that it had, and certainly they have not said so. The appeal must, therefore, be dismissed.

Bowen, L.J.—I am of the same opinion. I have no doubt that Mathew, J. was right. The rules of construction are the same in construing these policies of insurance as in the case of any other instruments. That is laid down in *Robertson* v. *French* (4 East, 130), where Lord Ellenborough says: "In the course of the argument it seems to have been assumed that some peculiar rules of construction apply to the terms of a policy of assurance which are not equally applicable to the terms of other instruments and in all other cases: it is therefore proper to state upon this head, that the same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz., that it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense." It is to be remembered that this is a commercial document used for a peculiar purpose among merchants, and therefore to that extent to be construed in a particular way. We have not in this case to construe a clause that defines the subject-matter to be carried in the ship; but a warranty which excludes a certain class of cargo which would be dangerous to the ship. The warranty is "warranted no iron or ore, or phosphate cargoes exceeding net registered tonnage across the Atlantic." I should think that there was no business man who did not know that steel is iron in a certain condition of its manufacture.

A good deal of evidence was given at the trial to show that in transactions of sale and the like, and in such documents as bills of lading and charter-parties, business men would not describe steel as iron. That seems to me to follow. It is natural enough that in describing individual matters of commercial contract such matters should be described specifically, and if for the purpose of insurance it is necessary to describe steel specifically, the term "iron" would be inappropriate. But this is a clause that is not intended for the purpose of identification, but for the purpose of excluding certain classes of goods, the weight of which makes them undesirable as cargo. It would naturally therefore be not a specific, but a general description. The description of the other two kinds of cargo mentioned, "ore or phosphate," seems to bear out that view. What are the authorities? In the American case of *Coit* v. *Commercial Insurance Company* (7 Johns, 385), evidence was admitted to show that by mercantile usage the meaning of the word "roots" in the memorandum of a policy was confined to roots perishable in their nature, and did not include sarsaparilla, which, although a root, was not perishable. That case shows that evidence is admissible to establish a usage modifying the ordinary use of words found in a memorandum. To the same effect are *Scott* v. *Bourdillion* (2 Bos. & P. N. R. 213), *Moody* v. *Surridge* (2 Esp. 633), and *Mason* v. *Skurray* (1 Park on Ins., 7th edit. 179), all of which cases are collected in 1 Parsons on Insurance, p. 627, note. Therefore the plaintiff was possibly entitled to give evidence to show that iron and steel are used in different senses in mercantile documents. That evidence, however, comes to nothing if the plaintiff cannot show that in a particular warranty, such as this, iron and steel are used in a distinct sense. That was where this case broke down. This being a new form of warranty, it was almost impossible that there could be any usage as to the meaning of the words in it.

Fry, L.J.—In this case a time policy on a ship contains a warranty in the following terms: "No iron or ore, or phosphate cargoes exceeding net registered tonnage across the Atlantic." What is the meaning of the word "iron" in the English language as used by ordinary persons? To my mind it is matter of common knowledge that iron includes steel. That being so, the burden is thrown on those who say that, as used here, the word "iron" has a more limited signification. Now there is an undoubted difference between the use of words for the purpose of describing specific things that are to be dealt with, and the use of words for the purpose of excluding a class of things that are not identified. A specific parrot would naturally be described as a parrot. But if you were desirous of excluding parrots generally from the scope of a contract, you would be more likely to say, "No birds." The evidence at the trial appears to me not to be sufficiently applicable to this precise warranty to discharge the burden of proof that was upon the plaintiff. I think that there is no evidence which cuts down the ordinary meaning of this word and shows that it ought not to have its ordinary effect in this warranty. I do not think that you may look at the purposes of the warranty in order to enlarge the meaning of the words used in it; but I think that you may look at the purposes of the warranty in order to exclude a limitation sought to be put upon the ordinary meaning of those words. It is obvious that in this case the purpose of the warranty applies as much to steel as to any other form of iron. Lastly, the other words used in the warranty—ore and phosphates—are general words, which goes very strongly to show that iron was intended to be used

in its general sense. For these reasons I am of opinion that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Rowcliffes, Rawle,* and *Co.*, for *Stone, Fletcher,* and *Hull,* Liverpool.

Solicitors for the defendants, *W. A. Crump* and *Son.*

Wednesday, Feb. 6, 1889.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

The Longford. (*a*)

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

Collision—Action in rem—Notice of action—City of Dublin Steam Packet Company—6 & 7 Will. 4, *c. c., s.* 8.

The 8*th section of* 6 *&* 7 *Will.* 4 *(local and personal), c.* 100, *which requires notice to be given one calendar month before bringing any "action in any of His Majesty's Courts of law" against the city of Dublin Steam Packet Company, does not apply to collision actions in rem against the company's vessels, and in such cases no notice is necessary.*

This was an action *in rem*, instituted by the owners of the steamship *Dublin*, her cargo and freight, against the owners of the steamship *Longford*, to recover damages occasioned by a collision between the two vessels.

The collision occurred in Liverpool Bay on the 26th Oct. 1888.

The defendants were the City of Dublin Steam Packet Company, and by sect. 8 of 6 & 7 Will. 4 (local and personal) c. c.:

No action in any of His Majesty's Courts of law to which the said company (the City of Dublin Steam Packet Company) shall be liable in respect of any damage, injury, or trespass, alleged to be done, committed, or occasioned to or against any ship, lighter, barge, craft, wherry, or any kind of vessel on the high seas, or in any river, port, or harbour, or to or against any passenger on board any steam vessel of the said company, or the owner, shipper, or consignee of any goods, merchandises, or baggage shipped on board thereof, or to or against any person or persons, property, goods, or effects, whatsoever shall be brought, commenced, or prosecuted against the said company, unless one calendar month's previous notice in writing shall have been given by the party or parties commencing such action to the said company, such notice to be given or left at the head or principal office of the said company, nor unless such action shall be brought or commenced within twelve calendar months next after the cause or causes of action shall have arisen in respect of which such action shall be brought or commenced.

The defendants appeared, and by their defence pleaded that the plaintiffs had given them no notice of action (as was the fact) in compliance with the provisions of the above section, and also that on the merits the plaintiffs' vessel was solely to blame for the collision.

Jan. 29.—The point of law raised in the defence now came on for hearing.

Sir *Walter Phillimore* and *Carson* for the defendants.

Barnes, Q.C. and *Hurst* for the plaintiffs.

Butt, J.—This is an action *in rem*, for damages arising out of a collision occurring on the high seas. The defendants have in substance pleaded that by this Act of Parliament no action shall be brought in any of Her Majesty's Courts of law in which the said company shall be liable in respect of certain injuries of which this charged in the present claim is one, "unless one calendar month's previous notice in writing shall have been given by the party or parties commencing such action to the said company." The section then describes how the notice may be given, and it is not denied that no such notice has been given in the present case. The first question that arises is, is this action against the company within the act? Now in the first place it is not in name an action against the company, neither the company nor any individual shareholder in the company is named in the writ by which this action is commenced; therefore not being a suit against the company in name, *primâ facie* it is not within the words of the section. But it is not in substance an action against the company for the damage proceeded for, because it is perfectly clear that whatever may be the fact in this particular action, in such actions as this the claim against the *res* may practically result in a judgment for a much smaller amount than the amount which might be recovered from the owners of the *res*. For instance, if the damage proceeded for by the plaintiff amounts to 1000*l.* and the value of the *res* is only 500*l.* it is perfectly clear that in an action *in rem*, such as this, the utmost amount which the plaintiff could recover would be 500*l.*, or only one-half of the damages for which he proceeded, which he would be entitled to recover in an action against the owners. Therefore, I say in substance this is not an action against the owners, because in an action of this sort it by no means follows that the remedy against the *res* is co-extensive with what the remedy against the owners would be.

Now in my view, without discussing the policy of the Legislature, this is a section which ought to be construed strictly. I have pointed out that by the mere words this is not an action against the company. But did the Legislature intend that this month's notice should precede an action *in rem?* It would take a great deal to convince me it did so intend, because the moment that by the wrongful act of those on board a vessel an injury is inflicted on another ship on the high seas there arises what is called a maritime lien on the property which serves as a security to the injured person for the recovery of the damage he has received. Now just consider what would be the effect of holding that this section delayed the institution of the action for one month at least. Why the effect would be in many cases to deprive a plaintiff of the whole of his security. Ships are constantly coming and going, and if the meaning of the Act is what the defendants contend for, the security of the *res* would be lost in many ways. The ship would in all probability be sent to sea, where she might be salved or collide with another ship, or be lost in various ways, and so the injured party might be deprived of his remedy. I do not think that the Legislature could have intended that the security which the law gives in such cases should be withheld for an indefinite period. There is nothing to prevent this company sending the ship to sea for a voyage for twelve months.

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

It may be beyond their statutory powers, but they can do it if they please. Therefore I am not prepared to hold that this Act of Parliament deprives the plaintiffs of their security in this way. It is said that the case of *The Parlement Belge* (4 Asp. Mar. Law Cas. 235; 42 L. T. Rep. N. S. 273; 5 P. Div. 197) concludes this question. The utmost that case decides is that the owners of a ship may be said to be indirectly impleaded in a suit *in rem*. I do not think it concludes the present case at all. I therefore hold that this is not a case in which the company can avail themselves of this section, and give judgment for the plaintiff on this point of law.

From this decision the defendants appealed.

Feb. 6.—Sir *Walter Phillimore* and *Carson*, for the defendants, in support of the appeal.—The defendants are entitled to a month's notice under the Act of Parliament. The words are general, and not restricted to actions *in personam*. It has now been decided that an action *in rem* impleading the ship impleads the owners:

The Parlement Belge, 42 L. T. Rep. N. S. 273; 5 P. Div. 197; 4 Asp. Mar. Law Cas. 235;
The Newbattle, 52 L. T. Rep. N. S. 15; 10 P. Div. 33; 5 Asp. Mar. Law Cas. 356.

In the writ the owners of the *Longford* are named as defendants, and since the Judicature Act the procedure in actions *in rem* has in many respects been assimilated to the procedure in actions *in personam*. The plaintiffs by their claim ask for judgment against the defendants. As no notice of action has been given the owners are not responsible, but it is said the ship is, which is negatived by the decision of Dr. Lushington in *The Druid* (1 Wm. Rob. 399). The very words of the section point to collisions on the high seas which are essentially the subject of an action *in rem*. The case of *The Mullingar* (1 Asp. Mar. Law Cas. 252) is wrong, and not binding on this court.

Barnes, Q.C. and *Hurst*, for the plaintiffs, were not called upon.

Lord Esher, M.R.—In this case the question is whether an action *in rem* at the present moment is an action in one of Her Majesty's courts of law to which this company is liable within the meaning of this section of the Act of Parliament. Now in construing a section one must not cut it up into little bits, but you must take it as a whole. The section is not "no action in any of His Majesty's courts of law shall be commenced without a month's notice." It is "no action in any of His Majesty's courts of law to which the said company shall be liable." The Act is to be construed as though we had to construe it the day after it passed. A great many rules of the Judicature Act have been cited. It is said that we are to deal with the case under the Judicature rules It is also said that they are evidence of what the law was before the Judicature rules passed. Now it is obvious in construing this Act of Parliament we have to construe it first, and then see how the Judicature rules are applicable to it. It is not correct to say that the Judicature Act affords evidence of what the law was before the Act. It deals only with procedure; it alters procedure, and was passed for that purpose. An Act which alters procedure is not evidence of what the procedure was before the Act. Therefore we have to deal with this matter wholly irrespective of the Judicature Act. Is it true to say that an action *in rem* in the Admiralty Court is an action "to which the said company shall be liable." The case of *The Parlement Belge* (*ubi sup.*) has been cited to us. Now if there is anything to be collected from that decision which can be applicable to the present case it is that an action *in rem* against a ship in the Admiralty is not an action *in personam*, but that it indirectly affects the owners or persons interested in the ship. When you say that it indirectly affects them, that is equivalent to saying that it does not directly affect them. *The Parlement Belge* (*ubi sup.*) is really not in point, and if it were, it is against the appellant's argument, and not in favour of it.

On looking at the section, I first of all find it speaks of "actions." That word was not applicable at the passing of the Act to procedure in the Admiralty Court. In the Admiralty actions were called "suits" or "causes" at that time. That in itself perhaps does not settle the matter. But, in the second place, the Admiralty Court was never called one of "His Majesty's courts of law." Nobody ever called it so. It is not one of the courts of law in the ordinary sense. In its beginning it took its jurisdiction from the Lord High Admiral as distinguished from the Sovereign. But I do not lay much stress on these considerations. It may be that it would not be wrong to call the Admiralty Court one of Her Majesty's courts of law in some Act of Parliament; but the question is, whether it is so called in this Act of Parliament. I have endeavoured to show in *The Parlement Belge* (*ubi sup.*) that an action *in rem* is not an action *in personam*; that it is not that and something else; that it is a different thing from an action *in personam*. The effects are wholly different. In an action *in rem* the plaintiff does not necessarily recover that which he has lost; he can only recover that which he has lost to the extent of the value of the property over which he has a maritime lien. If the value of the property is not so large as his damages, he does not recover all his damages. There are numerous other circumstances which show that an action *in rem* is different from an action *in personam*. On looking at the section to see to what cases it is applicable, there may be one or more which could have been brought in the Admiralty Court, but most of them could not have been brought in that court at all. Now when we look to the effect, as Butt and Townshend, JJ. did, of what we are asked to do, it is this: to render futile any action in the Admiralty Court at all. If the plaintiffs are to give a month's notice before seizing a ship, and before commencing an action, it is clear they never might be able to seize her at all. She might at once be sent out of the jurisdiction. It is said that the month's notice would enable the defendants to pay the money into court, but the plaintiffs have no means of knowing that what is paid into court is sufficient. The defendants are only liable to the value of their ship. Assume her to be out of the way, then the plaintiffs would have no means of valuing her, and so deciding whether the money paid into court is sufficient. All the circumstances go to show that an action *in rem*

was not within the contemplation of the Act; and if it was not then, it is not now. The action *in rem* is precisely the same as it was before, except in matters of procedure which have been slightly altered. I am perfectly clear that the judgment of the Irish judge was right, and that Butt, J.'s judgment is right, and that the section does not apply to an action *in rem* against any of the ships of this company.

Bowen, L.J.—I am of the same opinion. The question is whether at the time the Act was passed the section intended to include within its scope actions *in rem* as well as actions *in personam*. If we were to hold that this section prescribes that notice of action is to be given one month before any suit *in rem* is brought in the Admiralty Court, two consequences would follow. In the first place, we should have to hold that a number of words in the section, which are perfectly intelligible in their ordinary sense, are used in a distorted and unusual sense. The words are "no action in any of His Majesty's courts of law to which the said company shall be liable." We should have to apply the word "action" to a suit in the Admiralty Court. We should have to hold that the Admiralty Court, the proper title of which was the High Court of Admiralty, was one of His Majesty's courts, and not only that, but one of "His Majesty's courts of law" within the meaning of the section, although it is not a court of common law at all. We should futher have to hold that an action *in rem*, which really begins by proceedings against the ship, but which no doubt has the result of citing before the court the shipowner in person, is an action in the ordinary meaning of the words which could be prosecuted against the company. In the first place, therefore, we should have to do violence to the language of the Act of Parliament. The second consequence would be, that we should involve the parties who are injured by a collision with the ships of this company in this strange misfortune, that they would never be able to institute a suit *in rem* in the Admiralty Court unless they gave a month's notice beforehand; that is to say, unless the ship was in one of the ports a month after the notice was given that would practically make all actions *in rem* against this company useless if not impossible. For these reasons, were we to construe the Act as contended for, we should have to do more or less violence to language, and the result would be to work manifest injustice to persons. It seems to me we ought not to adopt the argument of the appellants as to the construction of the Act at the time it passed and the present time. It has been said that the Judicature Act makes a difference. How? Has it made an action *in rem* the same thing as an action *in personam?* Nothing of the sort. All that it has done has been to amend and modify certain formalities with which an action *in rem* now commences, but in all other respects in essential matters it differs entirely from an action *in personam*. Therefore the Judicature Act has made no difference.

Fry, L. J. concurred. *Appeal dismissed.*

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *Carlisle, Unna*, and *Rider*.

Monday, Feb. 25, 1889.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

The Moorcock. (*a*)

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

Damage — Bed of river — Grounding of vessel — Liability of wharfinger.

Where an agreement is entered into between shipowners and wharfingers that a ship shall proceed to a wharf in the river Thames for the purpose of discharging and loading cargo, and it is known to the parties that she must take the ground at low water, there is an implied representation by the wharfingers, even though the bed of the river is not under their control, that it is in such a condition as not to injure the ship on her taking the ground, and if, by reason of the uneven condition of the bed of the river, she is injured, the wharfingers are liable for the damages caused to her.

This was an appeal by the defendants from a decision of Butt, J., holding them liable for injuries occasioned to the steamship *Moorcock*.

The action was *in personam* by the owners of the *Moorcock* against the defendants, who were wharfingers, to recover damages for injury to the *Moorcock* caused as hereinafter stated.

The defendants were the proprietors of a wharf and jetty abutting on the Thames and known as St. Bride's Wharf. In Nov. 1887 it was agreed between the plaintiffs and the defendants that the *Moorcock* should be discharged and loaded at St. Bride's Wharf. Accordingly on the 14th Dec. the *Moorcock* was moored alongside the wharf for the purpose of discharging her cargo; but as the tide fell and she ceased to be waterborne she took the ground, and in consequence of some inequalities in the bed of the river she sustained the damage complained of.

It was known to the plaintiffs and defendants that on the tide ebbing the *Moorcock* would take the ground.

The bed of the river at the place where the *Moorcock* took the ground was vested in the Thames Conservators, and the defendants had no control over it.

The defendants made no charge for vessels lying at the wharf, but charged for the use of cranes, and also rates for all goods landed, shipped, or stored.

The further facts of the case appear in the report below (59 L.T. Rep. N. S. 872; 6 Asp. Mar. Law Cas. 357; 13 P. Div. 157).

Finlay, Q.C. and *Hollams*, for the defendants, in support of the appeal.—The learned judge was wrong in fixing the defendants with liability. No case has yet gone so far as to decide that parties are liable for the condition of a river over which they have no control:

Reg. v. *Williams*, 51 L. T. Rep. N. S. 546; 9 App. Cas. 418;
Mersey Docks Trustees v. *Gibbs*, 14 L. T. Rep. N. S. 677; L. Rep. 1 H. of L. Cas 93;
Heaven v. *Pender*, 49 L. T. Rep. N. S. 357; 11 Q. B. Div. 503;

It was known to the shipowners that the soil of the Thames is vested in the conservators. It was, therefore, as much within the plaintiff's

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

power as within the defendants' to inform themselves of the condition of the bed of the river. The defendants were in fact ignorant of the danger. The utmost extent of their obligation to the plaintiffs would be to warn them of dangers within their knowledge.

Barnes, Q.C. and *Hurst* (with them *Robson*) for the plaintiffs.—There was an implied representation that the berth and bed of the river were fit for the purpose for which they were to be used. It was within the knowledge of both parties that the ship would take the ground at low water. The defendants had the means of informing themselves of the condition of the bed of the river, and it was their duty to ascertain whether it was safe or not. In the circumstances of the present case, shipowners have a right to expect that wharfingers have taken reasonable steps to ascertain the state of the bed of the river:

White v. *Phillips*, 33 L. J. 33, C. P.; 15 C. B. N. S. 245;
Curling v. *Wood*, 16 M. & W. 628;
Winch v. *Conservators of the Thames*, 31 L. T. Rep. N. S. 128; L. Rep. 9 C. P. 378;
Indermaur v. *Dames*, 14 L. T. Rep. N. S. 484; L. Rep. 1 C. P. 274.

Finlay, Q.C. in reply.

Lord Esher, M.R.—There can be no doubt that the two facts by themselves, of owning this jetty in the river and of there being an uneven bottom to the river in front of the jetty, impose no liability on the owner of the jetty with regard to the public in general. Of that there can be no doubt. The question is, what is the proper implication where the owners of the jetty are in the position in which these defendants are, and have made such a contract as has been made in this case? The question is, not what is their duty to the general public, but what is the implication from the contract into which they have entered with these plaintiffs—what is the contract which they have made with them? Now, I cannot doubt that what the defendants did was to make an agreement with the plaintiffs, to enable them to use their wharf by using the river which is adjacent to the front of the wharf. I agree with Butt, J. that it is most certain, and beyond doubt, that the use of the defendants' premises by vessels such as the *Moorcock* cannot be had without mooring the vessel alongside the jetty, and without her taking the ground at the jetty. They do not charge directly for the use of their wharf, but they cannot charge anybody anything until the *Moorcock* is moored to their jetty. I say they cannot earn anything for the use of the wharf until that happens, for this reason: they allow a vessel to be moored alongside their jetty in order that it may be used for loading and unloading goods, and they get paid in that way for the use of their wharf. Therefore they earn nothing without persuading a vessel to moor alongside the jetty. That is a necessary and immediate step to their earning profit by the use of the wharf.

Now, a vessel like the *Moorcock* cannot be moored to this wharf without being obliged to take the ground at low water on every tide. That is a necessary part of the transaction. Therefore, we have got this: that, in order that the defendants' wharf may be used so that they may earn profit, a vessel like the *Moorcock* must be moored to their wharf under such circumstances that she must take the ground at every tide. Now, the wharfingers are always on the spot, and if anything happens in front of their wharf they know or have the means of finding out. They in making such agreements as they made with the *Moorcock* may be doing so with foreign vessels, or with British vessels coming from abroad or other parts of the United Kingdom. A ship's officers have no reasonable means of discovering what the bottom of the river is until they are moored at the wharf and their ship has taken the ground. Now, what is the reasonable implication from such a contract for such a purpose among people of this class? In my opinion, honest business could not be carried on between people in the position of the plaintiffs and the defendants unless you imply that the defendants have undertaken some duty to the plaintiffs with regard to the bottom of the river at this place. If that is so, what is the least onerous duty one can imply? In this case we are not bound to say what is the whole of the duty. All we have to say is, whether there is not at least the duty which the learned judge has held does lie on the defendants. That the defendants can find out the state of the bottom of the river close to the front of their wharf without the smallest difficulty is perfectly obvious to anybody who understands anything about rivers at all. For instance, they can sound the bottom with a pole, or ascertain its condition in a variety of other ways which are perfectly easy. It is the business of persons conversant with rivers, especially when they are on the spot at every tide, to find out the state of the bottom in some way or another. Whether they can see the actual bottom of the river or not at low water is not, to my mind, the least material. Supposing at low water there were two feet of water always over the mud; it makes no difference that they cannot see the bottom. They can feel for the bottom by sounding, or in some similar way, and find out its condition with as much accuracy—nay, with a great deal more accuracy—than if they could see it with their own eyes. When it is so perfectly easy to do this, and when, in order to earn money, business requires a ship to be brought alongside their wharf, in my opinion honesty of business requires, and we are bound to imply it, that the wharfingers have undertaken to see that the bottom of the river is reasonably fit for the purpose, or that they ought, at all events, take reasonable care to find out whether the bottom of the river is reasonably fit for the purpose for which they agree that their jetty should be used; and then, if not, either procure it to be made reasonably fit for the purpose, or inform the persons with whom they have contracted that it is not so. That, I think, is the least that can be implied as the defendants' duty, and that is what I understand the learned judge has implied. He then goes on to say that, as a matter of fact, they did not take such reasonable measures in this case. I myself have not the least doubt in making this implication as part of the contract. I therefore have no doubt that the defendants broke the contract, and they are therefore liable to the plaintiffs for the injury which the vessel sustained.

Bowen, L.J.—The defendants in this case are the owners of a wharf and jetty attached in the river

Thames, and the only use to which it is put is holding out to ships facilities for loading and unloading alongside of it. There is only one berth where the ships can lie, and that is close alongside the jetty. The question which arises in this case is whether, when a contract is made to let the use of this jetty to a ship which can only use it, as is known to both parties, by her taking the ground, there is any implied warranty on the part of the wharfingers, and if so what is the extent of that warranty. Now an implied warranty, or as it is called a covenant in law, as distinguished from an express contract or express warranty, really is in every instance founded on the presumed intention of the parties and upon reason. It is the implication which the law draws from what must obviously have been the intention of the parties, an implication which the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either of the parties. I believe that if one were to take all the instances—which are many—of implied warranties and covenants in law which occur in the earlier cases which deal with real property, passing through the instances which relate to the warranties of title and of quality, and the cases of executory contracts of sale and other classes of implied warranties like the implied authority of an agent to make contracts, it will be seen that in all these cases the law is raising an implication from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended it shou ld have. Now, if that is so, the reasonable implication which the law draws must differ according to the circumstances of the various transactions, and in business transactions what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended by both parties; not to impose on one side all the perils of the transaction, or to emancipate one side from all the burdens, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for.

Now, what did each party in the present case know? because, if we are examining into their presumed intention, we must examine into their minds as to what the transaction was. Both parties knew that the jetty was let for the purpose of profit, and knew that it could only be used by the ship taking the ground and lying on the ground. They must have known that it was by grounding that she would use the jetty. They must have known, both of them, that unless the ground was safe the ship would be simply buying an opportunity of danger and buying no convenince at all, and that all consideration would fail unless the ground was safe. In fact, the business of the jetty could not be carried on unless—I do not say the ground was safe—it was supposed to be safe. Now, the master and crew of the ship could know nothing, whereas the defendants or their servants might, by exercising reasonable care, know everything. The owners of the jetty or their servants were on the spot at high and low tide, morning and evening. They must know what had happened to the ships that had used the jetty before, and with the slightest trouble they could satisfy themselves in case of doubt as to whether the berth was or not safe. The ship's officers, on the other hand, had no means of verifying the state of the berth, because, for aught I know, it might be occupied by another ship at the time the *Moorcock* got there. Now, the question is, how much of the peril or the safety of this berth is it necessary to assume in order to get the minimum of efficacy to the business consideration of the transaction which the ship consented to bear, and which the defendants took upon themselves. Supposing that the berth had been actually under the control of the defendants, they could, of course, have repaired it and made it fit for the purpose of loading and unloading. It seems to me that the case of *Mersey Docks Trustees* v. *Gibbs* (*ubi sup.*) shows that those who own a jetty, who take money for its use, and who have under their control the *locus in quo*, are bound to take all reasonable care to prevent danger to those using the jetty, either to make the berth good or else not to invite ships to go to the jetty, *i.e.* either to make it safe or to advise ships not to go there. But there is a distinction between that case and the present. The berth here was not under the actual control of the defendants. The berth is in the bed of the river, and it may be said that those owning the jetty have no duty cast upon them by statute or common law to repair the bed of the river, and that they have no power to interfere with it except with the licence of the conservators. Now it does make a difference where the entire control of the *locus in quo*, be it canal, or dock or river, is in the persons taking toll for the user, and therefore we must modify, to a certain extent, our view of the necessary implication which the law would make in the present case as to the duties of the defendants. We must do so for the reason laid down by Holt, C.J. in his famous judgment in *Coggs* v. *Bernard* (2 Ld. Raym. 909) where he says "it would be unreasonable to charge persons with a trust further than the nature of the thing puts it in their power to perform." Applying that modification, which is a reasonable modification, to this case, it may well be said that the law will not imply that the defendants, who had not control of the place, ought to have taken reasonable care to make the berth good, but it does not follow that they are relieved from all responsibility—a responsibility which depends not merely on the control of the place, which is one element as to which the law implies a duty, but on other circumstances. The defendants are on the spot. They must know the jetty cannot be safely used unless reasonable care is taken. No one can tell whether reasonable safety has been secured except themselves, and I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see that the berth, which is the essential part of the use of the jetty, is safe, and if it is not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so. Remember that this is a business transaction as to which the parties may at any moment make any bargain they please. We have to consider that. The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the covenant which the law ought to imply. So far as I am con-

cerned, I do not wish it to be understood that I at all consider this is a case of a duty on the part of the defendants to see that the access to the jetty is kept clear. The difference between access to the jetty and the use of the jetty seems to me, as Mr. Finlay argued, only a question of degree, but when you are dealing with implications which the law prescribes, you cannot afford to neglect questions of degree, and it is just that difference of degree which brings one case on the line and prevents another from approaching it. I confess that on the broad view of this case I think that business could not be carried on unless there was an implication of the nature I have indicated, at all events, in a case where the jetty is to be used as it was in the present case. Therefore, although this case is a novel one, I do not feel any difficulty in drawing the inference that it comes within the line, and that the defendants are liable.

Fry, L.J.—I have come to the same conclusion, and I shall add nothing except this; that the facts that the conservators were under no obligation to remove the saddleback or shingle, or stone which did the damage, and that the defendants had the means of examining the bottom of the river and neglected to do so, are considerations which weigh much with me in coming to the conclusion that there was the implication which the learned judge has relied on.

Lord Esher, M.R.—We ought to have said that we do not think any of the cases cited are authorities binding on the present one. We have gone a step beyond any of them.

Appeal dismissed.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

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

Saturday, March 2, 1889.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

The Vindobala. *(a)*

Co-ownership action — Charter-party—Managing owner—Authority—Honorary engagements.

The managing owner of the ship V., with the authority of his co-owners, entered into negotiations abroad with the view of chartering the ship. These negotiations were carried on by an agent abroad. On the 17th July 1884 a form of charter, signed by the managing owner, was offered to the proposed charterers. They objected to certain provisions in it, to which objections the agent, with the managing owner's authority, assented. On the 19th July the charterers signed the charter, having previously introduced into it certain further alterations which had never been suggested to the managing owner's agent. On the same day certain of the co-owners gave notice to the managing owner that they refused to be bound by any charter. The managing owner, considering himself bound to sign the charter-party, signed it on the 22nd July. The execution of the charter-party was prevented by the arrest of the V. by the dissentient owners, and damages resulted therefrom.

Held (reversing the decision of Butt J.), in a co-ownership action, that there was no binding contract until the managing owner signed the charter on the 22nd July, and that up to the signing of the same any of the owners could revoke the managing owner's authority, and that, as the dissenting owners had revoked their authority on the 19th July, they were not bound by the charter.

The mere fact of an agent being bound in honour to complete a contract which he is negotiating for his principal, where he, the agent, is under no legal liability if he refuses to complete, does not prevent the principal withdrawing his authority any time before the agreement is completed.

Per Lord Esher, M.R.: The managing owner of a ship is the agent of each co-owner separately, and each co-owner may retract his authority to the managing owner without consulting the other co-owners.

The Talca (42 *L. T. Rep. N. S.* 61; 4 *Asp. Mar. Law Cas.* 226; 5 *P. Div.* 169) *doubted.*

This was an appeal from a decision of Butt, J. by certain of the defendants (known as the Bell defendants) in an action instituted by the executors of one Robert Dickinson, deceased, to recover contributions from all the defendants as part owners of the s.s. *Vindobala*, in respect of expenses incurred by Dickinson and the plaintiffs as managing owners in relation to the management of the vessel.

The facts were presented to the court in the form of a special case, and on the 6th Aug. 1886 the claim was referred to the registrar and merchants to report on the accounts upon the facts stated in the special case.

The registrar accordingly investigated the accounts, and made a report to which both plaintiffs and defendants objected, and they applied to the court to vary the same. At the hearing of the petitions in objection to the report, Butt, J. confirmed the report: (58 L. T. Rep. N. S. 353; L. Rep. 13 P. Div. 42; 6 Asp. Mar. Law Cas. 250.) *(a)*

The facts, so far as are material to the appeal, were as follows:—

For some time prior to the 11th July 1884, Robert Dickinson, one of the plaintiffs, namely, E. J. Walker, and the defendants were the registered owners of the s.s. *Vindobala*. Robert Dickinson had been appointed managing owner of the ship at a meeting of the owners, held on the 18th April 1882, and continued to be so till his death in Sept. 1884. Shortly after the death of Robert Dickinson, his acting executors, the plaintiffs, became the registered owners of his shares.

As it was expected in July 1884 that the *Vindobala* would shortly arrive in Rotterdam, negotiations began on the 11th July in reference to chartering her by merchants in Amsterdam. On that day Messrs. Brown, Son, and Co., the London agents of Messrs. Wilson and Armstrong, who were Dickinson's brokers at Newcastle, wrote to Wilson and Armstrong suggesting that they, Brown, Son, and Co., should get a charter for the *Vindobala*, to which proposal Wilson and Armstrong on

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law

(a) In the report of the proceedings in the court below it is stated that the charter was signed by the managing owner before it was signed by the charterer. This is incorrect, as appears from the present report. The inaccuracy was due to the fact that it was so stated by Butt, J. in his judgment.—Ed.

the 12th July assented by letter and telegram. Accordingly, on the same day, Brown, Son, and Co. wrote to one Heeres, of Amsterdam, a letter, of which the following is a copy, omitting formal parts:

We have your favour of yesterday, and confirm our wire of date offering the s.s. *Vindobala*, 1134 nett 19ft. draught; Riga, Amsterdam, Westzaan, or Zaandarm, and trust to hear on Monday first thing that the business is in order, as owner will then be in town. In any case let us know how matters stand.

In this letter was inclosed a charter-party for the *Vindobala* signed by Brown, Son, and Co. as agents, and dated July 12th.

On the same day, the 12th July, Brown, Son, and Co. wrote to Wilson and Armstrong, telling them of the negotiations with Heeres, and inclosing a copy of the charter in the same terms as that sent to Heeres, and telling them that this was the charter on which they had offered the ship to Heeres. On the 14th July, Brown, Son, and Co. wrote to Wilson and Armstrong a letter, of which the following is a copy, omitting formal and other parts not relating to the ship:

Heeres wired to-day; "*Vindobala* fixed particulars letter." We are afraid this means some alterations, but trust they are not important. However, in deciding, it is necessary to take into account Baltic freight; 19*s.* has been done from Cronstadt, and 20*s.* is now rate quoted. So it will be necessary to take position of affairs into consideration before declining the Riga business, because terms are not just such as wanted.

On the same day, the 14th July, Brown, Son, and Co. wrote to Heeres a letter of which the following, omitting formal parts, is a copy:

We note your telegram announcing steamer fixed, particulars later, from which we presume there are some alterations, but trust they are not important, otherwise owner will not confirm we fear.

On the same day, the 14th July, Heeres wrote to Brown, Son, and Co. acknowledging receipt of letter of the 12th inclosing charter, and saying that the proposed charterer declined to guarantee the ship free of lighterage at Riga, and asking that his (Heeres') brokerage should be increased.

Brown, Son, and Co. subsequently assented to the brokerage being increased, but instructed Heeres to if possible come to satisfactory terms about the lighterage, and ultimately, on the 17th, telegraphed to Heeres as follows: "*Vindobala's* charter confirmed; insert if possible, proceed Riga or usual loading-place."

On the 18th July Brown, Son, and Co. wrote to Wilson and Armstrong a letter, saying that they had seen Mr. Wilson (a clerk in Dickinson's office), and had explained the Riga fixture to him, but that as yet they had not received charter copies from abroad. On the same day Heeres wrote to Brown, Son, and Co. saying he had not got the charter signed yet, as the charterer was out of town.

On the 19th July certain of the defendants, called the Bell defendants, gave notice through their solicitors to Dickinson that they declined to continue sailing the *Vindobala*, or to be in any way bound by any new charter-party, and asked for a bond for the safe return of the vessel.

On the 20th July Heeres wrote to Brown, Son, and Co. inclosing a signed charter-party, which was dated the 17th July.

On the 21st July Brown, Son, and Co. wrote to Heeres, pointing out, as was the fact, that the charter-party signed by the charterer differed from the original form of charter in the following respects, viz., that whereas in the original form the ship was to be cleared free of commission, and the owner and master to have an absolute right of lien on the cargo for all freight, dead freight, and demurrage, and all other charges whatsoever, these provisions were not in the charter-party of the 17th. It also appeared that to the excepted peril clause the words "strikes of workmen, or any other unavoidable accidents over which the charterers have no control," were added to the charter of the 17th. However, notwithstanding these alterations, Dickinson signed the charter-party on the 22nd.

By the terms of this charter-party the *Vindobala* was to proceed from Rotterdam to the Baltic, and there load a cargo of timber. Accordingly Dickinson, with the object of preventing the outward voyage to the Baltic being unprofitable, entered into a charter-party, dated the 28th July, for the carriage of coals from the Tyne to the Baltic.

On the 3rd Aug. the *Vindobala* arrived in the Tyne from Rotterdam, and commenced to load a cargo of coals under the charter-party of July 28.

On the 5th Aug. the Bell defendants issued a writ against the *Vindobala* in an action of restraint, and she was arrested on the same day, when about to put to sea. On the 9th Sept. Dickinson died.

On the 18th Sept. the charter-party of the 17th July was cancelled by agreement between the parties.

On the 21st Oct. E. J. Walker, one of the plaintiffs, was appointed managing owner.

On the 26th Oct. the coals on board the *Vindobala* took fire, and had to be discharged, and in respect of this the shipowners had to pay damages.

On the 19th Dec. bail was given in the action of restraint, when the ship was released.

In addition to the Bell defendants were other defendants, known as the Craven defendants, who objected to the registrar's report for reasons which appear in the report in the court below, but who were not appealing from the decision of Butt, J.

The plaintiffs claimed contributions from the owners in respect of the coal charter of the 28th July, and the expenses of the ship while under arrest.

Butt, J. held that the Bell defendants were bound by the charters of the 17th and 28th July, and that they were liable for all expenses consequent on the arrest, and that the damage to the coal was to be borne rateably by all the co-owners.

Barnes, Q.C. (with him *Balloch*) for the Bell defendants, in support of the appeal.—The appellants gave notice to the managing owner that they would not be bound by any new charter before the charter of the 17th July was concluded. They were therefore not bound by that charter, and are not liable to any losses incidental to it. The authority of the managing owner's agent was either to conclude a charter in terms similar to the original form of charter of the 12th, or, in the event of any substantial alterations being proposed by the charter, to refer them to the managing owner for acceptance. Heeres was

never bound in honour to conclude a charter containing the terms of the second charter, and even if he was, the court will not take notice of honorary engagements:

Warwick v. *Slade*, 3 Camp. 127;
Heyman v. *Neale*, 2 Camp. 337;
Farmer v. *Robinson*, 2 Camp. 338, n.

In the event of the managing owner instructing his agent not to conclude the charter, the agent was under no legal liability to the charterer for breaking off the negotiations:

Perry v. *Barnett*, 53 L. T. Rep. N. S. 585; 15 Q. B. Div. 388;
Seymour v. *Bridge*, 14 Q. B. Div. 460;
Read v. *Anderson*, 51 L. T. Rep. N. S. 55; 13 Q. B. Div. 779.

Moreover, the Bell defendants were under the circumstances entitled to arrest the *Vindobala*, even assuming they were bound by the charter:

The Talca, 42 L. T. Rep. N. S. 61; 5 P. Div. 169; 4 Asp. Mar. Law Cas. 226;
The England, 56 L. T. Rep. N. S. 896; 12 P. Div. 32; 6 Asp. Mar. Law Cas. 140;
The Apollo, 1 Hagg. 306.

John Mansfield, for the plaintiffs, *contra*.—The charter of the 17th July was in substance concluded before the Bell defendants gave notice of objection. The precise form of charter had not then been finally agreed upon, but the ship was in fact fixed for a certain voyage at a certain rate of freight. These negotiations had gone so far that each co-owner had impliedly contracted that he would not then withdraw his authority, when to do so would be not only a breach of honour, but also a violation of the ordinary principles of business:

Cory v. *Patton*, 30 L. T. Rep. N. S. 758: 26 L. T. Rep. N. S. 161; L. Rep. 9 Q. B. 577; L. Rep. 7 Q. B. 309;
Ionides v. *Pender*, 30 L. T. Rep. N. S. 547; L. Rep. 9 Q. B. 531.

The arrest of the *Vindobala* by the Bell defendants cannot be supported in this court on the authority of *The Talca* (*ubi sup.*). [Lord Esher, M.R.—I do not know whether it will be necessary to consider the question of arrest, but I am far from saying that this court will necessarily concur in that decision.]

Joseph Walton for the Craven defendants.—The Bell defendants were not in a position to retract their authority. Co-owners constitute a partnership at will, and individual co-owners cannot by themselves, without consulting the interests of other co-owners, withdraw their authority to negotiations which have been entered upon on their behalf.

Barnes, Q.C. in reply.

Lord Esher, M.R.—In this case the plaintiff, the managing owner of the *Vindobala*, acting for himself and other co-owners, sues two sets of defendants, also co-owners, for contributions. One is a contribution in respect of damages which the managing owner, acting on behalf of those for whom he was authorised to act, was bound to pay to certain coal owners who had shipped coals on board the ship. The second is for a contribution to the expenses attaching to the ship while she was lying at Newcastle under arrest in the Admiralty Court. The defendants' defence is that they were not bound by any charter-party under which the coals were put on board the ship, and their defence with regard to the contribution to the expenses of the ship while she was under arrest is that they rightfully arrested her, and that therefore they cannot be bound to pay a contribution towards the expenses occasioned by that arrest. It seems clear to me that neither set of defendants can be made liable in respect of damages to the coal-shippers under the charter-party unless they were bound by that charter-party. Therefore, the question is whether they were bound by that charter-party. Again, it cannot be said that the arrest they made was a wrongful one unless they were bound by the charter under which the ship was going to sea. Therefore both points depend upon this, viz., whether they were bound by a charter-party under which the coals were shipped, and under which the ship was about to go to sea. The coals were shipped under a subsidiary charter, which the shipowners were entitled to enter into by the terms of the charter-party made with the Amsterdam charterer. By that charter the ship was to take out coals on the outward voyage; she was to proceed from Newcastle to Riga with coals, and then under the other charter ship a cargo of timber there and bring it home. It seems to me to follow from that that the coals, although not shipped under the Amsterdam charter-party, were shipped as between the shipper of the coals and the shipowners, under a subsidiary charter, which was the outcome of the Amsterdam charter. Therefore, the Bell defendants cannot be made liable unless they were parties to the Amsterdam charter. If they were not they certainly were not parties to the subsidiary charter-party. It has been suggested that there were two contracts of charter-party in this case; that there was one on the 17th July binding the Bell defendants, and afterwards another on the 22nd under which the ship sailed. It seems to me, however, impossible and absurd to suppose that there were two charter-parties with regard to the same voyage to go to the same place for the same freight. The question is whether they were bound by that charter-party under which the ship was going to sail, and, in point of fact, afterwards did sail. That is a charter-party which was signed by the managing owner on the 22nd July. Now, what would make them liable under that charter-party? I think that if persons acting under their authority had made a binding agreement with the charterer in Amsterdam, that the managing owner, on their behalf, would sign a formal charter upon terms already agreed to before they retracted, then they could not have retracted their authority, and would have been bound by the formal charter which was signed after they attempted or pretended to retract their authority.

That brings us to this question, was there a contract fixing the terms of the charter-party agreed to by the agent who was acting for the managing owner, that is, was there a contract binding as to the terms which the agent or the managing owner would sign. Now, when we look, so far as we can upon the information before us, into what took place at Amsterdam, the question comes to be this. Did the Amsterdam broker, who was acting for the managing owner, come to a binding contract with the charterer as to the terms which are in the charter-party which was eventually signed; or did he only agree to the terms in that charter-

party, subject to their being confirmed by the managing owner? Which did he do? Did he agree to any terms with the charterer except subject to their being approved by the managing owner? If he did, had he any authority to bind the managing owner to terms without first referring them to the managing owner. I am of opinion that he did not agree to any terms that were binding, and if he did he exceeded his authority; when you look closely into the correspondence it seems to me to show what he really meant to do. He had the charter-party dated the 12th July sent out to him signed by the managing owner, who gave instructions which, to my mind, come to this, that if the proposed charterer in Amsterdam would agree to those terms, he was to sign the charter-party. The managing owner practically said this: "I have signed it, do you the charterer sign it, and then it will bind both," and if the charterer had agreed to that and signed it, the transaction would have been perfectly clear. But it is obvious that the proposed charterer refused to sign the contract in its original form. Now, it is suggested that he might perfectly well have signed it, subject to this, that he would still ask the shipowners to add a term to it. But he did not do that, and it is clear, to my mind, that he refused to agree to the terms of that charter-party and insisted upon other terms being put into it. Now, did the managing owner's broker at Amsterdam ever come to any final agreement as to what should be the terms of the charter-party to which they would both agree? It seems to me that they never did so agree, and that the broker at Amsterdam, acting for the shipowner, did not undertake to agree to the final terms. Finding that the charterer insisted on more terms than were in the charter of the 12th, he tried to come to an arrangement about them, and throughout the negotiations the charterer kept on suggesting fresh terms, as undoubtedly he had a right to do until there was a binding agreement. It seems to me to be pretty clear that the broker at Amsterdam took the charter-party which was signed by the managing owner as a proposed form of charter to which he (the broker) was to ask the charterer to assent. He takes it as a proposal for a charter, and accordingly writes home, after negotiations have been pending as to the form of the charter, words to this effect: "Do if you possibly can agree to these terms, for he is a calumnious man, and if you do not take the terms he will go off." The word "calumnious" no doubt means "contentious." It is clear, to my mind, that he did not assume to have bound the managing owner. But assume he did, then I think he had no authority for so doing. It seems to me that the managing owner's position is this: "I send you the charter-party of the 12th in this form. If he will take that, let him sign it. If not, negotiate terms." But the power of negotiating for terms did not give him authority to bind the managing owner. In the ordinary course of business there is easy communication between Amsterdam and London. The managing owner practically says this: "If he wants other terms than those, say what he wants, and I will see whether I accept them." It is not like the case of a charter which is being negotiated by an agent in a foreign port, because there the agent invariably has authority to sign the charter-party. The ordinary course of business would be in such a case for the agent to sign. It is perfectly obvious here that the broker in Amsterdam was not to sign so as to bind the managing owner, and that the charter was to be sent back to the managing owner to be signed. That makes it almost conclusive that all the authority the Amsterdam broker had was to negotiate terms, and then refer them to the managing owner for consideration and adoption, unless of course the charterer had agreed to sign the original form of charter.

Now, did the charter-party which was eventually entered into bind the Bell defendants, or had they cancelled the authority they had previously given? It is suggested by Mr. Walton that they could not do that. He says these co-owners were partners, and they could not cancel their authority without the consent, as I understand him, of the other co-owners. But then it is put to him: "How long do you say they are partners? Do you only rely on the fact that they had employed a managing owner on the terms that he should be employed for a year? How can you say that that is sufficient to make these men partners?" He talks of the most astounding partnership that I have ever heard of, viz., that these people are partners at will. What does he mean by that? Why this: that any one of them may withdraw from it at any moment. I am certain that, even if it were possible, there never was such a partnership, and that such an idea never crossed the brains of these people. Then Mr. Walton argued that as co-owners they had no right at some period, which he was not able to fix, to retract their authority. Now, the ship's husband is generally one of the co-owners, and what is his relation to his brother co-owners? Nothing more or less than this: that he is the agent of each of them who has authorised him to act. He is the agent of each of them individually. Each co-owner, although he is a co-owner in the property of the ship, has a perfectly independent property. He is as independent as any stranger could be of the others. Therefore you must get authority from him to the person who is said to be his agent. He is not to consult his other co-owners whether he will make a person his agent, but he has the right to make the ship's husband his agent. What he can do in regard to the employment of the ship is another thing. I suppose the majority may insist on the ship being employed in a particular way, subject to this: that if a minority of one does not choose to have it employed in that way, he can, by the Admiralty law, object to the ship sailing unless they indemnify him. Therefore the question must be, whether the Bell defendants retracted their authority. If there was no binding charter-party which bound them before the time they did retract, they had a perfect liberty to retract, and I think they did so before a binding contract was made.

Then it is put that they did not retract until after the managing owner or his agent had bound himself in honour to the charterer to get this charter finally signed. First of all, I think there was no binding in honour or in any other way. The charterer had had a charter-party offered to him. He had declined it, and made a counter-offer, and there is nothing to show that the agent either bound himself or the managing owner in

honour to accept the terms which the charterer was making by way of counter-offer. But even if he was bound in honour, that is not a matter to be recognised in a court of law, and I quite agree with Lord Ellenborough in the case which has been cited, where he says: "I cannot take notice of honorary engagements." A court of law is not a court of morals, and all you can say of a person who is bound in honour is that there is nothing to bind him in a court of law. The Stock Exchange case and the betting case are not in point. They are explained on this ground: that the persons had an authority from the principal to bind themselves by an honorary engagement. In other words, there was a contract between the principal and the agent that if the agent made an honorary engagement the principal would indemnify him if he kept the honorary engagement. But they are not authority in the present case, even if there was an honorary obligation, as it is called, by the managing owner or his agent and the charterer to get this charter-party signed. I put it distinctly, that even if there was an honorary obligation it is a thing which cannot be noticed in a court of law, and has therefore no binding validity. Now, with regard to the Craven defendants, are they bound by this charter-party? They had given the managing owner authority to make charter-parties, and unless they retracted that authority he was entitled to make any reasonable charter-party on their behalf. It is not suggested that this charter-party which was made is unreasonable. Therefore the managing owner entered into this charter under authority from them. Then it was urged that the Bell defendants were bound to give notice of the cancellation of their authority to all the co-owners. I know of no such law. They are perfectly independent of their co-owners, and their authority is wholly an independent one. But, even if there was anything in the point, it is obvious that the Craven defendants knew before this charter-party was signed that the Bell defendants were objecting to it. Therefore the point does not arise. On the whole, after hearing this complicated case so laboriously and so ably argued, I have come to the conclusion that we cannot agree with the decision of the learned judge, and think that this appeal must be allowed. I have communicated with the learned judge, and he tells me that he thought the agent was bound by an honourable obligation. I am of opinion that he did not bind himself in this way, and assuming that he did, I am equally clear that the law cannot, under such circumstances as these, take notice of honorary obligations.

Bowen, L.J.—In this case the real question upon which the rights of the parties depend seems to be whether, on the 19th July, the revocation which was intimated on that day by the Bell defendants to the managing owner was in time or not. What was the effect in law of that revocation? The difficulty of the case which I acknowledge seems to me to be a difficulty of fact and not of law. As men of business and honour, the parties I suppose did not wish to put each other to the expense of commissions and taking evidence abroad; and they have left us to gather the facts from the correspondence, which, to make matters worse, is partly that of a man who understands English imperfectly. Therefore, we have to do the best we can to arrive at the true facts upon these materials. We begin by considering what is the extent of the authority of Heeres, because that lies at the root of the whole matter. I cannot but think that the true authority is that conferred in the first instance by the letter and charter-party of the 12th July. We must forget the previous telegram. We have not got it, and we have no materials for knowing the way in which Heeres would understand it. We must therefore go to the letter of the 12th July which contained the charter. It seems to me that the managing owner by that letter conferred authority on Heeres to conclude an arrangement if he could obtain a charter in conformity with the charter which he sent out, and authorised him if he could not to negotiate for any other terms he might think desirable. Such was the original authority of Heeres. What did he do? His account of the negotiations is this: It appears that there was an objection taken as to two points in the original form of charter, and that on the 17th July Heeres received a telegram from Brown, Son and Co., saying "*Vindobala* charter confirmed" subject to these two alterations. We have been asked by Mr. Mansfield and by Mr. Walton to hold that on the 17th he did conclude a binding contract with the charterers to that effect. There are two difficulties. The first is, that it is not clear that upon the 17th the charterer bound himself to that extent. It is equally consistent with the correspondence that when the telegram was received from England he was still in the position of a person who could withdraw. I doubt very much whether there was anything at all on the 17th which bound the charterer. There was, it seems to me, at the most, an authority to Heeres to conclude if he could on the terms submitted on that date, and authority to offer fresh terms and negotiate if those terms were not accepted. That seems to me to show that there was no binding contract on that date. Heeres does not say so, and he seems to assume that if the altered terms were not sent to England there was nothing to bind the charterer at all. On that ground it seems to me that, if there was no binding contract on the 17th, then the binding contract was signed on the 22nd. That came to England as a fresh offer from the charterer, which was to be accepted or rejected, and before it could have been the revocation intervened. But I will assume, for the purpose of argument, that on the 17th there was something which bound the charterers, though I think it would be more guess work than a sound inference of fact. But even so, it still remains that Heeres signed the charter which was supposed to be drawn in conformity with the authority conferred on the 12th, but he got back from the charterer a different charter. What was his position? If he took the different charter, it seems to me that he waived the original obligation. He would take it in discharge of the obligation of the first charter dated the 12th July. But by the time the second charter dated the 17th July came to England to be accepted by the managing owner, and when the managing owner accepted it, thereby discharging the original obligation, it seems to me that it was too late. The charter-party which was accepted and on which the ship sailed, was the charter of the 22nd, and by that the case must stand. The truth is, that Heeres' authority breaks down. He had no authority to con-

clude the ultimate charter. He only had authority to negotiate another charter-party and refer it home for ratification and acceptance, and before it was accepted the revocation came.

Mr. Mansfield and Mr. Walton endeavoured to escape from the difficulty in this way. They said there was authority here by which Heeres had power to pledge himself in honour, and that if he was bound in honour it was too late afterwards for those who had intrusted him with that authority to back out of the transaction. In the first place, there seems to be no evidence at all of binding Heeres in honour. Further, I think it is contrary to notions of business that an agent employed to make a binding contract should have further authority to bind himself, not according to law but according to honour. In the betting case which has been alluded to it is clear that the agent was employed in transacting business outside the ordinary law, and outside the ordinary contracts which the law recognises. The suggestion that there was an implied contract here not to retract till the consent of the other co-owners was obtained also breaks down. Where is there any evidence in the case to justify the view that the Bell defendants had promised the managing owner that when he had once begun his negotiations they would not retract their authority? With regard to the Craven defendants, I take exactly the same view as Butt, J. did. On the whole, I think the appeal ought to be allowed.

Fry, L.J.—The main question is undoubtedly one of fact, and that question has been presented to us in a manner which renders it exceedingly difficult of solution. We have to infer it from the correspondence of Heeres, who writes English with considerable imperfection. The main question is, whether this contract was made before the Bell defendants retracted their authority. To my mind, the true result of the correspondence is that there was no concluded bargain between the parties until the signature of the charter-party on the 22nd. It is true that the terms of the charter-party of the 12th had been accepted with two exceptions, one on the question of brokerage, the other of lighterage, and that, on the 17th, Brown, Son, and Co. sent a telegram to Heeres, saying, "*Vindobala's* charter confirmed." But there is no evidence that that was communicated to the charterers, and the true inference of fact is that they never were bound till they signed the second charter. It is impossible to guess with certainty what took place, but, if I am to guess, I guess that the whole thing was open till the charter was signed. Then it is said that there was authority given by the Bell defendants to bind them in honour. I entirely agree that that is not the law. It is an extension of the law brought forward for the first time. I also entirely concur that there was in fact no honorary engagement. It may well have been that after what had taken place it would not have been honourable on the part of Heeres or the managing owner to withdraw the ship from the proposed charterers, if they had been willing to accept the terms of the charter-party of the 12th July; but if they, as in point of fact they did, insisted on new terms, there is nothing whatever that called on the managing owner to consider himself bound in honour. It has been argued that there was a partnership, but I confess that I cannot see any evidence of it. Considering how common co-ownership is in the law of England, the absence of any authority in favour of the contention is significant. For these and other reasons, I think that we are bound to allow this appeal.

Appeal allowed.

Solicitors for the plaintiffs, *Talbot* and *Tasker*, agents for *Haigh* and *Son*, Liverpool.

Solicitors for the Bell defendants, *Thos. Cooper* and *Co.*

Solicitors for the Craven defendants, *Hickin* and *Fox*

Monday, March 25, 1889.

(Before Lord Esher, M.R., Fry and Lopes, L.JJ., assisted by Nautical Assessors.)

The Tasmania. (*a*)

Collision—Sailing ships—Keeping course—Regulations for Preventing Collisions at Sea, arts. 14, 22, *and* 23.

Where one of two sailing ships whose duty it is to keep out of the way of the other causes risk of collision by a wrongful manœuvre, and persists in such manœuvre in such a way that the officer in charge of the other ship ought to see that unless he acts with his helm a collision will be inevitable, it is the duty of such officer, under art. 23 *of the Regulations for Preventing Collisions at Sea, to port or starboard as circumstances may require.*

The sailing ships C. and T. were approaching one another red light to red light. The C. was running free, the T. was close-hauled on the port tack. When the ships were about four ship's lengths from each other, the C. opened her green light about two points on the port bow of the T. and continued to keep it open. The T. kept her course till the last moment, when her helm was starboarded, but the vessels came into collision, the T. striking with her stem the starboard side of the C. The Court of Appeal was advised by its assessors that, at the time when the master of the T. ought to have seen that the C. was determined to cross his bows under a starboard helm, a collision was not inevitable. At the trial below the C. was found alone to blame. On appeal:

Held that the T. was also to blame for not altering her course by starboarding when her master saw, or ought to have seen, that the C. was persisting in crossing his bows.

This was an appeal by the plaintiffs in a collision action *in rem* from a decision of Butt, J., holding them alone to blame.

The collision occurred on the 8th March 1888 in the English Channel between the plaintiffs' ship *City of Corinth* and the defendants' ship *Tasmania*.

The *City of Corinth* was sunk and only two of her crew were saved, the chief officer and an able seaman, who were called on deck before the collision but after the *Tasmania* had come in sight.

The facts alleged on behalf of the plaintiffs were as follows:—Shortly before 7 p.m. on the 8th March the *City of Corinth*, a full-rigged ship of 1220 tons register, manned by a crew of thirty

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

hands all told, was in the English Channel eighteen to twenty miles S.S.W. of St. Catherine's Light, Isle of Wight, in the course of a voyage from Pisagua to Hamburg. The weather was misty and dark, with occasional thick showers of small rain. The wind was a fresh breeze from S.W. by S. magnetic. The *City of Corinth* was heading E. by N. magnetic under all plain sail, and was making about six knots an hour. Her regulation lights were duly exhibited and burning brightly, her foghorn was being sounded at intervals when necessary, and a good look-out was being kept. In these circumstances the second mate, who was in charge, reported to the captain, who was examining a chart in the cabin, a vessel which proved to be the *Tasmania* close to, showing a red light. Thereupon the captain of the *City of Corinth* and the chief mate went on deck, when the said red light was seen almost abeam on the *City of Corinth's* starboard side and from fifty to one hundred yards distant. At that time the helm of the *City of Corinth* had been put hard up and the cross-jack yard was being squared, and the chief mate let go the port main braces to help the vessel pay off. The *Tasmania*, however, continued to approach at a considerable speed, and came into collision with the *City of Corinth*, the stem of the former striking the latter about the main hatch just before the main-mast with such tremendous violence that the *City of Corinth* sank immediately.

The facts alleged by the defendants were as follows:—The *Tasmania* was a four-masted square-rigged ship of 2175 tons register, and at the time of the collision was on a voyage from London to San Francisco laden with a general cargo. Shortly after 7 p.m. on the 8th March the *Tasmania* was about twenty miles off St. Catherine's Point, bearing about N.-½-E. She was making about three to four knots. She was sailing close-hauled (steering full and by) on the port tack heading about N.W. by W.-½-W. magnetic, the wind being a strong breeze from about S.W. magnetic. 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 *Tasmania* observed the red light of a sailing vessel which proved to be the *City of Corinth* about two points on the port bow, and distant about a mile. The *Tasmania* was kept on her course, her cross-jack course was clewed up, and the *City of Corinth* was carefully watched. When the *City of Corinth* was about a quarter of a mile off and nearly on the same bearing the red light was shut in and the green light came into view. The master of the *Tasmania* then sent a man forward to see if his own lights were burning brightly, and then called the second mate on to the poop to ask his opinion as to what the *City of Corinth* meant to do. The green light continued open, and when about two ships' lengths off the helm of the *Tasmania* was put hard down and her topsail and main top-gallant halyards were let go, but the *City of Corinth* came on, and with her starboard side about amidships struck the jibboom and stem of the *Tasmania*.

Butt, J. accepted the story told by the defendants and disbelieved the story of the plaintiffs. He found that the *City of Corinth* was running free, and that the *Tasmania* was close-hauled, and held the *City of Corinth* alone to blame on the ground that the vessels were approaching red light to red light, and that the collision was caused by the *City of Corinth* starboarding across the bows of the *Tasmania*.

The only material part of the judgment, so far as the appeal is concerned, was as follows: "The result is, that we find that the *Tasmania* was close-hauled at the time of the collision, that practically she had not deviated from the heading which she held at the outset, and that therefore she is not to blame. The real cause of the collision is, that the *City of Corinth* failed to keep out of the way as required by the regulations. I therefore pronounce the *City of Corinth* alone to blame."

The following Regulations for Preventing Collisions at Sea are material to the decision:

Art. 14. When two sailing ships are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz.: (*a*) A ship which is running free shall keep out of the way of a ship which is close-hauled.

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 circumstances which may render a departure from the above rules necessary in order avoid immediate danger.

Sir *Richard Webster*, Q.C. (A.-G.), *C. Hall*, Q.C., Sir *Walter Phillimore*, and *Pyke*, for the plaintiffs, in support of the appeal.—The *Tasmania* was solely to blame. Even assuming the *City of Corinth* to blame, the *Tasmania* is also to blame. When her master saw that the *City of Corinth* was persisting in crossing his bows, he ought to have acted with his helm. Had he done so at an early period the collision would have been avoided. There were special circumstances within the meaning of art. 23 requiring him to depart from art. 22.

Barnes, Q.C., *Raikes*, and *A. Russell*, for the defendants, *contra*.—It was the duty of the *Tasmania* to keep her course, as she in fact did until the collision was inevitable. To hold her to blame would be to throw upon her the duty of keeping out of the way of the other vessel. The other vessel may at any moment counteract her wrong manœuvre and so avoid the close-hauled ship, provided she keeps her course.

Lord Esher, M.R.—Whilst I agree that it was a misfortune for the *City of Corinth* that all her crew except two should be drowned, that is no reason why we should imagine things were or were not, simply because there are no witnesses to prove what really occurred. But, upon the facts before the learned judge, it is impossible to say that the *City of Corinth* was not in the wrong. I think it is clear that for some reason or other she put her helm hard a-starboard in order to cross the bows of the *Tasmania*. Now comes this consideration. As long as there was any doubt about what the *City of Corinth* was doing, the *Tasmania* was bound to keep her course. Therefore it is quite true to say that, if those on the *Tasmania* had seen the other vessel's green light under such circumstances that her master would have a right to suppose that it was a mere accident and that the other vessel would luff back, he ought still to have kept his course.

But the question is, whether what was done was not sufficient to show the master of the *Tasmania* that the opening of the green light was no acci-

dent, but to show to him as an officer of ordinary skill that the *City of Corinth* had made up her mind to go across the bows of the *Tasmania*, and was so showing her green light. The moment he ought to have seen that, that very moment he ought to have acted, because the manœuvre of the *City of Corinth* was putting the ships into such a position that it was no longer safe for him to obey the rule as to keeping his course. The moment he saw that the other ship had made up her mind to cross his bows at the distance the ships were then from each other, it must have been obvious to any captain of ordinary skill that it was wrong for him then to keep his course, and if he kept his course after the other ship had made up her mind to cross his bows he must increase the danger. We have inquired of the gentlemen who assist us, and they agree with the view I have taken myself, that the action of the *City of Corinth* was so determined and so clear that almost immediately after the captain of the *Tasmania* saw her green light he must have known, or ought to have known, that she had made up her mind to cross his bows at that distance, and therefore, almost immediately after he saw her green light, he ought to have acted. But did he act almost at once? It is useless to talk of seconds and minutes. The only satisfactory way to judge is to consider the account of what was in fact done, and not what is said about time and distance. What was done? The *Tasmania* was a long ship, and the lights were on the forecastle or on the edge of the forecastle. The captain was on the poop. What does he do? He sends a man forward the whole length of the ship to see whether the lights are burning or not. A more useless thing there could not be under the circumstances. He had seen the other vessel's lights, and must have seen from the way the green light was approaching him that she had determined to go ahead of him. It looks as if he was getting evidence to show that he was not in the wrong. It was mere waste of time. And then after that man had come back, and the other vessel is still coming round under a hard-a-starboard helm, showing clearly what she was doing, he delays still. He calls the mate, who in his deposition says, like all the witnesses, that the collision was not the captain's fault and that it was inevitable; he calls the mate to stand by and see what the light of the other vessel is doing. In the opinion of those who assist us, he ought to have seen before for himself, and ought not to have wanted assistance. Therefore we have it, that he first sends a man forward, and then calls the mate up on the poop before he gives any order. Then I have no doubt he gave the order to put the helm hard down. I will not inquire as to whether the mate interfered with that order. I have a strong impression that he did, and that there was some hesitation in carrying it out. But it is not necessary to go into that. The captain ought not to have inquired about his lights and consulted the mate as he did. If he had preserved his his presence of mind he ought to have acted on his own view without consultation. Therefore he did not act as soon as he ought, under circumstances which showed him that he ought to have departed from the rule as to keeping his course sooner than he did. The only right thing for him to do was to put his helm hard down and come up into the wind. Therefore he acted too late. That puts him in the wrong, unless it can be shown that what he did wrong could not have any effect upon the collision. If the collision at the time he ought to have acted was inevitable, his not doing what he ought to have done would become of no consequence. But we are advised that at that time the collision was not inevitable. Under those circumstances the master of the *Tasmania* did not act with the presence of mind which it is the duty of a captain under difficult circumstances to possess. I therefore think that the *Tasmania* is to blame, and that the decision of the learned judge must be varied by holding both vessels to blame. I am sorry the learned judge in his judgment does not seem to have touched upon this part of the case. I do not know whether it was pressed upon him or not, but the rights of parties cannot be affected by that.

Fry, L.J.—I entirely agree that the *City of Corinth* is to blame. As to the *Tasmania*, did her master, or did he not, delay altering her course when departure from it was necessary to avoid collision? I feel very strongly what has been urged at the bar as to the importance of not allowing trifling circumstances to justify a departure from the rules; but in this case it appears to me that the master has himself stated circumstances which show that he ought to have altered his course earlier than he did. He has explained the series of transactions which took place after the green light was open to him. It appears to me that his mind ought to have been applied to what he ought to do on seeing that green light. Instead of so applying his mind, he seems to have applied it to obtain evidence. What happened was this. He sends a man to look at his own light, calls the mate, consults with him, and then does the right thing, but does it too late. That at any rate is the opinion of our assessors, and I cannot venture to differ from any conclusion which they arrive at.

Lopes, L.J. concurred.

Solicitors for the appellants, *Gellatly, Son.* and *Warton.*

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

Wednesday, March 27, 1889.

(Before Lord Esher, M.R., Fry and Lopes, L.JJ.)

The Monkseaton. (*a*)

Collision—Inevitable accident—Costs.

In cases of collision caused by inevitable accident costs, as a general rule, will follow the event, notwithstanding the former practice in the Admiralty Court to make no order as to costs in such cases.

This was an appeal from a decision of the President of the Admiralty Division finding the steamship *Monkseaton* to blame for a collision with the steamship *Spearman.*

The collision occurred in the river Tagus on the 9th Feb. 1888.

At the time of the collision the *Spearman* was lying at anchor off Lisbon laden with a general cargo. The *Monkseaton*, which had put into the Tagus to repair her propeller, had been moored to a buoy two or three lengths above the *Spearman.* She was moored by a chain, which, as well as the

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

buoy, were the property of the defendants' agents at Lisbon, but which had been laid down by them with the sanction and under the superintendence of the harbour authorities.

On the morning of the 9th Feb. the *Monkseaton* parted from her moorings, and drifted into collision with the *Spearman*, doing her the damage complained of.

The cause of the *Monkseaton* parting from her mooring was the breaking of a shackle in the chain attaching her to the buoy.

The defendants pleaded inevitable accident.

The President of the Admiralty Division pronounced the defendants liable, on the ground that the excessive shearing of the *Monkseaton* necessitated extra precaution, which had not been taken.

The Court of Appeal reversed this decision, holding that there were no circumstances requiring the defendants to take extra precaution, and that the collision was an inevitable accident, caused by a flaw in the shackle.

Myburgh, Q.C. (with him *L. Batten*), for the respondents, thereupon applied for costs.—Having regard to the facts of this case, the plaintiffs were justified in bringing the action, and therefore the defendants ought to pay their costs. At any rate, the plaintiffs ought not to be ordered to pay the defendants' costs. It is the rule in the Admiralty Court that, where a collision is the result of an inevitable accident, each party bears his own costs:

The Marpesia, 26 L. T. Rep. N. S. 333; L. Rep. 4 P. C. 212; 1 Asp. Mar. Law Cas. 261.

The Court of Appeal in *The Swansea* (4 P. Div. 115; 40 L. T. Rep. N. S. 442; 4 Asp. Mar. Law Cas. 115) seem to indicate a departure from the rule, but it was subsequently followed in *The Buckhurst* (6 P. Div. 152; 4 Asp. Mar. Law Cas. 484; 46 L. T. Rep. N. S. 108). Assuming the court should adopt the rule in force in other branches of the High Court, there are special circumstances in this case which entitle the plaintiffs to their costs.

Barnes, Q.C. (with him Sir *Walter Phillimore* and *Baden-Powell*), for the defendants, *contra*.

Lord ESHER, M.R.—We think that the Court of Appeal in the case of *The Swansea* (*ubi sup.*) laid down the right rule as to costs. There had been a rule in the Admiralty Court of not giving costs on either side in cases of inevitable accident, a rule which the Privy Council in the case of *The Marpesia* (*ubi sup.*) thought a bad one, but to which they adhered. Then came the Judicature Act, making the Court of Admiralty a division of the High Court, and subsequently to that the Court of Appeal, in the case of *The Swansea* (*ubi sup.*), thought that the same rule as to costs ought to exist in all divisions of the High Court. In other branches of the High Court than the Admiralty the rule is perfectly clear that where a plaintiff brings an action and fails he pays the costs. In the present case there are no special circumstances requiring a departure from the general rule, and we think the plaintiffs must pay the costs both here and below.

FRY and LOPES, L.JJ. concurred.

Solicitors for the appellants, *Thomas Cooper* and *Co.*

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

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Dec. 17 *and* 18, 1888.

(Before HUDDLESTON, B., by consent sitting as a Divisional Court.)

THE SECRETARY OF STATE FOR INDIA *v.* HEWITT AND CO. LIMITED. (*a*)

Practice—Preliminary act—Damage to cargo by collision — Action brought by owner of cargo against owner of colliding vessel—Action brought not in Admiralty Division but in Queen's Bench Division—Liability of plaintiff to file preliminary act—Order XIX., r. 28.

The principle of filing a preliminary act, under Order XIX., r. 28, *applies to every division of the High Court, and is not confined exclusively to actions in the Admiralty Division.*

The plaintiff had a quantity of goods on board a barge. This barge was sunk by a vessel belonging to the defendants, and the plaintiff's goods were damaged. Cross-actions were brought by the owners of the barge and vessel respectively, but these actions were dismissed, as both parties were to blame. Afterwards an action was brought in the Queen's Bench Division by the plaintiff, the owner of the goods, against the owners of the vessel, for the damage to his goods. The defendants required the plaintiff to file a preliminary act under Order XIX., r. 28.

Held, that the damage sued for was "damage by collision" within the meaning of the rule, and that the plaintiff must file a preliminary act. (*b*)

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

(*b*) In the case of *Armstrong and Co.* v. *Gaselee and others* (6 Asp. Mar. Law Cas. 353; 59 L. T. Rep. N. S. 891; 22 Q. B. Div. 250) the Divisional Court exercised its discretion by refusing to order the plaintiffs to file a preliminary act. In that case the plaintiffs were the owners of a barge and her cargo, who employed the defendants' tug to tow the barge. During the towage the barge was towed into collision with another vessel and sank in consequence thereof. Consequently, in the subsequent case of *The Alexandra* (not reported), which was an action *in personam* in the Admiralty Division, by a barge-owner against a tug-owner, for towing his barge into collision with another vessel, the parties refrained from filing preliminary acts. On the action coming on for trial Butt, J. complained in strong terms of the absence of preliminary acts, and intimated that in future it was desirable they should be filed in such cases. Whilst no doubt the decision in *Armstrong and Co.* v. *Gaselee and others* (*ubi sup.*) is binding upon the judge of the Admiralty Division, it is to be remembered that that decision is dealing with an action in the Queen's Bench Division, whereas, in the Admiralty Court and Division, it has been the almost universal practice in all cases arising out of collision to file preliminary acts. The case of *The John Boyne* (3 Asp. Mar. Law Cas. 341; 36 L. T. Rep. N. S. 29), which is sometimes cited as an authority to the contrary, was really only a decision founded upon the particular facts of the case, and the language of the judgment lays down no general proposition. Although Wills, J., in the case of *Armstrong* v. *Gaselee*, seems to indicate that Order XIX., r. 28, applies only to questions arising between two colliding vessels, he does not say so in express terms, and later on he goes on to state that he "should be sorry to say that there might not be cases of this description in which the court could properly order preliminary acts to be filed." Butt, J., in *The Alexandra*, was clearly of opinion that cases of this description were within the comprehensive language of the rule, and if so, parties can only dispense with preliminary acts in those cases where the judge in his discretion thinks fit—a discretion which Butt, J. has clearly intimated he

Appeal by the plaintiff from an order by Charles J., at chambers, affirming an order of Master Kaye, ordering the plaintiff, the Secretary of State for India, to file a preliminary act, under Order XIX., r. 28, in an action brought in the Queen's Bench Division of the High Court, for damage to cargo by a vessel belonging to the defendants.

In Nov. 1886 the plaintiff had caused to be shipped on board a barge, called the *Sultan*, a large quantity of ammunition, and whilst this barge was in the river Thames it was sunk by a vessel called the *Hallett*, belonging to the defendants. The ammunition was damaged to the extent, it was alleged, of 3000*l.*, and for this damage the present action was brought, not in the Admiralty Division but in the Queen's Bench Division. In Aug. 1887 an action was brought by the owners of the barge against the owners of the vessel, and a cross-action was brought by the owners of the vessel. In these actions the court found both parties to blame, and their actions were dismissed. Subsequently, the present action was brought by the Secretary of State for India, for damage to the ammunition, against the owners of the *Hallett*, as since the case of *The Bernina* (*Mills* v. *Armstrong*, 58 L. T. Rep. N. S. 423; 13 App. Cas. 1), the owner of the cargo was not so identified with the barge in which the cargo was stored as to be precluded from bringing an action against the colliding vessel.

The learned judge at chambers was of opinion that the action was an action for "damage by collision," within Order XIX., r. 28, and he ordered the plaintiff to file a preliminary act.

Order XIX., r. 28, provides that,

> In actions in any division for damage by collision between vessels, unless the court or a judge shall otherwise order, the solicitor for the plaintiff shall, within seven days after the commencement of the action, and the solicitor for the defendant shall, within seven days after appearance, and before any pleading is delivered, file with the registrar, master, or other proper officer, as the case may be, a document to be called a preliminary act, which shall be sealed up, and shall not be opened until ordered by the court or a judge, and which shall contain a statement of the following particulars.

The "particulars" to be stated in the "preliminary act" are then set forth, under thirteen different heads, at foot of the Order.

Cohen, Q.C. and *C. C. Macrae* for the appellant.—The learned judge did not exercise his discretion in the case, as he thought he was bound by a decision of Butt, J. at chambers, in the case *Webster* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* (5 Asp. Mar. Law Cas. 256, n.; W. N. 1884, p. 1), a case altogether different from the present. Our first point is, that the rule only applies to actions brought by the owner of one ship against the owner of another ship, and it has no application in a case of this kind. I shall, if necessary, contend that this is not "damage by collision," but "damage arising out of a collision," within sub-sect. 9 of sect. 25 of the Judicature Act 1873. In Order XIX., r. 28, the words are "damage by collision," and there is a difference between those words and "damage arising out of a collision." [Huddleston, B.—Put this case: a bale of goods is on deck, the bale is cut through by the colliding vessel: is that not damage by collision?] Yes, but the present case is different, as here the goods do not come in contact with the colliding vessel. Preliminary acts were considered by Dr. Lushington, in the cases of *The Inflexible* (Swabey, 32), and *The Vortigern* (Swabey, 518). In the latter case Dr. Lushington said: "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." These reasons do not apply in the present case, as none of the facts are within the knowledge of the plaintiff. Again, this is not an Admiralty action, but a common law action, and the rule does not apply to such actions, but if the rule does apply to such actions it is not absolute in its terms, but gives a discretion, as it says "unless a court or judge shall otherwise order."

Dr. *Raikes*, for the defendants, was not heard.

Huddleston, B.—It seems to me that I ought to act upon the words of the rule. Mr. Macrae has pointed out that this is not an action in the Admiralty Court, but that it is an action in the High Court. That is provided for by the rules, because Order XIX., r. 28, says, "In actions in any division for damages." Therefore, the principle of the preliminary act applies in every case in the High Court, and not merely exclusively to the Admiralty Division. The words seem to me to be certainly imperative: "In actions in any division for damage by collision between the vessels, unless the court or a judge shall otherwise order," the preliminary act is to be filed, and filed within a certain time. That is a very salutary rule. The object of it is what was pointed out by Dr. Lushington in the case of *The Vortigern* (*ubi sup.*), that the 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. Now, no doubt there may be cases in which it is impossible to file a preliminary act, and in all probability, if the persons in this case were persons who were outside, as it were, the collision—that is to say, not being representatives of either ship—it might be very difficult indeed that this rule should be complied with. I can quite understand the plaintiff in this particular case saying, "Well, but we are the Secretary of State for India, and we really do not know anything about these circumstances, because we put our goods on board one vessel, and they have been destroyed; therefore, we know nothing of the circumstances." If that had been put upon affidavit, and it had been shown to me that they could not have done that, I can quite understand that then my brother Charles and myself might have exercised our discretion, and said, "Well, these are circumstances under which it is impossible to give a preliminary act." But that is not the case here.

will not exercise. A point which seems to press upon the common law judges of the difficulty of correctly answering all the questions is really of no weight. The court is not unreasonable, and only requires the best answers that can be given in the circumstances of the case. In many ordinary collision actions between ship and ship there may be circumstances which prevent the parties correctly answering some of the questions, and yet they are required to file the best preliminary acts they can under the circumstances.

First of all, I have no affidavit at all; and in the next place, it seems to me to be perfectly clear that there would be no difficulty in complying with this rule, because the whole of these points have been raised in the former trial between the two vessels, in which the preliminary acts were filed between the two vessels, as provided for by the section of the Act, and there would be no difficulty at all on the part of the plaintiff, in ascertaining what the preliminary act was, which was filed in the former trial, and in giving that as his preliminary act. No doubt it would not have the effect of *recenti facto*, but still it would have the effect of preventing the defendants from shaping a different case; as is pointed out by Dr. Lushington, it is to prevent the defendants from shaping their case to meet the case put forward by the plaintiff. Therefore, if I were to hold that the plaintiff was not to file a preliminary act, I should also dispense with the necessity of the defendants filing a preliminary act, and one of the main objects of filing preliminary acts would be entirely defeated. The cases of *The Vortigern* (*ubi sup.*) and *The Inflexible* (*ubi sup.*) do not at all militate against what I have said, and the authority referred to of my brother Butt I do not think applies to this case, because, what I think he decided there was that, whether the action was for injury to the person, or whether it was an action for injury to goods, the necessity applied equally for a preliminary act. However, that does not arise here. I think that my brother Charles exercised a proper discretion, and therefore I think that this appeal must be dismissed, and with costs.

Appeal dismissed with costs.

Solicitor for the plaintiff, *The Solicitor to the India Office.*

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

Monday, April 8, 1889.

(Before Lord COLERIDGE, C.J. and HAWKINS, J.)

HEDGES (app.) *v.* HOOKER (resp.). (*a*)

Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 303, 317, 318—*Passenger—Passenger steamship—Steamship not having certificate carrying persons other than crew.*

The respondents were charged that they, being the owners of the British steamship Era, did ply on the river O. with certain passengers on board without having one of the duplicates of a certificate issued by the Board of Trade put up in some conspicuous part of the ship so as to be visible to all persons on board the same. More than twelve persons were taken on board the steamer for an excursion from I. down the river O. to F. and back. No charge was made by the respondents for the use of the steamer, but a gratuity was given to the master and crew. The justices dismissed the case.

Held, that the justices were right, as the steamship was not a passenger steamship within the meaning of sects. 303 *and* 318 *of the Merchant Shipping Act* 1854.

THIS was a case stated by the justices for the borough of Ipswich, and was in the following terms:—

1. At a court of summary jurisdiction, holden at the Town Hall, Ipswich, in and for the borough of Ipswich, on the 26th Nov. 1888, an information and complaint preferred by William Hedges, of Ipswich, in the county of Suffolk, superintendent of Customs (hereinafter called the appellant) against Alfred Hooker and Joseph Hooker, of Vernon-street, Ipswich (hereinafter called the respondents), under sect. 318 of the Merchant Shipping Act 1854, and charging that the British steamship *Era*, of which the respondents were the owners, did, on the 1st Aug. 1888 ply on the river Orwell with certain passengers on board, without having one of the duplicates of a certificate issued by the Board of Trade, put up (as required by sect. 317 of the Merchant Shipping Act 1854) in some conspicuous part of the said ship, so as to be visible to all persons on board the same, contrary to sect. 318 of the said Act, came on to be heard.

2. It not having been proved that the summons issued upon the above information had come to the knowledge of the said Alfred Hooker, the case was heard only as against Joseph Hooker.

3. Upon the hearing of the said information and complaint, the defendant Joseph Hooker appeared, and was represented by his solicitor, and the following facts were proved:

The said steamship *Era* was a British steamship.

The said Alfred Hooker and Joseph Hooker were the registered owners on the 1st Aug. 1888.

No duplicate of the certificate mentioned in sect. 318 of the Merchant Shipping Act 1854 had been on the said 1st Aug. 1888 put up in any part whatsoever of the ship as required by sect. 317 of the said Act, and no such certificate was in force for the said ship on the 1st Aug. 1888, or had indeed ever been issued to such ship.

On the 1st Aug. 1888 the said steamship proceeded from Ipswich, having on board twenty-one or more persons, who were passengers within the meaning of sects. 303 and 318 of the Merchant Shipping Act 1854. The said passengers were members of a Wesleyan choir and their friends. The vessel left the landing-place at Ipswich about 9.30 a.m. and proceeded down the river Orwell with such passengers on board to Felixstowe pier in Harwich harbour and in the mouth of the Orwell and Stour, opposite Harwich, where four more passengers were taken on board. She then rounded at Beach End Bell Buoy outside of the seaward entrance to Harwich harbour, and then proceeded a short distance up the river Stour.

The party was landed at Felixstowe and had tea upon the beach, having also been supplied with fruit on the vessel. The steamship returned to Ipswich on the evening of that day with the party on board.

The sum of 1*s.* 6*d.* was paid by each of the passengers to the leader of the choir for the day's outing. This included the tea before referred to and fruit during the day.

No charge was made by the owners, they having refused payment, but a gratuity of 1*l.* 10*s.* was given to Joseph Hooker by the leader of the choir, 10*s.* for the crew, and 1*l.* for himself and for coals.

4. On these facts we were of opinion that there was no evidence before us of the offence charged in the information against the 318th section of

(*a*) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

the Merchant Shipping Act 1854, and that there was no evidence of the said vessel having plied on the occasion in question within the meaning of the said section, and we consequently dismissed the case.

5. The appellant being dissatisfied with our decision, on the 1st Dec. 1888 made written application to us, in the manner and form required by the statutes in that behalf, to state a special case for the opinion of this honourable court, and subsequently entered into a recognisance to prosecute his appeal as required by the statute.

6. The question for the opinion of this honourable court is, whether our determination, which is stated in the fourth paragraph of this case, was right in point of law.

Danckwerts for the appellant.—The respondent was summoned for contravening the provisions of Part 4 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104). That part is headed "Safety and prevention of accidents," and sect. 291 provides that it shall apply to all British ships. It is provided by sect. 303 that the word "passengers" shall be held to include any persons carried in a steamship other than the master and crew and the owner, his family, and servants; and the expression "passenger steamer" shall be held to include every British steamship carrying passengers to, from, or between any place or places in the United Kingdom, excepting steam ferry boats working in chains, commonly called steam bridges. Then sect. 309 enacts that the owners shall have surveys made by shipwrights and engineers, who shall make declarations as to the efficiency of the ship; and by sect. 312, upon the receipt of such declarations, the Board of Trade shall, if satisfied that the provisions of the fourth part of this Act have been complied with, cause a certificate in duplicate to be prepared and issued. By sect. 317 it is directed that one of the duplicates of the certificate shall be put up in some conspicuous part of the ship so as to be visible to all persons on board. By the latter part of sect. 318 it is provided that, if any passenger steamer attempts to ply or go to ea without such production (of such certificate), ny such officer (of customs) may detain her until uch certificate is produced; and if any passenger teamer plies or goes to sea with any passengers on board, without having one of the duplicates of such certificate as aforesaid so put up as aforesaid in some conspicuous part of the ship, the owner thereof shall for such offence incur a penalty not exceeding 100*l.*, and the master of such ship shall also incur a further penalty not exceeding 20*l.* By the Merchant Shipping Act 1876 (39 & 40 Vict. c. 80), sect. 16, it is enacted that any steamship may carry passengers not exceeding twelve in number, although she has not been surveyed by the Board of Trade as a passenger steamer, and does not carry a Board of Trade certificate as provided by the Merchant Shipping Act 1854 with respect to passenger steamers. The justices held that there was no evidence of the vessel having "plied." The word "ply" does not necessarily mean ply for hire, though perhaps that is the sense in which the word is now generally used. It refers to inland navigation as opposed to "going to sea." The above sections were passed with a view to secure the safety of, and to prevent accidents to passengers; there is no reason why a person should not be protected merely because he does not pay.

Morton Smith for the respondent.—There is nothing in the Act to warrant the suggestion that the word "ply" refers to inland navigation only. The whole of the Merchant Shipping Act 1854 applies to vessels going to sea. The vessel in this case never went to sea. "Plying" means being at a certain quay or pier for the purpose of receiving passengers in the usual way to carry them from place to place.

Danckwerts in reply.—It is the user of this vessel on the particular occasion which gives her the character of a passenger steamship.

Lord COLERIDGE, C.J.—I am of opinion that the justices were right in this case. There has not been enough proved to put it on the respondents to prove their case. The case does not state that the *Era* was a passenger steamer, but that it was a British steamer with passengers on board. The justices set out all the facts, and then say that these persons were passengers within the meaning of sect. 303 of the Merchant Shipping Act 1854, but they held that no breach of sect. 318 had been committed because the steamer was not plying within the meaning of that section. It is impossible to define exactly what constitutes a passenger steamer. Each case must stand on its own circumstances. For instance, take the case where a gentleman takes a party on his steam yacht up and down a river. I should say that such a case was too clear for argument. In the present case the respondents are the owners of a steamer on which they take a number of boys and girls who form a choir down the river for a trip and bring them back again, and they charge nothing for the use of the steamer. The question in the case is, whether the vessel was a passenger steamer, and these persons who were on board were passengers within the meaning of the Merchant Shipping Act 1854, s. 303, which says that "the word 'passengers' shall be held to include any persons carried in a steamship other than the master and crew, and the owner, his family and servants; and the expression 'passenger steamer' shall be held to include every British steamship carrying passengers to, from, or between any place or places in the United Kingdom, excepting steam ferry boats working in chains, commonly called steam bridges." I think the sort of thing done here was not pointed at by the Act of Parliament, and that it would be straining the Act to include it. These people were not passengers within the reasonable meaning of the word. It is further provided by sect. 318 of the same Act, that if any passenger steamer attempts to ply or go to sea without producing the certificate of the Board of Trade any officer of Customs may detain her until such certificate is produced. This vessel did not proceed to sea, and I do not think she can be said to have plied. The word "ply," as defined in Johnson's Dictionary would not include this case. No doubt the ordinary meaning of the word contains the notion of plying for hire, and I agree that it is the first and natural meaning of the word, but it does not exhaust it. In the case of *Reg.* v. *The Divisional Justices of Dublin* (15 C. C. C. 379) it was held that the justices were wrong in not convicting the owner of a tug boat who took the managing owner, his wife, the

Dublin staff, and some friends and their wives who had been invited by the Dublin manager for a pleasure trip, to see the fireworks at Kingstown, there being, as in the present case, no duplicate of the Board of Trade certificate put up in some conspicuous part of the ship. But that was not an unanimous decision of the court. O'Brien, J. dissented, and the latter part of his judgment I wish to rely upon and adopt as my own. He came to the conclusion that the justices were right in not convicting the owner of the vessel, and I should have agreed with him on the facts of that case that it did not come within the meaning of sects. 303 and 318. But the facts of that case and the present case are not the same. In that case, as I understand, the vessel did proceed to sea. I am of opinion in the present case that the justices were right, and the appeal must be dismissed.

Hawkins, J.—I am of the same opinion. The information must set forth the offence with which the accused is charged. It is not alleged in this case that this was a passenger steamer, whereas sect. 318 of the Merchant Shipping Act 1854, under which the respondent was charged, says: "If any passenger steamer plies or goes to sea with any passengers on board without having one of the duplicates of such certificate so put up as aforesaid in some conspicuous part of the ship, the owner thereof shall for such offence incur a penalty not exceeding 100*l*." But, even assuming that it was a passenger steamer, and that persons were on it, and going down the Orwell could it be said to be "plying" within the meaning of the Act? The justices came to the conclusion that there was no evidence that it was plying, and I cannot think that having persons on board for the purpose of this pleasure trip was "plying." The justices have found that there was no evidence to support the charge, and I see no sufficient reason for disturbing their decision.

Appeal dismissed.

Solicitor for the appellant, *The Solicitor to the Board of Trade.*

Solicitors for the respondents, *Tayler* and *Son*, for *R. R. Hill*, Ipswich.

April 9, 10, *and May* 4, 1889.

(Before Charles, J.)

The Canada Shipping Company Limited *v.* The British Shipowners' Mutual Protection Association Limited. (*a*)

Insurance (*marine*)—*Mutual insurance association*—*Rules*—*Damage to cargo*—"*Improper navigation*"—"*Improper stowage.*"

By the rules of a mutual protection association members were protected against loss of, or damage to, goods on board any ship entered for protection under the rules when such loss or damage had been caused by the improper navigation of the ship; no member could claim for any damage to, or loss of cargo, where the same should have been caused by improper stowage.

A cargo, consisting of iron, coal, coke, and seventy casks of patent coating composition, was carried from M. to A. on board a vessel belonging to the plaintiffs, who were members of the defendant association, and whose ship was entered for protection under the rules. It was found, on the cargo being discharged at the end of the voyage, that some of the casks had leaked, and a quantity of the composition, which smelt strongly of creosote, had saturated the dunnage and the ceiling and limber boards of the vessel. When the vessel was empty the ceiling and limber boards were scraped; she was then loaded with a cargo of wheat, and a quantity of the dunnage wood which had been in contact with the composition was used to stow the cargo. The wheat on being discharged smelt strongly of creosote, and some of it was discoloured. The plaintiffs bought the cargo from the owners at the price of undamaged wheat, and, having resold it again at a considerable loss, claimed to recover that loss from the defendants on the ground that it was loss or damage to goods caused by the "improper navigation" of the ship within the meaning of the rules of the defendant association.

Held, that the act of putting cargo into a hold so saturated with a tarry substance that the whole cargo was tainted, was bad management of the vessel as a receptacle or warehouse for the goods, but did not affect her qualities as a ship, and did not come within the term "improper navigation."

Held further, that this was a case of "improper stowage" within the meaning of the rules of the defendant association, and that on both these grounds the defendants were protected from liability.

Carmichael *v.* Liverpool Sailing Shipowners' Mutual Indemnity Association (57 *L. T. Rep. N. S.* 550; 6 *Asp. Mar. Law Cas.* 130) *distinguished.*

The plaintiffs were the owners of the ship *Lake Ontario*, which was duly entered for protection under the rules of the defendant association.

The rules of the defendants, so far as they are material to this case, were as follows:

4. The risks, events, and occurrences in respect of which members shall be entitled to protection under these rules are: Loss of or damage to any goods or merchandise or other property or things on board or in charge of any ship entered for protection under these rules (not being the ship herself, or her tackle, apparel, furniture, or stores), when such loss or damage has been caused by the improper navigation of such ship, or by collision with any substance other than water, provided she is entered for protection under these rules at the time of such loss or damage happening. Damage to or loss of goods or things on any pier or jetty, or like structure, caused by like improper navigation, shall be deemed covered by this clause.

12. No member shall have any claim under these rules for costs or charges of repairing any ship entered for protection under these rules, nor for any damage to or loss of cargo, or other things, where the same shall have been caused by improper stowage.

15. No member or other person shall be entitled to protection under these rules for any accident caused by his own negligence.

In Feb. 1885 the *Lake Ontario* sailed from Middlesbrough for Adelaide, with a cargo on board which consisted of pig iron, coal, coke, and seventy casks of patent coating composition, together with machinery castings, bricks, and other goods. She arrived at Adelaide in May 1885, and on the cargo being discharged it was found that the casks containing the composition had leaked, and the dunnage wood and the ceiling and limber boards were soaked with the composition, which smelt strongly of creosote. After the hold had been cleaned out and the ceiling scraped,

(*a*) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

dunnage wood, which consisted in part of the dunnage used for stowing the casks of composition, was placed upon the ceiling, and upon the dunnage wood some sacking was laid. A cargo of wheat in bags was then loaded on the ship, which sailed to Queenstown for orders, and there received orders for Dublin. On the arrival of the ship in Dublin the discharge of the cargo commenced, and it was shortly afterwards found that the cargo smelt strongly of creosote, and that some of the bags and their contents were discoloured. In consequence of this the consignee of the cargo made a claim upon the plaintiffs, which was settled by the plaintiffs paying the value of the cargo as if undamaged, and themselves taking over and realising the damaged wheat. By this arrangement the plaintiffs paid 12,507*l.* 13*s.* for the cargo, and they realised from it 10,109*l.* 3*s.*, after deducting expenses and freight at 5*s.* per ton for bringing the cargo from Dublin to Liverpool.

The plaintiffs sought to recover from the defendants the loss which they had thus incurred, on the ground that, owing to the neglect of the master and crew, the *Lake Ontario*, when she received her cargo and sailed therewith, was in such a condition that she could not carry the cargo safely on the voyage, and in consequence the cargo during the voyage was damaged. They further alleged that the cargo was properly stowed, and that the damage thereto did not arise from improper stowage. The defendants denied that the cargo was damaged through the improper navigation of the ship, and contended that the damage had arisen from improper stowage, and that they were therefore not liable to indemnify the plaintiffs.

Barnes, Q.C. and *Carver* for the plaintiffs.

Cohen, Q.C. and *Joseph Walton* for the defendants.

The arguments appear fully from the judgment.

May 4.—CHARLES, J. delivered the following judgment:—The plaintiffs in this case were the owners of a ship called the *Lake Ontario*, which was entered on the books of the defendants, an association of shipowners, for protection for the whole amount of her tonnage. Among the risks, events, and occurences in respect of which, according to the defendants' rules, the plaintiffs were by reason of such entry entitled to protection were the following: "Loss of or damage to any goods or merchandise or other property or things on board or in charge of any ship entered for protection, where such loss or damage has been caused by the improper navigation of such ship, or by collision with any substance other than water . . . Damage to or loss of goods or things on any pier or jetty, or like structure, caused by like improper navigation, shall be deemed covered by this clause." The rules also provided that no claim should be made for any damage to or loss of cargo or other things where the same should have been caused by improper stowage. It was proved at the trial that in Nov. 1884 the *Lake Ontario* carried a general cargo from Middlesbrough to Adelaide, consisting of pig iron, coal, and coke, and seventy casks of patent liquid coating composition, to be used as paint for machine castings. These casks were stowed on dunnage wood between the foremast and the main hatch. On the 27th May 1885 the ship arrived at Adelaide, and a few days later began to be discharged. The iron, coal, and coke were taken out first, and then the casks, some of which it was found had been leaking. A quantity of composition had escaped into the hold, and had saturated a portion of the dunnage and the ceiling and limber boards of the ship. The whole ship was pervaded with a strong smell of creosote or paraffin. Whilst she was empty the ceiling and limber boards were scraped in the usual way, but no special measures were adopted to get rid of the smell. In June 1885 she was loaded with a cargo of wheat, to be carried to Dublin. Dunnage wood, including the portion which had been in contact with the composition, was first laid on the ceiling. On the dunnage was a layer of sacking, and on the sacking the wheat was placed in bags. The ship arrived at Dublin on the 20th Nov., and after a few bags had been discharged a complaint was made by the consignee that they smelt of paraffin. The discharge was stopped in consequence, and the plaintiffs bought in the cargo at the market price of undamaged wheat. The bags which had been taken out were replaced, and the cargo was carried to Liverpool, where a careful examination of it was made, and the whole of it was found more or less tainted with the smell of paraffin, and the wheat in some of the bags packed nearest to the ceiling and dunnage was discoloured. The plaintiffs sold the cargo in this condition for the best price they could get, and were losers to the extent of 2400*l.* This sum they sought in this action to recover from the defendants. The main point of controversy at the trial was as to the cause of the damage, the plaintiffs contending that it arose entirely, or almost entirely, from the saturated condition of the ceiling and limber boards; the defendants, on the other hand, insisting that it was attributable to the condition of the dunnage wood. It is not necessary for me to examine the evidence in detail on the one side and the other upon this point. It left in the result no doubt on my mind that the state of the dunnage had little or nothing to do with the state of the cargo. The damage, in my opinion, was attributable to the state of the ceiling and limber boards. They had not been properly cleansed, and the tarry stuff with which they were impregnated tainted the whole cargo. Two questions now arise for my determination—first, did this damage arise from improper navigation? and, secondly, if it did, was it also damage caused by improper stowage? First, then, I must consider whether it was caused by improper navigation. Now, it was caused by the act of the plaintiffs in putting the goods into a ship which had not been effectually cleaned. She was, when loaded, unfit to receive a cargo of wheat, and, as might have been anticipated, the wheat was spoiled. That this was improper management can scarcely be disputed; but was it "improper navigation?" It was contended that it was, chiefly upon the authority of *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (6 Asp. Mar. Law Cas. 130; 19 Q. B. Div. 242). There, during the loading of a cargo of wheat, a port in the ship's side was insufficiently secured, so that during the voyage water leaked in and damaged the wheat in the lower hold. The leak did not impede the navigation of the ship. It was held, nevertheless, in the Divisional Court

and the Court of Appeal that there had been "improper navigation" with regard to the safety of the cargo. Much reliance was placed by the plaintiffs on the language of the learned judges in that case. Thus Wills, J., at p. 246, says: "Improper navigation is not confined to the voyage; it embraces acts done anterior to the voyage which render the ship unfit to carry the cargo." Fry, L.J. says, at p. 249: "Without attempting to define all the cases which may come within the words 'improper navigation,' I think those words, as used in this rule, do include every case where something is omitted to be done which ought to be done before the departure of the ship in order to enable the ship to carry the cargo safely from the port of departure to the port of arrival, and where that omission leads to the cargo not being safely and securely carried;" and Lopes, L.J., at p. 251, says: "In my opinion, improper navigation means the improper management of a ship in respect of the cargo (and this was a cargo-carrying ship) during the voyage. . . . It appears to me that any negligence before the commencement of the voyage which results in bad management of the ship in respect of the cargo during the voyage is improper navigation within this rule, although the course of the vessel is in no way impeded or hindered." These observations, however, must, I think, be construed with regard to the facts of the case and the arguments presented, and not as laying down as a rule that all improper management of whatever kind of a ship whereby a cargo is damaged is necessarily improper navigation with reference to that cargo. The illustrations given by Fry, L.J. of a captain having put to sea without a compass, whereby the ship loses her way on the ocean and ship and cargo are lost, or, again, of bad stowage before the commencement of the voyage affecting the sailing of the ship, point to some limitation imposed by the use of the word "navigation;" and on reference to the judgment of Lord Esher, M.R., I think it clear what the limitation is. Improper navigation includes, according to him, something wrongly done or omitted before the navigation commenced which has an effect on the ship's navigation whilst she is being navigated, and which affects her safe sailing as a ship with regard to the safety of the goods on board. In *Carmichael* v. *Liverpool Sailing Shipowners' Mutual Indemnity Association* (6 Asp. Mar. Law Cas. 130; 19 Q. B. Div. 242), the safe sailing of the ship was directly affected, as regarded the safety of the goods, owing to the inefficient closing of the porthole before the navigation began. The partly-closed opening rendered her unsafe as a ship for the cargo, just as she would have been unsafe had she gone to sea with her hatches open, so that sea-water could reach her hold. That being so, the defendants' pleas, first, that the wrong act was done before the navigation commenced, and, secondly, that the ship herself had not been endangered, were held unavailing. So, again, in *The Warkworth* (5 Asp. Mar. Law Cas. 326; 9 P. Div. 145), the plaintiffs' ship, owing to a defect in her steering gear, which had been carelessly mended before the navigation commenced, steered so badly that she came into collision with another vessel. It was held that she had been improperly navigated within the meaning of 25 & 26 Vict. c. 63, s. 54, sub-sect. 4. She had been sent to sea in a state which rendered it dangerous to sail her, and it is with reference to the fact that she was not in a condition to be employed as a ship at all that the observation of Bowen, L.J. must, I think, be read. "A person," he says, at p. 148, "who uses his ship which is not in a condition to be so employed does in reality improperly navigate her." By that I understand him to refer to the employment of a ship as a ship. Now, in the present case the act of improper navigation relied on was putting the cargo into a hold, the bottom of which was so saturated with a tarry substance that the whole cargo was tainted. But this act had no effect whatever on the safe sailing of the ship as a ship, with regard to the safety of the goods. It was bad management of her as a receptacle or warehouse for the goods, but did not at all affect her qualities as a ship, and that being so does not appear to me to come within the term "improper navigation." This disposes of the case; but I think I ought to express my opinion on the further contention raised by the defendants. Assuming the case to be one of "improper navigation," was it one of "improper stowage?" I have felt considerable doubt on this point, but, after consideration, I have come to the conclusion that the case was one of "improper stowage." it was urged that "improper stowage" meant Improper collocation of the parts of the cargo. But I do not see why the term is to be so limited. It seems to me to apply as well to the placing of the whole cargo in an unsuitable place as to the unskilful disposition of its parts. Suppose, for example, that the cargo had been tainted by the dunnage, I should certainly have thought the case to be one of "improper stowage," and I see no reason why the disposition of the cargo in a dirty and unsuitable hold is not equally "improper stowage." Whichever view, therefore, be adopted as to the meaning of the phrase "improper navigation," the defendants are, in my judgment, protected from liability. If the case was not one of "improper navigation" they are free, because the first rule which I have cited does not apply. If the case is one of "improper navigation" they are protected by the second rule, which exempts them from liability in case of "improper stowage." My judgment is accordingly for the defendants with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Rowcliffes, Rawle,* and *Co.*, for *Hill, Dickinson, Dickinson,* and *Hill,* Liverpool.

Solicitors for the defendants, *W. A. Crump* and *Son.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Wednesday, May 1, 1889.

(Before Butt, J., assisted by Trinity Masters.)

THE AGUADILLANA. (*a*)

Collision—Fog — Anchorage ground — Rules and Bye-laws for the Navigation of the River Thames 1872, *arts.* 10 *and* 12.

Although a vessel may be justified in anchoring in the fairway of the Thames through being overtaken by a dense fog, such a place is not a proper

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

anchorage ground under arts. 10 *and* 12 *of the Thames Rules and Bye-laws* 1872, *and the duty lies on those in charge of her to move her as soon as they reasonably can, and if a collision occurs whilst she is so anchored, the question will be, whether between the time of her anchoring and the collision the weather was such that she could reasonably have been removed.*

A steamship bound up the Thames on a flood tide ought not to leave a wharf and get under way in a dense fog, and, semble, if a vessel is overtaken by a dense fog in such circumstances, the proper mode for her to go up is dredging up stern first with her anchor down, so that she can be brought up at any moment.

THIS was a collision action *in rem* instituted by the owners of the steamship *Alford* against the owners of the steamship *Aguadillana*. The defendants counter-claimed.

The collision occurred in Greenwich Reach of the river Thames, on the 7th Jan. 1889.

The facts alleged by the plaintiffs were as follows: Shortly before 4.45 a.m. on the 7th Jan. the *Alford*, a steamship of 638 tons register, laden with a general cargo, was in Greenwich Reach, bound up the river. She had just previously left the cattle wharf at Deptford. The weather, which had been foggy when she left the cattle wharf, had just set in a dense fog, and the tide was the last quarter flood, of the force of about two knots. She was proceeding up about mid-stream, with an angle to the north shore, and making about a knot through the water, with her engines working easy ahead. Her regulation lights were duly exhibited and burning brightly, her whistle was being duly sounded, and a good look-out was being kept on board of her. In these circumstances those on board the *Alford* (which had previously stopped her engines on account of the fog, and then, in order to clear a steamer under way on the port bow, had set them easy ahead, and put her helm aport) suddenly observed the white light and loom of a vessel at anchor, which proved to be the *Aguadillana*, distant about half to one ship's length, and bearing about three points on the port bow, and although the engines of the *Alford* were at once put full speed astern, and her helm hard-a-ported, she fouled the chain cable of the *Aguadillana* with her port side, which brought her up, and then with her port side struck the stem of the *Aguadillana*, thereby sustaining great damage.

The facts alleged by the defendants were as follows: At about 4.45 a.m. on the 7th Jan. the *Aguadillana*, a Spanish steamship of 848 tons register, left the Surrey Commercial Docks on a voyage to Bremerhaven, laden with a general cargo. The *Aguadillana* proceeded down the river for about an hour, when the weather, which had been hazy, became very thick with fog, and, as it was unsafe to continue under way, the *Aguadillana* was brought to anchor off the Victualling Yard, Deptford, about half a ship's length from the Deptford buoys, where she remained until the collision with the *Alford*. About 4.30 p.m. the *Aguadillana* was lying to her anchor head down the river, the tide being three-quarter flood, running about two knots an hour. There was still a thick fog, and no wind. The *Aguadillana* had her regulation riding light duly hoisted on the forestay, and a white light also hung from aft, above the taffrail, and both were burning brightly. A good look-out was being kept on board of her, and her bell was being duly sounded. In these circumstances those on board the *Aguadillana* observed about one to two ships' lengths off, and about two points on the starboard bow of the *Aguadillana*, the loom of a steamship, which was the *Alford* under way, and angling towards the stem of the *Aguadillana*. The bell of the *Aguadillana* was kept loudly ringing, but the *Alford*, showing her red light, came on across the bows of the *Aguadillana*, and with her port side struck the stem of the *Aguadillana*, doing her considerable damage.

The plaintiffs (*inter alia*) charged the *Aguadillana* with anchoring and remaining anchored at an improper place, in breach of arts. 10 and 12 of the Rules and Bye-laws of the river Thames 1872.

The defendants (*inter alia*) charged the *Alford* with improperly being under way, having regard to the thick fog which there was at, and had been before, the time of the collision.

C. Hall, Q.C. (with him *J. P. Aspinall*) for the plaintiffs.

Sir *Walter Phillimore* (with him *Stubbs*) for the defendants.

BUTT, J.—The *Aguadillana* had, in consequence of a dense fog, dropped her anchor somewhere near the middle of the river. I very much doubt whether she was as near mid-river as is alleged, having regard to the evidence as to the proximity of one of the buoys to her. But I do not think it is very material, because I think, and the Elder Brethren agree with me, that it was owing to the fog that she dropped her anchor where she did. She was not anchored in a proper anchorage ground, and a duty, therefore, lay on those in charge of her to move her as soon as they reasonably could. Therefore, the question is, Was the state of the weather during that day such as would have offered the pilot of the *Aguadillana* a reasonable opportunity of shifting his berth? There is one matter which has weighed considerably with myself and the Elder Brethren, and it is this: the mate and pilot of the *Aguadillana*, the captain being on shore, actually consulted together whether it was safe and prudent to move the ship, and came to the conclusion that it was not. No doubt there is considerable conflict and contradiction as to the density of the fog, and as to its varying nature during the day. But, on the whole, I must say I think the evidence establishes that there was a dense fog prevailing without intermission throughout the day. There are some witnesses called on behalf of the *Aguadillana* with reference to whom I will say that their acts, rather than their opinions, weigh very strongly upon my mind. I refer especially to the witnesses Sinclair and Jones. Sinclair was the pilot of a vessel at anchor very near to the place of collision. He was in such a position opposite to the entrance to the dock that he desired to move, and says that if the weather had permitted he would have moved. He said he did not consider it prudent in the then state of the weather to do so, and added that he never saw across the river, nor half across, all day. I do not forget in connection with this that Mr. Hall has pointed out that this man was not on board his ship until two in the afternoon. But then we have the

evidence of Jones, who was chief boatman on board the little steam launch *Mary*, belonging to the Thames Conservancy Board. There was a board meeting that day. The *Mary* started from Greenwich, but had to stop at Limehouse about 10 a.m., because the fog was so dense that her master was afraid to take even this little craft further up the river. He accordingly went on by train, and instructed Jones to come on up the river if the fog would allow, and if not by a certain time then to go back to Greenwich. Now, as a matter of fact, this little launch waited till 1.30 p.m. in the afternoon. During all that time, in the judgment of the man in command, he was not justified in taking her up the river. He then got under way at Limehouse Pier, and did not reach Greenwich till 3.30 p.m. Taking a little steam launch like this down from Limehouse Pier to Greenwich against the flood tide is a different thing to taking a vessel of the size of the *Aguadillana* up from the cattle wharf at Deptford to the premises of the General Steam Navigation Company with the tide. On the whole, the conclusion to which I have come, and in which the Elder Brethren agree, is that although we are not disposed lightly to justify a man who drops his anchor in or near mid-river, and remains there when he could reasonably move his ship to a proper berth, we think the circumstances are such in this case that those in charge of the *Aguadillana* had no reasonable opportunity of moving her, and that, therefore, they are not to blame for remaining where they did.

With regard to the *Alford*, I do not believe it is accurate to say, as her witnesses have said, that they saw the lights on shore on the other side of the river. I do not think it necessarily follows that they are wilfully stating that which they knew to be untrue, because I dare say there were lights on the other side of the river which they might have mistaken for shore lights. The conclusion to which I have come is, that in the state of the weather which prevailed, the *Alford* ought not to have left the cattle wharf and attempted to go up the river as she did. We think that it was imprudent to go up the river at all. But the Elder Brethren advise me very strongly, and it is entirely in accord with my view, that she ought to have gone up stern first. Now, I know very well that there are objections with regard to lights to vessels dredging up the river stern first. But vessels do, as a rule, on a flood tide dredge up stern foremost. I know an instance, namely, in the Mersey, where there is a positive recommendation that vessels going up the Mersey on a flood tide shall turn and go up stern first. Moreover, in this case we have the fact that the *Benbow*, a vessel belonging to the same company as the *Alford*, did go up early on that afternoon from the same wharf, and that she went up stern first. The steamship *Royal Dane* performed the same manœuvre. Its advantages are obvious. A steamer dredging up with a flood tide, with her anchor on the ground, can immediately pay cable out and get a hold of the ground in case of emergency. It seems to me extremely probable that if the *Alford* had had her stern towards this vessel when she let go her anchor, there would have been no collision at all. We think, therefore, that the *Alford* was to blame in acting as she did at the time in question. There are one or two other facts which, to my mind, discredit the evidence of the *Alford*. I have no doubt whatever but that the *Aguadillana* and some other vessels were all ringing their bells at the time in question as hard as they could, and yet not a witness from the *Alford* has been willing to admit that they ever heard a bell. Either they were wilfully stopping their ears, or they were extremely negligent. On the whole, the conclusion to which I have come is that the *Alford* must be pronounced alone to blame.

Solicitor for the plaintiffs, *William Batham*.
Solicitors for the defendants, *Stokes, Saunders*, and *Stokes*.

Tuesday, May 7, 1889.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE IMBRO. (*a*)

Collision—Stern light—Overtaking ship—Regulations for Preventing Collisions at Sea, arts. 2, 6, *and* 11.

It is a breach of the Regulations for Preventing Collisions at Sea to carry a fixed stern light the rays of which show within the area of the side lights.

Semble, it is a breach of the Regulations for Preventing Collisions at Sea to carry any fixed stern light, as the Regulations only contemplate a stern light being shown when there is a vessel overtaking.

Semble, a vessel carrying a fixed stern light, the rays of which show within the area of the side-lights, must be held to blame if a collision occurs, unless she can show that the carrying of such a light could not have contributed to the collision.

THIS was a collision action *in rem* by the owners of the ship *Poseidon* against the owners of the steamship *Imbro* and her freight. The defendants counter-claimed.

The collision occurred about 7 p.m. on the 25th Feb. 1889, in the English Channel off Dungeness. The facts alleged by the plaintiffs were as follows: Shortly before 7 p.m. on the 25th Feb., the *Poseidon*, an iron ship of 1708 tons register, whilst on a voyage from Chittagong to Dundee, laden with a cargo of jute, was in the Straits of Dover, about nine miles from Dungeness. She was becalmed, heading about N.N.W., and without steerage way. The weather was fine and clear, The regulation side lights of the *Poseidon* were duly exhibited and burning brightly. A white light was also hung over her stern, two feet above the level of the deck, for overtaking vessels. The stern of the *Poseidon* was elliptical in shape, and the light was in a globe lantern lashed outside the rail. The rail was an open rail, and closed in with canvas. In these circumstances those on board the *Poseidon* observed the green and masthead lights of a steamer (which proved to be the *Imbro*) bearing between two and three points abaft the beam on the port side of the *Poseidon*. She was distant about a mile, and her hull was visible about the same time. The lights of the *Imbro* gradually drew nearer to the *Poseidon*, and, when the *Imbro* was within about three ship's lengths of the *Poseidon*, she suddenly showed her red light

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

and shut in her green light, thereby rendering a collision inevitable. Those on board the *Poseidon* then loudly hailed the *Imbro* to stop and reverse her engines, and waved the bright light which had been shown from the stern; but the *Imbro* came on at great speed, and with her stem and port bow struck the port quarter of the *Poseidon*.

The facts alleged by the defendants were as follows: Shortly before 7 p.m. on the 25th Feb., the *Imbro*, a screw steamship of 780 tons register, while on a voyage from Bilbao to Newcastle, laden with a cargo of iron ore, was in the English Channel off Dungeness. The *Imbro* was heading about E. by N. ¾ N., making eight knots an hour. Her regulation lights were duly exhibited and burning brightly, and a good look-out was being kept on board of her. Under these circumstances a white light, which proved to be on the *Imbro*, was seen half a point on the starboard bow and distant three and a half to four miles. This light was taken to be the masthead light of a steamship, and was watched in the expectation that the steamship would show one or both of her side lights, and the *Imbro* was kept on her course. Some time after a red side light was seen nearly right ahead, but a little on the port bow withal, and was taken to be the light of a sailing vessel. Both lights were carefully watched, and the *Imbro* was kept on her course, as it was believed that the red light could be easily cleared when the supposed steamship showing the white light had been made out and acted for; but suddenly the white and red lights before mentioned were made out to be on the same ship, viz., the *Poseidon*, and, although the helm of the *Imbro* was at once put hard-a-port and her engines reversed full speed, the *Imbro* with her stem and port bow struck the port quarter of the *Poseidon*.

The defendants (*inter alia*) charged the plaintiffs with breach of arts. 2, 6, and 11 of the Regulations for Preventing Collisions at Sea in carrying a stern light so as to be visible continuously and within the area of the red light, and so as to mislead those on board the *Imbro*.

Myburgh, Q.C. and *Bucknill*, Q.C. for the plaintiffs.—The *Imbro* is alone to blame. The *Poseidon* was justified in carrying a fixed stern light, and did not by so doing act in contravention of the Regulations for Preventing Collisions at Sea. Inasmuch as the rail was covered with canvas, the light could not intersect the side lights, and could not therefore mislead those on the *Poseidon*. Art. 11 does not say that the light shall be screened; it merely says that the light shall be shown from the stern. If so, the plaintiffs complied with the letter of the article. It is also submitted that, for the purposes of the Regulations, "show" and "carry" are synonymous terms. For instance, in art. 10 (*d.*) the word used is "show," which from the context clearly means "carry." The remarks of Sir James Hannen in *The Palinurus* (6 Asp. Mar. Law Cas. 271; 58 L. T. Rep. N. S. 533; 13 P. Div. 14) are not applicable to the facts of this case, and are also *obiter*. As long as the *Imbro* was an overtaking vessel she was entitled to the assistance of a stern light, and it is immaterial how it was shown to her.

Sir *Walter Phillimore* (with him *J. P. Aspinall*), for the defendants, *contra*.—It is submitted that in fact the rays of the stern light intersected the rays of the side lights, and therefore the plaintiffs are guilty of a breach of the Regulations for Preventing Collisions at Sea. As soon as ever the *Imbro* came within the range of the red light of the *Poseidon*, she ceased to be an "overtaking ship" within the meaning of art. 11. The light contemplated by the Regulations is a flash light and not a fixed light, which is always liable to be mistaken for something other than a stern light. The language of Sir James Hannen in *The Palinurus* (*ubi sup.*) is exactly in point:

The Main, 6 Asp. Mar. Law Cas. 37; 55 L. T. Rep. N. S. 15; 11 P. Div. 132;
The Franconia, 35 L. T. Rep. N. S. 721; 3 Asp. Mar. Law Cas. 295; 2 P. Div. 8;
The Dunelm, 9 P. Div. 164; 5 Asp. Mar. Law Cas. 304; 51 L. T. Rep. N. S. 214.

If the *Poseidon* was heading N.N.W., and the *Imbro* E. by N. ¾ N., showing her green light to the *Poseidon*, she must have been within the area of the *Poseidon's* red light, and less than two points abaft her beam. Hence those on her saw both the red and stern lights at the same time, and therefore two lights were visible within the same area.

Myburgh, Q.C., in reply, cited

The Seaton, 5 Asp. Mar. Law Cas. 191; 49 L. T. Rep. N. S. 747; 9 P. Div. 1.

Cur. adv. vult.

May 7.—BUTT, J.—At 7 p.m. in the evening of the 25th Feb., a collision occurred between the ship *Poseidon* and the steamer *Imbro*. The *Poseidon* was bound on a voyage from Chittagong to Dundee, laden with a cargo of jute, and was lying becalmed off Dungeness. She was heading to the northward and westward without steerage way. The *Imbro* was on a voyage from Bilbao to Newcastle, laden with iron ore. She was steering E. by N. ¾ N., and was making eight knots an hour. Under the Regulations for Preventing Collisions at Sea, it was the duty of the officer in charge of the *Imbro* to keep out of the way of the *Poseidon*. In fact, she ran into the *Poseidon* at considerable speed, the stem and port bow of the steamer striking the port quarter of the *Poseidon*. The officer in charge of the *Imbro* endeavoured to excuse himself by saying that he was misled by the *Poseidon* exhibiting an improper light, and that this was the real cause of the collision. After stating the course and speed of the steamer, and that her regulation lights were duly exhibited, the defence in paragraph 3 alleges as follows: "In these circumstances those on board the *Imbro* observed a white light, which afterwards proved to be on the *Poseidon*, distant three and a half to four miles, and bearing about half a point on the starboard bow. This light was taken to be the masthead light of a steamship, and was watched in the expectation that she would show one or both of her side lights, and the *Imbro* was kept on her course. Some time afterwards a red light was seen nearly right ahead, but a little on the port bow withal, and was taken to be the light of a sailing vessel, the white light being still about the same bearing on the starboard bow. Both lights were carefully watched, and the *Imbro* was kept on her course, as it was believed that the red light could be easily cleared when the supposed steamship showing the white light had been made out and acted for; but suddenly the white and red lights before mentioned were (by the cabin lights of the *Poseidon*) made out to be on the same ship, and,

although the helm of the *Imbro* was at once put hard-a-port and her engines reversed full speed, the *Imbro* with her stem and port bow struck the port quarter of the *Poseidon*, thereby sustaining damage." Par. 5. "Those on board the *Poseidon* improperly carried a stern light so as to be visible continuously and within the area of her red light, and so as to mislead those on board the *Imbro*." It is impossible to accept the evidence adduced in support of these allegations as entirely accurate and trustworthy. It is not, however, necessary now to deal with it in detail, because I am of opinion that, on his own showing, the officer in charge of the *Imbro* was to blame. He was approaching two lights—the one white, the other red—both nearly ahead of him, which he says he mistook for the lights of two different vessels, the one a steamship, the other a sailing vessel. Contrary to his expectation, the vessel which he says he mistook for a steamer failed to open either one or other of her coloured lights—a circumstance in itself embarrassing and suggestive of difficulty and danger, inasmuch as it prevented his judging the direction she was steering. Yet he kept on at full speed until he got so close to the *Poseidon* that it was impossible to avoid collision with her, lying as she was practically helpless and motionless on the water. The Elder Brethren agree with me in regarding this as reckless and negligent navigation and a breach of art. 18 of the Regulations. The *Imbro* must therefore be held to blame.

Then comes the question, was the *Poseidon* also to blame? Besides the regulation side lights she was carrying over her stern a white light in a globe lantern lashed to the rail. We were asked to believe that this light was so fixed that it could not be seen forward of a line drawn at the stern of the ship at right angles to the keel. The ship has an elliptical stern, and we have no doubt that the light in question would, and did in fact show considerably forward of such line; that its rays intersected the rays of the coloured lights at no great distance from the ship, and that both the red light and the stern light of the *Poseidon* were at one and the same time open, and were actually seen by those on board the *Imbro*. Is it a breach of the Regulations to carry a light so fixed? The following articles of the Regulations for Preventing Collisions at Sea are material. Art. 2: "The lights mentioned in the following articles and no others shall be carried in all weathers from sunset to sunrise." 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." It is an infringement of art. 2 to carry a stern light fixed as a permanent light, because when there is no vessel overtaking it it would be a light other than those prescribed. I am disposed to think that art. 11 contemplates only the holding up or flashing of a light to an overtaking ship. The words certainly do not authorise the carrying of such a light on board a ship when there is no vessel overtaking her in sight. I hold it to be contrary to the spirit as well as to the words of the articles for a vessel to exhibit such a fixed light to a vessel which is not overtaking her within the meaning of the rule; though it may be inevitable that a light, *e.g.*, a flare, shown to an overtaking vessel shall be seen by another vessel not overtaking her. It becomes then material to determine what is an overtaking vessel within the meaning of art. 11. In my opinion a vessel approaching another from aft and being more than two points abaft the beam of the foremost ship—a position from which the coloured side lights of the foremost vessel would not be visible—is an overtaking vessel within the meaning of art. 11, and a vessel is not an overtaking vessel within the meaning of the article unless she is more than two points abaft the beam of the other vessel. In one sense no doubt a vessel may be overtaking another when she is less than two points abaft the beam of the other. I hold nevertheless that she is not then an overtaking vessel within the meaning of the word as used in art. 11, the whole object of the article being, in my judgment, to provide for a warning light being shown to a vessel approaching another from aft and in such a position from which the coloured lights of the foremost vessel would not be visible. This appears to me an interpretation which makes the several articles work in harmony, and which obviates the difficulty to which I referred in the case of *The Seaton* (*ubi sup.*). I mention that case for the purpose of saying here that I consider any expression which I may have used during the arguments of counsel, and which may conflict with my present decision, erroneous. Applying arts. 2 and 11 as I have interpreted them to the facts of this case, it is clear that those in charge of the *Poseidon* were guilty of a breach of the Regulations in carrying the stern light as they did. Whether that breach of the Regulations was one which would have misled an officer exercising ordinary care and intelligence, or whether it did in fact mislead the officer in charge of the *Imbro*, I am not concerned to inquire. The 17th section of 36 & 37 Vict. c. 87 provides as follows: "If in any case of collision it is proved to the court before which the case is tried that any regulation for preventing collisions contained in or made under the Merchant Shipping Acts 1854 to 1873 has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary." It has been proved that one of the regulations referred to in that section has been infringed; it is not shown that the circumstances of the case made a departure from the regulation necessary; and it is, in my judgment, impossible to say that the infringement of the regulation in question may not have caused or contributed to the collision. I think that the interpretation of the regulations which I have expressed is covered by decisions of the Court of Appeal in the cases of *The Franconia* (*ubi sup.*) and *The Main* (*ubi sup.*), and of the President of this division in the case of *The Palinurus* (*ubi sup.*). If this decision goes to any extent beyond the authority of those cases the responsibility is mine. I pronounce both vessels to blame.

Solicitors for the plaintiffs, *Hollams, Sons, Coward*, and *Hawksley*.

Solicitors for the defendants, *Downing, Holman*, and *Co.*

Wednesday, May 15, 1889.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE LEE. (*a*)

Salvage—Consolidated actions—Tender—Costs.

Where separate salvage actions against the same ship were consolidated, leave being given to the various plaintiffs to appear separately at the hearing as their interests were conflicting, and the defendants with their defence tendered and paid into court a sum of money as being sufficient to satisfy all claims, but did not apportion it to the separate plaintiffs, the Court having upheld the tender ordered all parties to pay their own costs incurred subsequently to the tender, the defendants paying the costs previous to the tender.

THESE were three consolidated salvage actions against the owners of the steamship *Lee*, her cargo and freight.

The plaintiffs delivered separate statements of claims, and the actions were subsequently consolidated.

The defendants paid into court the sum of 1750*l.* and in paragraph 14 of their defence alleged as follows: "The defendants have paid into court the sum of 1750*l.*, and say the same is sufficient to satisfy all claims which may be made in respect of the said services."

Kennedy, Q.C., *Aspinall Tobin*, *J. P. Aspinall*, and *Pickford* for various plaintiffs

Sir *Walter Phillimore* and *Joseph Walton* for the defendants.

BUTT, J. upheld the tender, and, in dealing with the costs, said as follows:—Now, then, with regard to the question of costs. I am not disposed to make the salvors pay costs in this case. Although I think the sum of 1750*l.* was sufficient for the services, yet it is extremely difficult if not impossible for each one of the separate salvors to determine whether this tender should be accepted or not. Supposing one of the salvors was inclined to think that the award was enough for the whole of the services, how could he accept it without the consent of all the others? How could he know what portion of it was attributable to him? I do not think under these circumstances it would be reasonable to make them pay the costs. I therefore direct that each party shall pay his own costs.

Solicitors for the plaintiffs, *Hill, Dickinson, Dickinson*, and *Hill, John Woodburn, E. G. Roberts.*

Solicitors for the defendants, *Bateson, Bright*, and *Warr.*

Tuesday, June 18, 1889.

(Before BUTT, J.)

THE STETTIN. (*a*)

Carriage of goods—Bill of lading—Delivery to the consignee—German law.

Where by a bill of lading goods are to be delivered to a named consignee or his assigns, and it is not assigned, the master is not justified either by English or German law in delivering to the consignee without his producing the bill of lading, and if he does so, and the consignee has no right to the possession of the goods, the shipowner is liable to the shipper for damages for wrongful delivery.

THIS was an action *in rem* by Sir Charles Price and Co. against the owners of the German steamship *Stettin*, to recover damages for wrongfully delivering a cargo of seed oil shipped by the plaintiffs on the said steamship.

The action was instituted in the City of London Court, and transferred to the High Court.

The plaintiffs were oil refiners carrying on business in the city of London, and on the 19th June 1888 they agreed with the defendants that the defendants should carry for them in the *Stettin*, on the terms contained in a bill of lading, fifty-seven barrels of seed oil belonging to the plaintiffs, from London to Stettin.

The material parts of the said bill of lading were as follows:

Shipped in good order and condition by Sir Charles Price and Co. on board the steamship or vessel called the *Stettin* . . . now lying in this port bound for Stettin . . . fifty-seven barrels of seed oil . . . to be delivered subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition, from the ship's deck where the ship's responsibility shall cease, at the port of Stettin unto S. Mendelsohn or to his or their assigns, he or they paying freight for the said goods in London . . . the goods to be taken from the ship by the consignees as soon after arrival as the vessel is ready to discharge, or the same may be transhipped into lighters and (or) landed on the quays and (or) warehoused all at the expense and risk of the owners of such goods. . . . In witness whereof the master or agent of the said vessel hath affirmed to two bills of lading, exclusive of the master's copy, all of this tenor and date, one of which bills being accomplished the others to stand void.

The plaintiffs accordingly shipped the said goods and paid the defendants the freight in respect of their carriage.

On the ship's arrival at Stettin, the master having a copy of the bill of lading and being personally acquainted with Mendelsohn, the person named in the bill of lading, delivered the goods to him, without requiring him to produce the bill of lading.

Mendelsohn was the agent of a person to whom the plaintiffs had contracted to sell the goods, but the vendee having failed to comply with the terms of the contract of sale as to payment, the bill of lading was retained by the plaintiffs' agent at the port of discharge.

Mendelsohn on receipt of the goods delivered them to the vendee, and they and their value were thereby lost to the plaintiffs.

The plaintiffs called German advocates to prove that by German law the master could not deliver to the consignee named in the bill of lading without the production of the bill of lading. The defendants called German advocates to prove the contrary. The result of such evidence is stated in the judgment of Butt, J.

Cohen, Q.C. (with him *Pike*), for the plaintiffs, was not called upon.

Joseph Walton (with him *Barnes*, Q.C.) for the defendants.—Neither according to German nor English law was it necessary that the bill of lading should be produced before these goods were delivered to the consignee. The contract between the parties, as evidenced by the bill of lading, was that the shipowner should deliver to the named consignee, on his or the shippers' order. There was no order, and therefore the

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

shipowners fulfilled the contract in delivering to the consignee. There is no authority for the plaintiffs' contention.

BUTT, J.—I have no doubt but that Mendelsohn was really the agent of the person with whom the plaintiffs had contracted in this case. I think the evidence clearly establishes that. With regard to the other question, which is the main one in the case, it is contended that by German law the shipowner is entitled to deliver to the consignee named in the bill of lading without production of either part of the bill of lading. Now we have had the evidence of skilled advocates on one side and the other, and their evidence is entitled to consideration. But they differ and differ very widely, and in that divergence of opinion I have come to the conclusion that the German law upon this subject does not differ in any essential respect from the English law. All I have to do therefore in the present case is to apply the English law upon the subject. I have no doubt whatever that, according to English law, a shipowner is not entitled to deliver goods to a person like Mendelsohn without either one part or the other of the bill of lading being produced. I shall therefore give judgment for the plaintiffs and refer the question of damages to the registrar if necessary.

Solicitors for the plaintiffs, *J. A.* and *H. E. Farnfield.*

Solicitors for the defendants, *Thos. Cooper* and *Co.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Saturday, Dec. 1, 1888.

(Present: The Right Hons. Lords WATSON, Lord FITZGERALD, Lord HOBHOUSE, Lord MACNAGHTEN, and Mr. STEPHEN WOULFE FLANAGAN.)

THE CITY OF PEKING.

THE STEAMSHIP CITY OF PEKING *v.* THE COMPAGNIE DES MESSAGERIES MARITIMES (OWNERS OF THE S.S. SAGHALIEN) AND THE OWNERS OF CARGO ON BOARD. (*a*)

Collision—Evidence of negligence.

The fact of a vessel under steam colliding with a ship at her moorings in daylight is primâ facie evidence of fault; and her owners cannot escape liability except by proving that a competent officer could not have averted the collision by the exercise of ordinary care and skill.

Where a steamship under way collided with a vessel at her moorings in daylight in consequence of an exceptional current, known to be a possible though improbable occurrence, and it was proved that there was delay in dropping her anchor, and that the other anchor was not in readiness, she was found to have neglected ordinary precautions, and her owners were held liable.

THIS was an appeal from the judgment of the judge of the Vice-Admiralty Court of Hong Kong by the defendants, the owners of the s.s. *City of Peking*, in a collision action *in rem.*

The collision took place in the harbour of Hong Kong, on the 29th Nov. 1886, between the plaintiffs' steamship the *Saghalien* and the defendants' steamship the *City of Peking.*

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

The *City of Peking* was found solely to blame for the collision.

At the time of the collision the *Saghalien* was lying moored to a buoy in Hong Kong harbour, and was run into by the *City of Peking* as she was entering the harbour, solely owing (as was alleged by the defendants) to a sudden and unexpected current driving her to port, which made it impossible for those in charge of her to avoid the collision.

The material facts of the case appear in the judgment.

Nov. 8, 1888.—Sir *Walter Phillimore* and *Joseph Walton* for the appellants, the owners of the *City of Peking.*

Barnes, Q.C. and Dr. *Raikes* for the respondents, the owners of the *Saghalien.*

Dec. 1.—Judgment was delivered by

Lord WATSON.—This is an appeal brought by the owners of the *City of Peking* against a judgment of the Vice-Admiralty Court of Hong Kong, condemning their ship and bail in the amount of damage occasioned to the steamship *Saghalien*, belonging to the Compagnie des Messageries Maritimes, and her cargo, by the collision of the two vessels, which occurred within the harbour of Hong Kong shortly after 2 p.m. on the 29th Nov. 1886. The northern fairway of the harbour, which is about two-fifths of a mile in breadth, runs westward from the south-western extremity of a promontory, jutting into the harbour from the north, which is known as Kowloon Point. At the time of the collision the *Saghalien* was lying opposite to Kowloon Point, her head being moored to a buoy on the southern side of the fairway, which left her free to swing with wind or tide. The *City of Peking*, which is a screw steamer of 5042 tons burthen, and 425 feet in length, entered the harbour from the east, against a half ebb tide, on her way to her own moorings, which are situated on the north edge of the fairway nearly a mile to the west of Kowloon Point. It is not matter of dispute that, after she came within the limits of the harbour, the *City of Peking* was steered straight for the Meeanee buoy, which lay between her and the *Saghalien*, until she reached a point about three-fifths of a mile to the east of the latter vessel; and that appears to be the usual and proper course. The account which is given, by her own witnesses, of the subsequent navigation of the *City of Peking*, from the point in question till the collision took place, is as follows. In ordinary circumstances, her helm at that point would have been ported, so as to bring her towards the centre of the fairway, and she would in that case, if she had continued to obey her helm, have passed the *Saghalien* at a considerable distance. But that course was obstructed by two large junks which were heading towards Kowloon Point. These junks were in reality anchored, but they were supposed to be under way, owing to the fact that their sails were set, and were filled by a light easterly wind, and that their hawsers were on their port side. In these circumstances the speed of the *City of Peking* was reduced from ten to between four-and-a-half and five knots an hour, and her helm was ported and steadied on a course nearer to the south side of the fairway, which, if maintained, would have carried her astern of the junks, and about 400

feet ahead of the *Saghalien*. When she was astern of the junks, and about ninety feet from them, but before she came abreast of the *Saghalien*, the witnesses for the *City of Peking* assert that her head was suddenly caught by a strong tidal current, running southwards from Kowloon Point at the rate of four to five knots an hour, which at once canted it round to port. The captain, who was himself in charge upon the forward bridge, then gave three consecutive orders, all of which were promptly obeyed. He first ordered the helm to be put hard-a-port, but that had no effect. At that moment his vessed was less that twice her own length from the *Saghalien*, and he at once saw that there was imminent danger of collision. In fact the two ships were so near to each other that, in his judgment, he could not have got clear of the *Saghalien* by going full speed ahead. He accordingly gave the order to stop and reverse, and at the same time directed the third officer to go to the chief engineer and tell him to back her as hard as possible. On the return of the third officer from that errand, but not till then, he gave the order to drop the starboard anchor, which was the only one ready to let go, the port anchor having been unshackled just before they came abreast of Kowloon Point. These proceedings failed to stop her way, and the stem of the *City of Peking* struck the *Saghalien*, which was then heading to the north, nearly amidships, causing damage both to hull and cargo. The learned judge of the Vice-Admiralty Court came to the conclusion, upon the evidence, that the statements made by the witnesses of the *City of Peking* as to the alteration of her helm at the distance of three-fifths of a mile from the *Saghalien* are erroneous, and that she was actually steered throughout upon a course which necessarily brought her at right angles on the *Saghalien*.

Except upon very clear testimony their Lordships would be unwilling to hold that a well-equipped vessel like the *City of Peking*, with her officers and crew at their posts and on the outlook, had deliberately run down a ship at anchor; but there appears to them to be no ground for that inference in the present case. The learned judge relied upon the evidence of Isuard and Delmas, the second captain and lieutenant of the *Saghalien*, and that of Captain Paul, of the *Tanais*, who all state that, when they saw the *City of Peking*, she was bearing straight for the *Saghalien*. Had these witnesses observed the whole course of the *City of Peking*, their evidence would have been material; but having regard to the time at which their observations were made, it does not conflict with the evidence for the *City of Peking*. Only one of the three, Delmas, saw her at some distance off, when she fired a gun on entering the harbour, at which period of time she was admittedly steered for the Meeanee buoy, which was nearly in a line with the *Saghalien*. He then went about his own business, and saw no more of her, until her crew were preparing to let go the starboard anchor. Isuard no doubt says that he never lost sight of her, and that she never changed her course; but it clearly appears from his evidence that he did not see her at all until just before she was observed for the second time by Delmas. Captain Paul's opportunities of observation were equally limited. He says, "It was perhaps a minute from the time I first saw her till the collision." Whilst their Lordships are prepared to acquit the *City of Peking* of having steered a straight course for the *Saghalien*, it does not necessarily follow that, in their opinion, she must be absolved of all blame in the matter. When a vessel under steam runs down a ship at her moorings in broad daylight, that fact is by itself *primâ facie* evidence of fault; and she cannot escape liability for the consequences of her act, except by proving that a competent seaman could not have averted or mitigated the disaster by the exercise of ordinary care and skill. The appellants attribute the collision wholly to the effect upon their vessel of the current which caught her head, to counteract which they maintain that every reasonable precaution was used which ordinary skill and prudence could suggest. It appears to be an undoubted fact that, in certain states of the weather, at half ebb, the tide setting eastwards sweeps down the western shore of the promontory of Kowloon, and is thereby deflected, and runs with considerable force in a southerly direction across the fairway. These currents are exceptional, but that they do occasionally, although at distant intervals, occur, is known to mariners who frequent the harbour, and was known to the captain of the *City of Peking*. The evidence on both sides establishes that it is impossible to lay down any rule in regard to the recurrence of these exceptional tides; they may occur at any time, even when least anticipated, and a cautious mariner is therefore bound always to beep in view the possibility of their being met with. There can be no reason to doubt the statement of the captain that he did not expect to meet with a current of the force of that which he encountered; but, however little expected, it was his duty to be prepared for such a contingency. The fact that he had been compelled, by the apparent position of the two junks, to keep to the southern edge of the fairway made that duty the more imperative. Their Lordships are not prepared to hold that, using all due precaution, he was not entitled to steer upon the course which he proposed to follow. The liability or non-liability of his ship appears to them to depend upon this consideration—whether, at the time when she was caught by the current, he was prepared to use, and did actually use, all ordinary and proper measures for averting the collision? There is a serious conflict of testimony as to the actual force of the current at the time of the collision, some witnesses estimating it at half a knot, and others at nearly five knots, an hour. Their Lordships do not think it necessary to decide between these conflicting views, or to determine the precise strength of the current on the occasion in question. It appears to them that, assuming his statement on that point to be correct, the evidence nevertheless establishes that the captain of the *City of Peking* failed, in two particulars, to take proper steps for checking the way of his ship.

In the first place, their Lordships have been advised by their nautical assessors, and they have no hesitation in holding, that the starboard anchor ought to have been dropped at the same time when the order to stop and reverse was given. That an appreciable interval of time must have elapsed between the giving of the second and third orders is made clear by the evidence of the captain and third officer; and the second captain of the *Saghalien* is probably not

far wrong in his estimate of distance when he states that, at the time it was dropped, the two vessels were not more than 200 feet apart. Seeing that 60 fathoms or 180 feet of chain were payed out with the anchor, there must have been very little time for it to operate before the collision occurred. In the second place, their Lordships have been advised that, in the circumstances in which the *City of Peking* was placed, her port anchor ought also to have been in readiness, and ought to have been let go, so soon as the ship ceased to obey her helm in consequence of the current. In that opinion they entirely concur. In such circumstances, the keeping of both anchors in readiness is a safe and ordinary precaution, it being impossible to predict which of the two it may become necessary to drop or that both will not be required. That a second anchor, if dropped in time along with the first, would have had a material influence in averting the collision, or minimising its effects, can hardly be questioned by the appellants, whose third officer states in his evidence, "I dare say two anchors would have held her." The fact seems to have been that those in charge of the *City of Peking*, although they ought to have been aware of the possibility, thought there was no probability of danger from a current; and, acting on that speculation, they allowed the port anchor to be unshackled before the junks were reached. In other words, they took their chance, and the ship must bear the consequences. It is right to state that these views are in entire accordance with certain of the findings in the court below. Their Lordships will humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed. The appellant must pay the costs of the appeal.

Solicitors for the appellant, *Trinders* and *Co.*

Solicitors for the respondents, *Gellatly* and *Warton.*

Supreme Court of Judicature.

COURT OF APPEAL

Friday, Feb. 15, 1889.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

The Great Britain 100 A 1 Steamship Insurance Association *v.* Wyllie and others. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Insurance—Marine—Mutual Association—Policy, form of — Insurance by managing owner — Liability of other owners for contributions.

H. & G., the managing owners of a steamship, insured her in a mutual assurance association in their own names, and the policy was expressed to be "as well in his or their own names as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, subject to the provisions hereinafter contained." The consideration stated in the policy was "the contributions to be paid from time to time by the assured for losses and averages on other steamships." Such contributions having become payable, the association sued the part owners other than H. and G. to recover the same.

Held, that these part owners were liable, because the policy was made on their behalf, and they were "assured" within the meaning of the policy, and were expressly bound by the consideration clause to pay these contributions.

Quære, whether they became members of the association.

The Ocean Iron Steamship Insurance Association *v.* Leslie (57 *L. T. Rep. N. S.* 722; 6 *Asp. Mar. Law Cas.* 226) *approved.*

United Kingdom Mutual Steamship Insurance Association *v.* Nevill (6 *Asp. Mar. Law Cas.* 226, *n.*; 19 *Q. B. Div.* 110) *distinguished.*

This was an appeal by the defendants Wyllie, Ellis, Bower, Dalzell, and Burnyeat from the judgment of Day, J. at the trial without a jury in Middlesex.

The plaintiffs, a mutual marine insurance association, sued the defendants, as part owners of the steamship *Orchis*, for calls made in respect of the insurance of that vessel, amounting to 63*l.* 12*s.* 7*d.* The *Orchis* was owned as to forty-eight shares by Messrs. Hornstedt and Garthorne, as to two shares by Wyllie, as to two shares by Bower, as to one share by Ellis, and as to four shares by Dalzell and Burnyeat. Messrs. Hornstedt and Garthorne were the managing owners of the *Orchis*, and they insured her with the plaintiff association. It was admitted that they had authority to insure in a mutual club. The policy of insurance was as follows:

Know all men that Hornsted and Garthorne as well in his or their own name or names as for and in the name or names of all and every other person or persons to whom the same doth, may, or shall appertain, in part or in all, subject to the provisions hereinafter contained, doth make assurance and cause himself or themselves and them and every of them to be insured . . . And so we, the assurers, are contented, and do hereby promise and bind ourselves to the assured, their executors, administrators, and assigns for the true performance of the premises; the consideration due unto us, the assurers, for the said insurance, being the contributions to be paid from time to time by the assured for losses and averages on other steamships mutually insured in the above-named association, and other costs, charges, and expenses of the association, at and after the rates per cent. to be determined by the committee thereof. And it is mutually agreed between the assured and assurers that all the rules of the said association, whether set out herein or indorsed hereupon, or otherwise, shall be as binding upon the assured and assurers, and that as fully and effectually to all intents and purposes, as if such rules were inserted in this policy, and formed part thereof.

The memorandum of association provided:

4. The objects for which the association is established are: (1) The insurance of steamships belonging to members of the association, or in which members of the association are interested or have a share or shares.

The articles of association, so far as are material in this case, were as follows:—

1. The association for the purposes of registration is declared to consist of one hundred members.

2. The committee may, whenever the business of the association requires it, register an increase of members.

3. Every person shall be deemed to have agreed to become a member of the association who insures any ship, or share or shares in a ship, in pursuance of the regulations hereinafter contained.

16. Every member shall have one vote (at general meetings) for each steamer entered by him or his firm.

32. All policies of insurance shall be issued or underwritten in the name of the association, and shall have a copy of the rules indorsed thereon.

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

33. All claims in respect of insurances shall be made and enforced against the association, and not against any member or members thereof.

34. Every engagement or liability of a member of the association in respect of any insurance shall for all purposes relating to enforcing such engagement or liabilities be deemed to be an engagement or liability by or on the part of such member to the association, and not to any other member or members.

The rules indorsed upon the policy, so far as material, were as follows:—

1. The members of this club shall mutually insure each other's steamships or shares therein, in such manner and against such loss and damage as are hereinafter mentioned.

3. The insurance is against . . . the charges whereof the members having ships entered in this club shall bear in proportion to the sum insured in this club.

27. The committee shall meet at least once a month for the settlement of claims, and for such claims as they may pass, and for other contributions payable under these rules the managers shall draw on the members at one month, the members' respective proportion of such claims being calculated according to their several interests in this club at the time of such claims accruing.

33. A member shall be uninsured in respect of any ship or his share therein [upon certain events].

34. A member, provided he give due notice in writing, shall cease to be liable to contribution in respect of any ship for claims accruing [after certain events].

36. For ships ceasing to be insured the association may, but shall not be compelled to, relieve the member from future liability to contribution, on such terms as the managers may certify to be expedient.

The action came on for trial before Day, J. without a jury, in Middlesex, when he gave judgment for the plaintiffs for the amount claimed, as follows:

Day, J. — The plaintiffs in this action are one of those clubs which exist for the purpose of mutual insurance. Now, there is no doubt it is well settled that in the case of companies, as ordinarily understood there can neither be any liability on the part of *cestuis que trust* to the company, nor any right on their part as against the company. That is well settled law. Who are to be treated as members of the company is to be ascertained by the register. Companies of this description are creatures of statute law, which has made provisions regulating their existence and determining various details of their organisation. It is well settled law that no person can be liable as a shareholder, or be entitled to any benefit as a shareholder, who is not registered; that is to say, a person must be nominated a member of the company, and must be known as a member of the company, and persons cannot be held to be members of the company, whether for good or evil, who are not registered as members of the company. There can be no such thing as equitable interests in shares in a company as between the company and such persons. The company is not bound to take cognisance of trusts in any way. The company cannot take advantage of, or insist upon, rights as against persons who are not, in point of form, members of the company.

Now, that is clear and well-defined law, and is consistent with the statutes, and consistent with the necessities of the case. It would lead to inconvenience, which would be exceedingly great, if the law were otherwise. We are now dealing with that which is called a company, and is necessarily a company by reason of our law — namely, a mutual insurance club. It is, no doubt, laid down by the Lords Justices, that in cases of these insurance clubs there can be no trusts, and there can be no undisclosed principals, or undisclosed members; and, if I may say so, I concur in their view. This is necessarily an inconvenience arising from the law under which these clubs are constituted; it is an inconvenience that these policies must differ, and that the rights and liabilities must differ from the rights and liabilities of insurers who insure otherwise than on this mutual principle. This mutual principle has been exceedingly well explained by Mathew, J. in a case to which my attention has been called, which is reported in the Law Times—*The Ocean Iron Steamship Association* v. *Leslie* (*supra*). It is, no doubt, a modern practice, a most beneficial practice, and one based on thoroughly sound principles. At the same time the nature of these clubs differs very materially from that of ordinary companies. The members are necessarily a fluctuating body, and there are, consequently, fluctuating interests; and where the word "share" is used with reference to these clubs, it is used in a very different sense, or rather represents an entirely different thing, to that which is represented by the word "share" when it is used in reference to the interest of a person in an ordinary joint-stock company. I pointed out in the course of the argument the great difference between the word "share," as well understood and applied to interests of persons in joint-stock companies, and the word "share" as applicable, if it be applicable, to interests in these clubs. It is not a share at all in the ordinary sense of the word; in fact, it is in no sense a share. It is really a matter of proportionate liability, which is constantly varying according to the success or otherwise with which the club is conducted, or according to the extent of losses which may occur. It is a mere question of liability to make good the losses, and of the right to be paid for losses, as and when they occur. It is inconvenient to introduce the same word into two entirely different classes of cases, to which it is not similarly applicable. Now, in the present case the company, or rather the club —for I use that expression as more convenient— issued a policy. The membership of the club is defined by the articles of association. By art. 3 it is provided that "every person shall be deemed to have agreed to become a member of the association who insures any ship, or share or shares in a ship, in pursuance of the regulations hereinafter contained." Therefore, the membership is constantly fluctuating. A man becomes a member the instant he insures his ship. That constitutes membership. Having become a member he is interested, and the benefit he is to get is the payment of his insurance if his ship be lost. The liability he is under is the contribution he will have to make towards losses generally.

Now, in the present case a policy was issued in these terms: "Hornstedt and Garthorne as well in his or their own name or 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, subject to the provisions hereinafter contained, doth make assurance," and thereupon, as is admitted, Hornstedt and Garthorne became members. But it appears to me that not only did they become members, but that the other persons on whose behalf they professed there and then on the face of the policy to be acting, by the words "the name and names of all and every other person or persons to whom

the same doth, may, or shall appertain," who were then the owners of the ship, also became members. It was not an insurance of any particular interest, or the interest of Hornstedt and Garthorne, but it was a policy effected on the whole ship, and upon all the interests in the ship, that then existed, and it was to be in the name or names of those persons. There can be no doubt that, if this had been an ordinary policy outside the club, no question would have arisen, but that every person then interested in the ship would have become insured, and the policy have enured to their benefit, and they would have become liable for the premiums. Now, what is the consideration for this policy? "The consideration due unto us, the assurers, for the said insurance, being the contributions to be paid from time to time by the assured." Now, who are the assured? The people who own the ship are, because they own the ship, and because Hornstedt and Garthorne, when they gave their own names, said that they also insured in the names of themselves and all other persons who were owners of the ship. The assured are Hornstedt and Garthorne and all other persons who are owners of the ship. They are the assured, not because they own the ship, but because Hornstedt and Garthorne told the association when they effected the policy that they were the persons on whose behalf the insurance was made. I cannot see any reason to doubt, looking at this policy, that they were the persons insured, and that they undertook by this policy to make good the contributions. It is conceded that, if it were not for the fact that the Great Britain 100 A 1 Steamship Insurance Association Limited happened to be a mutual club, there would be no doubt about it. I cannot see why the words should not mean the same thing when it is a club that is the assurer. If these persons are the assured, why are they not liable for these contributions? They have undertaken to pay them. They gave the authority to Hornstedt and Garthorne to insure in the club. Whatever has been done by Hornstedt and Garthorne has been done by their authority. The insurance has been effected by Hornstedt and Garthorne on their authority, and with authority to pledge their liability, and now it is said they are not liable because they are not members. I hold that they are members, because under the articles of association they are persons who have insured their ship, and became, by the act of insuring their ship, members of the association. Now, I have been pressed with the decision in *The United Kingdom Mutual Steamship Insurance Association Limited* v. *Nevill* (*sup.*), in the Court of Appeal, but that was a very different case. I need not go into the reasons assigned for the judgment, nor into the decision to which the Court of Appeal came. I am bound by that decision so far as it may be applicable; but I consider that case does not apply to the present. That was a very different case in many respects. The words there were entirely different. That policy, it would seem to me, excluded the notion of the co-owners being assured, because, remembering that the terms of the articles of association as to membership are similar to those found in the present case, I find that policy recites that Tully and Co. became members of the United Kingdom Mutual Association. Those words exclude the idea that the co-owners became members. The words are, "Whereas Tully having become a member," and they exclude the notion that the other people intended to become members. Tully therefore effected an insurance on the ship without any reference, as far as I can see, to any interest of any other persons. He did not purport to do it in the name of or on behalf of other persons. Therefore I am clearly of opinion that this case is distinguishable from the case in the Court of Appeal, and I give judgment for the plaintiffs with costs.

The defendants appealed.

Barnes, Q.C. and *Joseph Walton* for the appellants.—Though the managing owners had authority to insure the whole interest in this ship in the plaintiff association, they had no authority to insure in such a way as to make these defendants members of the association. When the form of the policy is looked at, together with the rules incorporated in it, and the articles of association, it is clear no persons became members except those whose names were given to the association and registered. Therefore these defendants did not become members, and no persons except members become liable to the association. This case is governed by the decision in *The United Kingdom Mutual Steamship Assurance Association* v. *Nevill* (19 Q. B. Div. 110; 6 Asp. Mar. Law Cas. 226, n.), which decided that only the person named in the policy became liable to the assurers. This case is distinguishable from *The Ocean Iron Steamship Insurance Association* v. *Leslie* (6 Asp. Mar. Law Cas. 226; 57 L. T. Rep. N. S. 722); the form of the policy is different, and there is no express contract by the assured to pay the premiums. This policy, if it is a contract with these defendants, is *ultra vires* inasmuch as this is a mutual association, and therefore cannot insure any persons who are not members.

Bucknill, Q.C. and *Macrae*, for the respondents, were not heard.

Lord Esher, M.R.—In this case an action was brought by the Great Britain 100 A 1 Steamship Insurance Association against the defendants, who were part owners of the steamship *Orchis*. The action is upon a policy of insurance, taken out by a firm named Hornstedt and Garthorne, and was brought to recover calls or contributions which were alleged to have become payable by these defendants in respect of the losses incurred by other persons, who were insured in the same association. The learned judge at the trial held that these defendants were liable, and they have appealed against that decision. The appeal has been supported upon several grounds: first, that Hornstedt and Garthorne had no authority to take out this particular form of policy; secondly, that even assuming there was authority to take out this policy, these defendants are not, by its terms, and according to the articles of association, liable to the plaintiffs; and thirdly, that if this policy binds these defendants, it is *ultra vires* of the association to grant such a policy. Now, as to the question of authority, it is admitted that Hornstedt and Garthorne had authority to make a policy of insurance on this steamship with mutual insurance clubs, and therefore, of course, they had authority to make it with this club.

Then arises the question whether they bound these defendants, and to what they bound them. The memorandum and articles of association of the plaintiffs show that they are a mutual insurance club for steamships, and it has been argued that they had only power to enter into policies of insurance with members of the association, and that these defendants never became members, not having been named in the policy. The policy itself is in the ordinary form of a Lloyd's policy, with the necessary modifications. It begins thus: "Know all men that Hornstedt and Garthorne as well in his or their own name or 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, subject to the provisions hereinafter contained, doth make assurance and cause himself or themselves and them and every of them to be insured." It is said on behalf of the appellants that the persons whose names are not given in the policy, but whose interests are insured, are merely undisclosed principals of Messrs. Hornstedt and Garthorne, and that such persons can only be sued as undisclosed principals. It has, however, been held for very many years, that in policies made in such form the agreement of insurance is made directly with all the persons on whose behalf such policy is made, exactly as if the names of all of them had been given and entered in the policy itself. Such a policy must therefore be construed as if the names of all such persons were given and entered in the policy, and such persons are the assured, and are included in the expression "the assured" in all parts of the policy. Then the policy, further down, proceeds thus: "And so we, the assurers, are contented, and do hereby promise and bind ourselves to the assured . . . for the true performance of the premises; the consideration due unto us, the assurers, for the said insurance being the contributions to be paid from time to time by the assured for losses and averages on other steamships mutually insured in the above-named association." The "assured" there means all those persons referred to at the beginning of the policy, as if they had been there named, and therefore there is an express contract by those persons to pay the contributions therein referred to, and consequently to pay the contribution sought to be recovered in this action.

The appellants contend that, by the rules, incorporated in the policy, such a policy can only be made with members of the association, and that they, not being named in the policy, or registered as members according to the Companies Act 1862, are not members, and that this policy could not be made with them. It is not, in my opinion, necessary to determine in this case whether these defendants are or are not members of the association. It is difficult to say that they are not, for some purposes, members, as, for instance, under the rules relating to the "assured." There are, however, other rules which seem to say that something more than being assured is necessary to make them members. It may be that they are members for the purposes of insurance, though not for the purpose of voting, of receiving notices, and so forth, and that they are not liable to contribute to the general expenses. I do not decide this question —it being unnecessary to do so here. Assuming that these defendants are not members at all, yet they are liable to pay these contributions, for they have expressly contracted to pay them, as is shown by the decision of Mathew, J. in *The Ocean Iron Steamship Insurance Association* v. *Leslie* (*sup.*). He there says: "The company, not content with the liability of the agent, as was the case in *Nevill's* case (*sup.*), stipulate that they shall be entitled to look to the principal; in other words, they emphatically contract that the principal shall be liable to them as well as the agent. It is clear that that contract is binding on the assured, not from their being parties who sign the contract, but as being the persons to whom the policy is issued, and who are to have the benefit of it." It is a necessary implication from the memorandum, the articles, and the rules of this association, that they have power to enter into contracts of mutual insurance with persons who may not be members, and to make such a contract as is contained in this policy with persons mutually insured, and therefore it is immaterial whether these persons were members or not, and this contract is not *ultra vires*. It has been urged that this case is governed by *United Kingdom Mutual Steamship Assurance Association* v. *Nevill* (*sup.*), but that case is not in point here. In his judgment in *The Ocean Iron Steamship Insurance Association* v. *Leslie* (*sup.*), Mathew, J. has so clearly shown this that it is difficult to say anything in addition. He has pointed out the difficulties which arose in the way of these mutual insurance clubs, and how they endeavoured to escape them, and how, in trying to avoid one difficulty they fell into another, as appears from *United, &c.*, v. *Nevill* (*sup.*), by departing from the old form of Lloyd's policy in its introductory part, so that the only person who became liable on the policy was the person in whose name it was made, and, lastly, how they returned to Lloyd's policy and adapted it to the case of contributions. These defendants are therefore liable to pay these contributions, and the appeal must be dismissed.

Bowen, L.J.—In this case a mutual insurance association are suing these defendants, who are part owners of a steamship, upon a policy of insurance, for contributions in respect of the losses of other steamships insured in the association. The policy in question was made by certain part-owners, Messrs. Hornstedt and Garthorne, on behalf of themselves and the other part owners. The liability of these defendants depends upon the terms of that policy. It is said on behalf of the plaintiff association that there is in the policy an express contract by these defendants to pay these contributions. That is a question to be determined upon the construction of the policy. The policy is in the ordinary form of a Lloyd's policy, and that form would be a mere trap and snare if the construction put upon it by the plaintiff association were not the right construction. It begins thus: [Reads the first clause of the policy.] In a policy so framed, the term "the assured," wherever that expression occurs afterwards in the policy, means all those persons whose interests are protected by the policy according to the statement at the commencement of the policy. Then follows this essential clause: [Reads the clause commencing "and so we, the assurers, are contented."] In that clause the term "the assured" means, as I have before said, all the persons whose interests

are insured, and those persons undertake to pay to the assurers contributions for losses and averages on other steamships mutually insured in the association, according to the only proper construction of the policy. The only thing which has been suggested to be inconsistent with that construction is the last clause, which provides that the rules are incorporated into the policy. These rules follow, and contain the provisions relating to members. Can it be said that the incorporation of those rules into the policy cuts down the previous clear words of the policy, which say that the assured are to pay contributions? I think not. The result would be either that the assured are not bound at all, or that all the contributions are to be paid by the persons actually named in the policy. There is, however, a clear and express contract by the assured to pay, and they are liable. It has been argued by the appellants that, by the articles and rules, it is *ultra vires* for the association to make insurances which cover the interests of co-owners, who do not become members of the association. That is not so, for their memorandum of association states their object to be: "The insurance of steamships belonging to members, or in which members of the association are interested, or have a share or shares." How, then, can it be said that the association acts *ultra vires* in making such an assurance as this? I doubt whether these defendants ever became members of the association, but it is unnecessary to decide that question, for they have bound themselves by an express contract to pay. The case of *United Steamship Assurance Association* v. *Nevill* (*sup.*) is no authority upon this case. The policy in that case is before us, and is quite different to the policy in this case. There Tully was throughout the policy treated as the sole and only person insured, and, looking at the terms of the document, it could not be said that there was any contract by anyone else to pay contributions. This policy is quite different, and is, in all essentials, like the policy in the case of *The Ocean Iron Steamship Insurance Association* v. *Leslie* (*sup.*). There is no valid distinction between that case and the present one, and I quite agree with the judgment of Mathew, J. in that case.

Fry, L.J.—I am of the same opinion. These defendants are liable to pay these contributions either as members of the plaintiff association, or upon an express contract to pay. I pass by the first alternative, only saying that I share the doubts, expressed by my brothers, whether these defendants were members, looking at the statute (Companies Act 1862) and the constitution of the association. The question, then is, was there an express contract by these defendants to pay contributions? If there was, then they are liable. Looking at the constitution of this association, it seems clear to me that the association contemplated the making of such contracts as this, as appears from clause 4 (1) of the memorandum of association, and the insurance of the entire interest in steamships by members who were not owners of the entire interest in them. That kind of business does not seem to be, strictly speaking, mutual insurance, and Mr. Walton endeavoured to cut down the meaning of this policy to something which would be strictly mutual insurance. But we should expect the association to in some way bind persons, such as these defendants, who were not members, to pay the consideration for the insurance of their interests in the vessel. That their interests were insured appears from the commencement of the policy, and we find that further on the assured are expressly bound to pay contributions. The defendants are therefore liable by express contract to pay, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Wynne, Holme,* and *Wynne,* for *Forshaw* and *Hawkins,* Liverpool.

Solicitors for the respondents, *Lowless* and *Co.*

Tuesday, May 21, 1889.

(Before Lord Esher, M.R., Fry and Lopes, L.JJ.)

The Apollo. (*a*)

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

Damage—Dock—Grounding of vessel—Harbour master.

The plaintiffs' vessel having fouled her propeller whilst entering the port and harbour of Port Talbot, was, with the permission of the foreman docksman in the absence of the harbour master, placed in the sea lock leading into the dock, for the purpose of being put upon the ground and freeing her propeller. On the water being let out, the vessel took the ground, and sustained damage to her bottom by sitting upon an old sill, which had not been removed when the lock was lengthened. It appeared that the control of the management of the dock was in the hands of the harbour master, who at the time was ill, and that the foreman docksman was acting in his place. It also appeared that the foreman docksman did not know the condition of the bottom of the lock, and had so informed the master of the Apollo. In an action by the shipowners against the dock authority:

Held (*Lord Esher, M.R. dissentiente*), *that the use of the lock for the purpose was an extraordinary use; that the master of the Apollo was a bare licensee; and that the foreman docksman had no authority to grant the use of the lock for such purpose so as to render the defendants liable for the damage ensuing.*

This was an appeal by the plaintiffs in an action *in personam* against the Port Talbot Company from a decision of Butt, J. dismissing their action with costs: (60 L. T. Rep. N. S. 112; 6 Asp. Mar. Law Cas. 356.)

The action was instituted by the owners of the steamship *Apollo* to recover damages for injuries occasioned to her in the defendants' dock under the circumstances hereinafter stated.

The defendants were incorporated by Act of Parliament for the purpose (*inter alia*) of making and maintaining the harbour of Port Talbot, and of making and maintaining docks, locks, and other works at the said port. The defendants were also authorised to and did demand and receive dues in respect of vessels entering and using their docks.

On the 24th Dec. 1887 the *Apollo,* laden with a cargo of railway iron and tin plates, entered the said dock, and in getting to her berth her

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

propeller fouled a rope stretched across the dock and was injured.

For the purpose of repairing the injured propeller the *Apollo* was placed in a lock leading from the sea to the dock, and the water was let out so that it might be used as a dry dock. The lock had since its original construction been lengthened, and the gates and sill of the old lock had never been removed. When the water was drawn off, the *Apollo* rested on this sill and sustained the damage complained of.

The plaintiffs alleged that a man named Johns, whom they said occupied the position of deputy harbour master, had given permission to the *Apollo* to go into the lock, and had placed her in it, and represented that its bottom was safe for the vessel to lie upon.

The defendants denied that Johns was deputy harbour master, or that he had made any representation to the plaintiffs as to the lock being a safe place for the *Apollo* to lie in, or that he had any authority to allow the lock to be used for the purpose.

They alleged that Johns' position was that of foreman docksman in receipt of weekly wages. It appeared that at the time in question the harbour master was confined to his bed by an attack of gout; but it was alleged that, as his house was on the quay, the master of the *Apollo* might have seen him and asked his permission to place her in the lock, and his opinion whether he thought the lock a safe and proper place for placing her in.

The remaining facts appear in the judgments.

Sir *Henry James*, Q.C., *Barnes*, Q.C., and *Synnott*, for the plaintiffs, in support of the appeal.—The plaintiffs are entitled to judgment. Johns was in fact the deputy harbour master, and the defendants are liable for his acts. The plaintiffs could know nothing of the condition of the bottom of this lock, whereas the defendants knew or ought to have known of its condition. Hence it was their duty to inform the plaintiffs of this hidden danger:

Indermaur v. *Dames*, 16 L. T. Rep. N. S. 293; L. Rep. 2 C. P. 311;
Southcote v. *Stanley*, 1 Hurl. & Norm. 247.

Bucknill, Q.C. and *Macrae*, for the defendants, *contra*.—The judgment appealed from is right. Johns had no authority to authorise the user of the lock for this extraordinary purpose. The fact is, that in order to oblige the captain of the *Apollo* he allowed her to be placed there, but did not thereby cast any liability upon his employers for any damage she might sustain. The captain of the *Apollo* was a bare licensee *quâ* the use of this lock, and there has been no actionable breach of duty on the part of the defendants:

Gautret v. *Egerton*, 16 L. T. Rep. N. S. 17; L. Rep. 2 C. P. 371;
Ivay v. *Hedges*, 9 Q. B. Div. 80.

Lord Esher, M.R.—This is a case in which the plaintiffs bring an action against the Port Talbot Company for damage done to their ship in Port Talbot Docks by the alleged negligence of a servant of the dock authority for whose negligence it is contended that they are answerable. The ship in question was a steamship of considerable size, and at the time of the accident she had a cargo on board. As she went into the Port Talbot Dock a rope got entangled in her screw. Unsuccessful efforts were made to disentangle it. Thereupon a harbour official of the name of Johns advised that the ship should be put into the lock, which is the lock through which ships go in and out of the dock, and that the water should be let off so that she might take the ground. The ship was thereupon taken into the lock, and she did take the ground; but unfortunately the lock had since its original construction been altered. It had been lengthened, and the old gates were left and stood back against the sides of the lock. These gates when shut shut against a sill, which was also left when the alterations were made. Therefore in the middle of this lock was a sill which made the bottom of it uneven, and made it dangerous for a ship to take the ground upon it. When the water was let out of the lock the ship with her cargo in took the ground upon this sill and broke her back. Is anybody liable for that? It is contended on the one side that this man Johns had implied though not express authority from the defendants to act as dock or harbour master, and that the harbour master would have a right, when a ship was in distress within the dock, to direct where the ship was to be placed in order to have the necessary repairs executed; and hence it was said that a ship's captain who desired to repair his ship while in distress in the dock would be bound under penalties to obey the harbour master as to the place where he was to do the repairs, or else go to sea with his ship in a damaged condition. That it was said imposed a duty on the harbour master to take reasonable care in his selection of a place in which he directed a captain to put his ship, and if through his negligence in directing a captain to put her in an improper place she was damaged, it was urged that that was negligence for which the defendants would be liable. As I have already said, it was contended that Johns had the power of a harbour master. Now Johns was not in fact harbour master. Captain Fitzmaurice was harbour master; but it appears that Mr. Talbot, who is really the Port Talbot Company, never went near the docks, never was referred to about them, purposely abstained from giving any orders, and had in fact put the whole of his authority into the hands of the harbour master. If that is so, the owner of a business who does that has no right to suppose that his manager to whom he has given this vast authority will be always in a state to carry out his directions. It seems to me it is a necessary implication that if he gives his manager that extent of authority, he gives him authority to depute his authority in cases of illness or necessity to another person. For that reason I think it is right to say that, if Captain Fitzmaurice was ill, he had authority from Mr. Talbot to depute his authority.

Then the question is, did he depute his authority to Johns? The judge of the Admiralty Court seems to have disbelieved a quantity of evidence which I can see no reason to disbelieve. That is the evidence as to whether Fitzmaurice had delegated his authority to Johns or not. Johns was the man who if there was negligence was guilty of it, and he had a strong interest as to any evidence he might give. Having read his evidence, I confess I do not believe him. There are other witnesses who give the most distinct evidence that Johns, when Fitzmaurice

was ill, was taken by everyone frequenting the docks to be the deputy harbour master, and that he acted as such. Was Johns authorised to give the same directions that the harbour master might give? To my mind, the evidence is clear, otherwise you must come to this conclusion: that all the men of business about the docks were mistaken, and were wrong in supposing that this man was authorised in doing what he was doing. I think he had the authority of the harbour master, and if so, was it negligence in him not to have known about this sill? If he did not know he ought to have known. It would have been negligence in the harbour master, and was therefore negligence in Johns. I therefore think that Mr. Talbot having deputed to his harbour master authority to depute his authority to Johns, Johns had authority and power to direct this captain where to put his ship to repair her damage, and that he did direct him to put her into the lock. There was no negligence in the captain in obeying such an order, and there was negligence in Johns in ordering the ship to be put into the lock. Therefore, there was negeligence on the part of Mr. Talbot through his servant, and none on the part of the captain. In my opinion, the appeal ought to be allowed.

Fry, L.J.—In this case I have the misfortune to differ from the Master of the Rolls, and to think that the decision of the court below was correct. In approaching this case I am not able to adopt the view of the Master of the Rolls as to the evidence. The learned judge below expressed his view as to the truthfulness of Captain Johns and his disbelief as to some of the statements made by the captain; and I feel bound to take the finding of the learned judge with regard to the credibility of respective witnesses. Again, with regard to the facts of the case, they present themselves to my mind in a different manner from that in which they present themselves to the Master of the Rolls. The facts as I understand them are shortly these: that early on the morning of the 24th Dec. 1887 the steamship *Apollo* entered from the tidal river into the lock which leads into the harbour of Port Talbot, and that when in the dock she fouled her screw. She did not enter as a vessel in distress but for business purposes, and the fouling took place after she had entered. Davis was a pilot, who brought the steamship into the dock, and about 10 a.m. in conference with the captain of the ship he suggested that it might be possible to obtain the use of the lock for the purpose of disentangling the rope from the screw. He knew that a similar thing had been done in one or two other cases, and he thought it would be a convenient course to pursue if permission could be obtained. Accordingly about 11 a.m. the pilot saw Jenkins, the broker of the ship, and shortly after Jenkins saw Johns, the person who occupied the position which has been so much in controversy, and a conversation took place between them, the true result of which is that Jenkins asked the licence or permission of Johns to use this lock in an extraordinary manner, viz., by letting the water out and placing the ship on the bottom of the lock for the purpose of freeing the screw. Again, a little later, Jenkins and Johns met, and a similar conversation ensued. In the meantime the captain had gone to Swansea for the purpose of getting a diver, and on his return Jenkins and Davis met him at the station and told him that Jenkins had obtained permission. The next thing was to see how it could be done, and accordingly Jenkins and Davis arranged that evening with Johns that the operation should take place early next morning if Johns could get the necessary men together. According to Johns' statement what took place was this, that he said he would.

The conclusion which I draw from this evidence, and which I think the judge below also drew, is this—not that Johns gave any direction to the captain that he should put his ship into this lock, but that as a matter of favour Jenkins obtained the leave or licence of Johns to use the lock in this particular manner. I cannot help observing that twice over Jenkins used the expression that permission had been obtained to do it, language which it seemed to me no ship's broker would ever have used if he meant to say that Johns in the exercise of his authority as harbour master had given directions as to what was to be done with the ship. I think that if the same conversation had taken place with Mr. Talbot himself it would simply have constituted the captain of the *Apollo* the bare licensee of the defendants to perform this operation in the defendants' lock. The next morning Johns got his men together, and the *Apollo* was brought into the lock. The water was let out, the vessel took the bottom, and in consequence of the sill, as to which I accept the statement of Johns that he did not know of its existence, she broke her back. Now why is Mr. Talbot to be made liable for this? As I have already said, according to my view of the facts what was granted as between the persons representing the ship and the persons representing the defendants was a mere licence to use the lock at the risk of the captain of the ship for an extraordinary purpose. The captain therefore was a bare licensee. It was proved before Butt, J. that Johns had never seen the bottom of the lock, and he told the captain so. The consequence is that the licensor who gave the licence is not responsible for the existence of a structure unknown to himself. No doubt, if he had laid a trap or had induced the plaintiff to enter into a position of risk which resulted in injury, knowing of the risk likely to produce that injury, the case would have been different; but that is not so. I regard the use of the lock for which permission was thus granted as an extraordinary use. The natural function of a lock is to carry floating vessels from the tidal river into the dock, or from the dock into the tidal river. Hence the use of it for the peculiar purpose mentioned in this case was an extraordinary use; and though it may well be that Captain Fitzmaurice the harbour master, or Johns acting as his deputy, may have had authority from Mr. Talbot to grant a bare licence for the use of it in this particular manner, there is nothing in my opinion to show that they had any authority to allow the use of it in this extraordinary manner in terms which would make the licensor responsible for damage accruing from the condition of the waterway. I think, therefore, that the decision of the learned judge below was right, and that the appeal must be dismissed with costs.

Lopes, L.J.—The facts of this case have been stated by Fry, L.J., and I agree with his statement. I also agree with Fry, L.J. as to the result

of the evidence. I think it is this: that Johns permitted the lock to be used as it was at the risk of the person using it, and in order to accommodate and oblige that person. With regard to the question of contributory negligence, I do not agree with the learned judge below. I do not think that there was contributory negligence on the part of the captain. The result is that the appeal must be dismissed with costs.

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

Solicitors for the defendants, *Maples, Teesdale*, and *Co.*

Monday, June 24, 1889.

(Before Lord Esher, M.R., Lindley and Bowen, L.JJ.)

The Westbourne.(*a*)

Salvage—Verbal agreement—Supervening circumstances—Amount of award.

Where the master of a ship has agreed to tow a ship which is in distress to a named port for a fixed sum, such agreement is binding on the parties to it, even though by reason of an increase in the weather the performance of the agreement becomes more onerous than was originally contemplated; but if supervening circumstances are such as to render the performance of the contract nautically impossible, the Court of Admiralty is entitled to treat the agreement as if it had never been made, and, if the vessel is taken to a place of safety, to award to the salvors such salvage as the merits of the case require; and this is so whether the original contract be a towage or salvage agreement.

This was an appeal by the defendants in a salvage action from a decision of Butt, J.

The services were rendered by the steamship *Howick* to the steamship *Westbourne*, her cargo and freight, in the Mediterranean under the circumstances hereinafter stated.

About 5.40 p.m. on the 2nd Nov. 1887 the *Howick*, a steamship of 1009 tons register, while on a voyage from Nikolaief to Gibraltar was about 250 miles east of Gibraltar, when she fell in with the steamship *Westbourne*, exhibiting signals of distress. The *Westbourne* had lost her propeller, and was in want of assistance. The master of the *Howick* offered to tow the *Westbourne* to Carthagena, but the master of the *Westbourne* declined to be towed to that port, and it was thereupon verbally agreed between the two masters that the *Howick* should tow the *Westbourne* to Gibraltar for 600*l.*, the *Westbourne* to find ropes and gear. The *Howick* accordingly made fast ahead with the *Westbourne's* hawsers, and commenced to tow towards Gibraltar, but during the night the weather became so bad that the hawsers parted several times. On the following morning, in consequence of a hawser parting, the mate of the *Howick* was severely injured. At this time the *Westbourne* had only one hawser left, and part of this had been carried away. The weather continued so bad that it was described in the log of the *Westbourne* as a complete hurricane, and the master of the *Howick* judged that it was impossible to tow the *Westbourne* to Gibraltar. Consequently he altered his course towards Carthagena. The towage towards Carthagena continued throughout Nov. 3, and at about 4 p.m., when the vessels were a few miles from Carthagena, the master of the *Westbourne* signalled to the *Howick* to proceed to Gibraltar, but the master of the *Howick* signalled in reply that it was impossible, and that he required medical assistance. The *Howick* accordingly continued to tow to Carthagena, and ultimately the *Westbourne* was brought up in safety in Carthagena harbour.

It was alleged by the master of the *Howick* that, as soon as he had determined it was impossible to tow to Gibraltar, he sent a message to that effect by the *Westbourne's* boat to the master of the *Westbourne*. The master of the *Westbourne* denied receiving this message.

The defendants by their defence, after alleging that at the time the agreement was made there were indications of bad weather, and that it never became impossible to tow to Gibraltar, proceeded as follows:

5. The agreement mentioned in paragraph 3 of the statement of claim is correctly stated, except that it was not agreed that the *Westbourne* should find all ropes and gear. The defendants say that the agreement was made having regard to all probabilities of bad weather and other accidents and perils of the sea, and having regard to the condition of the *Westbourne*; and that at the time the said agreement was made Gibraltar was about 250 miles distant, and Carthagena about fifty miles, and that the deviation to Carthagena was made against the will and notwithstanding the protest of the master of the *Westbourne*. The defendants further say that under and by virtue of the said agreement the *Howick* was bound to take the *Westbourne* to Gibraltar, and that if the *Howick* was compelled by stress of weather or other reasons which, however, the defendants deny, to put into Carthagena, she was bound thereafter, if required, to fully perform her service under the said agreement. But they admit that neither the master of the *Westbourne* nor the defendants required of the master of the *Howick* or of the plaintiffs any further performance of the agreement after the *Westbourne* had been brought to Carthagena.

6. The defendants have paid the said sum of 600*l.* int court, and say that the said sum is sufficient to satisfy any claim the plaintiffs may have against the defendants herein.

The agreed value of the *Westbourne*, her cargo and freight, was in all 24,500*l.*

It was proved as a fact that the verbal agreement was that the *Westbourne* should provide all ropes and gear.

At the trial Butt, J. held that, by reason of supervening circumstances not within the original contemplation of the parties, it became impossible to carry out the agreement, that it was therefore at an end and not binding on him, and he awarded 900*l.* for the plaintiffs' services.

Sir *Walter Phillimore* and Dr. *Raikes* for the appellants.—The plaintiffs are not entitled to more than 600*l.* They in fact towed us a less distance than the contract distance, and yet the learned judge has given them 300*l.* more than the sum for which they agreed to tow the contract distance. There have been many cases in which by reason of supervening circumstances towage has been converted into salvage. But this was salvage *ab initio*, and the parties were contracting on the basis of salvage, and therefore running the risk of not being able to perform the contract. The contract was in fact never at an end; it was merely delayed in performance by

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

the weather, an element which is always present to the minds of parties to a salvage contract. Supervening circumstances made the contract more onerous. They might have made it less onerous than originally contemplated, and yet the defendants could not on that ground have given less than the 600*l.*:

The True Blue, 2 W. Rob. 176;
The Minnehaha, 4 L. T. Rep. N. S. 811; Lush. 335;
The Waverley, 24 L. T. Rep. N. S. 713; L. Rep. 3 A. & E. 369; 1 Asp. Mar. Law Cas. 47;
The Betsy, 2 W. Rob. 170;
The J. C. Potter, 23 L. T. Rep. N. S. 603; L. Rep. 3 A. & E. 292.

Barnes, Q.C. and *J. P. Aspinall*, for the respondents, were not called upon.

Lord Esher, M.R.—I am of opinion that this was in one sense a towage agreement, but it was a towage agreement entered into whilst the ship was in danger, and in such exceptional danger that she required or might have required salvage assistance. Now I think that, where an agreement is made under such circumstances for a fixed sum, the fact of its performance makes it binding not only in every other court, but also in the Admiralty Court. But if, by circumstances over which those who now argue they are salvors have no control, the service is so far altered as to become a service of a wholly different class, then the Court of Admiralty has a right to deal with the services as if the original agreement had not been made. If the new circumstances have supervened after the original contract was made, and if those new circumstances have gone to the extent which I have stated, then the Court of Admiralty has authority and power to deal with the matter as salvage, entitling those who have thus become salvors to such a salvage award as the Court of Admiralty, taking all the circumstances of the case into consideration, shall think right. Now in this case, when the agreement was made there is no doubt that there had been bad weather to a serious extent, and at the time when the agreement was made there was still bad weather. But according to the evidence it was only called moderately bad. The ship's machinery, however, was so damaged that, although she could sail, she could not steer. She was in manifest danger, and could only be made safe by being towed. Therefore not in fine weather, but in moderately severe weather, the agreement was made that she should be towed to Gibraltar, she finding the tow ropes. Now that agreement, whether you take it to be a pure towage contract, or whether you take it to be a towage agreement partaking of the nature of salvage, is an agreement which contemplates her being towed from that place to Gibraltar. After the contract was made, whichever kind of contract you call it, circumstances supervened which were beyond the control of those who now claim to be salvors. The evidence, I think, clearly supports the findings of fact of the learned judge. After the *Westbourne* had been taken in tow, without any fault, without any negligence, and without, as is now admitted, any equivocal manœuvre on the part of the towing vessel, the towing ropes broke one after the other. What caused them to break in this way? Why the captains of both vessels say that the weather increased till it became most violent. The evidence of the mate is also most clear and distinct upon this point, and it is this, that the weather, which was comparatively moderate when the agreement was made, turned to nothing less than a hurricane. The cargo shifted, the vessel listed, and, as I have already said, rope after rope broke without any fault on the part of the *Howick*. This all indicates severity of weather. The increase in the weather altered the circumstances to this extent, that the ship, which had not been in immediate danger before, was put into that position. If the ship which now claims to be a salvor had left the *Westbourne* at that time, she probably would have been lost. By the contract the salving ship had put herself in such a position that she was bound to remain by the other ship if she could. But the nature of her service had so altered that instead of towing a helpless ship she was towing a ship in imminent danger. She had to tow the *Westbourne* with a single rope, and I am of opinion that, had she continued to tow towards Gibraltar, she would not only have exposed the *Westbourne* to serious danger, but she would have been in serious danger herself. It is a severe strain on a screw steamer in such circumstances to tow a vessel with only one rope.

Therefore the circumstances were so altered that from being the towing of a helpless vessel it was altered to a case of towing a ship in imminent danger, and putting herself in imminent danger likewise. Therefore those who now claim to be salvors could not in the circumstances tow the *Westbourne* upon the course originally agreed upon. They could not with safety attempt to tow her to Gibraltar. Therefore it had become practically impossible to carry out the original contract. The nature of the circumstances was wholly altered. Under these circumstances the Court of Admiralty has authority to deal with the question as though no contract had been made. If that is so, it is not suggested that the amount of the award is an exorbitant sum. In my opinion, therefore, the judgment must stand, and the appeal be dismissed.

Lindley, L.J.—I am of the same opinion. The contract, which was a verbal one, was that the *Howick* should tow the *Westbourne* on the ordinary course to Gibraltar for 600*l.* She was not to go round the coast by Carthagena, but was to go direct to Gibraltar. The next point to consider is the finding of the learned judge under the advice of the Trinity Masters. He says that it became practically impossible to go to Gibraltar, and in that I entirely agree with the learned judge. That practically disposes of the case. I therefore think the appeal must be dismissed.

Bowen, L.J.—I also am of the same opinion. The first question is, what was the contract between these parties? Was it that the *Westbourne* was to be towed to Gibraltar any way the *Howick* chose to take her, or was it to be direct? I am of opinion that it meant that she was to be towed direct to Gibraltar, and not to Carthagena and then to Gibraltar. There was another term in the contract restricting it to be performed in a particular way, viz., the *Westbourne* to find ropes for the towage. Therefore the contract was for a particular service to be performed in a particular way. As soon as one sees that those were the terms of the contract the case is really at an end. No doubt the ship which was to be towed

was in a position of danger, but if circumstances intervened which rendered the performance of the contract impossible there was an end of the contract. It would not be enough to prove intervening circumstances which rendered the performance of the contract more onerous than had been originally contemplated. But the learned judge has found that it became nautically impossible to perform the service in the way agreed, and in that view I agree. Once the contract was at an end, the case resolved itself into ordinary salvage services, and I think the decision appealed from is correct.

Solicitors for the appellants, *Waltons, Bubb,* and *Johnson.*

Solicitors for the respondents, *Coote* and *Ball.*

Thursday, July 11, 1889.

(Before Lord Esher, M.R., Cotton and Lindley, L.JJ., assisted by Trinity Masters.)

The Earl Wemys. (*a*.)

Collision — Sailing ships — Close-hauled ship — Luffing—Trade winds—Regulations for Preventing Collisions at Sea, arts. 14 *and* 22.

The custom of sailors to treat sailing ships when in the trades as close-hauled ships when they are sailing a point or two from being as close-hauled as they can lie, does not affect the legal construction of the regulations, and the court will not exonerate vessels so sailing from duties applicapable to sailing ships in other latitudes.

Semble, a sailing ship is close-hauled within the meaning of art. 14 *if she is sailing half a point free of the nearest she can lie to the wind, but not if she is two points off.*

The sailing ship E. W. while sailing free in the trades saw the red light of the sailing vessel A. on her starboard bow. The A. was sailing close-hauled (as it is called in the trades), but was in fact not as close to the wind as she could lie. As the vessels approached the E. W. ported to keep out of the way of the A. At about the same time the A. not only luffed up as close as she could to the wind, but also went a little farther under a starboard helm, thus counteracting the porting of the E. W., and a collision occurred.

Held, that the A. altered her course in breach of art. 22, *and was to blame for the collision.*

This was an appeal by the plaintiffs in a collision action from a decision of Butt, J. holding their sailing ship the *Ardencaple* solely to blame for a collision with the defendants' sailing ship the *Earl Wemys.*

The collision occurred about 8 p.m. on the 8th Sept. 1888 in the South Atlantic Ocean in lat. 2 deg. S. and long. 27 deg. W.

The facts alleged by the plaintiffs were as follows: Shortly before 8.10 p.m. on the 8th Sept. the *Ardencaple,* a sailing ship of 1737 tons register, laden with a cargo of salt, and on a voyage from Liverpool to Calcutta, was in lat. 2 deg. 56 min. S. and long. 27 deg. 27 min. W. There was a moderate S.E. wind true (or S.E. southerly magnetic). The *Ardencaple* was on the port tack sailing by the wind with her sails lifting. She was heading S.W. by S. ½ true (or S.W. ¼ W. magnetic). In these circumstances those on the *Ardencaple* saw the green light of the *Earl Wemys* distant about two miles, and about a point on the port bow. The *Ardencaple* kept her course, but when the *Earl Wemys* was right ahead and crossing the bows of the *Ardencaple,* the *Ardencaple* luffed a little to check her way. Very shortly afterwards, when the *Earl Wemys* was on the starboard bow of the *Ardencaple,* she shut in her green light and opened her red, rendering a collision inevitable. As the only chance of avoiding a collision the helm of the *Ardencaple* was at once put hard-up and the weather cross-jack braces and mizzen halyards were let go to assist her in paying off, but nevertheless the stem of the *Ardencaple* struck the port side of the *Earl Wemys* between the main and mizzen masts.

The facts alleged by the defendants were as follows: At about 8 p.m. on the 8th Sept. the *Earl Wemys,* a sailing ship of 1411 tons register, laden with a cargo of wheat, and on a voyage from San Francisco to Queenstown, was in about lat. 2 deg. S. and long. 27 deg. W. The wind was a fresh S.E. trade, and the *Earl Wemys* was under all sail on the starboard tack, heading about N. by E. In these circumstances those on board the *Earl Wemys* observed the red light of a vessel, which proved to be the *Ardencaple,* distant about two miles, and bearing from one and a half to two points on the starboard bow. The *Ardencaple* was assumed to be close-hauled on the port tack, and the helm of the *Earl Wemys* was at once ported. When the *Ardencaple* had been brought ahead, she suddenly opened her green and shut in her red light. As the *Earl Wemys* was rapidly altering under her port helm, it was kept a-port and hard-a-port as the only chance of avoiding a collision. But the *Ardencaple* came on still showing her green light until close to, when her red light again opened, and with her bowsprit she struck the mizzen-mast of the *Earl Wemys,* and then with her stem struck the *Earl Wemys* on her port quarter.

The defendants charged the plaintiffs (*inter alia*) with altering their course.

The following Regulations for Preventing Collisions at Sea were referred to:

Art. 14. When two sailing ships are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other as follows, viz. (*a*) A ship which is running free shall keep out of the way of a ship which is close-hauled.

Art. 22. Where by the above rules one of two ships is to keep out of the way, the other shall keep her course.

It was proved and admitted at the trial that in the trades sailing vessels which are one to two points from being absolutely close-hauled are treated as close-hauled vessels.

Butt, J. found that the collision was caused by the luffing of the *Ardencaple,* she having come up from being about two points free to quite close-hauled: (60 L. T. Rep. N. S. 431; 6 Asp. Mar. Law Cas. 364.)

Sir *Walter Phillimore, Barnes,* Q.C., and *Leck* for the appellants in support of the appeal.—The *Earl Wemys* is solely to blame. The *Ardencaple* never deviated from her course. Assuming she did luff a little, she was justified in so doing so:

The Aimo, 29 L. T. Rep. N. S. 118; 2 Asp. Mar. Law Cas. 96;

The Marmion, 27 L. T. Rep. N. S. 255; 1 Asp. Mar. Law Cas. 412.

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

Moreover, on the authority of *The Tasmania* (60 L. T. Rep. N. S. 692; 6 Asp. Mar. Law Cas. 381; 14 P.D. 53), the *Ardencaple* was bound to luff when she saw the *Earl Wemys* persisting in doing wrong. Assuming the *Ardencaple* to have done wrong, she is free from blame on the ground that the wrongful manœuvre of the *Earl Wemys* was at the last moment and gave the officer of the *Ardencaple* no time to judge what he ought to do:

The Bywell Castle, 4 P. Div. 219; 4 Asp. Mar. Law Cas. 207; 41 L. T. Rep. N. S. 747;
The Khedive, 5 App. Cas. 876; 43 L. T. Rep. N. S. 610; 4 Asp. Mar. Law Cas. 360.

Myburgh, Q.C. and *Raikes*, for the respondents. —The collision was solely caused by the excessive luffing of the *Ardencaple*. Assuming a vessel is justified in luffing a little, she does wrong in luffing as much as the *Ardencaple* did:

Chadwick v. *City of Dublin Steam Packet Company*, 6 Ell. & B. 771;
The Great Eastern, 2 Mar. Law Cas. O. S. 97; 11 L. T. Rep. N. S. 5; 3 Moo. P. C. C. 31;
The Singapore, L. Rep. 1 P. C. 378.

Sir *Walter Phillimore* in reply.

Lord Esher, M.R.—In this case we are advised and come to the conclusion that, if the *Ardencaple* had not luffed as much as she did, there would have been no collision. It follows therefore that, whether the *Earl Wemys* did that which she did in the best way or not, or whether she did in a way which if it were only a question of seamanship would be a very hazardous way, or whether she ought to have done it as a matter of seamanship sooner than she did, or not, according to the rule, she cannot be found fault with for what she did. She had a right to take a course which she thought would clear her of that vessel, and if she did clear the vessel, the rules do not allow us to find fault with her. She is to exercise her own discretion about the matter, and that discretion cannot be questioned if what she does will clear her of the other vessel: she is to clear her, and in any way that she thinks best. If we are advised that there would have been no collision unless the *Ardencaple* luffed up—that is, started it—that the collision was caused at all events by her luffing up, then the only question that remains is, was she entitled to luff up as much as she did? If she was, the other vessel must have been in the wrong because she did not escape her. If she luffed up more than she was entitled to, then the other would have escaped her if she had not luffed up so much, and the collision is the result of her luffing.

Now, three points suggest themselves to one: first of all, are these rules to be construed differently with regard to ships in the trades, as they are called—that is, the rules which are to govern the action of these ships with regard to each other when they are approaching so near that there may be danger of collision — are they to be construed differently in the trades from what they would be in any other place? About that my mind is clear that they are not. The rules are made to apply to the sailing of ships wherever they are. Then comes another question: if a vessel is within the meaning of rule 14, clause (*a*), a close-hauled vessel, what is the meaning of keeping her course in rule 22 as applied to that? A vessel may be close-hauled, that is, sailing on the wind with her yards not so pointed as they could be; that is to say, her yards not square, or not so placed as they would be if she was sailing free. She may be sailing on a wind, that is close-hauled, within the meaning of the first of those rules, although she is not as close-hauled as she can possibly be; that is, jammed close to the wind—I believe that is the nautical phrase for it. If she is sailing half a point off that, the cases seem to have said that she is nevertheless close-hauled within the meaning of the rule. The phrase close-hauled does not mean jammed close to the wind; it means more off than that. How far off could she be sailing and yet be said to be close-hauled, how far off being close jammed to the wind? Half a point off, I think everybody is clear that she would still be a close-hauled ship. I think we are told that she might be sailing a point off, and yet be considered within the first part of that rule a close-hauled ship. Whether that would be so if she were more than that, say a point and a half, I am not quite so certain; and it does not seem necessary to consider it in this case, as she was here two points off, two points or more. I should say she was no longer a close-hauled ship. It does not do to say that sailors call a ship in the trades a close-hauled ship when she is really a free ship. If they sail their ship free in the trades in order to get through the trades quicker they are a ship sailing free; they are not a ship sailing close-hauled. But this ship has been taken by everybody to be a close-hauled ship. I should suppose, therefore, that if she was a close-hauled ship you must not say that she was a free ship; you must say that she was still close-hauled although a point free, sailing so as not to be jammed close, and perhaps a little more—I will not say she was not. Now, it was said, if that is so, might she, when she is told to keep her course, come up from that point, or a little more up to jammed close; that is, might she come up a point? It is not necessary in the view that we have ultimately taken of this case to decide that now. It is a point of construction which, although not long to state, seems to me to be extremely difficult to answer. I am not prepared to say whether she might. It has been held by two courts at least that if she comes up only half a point, that is, if she was sailing half a point off being jammed close, and came up only half a point, it could not be said that she was not keeping her course. Nobody has yet said whether, if she was sailing a point off, and came up that whole point, she would be really altering her course. It is not necessary to decide it, because we have come to the conclusion that this vessel came up more than that, and that she not only came up so as to be what you call close-jammed, but that she went over that point, and that therefore she had deviated from her course more than coming up so as to be jammed to the wind; she had brought herself up until her sails were shaking; until, therefore, she had come over the point that I said, and to a point such as that she could not have sailed on it—she must have gone off again before she could have sailed—if so, she has done more than even on the extreme ruling which I have just stated she was entitled to do. She has, therefore, come up more than that, and if she came up more than that, we cannot doubt but that she altered her course from what it had been, and that alteration of her course caused the collision. Without her having done that there would have been no collision.

Therefore the other ship cannot have caused the collision; therefore she was solely to blame, and the judgment of the learned judge below is right.

COTTON and LINDLEY, L.JJ. concurred.

Solicitors for the plaintiffs, *Stokes, Saunders,* and *Stokes.*

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

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, May 7, 1889.

(Before BUTT, J.)

THE ECLIPSE. (*a*)

Collision—County Court appeal—Application to adduce fresh evidence—Divisional Court—Judicature Act 1873, *ss.* 45 *and* 52; *R. S. C., Order LIX., rr.* 4, 17.

A judge of the Probate, Divorce, and Admiralty Division sitting alone can entertain an application for leave to adduce fresh evidence at the hearing of an Admiralty County Court appeal. (*b*)

THIS was a motion by the appellants in an appeal from the City of London Court for leave to adduce further evidence at the hearing of the appeal.

The action was a collision action *in rem* instituted by the owners of the steam tug *Traveller* against the steam tug *Eclipse,* and at the hearing thereof Mr. Commissioner Kerr gave judgment for the defendants.

The motion was made returnable before Butt, J., and, on its coming on for hearing, counsel for the respondents took the preliminary objection that the application could only be made to a divisional court.

The following enactments were referred to, and are material to the decision:—

The Judicature Act 1873:

Sect. 45. All appeals from petty or quarter sessions, from a County Court, or from any other inferior court which might before the passing of this Act have been brought to any court or judge whose jurisdiction is by this Act transferred to the High Court of Justice, may be heard and determined by divisional courts of the said High Court of Justice, consisting respectively of such of the judges thereof as may from time to time be assigned for that purpose, pursuant to the rules of court, or (subject to rules of court) as may be so assigned according to arrangements made for the purpose by the judges of the said High Court. The determination of such appeals respectively by such divisional courts shall be final unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior court shall have been heard.

Sect. 52. In any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single judge of the Court of Appeal; and a single judge of the Court of Appeal may, at any time during vacation, make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit: but every such order made by a single judge may be discharged or varied by the Court of Appeal or a divisional court thereof.

Order LIX., r. 4. Every judge of the High Court of Justice for the time being shall be a judge to hear and determine appeals from inferior courts under sect. 45 of the principal Act. All such appeals (except Probate and Admiralty appeals from inferior courts and from justices which shall be to a divisional court of the Probate, Divorce, and Admiralty Division) shall be entered in one list by the officers of the Crown Office Department, and shall be heard by such divisional court of the Queen's Bench Division as the Lord Chief Justice of England shall from time to time direct.

Order LIX., r. 17. Subject to these rules, the rules for the time being in force with respect to appeals from the High Court to the Court of Appeal shall, so far as practicable, apply to and govern appeals from County Courts and other inferior courts of record of civil jurisdiction to the High Court.

Watson, for the respondents, in support of the objection.—A single judge has no jurisdiction to entertain this application. By sect. 45 of the Judicature Act 1873, and by Order LIX., r. 4, Admiralty appeals from County Courts are to be heard and determined by divisional courts of the Probate, Divorce, and Admiralty Division, and hence they alone have jurisdiction to entertain any application incidental thereto. Sect. 52 of the Judicature Act 1873 is dealing with jurisdiction, and is not made applicable to County Court appeals by Order LIX., r. 17, which is solely dealing with procedure.

Cohen, Q.C. (with him *Butler Aspinall*) for the appellants, *contra.*—Both the Judicature Act and the rules made thereunder deal with procedure, and hence Order LIX., r. 17, in express terms applies the provisions of sect. 52 of the Judicature Act 1873 to County Court appeals. The convenience of so holding is obvious, as otherwise special divisional courts would have to be held in this division for entertaining this class of application, whereas if a single judge can deal with it, it can be made and disposed of when occasion requires.

BUTT, J.—I think I have power to entertain this application, and shall do so.

The application was then heard and granted.

Solicitor for the appellants, *Oswald H. Clarkson.*

Solicitors for the respondents, *Tatham, Oblein,* and *Nash.*

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

(*b*) The attention of the learned judge was not called to Order LIX., r. 9, which is as follows: "The following rules (10 to 17) of this order shall apply to appeals to the Queen's Bench Division from County Courts and other inferior courts of record of civil jurisdiction in all proceedings other than proceedings in bankruptcy." This would appear to exclude the application of rule 17 to appeals to any division but the Queen's Bench, and if these rules are to be taken as containing the only procedure applicable to appeals to the Admiralty Division, it would seem that the learned judge had no jurisdiction to entertain the application of *The Two Brothers* (3 Asp. Mar. Law Cas. 99; 1 P. Div. 52) and *The Humber* (9 P. Div. 12; 5 Asp. Mar. Law Cas. 181). —ED.

Wednesday, May 15, 1889.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE SCHWAN. (*a*)

Collision—River Thames—Vessels crossing river—Rules and Bye-laws for the Navigation of the River Thames, arts. 24 *and* 25.

Where a vessel lying at anchor in the river Thames head to tide gets under way for the purpose of proceeding up or down the river with the tide, and

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

in turning round she has to work across the river, she is a steam-vessel "crossing from one side of the river towards the other side" within the meaning of art. 24 of the Rules and Bye-laws for the Navigation of the River Thames, and it is her duty to keep out of the way of vessels navigating up and down the river, and of the latter to keep their course, under art. 25.

THIS was a collision action *in rem* by the owners of the steamship *Annie* against the owners of the steamship *Schwan*. The defendants counter-claimed.

The collision occurred in Gravesend Reach at about 10 a.m. on the 16th Dec. 1888.

The facts alleged by the plaintiffs were as follows: Shortly before 10 a.m. on the 16th Dec. the *Annie*, a steamship of 785 tons register, was in Gravesend Reach in the course of a voyage from London to Newcastle-on-Tyne in ballast. The *Annie* was heading down Gravesend Reach well to the south of mid channel under a slight port helm, making about three knots an hour through the water. The tide was half flood running about two knots. In these circumstances those on board the *Annie* observed a steamship, which proved to be the *Schwan*, bearing about 2 to 3 points on the port bow and 500 yards lower down the river. The *Schwan* was lying with her head down river slightly angling to the south, apparently getting under way. The engines of the *Annie* were thereupon put dead slow, and a single blast was blown on her whistle to indicate that she was under a port helm. As the *Annie* approached her the *Schwan* was seen to be angling more athwart the river, and the engines of the *Annie* were thereupon stopped. Shortly afterwards, however, the *Schwan* was suddenly seen to come ahead as if to cross the bows of the *Annie*, causing risk of collision. Although the engines of the *Annie* were at once reversed full speed, the *Schwan* came on and with her starboard side struck the stem of the *Annie*, doing her damage.

The facts alleged by the defendants were as follows: At about 10.30 a.m. on the 16th Dec. the *Schwan*, a German steamship of 1011 tons register, was in Gravesend Reach on a voyage from Bremerhaven to London. She had a general cargo and carried passengers, and was in charge of a duly licensed Trinity House pilot. She had dropped her anchor a short time before on the north side of the river on account of craft in the reach, and at the time in question was getting her head up river and angling somewhere about W. S. W. Her speed was about one knot an hour, and her whistle was being duly sounded. In these circumstances those on board the *Schwan* observed the *Annie* about two cables lengths off and about four points on their starboard bow. The engines of the *Schwan*, which had been going ahead for the purpose of clearing a vessel at anchor, were stopped. Her helm was starboarded, and two blasts of her whistle were blown. The *Annie*, however, without answering the signal, came on and tried under a port helm to cross the bows of the *Schwan*. Two short blasts of the *Schwan's* whistle were again blown and her engines were set full speed astern. Three short blasts of her whistle were then given, but the *Annie* without slackening her speed struck the starboard side of the *Schwan* with her stem.

The defendants, besides denying that the *Schwan* was negligently navigated, set up the defence of compulsory pilotage.

The plaintiffs (*inter alia*) charged the defendants with breach of art. 24 of the Rules and Bye-laws for the Navigation of the River Thames, which is as follows:

Act 24. Steam-vessels crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river.

Art. 25. Where by the above rules one of two vessels is to keep out of the way, the other shall keep her course.

Sir *Walter Phillimore* (with him *J. P. Aspinall*) for the plaintiffs.—The defendants are to blame for breach of art. 24 of the Rules and Bye-laws for the Navigation of the River Thames. The *Schwan* was "crossing from one side of the river towards the other side" within the meaning of that article, and hence it was her duty to keep out of the way of the *Annie*, which she admittedly neglected to do. The *Annie* was bound, in compliance with art. 25, to keep her course, and that she did, and therefore no blame can be attached to her.

Bucknill, Q.C. and *Pyke*, for the defendants, *contra*.—The *Schwan* was not within art. 24. She was merely turning in the river, and not crossing from one side of the river to the other. The article was never meant to apply to the circumstances of the present case. Those on the *Annie* saw the manœuvres of the *Schwan*, and yet, instead of waiting or going under the *Schwan's* stern, chose to come on, and so brought about the collision.

Sir *Walter Phillimore* in reply.

BUTT, J.—In this case the *Annie* was going down the reach at a moderate speed well outside the line of buoys. Although her captain described the collision as having occurred just inside the buoys, I think it clear that it was well outside. Now the *Schwan* was crossing the river, having been just before at anchor on the north shore. She was crossing the river, or, to quote the language of art. 24 of the Thames Bye-laws, she was "crossing from one side of the river towards the other side." The vessels were, as it seems to me, within the provisions of arts. 24 and 25. By art. 24 it was the duty of those in charge of the *Schwan* to keep her out of the way of the *Annie*. The relative duty of the *Annie* was to keep her course. The *Annie* did keep her course, and the *Schwan* also did something very like keeping her course, but it was a course which, instead of keeping her out of the way of the *Annie*, put her into it, and hence the collision, the *Annie's* stem striking the starboard side of the *Schwan* just before the forerigging.

The account given by the master and pilot of the *Schwan* is, that those on the *Annie* seeing them heading towards the south shore would starboard the helm and go under their stern. Reckoning on that, they chose to keep on heading across the river, and they gave moreover the two-blast signal; that is to say, they expected that the *Annie* to please them would commit a breach of art. 25. Seeing the persistency of the *Schwan* in attempting to cross her bows in violation of art. 24, which the *Annie* had no reason to expect, she stopped and reversed her engines. It is true that that was not done in time to avoid a collision.

Although from the photographs it does not appear to me to have been a very severe blow, it seems to be one which might well have been caused by the *Schwan* drifting up with a two-knot tide and with the *Annie* nearly stopped, although I do not believe the story that she was actually making sternway. It follows from what I have said that the *Schwan* was negligently navigated. Now comes the question, can her owners be held liable? [The learned Judge then dealt with the plea of compulsory pilotage, and having held that it was established dismissed the claim and counter-claim with no order as to costs on either side.]

Solicitors: for the plaintiffs, *Botterell* and *Roche*; for the defendants, *Clarkson, Greenwells*, and *Co.*

Tuesday, May 21, 1889.

(Before BUTT, J.)

THE NEREID. (*a*)

Limitation of liability—Loss of life—Actions under Lord Campbell's Act — Stay of proceedings—Merchant Shipping Act 1854 (17 & 18 *Vict. c.* 104), *s.* 514.

In an action for limitation of liability in respect of a collision for which the plaintiffs had admitted liability, and in which loss of life had ensued, the Court granted a decree limiting the plaintiffs' liability to 15*l. per ton, upon payment into court of* 8*l. per ton and security being given for the balance, but refused to stay life actions which had been instituted in the Admiralty Division, the plaintiffs in such actions wishing to have their damages assessed by a jury.*

THIS was an action of limitation of liability by the owners of the steamship *Nereid*, to limit their liability in respect of a collision between the *Nereid* and the steamship *Killochan*.

The collision occurred on the 3rd Feb. 1889, and in consequence thereof several lives were lost.

Actions were subsequently instituted under Lord Campbell's Act, by the personal representatives of the deceased, against the *Nereid*, in the Admiralty Division.

The owners of the *Nereid* admitted their liability for the collision, and now asked for judgment in the limitation action.

J. P. Aspinall for the plaintiffs.—The plaintiffs ask for the usual decree, viz., to limit their liability to 15*l.* per ton, and for an order staying all pending actions.

H. Stokes for the plaintiffs in the life actions.—My clients object to having their actions stayed. They have a right to have their claims assessed by a jury.

BUTT, J.—The plaintiffs in the life actions are entitled to have their claims assessed by a jury. I shall therefore decline to stay them. The plaintiffs are entitled to a decree limiting their liability to 15*l.* per ton, and they must give security for the difference between 15*l.* and 8*l.* in respect of the life claims. The 8*l.* per ton they will pay into court.

Solicitors for the plaintiffs, *T. Cooper* and *Co.*

Solicitors for the life claimants, *Pritchard* and *Sons*.

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

Tuesday, May 28, 1889.

(Before BUTT, J.)

THE DURHAM CITY. (*a*)

Master's disbursements — Charter-party — Coals —Liability of shipowners.

By a charter-party between the charterers and the owners of a steamer it was provided that the owners should maintain her in a thoroughly efficient state; that the charterers should provide and pay for all coals and fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever not appertaining to the working or efficiency of the steamer; and that if in consequence of the deficiency of men or stores, collision, want of repairs, breakdown, and other causes, she put into any port other than that to which she was bound, the port charges, pilotages, and other expenses at such port should be borne by the owners. The steamer put into a port to which she was not bound, for the alleged purpose of repairing the condenser, which was leaking. In consequence of such deviation the master had to buy extra coals, and now sought to make the shipowners liable for them.

Held, that, assuming the deviation was caused by the breakdown of the condenser, the price of the coals was not "port charges, pilotages, and other expenses," and that therefore the shipowners were not liable.

THIS was an action *in rem* for master's wages and disbursements against the owners of the steamship *Durham City*.

The plaintiff was the late master of the *Durham City*, and claimed the sum of 213*l.* 8*s.*

By his statement of claim the plaintiff alleged that while on a voyage from the River Plate to Liverpool it became necessary, owing to the condition of the ship's condenser, which was leaking badly, to put into Vigo to repair it. Whilst at Vigo he incurred liabilities for necessaries for the ship, including a further supply of coal, which had been rendered necessary in consequence of the deviation, which liabilities the defendants refused to meet.

The defence, so far as is material, was as follows:

The defendants say that:

2. They deny that at any time on the said voyage it was or it became necessary, owing to the condition of the said ship's condenser, to put into Vigo or any other port.

3. They do not admit that the plaintiff made any disbursements as alleged on behalf of the said ship and the defendants or either.

4. No balance or sum of money whatever is due from the defendants to the plaintiff, and the defendants do not admit that any of the said particulars are correctly set forth.

5. If the plaintiff acted as master of the said ship (which is not admitted) he was appointed by, and was in fact the servant of, Messrs. R. P. Houston and Co., to whom the said ship was chartered on the 14th Nov. 1888 for one round voyage to the River Plate and home; and if the plaintiff in fact incurred liabilities and made disbursements in the port of Vigo he did so as the servant of the said charterers, and not on account of or with the authority of the said ship or the defendants. The defendants crave leave to refer to the charter-party of the said ship on the voyage in question.

6. By the terms of the said charter-party the disbursements of the said ship in the port of Vigo were for the charterers' account, and are not payable by the defendants, and they are in no way liable for the same. If any sum of money or balance of any account or accounts is due to the plaintiff, it is a sum or balance of 23*l.* 1*s.* 2*d.*, which the defendants have paid into court.

The particulars of the plaintiff's claim included a sum of 182*l.* for coal at Vigo, and various other charges, such as clearance out, pilotage in and out, consular charges, stamps for manifest, provisions, &c.

The material provisions of the charter-party were as follows:

It is this day mutually agreed . . . The owners shall provide and pay for all oils, paints, and stores for the vessel, and for all provisions and wages of the captain, officers, engineers, firemen, and crew; shall pay for the insurance on the vessel, also for all engine room stores, and maintain her in a thoroughly efficient state in hull and machinery for the service. The charterers shall provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever not appertaining to the working or efficiency of the steamer. . . . Charterers to appoint their own captain, who shall command steamer during tenure of this charter-party, owners paying him at the rate of 25*l.* per month. The master shall be under the orders and directions of the charterers as regards employment, agency or other arrangements. . . . If the charterers shall have reason to be dissatisfied with the conduct of the master, officers, or engineers, the owners shall, on receiving particulars of the complaint, investigate the same, and if necessary make a change in the appointments. . . . In the event of loss of time from the deficiency of men or stores, collision, want of repairs, breakdown of machinery, or other causes appertaining to the duties of the owners, preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease until she be again in an efficient state to resume her service; and if in consequence of such deficiency, collision, want of repairs, breakdown, or other causes, the vessel puts into any port or ports other than those to which she is bound, por charges, pilotages, and other expenses at those ports shall be borne by the owners.

At the trial the plaintiff's witnesses swore that the ship put into Vigo in consequence of the condenser having broken down, and that it was necessary to go there to repair it.

It appeared that the plaintiff, when paying for the disbursements at Vigo, drew a draft upon Houston and Co., the charterers, which they refused to accept. The plaintiff was subsequently sued by the holders of the draft, who recovered judgment against him. The defendant's witnesses alleged that the sole reason for putting into Vigo was that the master had started on the voyage with an insufficient supply of coal, and that the repairs to the condenser might have been effected at sea.

Sir *Walter Phillimore* (with him *Carver* and *Mansfield*) for the plaintiff.—All the expenses at Vigo were the necessary consequence of the breakdown of the condenser, and are therefore by the terms of the charter-party to be paid for by the shipowners. The coals come within the words "other expenses at those ports." [BUTT, J.—The fact of the master drawing upon the charterers would seem to show that he was looking to them for indemnity.] He is not a lawyer, and his acts cannot affect the legal rights of the case. It seems only reasonable that the shipowners should pay these expenses, inasmuch as they were incurred in consequence of a defect in their ship.

Barnes, Q.C., for the defendants, *contra*.—On the facts it is contended that the cause of putting into Vigo was not the breakdown, but shortness of coal. Assuming it to be otherwise, there is no liability on the owners in respect of coal:

The Beeswing, 53 L. T. Rep. N. S. 554; 5 Asp. Mar. Law Cas. 484.

There is a special provision in the charter that the charterers shall pay for all coals. The words "port charges, pilotages, and other expenses" do not include coals.

Sir *Walter Phillimore* in reply.—If the deviation was occasioned by the breakdown, the necessity for supplying further coals was caused by the defendant's breach of contract in neglecting to maintain the ship "in a thoroughly efficient state in hull and machinery," as provided by the charter. Therefore if the charterers are liable in the first instance to the master for the coal, they have a right to recover over against the shipowners, and hence to avoid circuity of action the plaintiff ought to recover it in this action.

BUTT, J.—In this case the plaintiff, who was the master of the steamship *Durham City*, sues the owners of that ship to recover the sum of 213*l.* 8*s.* which he alleges is the balance due to him in respect of wages and disbursements made on behalf of the ship. The question for me turns upon the disbursements, as the wages are not now in dispute. The struggle is, whether the shipowners or the charterers are to pay for the disbursements. I understand it to be the fact that both charterers and shipowners are solvent people, and by either one or other of them these disbursements have to be paid.

The main item in dispute is a charge of 182*l.* for coal, put on board at Vigo. With reference to that item there is a question of law to be considered, as well as a question of fact. In my opinion, this item is a matter which may be disposed of without dealing with the question of the cause for putting into Vigo, because I think that, even assuming the plaintiff established by evidence that by reason of the condition of the ship's condenser it was necessary to put into Vigo, I am still of opinion that it is the charterer and not the shipowner who is liable to pay for the coal. I think there was no authority whatever for the master to order coals on behalf of the shipowner, or to pledge his credit for them. The material portions of the charter-party under consideration are these: "The charterers shall provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions, and all other charges whatsoever not appertaining to the working or efficiency of the steamer . . . In the event of loss of time from the deficiency of men or stores, collision, want of repairs, breakdown of machinery, or other causes appertaining to the duties of the owners, preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease until she be again in an efficient state to resume her service; and if in consequence of such deficiency, collision, want of repairs, breakdown, or other causes, the vessel puts into any port or ports other than those to which she is bound, port charges, pilotages, and other expenses shall be borne by the owners." Now, this ship put into Vigo, a port to which she was not bound. Assuming that she put in for repairs owing to the leakage of this condenser and for no other purpose, I think there is no liability whatever in respect of these coals. The expenses which are to be borne by the shipowners are *ejusdem generis* with the specified charges within which coals do not come. Therefore I am of opinion that, taking the second paragraph of the statement of claim to be proved, the plaintiff is not entitled to recover the 182*l.*

in respect of the coal. If the defendants had paid into court a small sum more than they have the question would end there, because they would then have covered the whole of the plaintiff's claim, less 182*l.* But I do not think that the amount paid in is quite sufficient. Therefore I must determine the question of fact, whether this vessel put into Vigo because the condenser was leaking. I think that the real cause for putting into Vigo was want of coal and not leakage in the condenser; and, having come to that conclusion, I must give judgment for the defendants, and order the plaintiffs to pay the costs of the action.

Solicitors for the plaintiff, *Simpson* and *North*.
Solicitors for the defendants, *Downing. Holman*, and *Co.*

HOUSE OF LORDS.

Nov. 30, *Dec.* 3, 4, 1888, *and May* 27, 1889.

(Before the LORD CHANCELLOR (Halsbury), Lords WATSON and MACNAGHTEN.)

HAMILTON *v.* BAKER; THE SARA. (*a*)

Maritime lien—Master's disbursements—Admiralty Court Act 1840 (3 *&* 4 *Vict. c.* 65), *s.* 6—*Merchant Shipping Act* 1854 (17 *&* 18 *Vict. c.* 104), *s.* 191—*Admiralty Court Act* 1861 (24 *Vict. c.* 10), *s.* 10.

Prior to the Admiralty Court Act 1861 *a master had no maritime lien for disbursements, and neither that Act nor the Merchant Shipping Act* 1854 *can be construed as giving him such lien.* (*b*)

Judgment of the Court of Appeal reversed.

The Mary Ann (13 *L. T. Rep. N. S.* 384; 2 *Mar. Law Cas. O. S.* 294; *L. Rep.* 1 *A. & E.* 8); *and* The Feronia (17 *L. T. Rep. N. S.* 619; 3 *Mar. Law Cas. O. S.* 54; *L. Rep.* 2 *A. & E.* 65) *overruled.*

The Glentanner (*Swa.* 415) *disapproved.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.) reported in 57 L. T. Rep. N. S. 328; 6 Asp. Mar. Law Cas. 163; and 12 P. Div. 158, who had affirmed a judgment of Butt, J.

The action was brought in the Admiralty Division *in rem* by the respondent as plaintiff, against the owners of the steamship *Sara* as defendants, to recover the sum of 183*l.* 13*s.* 10*d.* and interest from May 10, 1885, at 5 per cent. per annum, being the amount of a bill of exchange drawn by the respondent as master of the steamship *Sara* upon her managing owners in respect of coals and necessary port charges supplied to and incurred by the vessel at St. Vincent. The appellants, William Hamilton and John Hamilton, intervened in the action as mortgagees of the vessel, and by their defence alleged that, on the 23rd April 1884, the vessel was mortgaged to them, and that they entered into possession on the 16th May 1885, and they denied the right of the respondent to claim the amount sued for against the vessel.

The circumstances which gave rise to the action were as follows:—The respondent was a master mariner, and the steamship *Sara* belonged to a limited company, and was managed on the company's behalf by Messrs. J. F. Cohen and Co., the managers and directors of the company. In the early part of the year 1885 the respondent was engaged by Messrs. J. F. Cohen and Co. to act as master of the vessel on a voyage from England to the River Plate and back to Antwerp, calling at St. Vincent in the Cape de Verde Islands on the return voyage for coals. The respondent was instructed by the managers to apply at St. Vincent to a firm of Miller and Nephew, for the supply of the necessary coals, and to draw upon the managers in payment for the coals and necessary port charges. In the month of March 1885 the vessel on her return voyage had to put into St. Vincent for coals to enable her to complete her voyage to Antwerp, and in accordance with his instructions the respondent applied to Messrs. Miller and Nephew for the necessary coals, which were supplied by them, and signed a bill of exchange for 182*l.* 19*s.* 4*d.* drawn upon Messrs. J. F. Cohen and Co. The amount of the bill was for the necessary coals and port charges supplied to and incurred by the vessel. The vessel afterwards proceeded on her voyage and arrived at Antwerp, and afterwards went, *viâ* Middlesbrough, on to Marseilles. The bill of exchange was dishonoured by Messrs. J. F. Cohen and Co., and due notice of dishonour was given to the respondent. The appellants, who had taken a mortgage on the vessel on the 23rd April 1884, had taken no steps to enter into possession, and did not enter into possession until the 16th May 1835, after arrival of the ship at Marseilles, when one of them went out and took possession, and discharged the respondent. The respondent then asked the appellants to indemnify him against his liability on the bill of exchange, but they declined to do so. The amount of the bill of exchange having been claimed by the holders, Messrs. George Miller and Co., the representatives in Bristol of the firm of Miller and Nephew, the respondent commenced this action to recover the amount of the bill and expenses.

The action came on for trial on the 14th Feb. 1887 before Butt J. At the close of the case the learned judge held that the respondent, the master, had a maritime lien for the disbursements in question in priority to the appellants, the mortgagees, and gave judgment in his favour, on the authority of *The Mary Ann* (13 L. T. Rep. N. S. 384; 2 Mar. Law Cas. O. S. 294; L. Rep. 1 A. & E. 8) and *The Ringdove* (55 L. T. Rep. N. S. 552; 6 Asp. Mar. Law Cas. 28; 11 P. Div. 120), and his judgment was affirmed on appeal, as above mentioned.

Finlay, Q.C. and *Nelson* appeared for the appellants, and argued that the question in the case, namely, whether the master has a maritime lien for necessary disbursements, depended upon the true construction of the Admiralty Court Act

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

(*b*) Since the decision in this action the Merchant Shipping Act has been amended so as to give a master a maritime lien for his disbursements: cf. 52 & 53 Vict. c. 46, s. 1, which provides that "Every master of a ship and every person lawfully acting as master of a ship by reason of the decease or incapacity from illness of the master of the ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements properly made by him on account of the ship and for liabilities properly incurred by him on account of the ship as a master of a ship now has for the recovery of his wages."—ED.

1840 (3 & 4 Vict. c. 65), s. 6, and the Admiralty Court Act 1861 (24 Vict. c. 10), s. 10. The master is not the servant of the mortgagees, but in practice no doubt such claims have been recognised. But the lien, if any, can only be for actual disbursements, not for a liability on a bill, such as this. See

The Two Ellens, 26 L. T. Rep. N. S. 1; 1 Asp. Mar. Law Cas. 208; L. Rep. 4 P. C. 161;
The Heinrich Bjorn, 6 Asp. Mar. Law Cas. 1; 55 L. T. Rep. N. S. 66; 11 App. Cas. 270;
The Chieftain, Br. & L. 104;
The Edwin, Br. & L. 281;
The Limerick, 34 L. T. Rep. N. S. 708; 1 P. Div. 411; 3 Asp. Mar. Law Cas. 206;
The Feronia, 3 Mar. Law Cas. O. S. 54; 17 L. T. Rep. N. S. 619; L. Rep. 2 A. & E. 65.

The stricter rule provides a valuable check on the master. The argument of the respondent rests upon *The Mary Ann* (13 L. T. Rep. N. S. 384; 2 Mar. Law Cas. O. S. 294; L. Rep. 1 A. & E. 8), and that case rested on *The Caledonia* (Swa. 17) and *The Glentanner* (Swa. 415), which were wrongly decided. No doubt the courts of first instance have held that there is a maritime lien, following *The Mary Ann*: see

The Edward Oliver, 16 L. T. Rep. N. S. 575; L. Rep. 1 A. & E. 379;
The Feronia, 17 L. T. Rep. N. S. 619; 3 Mar. Law Cas. O. S. 54; L. Rep. 2 A. & E. 65;
The Marco Polo, 24 L. T. Rep. N. S. 804; 1 Asp. Mar. Law Cas. 54;
The Limerick, 34 L. T. Rep. N. S. 708; 1 P. Div. 411; 3 Asp. Mar. Law Cas. 206;
Re Rio Grande Do Sul Company, 36 L. T. Rep. N. S. 603; 3 Asp. Mar. Law Cas. 424; 5 Ch. Div. 282;
The Fairport, 48 L. T. Rep. N. S. 536; 5 Asp. Mar. Law Cas. 62; 8 P. Div. 48;
The Ringdove, 6 Asp. Mar. Law Cas. 28; 55 L. T. Rep. N. S. 552; 11 P. Div. 120;

but the decision has not been generally approved, nor, before the present case, has it been laid down by the Court of Appeal. See also

The Pacific, 10 L. T. Rep. N. S. 541; Br. & L. 243; 2 Mar. Law Cas. O. S. 21;
The Two Ellens, 1 Asp. Mar. Law Cas. 203; 26 L. T. Rep. N. S. 1; L. Rep. 4 P. C. 161;
The Pieve Superiore, 30 L. T. Rep. N. S. 887; 2 Asp. Mar. Law Cas. 319; L. Rep. 5 P. C. 482;
The Rio Tinto, 50 L. T. Rep. N. S. 461; 9 App. Cas. 356; 5 Asp. Mar. Law Cas. 224.

On principle we contend that this is not a "disbursement" at all, but a mere liability of the master; that, by giving the Court of Admiralty jurisdiction in such cases the Legislature did not necessarily mean to make a maritime lien. There has been no such *communis error* as to prevent the House from interfering to overrule the erroneous decisions on which the respondent's case rests.

Sir *W. Phillimore* and *Barnes*, Q.C., for the respondent, contended that there was a maritime lien in the master's favour for disbursements, and that this liability was in fact a "disbursement." Mortgagees must be in the same position as the owner, and disbursements would be set off as against him in an account with the master. The case is of great importance in the interests of commerce, and the construction of the Acts for which we contend has prevailed for a long period. Bonds in this form are now the rule; the facilities of telegraphic communication have practically put an end to bottomry bonds. If the disbursements have been properly incurred the master should have priority over the mortgagees, and when the master has given his bill he has in fact paid the amount. [Lord HALSBURY, L.C. referred to *Bristow* v. *Whitmore*, 9 H. of L. C. 391.] The Act of 1861 was intended to extend maritime liens, and since the decision of *The Mary Ann* (*ubi sup.*) in 1865 it has never been doubted that such lien existed in these cases. In addition to the cases referred to by the appellants they cited

The Red Rose, July 1866, not reported;
The Daring, L. Rep. 2 A. & E. 260;
The Bold Buccleuch, 7 Moo. P. C. 267;
Collins v. *Lamport*, 34 L. J. 196, Ch.;
Randall v. *Roper*, 27 L. J. 266, Q. B.

Nelson in reply.—The increased facilities of communication make it the less necessary to give to the master a power which is liable to be abused.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

May 27.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: In this case the plaintiff, William Baker, brought an action *in rem* against the owners of the steamship *Sara* as defendants. The plaintiff claimed for disbursements, which had been supplied upon his order as master of the steamship *Sara* at St. Vincent in March 1885. The appellants intervened in the action, and their case was that they had taken a mortgage of the vessel on the 23rd April 1884, and, stripped of the other questions which have been disposed of by the evidence, the only real question is whether, under the circumstances I have stated, the plaintiff, Baker, had a maritime lien for his disbursements. I believe the question might be even more compendiously stated by saying that the question is whether the decision of Dr. Lushington in the case of *The Mary Ann* (13 L. T. Rep. N. S. 384; 2 Mar. Law Cas. O. S. 294; L. Rep. 1 A. & E. 8) can be supported by your Lordships' House. Now, two propositions are absolutely certain; one is that before 1854 no such lien could be claimed, and that neither the Act of 1854 nor the Act of 1861 created such a lien in express terms. The arguments addressed to your Lordships, singularly enough, are in some of their aspects very effectively answered by some of the passages in the very judgment relied on. It is not true to say that the mere enacting by the Admiralty Court Act that the High Court of Admiralty shall have jurisdiction purports to confer a maritime lien. Dr. Lushington himself says that the same enactment provides that the proceedings in that court may be either *in rem* or *in personam*. Further, he says that 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. The whole of the learned judge's reasoning, upon which his judgment ultimately turned, was this; he says: "Supposing before this Act this court had jurisdiction to deal with any subject-matter in certain cases, and those only, and that in those cases the court was bound to recognise the existence of a maritime lien, and supposing that by this Act the Legislature extended the jurisdiction so as to enable the court to deal with the same subject-matter in other cases also, then I think that in such other cases, and with regard to the same subject-

matter, the Legislature must be taken, notwithstanding the absence of any express words, to have intended to created a maritime lien." This is the whole of the reasoning upon which the judgment depends, and it is necessary to examine how it justifies the judgment when applied to the subject-matter with which we are dealing. Is it true that the court was bound to recognise a maritime lien for disbursements before the statute? Certainly not. The example given of the master here is certainly a very strange one, since it is in a sense expressly given by the combined operation of the 7 & 8 Vict. c. 112, and the 191st section of the Merchant Shipping Act 1854. The learned judge himself points out that the 10th section of the Act, which he was construing, cured the difficulty of forum in such a case by expressly giving the Admiralty jurisdiction to deal with any lien the master might have, and we have already seen that by the two former statutes the lien for the wages was actually and in terms created. But how does the providing the forum for the special lien already created lead to any inference that the giving jurisdiction does create a lien? It is true that where the contract was under seal, or where the terms were special and unusual, the Admiralty Court had no jurisdiction, because it was said that the sailors' ordinary contract wtth the master was presumed to be on the credit of the ship, whereas other contracts were said to be on the personal credit of the owners; but whatever may be said as to the practical abolition of the distinction between wages "carned on board the vessel" under a special contract or an ordinary contract, what relation has such a provision to the case of disbursements? Where the subject-matter, whether collision or seamen's wages, had, in its own nature, a maritime lien, I can well understand that the extension of the jurisdiction to a case where the nature of the subject-matter was the same—*e.g.*, collisions within the body of the county—carried with it, as inherent in the nature of the thing itself, a maritime lien, and it may well be argued that the Legislature did not intend to alter the incidents of the subject-matter thus submitted to a new jurisdiction.

The learned judge's own reasoning seems to me to lead to a different conclusion from that at which he arrived. Nor does the power to enter into the whole account, given by the section already referred to, appear to me to carry the matter any further. The learned judge himself uses the most powerful argument against his own decision. A maritime lien, he says, springs into existence the moment the circumstances give birth to it, as damages, salvage, wages; and yet it is said here that whether there is a lien or not is to depend upon whether the owners set up, by way of set-off, counter-claims by them against the master. I share with many judges the difficulty of following the reasoning, and I am unable, therefore, to adopt the conclusions; but I do feel very strongly what has been forcibly expressed by Sir James Hannen in *The Ringdove* (55 L. T. Rep. N. S. 552; 6 Asp. Mar. Law Cas. 28; 11 P. Div. 120), and by the Master of the Rolls in the present case, the practical adoption in actual business of the decision in *The Mary Ann*, and I have striven to see whether it was possible to give effect to that practice; but I cannot omit to consider that we are construing comparatively modern statute law and not business documents merely. Your Lordships' House is asked to sanction a canon of construction that may extend more widely than the particular case now dealt with, and I am therefore constrained to move your Lordships that the judgment be reversed and this appeal allowed.

Lord WATSON.—My Lords: There is but one substantial question raised in this appeal. Has the master of a British ship a maritime lien enforceable in the Court of Admiralty for disbursements made by him on account of the ship in a foreign port? By the common law of England the master's claims, whether for wages or disbursements, did not carry with them any hypothecary interest in the ship; and, inasmuch as they rested upon contract alone, were not cognisable in the Admiralty Courts. The Merchant Shipping Act 1854 gave the master, in express terms, the same lien which other seamen had for recovery of their wages by law or custom; and also conferred upon the Admiralty Court a limited jurisdiction to entertain other claims at his instance. whilst the Admiralty Court Act 1861 extended its jurisdiction to any claim for disbursements made by him on account of the ship. Neither statute expressly attaches a lien to his claims for disbursements; but it is said that the effect of their provisions is to give him the right by implication. Sect. 191 of the Act of 1854, which creates a lien for the master's wages, concludes thus: "If, in any proceeding in any Court of Admiralty or Vice-Admiralty touching the claim of a master to wages, any right of set-off or counter-claim is set up, it shall be lawful for such court to enter into, and adjudicate upon, all questions, and to settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due." I am willing to assume that the accounting which these provisions contemplate must be confined to items connected with the ship; and I do not doubt that a claim for disbursements is one which the master might competently prefer in answer to any set-off or counter-claim pleaded in defence to his suit for wages. But it does not appear to me to be a necessary or natural inference that the Legislature meant to attach a maritime lien to every demand which a master may competently make in the accounting, or to his claim for disbursements. When a variety of personal and unsecured claims are dealt with in a single clause, and it is expressly declared that one of them shall bear a lien, there arises a strong presumption that a similar privilege is not to attach to the rest; and that presumption cannot be overcome except by very plain implication. A proper right of lien constitutes a *nexus* upon the ship which *suâ naturâ* must exist and accompany the claim from its inception; and it is very improbable that the Legislature should have intended to create a maritime lien, which does not come into existence unless and until a plea of set-off is judicially stated in answer to a claim for wages. The strongest argument to the contrary is to be found in the suggestion that sect. 191 necessarily contemplates a decree *in rem*, which is said to imply the existence of a maritime lien. But the clause enacts that, in the event of the balance of accounts being against the master, the court is to direct payment,

which cannot be effected by a decree *in rem;* and, so far as I am aware, there is no authority for the proposition that there must be a proper maritime lien for every claim which the Legislature has made enforceable against the ship.

The Act of 1861, which throughout its whole clauses deals with remedies and not with rights, provides (sect. 10) that the Admiralty Court shall have jurisdiction "over any claim by the master of a ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship." But it also provides (sect. 35) 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*." In the face of that enactment it would be difficult to hold that the submission of a merely personal or contractual claim to the jurisdiction of the Court of Admiralty converted it into a real right against the ship from the time when it came into existence. In *The Mary Ann*, which was decided by Dr. Lushington in 1865 (13 L. T. Rep. N. S. 384; 2 Mar. Law Cas. O. S. 294; L. Rep. 1 A. & E. 8) that learned judge held that the master's claim for disbursements on account of ship does bear a proper maritime lien. In arriving at that result, I do not think that the learned judge relied solely upon the provisions of the Act of 1861, although there are observations in his judgment which might admit of that construction. His reasoning leads me to infer that if, before the passing of the Act, claims for disbursements had been wholly excluded from the jurisdiction of his court, and had been unaccompanied by a lien, Dr. Lushington would have held that the provisions of the Act were, *per se*, insufficient to create the right. He said: "There is a clear distinction between a maritime lien and a claim, the payment of which the court has power to enforce against the ship and freight. A maritime lien springs into existence the moment the circumstances give birth to it, as damages, salvage, and wages. But it does not follow that because a claim may, by Act of Parliament, be enforceable against the *res*, that therefore it creates a maritime lien." The law had already been laid down to the same effect by the learned judge in the case of *The Pacific* (Br. & L. 243), which related to the claim of a material man. He there pointed out that, in cases where statute gives to the creditor in an unsecured personal debt a real action against the ship, and does not clearly prescribe that his claim shall override that of a mortgagee, such creditor in no case "obtains the ship as a security until he institutes his suit in this court." His right in that case is subject to any registered mortgage, and he must "arrest the ship, and then acquires the *res* as a security." So far I agree with the reasoning of the learned judge. The real grounds of Dr. Lushington's decision in *The Mary Ann* are to be found in the fact that, before the Act of 1861, his court had a limited jurisdiction over claims for disbursements; and in the assumption that in such cases the master had a maritime lien. Upon these premises the learned judge argues, with considerable force, that it must have been the intention of the Legislature that under the enlarged jurisdiction conferred by sect. 10 of the later Act the master's claim for disbursements should have the same privileges which were attached to it under the limited jurisdiction established by the Act of 1854. Referring to sect. 191, and the effect which he attributed to it as creating a lien, *pro tanto*, for disbursements, Dr. Lushington says: "If this be so, then under this Act—*i.e.*, the Act of 1861—the master claiming his disbursements is to be preferred to the mortgagee, because before the Act his claim for disbursements was entitled to a similar preference in the only case where the court could take cognisance of such disbursements—namely, in the case of a set-off." In my opinion, the *ratio* of the judgment in *The Mary Ann* fails, because I am unable to hold that the enactments of sect. 191 of the Merchant Shipping Act can be interpreted as creating a maritime lien for disbursements; and the enactments of the statute of 1861, even when tested by Dr. Lushington's own principles, are in themselves insufficient to create such a right. In *The Feronia* (17 L. T. Rep. N. S. 619; 3 Mar. Law Cas. O. S. 54; L. Rep. 2 A. & E. 65) the authority of *The Mary Ann* was followed by Sir Robert Phillimore, who refers to and adopts the views of his predecessor. It was again followed in the case of *The Ringdove* (55 L. T. Rep. N. S. 552; 6 Asp. Mar. Law Cas. 28; 11 P. Div. 120) by Sir James Hannen, who stated that the reasoning of Dr. Lushington was not satisfactory to his mind. In the present case Butt, J. considered himself bound by these precedents; but intimated that, apart from their authority, he would have had considerable difficulty in holding that there is any maritime lien for masters' disbursements. None of these judgments in the Admiralty Court were brought under review; but in *Re Rio Grande Do Sul Steamship Company* (36 L. T. Rep. N. S. 603; 3 Asp. Mar. Law Cas. 424; 5 Ch. Div. 282) the Court of Appeal in a liquidation gave incidental effect to a lien for disbursements. An observation is attributed to James, L.J. in that case which, if it had been made *causâ cognitâ*, would have been entitled to great weight; but the report shows that the lien was conceded, and that the point which your Lordships have now to decide was neither raised nor discussed. It was strongly urged by the respondent's counsel that your Lordships are now precluded, by a *series rerum judicatarum*, from denying effect to the principle laid down in *The Mary Ann* and *The Feronia*. But I do not think that these authorities, which have been followed but not approved in the most recent cases, are of sufficient weight to establish a latent security of an exceptional character against purchasers and mortgagees.

Lord MACNAGHTEN.—My Lords: The main question argued in this case, and the only question upon which it is necessary to pronounce an opinion, is reduced to a narrow point. It is clear that at the time of the passing of the Admiralty Court Act 1861 disbursements made by the master of a ship in the ordinary course of his employment did not create any lien in his favour. It is equally clear that neither the Act of 1861 nor any subsequent Act has in terms conferred a maritime lien for the master's disbursements. Sect. 10 of the Act of 1861 declares that "The Court of Admiralty shall have jurisdiction over any claim by the master of any ship for disbursements made by him on account of the ship." That section gave the court jurisdiction to entertain suits falling within its scope, and of itself it did

nothing more. The jurisdiction, as the Act declared, might be exercised either by proceedings *in rem* or by proceedings *in personam*. It thus became competent for the Court of Admiralty, on the master preferring his claim for disbursements, to arrest the ship on account of which the disbursements were made. But in the absence of a maritime lien the arrest could not affect a subsisting mortgage or any other valid charge upon the ship. So far the matter seems clear, and if the question depended solely upon the general law before the Act of 1861, and upon the language of that Act, there would be no ground for the contention put forward on behalf of the master in the present case. It cannot, however, be disputed that ever since the year 1865 it has uniformly been held that the claim of a master for his disbursements is to be preferred to the claim of a mortgagee. Dr. Lushington arrived at the conclusion without any hesitation in the case of *The Mary Ann* (*ubi sup.*). His view was adopted and approved of by Sir R. Phillimore in *The Feronia* (*ubi sup.*). It was accepted by the Court of Appeal in the case of *Re Rio Grande Do Sul Company* (*ubi sup.*), and it has been followed in *The Ringdove* (*ubi sup.*) by Sir James Hannen, who observed that he did not feel at liberty to disregard the authority of *The Mary Ann*, though he could not say that Dr. Lushington's reasoning was altogether satisfactory to his mind. The appellants challenged the decision in *The Mary Ann* and the course of practice which has followed it. The respondent contends that the decision was right. But whether it was right or not he says that it is too late now even for this House to interfere. I am sensible of the inconvenience of disturbing a course of practice which has continued unchallenged for such a length of time, and has been sanctioned by such high authority. But if it is really founded upon an erroneous construction of an Act of Parliament, there is no principle which precludes your Lordships from correcting the error. To hold that the matter is not open to review would be to give the effect of legislation to a decision contrary to the intention of the Legislature merely because it has happened, for some reason or other, to remain unchallenged for a certain length of time.

I propose, therefore, as briefly as I can to examine the decision in *The Mary Ann*, and the circumstances under which it was pronounced. Originally the master had no right to resort to the Court of Admiralty for his wages, or for anything due to him from the owners. The first alteration in this respect was made by the Merchant Seamen Act of 1844 (7 & 8 Vict. c. 112, s. 16), which gave the master, for the recovery of his wages, all the rights, liens, and remedies of an ordinary seaman, but only in the case of the bankruptcy of the owner. As, however, an ordinary seaman had no right to come to the Admiralty Court when his wages were due under a special contract, this provision did not much improve the master's position. Then came the Merchant Shipping Act 1854, which, in sect. 191, re-enacted the provision in the Act of 1844 as regards the master's wages, omitting all reference to the bankruptcy of the owner, and then went on to enact that "if in any proceeding in any Court of Admiralty . . . touching the claim of a master to wages any right of set-off or counter-claim is set up, it shall be lawful for such court to enter into and adjudicate upon all questions, and to settle all accounts then arising, or outstanding and unsettled, between the parties to the proceeding, and to direct payment of any balance which is found to be due." The first case of importance under this section was *The Caledonia* (Swa. 17), decided in 1855. There the master preferred a claim for wages, and arrested the ship for a sum sufficient to cover his disbursements as well. The mortgagees intervened. They declared that they had no intention of setting up any right of set-off or counter-claim, but they tendered a sum less than the amount claimed in respect of wages, on the ground that payments had been made on account of wages both by themselves and by the owners. Dr. Lushington held that under the Act of 1854, if the owners chose to avail themselves of any advances, or anything in the nature of a "set-off," the whole account between the owners and the master was opened, and he thought that the mortgagees could be in no better position than the owners. There the general account between the master and the owners was not taken as against the mortgagees, apparently because they disclaimed any intention of setting up a right of set-off. But, as the general account was not opened, they did not get the benefit of payments made by the owners on account of wages. They were only liable through the master's lien; but they had to pay more than the lien covered. In the case of *The Glentanner*, which was decided in 1859 (Swa. 415), the mortgagees were less discreet or less fortunate. They declared that they would set up a right of set-off or counter-claim. The master was then directed to bring in his accounts. The mortgagees did not file a counter-claim or set-off, but they objected to all the items in the master's account except those relating to the payment of wages. Dr. Lushington, in giving judgment, stated that he adhered to every word he said in *The Caledonia*. He thought that the general account, if opened at all, must be gone through and a balance made. He was of opinion that the accounts spoken of in the Merchant Shipping Act meant "the accounts between the master and the ship, exclusive of any private account between the master and her owners for merely extraneous purposes," and that a mortgagee taking possession of the ship and claiming the benefit of items in the account against the master's claim for wages thereby made himself a party to the whole account. Why, he asked, should the master be prejudiced by the sale or mortgage of the ship? He was of opinion that, as the mortgagees had declared to set up a counter-claim and had opened the account, an item of 400*l.* claimed for disbursements belonged to "the account arising, and outstanding and unsettled, between them and the master," who were, he said, "the parties to the proceeding." It is to be observed that the learned judge does not in terms say that the master had a maritime lien for his disbursements. His argument, if I understand his judgment aright, rather seems to be that a mortgagee intervening and setting up a right of set-off or counter-claim took upon himself the personal liability of the owner for debts due in connection with the ship.

Then followed in order of date the Admiralty

Jurisdiction Act 1861, which gives the Court of Admiralty jurisdiction over any claim by the master for wages, whether due under a special contract or not, and for disbursements made by him on account of the ship. Soon afterwards the question arose as to the effect of that Act on the master's claim for disbursements as between the master and a mortgagee. The point was raised directly in *The Mary Ann*, in which Dr. Lushington gave judgment on the 7th Nov. 1865. In that case, dealing with the language of the Act, the learned judge expressed the view which has since been established in the Privy Council and in this House. He thought that the words "the High Court of Admiralty shall have jurisdiction" meant only what they purport to say—neither more nor less—that is, that the court shall take cognisance of the cases provided for. But he considered that, in determining whether in these cases of extended jurisdiction it was meant to create a maritime lien, or what was the intention of the Legislature, the court would look to the law as it stood before the late Act; and he came to the conclusion that under the Act of 1861 the master claiming for disbursements was to be preferred to the mortgagee, "because before the Act his claim for his disbursements was entitled to a similar preference in the only case where the court could take cognisance of such disbursements — namely, in the case of a set-off." I may observe that in that case also the learned judge, while holding that the claim of the master was to be preferred to that of the mortgagee, does not say in terms that the effect of the Act was to give the master a maritime lien for his disbursements. However, in *The Feronia*, which was decided in 1868 (17 L. T. Rep. N. S. 619; 3 Mar. Law Cas. O. S. 54; L. Rep. 2 A. & E. 65), Sir Robert Phillimore expressly stated that in the case of *The Mary Ann* it was decided that under the Act of 1861 the master has a maritime lien both for his wages and disbursements, and that upon this ground his claim was preferable to that of a mortgagee. No doubt that was the practical result of the decision, and it has been so treated ever since.

Under these circumstances the question whether the decision in *The Mary Ann* and the practice of the Admiralty Court which rests upon it can be supported depends, I think, on the answer to be given to one or both of these further questions: (1) whether the decision in *The Glentanner* was right, and, if so, (2) whether the existence of the rule there laid down justified Dr. Lushington's inference as to the intention and effect of the Act of 1861. It is not, I think, necessary, to go into the latter question, because I am of opinion that the decision of *The Glentanner* was based on a construction of the Act of 1854 which is plainly erroneous. Did the Act of 1854, as against a mortgagee or purchaser, give the master of a vessel a maritime lien for his disbursements in the event of his instituting a suit in the Admiralty Court for wages (which at that time he could only do in the absence of a special contract), and in the event of the mortgagee or purchaser thereupon setting up a right of set-off or counter-claim? The question, I think, answers itself. "A maritime lien," as was observed in *The Two Ellens* (26 L. T. Rep. N. S. 1; 1 Asp. Mar. Law Cas. 208; L. Rep. 4 P. C. 161), "must be something which adheres to the ship from the time that the facts happen which gave the maritime lien, and then continues binding on the ship until it is discharged. It commences, and there it continues binding on the ship until it comes to an end." A lien or preference which is supposed to have its origin in a certain transaction, and yet has no binding force or effect unless and until two things happen, neither of which has any connection with the original transaction, is certainly not a maritime lien in the ordinary sense of the term. But then, did Parliament intend to create this anomalous preference or privilege—whatever it may be called — in the particular case of the concurrence of the two events contemplated by sect. 191 of the Act of 1854? It would be strange if it did. The Act gave the master a maritime lien for wages; that is, I suppose, for the amount of his wages for the time being due and owing. Now, a man is bound to pay his own debts, and he is also bound to discharge a preferential claim on property upon which he has a security if he means to make his security available. But even an honest man, without any disparagement to his honesty, may object to pay another man's debt, and may wish to investigate the amount of a preferential claim on property belonging to him as purchaser or mortgagee. Is it conceivable that it could have been the intention of Parliament that if the master brought a suit for wages for which the statute gave him a maritime lien, a mortgagee or purchaser, intervening for the protection of his own property, should not be at liberty to investigate the extent of the lien—to see both sides of the special account with which he is concerned—except at the risk of having to pay a claim which up to that time was neither a debt of his nor a charge upon his property? I cannot imagine that even in hard cases—and these are all cases of hardship — Parliament meant to encourage excessive claims by masters or to set a trap for unwary mortgagees. Is there anything in the language of the Act of 1854 to countenance such a notion? I do not think there is. The Act speaks of accounts "outstanding and unsettled between the parties to the proceeding." When a mortgagee intervened "the parties to the proceeding," as Dr. Lushington said in *The Glentanner*, were the master on the one hand and the mortgagee on the other; the master's claim for disbursements did not enter into the account between the mortgagee and the master. The claim for wages might properly come in, because it was a preferential claim on property belonging to the mortgagee. If Parliament had intended by the Act of 1854 to give the master a maritime lien or a preferential claim for his disbursements, nothing would have been easier than to have said so. And it is to be observed that in the very section in question a lien is given in plain terms for the master's wages.

In the result, therefore, I am of opinion that the Act of 1854 did not in any event give the master a maritime lien or preferential claim for his disbursements. It follows that, in my judgment, the decision in *The Glentanner* proceeded on an erroneous construction of the Act, and that the decision in *The Mary Ann*, and

the practice of the Admiralty which rests upon it, cannot be supported. Your Lordships, on the one hand, were warned of the disastrous consequences of disturbing the practice of the Admiralty Court. On the other hand it was urged that the disadvantages resulting from allowing such a lien more than counterbalance any possible advantage, and it was said that the facilities of communication which exist nowadays between all parts of the world make it unnecessary to give the master a power which certainly may be abused. Between these conflicting views I do not venture to express any opinion. I have only to state what, in my judgment, the law really is. It is for the Legislature to alter the law, if Parliament in its wisdom thinks an alteration desirable. I think the appeal ought to be allowed.

Judgment appealed from reversed. Respondents to pay the costs both in the House of Lords and in the courts below.

Solicitors for the appellants, *Lowless* and *Co.*
Solicitors for the respondent, *Ingledew, Ince,* and *Colt.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Jan. 31, *Feb.* 1, *and Aug.* 1, 1889.

(Present: The Right Hons. Lords WATSON, FITZGERALD, HOBHOUSE, and MACNAGHTEN.)

STRANG STEEL AND CO. *v.* SCOTT AND CO. (*a*)

ON APPEAL FROM THE COURT OF THE RECORDER OF RANGOON.

Jettison — General average — Loss through negligence of master.

There are two exceptions to the right to claim general average: First, a wrongdoer through whose default the peril has happened which gives rise to the sacrifice cannot claim; secondly, owners of deck cargo are not entitled to general average except where such cargo is carried on deck in accordance with the custom of the trade, or where the other cargo-owners have consented to the carriage of the goods on deck. Owners of jettisoned cargo subject to the above exceptions are entitled to recover for general average, even where the peril which necessitated the jettison has been brought about by the negligence of the master.

Semble, that the right to general average arises not as a matter of contract but as a positive right in consequence of a common danger requiring that all should contribute to indemnify for the loss of property which has been sacrificed to save the whole adventure, and this right of contribution is similar to the right upon which claims for salvage services are founded.

THIS was an appeal from a judgment of the Recorder of Rangoon (F. Agnew, Esq.) in an action brought by the respondents, as owners of cargo shipped on board the steamship *Abington*, against the appellants, as representing the owners of the ship, under circumstances which appear fully from the judgment of their Lordships.

Finlay, Q.C. and *Barnes*, Q.C. appeared for the appellants, and contended that a claim for general average contribution arose in this case, though the mishap which rendered the jettison necessary was due to the negligence of those in charge of the vessel. The shipowner has a lien on the goods for the amount of the general average contribution payable by them, and his duty was to collect it before parting with them, as he is the agent for all parties interested. This right of lien is not affected by the negligence of the master and crew which led to the jettison. See

Simonds v. *White*, 2 B. & C. 805;
Crooks v. *Allan*, 4 Asp. Mar. Law Cas. 216; 41 L. T. Rep. N. S. 800; 5 Q. B. Div. 38;
Schloss v. *Heriot*, 8 L. T. Rep. N. S. 246; 1 Mar. Law Cas. O. S. 335; 14 C. B. N. S. 59;
Dobson v. *Wilson*, 3 Camp. 480.

Further, there is an exception in the bills of lading which exempts the owners from all liability in respect of the negligence of the master in the management or navigation of the ship:

Hallett v. *Bousfield*, 18 Ves. 187.

The claim for general average rests on general law, and the exception in the bill of lading shows that no cross-action is maintainable. They also referred to

Burton v. *English*, 5 Asp. Mar. Law Cas. 187; 49 L. T. Rep. N. S. 768; 12 Q. B. Div. 218;
Cargo ex Laertes, 57 L. T. Rep. N. S. 502; 6 Asp. Mar. Law Cas. 174; 12 P. Div. 187;
The Glenfruin, 52 L. T. Rep. N. S. 769; 5 Asp. Mar. Law Cas. 413; 10 P. Div. 103;
Lowndes on General Average, 4th edit. p. 332;
Abbott on Shipping, 12th edit. p. 533;
Parsons on Marine Insurance, vol. 2. p. 285;
Royal Exchange Shipping Company v. *Dixon*, 6 Asp. Mar. Law Cas. 92; 56 L. T. Rep. N. S. 206; 12 App. Cas. 11.

Bigham, Q.C. and *Fitzgerald*, for the respondents, argued that, under the circumstances, this was not a general average loss at all. The sacrifice was for the benefit of the owners, not of the whole adventure:

Parsons on Marine Insurance, vol. 2, p. 285;
Parsons on Shipping, vol. 1, p. 211;
Wright v. *Marwood*, 45 L. T. Rep. N. S. 297; 4 Asp. Mar. Law Cas. 451; 7 Q. B. Div. 62;
The Norway, Br. & Lush. 377; affirmed on appeal, Ibid. 404.

Where a shipowner puts, as here, an unreasonable condition on the delivery of goods, he waives his right to a proper tender:

Huth v. *Lamport*, 54 L. T. Rep. N. S. 335; 16 Q. B. Div. 442; affirmed on appeal, 54 L. T. Rep. N. S. 663; 16 Q. B. Div. 735; 5 Asp. Mar. Law Cas. 543, 593;
Ashmole v. *Wainwright*, 2 Q. B. 837.

Barnes, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Aug. 2.—Their Lordships' judgment was delivered by

Lord WATSON.—The steamship *Abington*, on her way from London to Rangoon, with a general cargo, ran aground on the Baragua Flats in the Gulf of Martaban. Part of the cargo was thrown overboard in order to lighten the vessel, which was got off by that means, and was enabled to reach her destination in safety on the 19th Oct. 1886. On the day of her arrival in the port of Rangoon, the appellants, Strang Steel and Co., local agents for the ship, intimated to the respondents, A. Scott and Co., and other con-

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

signees of the cargo then on board, that a deposit of one per cent. upon the value of their goods would be required before delivery "against probable average claim;" and on the following day they made a further intimation that the amount of deposit required would be five per cent. A correspondence ensued, in the course of which the respondents made various tenders, all of which were declined; and on the 25th Oct., six days after the arrival of the *Abington*, they paid the required deposit, amounting to Rs.1592. 11, under protest, and obtained delivery of their goods. The respondents, on the 27th Oct. 1886, instituted the present suit in the Court of the Recorder of Rangoon for recovery of their deposit, and for damages on account of the detention of their goods, upon the allegation that they had before payment made a tender entitling them to delivery. Upon the same day on which their plaint was filed the respondents applied to the court, under sect. 492 of the Civil Code, for an injunction to restrain the appellants, Strang Steel and Co., from remitting to England, or removing from the jurisdiction of the court, the deposit paid to them on the 25th Oct. These appellants judicially undertook to retain the amount claimed in their own possession, subject to the orders of the court, without the issue of a formal injunction, and no further proceedings have been taken in that application. On the 5th Feb. 1887 the respondents were allowed to add to their original ground of action an allegation, to the effect that they were not liable to contribute for general average on account of either ship or cargo, because the grounding of the *Abington*, and the consequent jettison of part of the cargo, were due to the default, negligence, and misconduct of her master. Upon the pleadings thus amended, the case was twice tried before the Recorder, who ultimately, on the 15th Aug. 1887, gave the respondents decree for Rs.1592. 11, and for Rs.200, in name of damages, with costs of suit. The learned judge found, as matter of fact, that the stranding of the ship upon the Baragua Flats was occasioned by the negligent navigation of the master; and he held, as matter of law, that no claim for general average arises to the owners of cargo jettisoned when the peril which necessitated jettison is induced by the fault of the ship. Whilst resting his decision upon that ground, the learned judge indicated that, in his opinion, the respondents had made a tender entitling them to demand immediate delivery of their goods, before they paid the deposit to the appellants.

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

The first question raised is one of general importance, and, so far as their Lordships are aware, has never been made matter of direct decision in this country. It may be convenient in dealing with it to consider first of all the rights and remedies which the owners of cargo thrown overboard have in a proper case of jettison. Some of the qualities of their right, and of the remedies by which it may be enforced, have been authoritatively defined. Each owner of jettisoned goods becomes a creditor of ship and cargo saved, and has a direct claim against each of the owners of ship and cargo, for a *pro ratâ* contribution towards his indemnity, which he can enforce by a direct action. In *Dobson* v. *Wilson* (3 Camp. 480) Lord Tenterden said: "If a shipper of goods which are sacrificed for the salvation of the rest of the cargo is entitled to receive a contribution from another shipper whose goods are saved, I know not how I can say that this may not be recovered by an action at law. This is a legal right, and must be accompanied with a legal remedy." Again, it is settled law that, in the case of a general ship, the owner of goods sacrificed for the common benefit has a lien upon each parcel of goods salved belonging to a separate consignee for a due proportion of his individual claim. The cargo not being in his possession or subject to his control, his right of lien can only be enforced through the shipmaster, whom the law of England, following the principles of the *Lex Rhodia*, regards as his agent for that purpose. The duty being imposed by law upon the master, he is answerable for its neglect. In the course of the argument, his liability in that respect was questioned upon the authority of certain dicta of Lord Eldon's in *Hallett* v. *Bousfield* (18 Ves. 187). The circumstances of that case were very special. One of a number of persons alleging a right to contribution applied for an injunction to restrain the master from delivering the cargo without taking security, the bulk of them having consented to his so doing. Lord Eldon expressed a doubt whether it was the right of every owner of part of the jettisoned cargo to compel the captain to call on every owner of cargo saved to give security; but he dismissed the application on the ground that there was no instance of such an equitable remedy having been granted. Courts of equity are chary of granting injunctions which may lead to inconvenient results; and it does not follow from *Hallett* v. *Bousfield* that a master might not be restrained from making delivery of the cargo, at the instance of

all or most of those entitled to contribution, without taking security for their claims. But their Lordships see no reason to doubt that, assuming the applicant's claim for contribution in that case to have been well founded, he would have had his remedy at law. In *Crooks and Co.* v. *Allan* (41 L. T. Rep. N. S. 800; 4 Asp. Mar. Law Cas. 216; 5 Q. B. Div. 38), Lord Justice (then Mr. Justice) Lush held that a master or shipowner is bound to exercise the power he is invested with when a general loss has arisen, and to use the means in his power for adjusting the average claims and liabilities and securing their payment, and he accordingly ordained the defendants, who had neglected to perform that duty, to pay to the plaintiffs the whole amount of contribution to which they were entitled. The learned Judge observed, that "the right to detain for contribution is derived from the civil law, which also imposes on the master of the ship the duty of having the contribution settled and of collecting the amount, and the usage has always been substantially in accordance with that law, and has become part of the common law of England." The rule of contribution in cases of jettison has its origin in the maritime law of Rhodes, of which the text, as preserved by Paulus (Dig. L. 14, tit. 2), is, "Si levandæ navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est." The principle of the rule has been the frequent subject of judicial comment. Lord Bramwell, in *Wright* v. *Marwood* (45 L. T. Rep. N. S. 297; 4 Asp. Mar. Law Cas. 451; 7 Q. B. Div. 62), said that, to judge from the way in which contribution is claimed in England, "it would seem to arise from an implied contract *inter se* to contribute by those interested." Brett, M.R., in *Burton* v. *English* (49 L. T. Rep. N. S. 768; 5 Asp. Mar. Law Cas. 187; 12 Q. B. Div. 218), disputed that view, and stated his opinion to be that the right to contribution "does not arise from any contract at all, but from the old Rhodian laws, and has been incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, when natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one, in order that the whole adventure may be saved." Whether the rule ought to be regarded as matter of implied contract, or as a canon of positive law resting upon the dictates of natural justice, is a question which their Lordships do not consider it necessary to determine. The principle upon which contribution becomes due does not appear to them to differ from that upon which claims of recompence for salvage services are founded. But, in any aspect of it, the rule of contribution has its foundation in the plainest equity. In jettison, the rights of those entitled to contribution, and the corresponding obligations of the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved. There are two well-established exceptions to the rule of contribution for general average, which it is necessary to notice. When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which immediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrongdoer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompence for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save. *Schloss* v. *Heriot* (8 L. T. Rep. N. S. 246; 1 Mar. Law Cas. O. S. 335; 14 C. B. N. S. 59) is a leading English authority upon the point. In that case, which was an action by the shipowner against the owners of cargo for contribution in an average loss, a plea stated in defence, to the effect that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness, was held to be a good answer to the claim by Erle, C.J., and Willes and Keating, JJ. The second exception is in the case of deck cargo. The reason why relief by general contribution is denied to the owners of goods stowed on deck, when these are thrown overboard in order to save the cargo under hatches, is obvious. According to the rules of maritime law, the placing of goods upon the deck of a sea-going ship is improper stowage, because they are hindrances to the safe navigation of the vessel; and their jettison is therefore regarded, in a question with the other shippers of cargo, as a justifiable riddance of incumbrances which ought never to have been there, and not as a sacrifice for the common safety. But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon deck; and the exception does not apply, either (1) in those cases where, according to the established custom of navigation, such cargoes are permitted, or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship.

It appears from the proceedings in this suit that the average claims at the instance of cargo owners exceed $30,000, and that there is a small claim on account of ship. The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of the *Abington* unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers. But the negligent navigation of the master cannot, in the opinion of their Lordships, afford any pretext for depriving those shippers whose goods were jettisoned of their claim to a general contribution. They were not privy to the master's fault, and were under no duty, legal or moral, to make a gratuitous sacrifice of their goods, for the sake of others, in order to avert the consequences of his fault. The Rhodian law, which in that respect is the law of England, bases the right of contribution not

upon the causes of the danger to the ship and cargo, but upon its actual presence; and such exceptions as that recognised in *Schloss* v. *Heriot* are in truth limitations on the rules, which have been introduced, from equitable considerations, in the case of actual wrongdoers, or of those who are legally responsible for them. The owners of goods thrown overboard having been innocent of exposing the *Abington* and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for the loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves. In support of the legal proposition which they induced the learned Recorder to accept, the respondents relied upon a passage which is to be found in the original text of Lord Tenterden's work on Shipping (edit. 1881, p. 499). It is in these terms: "The goods must be thrown overboard for the sake of all, not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped or received the goods, but because at a moment of distress and danger their weight, or their presence, prevents the extraordinary exertions required for the general safety." It appears to their Lordships that, if Lord Tenterden had really meant to lay down the rule that there can be no contribution for jettison in the case of a ship overladen through the fault of those who received and put her cargo on board, he would have done so in plain terms. What he does say is, that there can be no proper jettison from an overladen ship so long as ship and cargo are exposed to no peril whatever from the action of the sea, but are merely exposed to the inconvenience of being unable to reach their destination in the ordinary course of time. The authority upon which the respondents placed their chief reliance was that of Mr. Parsons, who, in his treatise on the Law of Insurance (vol. 2., p. 285), and also in his Law of Shipping (vol. 1, p. 211), states that "when a jettison is justified by the circumstances in which it takes place, and these circumstances are occasioned by the fault of the master, or his want of care or skill, the jettison would give no claim for contribution; but the owners of the ship would be liable to the owners of the goods jettisoned for the damages caused by the wrongdoing of the master." In both works, the proposition is laid down in precisely the same terms, and the same cases are referred to. These treatises are justly regarded as of great authority in questions of maritime law; but their Lordships are constrained to say that, in their opinion, the text above cited is inaccurate, in so far as it bears that no claim of contribution will arise to the owners of jettisoned cargo in the case supposed, and is unsupported by the decisions upon which it is founded, which, all of them, relate to one or other of the exceptions already noticed.

Upon the question of legal tender, their Lordships are unable to concur in the opinion expressed by the learned Recorder. The correspondence which passed, before the deposit was paid, appears to them to show that both of the parties were exceedingly unaccommodating, and somewhat unreasonable, and that neither of them was altogether in the right. Their Lordships, even if it had been desirable to decide the second point urged for the appellants, are not in a position to do so, because there is no proof and no admission to the effect that, as alleged by them in argument, all the bills of lading for goods shipped in the *Abington* contained the same exception with those produced, of the master's act, neglect, or default in navigating the ship. But this is not a suit for recovery of contribution; and the appellants, if it be necessary, will not be precluded from substantiating their averments in the adjustment of average claims. The result is, that their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to dismiss the respondent's action, with costs in the court below. The respondents must also pay the costs of this appeal.

Solicitors for the appellants, *W. A. Crump* and *Son*.

Solicitors for the respondents, *Badham* and *Gore*.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, July 30, 1889.

(Before Lord ESHER, M.R., LINDLEY and BOWEN, L.JJ.)

THE CANADA SHIPPING COMPANY LIMITED *v.* THE BRITISH SHIPOWNERS MUTUAL PROTECTION ASSOCIATION LIMITED. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance—Mutual insurance association—Rules—Damage to cargo—"Improper navigation."

Under the rules of the defendants, a mutual insurance association, the plaintiffs were entitled to protection in respect of damage to goods on board their ship if "caused by the improper navigation" of the ship. A cargo of wheat in the hold of the vessel was damaged during a voyage through the ceiling of the ship and the dunnage being saturated with creosote which had leaked from casks which formed part of the cargo on the outward voyage.

Held (affirming the decision of Charles, J., 6 Asp. Mar. Law Cas. 388; *22 Q. B. Div.* 727; *60 L. T. Rep. N. S.* 863), *that the damage was not caused by the improper navigation of the ship.*

THIS was an appeal from a decision of Charles, J., reported 6 Asp. Mar. Law Cas. 388; 60 L. T. Rep. N. S. 863, where the facts are fully stated. The point in issue was shortly this: whether the plaintiffs, owners of a ship insured with the defendant association, were entitled to compensation for damage to a cargo of wheat which was caused by the dunnage and the ceiling and timber boards of the vessel being tainted with creosote which had leaked from some casks of patent coating composition which had formed part of the cargo carried on the outward voyage. The rule of the defendant association, under which the plaintiff claimed, gave protection when the "loss or damage has been caused by the improper navigation" of the ship. There was also a rule, No. 12, that no member should

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

have any claim under the rules where the damage had been "caused by improper stowage."

Charles, J. gave judgment for the defendants.

The plaintiffs appealed.

Barnes, Q.C., and *Carver*, for the plaintiffs, admitted that no question arose under rule 12, if the point as to improper navigation was decided against them. This case is governed by

> *Carmichael and Co.* v. *Liverpool Sailing Ship Owners Mutual Indemnity Association*, 6 Asp. Mar. Law Cas. 130; 57 L. Rep. N. S. 550; 19 Q. B. Div. 242,

in which an unnatural meaning has been given to "navigation," and applying the meaning there given to the word "navigation" in this rule the plaintiffs are entitled to indemnity for their loss. The safe sailing of the ship in that case was not affected any more than it was in this. They also cited

> *Stanton* v. *Richardson*, 30 L. T. Rep. N. S. 643; 3 Asp. Mar. Law Cas. 23; L. Rep. 9 C. P. 390;
> *Good* v. *London Steamship Owners*, L. Rep. 6 C. P. 563.

Cohen, Q.C. and *Joseph Walton* for the defendants.

Lord Esher, M.R.—I do not agree that in *Carmichael* v. *Liverpool Sailing Ship Owners Mutual Indemnity Association* (*ubi sup.*) the court held that "navigation" was there used in anything but the ordinary sense of the word; if the court had held so, the decision would be a very bad one. In that case the court was merely paraphrasing the ordinary meaning of the word "navigation," and I think that not only was that case rightly decided, but also that the phraseology made use of in it was unusually accurate and explanatory. At page 248 of the report of *Carmichael's* case, in Law Reports (19 Q. B. Div.) I used these words: "If there be negligence before the navigation of the ship commences—negligence of the owner or his servants—which has the effect of causing the ship to be unsafely navigated during the navigation with regard to the safety of the goods, that makes the navigation under those circumstances improper navigation by the shipowner or those for whom he is liable. Here there was negligence before navigation commenced. I purposely say navigation instead of voyage, because there might be navigation without any voyage at all. Here the negligence commenced before the navigation of the ship commenced, but it was the negligence of the shipowner and of those for whom he was responsible, and it had the effect that it rendered it impossible, unless the matter was found out and put right, to navigate that ship, after her navigation had begun, safely with regard to the safety of the goods." That is not exhaustive, but I think it is a right definition with regard to a ship carrying a cargo. Well, if that is the meaning of "navigation," can it be said that the case now before us comes within it? I think it cannot. Here the ship, as to her sailing with regard to the safety of the goods, was in perfect order. The whole mischief happened from what was wholly inside her, and it would not affect her sailing. I am of opinion that Charles, J. was right in his construing of this policy, and for the reasons he gave. Having given this decision on the meaning of "improper navigation," there is no occasion to consider the meaning of "improper stowage" in rule 12.

Lindley, L.J.—If the rules are construed literally, it is impossible to say that a ship smelling of creosote was "improper navigation;" she might be unfitted by it for some cargoes perhaps, but not all. *Carmichael's* case (*ubi sup.*) was, in my opinion, quite rightly decided, but it is a different case to this.

Bowen, L.J.—I am of the same opinion. I should have thought it quite clear that loss or damage cannot be caused by "improper navigation" unless caused by navigation, and navigation means the sailing of the ship. It has been contended that the decision in *Carmichael's* case was to the effect that that which was not damage caused by navigation was damage caused by improper navigation. If this was the meaning of the decision, it was a wrong one; but I think it was correctly decided, and that the language of the Master of the Rolls was absolutely correct. The language used by the other members of the court is possibly capable of misconstruction by not taking into consideration the facts and the current of thought running through the arguments. That case really decides this, that navigation is not less improper because its badness is caused by something which happened before the voyage commenced.

Appeal dismissed.

Solicitors for the plaintiff, *Rowcliffes, Rawle, and Co.*, for *Hill, Dickinson, and Hill*, Liverpool.

Solicitors for the defendant, *W. A. Crump and Son.*

May 1 *and* 2, 1889.

(Before Lord Halsbury, L.C., Cotton and Fry, L.JJ.)

Re The Missouri Steamship Company Limited; Monroe's Claim. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Contract of affreightment — Conflict of laws — Charter-party—Bill of lading—Special exemption.

A claim was made by an American citizen in the winding-up of a British steamship company for damages for the loss of his cattle arising through the negligence of the master and crew. The ship in which the cattle were carried was a British ship trading between Boston and Liverpool. The charter-party contained express stipulations exempting the company from liability for loss caused by the negligence of the master and crew. The cattle were shipped at Boston, and bills of lading were given there, in conformity with the contract. The ship stranded on the coast of North Wales owing, as was admitted, to the negligence of the master and crew. According to the law of the United States the stipulations exempting the owners from liability through negligent navigation were void; but according to English law such stipulations were good, and were usually inserted in English bills of lading.

Held, that from the special provisions of the contract itself it appeared that the parties were contracting with a view to the law of England, and that, consequently, the shipowner was exempt.

Decision of Chitty, J. (58 *L. T. Rep. N. S.* 377; 6 *Asp. Mar. Law Cas.* 264) *affirmed.*

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

The Missouri Steamship Company was a limited company registered in England, and owned the steamship *Missouri*, which was one of a line of steamers trading between United States ports and Liverpool, known as the "Warren Line."

The managers of the line were George Warren and Co. Their agents in America were Warren and Co., who did the business of the steamers there.

The s.s. *Missouri* was registered at the Custom house at Liverpool, and sailed under the British flag.

On the 4th Jan. 1883 a contract was entered into between Albert N. Monroe, of Boston, a citizen of the United States of America, and Warren and Co., on behalf of the company, for the carriage by the s.s. *Missouri* of 400 sheep from Boston to Liverpool. The contract was signed at Boston, and contained the following clause:

When the animals are shipped bills of lading will be issued for them, and said bills of lading will contain stipulations to the following effect, to which the shipper hereby agrees, viz.: Ship not accountable for the acts of God, the Queen's enemies, pirates, robbers, or thieves, barratry of master, or mariners, restraints of princes, rulers, or people, loss or damage, mortality or injury resulting from any of the following perils, whether arising from the negligence, default, or error in judgment of the master, mariners, engineers, or others of the crew or otherwise howsoever—namely, accidents to fittings, disease, stress of weather, want of space, air, or water, accidents to condensing apparatus, tanks, or machinery, diminishing or injuring the supply of water or air, risk of craft, explosion, or fire, in port or at sea, in craft or on shore, before lading or after unlading, accidents from steam machinery or boilers, or any damage or injury thereto, however caused, nor for collision, stranding, or any other accident or peril of the seas, rivers, and steam navigation, of whatever nature or kind soever, howsoever such collision, stranding, or other accident or peril may be caused. Liberty is reserved to the ship, her agents, officers, and owners, in the event of the said ship's putting back to Boston, or into any port, or otherwise being prevented from any cause from proceeding in the ordinary course of her voyage, to tranship the animals by any other steamer, and liberty is also reserved to sail with or without pilots, to call at any intermediate port or ports, and to tow and assist vessels in all situations.

The contract was a printed one. The form of it was prepared in England, and had been in use by the s.s. *Missouri*, and other steamships of the Warren line, for a number of years prior to 1883. It was the only form of contract adopted by the Warren line in carrying cattle.

The bills of lading for the 400 sheep shipped by A. N. Monroe on board the s.s. *Missouri* at Boston to be carried to Liverpool was signed on the 7th March 1883, and it contained the clause as to exceptions mentioned in the contract and set out above.

On the 8th March 1883 the s.s. *Missouri* sailed from Boston, and whilst on her voyage to Liverpool rendered certain salvage services.

Owing to the deviation and consequent delay caused by so doing, the sheep were exposed to much additional wear and tear and knocking about upon the voyage, and in consequence eleven sheep died and the remainder were seriously damaged and reduced in value.

On the 6th Feb. a contract was made between J. A. Hathaway, who was an American citizen resident at Boston, and Warren and Co., on behalf of the company, for the carriage by the s.s. *Missouri* of cattle from Boston to Liverpool. The contract was exactly similar in form to the previous one.

A part of the space taken under such contract was sublet to Mr. A. N. Monroe, and an indorsement to that effect was made on the contract.

Under that contract A. N. Monroe, on the 17th Feb. 1886, shipped 264 fat cattle on board the s.s. *Missouri* at Boston to be carried to Liverpool. The bills of lading for the cattle were signed on the 17th Feb. 1886, and were exactly similar in form to the previous bills of lading.

The s.s. *Missouri* sailed from Boston on the 17th Feb. 1886, and in course of her voyage ran ashore on the coast of North Wales and became a total wreck. All the cattle went into the sea and were lost in consequence of such stranding. A Board of Trade inquiry was afterwards held at Liverpool to inquire into the cause of the stranding. The court found that it was due to negligent and careless navigation on the part of those on board and in charge of the vessel on behalf of her owners.

The company then went into voluntary liquidation, and the usual advertisements for claims were issued. The only one sent in was that of A. N. Monroe, who claimed 6751*l.* 17*s.* 3*d.* damages for the loss and deterioration of the sheep and the loss of the cattle. He alleged that the damage to the sheep was "caused by those in charge of the said steamship on behalf of the said company by wrongfully and in breach of the said contract deviating from and delaying upon the said voyage, and exposing the said sheep to improper hardships and risks," and that "the cattle were destroyed by those in charge of the said steamship on behalf of the said company by wrongfully navigating the said steamship in a negligent and reckless manner."

A summons, under sect. 138 of the Companies Act 1862, was taken out, on behalf of the liquidators, asking that it might be determined whether the claim against the company by A. N. Monroe ought, or ought not, to be allowed by the liquidators.

The summons was heard by Chitty, J., and in support of Mr. Monroe's claim an affidavit was produced, made by an attorney of Boston, stating that, according to the law of the United States, the company was liable to A. N. Monroe for the claim which he had put forward. The reason for his opinion was stated to be that, according to decided cases in American law, a common carrier could not lawfully stipulate by special contract for exemption from responsibility for the negligence of the carrier, or his servants.

The liquidators, on the other hand, obtained affidavits from attorneys at New York giving a *résumé* of the American decisions bearing on the point; also affidavits from several other attorneys in America. The result of them appeared to be that the American law applicable to the circumstances of the present case had never been finally settled; but that the point was being raised in the case of *The Montana*, which was at present under appeal to the Supreme Court of the United States.

The liquidators' answer to A. N. Monroe's claim was, that it should be decided according to English law, and not according to the law of the United States; and that, according to the former law, the claimant would be bound by the terms of the contracts and bills of lading, by which the

owners of the s.s. *Missouri* had liberty to tow vessels and were exempted from the consequences of the negligence of their servants.

Chitty, J. held that the stipulations in the bill of lading were valid (1) because the contract was governed by the law of the flag, and (2) because from the contract itself it appeared that the parties were contracting with a view to the law of England.

From this decision Mr. Monroe appealed.

The appeal came on for hearing on the 20th June 1888, but was ordered to stand over until the judgment of the Supreme Court of the United States in the *Montana* case was delivered.

On the 5th March 1889 that court affirmed the decrees of the circuit court, and held that such stipulations excepting the shipowner from liability were "unreasonable, contrary to public policy, and therefore void."

The appeal of Mr. Monroe now came on for hearing.

Sir *Walter Phillimore* and *T. G. Carver* for the appellant.

Arthur Cohen, Q.C., and *Frederic Thompson* for the liquidators.

The following cases were referred to:

The Peninsular and Oriental Steam Navigation Company v. *Shand*, 3 Moo. P. C. N. S. 272;
Robinson v. *Bland*, 1 Wm. Bl. 257; 2 Burr. 1077;
Quarrier v. *Colston*, 1 Ph. 147;
Lloyd v. *Guibert*, 13 L. T. Rep. N. S. 602; 2 Mar. Law Cas. O. S. 283; L. Rep. 1 Q. B. 115;
Chartered Mercantile Bank of India v. *The Netherland India Steam Navigation Company*, 5 Asp. Mar. Law Cas. 65; 48 L. T. Rep. N. S. 546; 9 Q. B. Div. 118; 10 Q. B. Div. 521;
Jacobs v. *Crédit Lyonnais*, 49 L. T. Rep. N. S. 39; 12 Q. B. Div. 589;
Pope v. *Nickerson*, 3 Storey, 645.
Lee v. *Abdy*, 55 L. T. Rep. N. S. 297; 17 Q. B. Div. 309;
The Bahia, 12 L. T. Rep. N. S. 145; Br. & L. 61;
The Gaetano and Maria, 46 L. T. Rep. N. S. 835; 4 Asp. Mar. Law Cas. 470, 535; 7 P. Div. 137;
Story on the Conflict of Laws, 7th edit., sects. 242, 281, 299;
Phillimore's International Law, vol. 4, p. 525;
Huber v. *Steiner*, 2 Bing. N. C. 202;
The Halley; The Liverpool, Brazil, and River Plate Steam Navigation Company v. *Benham*, 3 Mar. Law Cas. O. S. 131; 18 L. T. Rep. N. S. 879; L. Rep. 2 Priv. C. 193;
Potter v. *Brown*, 5 East, 124;
Holman v. *Johnson*, Cowp. 341;
Kay v. *Wheeler*, 16 L. T. Rep. N. S. 66; 2 Mar. Law Cas. O. S. 466; L. Rep. 2 C. P. 302;
Carr v. *The Lancashire and Yorkshire Railway Company*, 7 Ex. 707.

Lord Halsbury, L.C.—In this case, from the peculiar mode in which the question arises, and from the fact that there are no pleadings, but simply a claim fortified by an affidavit, the question has been somewhat obscured by reason of the absence of definiteness which such a form of procedure necessarily involves. But in substance it is an action on a contract entered into between certain persons. I say "persons" advisedly, though one of them is an incorporated company. The question is, whether upon familiar principles a contract entered into at Boston, in the United States, for the carriage of cattle to England, and subject to certain stipulations, is one that, when the English courts are applied to, will be enforced according to the law of England or whether the English courts will decline to enforce it, because, if the question had arisen in the United States, the courts of the United States would have declined to give effect to one of the stipulations in the contract. I confess I have been somewhat surprised at the lengthy elaboration of principles which I should have thought by this time had been so far accepted as part of the English law that it was not necessary to enter into so elaborate a consideration of them. That one country will under some circumstances enforce contracts made in another, is a proposition I should have thought not requiring authority; and it lies at the foundation of the whole of this argument that when a contract is made between two persons in one country to be performed in another, one of the considerations which according to all writers is to be regarded is, what the contract itself contemplated as the law which was to regulate the contract. Sir Walter Phillimore's argument pushed to its extremity appears to me to come to this—that no such question ever ought to have arisen, and that each country should have refused to enforce a contract made in another country unless the laws of both countries were identical. For a proposition so absurd in its terms Sir Walter Phillimore of course would not contend. It seems to me that it is impossible to approach this question without recognising the fact that there may be stipulations which one country will enforce and which another country will not enforce, and that, in order to determine whether they are enforceable or not, you must have regard to the law of the contract, by which I mean the law which the contract itself imports is to be the law governing the contract. I put aside, as Sir Walter Phillimore candidly put aside, questions in which the positive law of the country forbids certain contracts to be made. Where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would enforce it. But Sir Walter Phillimore does not contend that the contract now in dispute is a contract coming within that category.

But, assuming for the moment that the law which the parties contemplated as the law of the contract is one which can prevail (and for that not only is there a very considerable body of English authority, but the judgment in the *Montana* case, which is invoked here as the judgment to which we are to bow, recognises the fact that the validity of this contract may be affected by the intention of the parties as seen through the contract, as to whether it is to be governed by the English law or not), it would seem that the only question to be determined is what was the law which the parties contemplated as being the law governing this contract. Now, this is a contract for the conveyance of cattle from Boston to England by sea on board a British ship, by a British company, whose domicile is in England. Those circumstances, though very strong, perhaps would not be conclusive. But when I look at the contract itself, and find the ordinary exceptions to the bill of lading are the "Queen's enemies," and so on, it is absolutely impossible to resist the conclusion that the parties did contemplate being governed by English law in their contractual relations. If I am to assume that the law of the United States is, that this particular stipulation now in dispute is of no validity

in the United States, and cannot be enforced: when I find that both the parties to the contract make this stipulation a part of the contract into which they enter—that stipulation being valid and capable of being enforced in England, and invalid and incapable of being enforced in the United States—it seems to me to follow irresistibly that the contractual relations into which the parties entered were such that they intended them to be governed and regulated by English law; and if that is so, the question is free from doubt. I do not propose to enter into the question whether or not the judgment of the American court in the *Montana* case is in all respects satisfactory. It is enough for me to say, that whatever be the American law, assuming always that it is outside the category to which I have before referred, the law which the parties have elected as the law of their contract makes this stipulation valid. It is not necessary to advert to the principle that the plaintiff here is endeavouring to enforce a contract in this country, and seeking to enforce in this country the jurisprudence of another country by which the parties did not intend to be bound, and to have recognised in the courts of this country a system of jurisprudence different from its own. I confess I have not been able during the very long and elaborate argument of this case to entertain the least doubt on the question which has been the subject of so much discussion. I am of opinion the judgment of Chitty, J. ought to be affirmed, and the appeal dismissed with costs.

COTTON, L.J.—I entirely agree, and I should hardly have added anything to what the Lord Chancellor has said, but for the fact that the case has been discussed on behalf of the appellant with great learning and elaboration, and at great length. This is a claim made against this company for loss of cattle which were shipped in the United States under and in consequence of a contract entered into between the shipper and a steamship company, which company is now being wound-up. That contract contained a clause which, if it is to be relied on and can be relied on, exempts the company from all liability in respect of the loss for which the appellant claims. It has been decided by English law, for reasons which I think are satisfactory, that such a stipulation is good, and exempts the company from liability in a case like this. Then, what is relied on in contradiction to this? The American law. We have to consider, first of all, what law is to be considered in dealing with this contract. A vast number of cases were referred to by the appellant to show that here we could not rely on any law except the law of America, or, rather, of the place, Boston, where this contract was entered into. In my opinion, that is not what the American judgment in the *Montana* case, which has been referred to, nor what the cases which we ought to consider authorities—namely, English decisions—have laid down. What they have laid down is this, that *primâ facie* the law of the country where the contract is made will govern the contract, decide what its incidents are, decide what its true construction is and its validity, but that the court must look at the circumstances of the case, and from various circumstances may come to the conclusion that the contract is to be governed by the law of some other country; and all the cases come to this, that you cannot lay down any distinct, positive rule what will be the governing circumstance, but you must consider, having regard to the nature of the contract entered into and the other circumstances of the case, what law is this contract to be considered as being governed by. I will not repeat what the Lord Chancellor has said as to the reasons for the opinion we have formed that this contract must be considered as one to be dealt with according to the law of England.

That being so, the only question is this, whether there is anything in the American law which prevents us giving effect to this contract as it stands. The case referred to was the case of *The Montana*—a decision of the Supreme Court of America; and that decision comes to this, not that the contract is void, but that this particular clause in the contract is one which they consider contrary to public policy, and they will disregard it when they enforce the contract; that is to say, they will enforce the contract without giving any effect to the clause, which in this case, if the clause had been valid, would have protected the company from liability. That, I think, is very clear from various passages in the judgment. In one place in that judgment the court says: "We are then brought to the consideration of the principal question in the case—namely, the validity and effect of that clause in each bill of lading by which the appellant undertook to exempt himself from all responsibility for loss or damage by perils of the sea arising from negligence of the master and crew of the ship." That is the only question they consider, and they come ultimately to the conclusion that it is contrary to public policy that that stipulation should be enforced, and they say in winding-up that part of the case: "This review of the principal cases demonstrates that, according to the great preponderance, if not the uniform concurrence, of authority, the general rule that the nature, the obligation, and the interpretation of a contract are to be governed by the law of the country where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties when entering into the contract clearly manifest a mutual intention that it shall be governed by the law of some other country." There is evidence here to show that the appellant intended to enter into the contract in this form, and intended to take advantage of what he knew was the American law that this stipulation would be disregarded. I must say, with great respect to the American courts, that I doubt whether public policy would justify the non-recognition of this clause in favour of the person who was guilty of dishonesty, according to his own statement, by intending to take the benefit of this contract, but, if the question of this clause and its validity arose, intended to take advantage of the American law in order to defeat the rights of the person with whom he contracted. I refer to this simply as showing that what they are considering is this, that this clause was contrary to public policy, not that there was anything in the law of the United States which would prohibit a carrier from

entering into such contracts, or make it a criminal offence to do so, but simply that it was contrary to public policy, the result of which would be that the American courts would not enforce it. As the Lord Chancellor has said, I do not enter into the question what will be the result where parties have made in America a contract which they intend to be governed by English law, when, according to the American law, such a contract would be itself illegal. In my opinion, no such question arises here. The result of the decision in the *Montana* case is simply this, that for the purposes of public policy adopted in the United States they consider that this clause ought not to be enforced. In my opinion, we are not bound when a contract is entered into with reference to English law to abstain from acting on that contract simply because in the case I have mentioned the American courts, when the contract was entered into in the United States, would not enforce it, considering, though we do not so consider, that the course they take is in accordance with public policy. I may state that, in my opinion, that judgment, as regards the rejection of this clause because it is contrary to public policy, does not apply to a contract where the court comes to the conclusion as a matter of fact that the law to be applied, and which the parties must be considered to have known would be applied, is the law not of the United States but of another country. In my opinion, the judgment of Chitty, J. was right, and the appeal fails.

Fry, L.J.—The principles on which this case has to be decided have been familiar to the courts at any rate since the time of Lord Mansfield, who, in the case of *Robinson* v. *Bland* (*ubi sup.*), expounded those principles of law, and they have been clearly stated since in many cases, among others in the well-known case of *Lloyd* v. *Guibert*, where the learned judge who delivered the judgment of the Exchequer Chamber said (13 L. T. Rep. N. S. 604; L. Rep. 1 Q. B. 122): "It is, however, generally agreed that the law of the place where the contract is made is *primâ facie* that which the parties intended, or ought to be presumed to have adopted as the footing upon which they dealt, and that such law ought therefore to prevail in the absence of circumstances indicating a different intention, as for instance"—and he goes on to enumerate instances from which the courts have gleaned a different intention. That view of the law was fully adopted in the case of *Jacobs* v. *The Crédit Lyonnais* (*ubi sup.*) in this court. I think, therefore, the general principle on which we have to proceed is one which admits of no doubt, and the inquiry, therefore, is this: Looking at the subject-matter of this contract, the place where it was made, the contracting parties and the things to be done, what ought to be presumed to have been the intention of the contracting parties, with regard to the law which was to govern this contract? By that I mean, to determine its validity and its interpretation. Now, in the first place, the ship was an English ship; the owner was an English company; England was the place to which the goods were to be brought, and the place at which the final completion of the contract was to take place; and, what is still more important, the forms of the contract and the bill of lading were English forms. According to the law of England, the contract would be good in the terms in which it stood; whereas, according to the law of the United States, the important terms of the contract would be excluded from it. That is, to my mind, a very cogent consideration to show that what must be presumed to have been the intention of the parties was this, that the law which would make the contract valid in all particulars was the law to regulate the conduct of the parties. Looking at all the circumstances of the case, I have no doubt as to the conclusion we ought to arrive at as to the presumption of the intention.

In coming to that conclusion, and in stating those principles, I am glad to find I am in entire accordance with the law laid down in the American courts. It appears to me the passages cited from Story, J. are strong in favour of the principle to which I have referred, and in the case of *The Montana* that rule was adopted in express terms by the Supreme Court of the United States. Cotton, L.J. has read one passage from that judgment, and I will read another: "This court has not heretofore had occasion to consider by what law contracts like those now before us should be expounded. But it has often affirmed and acted on the general rule that contracts are to be governed, as to their nature, their validity, and their interpretation, by the law of the place where they were made, unless the contracting parties clearly appear to have had some other law in view;" and in that very case, in accordance with the principle so laid down, the Supreme Court proceeded to inquire whether there were any circumstances from which they ought to presume any other law than that of the place of making the contract was contemplated by the parties. Therefore it is obvious, in adopting the principles which I have stated, we are proceeding not only according to the English law, but also according to the law of America; and it is very desirable, if possible, the law relating to the interchange of comity between nations should be the same. There was only one other argument put forward to which I need refer, and it seemed to me to be a little halting between two statements. Sir Walter Phillimore laid down a proposition to this effect, that whenever the law of the place where the contract is made prohibits a particular stipulation in a contract, no other country can treat that stipulation as valid. If by the word "prohibit" he means that the law of the United States has in terms prohibited this stipulation, or has rendered illegal or criminal the introduction of the stipulation, it appears to me the decision in *The Montana* shows that that is not the law of the United States. That decision I think, when fairly read, shows what one would expect to be the case, namely—that the courts have held that the stipulation which is obnoxious to their public policy is void, not illegal; exactly in the same way as in this country we hold that stipulations which are in restraint of trade are not illegal, and the entering into them does not constitute an illegal conspiracy, but they are void. If, on the other hand, it be argued that where the law of the place of the contract refuses to enforce a stipulation then no other country will enforce that stipulation, we have a proposition which, on the face of it, appears to me to be untenable. Therefore, whichever is the alternative of the proposition which Sir Walter Phillimore adopts, neither of them will support his case. I think, therefore,

the decision of Chitty, J. was correct, and that this appeal fails.

Solicitors for the liquidators, *Robins, Cameron,* and *Kemm,* agents for *Bateson, Bright,* and *Warr,* Liverpool.

Solicitors for the claimant, *Rowcliffe, Rawle,* and *Co.,* agents for *Hill, Dickinson, Lightbound,* and *Dickinson,* Liverpool.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

April 4, May 24, and July 1, 1889.

(Before CAVE, J.)

THE RESTITUTION STEAMSHIP COMPANY *v.* SIR JOHN PIRIE AND CO. (*a*)

Charter-party — Colliery guarantee — Incorporation — Construction — Demurrage — Detention in the nature of demurrage—Cesser clause—Clean bill of lading.

A "cesser clause" in a charter-party applies not merely to liability for demurrage, but to liability incurred through detention in the nature of demurrage.

A clean bill of lading is a bill of lading which contains nothing in the margin qualifying the words in the bill of lading itself.

It was agreed by charter-party between the plaintiffs, the owners of a steamship, and the defendants, the charterers, that the ship should proceed to C. and there "load in the usual and customary manner a cargo of coals," and proceed to T. "The vessel to be loaded as customary, but subject in all respects to the colliery guarantee, in 108 colliery working hours." The cargo was to be unloaded at a specified rate per day, "or charterers to pay demurrage at the rate of 30s. per hour." The master was to sign "clean bills of lading without alteration as presented by charterers." "The charterers' liability under this charter-party to cease on the cargo being loaded and the advance freight paid, the owners having a lien on the cargo for the balance of the freight and demurrage."

By a colliery guarantee, the proprietors of a colliery undertook to load the ship for the defendants in 108 hours. "Demurrage, if any, to be at the rate of 20s. per hour." The vessel was not loaded in 108 colliery working hours.

In an action brought by the plaintiffs against the defendants for damages for demurrage, or in the alternative for detaining the vessel an unreasonable time at the port of loading:

Held, that the defendants were not liable, as the "cesser clause" in the charter-party covered the claim made by the plaintiffs.

Semble, that the owners of the ship have no right of action against the charterers under the colliery guarantee unless the guarantee is incorporated with the charter-party; but that the right of action under such guarantee, if the shipowners have any such right at all, would be against the colliery proprietors.

THIS was an action to recover damages for demurrage, and for detention of a ship at the port of loading.

By a charter-party it was mutually agreed between the plaintiffs, who were the owners of a steamship called the *Restitution,* and the defendants, the charterers of the ship, that the ship should proceed to Cardiff, and "there load in the usual and customary manner" a cargo of coals, which the charterers bound themselves to ship and proceed with to Singapore. An advance freight was to be paid "eight days from final sailing from the last port in the United Kingdom and from the date of masters' signing clean bills of lading without alteration as presented by charterers," and the remainder on delivery.

The vessel to be loaded as customary, but subject in all respects to the colliery guarantee, in 108 colliery working hours. The cargo to be unloaded at the average rate of not less than 200 tons per working day, . . or charterers to pay demurrage at the rate of 30*s* er hour. The charterers' liability under this charter-p ty to cease on the cargo being loaded and the adva ce freight paid, the owners having a lien on the cargo for the balance of the freight and demurrage.

By a colliery guarantee the proprietors of a colliery undertook to load the ship for the defendants subject to the following condition:

The said steamer shall load in Roath Basin, Cardiff, and after being completely discharged and unballasted, and written notice thereof given to us within our usual office hours, we shall be allowed, for shipping a cargo of Ferndale steam coal, to be received by the vessel at the usual tip or tips, 108 hours, during which she shall be available and ready for loading. Demurrage, if any, to be at the rate of 20*s*. per hour.

The vessel was not loaded within the stipulated time, and the plaintiffs now brought an action against the defendants for demurrage, or in the alternative for damages for detaining the vessel for an unreasonable time at the port of loading.

Clement Higgins, Q.C. and *Benson* for the plaintiffs.—We are entitled to sue the defendants either under the charter-party or the colliery guarantee. They are distinct contracts, and are not incorporated with each other:

The Zeus, 59 L. T. Rep. N. S. 344; 6 Asp. Mar. Law Cas. 312; 13 P. Div. 188.

With regard to the loading the colliery guarantee is the dominant contract, and, if necessary, will override the provisions of the charter-party:

Gullischen v. *Stewart Brothers,* 5 Asp. Mar. Law Cas. 200; 50 L. T. Rep. N. S. 47; 11 Q. B. Div. 186.

That being so, if we elect to claim under the guarantee, the cesser clause in the charter-party does not affect the unqualified agreement to pay demurrage in the guarantee. The contract of the plaintiffs under the guarantee was with the defendants as principals, and not with the colliery proprietors, who were only acting as agents to load on behalf of the defendants. But if it is said that our claim is under the charter-party, the "cesser clause" is none the less inoperative. The charter-party contains no provision for demurrage or delay at the port of loading, and therefore, if we are under the charter-party, our claim resolves itself into one for detention in the nature of demurrage, to which the cesser clause has no application:

Lockhart v. *Falk,* 33 L. T. Rep. N. S. 96; 3 Asp. Mar. Law Cas. 8; L. Rep. 10 Ex. 132.

Again, under the particular circumstances of this case, the cesser clause could not apply. The charterers' liability under the charter-party is personal, and only ceases when the lien arises.

(*a*) Reported by R. M. MINTON-SENHOUSE, Esq., Barrister-at-Law.

This liability is by the terms of the charter-party on the cargo being loaded, and the advance freight paid, and clean bills of lading signed. Now, clean bills of lading means bills of lading whereby the consignee is to receive the entire consignment free from any deduction, *e.g.*, demurrage; and, if it is held that this charter-party provides for payment of demurrage at the port of loading, no clean bills of lading were signed, and therefore our lien never arose. The lien not having arisen the cesser clause is inoperative, and is no defence to the action.

Abel Thomas for the defendants.—These two instruments must either be read together, or treated separately. If the plaintiffs are suing under the colliery guarantee as distinct from the charter-party, then we say that the plaintiffs were not parties to the guarantee, and cannot sue us under it. And if they are incorporated, then the cesser clause bars the plaintiffs' claim. It has been held that a cesser clause applies not only to demurrage itself, but to detention in the nature of demurrage:

Sanguinetti v. *Pacific Steam Navigation Company*, 35 L. T. Rep. N. S. 658; 2 Q. B. Div. 238; 3 Asp. Mar. Law Cas. 300;
Harris v. *Jacobs*, 15 Q. B. Div. 247;
Kish v. *Cory*, 2 Asp. Mar. Law Cas. 593; 32 L. T. Rep. N. S. 670; L. Rep. 10 Q. B. 553;
Nelson v. *Dahl*, 41 L. T. Rep. N. S. 365; 4 Asp. Mar. Law Cas. 392; 12 Ch. Div. 568; 6 App. Cas. 38.

[Cave, J.—What is the meaning of a "clean bill of lading?"] It means that the consignment is to be delivered in bulk and condition as described in the bill of lading.

Clement Higgins, Q.C. in reply.—The meaning we have assigned to clean bills of lading is correct, and is recognised among shippers. If it were not so, bills of lading would cease to be negotiable, because no one would take a bill of lading subject to unknown deductions. It is submitted that the language used in *Kish* v. *Cory* (*ubi sup.*) with reference to the applicability of a cesser clause to detention in the nature of demurrage only amounts to dicta, and that the decision in *Lockhart* v. *Falk* (*ubi sup.*) is good law.

Cave, J.—This was an action by which the plaintiffs sought to obtain from the defendants damages for the detention of the ship *Restitution* at Cardiff. The *Restitution* came to Cardiff under a charter-party which was entered into on the 28th April 1887, and which provided that the ship, after being in a loading berth as ordered, wholly unballasted and ready to load, subject to warranty, shall there load in the usual and customary manner a full and complete cargo of Ferndale steam coals as ordered by charterers; and then it goes on in another part of the charter-party to say, "The vessel to be loaded as customary, but subject in all respects to the colliery guarantee in (blank) colliery working hours." Now the colliery guarantee purported to be signed by D. Davis and Sons, proprietors of the Ferndale Colliery, and they thereby undertook to load the *Restitution* with a cargo of the above coal for Messrs. Pirie and Co., on terms arranged between them subject to the following conditions: "The steamer shall load in Roath Basin, in Cardiff, and after being completely discharged or unballasted, and written notice thereof given to us within our usual office hours, we shall be allowed, for shipping a cargo of Ferndale steam coal, to be received by the vessel at the usual tip or tips, 108 hours, during which she shall be available and ready for loading." I need not read the part as to the days which are not to count. "Demurrage, if any, to be at the rate of 20*s.* per hour." The charter-party then contains a clause to this effect: "The charterers' liability under this charter-party to cease on the cargo being loaded and the advance freight paid, the owners having a lien on the cargo for the balance of the freight and demurrage." Now, that being so, it was contended on behalf of the defendants that their liability upon the charter-party was disposed of and discharged by the cesser clause, it being admitted that a cargo was loaded and the advance freight paid under the charter-party. On the part of the plaintiffs it was contended that their claim was not under the charter-party, but under the colliery guarantee, a claim which it was extremely difficult to understand. It is said that my brother Field has held that the colliery guarantee is a distinct contract from the charter-party, and I see no ground to suppose that that is incorrect, although no case was actually produced. The charter-party is a contract entered into between the Restitution Steamship Company and Sir John Pirie and Co., that is to say, between the plaintiffs and defendants. The colliery guarantee, taken by itself, purports to be signed by Davis and Sons, and appears to be a sort of general undertaking, which by the custom of the trade no doubt the owners of the steamship *Restitution* would be entitled to take advantage of. But then, if the owners of the steamship *Restitution* sue upon the colliery guarantee alone, they must sue Davis and Sons. They cannot sue Sir John Pirie on the colliery guarantee unless the colliery guarantee is introduced into and made part of the charter-party. Moreover it is very difficult to see that the detention in question was any breach of the colliery guarantee. It is not necessary, however, to enter into that question, because, whether it was a breach of the language of the colliery guarantee, or whether it was a breach of the charter-party, the defendants in this action could only be made liable under the colliery guarantee as forming part of the charter-party. Therefore, under those circumstances, *primâ facie* the case would come within the cesser clause.

There was, however, another point taken with reference to the cesser clause, which is somewhat difficult to reconcile with the point taken about the colliery guarantee. That, however, is not very material; a party may be entitled to succeed upon one ground, although it is adverse to the contention which has formed the main basis of his argument. What was said was this. It was said: Take it that the claim is under the charter-party, and not under the colliery guarantee as introduced into the charter-party. There is nothing fixed with regard to demurrage or delay in loading except the 20*s.* per hour fixed in the colliery guarantee, and that consequently cannot extend beyond a breach of the guarantee, and if there is a breach of the charter-party, there is no demurrage fixed for that; and consequently the only right would be to recover for detention in the nature of demurrage. And the cesser clause applies to demurrage only, and not to detention in the nature of demurrage. I think,

however, after the decisions which have taken place upon this point, that contention cannot be successfully maintained. There are several cases in which the question has arisen, although I do not exactly know that it has ever been actually disposed of. In *Kish* v. *Cory* (*ubi sup.*), for instance, before the Court of Exchequer Chamber, a very strong opinion was expressed by one or two of the members of the court, and particularly by Brett, J., as he then was, that the charterer on loading was discharged from liability for demurrage at the port of loading under such a cesser clause as this, and that he is so discharged, whether the claim is in respect of demurrage properly so called, or in respect of damages for detention. So again in *Sanguinetti* v. *Pacific Steam Navigation Company* (*ubi sup.*) the present Master of the Rolls again expressed his opinion that the word demurrage has a very elastic meaning, and extended not only to demurrage properly so called, but also to damages for detention in the nature of demurrage; and this opinion he again expressed very strongly in *Harris* v. *Jacobs* (*ubi sup.*), and the other members of the Court of Appeal appear to have agreed with him upon that subject. At all events they expressed no dissent. Now, that authority is abundantly sufficient in warranting me in holding that the cesser clause of this charter-party applies to the demurrage claimed by the plaintiffs in this action, whether it is a claim for demurrage proper, or a claim for damages for detention in the nature of demurrage.

One other point remains, and that is, that under the charter-party the master is to sign clean bills of lading without alteration as presented by the charterers or their agent, and it was suggested that a clean bill of lading meant a bill of lading which purported to entitle the consignee to the delivery of the goods without paying for any demurrage. Now I have had some little difficulty in finding out what is meant by a clean bill of lading. There does not seem to be any case which has ever pressed much on the subject, but there is a very clear statement as to the meaning of the phrase "clean bill of lading" to be found in Pollock and Bruce's Law of Merchant Shipping, and there it is said that a clean bill of lading is a bill of lading which contains nothing in the margin qualifying the words in the bill of lading itself, "Shipped in good order and well-conditioned; goods of a certain character, or a certain weight or quality or what not." But where, for instance, you insert in the margin of the bill of lading the weight or quantity or quality unknown, that is not a clean bill of lading, because that contains a qualification. Where, on the other hand, there is no such qualification inserted in the margin, there the bill of lading is a clean one. Looked at according to that definition this bill of lading is a clean one. Therefore it does not seem to me that the condition that the master is to sign a clean bill of lading at all affects the question I have now to dispose of. The simple point is this: in my judgment the cesser clause does cover any claim which can be made by the plaintiffs for the detention of this ship in the Roath Basin, and consequently my judgment must be for the defendants with costs.

Solicitors for the plaintiffs, *Wynne, Holme*, and *Wynne*, for *Forshaw* and *Hawkins*, Liverpool.

Solicitors for the defendants, *Ingledew, Ince*, and *Colt*, for *Ingledew, Ince*, and *Vachell*, Cardiff.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Saturday, June 1, 1889.

(Before Butt, J., assisted by Trinity Masters.)

THE TWEEDSDALE. (*a*)

Collision—Steam trawler and sailing ship—Lights—Regulations for Preventing Collisions at Sea, arts. 3, 6, 17, *and* 23.

Where a steam trawler with her trawl down is going so slowly that there would be difficulty in getting out of the way of other vessels it is her duty to carry the extraordinary lights prescribed by the schedule, Part I. of the Order in Council, dated the 30*th Dec.* 1884, *and made in pursuance of the Merchant Shipping Act Amendment Act* 1862, *and not the ordinary lights of a steamship under way; and if she is carrying the former lights she is relieved from the duty prescribed by art.* 17 *of getting out of the way of sailing ships.*

This was a collision action *in rem* by the owners of the steam trawler *City of Gloucester* against the owners of the sailing ship *Tweedsdale*.

The collision occurred in the Bristol Channel on the 5th June 1888.

The facts alleged by the plaintiffs were as follows: At about 1.30 a.m. on the 5th June 1888 the steam trawler *City of Gloucester* was trawling about fifteen miles W.N.W. of Lundy Island. The wind was about N.E. blowing from a fresh to a strong breeze, and the weather was clear. The *City of Gloucester* was steaming at about one knot an hour with her trawl down, and heading about E. by S. She was carrying a lantern in front of the foremast head, showing a white, green, and red light, and about six or seven feet below it another white light. In these circumstances the side lights of a sailing ship, which proved to be the *Tweedsdale*, were seen about two miles off, about a point on her port bow, and apparently steering about W. The *Tweedsdale* continued to approach, and when about a mile off a flare-up was shown from the *City of Gloucester*, and shortly after another flare was shown. Immediately after the second flare the *Tweedsdale* shut in her green light, and then starboarded and attempted to cross the bows of the *City of Gloucester*. Although the engines of the *City of Gloucester* were at once stopped, and the *Tweedsdale* loudly hailed, she came on and struck the stem and port bow of the *City of Gloucester*, causing her to sink.

The plaintiffs (*inter alia*) charged the *Tweedsdale* with neglecting to keep out of the way of the *City of Gloucester*.

The facts alleged by the defendants were as follows: Shortly before 2.15 a.m. on the 5th June the *Tweedsdale*, a sailing ship of 1403 tons register, was in the Bristol Channel, on a voyage from Cardiff to Valparaiso, laden with a cargo of coals. She was heading W.N.W., and making about seven knots an hour. In these circumstances a white light, which afterwards proved to be exhibited on board the *City of Gloucester*, was seen about one and a half miles off, and from one to two points

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

on the starboard bow. The *Tweedsdale* was kept on her course, but the *City of Gloucester*, instead of keeping out of the way, held on and rendered a collision inevitable. The helm of the *Tweedsdale* was then put hard-a-port, but before she could answer it her jibboom struck the mast of the *City of Gloucester*, and then her stem struck the port bow of the *City of Gloucester*.

The defendants (*inter alia*) charged the *City of Gloucester* with neglecting to keep out of the way of the *Tweedsdale*.

The following Regulations for Preventing Collisions at Sea are material to the decision:

Art. 3. A sea-going steamship when under way shall carry:

(*a*) On or in front of the foremast at a height above the hull of not less than twenty feet, and if the breadth of the ship exceeds twenty feet then at a height above the hull not less than such breadth, a bright white light, so constructed as to show an uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, viz., from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least five miles.

(*b*) On the starboard side a green light so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles.

(*c*) On the port side a red light so constructed as to show an uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night with a clear atmosphere at a distance of at least two miles.

Art. 6. A sailing ship under way or being towed shall carry the same lights as are provided by art. 3 for a steamship under way, with the exception of the white light, which she shall never carry.

Art. 17. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

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.

By an Order in Council made in pursuance of the Merchant Shipping Act (Amendment) Act 1862, and dated the 30th Dec. 1884, it was ordered:

As regards steam-vessels engaged in trawling, when under steam such vessels if of twenty tons gross register or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, shall between sunset and sunrise either carry and show the lights required by the said recited art. 3 of the Regulations aforesaid, or shall carry and show in lieu thereof and in substitution therefore, but not in addition thereto, other lights of the description set forth in Part I. of the schedule hereto:

As regards sailing vessels engaged in trawling such vessels if of twenty tons net register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction shall between sunset and sunrise either carry and show the lights required by the said recited art. 6 of the Regulations aforesaid, or shall carry and show in lieu thereof and in substitution therefore but not in addition thereto, other lights of the description set forth in Part II. of the schedule hereto.

SCHEDULE.

Part I.—Steam-vessels.

(1) On or in front of the foremast head and in the same position as the white light which other steamships are required to carry, a lanthorn, showing a white light ahead, a green light on the starboard side, and a red light on the port side; such lanthorn shall be so constructed, fitted, and arranged as to show an uniform and unbroken white light over an arc of the horizon of four points of the compass, an uniform and unbroken green light over an arc of the horizon of ten points of the compass, and an uniform and unbroken red light over an arc of the horizon of ten points of the compass, and it shall be so fixed as to show the white light from right ahead to two points on each side of the ship, the green light from two points on the starboard bow to four points abaft the beam on the starboard side, and the red light from two points on the port bow to four points abaft the beam on the port side: and (2) a white light in a globular lanthorn of not less than eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon; the lanthorn containing such white light shall be carried lower than the lanthorn showing the green, white, and red lights as aforesaid, so, however, that the vertical distance between them shall not be less than six feet nor more than twelve feet.

Part II.—Sailing Vessels.

(1.) On or in front of the foremast head a lanthorn having a green glass on the starboard side, and a red glass on the port side so constructed, fitted, and arranged that the red and green do not converge, and so as to show an uniform and unbroken green light over an arc of the horizon of twelve points of the compass, and an uniform and unbroken red light over an arc of the horizon of twelve points of the compass, and it shall be so fixed as to show the green light from right ahead to four points abaft the beam on the starboard side, and the red light from right ahead to four points abaft the beam on the port side: and (2) a white light in a globular lanthorn of not less than eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon; the lanthorn containing such white light shall be carried lower than the lanthorn showing the green and red lights aforesaid, so, however, that the vertical distance between them shall not be less than six feet and not more than twelve feet.

It was admitted that the *City of Gloucester* was carrying proper lights; the question between the parties was, whether it was the duty of the steam trawler to get out of the way of the sailing vessel, or the duty of the sailing vessel to get out of the way of the trawler in the circumstances stated.

Barnes, Q.C. and *Robson* for the plaintiffs.—The *Tweedsdale* is alone to blame, as it was her duty in the circumstances to keep out of the way of the *City of Gloucester*. The *City of Gloucester* had only sufficient way on to keep herself under command, and was not in a position to keep out of the way of other vessels:

The Dunelm, 51 L. T. Rep. N. S. 214; 5 Asp. Mar. Law Cas. 304; 9 P. Div. 164.

The *City of Gloucester* was practically stationary, and therefore was not "proceeding" within the meaning of art. 17. The circumstances of the case bring her within art. 23. The fact that steam trawlers are allowed an option as to which lights they are to carry, and may carry those of a steamer under way, shows that when they are carrying the other lights they are not to be treated as steamships.

Sir *Walter Phillimore* and *H. Stokes* for the defendants.—Had the regulations intended to relieve steam trawlers from the duties of steamships they would have said so in express terms. A steam trawler with her trawl down is no more incapable of manœuvring for other vessels than a tug towing another vessel, and yet the duties of a steamship are applicable to a tug in such circumstances:

The American and The Syria, 31 L. T. Rep. N. S. 42; L. Rep. 4 A. & E. 226; 2 Asp. Mar. Law Cas. 350;

The Arthur Gordon and The Independence, Lush. 270; 4 L. T. Rep. N. S. 563; 1 Mar. Law Cas. O. S. 88.

The argument based upon the option of carrying different lights will not hold good in the case of day collisions. The fact that steam trawlers are to carry lights different from those carried by sailing trawlers shows that they are to be treated as ordinary steamers.

Barnes, Q.C. in reply.

BUTT, J.—This is a case of a collision between the steam trawler *City of Gloucester* and the sailing vessel *Tweedsdale*. It occurred somewhere about fifteen or twenty miles from Lundy Island, on the early morning of the 5th June last. The *City of Gloucester* is a paddle steam trawler, and was at the time fishing with her trawl down. She was making, according to the evidence of her master, about one knot an hour, and in all probability she was going at from about that to one and a half knots an hour. The *Tweedsdale* is a large four-masted barque of 1403 tons register. At the time in question she was bound on a voyage from Cardiff to Valparaiso with a cargo of coals. There was a tolerably fresh breeze, the weather was fine but dark, and the *City of Gloucester* was heading somewhere about E. by S. The *Tweedsdale* was heading W.N.W., and was making about seven knots an hour through the water. The *Tweedsdale* was seen at a considerable distance by those on board the *City of Gloucester*, and as she approached the *City of Gloucester* those on board that vessel burnt several flares. Neither the flares nor the lights of the *City of Gloucester* appear to have been seen by anyone on the *Tweedsdale*, and, until the collision had actually occurred, the crew of the *Tweedsdale* appear to have been in ignorance of the fact that there was a ship in their neighbourhood. Moreover, it is clear from the evidence given by those on board the trawler that the *Tweedsdale*, running as she was before the wind, was in a position in which she would naturally yaw, and we think she was negligently navigated in being allowed to yaw too much, so as to mislead those in charge of the trawler. For that she is to blame. On that part of the case neither I nor the Elder Brethren have any doubt.

Then arises a very much more difficult question, viz., whether the trawler was also in fault. She had her trawl down, and was being approached by a sailing vessel. It is said that she is to blame for not having stopped her engines. I do not know whether reversing is suggested, though there would be a difficulty in doing that, having regard to the fact that her trawl was down. A charge against her is that she committed a breach of art. 18 of the Regulations. Now, she was going at a very slow rate, and had actually stopped before the collision. Therefore no blame attaches to her for that. Then it is said that she infringed art. 17. The plaintiffs contend that under the circumstances the article is not applicable to her. In the first place, they say that these vessels were not till the last moment within art. 17. Even regarding the trawler as an unincumbered vessel, they say the vessels were not approaching in such directions as to involve risk of collision. But I am not able to take that view. I think it is clear that these vessels were for a considerable time and distance approaching one another so as to involve risk of collision. Therefore, if the steam trawler is to be regarded as an unincumbered vessel inasmuch as she took no steps to get out of the way of the sailing vessel, she would be to blame for breach of art. 17. Then comes the question, taking her to be a steamer incumbered with her trawl, was she bound to obey art. 17? The evidence is, that having her trawl on the ground she was moving at about one knot, and was carrying the following lights: a lantern on her foremast head, showing a white light ahead and red and green lights on either side, and a white light in a globular lantern six or seven feet below it. Those were proper lights for her to carry in compliance with the new regulations. She was, therefore, not carrying the ordinary lights for a steamer as prescribed by art. 3. Assuming, as I think is the case, that the *Tweedsdale* was approaching her in such a direction that she could see these lights, that ought to have apprised those on board her that the other was a fishing vessel with her trawl down. In that state of things I think that art. 23 prevents the application of art. 17, and relieves the trawler from the duty of keeping out of the way, and casts the duty on the other vessel. In arriving at this conclusion, although I do not say that the case of *The Dunelm* (*ubi sup.*) is an authority on the point, nevertheless the observations of the learned judges who decided that case have been of great assistance to me. The regulation in question was not in force when the case of *The Dunelm* (*ubi sup.*) was decided. The present regulation says that steam-vessels engaged in trawling when under steam and of twenty tons gross register or upwards shall between sunset and sunrise carry the lights prescribed by art. 3, or those referred to in the schedule. The schedule specifies the lights to be carried, and the manner in which they are to be carried. It is to be observed that this regulation gives an option. Trawlers are either to carry the lights this trawler was carrying, or in lieu thereof the lights prescribed by art. 3—*i.e.*, the ordinary lights of a steamer. I think the option must be exercised with discretion, and in this way: If a trawler has not only sufficient way on her to keep herself in command, but also sufficient way to enable her to act with effect in altering her course for other ships, then I think the ordinary regulation lights should be carried, and those in charge of her should act as the Regulations require those in charge of an unincumbered vessel to act. But if she has so little way on her that there would be difficulty in keeping out of the way of other vessels, she should then carry what I may call the extraordinary lights—viz., the lights prescribed by the schedule. The *City of Gloucester* was, as I have said, going only at such a rate as to give her bare steerage way. She was carrying the lights prescribed by the schedule, and I therefore hold her free from blame for this collision. This is the best construction I can put on rules not easy of interpretation; but I fear that it is almost impossible to put any construction on them which will not be open to some objection. The conclusion is, that I hold the *Tweedsdale* alone to blame.

Solicitors for the plaintiffs, *Ingledew, Ince*, and *Colt*.

Solicitors for the defendants, *Stokes, Saunders*, and *Stokes*.

Tuesday, July 30, 1889.

(Before BUTT, J.)

THE RECEPTA. (*a*)

Collision—Limitation of liability—Ship's register—Admissibility of evidence—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 26—*Merchant Shipping Act Amendment Act* 1862 (25 *&* 26 *Vict. c.* 63), *s.* 54.

In an action for limitation of liability the defendants may, if they have raised the question by their defence, call evidence to show that the ship's tonnage as shown by her register is not correct, and that it has been erroneously computed.

THIS was an action by the owners of the steamship *Recepta* to limit their liability in respect of a collision between the *Recepta* and the steamship *Hawk*.

In paragraph 3 of the statement of claim it was alleged as follows:

The gross tonnage of the *Recepta*, without deduction on account of engine-room space, after due allowance in respect of space solely occupied by and appropriated to the use of the crew, ascertained according to the provisions of the several Merchant Shipping Acts in that behalf, is 930·29 tons, and no more.

In paragraph 1 of the defence it was alleged as follows:

The defendants deny that the gross tonnage of the *Recepta* is as alleged in paragraph 3 of the statement of claim, and that the sum of 8*l.* per ton on the gross register tonnage is as alleged in paragraph 11 of the statement of claim, and say that, if the tonnage was computed or ascertained as alleged, it was erroneously computed, and such tonnage has since been determined and registered, in accordance with the rules in the said Acts contained, at 956·37 tons, and which last-mentioned tonnage is in fact the gross tonnage of the *Recepta* without deduction of engine-room space, and after due allowance of crew's space, and the sum of 8*l.* per ton tonnage, is 7650*l.* 19*s.*

The allegations in the statement of claim were supported by an affidavit and the *Recepta's* register.

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), s. 26, is material to the decision, and is as follows:

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

F. Laing, for the plaintiffs, having read the affidavit, and put in the ship's register, asked for a decree in the form of the claim.

J. P. Aspinall, for the defendants, tendered evidence to show that the register did not represent the actual tonnage of the ship.

F. Laing objected to the reception of such evidence on the ground that the ship's register was conclusive.

J. P. Aspinall contended that, under 17 & 18 Vict. c. 104, s. 26, he was entitled to show that it had been discovered that the tonnage of the ship had been erroneously computed, and that she had in fact been remeasured, and that her tonnage was not as alleged by the plaintiffs.

BUTT, J. held, that the evidence was admissible, and a Board of Trade surveyor was thereupon called in support of their case,

It was subsequently agreed between the parties that the amount of the plaintiffs' liability was to be based upon the tonnage alleged by the defendants in their defence, and proved by them by the evidence called.

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitor for the defendants, *Wm. Batham*.

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

HOUSE OF LORDS.

July 26, 29, *and Aug.* 9, 1889.

(Before Lords HERSCHELL, FITZGERALD, and MACNAGHTEN.)

OWNERS OF THE "GRACIE" *v.* OWNERS OF THE "ARGENTINO." (*a*)

THE ARGENTINO.

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Damages—Remoteness—Loss of employment—Demurrage.

A ship was damaged by a collison with another, for which both were to blame. While prosecuting the voyage in the course of which the collision occurred, she had secured an engagement for a new voyage, but in consequence of the damage caused by the collision she was unable to fulfil it.

Held (affirming the judgment of the court below), that the loss of the fair and ordinary earnings of such a vessel, on such a voyage as she was engaged for, was the direct and natural consequence of the collision, and could be recovered as damages; but that demurrage for the time during which she was under repair could not be recovered in addition.

THIS was an appeal from a judgment of the Court of Appeal (Lindley and Bowen, L.JJ., Lord Esher, M.R. dissenting), reported in 6 Asp. Mar. Law Cas. 348; 59 L. T. Rep. N. S. 914, and 13 P. Div. 191, who had affirmed with a variation a judgment of Sir James Hannen, reported in 6 Asp. Mar. Law Cas. 278; 58 L. T. Rep. N. S. 643, and 13 P. Div. 61.

The question arose out of a collision which took place in the river Thames, on the 20th Feb. 1887, between the steamships *Gracie* and *Argentino*. It was agreed between the parties that both ships should be deemed to be to blame, and the damages were referred to the registrar and merchants.

The claim sent in by the owners of the *Argentino* contained the following item of special damage:

16. Loss of profit in succeeding voyage which had been contracted for, but which defendants were unable to carry out, and for which another steamer was substituted, including eight days time lost in loading cargo upon next voyage beyond the time which would have been consumed in loading the cargo originally contracted for, 785*l.* 16*s.* 5*d.*

The Registrar disallowed this claim on the ground that the damages sought were too remote.

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

Sir James Hannen, by his order of the 14th Feb. 1888, "referred back the report to the registrar and merchants for further consideration as regards item No. 16."

The Court of Appeal, by their order of the 9th Aug. 1888, "referred back the report to the registrar assisted by merchants for further consideration, with directions that such damages should be allowed in respect of this collision as would represent the loss of ordinary and fair earnings of such a ship as the *Argentino*, having regard to the fact that she was for the time on Westcott's line of steamers, trading to Alexandria and to the Black Sea, and advertised to sail as such."

There was also a claim for demurrage.

Finlay, Q.C. and *Nelson* appeared for the appellants, and contended that a ship was not entitled to recover compensation for speculative profits which might have been earned, but only demurrage for the time during which she is under repair. The effect of the detention might have been to give her a chance of a more profitable engagement than the one she lost. The measure of damages is the cost of the repairs, and compensation for loss of time. See

Phillips v. *London and South-Western Railway Company*, 42 L. T. Rep. N. S. 6; 5 C. P. Div. 280.

The loss of the voyage might have been for her benefit, and damages based on the comparative profits of different voyages are too speculative. [Lord HERSCHELL referred to *Fletcher* v. *Tayleur*, 17 C. B. 21.] See

The Betsey Caines, 2 Hagg. 28;
The Columbus, 3 W. Rob. 158;
The Clarence, 3 W. Rob. 283;
The Yorkshireman, 2 Hagg. 30, n.;
The Risoluto, 48 L. T. Rep. N. S. 909; 5 Asp. Mar. Law Cas. 93; 8 P. Div. 109;
The Gazelle, 2 W. Rob. 279;
The Inflexible, Swa. 200;
The Black Prince, Lush. 568;
The Star of India, 35 L. T. Rep. N. S. 407; 3 Asp. Mar. Law Cas. 261; 1 P. Div 466;
The Consett, 5 Asp. Mar. Law Cas. 34, n.; 5 P. Div. 229;
The Gleaner, 3 Asp. Mar. Law Cas. 582; 38 L. T. Rep. N. S. 650;

and the following American authorities:

The Narragansett, Olcott's Ad. Rep. (New York) 388;
The Stromless, 1 Lowell (Mass. Dist. Rep.) 153;
Smith v. *Condy*, 1 Howard (Sup. Ct. U. S.) 28.

The Parana (36 L. T. Rep. N. S. 388; 3 Asp. Mar. Law Cas. 220; 2 P. Div. 118) and *The Notting Hill* (51 L. T. Rep. N. S. 16; 5 Asp. Mar. Law Cas. 241; 9 P. Div. 105) seem to vary the rule to some extent; but we submit that on the whole the rule is that, in the case of a partial loss, in addition to the repairs, compensation can only be allowed for loss of time, or at most for a change in the market rate of freight, of which there is no evidence here, where the claim is of a very special nature. If the use of a chattel is taken away only the market value of its use can be recovered. The claim is wrong in form, and exaggerated in amount.

Sir *W. Phillimore* and *H. F. Boyd*, for the respondents, argued that the claim was for what would have been made on the voyage for which the ship was engaged, less what was actually made on another voyage, and was not too remote. By claiming demurrage the respondents are not claiming the same thing twice over. The cases cited on the other side, rightly understood, are in our favour. *The Star of India* (*ubi sup.*) is exactly this case, and the rule was followed in *The Consett* (*ubi sup.*). The common law authorities are to the same effect. See

Bodley v. *Reynolds*, 8 Q. B. 779;
Wood v. *Bell*, 5 E. & B. 772;
Ex parte Cambrian Steamship Company, 20 L. T. Rep. N. S. 301; L. Rep. 4 Ch. 112;
France v. *Gaudet*, L. Rep. 6 Q. B. 199.

Demurrage is only a rough-and-ready way of calculating damages, the more accurate way is to look at the actual engagements of the ship.

Nelson was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Aug. 9.—Their Lordships gave judgment as follows:—

Lord HERSCHELL.—My Lords: The steamships *Argentino* and *Gracie* having been both declared to blame in cross-actions for damages sustained by a collision between the two vessels, the damages were referred in the usual way to the registrar and merchants. The claim sent in by the *Argentino* contained the following items: 16. Loss of profit on succeeding voyage which had been contracted for, but which the defendants were unable to carry out, and for which another steamer was substituted, including eight days time lost in loading cargo upon next voyage beyond the time which would have been consumed in loading the cargo originally contracted for, 785*l.* 16*s.* 5*d.* 17. Demurrage of the s.s. *Argentino* 1407 tons gross, for nineteen days at 5*d.* per ton per day, 564*l.* 17*s.* 1*d.*" The registrar disallowed the item 16 altogether, and allowed 232*l.* in respect of item 17. The learned President of the Admiralty Division referred the case back to the registrar to ascertain the amount of loss which the owners of the *Argentino* has sustained by that vessel not being able to fulfil an engagement entered into prior to the collision. His decision was affirmed by the majority of the Court of Appeal, with a variation in the direction given to the registrar. The facts are not in dispute. The collision took place in the Thames on the 20th Feb. 1887. Ten days prior to the collision, whilst the *Argentino* was at sea on a voyage from Sebastopol, it was arranged between Messrs. Westcott and Lawrence, shipbrokers, who collect cargo at London and Antwerp for conveyance to the Black Sea, and the managing owner of the *Argentino*, that as soon as that vessel had arrived and discharged her cargo, she should proceed to Antwerp and load for the Batoum route. In consequence of the collision the *Argentino* could not keep her engagement, and Westcott and Lawrence had to procure another vessel. Immediately after the repairs of the *Argentino* were completed, she left for Antwerp, having been engaged some days before that date to proceed to Odessa *viâ* Antwerp and London. The question raised by this appeal is, whether the damages claimed by the *Argentino* in respect of the loss of the profits which would have been earned from the employment of the vessel which had been arranged for prior to the collision, are in point of law recoverable. It is admitted that there is no special rule of the Admiralty Court governing the question, and that the law there

administered in relation to such a matter is the same as prevails at common law. Your Lordships have therefore to consider whether, if this were an action brought in the courts of common law and tried by a jury, the judge ought to have directed the jury that these damages could not be recovered on the ground that they were too remote. That damages, though undoubtedly traceable to the wrong in respect of which the action is brought, may nevertheless be too remote and therefore not recoverable, is beyond dispute. I do not think there has been much difference of opinion as to what constitutes remoteness of damage. The definitions which have been given, though varying in their mode of expression, appear to me to be substantially the same. They have generally taken a negative form, indicating what damage is not regarded as too remote, and leaving all else as properly falling within that description. I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act cannot be regarded as too remote. The loss of the use of a vessel and of the profit which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision. But further than this I agree with the court below that such damage is not necessarily limited to the money which could have been earned during the time the vessel was actually under repair. That a steamship, whilst prosecuting her voyage, should have secured employment for another adventure does not appear to me to be out of the ordinary course of things. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure would appear to me to be the direct and natural consequence of the collision.

I observe that no mention was made in the judgments of the learned judges in the courts below of the claim for demurrage and the allowance of the registrar in respect of it. The matter was pointedly brought before your Lordships in the arguments at the bar on behalf of the appellants, and it was urged that, if the judgment of the court below were affirmed, the respondent would get the damages twice over. I think it right, therefore, to state how this matter ought, in my opinion, to be dealt with. Where no claim is made in respect of loss of profits owing to the owner having been deprived of the earnings of a voyage which was in contemplation and the engagement for which had been secured, it would be right, and is no doubt the usual course, to award damages under the name of demurrage in respect of the loss of profit which it must reasonably have been anticipated the ship would earn during the time of detention. But where such a claim is made as in the present case, the owner cannot, I think, claim to have allowed, in addition as a separate item, demurrage in respect of the time the vessel was under repair. If he obtains as damages the loss which he has sustained owing to the loss of the employment he had secured, he is put in the same position as if there had been no detention. There would of course have to be taken into account, however, that, if the shipowner lost the contemplated voyage, he had the use of the vessel as soon as the repairs were completed for any other purpose, and what he earned, or rather what he could have earned, whilst upon any other adventure during the time he would otherwise have been engaged upon the contemplated vogage, must of course be set against the sum allowed him in respect of the loss of that voyage. It must be borne in mind, of course, that the set-off or deduction ought only to be in respect of what might have been earned in that part of the time covered by the lost voyage during which the owner had the use of his ship. It is, I think, only in this way that in a case like the present the length of time during which the ship was laid up for repairs can be taken into account. It is one of the circumstances to be considered in assessing the damages. For the reasons I have given I think the judgment of the Court of Appeal should be affirmed.

Lord FITZGERALD.—My Lords: In this case I concur in all that my noble and learned friend has just stated, and in the result at which he has arrived. It is to be regarded in the light of a common law action brought by the owners of the *Argentino* against the vessel in collision; and upon the main question as to whether the damages resulting to the owners of the *Argentino* from that collision were too remote or not I never from the beginning entertained any doubt. It is not alone that they are not remote, but they are the proximate result of the collision. I therefore adopt entirely the joint judgment of Bowen and Lindley, L.JJ. in the Court of Appeal.

Lord MACNAGHTEN.—My Lords: I concur.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Lowless* and *Co.*
Solicitors for the respondents, *Downing, Holman,* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Feb. 7 and March 18, 1889.

(Before Lord ESHER, M.R., BOWEN and FRY, L.JJ.)

PRICE AND CO. *v.* THE "A 1" SHIPS' SMALL DAMAGE INSURANCE COMPANY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Insurance, marine—"Warranted free from average under 3 per cent., unless general"—Particular and general average loss, together over 3 per cent., separately under 3 per cent.

A particular average loss under 3 per cent. is not recoverable under a policy of insurance containing the clause, "warranted free from average under 3 per cent., unless general," although there has been at the same time a general average loss which, if added to the particular average loss, would make the total loss more than 3 per cent. Consequently the underwriters of a policy of insurance covering all losses not recoverable under

(*a*) Reported by ADAM H. BITTLESTON, Esq., Barrister-at-Law.

a policy containing such a clause are liable for such a particular average loss.

Judgment of Cave, J. affirmed.

This was an appeal from the judgment of Cave, J., upon further consideration.

The action was brought by shipowners upon a policy of marine insurance, which was against "all losses which cannot be recovered under an ordinary Lloyd's or a similar policy of insurance by reason of the insertion therein of the clause, warranted free from average under three pounds per cent., unless general, or the ship be stranded, sunk, or burnt." The ship in question, during the time covered by the policy, was on a voyage from Calcutta to London, when she encountered a storm, which did her damage to the amount of 385*l.* 17*s.* 6*d.* The captain was also obliged, for the general safety of the ship and cargo, to cut away rigging, &c., to the value of 128*l.* 6*s.* 11*d.* It was admitted that this was a general average loss. Upon the average adjustment, the ship's contribution to the general average loss was 43*l.* 0*s.* 7*d.* The value of the ship was 30,000*l.*

The plaintiffs claimed to recover upon the policy in respect of the particular average loss to the ship of 385*l.* 17*s.* 6*d.*, as being under 3 per cent. of the value.

Cave, J. gave judgment for the plaintiffs for the amount claimed.

The defendants appealed.

French, Q.C. and *Carver* for the defendants.—It is submitted that the whole of the 167*l.*, that is to say, both the general average loss and the particular average loss, constitute one entire partial loss, and, such loss amounting to more than 3 per cent. of the value of the ship, the particular average loss could be recovered under an ordinary Lloyd's policy, and consequently cannot be recovered from the defendants. They cited

Dickinson v. *Jardine*, 3 Mar. Law Cas. O. S. 126; 18 L. T. Rep. N. S. 717; L. Rep. 3 C. P. 639;
Peters v. *Warren Insurance Company*, 1 Story's Rep. 463;
Stewart v. *Merchants' Marine Insurance Company*, 53 L. T. Rep. N. S. 892; 16 Q. B. Div. 619; 5 Asp. Mar. Law Cas. 506;
Lidgett v. *Secretan*, 1 Asp. Mar. Law Cas. 95; 24 L. T. Rep. N. S. 942; L. Rep. 6 C. P. 616;
Wilson v. *Smith*, 3 Burr. 1550;
Mavro v. *Ocean Marine Insurance Company*, 2 Asp. Mar. Law Cas. 590; 32 L. T. Rep. N. S. 743; L. Rep. 10 C. P. 414;
Dyson v. *Rowcroft*, 3 B. & P. 474.

Joseph Walton for the plaintiffs. — General average loss and particular average loss cannot be added together in calculating the percentage upon the value of the ship for the purpose of the clause in question. He cited

Padelford v. *Boardman*, 4 Mass. (Amer.) 548.

French, Q.C. in reply.

Cur. adv. vult.

March 18.—Lord Esher, M.R.—In this case an action has been brought against the insurers on a policy which is expressed to be against all losses which cannot be recovered under an ordinary Lloyd's, or a similar policy of insurance, by reason of the insertion therein of the clause, "Warranted free from average under three pounds per cent., unless general, or the ship be stranded, sunk, or burnt." There has been a loss; but the underwriters say that it is not a loss under the policy, because they say that it is a loss that might have been recovered under a Lloyd's policy with the above clause in it. It is true to say that it is not a loss within this policy if it is a loss within an ordinary Lloyd's policy. The question is therefore whether it is a loss within an ordinary Lloyd's policy. The facts as to the loss are as follows. Particular damage occurred to the ship by reason of bad weather. In consequence of that damage, and for the common good of ship and cargo, the ship put into a port of refuge. The first loss was obviously an average loss on the ship. Expenses in putting into a port of distress, on the other hand, are a general average loss. It is an admitted fact that, if the particular average loss in this case is taken by itself, it is below 3 per cent. But if you can add the general average loss on the same ship and goods to the particular average loss, the total loss exceeds 3 per cent. The question is, therefore, whether you can add a general average loss on ship and goods to a particular average loss on the ship in order to see whether the loss exceeds or falls short of the percentage specified in the policy. That depends upon the true construction of the clause containing the memorandum warranty. To say that the language of these Lloyd's policies can be construed according to strict grammar is impossible. They are in a form utterly regardless of grammar, but commonly understood by shipowners and insurers. One must, however, have some regard to the ordinary rules of grammar in construing these policies, and consequently may adopt the grammatical meaning of the words used when they have acquired no other meaning. The usual form of this clause in a Lloyd's policy upon goods is as follows: "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 five pounds per cent., unless general, or the ship be stranded." One must read that, as nearly as one can, grammatically. What is the meaning of the words "free from average?" "Average" is not an ordinary English word at all. "Average" is a technical mercantile expression; and it is well established that it means a partial loss as distinguished from a total loss. The warranty that we have to construe is only concerned with an average loss, that is, a partial loss. If there is a total loss of any of the things specified, the warranty does not apply. If there is a partial loss of any of these things, it does apply. Then we have the words "unless general." Where the partial loss has been a voluntary loss on the part of some of the parties for the benefit of all, the clause is not to apply. When one considers that the things mentioned are things of a very different kind and species, and that this clause is a common form, it seems to follow that the clause is meant to apply whether all the different kinds of goods mentioned are on board or not. Indeed, it is absurd to suppose that they would all be on board. Therefore, looking at this clause, as nearly as one can grammatically, but still more in its ordinary business sense, one must construe it as if each one of the things mentioned might be on board by itself. As a matter of business I should read the words as if each thing was mentioned by itself in a separate clause. It is said by mercantile lawyers that this clause was

introduced for the purpose of discounting disputes about small losses. It is also said to have been introduced on account of the difficulty, in the case of the loss of perishable goods, of discovering whether the loss is due to their own nature or to sea damage. Whether either of those is the reason for the insertion of this clause or not, it seems to me that it would be unbusinesslike and foolish to say that the losses upon all the goods were to be added together in order to ascertain the percentage for the purposes of the clause. Each of the things specified must be read as if it stood alone in a separate clause. Thus you must read: "Sugar is warranted free from average under five pounds per cent., unless general, or the ship be stranded." Then you must read the clause in a policy upon ship: "Ship warranted free from average under three pounds per cent. unless general, or the ship be stranded, sunk, or burnt." As I have said, that is equivalent to "warranted free from partial loss under 3 per cent. unless that loss is a general average loss." Upon the construction of this clause, therefore, I should come to the conclusion that, if a ship suffers a partial loss under 3 per cent., which is not a general average loss, such loss cannot be recovered under a policy containing the clause. If there be a general average loss, that can be recovered, although under 3 per cent. But the particular average loss and the general average loss cannot be added together.

It is, however, useless for us to consider what our decision would be upon the construction of the words of the policy, if there is authority on the subject. There is not so much authority on this subject as I could wish. I gather from the chapter on the memorandum or warranty "Free from Average" in Arnould's Marine Insurance that the view of that writer was that particular and general average cannot be added together for this purpose, but he does not appear to me to have dealt very fully with the point. In Stevens on Average (5th edit.) — Stevens, as we know, was not a lawyer, but is nevertheless an authority and an accurate writer on this subject—at p. 224, it is said, that, if several be insured together, and the average be claimed on the whole, the claim should be analysed to find if each be damaged 5 per cent.; *e.g.*, if a claim be made of 100*l.* on flax and hemp valued at 1000*l.*, *i.e.*, 10 per cent., unless each of them separately amount to 5 per cent., the claim can only be substantiated on one of them. That is exactly the conclusion I should myself have come to. He goes on to say, at p. 232, that general and particular average cannot be added together to make the underwriters liable if they jointly amount to the requisite percentage. Then I come to the book which I always rely on most in these cases, Phillips on Insurance. The writer says (vol. 2., 5th edit., p. 449, par. 1779), that "Under the general exception of losses under 3, 5, or any other rate per cent., not specifying any kind of loss, the question occurs, what damage or loss is to be included in making up the amount of the loss? And, first, can general and particular average losses be added together to make up the rate? The practice appears to have been not to add together the general and particular average to make an amount exceeding the excepted rate. And this practice has been ratified in jurisprudence so far as it has come under judicial cognisance." There is the exact matter which we have to decide dealt with, with that accuracy with which, to my mind, Mr. Phillips always expresses the propositions he lays down. He says there that the practice has judicial authority. In America, at all events, I think that it has. I think that the case of *Padelford* v. *Boardman* (4 Mass. 548) is exactly in point, and is a judicial decision that supports what Mr. Phillips says. In that case there was a policy of insurance containing a clause which exempted the insurers from liability for partial loss under 5 per cent., unless the damage happened by stranding or bilging, excepting in all cases general average. That is not precisely in the words of our English policies, but it is to the same effect. The facts in that case were, that the ship being damaged in a storm put into a port of refuge for the benefit of ship and cargo. The damage done to the sails and rigging was repaired, and the cost of that was a particular average loss on the ship. That was less than 5 per cent. The expenses of putting in to a port of refuge, and other similar expenses, were a general average loss. If it was allowable to join the general average loss to the particular average loss, the total loss was more than 5 per cent. Therefore, the question was raised in that case as clearly and distinctly as it could be. In the judgment in that case it is said: "In the case at bar, the partial loss or damage sustained by the vessel, and the contribution to which the same property became liable by the expenses voluntarily incurred in seeking a port to refit were occasioned, in the first instance, by the same accident." It is immaterial, therefore, that the whole loss was occasioned by the same storm. "The cases are distinguished, however, by the terms of the policy, and in the nature of the thing. The damage sustained by the vessel is the partial loss, but the contribution is a charge to which the property saved is made liable by the marine law; for the former being under 5 per cent., the underwriter is not liable by an express exception which is not extended to the latter. And that these are not to be blended by any constructive inference appears in the several adjudged cases that have been mentioned. And this opinion is conformable to the usage of merchants and insurers, as it has been understood on inquiry." Nothing can be more distinct than that decision; and the passage I have quoted from Phillips is equally clear.

I am therefore of opinion that a general average loss and a particular average loss are not to be added together for the purpose of calculating whether the loss is under 3 per cent. As to the general average loss, it does not matter whether it is under 3 per cent. or not; it is to be paid for by the insurers, however small the amount. As to the particular average loss, it cannot be recovered upon a policy containing the clause under consideration, if that loss, taken by itself, is under 3 per cent. The only other case that ought to be mentioned is one which was cited in the course of the argument, *Stewart* v. *Merchants' Marine Insurance Company* (16 Q. B. Div. 619). To my mind that case has nothing to do with the matter in dispute here. The decision in that case seems to show that, in the case of a policy upon goods, if there have been successive losses on the same voyage, those losses may be added together for the purposes of the

memorandum. I think that the decision goes also to show that, in the case of a policy on ship, the same thing may be done. It was also held that, in the case of a time policy, successive losses happening on different voyages could not be added together, although they all occurred within the time limited by the policy, on the ground that the long established maritime view was to divide the voyage and treat each voyage as a separate matter. The question whether general and particular average losses can be added together for the purposes of the memorandum is a very different one from the question whether successive losses on the same voyage can be so added together. I therefore consider that case not to be in point. For these reasons I am of opinion that the decision of Cave, J. should be affirmed.

Fry, L.J.—This case turns upon the construction of the memorandum in an ordinary Lloyd's policy. I think that the words in the memorandum, "Warranted free from average under three pound per cent., unless general," may be paraphrased by saying "Warranted free from particular average under three pounds per cent." The facts in this case are that the ship sustained damage in a storm to the extent of three or four hundred pounds. That was a particular average loss, or, in other words, a partial loss. But the captain caused part of the rigging to be cut away with a view to the preservation of ship and cargo. That was a sacrifice for the benefit of all, and was therefore a general average loss, giving rise to a general average contributon. That was a loss to the extent of 1200*l.* It is admitted that, unless the general loss can be added to the ship's particular loss, the 3 per cent. mentioned in the memorandum is not reached. In my opinion the two cannot be added together. They are essentially different things. The one loss consists of damage done by the sea to the ship; the other loss consists of a sacrifice voluntarily made for the benefit of the common undertaking. And, although both are called "average" losses, they are essentially different. It is said that the whole loss to the ship, both that from the damage done by the sea and that from the cutting away of the sails, amounted to 1674*l.*, and was an average loss amounting to more than 3 per cent., which might have been recovered by the plaintiffs from the underwriters on the Lloyd's policies at the time that the loss happened, without waiting to see whether the vessel arrived safely and a claim to contribution arose. But, in my opinion, that argument is not a tenable one. It may be that the plaintiffs could have sued the underwriters on the Lloyd's policies for the two sums of 1288*l.* and 385*l.*; but, if so, they could only do it by subrogating the underwriters to their own rights to contribution, and the two losses would still remain essentially distinct. I agree with the Master of the Rolls, that, according to the well-established practice of underwriters, the two things can never be added together in the manner suggested. I think that it is clear, both from the authorities cited in the court below by Cave, J., and from those cited in this court by the Master of the Rolls, that the two kinds of loss can never be added together to make up the 3 per cent. mentioned in the memorandum. The two things are essentially different in their origin and in their character.

Bowen, L.J.—I have very little to add. The guarantee in question is, "Warranted free from average under three pounds per cent., unless general, or the ship be stranded, sunk, or burnt." Whatever the exact history of the clause in its present shape may be, I think that everyone agrees in this, that its object is to prevent small claims against underwriters in respect of small average losses. The first case that gave the meaning which it has ever since had to the form in which this clause is drawn was doubtless that of *Wilson* v. *Smith* (3 Bur. 1550), which was a decision of Lord Mansfield, to the effect that the words "unless general" were to be read as an exception, and not as a condition, with this consequence, that the occurrence of a general average loss was held not to entitle the assured to recover for a particular average loss. The determination of the question which we have to deal with in this case is a further development of the construction of the clause, that question being whether you can add the general to the particular average loss in order to ascertain whether the average is under three pounds per cent., within the terms of the warranty. It seems to me that the authorities are all in one direction. I think that the American case of *Padelford* v. *Boardman* (4 Mass. 548) is directly in point. And I think that there is shown to be an established practice on the part of those who have had to deal with this clause that the two losses should not be added together for the purpose of ascertaining whether there has been an average loss under 3 per cent. In principle there is no reason that I can suggest why they should be so added, and I think that we should not depart from the general practice. The appeal should therefore be dismissed.

Appeal dismissed.

Solicitors for the respondents, *Rowcliffes, Rawle, and Co.*, for *C. A. M. Lightbound*, Liverpool.

Solicitors for the appellants, *Wynne, Holme, and Wynne*, agents for *Forshaw* and *Hawkins*, Liverpool.

Monday, July 8, 1889.

(Before Lord Esher, M.R., Cotton and Lindley, L.JJ., assisted by Nautical Assessors.)

The Vindomora. (*a*)

Collision—Fog—Alteration of helm.

There is no rule of navigation that where those in charge of a vessel in a dense fog hear a whistle or foghorn in their vicinity they are under no circumstances justified in manœuvring with their helm before seeing the other vessel. The propriety of manœuvring with the helm depends upon the circumstances of each case.

Where those in charge of a steamship in a dense fog heard a steam-whistle about three and a half points on their starboard bow, distant about half a mile, and starboarded, the Court held that in the circumstances it was a proper manœuvre.

This was an appeal by the plaintiffs in a collision action *in rem* from a decision of Butt, J. holding both vessels to blame

The collision occurred on the 21st Sept. 1888 in a fog in the North Sea between the plaintiffs'

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

steamship the *Haswell* and the defendants' steamship the *Vindomora*.

The facts alleged on behalf of the plaintiffs were as follows: At about 6.50 p.m. on the 21st Sept the *Haswell*, a steamship of 454 tons register, laden with a cargo of coals, was in the North Sea in the course of a voyage from Sunderland to London The weather, which had been fine and clear, had come on a dense fog. The course of the *Haswell* was S.E. by S.-½-S., and her engines, which had been going full speed, were put at dead slow. A good look-out was being kept, her steam whistle was being duly sounded, and her regulation lights were duly exhibited and burning brightly. At about 7 p.m. those on the *Haswell* heard the whistle of a steamer, which proved to be the *Vindomora*, about three points on the *Haswell's* starboard bow, and apparently about half a mile to a mile off. The engines of the *Haswell* were immediately stopped and her whistle blown two short blasts. No answer was returned to this signal by the *Vindomora*, and the whistle of the *Haswell* was again sounded two short blasts three times at short intervals. A blast of the whistle from the *Vindomora* was then heard from the direction of the *Haswell's* starboard beam, and at the same time the masthead light of the *Vindomora* was seen about a ship's length off a little abaft the starboard beam of the *Haswell*, and coming towards her. A collision being apparently inevitable, the engines of the *Haswell* were at once put full speed ahead, and her helm hard-a-starboard, as the only chance of avoiding it, but the *Vindomora*, coming on under a port helm, cut into the starboard quarter of the *Haswell* with her stem and port bow, causing the *Haswell* to sink.

The facts alleged on behalf of the defendants were as follows: Between 6.45 p.m. and 7 p.m., on the 21st Sept., the *Vindomora*, a screw-steamship of 1080 tons gross, while on a voyage from London to Sunderland, was in the North Sea. The weather was a thick fog. The *Vindomora* was on a north magnetic course, making about two to two and a half knots an hour, with her engines going dead slow. Her regulation lights were duly exhibited, and burning brightly, her steam-whistle was being sounded, and a good look-out was being kept. In these circumstances the whistle of a steamship, which proved to be the *Haswell*, was heard on the port bow of the *Vindomora*, a considerable distance off. The whistle of the *Vindomora* was sounded in reply, and the helm of the *Vindomora* was ported, and soon afterwards, the whistle having been again heard nearer the engines of the *Vindomora* were stopped. But very soon afterwards the masthead and green lights of the *Haswell* were seen about two lengths off, and bearing from one to two points on the port bow, rapidly approaching. The engines of the *Vindomora* were immediately reversed full speed, and her helm kept hard-a-port, but the *Haswell* came on, and with her starboard quarter struck the *Vindomora's* stern and her port bow.

At the trial Butt, J. disbelieved the defendants' witnesses as to speed, and found the *Vindomora* to blame for improperly porting her helm and going at an immoderate rate of speed.

He also found the *Haswell* to blame for starboarding, and concluded his judgment as follows: "Upon the whole, the conclusion to which we have come is, that both of these vessels acted with their helms, the one with the port the other with the starboard helm, at a time when neither could have known or judged by mere sound the exact position of the other. They were therefore both wrongly manœuvred, and this collision is the result. I must therefore pronounce both of these vessels to blame."

From this decision the plaintiff now appealed.

Hall, Q.C. and *Pyke*, for the plaintiffs, in support of the appeal.—The learned judge was wrong in holding that the *Haswell* improperly starboarded. It is contended that the *Haswell* never starboarded till the collision was inevitable. Assuming she did starboard, she was entitled to do so. Under art. 16 of the Regulations for Preventing Collisions at Sea it was her duty to keep out of the way of the *Vindomora*, and that she was entitled to do by any manœuvre she pleased. As a matter of fact, starboarding was the best manœuvre. There is no article which says vessels are not to manœuvre with their helms in a fog, and in the circumstances of the present case the *Haswell* was entitled to manœuvre as she did. [He was stopped.]

Sir *Walter Phillimore* and *J. P. Aspinall*, for the respondents, *contra*.—The judges in the Admiralty Court have always condemned vessels for acting with their helms in dense fogs. It is impossible to conjecture with any accuracy in a fog the bearing or distance of another vessel from the sound of her whistle, and hence the danger of manœuvring in the dark. That principle of navigation was applicable to the *Haswell*, and for violating it she has been rightly held to blame:

The Resolution, 60 L. T. Rep. N. S. 430; 6 Asp. Mar. Law Cas. 363;
The Frankland, 27 L. T. Rep. N. S. 633; L. Rep. 4 P. C. 529; 1 Asp. Mar. Law Cas. 489;
The Kirby Hall, 48 L. T. Rep. N. S. 797; 8 P. Div. 71; 5 Asp. Mar. Law Cas. 90;
The Dordogne, 51 L. T. Rep. N. S. 650; 10 P. Div. 6; 5 Asp. Mar. Law Cas. 328.

Lord Esher, M.R.—It seems to me that, unless we are to say that in all circumstances and under all conditions it is a rule of navigation that in a fog neither vessel is to alter her helm, we cannot uphold the decision of the learned judge. I am of opinion that there is no such rule, and I do not think that in any one of the cases which have been cited there is laid down any such hard-and-fast rule. I extremely doubt, too, notwithstanding the recollection of the opinion which Sir Walter Phillimore has stated to us, that it has been over and over again laid down in the Admiralty that there is the hard-and-fast rule for which he contends. I think he must be mistaken. There has been no case cited to us which states anything of the kind. Each case must be decided by its own circumstances—the position of the vessels at particular times; their distance from one another, and a variety of other considerations. The first point to be noticed in this case is, that it cannot be said that because we did not see the witnesses in the court below we ought not to differ from the learned judge. He has given a character to the witnesses from the *Vindomora* which satisfies me that he would not rely upon their evidence. I therefore do not believe what they say about altering the course of their vessel to the north, and in this the gentlemen who assist us agree.

Now, suppose the *Haswell* did starboard her helm after she heard the first whistle, in judging of her conduct we must first take into account her speed, which was almost as slow as could be. Assume she did starboard, was she wrong in so doing? That depends upon where the whistle was heard. On looking at the evidence from the *Haswell* as to its bearing, while of course agreeing that the witnesses cannot give it with exactness, we find they all say it was three and a half to four points on the starboard bow. While I do not say it was so exactly, it seems very much as if it was in that position. Looking at the way in which the evidence was dealt with in cross-examination, it appears to my mind that it was as good as accepted as true. Seeing there is no contradiction, unless it be the almost preposterous evidence that the *Haswell* was on the *Vindomora's* port bow, I have asked this question: Supposing the whistle of the *Vindomora* was heard three and a half points on the starboard bow of the *Haswell*, was there anything wrong in the *Haswell* starboarding? The gentlemen who assist us say, No; and I think if pressed they would go further, and say it was the right thing to do. If so, how are we to hold the *Haswell* to be in the wrong in such circumstances as these? I have asked our assessors another question, which is this: Did the starboarding of the *Haswell* conduce to the collision? They have answered, No; not at all. From these answers, and the view I myself take, it is clear that the starboarding could not have been a wrong manœuvre, and could not in any way have conduced to the collision, unless the vessels were in the position spoken to by the witnesses from the *Vindomora*, which position I do not believe or accept, seeing the view the learned judge took of their evidence. I cannot see that there was anything wrong in what the *Haswell* did, and I also think that it could not have brought about the collision. I must therefore differ from the learned judge, and hold the *Vindomora* alone to blame.

Cotton, L.J.—I agree. I only wish to express my concurrence with what the Master of the Rolls has said as to the cited cases laying down no definite rule as to what you can or cannot do in a fog. Each case must be judged by its own circumstances.

Lindley, L.J.—I am of the same opinion. I cannot see there was anything wrong in what the *Haswell* did, even assuming she did everything that was attributed to her.

Appeal allowed.

Solicitors for the appellants, *Gellatly* and *Warton*.

Solicitors for the respondents, *Botterell* and *Roche*.

Wednesday, July 10, 1889.

(Before Lord Esher, M.R., Cotton and Lindley, L.JJ.)

The Calliope. (*a*)

Damage—Wharfinger—Bed of river—Negligence.

By charter-party and bill of lading the plaintiffs' ship the C. was to deliver her cargo as directed by the consignees, and she was accordingly ordered by the defendant company, the consignees of the cargo, to proceed to the defendants' wharf to discharge.

There were two berths at the wharf, one alongside it and another outside the first berth. Between the two a ridge of mud from time to time accumulated, and the defendants, who were lessees of a part of the bed of the river, frequently scraped it away. On the C.'s arrival in the river, the defendants' traffic foreman wrote to her master saying he could bring the C. to the wharf at a certain time, and stating the then depth of the water, and asking him to inform the pilot thereof. While approaching the wharf the C. struck on the ridge and was damaged. The master of the C. did not know of the existence of the ridge.

Held, that it was the duty of the wharfingers to keep the space between the berths in a fit state, or warn vessels coming to the wharf of its condition, and that their neglect so to do was the cause of the accident, and that they were liable.

This was an appeal by the plaintiffs in an action *in personam* by the owners of the steamship *Calliope* against the Tredegar Iron and Coal Company Limited from a judgment of Butt, J. (*ante*, p. 359; 59 L. T. Rep. N. S. 901).

The action was brought to recover compensation for damage occasioned to the *Calliope*.

The defendants were the consignees of the *Calliope's* cargo, and also the owners of a wharf in the river Usk, called the Tredegar Wharf, and lessees of a part of the bed of the river fronting the wharf.

The *Calliope* was chartered by the Decido Iron Ore Company to load a cargo of iron ore, and proceed therewith to Newport, Monmouthshire, and deliver the same as directed by the consignees or their agents.

By the bill of lading, which incorporated the conditions in the charter-party, the cargo was made deliverable to the Decido Iron Ore Company or their assigns. The bill of lading was indorsed to the defendants.

Accordingly the *Calliope*, with her cargo on board, arrived off the Alexandra Dock in the Usk on Saturday the 29th May 1886, with a pilot on board, for the purpose of berthing her at the defendants' wharf, where she had been ordered to go. In consequence of there not being then sufficient water to enable the *Calliope* to get alongside, she anchored in the roads. On the same day one Griffiths, the traffic foreman at the wharf, wrote the following letter to the captain of the *Calliope*: "You can bring your steamer to the Tredegar Wharf Monday morning's tide. You can tell the pilot we have two feet more water at our wharf than Bathurst Basin."

There were two berths off the wharf, one immediately alongside it and another farther out in the river, and between the two a ridge was formed, which the defendants scraped away from time to time.

On Monday, the 31st May, the *Calliope*, in charge of a pilot, attempted to get to the wharf, but in doing so she grounded on the ridge between the berths, and sustained the injury complained of.

Neither the master nor pilot knew of the existence of this ridge.

Barnes, Q.C. and *Robson*, for the plaintiffs, in support of the appeal.—The defendants had a

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

duty to the plaintiffs either to keep the frontage of the wharf reasonably safe, or to warn vessels using it of the existence of this ridge:

The Moorcock, 60 L. T. Rep. N. S. 654; 14 P. Div. 64; 6 Asp. Mar. Law Cas. 373.

The plaintiffs could not know of the existence of this ridge without being told of it, and yet by the terms of the charter-party they were bound to go to the defendants' wharf. The ridge which caused the damage was formed from the way in which the defendants used the frontage of the wharf, and they were in the habit of occasionally scraping it away. They therefore knew of its existence, and ought to have warned the plaintiffs.

Finlay, Q.C. and *Joseph Walton*, for the defendants, *contrâ*.—The defendants are not answerable for the approaches to their wharf. If the plaintiffs' contention is good, how far out into the river is the defendants' responsibility to extend? In *The Moorcock* (*ubi sup.*) the cause of the damage was the condition of the berth, and not the approach to it. The defendants could not know the draught of every ship that came to their wharf. It was the pilot's business to bring the ship alongside, and it was his negligence which caused the accident.

Lord Esher, M.R.—I do not think this case is to be decided as an action of deceit. It is an action of negligence, and is not one for misrepresentation by a person for whom the defendants are responsible. There must be some duty on the part of the defendants, and some breach of it by them, to enable the plaintiffs to succeed. The case is this: The defendants are the assignees of a bill of lading, and by it they had power to direct this ship to go to any place at Newport which they might point out. They ordered her, not to a place over which they had no control, but to a quay of their own, and then directed her to discharge her cargo. Had they ordered her to a place to which she could not get they would have been liable to pay demurrage. But, in fact, they ordered her to their own quay, which was fronting a tidal river, and in some way which is not told to us, and it signifies not, they were not only owners of the quay, but they were also leaseholders of the frontage of the quay; that is, of a considerable portion of the soil of the river in front of the quay. Of what does a quay consist? It is not merely a piece of land. It is not a quay unless it faces the water. Therefore it must have a water front. What is a quay used for? For the embarkation or disembarkation of goods coming to it or going from it by water. Therefore a quay is nothing without a water frontage. The fact that with the fall of the tide ships will take the ground makes no difference. That does not prevent it being a quay. Why? Because the vessels can lie there, even if they take the ground. Of what does the frontage consist? Not to the distance of half a mile from the wharf. It is impossible to define exactly the number of feet which make the frontage of a wharf. That must depend upon a variety of circumstances. But practically it is that portion of the frontage through which vessels must come before they can lie at the wharf, and of course of the frontage in which they must lie. Now, in this case what was the frontage of the wharf? There was a berth close to the wharf, so that a vessel lying in that berth would be made fast to the wharf, and there was another berth outside it, in which, if a vessel were to lie, she would be made fast to the other vessel, or by ropes taken across the other vessel to the quay. Both berths in which vessels lie for the purpose of using the quay form part of the frontage of the wharf. If so, how can it be said that the part between them was not also part of the frontage? It is obvious it would be.

Then the question arises, has the owner of the wharf or the person in possession of the wharf who allows others to use it, any duty in regard to the frontage of the wharf? Is he to be allowed to leave the frontage, which is a necessary part of the wharf, for the purpose of using it in any state he pleases, and to allow vessels which are coming to the wharf for his benefit to find out for themselves whether they can get there in safety or not? In the case of *The Moorcock* (*ubi sup.*) we held that that was not so, and that there was some duty. It was alleged in that case that there was an absolute warranty that the front of the wharf should be safe. Whether, if at any time it becomes necessary to decide that question, it will be held that there is such a warranty it is not necessary now to say. But we did hold in that case that a wharfinger must take reasonable care that the front of his wharf is in a state of safety, or, if it is not, to warn persons who are going to use it. That was a case where the shipowner had a right to send his ship there or not just as he pleased. But here the case is stronger, because the ship here was bound to go to the defendants' wharf by contract, whereas in *The Moorcock* (*ubi sup.*) the ship could use the wharf or not as she pleased. It has been argued that the pilots at Newport would know what was the state of the river, and therefore that the wharfinger had no duty towards the shipowner. Even if that were true, would he have no duty to the captain, who may or may not take a pilot? Therefore that argument cannot be good. Where wharfingers day after day have every means of knowing what the bottom of the river is, and do in fact know it, is it to be said that they have no duty in regard to the frontage in relation to the captain of a ship, who does not know what the bottom of the river is, but is bound to go to their wharf. I cannot think that honest business could be carried on if that were the law. He must have some duty towards captains using his wharf? It is said that he had no duty to the captain of this ship, because the pilot knew the condition of the frontage. How can that be? He was not bound to have a pilot? What is this duty? Is the duty confined to the place close to the wharf, or is the wharf-owner liable for damage done to a ship by her grounding upon a place which is in a dangerous state, and over which she must necessarily go to get into the berth at the wharf? Is that to be left in a state of danger, and is there to be no duty on the wharfinger to have it in a reasonable state of safety? In my opinion the duty of the wharfinger extends to that part of the frontage as well as to the actual spot where the ship will finally lie, and his duty is to keep it reasonably safe, or to tell those coming to his wharf that it is not safe. What was the state of this frontage? It has been urged that there is no evidence that the ridge was higher than the ordinary normal

bottom of the river, and all that happened was that there were two berths or depressions, and between the two there was nothing which raised the bottom of the river above its normal level. Is that true? When you carefully examine into the matter, it seems to me to be demonstrated that it is not true, and that the ridge between the two berths was higher than the normal bottom of the river. Therefore there was a ridge on the day in question at the bottom of the river directly in front of the quay, and higher than the normal level. Of course, if there was this ridge, there was not the same quantity of water there as elsewhere, and that was why the ship went on the ground. Anything more dangerous than this ridge can hardly be imagined, and the almost inevitable result of it was what, in fact, occurred, viz., that the ship broke her back. How came that ridge to be there? Why it came from the way in which these wharfingers use their wharf and frontage for their own benefit. It comes from their having two berths, one outside the other, and hence when both berths are occupied there is an accumulation of mud between them and the ridge is formed. Therefore it was the use of the wharf and its frontage by the defendants which brought about this inequality, and caused there to be a less depth of water than there would have been if this ridge had not existed.

What was their duty under such circumstances? They ought not to have allowed the ridge to have accumulated to the extent they did. We do know that it was there on the morning when this accident happened. Therefore there was a neglect of duty on their part. It is, however, correct to say that, if the defendants' breach of duty was not the cause of the accident, and if it was caused by a want of care on the part of those in charge of the ship, the defendants would not be liable. Was there any reasonable want of care? The captain was responsible, because the pilot was only a servant, and if he ordered the pilot to go in he was bound to go in. It seems to me to be opposed to all notions of business to think that these pilots would be in the habit of going over this frontage merely because ships using this particular wharf would be there. The pilots would not go over it unless they were going to the wharf. If by reason of the way in which a wharf-owner uses his wharf the bottom of the river is from time to time altered, I cannot bring myself to say that all the pilots must know the condition of the bottom. Let us see what really occurred. The manager of the wharf made a statement in order that it might be acted upon by the master of the ship. He is the manager of those people who have ordered this ship to go to a particular wharf, and he makes a statement which comes to this: "You had better not come in to-day, but on Monday morning you can come in." That is said by a man who is the manager of the wharf, and has an opportunity of knowing the state of the river bed. I do not say it is a warranty nor even a statement of fact, but it is a statement on which a captain may reasonably act, he naturally supposing that this official would know the condition of the bottom of the river opposite his own wharf, to which his principals had ordered the ship to come. With regard to Griffiths, it is said that his duties were confined to managing the trucks. That I do not believe. It is useless to contend that Griffiths was not sent to help to bring this ship in and make her fast to the quay. When a man appears on the wharf as an official, and tells the captain of a ship something with regard to the frontage of the wharf, the state of which frontage depends upon the wharfinger, is it want of care on the part of the captain to accept what that man says? Therefore what these men said to the captain is sufficient to enable us to say that there was no want of reasonable care in what he did in attempting to take the ship to the berth. I am therefore of opinion that the defendants are liable for the damage sustained by this vessel, and that the appeal must be allowed.

Cotton, L.J.—I am of the same opinion, and think that the defendants are liable. The defendants were the lessees of a wharf in question, and the *Calliope* grounded on a ridge between two berths outside it. This ridge was formed by the defendants mooring for their own purposes vessels opposite their wharf in such a way that there was an accumulation of mud, which gradually grew higher and harder, between the two berths. I agree with the Master of the Rolls that this part of the bed of the river must be treated as a portion of the frontage of the wharf, because it is between the two berths at which vessels usually lie at the wharf. In my opinion the defendants are responsible for what happened in this place, and they had a duty towards persons whose ships came there; or, at the least, they were bound to warn persons so as to prevent them putting their ships in danger. I am therefore of opinion that it was a breach of duty on the defendants' part which caused the accident. But that does not necessarily conclude the case. There remains the question whether the plaintiffs were guilty of contributory negligence. On that I entirely agree with what the Master of the Rolls has said, the result being that the defendants are liable.

Lindley, L.J.—I am entirely of the same opinion. The learned judge in the court below failed to attribute sufficient weight to the fact that the ship was injured by grounding on the ground of the defendants. The defendants took the precaution from time to time of removing this ridge, but on the day in question the ground was uneven, a fact which the defendants knew was likely to occur. It appears that the *Calliope* grounded because there was not sufficient water to enable her to cross this ridge, which it was the defendants' duty to remove. Now, this is not an action of deceit, but of negligence. Why did the ship go to this wharf? She went there because she was bound to go by the terms of the charter-party, and upon the assumption that there would be enough water. Did those in charge of her fail to take any reasonable care? I cannot see that they did. In my opinion the ship grounded without negligence on the part of her master and crew, and I think the defendants are liable.

Solicitors for the plaintiffs, *Downing, Holman, and Co.*

Solicitors for the defendants, *Pritchard and Sons*, agents for *Vaughan and Hornby*, Newport.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Monday, Dec. 2, 1889.

(Before KAY, J.)

WESTRUP *v.* THE GREAT YARMOUTH STEAM CARRYING COMPANY LIMITED. (*a*)

*Towage services—Maritime lien—*3 *&* 4 *Vict. c.* 65.

In the liquidation of a steam-carrying company, and in a debenture-holder's action, a summons was taken out by the owners of steam-tugs asking that they might be declared entitled to a lien on the vessels of the company in respect of services rendered by the tugs in towing such vessels into and out of harbour.

Held, that towage services were not the subject of maritime lien; and that, therefore, the application must be refused.

THE above-named company was incorporated in Feb. 1884 under the Companies Acts 1862 to 1880 as a company limited by shares.

In pursuance of powers in that behalf conferred by its memorandum and articles of association the company borrowed for its purposes 40,000*l.* by the issue of mortgage debenture bonds.

On the 11th March 1889 this action was commenced against the company by Robert John Westrup (on behalf of himself and all others the holders of first mortgage debenture bonds of the company) to enforce the plaintiffs' securities, the company being insolvent and not having paid certain arrears of interest on the mortgage debenture bonds.

On the 12th March 1889 a receiver was duly appointed in this action.

On the 23rd March 1889 the company was ordered to be wound-up compulsorily by the court upon a petition presented by certain creditors of the company on the 9th March 1889.

On the 15th June 1889 the receiver in this action was duly appointed official liquidator in the winding-up.

On the 8th May 1889 it was ordered that the freehold and leasehold property of the company, and also the five steamers and thirty-two smacks and hulks, and other the property, assets, and effects of the company, except book-debts, should be sold with the approbation of the judge; and that the proceeds of such sale should be paid into court.

On the 12th July 1889 an interlocutory order was made in chambers for the usual accounts and inquiries in this action, which order, after stating that the judge did not require any further trial of the action other than such hearing, reserved the further consideration of the action.

A summons was subsequently taken out on behalf of George Nicholson and others, who were the joint owners of certain steam-tugs, for a declaration that they were entitled to a lien for towage services upon the vessels of the company to which they had rendered towage services, and for an order that they might be paid such claims in full, and the costs of and occasioned by the application, out of the proceeds of the sale of the company's vessels.

It appeared that during the five years that the company had carried on business the applicants' steam-tugs had continually performed towage services to the company's fishing vessels. Such towage services were all paid for up to the 2nd Oct. 1888, but had not been paid for since that date.

The towage services in question were in respect of towages in and out of Yarmouth harbour, and were therefore performed within the county, and not on the high seas.

The summons was adjourned into court, and now came on to be heard.

Barnes, Q.C. and *L. E. Pyke* for the applicants.

Horton Smith, Q.C. and *D. L. Alexander* for the official liquidator.

The arguments sufficiently appear from the judgment.

The following authorities were referred to in the course of the arguments:

The Henrich Björn, 55 L. T. Rep. N. S. 66; 6 Asp. Mar. Law Cas. 1; 11 App. Cas. 270, 283;
The Isabella, 3 Hagg. 427;
La Constancia, 4 Notes of Cases, 512;
The St. Lawrance, 5 Prob. Div. 250;
3 & 4 Vict. c. 65, s. 6;
Williams & Bruce on Admiralty, 2nd edit. 175;
The Princess Alice, 3 Wm. Rob. 138;
The Wataga, Swa. 165;
The General Palmer, 2 Hagg. 176;
13 Rich. 2, c. 5;
15 Rich. 2, c. 3;
2 Hen. 4, c. 11;
Admiralty Court Act 1861;
Com. Dig. 1 N. "Admiralty," E. 10;
The Two Ellens, 26 L. T. Rep. N. S. 1; 1 Asp. Mar. Law Cas. 208; L. Rep. 4 P. C. 161, 166;
The Ocean, 2 Wm. Rob. 368; 9 Jur. O. S. 381.

KAY, J.—This is simply a question whether there is any authority for the proposition that there exists a maritime lien for services rendered to a ship not in the nature of salvage, but in simply towing the ship. Of course, if it were towing for the purpose of salvage of the ship, nobody would hesitate to say that it must come within the principle applicable to salvage. But here it is admitted that there has been no salvage of that kind, but merely towage for the purpose of accelerating the speed of the ship either leaving or returning to the port. Now, the authority bearing upon the subject is as follows: In the case of *The Henrich Björn* (55 L. T. Rep. N. S. 66; 6 Asp. Mar. Law Cas. 1; 11 App. Cas. 270) Lord Bramwell discusses the meaning of sect. 6 of the statute 3 & 4 Vict. c. 65, which enacts "that the High Court of Admiralty shall have jurisdiction to decide all claims or demands whatsoever in the nature of salvage for services rendered to, or damage received 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." That case was one in which necessaries were supplied, and the argument seems to have been that, because the Act I have just mentioned gave the High Court of Admiralty jurisdiction with respect to necessaries, therefore necessaries became the subject of maritime lien. Lord Bramwell, in answering that argument, said this: "Jurisdiction is by the section given

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

in cases of towage, and it cannot be pretended that there was any maritime lien as to that when it occurs on the high seas. It was indeed said it was a sort of salvage; but it certainly is not. And the Admiralty Court, I take it, would have under the statute jurisdiction in a case of towage where the ship had been let and the owner was not liable." Then later on he said, "Jurisdiction as to towage was not created by the statute. It existed before with no maritime lien." Now that case came first before Sir James Hannen (49 L. T. Rep. N. S. 405; 5 Asp. Mar. Law Cas. 145; 8 Prob. Div. 151), and went on appeal to the Court of Appeal, by whom his decision was reversed (52 L. T. Rep. N. S. 560; 5 Asp. Mar. Law Cas. 391; 10 Prob. Div. 48). The judgment in the Court of Appeal, constituted of Lord Esher, M.R. and Bowen and Fry, L.JJ., was delivered by Fry, L.J. But in the part which I am about to read it was the judgment of them all, because, as has been pointed out, the Lord Justice begins by saying: "This judgment is that of the Master of the Rolls, Bowen L.J., and myself; but I should state that in that portion of it which decides that the agreement, which I shall presently read, is not a bottomry bond, the Master of the Rolls concurs with difficulty. But he unhesitatingly agrees with the remainder of the judgment." Now, these are the words used by the whole court, still commenting on the same 6th section of 3 & 4 Vict. c. 65: "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 that necessaries are more closely associated with towage, which gave no lien, than with salvage or damage." Therefore I have the considered opinion of Lord Esher and Bowen and Fry, L.JJ., confirmed by Lord Bramwell in the House of Lords, that towage on the high seas does not give a maritime lien.

Now, it has been argued, and I agree with the argument, that that statement of the law is not altogether extra-judicial, because it was a link in the argument on which the judgments were founded. The argument was this: "The statute does not give a maritime lien for necessaries in respect of which there was admittedly no maritime lien before the statute. It is said that it does give such a lien because the word 'necessaries' is coupled with the word 'salvage.' But it is also coupled with the word 'towage,' in respect of which likewise there is no maritime lien." I quite agree that it is a legitimate argument that that was an essential part of the *ratio decidendi*, and therefore those observations are rather more than extra-judicial dicta. Then what authority is there on the other side? No case has been cited in which the neat point has been argued and decided whether towage did give a maritime lien either on the high seas before the Act, or within the body of a county since the Act; but three cases have been cited in which towage has no doubt been treated as if it gave a maritime lien. They are *The Isabella* (3 Hagg. 427), *La Constancia* (4 Notes of Cases, 512), and the *St. Lawrance* (5 Prob. Div. 250). But in not one of those cases was the point argued. Towage was treated as though there was a maritime lien in respect of it when coupled with other things, as to which, in some of the cases, there was undoubtedly a maritime lien. That may have been because it was not worth while to insist upon the distinction (except in the case of *The Isabella, ubi sup.*) that the towage in question was towage in the nature of salvage. In the case of *The Isabella* it certainly was found that the towage was not in the nature of salvage; but there, again, I cannot find that there was any distinct argument or distinct decision on the point that towage differed from necessaries supplied to a ship in respect that it was the subject of maritime lien. Accordingly, I am bound to say that the weight of authority is against this application, and that it must be refused, and with costs.

Solicitors for the applicants, *Ingledew, Ince,* and *Colt,* agents for *Chamberlin* and *Leech,* Great Yarmouth.

Solicitor for the respondent, *H. Montagu.*

QUEEN'S BENCH DIVISION.

Oct. 24 and 25, 1889.

(Before HUDDLESTON, B. and MATHEW, J.)

Re AN ARBITRATION BETWEEN PYMAN BROTHERS AND DREYFUS BROTHERS. (*a*)

Charter-party — Lay days, commencement of — Demurrage—Arrival of ship.

By the terms of a charter-party the ship was to proceed to Odessa, or so near thereunto as she might safely get, and there load, from the factors of the freighters, a complete cargo of wheat. Twelve running days (Sundays excepted) were to be allowed the freighters for loading and unloading, and ten days on demurrage over and above the said lay days. The ship arrived in Odessa outer harbour on the 23rd Dec. 1888, but was not allowed to go alongside a quay loading berth, as the docks were full. The cargo was ready to be loaded on the 22nd Dec. 1888, and the charterers were ready and willing to load the same if and so soon as the vessel got a loading berth alongside a quay in the inner harbour at Odessa, where the cargo was stored, but not before. It was possible to load vessels at Odessa at a quay berth either in the inner or outer harbour, but in no other way. The ship was ordered to a quay loading berth in the inner harbour on the 8th Jan. 1889, and the charterers commenced the loading on the 10th Jan., which they completed on the 15th Jan. In arbitration proceedings between the shipowners and charterers the arbitrator found that the lay days expired on the 5th Jan. and that the charterers were liable for demurrage and detention.

Held (on motion to set aside the award), that the arbitrator was right, as the voyage was completed and the lay days commenced to run as soon as the ship had arrived in the outer harbour at Odessa and as near as she could get to a quay loading berth.

THIS was a motion to set aside an award.

By a charter-party dated the 3rd Oct. 1888 Messrs. Pyman Brothers, as owners of the steamship *Lizzie English,* agreed with Messrs. Dreyfus Brothers (*inter alia*) that the steamship *Lizzie English* should proceed to Constantinople, and as there ordered, within six running hours of

(*a*) Reported by ALFRED H. LEFROY, Esq., Barrister-at-Law.

arrival (or lay days to count) to Odessa or Sevastopol, or Theodosia, or so near thereunto as she might safely get, and there load (always afloat) from the factors of the said freighters a complete cargo of wheat $\frac{\text{and}}{\text{or}}$ seed $\frac{\text{and}}{\text{or}}$ grain at the option of the freighters, and being so loaded should proceed to a safe port in the United Kingdom, or a safe port on the Continent between Havre and Hamburg, twelve running days (Sunday excepted) to be allowed the said freighters (if the said steamer were not sooner despatched) for loading and unloading, and ten days on demurrage over and above the said lay days at fourpence per ton on the steamer's gross register tonnage per running day. The shipowners alleged that the *Lizzie English* was not loaded or discharged within the time limited by the charter-party, and was detained on demurrage for a long time at Odessa. The freighters denied the claim of the shipowners for demurrage, and it was agreed between the parties that the matter should be referred to arbitration.

The arbitrator found, as facts, that the *Lizzie English* reached Odessa outer harbour, and as near as she could get to a loading berth, on the 22nd Dec. 1888; that Messrs. Dreyfus Brothers received notice on that day from the captain that the steamship was ready to receive cargo; that the cargo was then ready to be loaded on the said steamship; that Messrs. Dreyfus Brothers were then ready and willing to load the same if, and so soon, as the said steamship got a loading berth alongside a quay in the inner harbour at Odessa, where the cargo was stored, but not before; that there were no practicable means of loading the said steamship at Odessa, except at, or alongside, a quay-berth either in the inner or outer harbour; that the harbour master at Odessa refused to allow the said steamship to go to a loading quay berth, either in the outer or the inner harbour at Odessa, until her regular turn came after the ships which had arrived at Odessa before her; that there was not at that time a custom at the port of Odessa that steamships under charter were not considered ready to receive cargo until after being moored alongside the quay; that the *Lizzie English* was ordered in her turn by the harbour master to a quay loading berth on the 8th Jan. 1889; that Messrs. Dreyfus Brothers began to load her on the 10th Jan.; and that her loading was completed on the 15th Jan. The arbitrator further found that the laying days of the *Lizzie English* expired on the 5th Jan., and that eleven days were occupied in loading and discharging her. Upon the above findings the arbitrator awarded that Messrs. Pyman Brothers were entitled to receive from Messrs. Dreyfus Brothers for demurrage and detention of the *Lizzie English* the sum of 456*l.* 16*s.*

Messrs. Dreyfus Brothers now moved that this award should be set aside or referred back to the arbitrator, on the ground that, as a matter of law on the facts as stated in the award, such award ought to have been in their favour.

Barnes, Q.C. and *English Harrison* in support of the motion.—The award is bad upon the face of it. This vessel could not be looked upon as an arrived ship until she had reached a place where the freighters could reasonably be expected to load. The lay days commenced to run from the time the *Lizzie English* reached a place of loading, not from the time when she entered the port of Odessa. The cases in support of this view are collected in *Carver's* "Carriage by Sea" (ed. 1885), p. 622. We rely particularly on

Brown v. *Johnson*, 11 L. J. 373, Ex.; 10 M. & W. 331; and

Tapscott and others v. *Balfour and others*, 1 Asp. Mar. Law Cas. 501; 27 L. T. Rep. N. S. 710; L. Rep. 8 C. P. 46.

Cohen, Q.C. and *J. G. Witt*, in support of the award.—The decision of the arbitrator is correct on the facts which he has stated in his award. The number of days to be occupied in loading and discharging the *Lizzie English* were specified by the charter-party, and the freighter must bear the burden of any occurrence which may delay the loading or discharging of the vessel when she has arrived within the ambit of the place mentioned in the charter-party so long as that occurrence is not due to the fault of the master or owners:

Randall v. *Lynch*, 2 Camp. 352.

Here the *Lizzie English* was to proceed to Odessa, and the arbitrator has found that she might have been loaded alongside a quay berth in the outer harbour. The lay days commenced to run, as the arbitrator has found, from the time when she arrived as near as she could get to a quay berth in the outer harbour. In *Nelson* v. *Dahl* (41 L. T. Rep. N. S. 365; 4 Asp. Mar. Law Cas. 172; 12 Ch. Div. 568), the cases on this point are all reviewed in the judgment of the present Master of the Rolls. In that case the Court of Appeal and the House of Lords held that a contract to proceed to London, Surrey Commercial Docks, or so near thereunto as she could safely get, was not satisfied by the arrival of the vessel outside the docks, but was satisfied by her fulfilling the alternative of getting as near as she could to a discharging berth. In the present case the *Lizzie English* duly arrived in the harbour to which it had been agreed she should proceed, and where she might have been loaded. Evidence was admissible to prove that there is a custom at the port of Odessa that the lay days should not commence until a ship has arrived within a more limited space. The charterers tried in this case to establish such a custom, but failed, as the arbitrator found that there is no custom at Odessa by which the shipowner is bound to take his vessel alongside a quay loading berth, as was allowed to be proved in the case of the *Norden Steamship Company* v. *Dempsey* (1 C. P. Div. 654). In the case of *Murphy* v. *Coffin and Co.* (5 Asp. Mar. Law Cas. 531, n.; 12 Q. B. Div. 87) the vessel was bound by the terms of the charter-party to go alongside a particular wharf if so ordered, but there was no such provision here. In *Tapscott and others* v. *Balfour and others* (27 L. T. Rep. N. S. 710; 1 Asp. Mar. Law Cas. 501; L. Rep. 8 C. P. 46) some time elapsed after the entry of the vessel into the dock selected by the charterers before she was allowed to go to the usual place of loading; but, as it was shown that she could have been loaded from lighters in the dock, it was held that the lay days commenced to run from the time she entered the dock. The following cases were also cited:

Brereton v. *Chapman*, 7 Bing. 559;

Ford and others v. *Cotesworth and another*, 3 Mar. Law Cas. O. S. 190, 468; 23 L. T. Rep. N. S. 165; L. Rep. 5 Q. B. 544;
Ashcroft v. *Crow Orchard Colliery Company*, 31 L. T. Rep. N. S. 266; 2 Asp. Mar. Law Cas. 397; L. Rep. 9 Q. B. 540;
Davies v. *McVeagh*, 41 L. T. Rep. N. S. 308; 4 Asp. Mar. Law Cas. 149; 4 Ex. Div. 265;
Harris v. *Jacobs*, 5 Asp. Mar. Law Cas. 530; 54 L. T. Rep. N. S. 61; 15 Q. B. Div. 247.

Barnes, Q.C. in reply.

Huddleston, B.—I am of opinion that in this case the decision of the arbitrator is correct and the shipowners must succeed. The arbitrator has stated certain facts on the face of his award for the purpose of enabling the parties to obtain the decision of the court as to the correctness of his view of the law bearing upon these facts. By the terms of the charter-party the vessel was to proceed to Constantinople, and then to proceed as there ordered to one of three places, of which one was Odessa, or as near thereunto as she might safely get, and there load, twelve running days (Sunday excepted) to be allowed the freighters for loading and unloading, and ten days on demurrage over and above the said lay days. From the facts, as stated in the award, the owner of the vessel appears to have fulfilled his contract. It appears to be clear that the ship might have been loaded in the outer harbour, for the arbitrator finds that there were no practicable means of loading her at Odessa, except at or alongside a quay berth either in the inner or outer harbour. He has also found that there was at that time no custom at Odessa that steamships under charter were only considered ready to receive cargo when moored alongside the quays. The real reason why she was not loaded sooner appears to be that the harbour was full, and the harbour master would not allow her to go to a quay-loading berth until her turn arrived. Over that proceeding neither the shipowners nor the charterers had any control. It seems quite clear that the freighters were not prepared to put their cargo on board in the outer harbour.

Mr. Cohen has very properly conceded that they had a right to occupy some of the stipulated lay days in requiring the ship to go to any place where it would be most convenient to them to load her. The question is, when the lay days commenced to run, so as to ascertain when demurrage became payable. The whole of the argument is therefore narrowed down to this—whether, according to the terms of the charter-party, the lay days commenced to run from the time the vessel arrived within the outer harbour, or from the time she reached a practicable berth for the purpose of loading. Mr. Cohen has referred us to the case of *Nelson* v. *Dahl* (41 L. T. Rep. N. S. 365; 4 Asp. Mar. Law Cas. 172; 12 Ch. Div. 568), where I find that Brett, L.J. says: "'The place so named'—*i.e.*, in the charter-party—" may give a description of a larger space, in several parts of which a ship may load, as a port or dock; or it may be the description of a limited space in which the ship must be in order to load, as a particular quay, or a particular quay-berth, or a particular part of a port or dock. If, when the charter is made, the ship is already in the place named, the shipowner may place the ship at the disposition of the charterer as soon as the ship is ready, so far as she is concerned, to load, by giving notice thereof to the charterer. If the place named be of the larger description, as a port or dock, the notice may be given, though the ship is not then in the particular part of the port or dock in which the particular cargo is to be loaded; but, if the place named is of the more limited description, the notice cannot be given until the ship is at the named place, though the ship is in the port or dock in which the named place is situated." Now, in the present case, the contract which was entered into by the parties, was not that the ship should go to Odessa, and there load in the inner harbour, but that it should go to Odessa and there load. It seems to me that the shipowner satisfied the requirements of this contract as soon as the vessel had entered the outer harbour, and notice had been given to the charterers of her readiness to receive cargo; and that from that period the lay days commenced. In the case of *Murphy* v. *Coffin and Co.* (5 Asp. Mar. Law Cas. 531, n.; 12 Q. B. Div. 87), which has been cited to us, the charterers had taken the precaution to provide by the charter-party that the vessel should proceed to the port of discharge and deliver the cargo alongside the consignee's, or railway, wharf, or into lighters, or any vessel, or wharf, where she might safety deliver it, as ordered. There was no such provision in the charter-party in this case. I accede to the principle of law laid down in the authorities which have been cited to us. I think that the arbitrator was right, and that this motion must be refused.

Mathew, J.—I am of the same opinion. The case of *Nelson* v. *Dahl* (41 L. T. Rep. N. S. 365; 12 Ch. Div. 568) contains a most accurate guide to all the previous authorities on this subject, and therefore it does not seem to me to be necessary to go through all the cases which have been referred to. Now, it appears that the port to which the vessel, about which the present question arises, was to proceed, is provided with various loading quays in the outer and the inner harbour. Mr. Cohen seems to me to have placed the proper construction on the contract, when he said that under it the charterers were entitled, when the vessel arrived at Odessa, to require the captain to take her to a convenient loading berth, provided he did not occupy more than the stipulated lay days in so doing. If the contract had contained no stipulation as to the time within which the loading was to take place, the shipowner might have been subject to the risk of any delay occasioned by the ship being taken to any particular wharf. Perhaps the time has not yet arrived for laying down any clear rule applicable to all contracts of this sort, or for unearthing the principle which underlies all the authorities on this subject; but I think that where a port to which a vessel has been chartered to go, has within it several places for loading or discharge, and the contract contains a time within which the vessel must be loaded or discharged, the particular place at which the vessel is to be loaded or discharged remains at the option of the merchant, subject to the condition that the obligation of loading and discharging within the stipulated time must be borne by him, and if from any circumstances, not the fault of the shipowner, the ship cannot be loaded within that time,

the responsibility for the delay must be borne by the merchant. In the present case, the place chosen by the merchant for loading was one at which the vessel could not load upon her arrival at the place named in the charter-party, and she was obliged to wait for a considerable period before she was able to do so. For that delay I consider that the merchant is liable under his contract.

Motion refused.

Solicitors for the charterers, *Lowless* and *Co.*

Solicitors for the shipowners, *T. Cooper* and *Co.*

Friday, Oct. 25, 1889.

(Before HUDDLESTON, B. and MATHEW, J.)

CARNEGIE *v.* CONNOR AND CO. (*a*)

Charter-party — Construction — Guarantee as to ship's capacity.

A charter-party provided that the ship should load a cargo of creosoted sleepers and timber and therewith immediately proceed to Smyrna. The charterer to have the option of shipping 200 tons of general cargo. The charter-party contained the following words: "owners guarantee ship to carry at least about 90,000 cubic feet, or 1500 tons dead weight." A lump sum of 1000l. was payable as freight. The ship was, in fact, able to load only 65,000 cubic feet, equivalent to 1120 tons dead weight, of the cargo specified in the charter-party, and the master refused to receive 8000 creosoted sleepers which had been sent alongside by the charterer. In an action brought by the charterer to recover damages against the owners.

Held, that the words in the charter-party did not amount to a guarantee that the ship would carry the named quantity of the cargo mentioned in the charter-party, and that evidence to show that she would carry such quantity of dead-weight cargo was admissible, and that such evidence having been rejected there must be a new trial.

THIS was an appeal from the Mayor's Court.

The action, which was tried before the Recorder of London and a special jury, was brought to recover damages for breach of stipulations in a charter-party, alleged by the plaintiff to amount to a guarantee of the carrying capacity of the steamship *Dotterell*. The charter-party provided that the *Dotterell* should be

Placed at the charterer's usual loading berth in the Victoria Dock and there load a cargo of creosoted sleepers and timbers. Charterer has option of shipping 100 to 200 tons of general cargo. Any piece exceeding two tons in weight to be put in at charterer's expense, the remainder of the cargo to be taken in with ship's steam cranes or winches. The necessary wood for stowage to be provided by the ship. Owners guarantee ship to carry at least about 90,000 cubic feet, or 1500 tons dead weight of cargo, and charterer to have the full range of ship's hold and usual stowing places for the stowage of such cargo; and being so loaded shall therewith immediately proceed on her voyage to Smyrna and deliver the same always afloat. . . . The freight to be as follows: one thousand pounds lump sum, £500 payable on sailing, and remainder within fourteen days less freight payable abroad. . . . Timber may consist of teak scantlings in cases about 23 feet long or otherwise, always provided steamer can reasonably stow the same. The owners to employ their own stevedores at ports of loading and discharge.

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Stevedores employed by the owners loaded the vessel with a full cargo, which consisted of 17,108 creosoted sleepers, 110 iron joists, 400 pieces of timber, 1015 cases of teak, 24 barrels of oil, and a small quantity of other articles. This cargo occupied 64,400 cubic feet, and amounted to 1120 tons dead weight. After the vessel was full, more than 8000 creosoted sleepers were sent alongside by the charterer, but were refused by the master, and were sent on by the charterer, in another vessel. The plaintiff sought to recover from the defendants the sum of 488l., which was the amount of freight paid by him in respect of the sleepers so rejected, at the rate of 15*s.* 3*d.* per ton. The learned Recorder directed the jury that the words in the charter-party, "owners guarantee ship to carry at least about 90,000 cubic feet or 1500 tons dead weight of cargo," amounted to an absolute guarantee that the steamship *Dotterell* could and should carry at least 1500 tons dead weight, or 90,000 cubic feet of the kind of cargo described in the charter-party and tendered by the plaintiff, and refused to admit evidence which was tendered on behalf of the defendants to show that the vessel had a carrying capacity of 90,000 cubic feet with reference to an ordinary cargo. On this direction the jury found a verdict for the plaintiff for the full amount of his claim.

The defendants accordingly moved that judgment should be entered for them, or that a new trial should be granted on the ground that the learned recorder was wrong in law in holding that the charter-party amounted to an absolute guarantee that the *Dotterel* could and should carry at least 1500 tons dead weight or 90,000 cubic feet of the kind of cargo described in the charter-party.

Bucknill, Q.C. (*W. E. Hume Williams* with him) for the defendants. — The recorder would not allow us to show that the ship could carry 90,000 cubic feet of ordinary cargo. The words in the charter-party only mean that she is capable of carrying so much part measurement and part dead weight of an ordinary cargo. They are words of expectation only.

Wheeler, Q.C. (*Palmer* with him) for the plaintiff.—The charter-party distinctly mentioned the goods to be carried and the guarantee related to a cargo of that description. The words in the charter-party are words of contract, as in *Morris* v. *Levison* (34 L. T. Rep. N. S. 576; 3 Asp. Mar. Law Cas. 171; 11 C. P. Div. 155), and not words of expectation.

HUDDLESTON, B.—It seems to be quite clear that there has been a miscarriage in this case, and therefore it must go down for a new trial. The verdict appears to have proceeded on the decision of the learned recorder that the words in the charter-party, "90,000 cubic feet or 1500 tons dead weight," was a guarantee that the ship would carry that quantity of the cargo provided by the charter-party. The inference sought to be arrived at by the plaintiff is that there was a guarantee that the ship would carry 90,000 cubic feet of creosoted sleepers and timber; but then it must be borne in mind that the charterers were to have the option of shipping from 100 to 200 tons of general cargo. That is the contract, and then it goes on to show what the vessel will carry, viz., 90,000 cubic feet or 1500 tons. The

case of *Morris* v. *Levison* (34 L. T. Rep. N. S. 576; 1 C. P. Div. 155), which has been quoted, is altogether different to this case, because there the contract was to carry a full and com plete cargo. and 1100 tons were described as what would be a full and complete cargo. Here the contract is merely to carry creosoted sleepers and timber, and then the provision is that the vessel will contain and carry 90,000 cubic feet or 1500 tons. We do not think that is a guarantee that she will carry that quantity of this particular cargo, therefore the view taken by the learned recorder was, in our opinion, wrong, and under these circumstances there will be a new trial.

MATHEW, J.—I am of the same opinion. I do not think there is any indication in this charter-party of an intention to guarantee that this ship should carry the cargo specified in the charter-party to the extent mentioned. The evidence which was proposed to be given by Mr. Bucknill, that this ship could carry 90,000 cubic feet or 1500 tons of dead-weight cargo, and which was objected to, appears to me to have been perfectly relevant to the issue, and I think that it ought to have been received. The learned recorder excluded that evidence, and informed the jury that the ship was bound to carry 250 tons more than she could possibly carry. It appears to me that the learned recorder was wrong, and that the jury ought not to have been so directed.

Order for a new trial.

Solicitors for the plaintiff, *Kenneth Powles.*

Solicitors for the defendants, *Lowless and Co.*

Saturday, Oct. 26, 1889.

(Before HUDDLESTON, B. and MATHEW, J.)

STEAMSHIP COUNTY OF LANCASTER *v.* SHARPE AND CO. (*a*)

Demurrage—Consignee acting as agent—Liability of—Bill of lading incorporating charter-party.

Consignees under a bill of lading making the goods deliverable to them "paying freight and all other conditions as per charter-party," are not liable to pay demurrage stipulated for by the charter-party and incurred at the port of loading, though they have taken delivery of the goods, provided they are, and are known to the shipowners to be, acting as agents, and have refused to accept delivery in the terms of the bill of lading, and have repudiated all liability for demurrage before accepting delivery.

Wegener *v.* Smith (24 *L. J.* 25, *C. P.*; 15 *C. B.* 285) *distinguished.*

THIS was a motion by way of appeal from a decision of the County Court judge of Liverpool.

The facts of the case were as follows:—The plaintiffs were the owners of the steamship *County of Lancaster.* The defendants were the consignees named in a bill of lading, by virtue of which they claimed delivery of the cargo conveyed by the *County of Lancaster* from Fowey to Liverpool. The charter-party, which the defendants signed as agents for the charterers, contained a clause to the following effect, viz., that the cargo was to be loaded, as customary, at Fowey, if longer detained, demurrage at 9*l.* a day. The bill of lading referred to the charter-party in the following terms: "The consignees paying freight and all other conditions as per charter-party." The *County of Lancaster* was detained three days at Fowey, the port of loading, and on her arrival at Liverpool the plaintiffs claimed from the defendants 27*l.* for demurrage, under the terms of the charter-party.

The defendants repudiated their liability, and demanded delivery of the goods on payment of the freight, offering at the same time to obtain the bond of their principals for the payment of any amount which might be due for demurrage. Ultimately, a portion of the cargo was delivered by the master of the ship to the defendants, the remainder being retained by the plaintiffs under their lien.

The plaintiffs brought an action against the defendants in the County Court to recover the sum of 27*l.*, the amount of their claim for demurrage. The County Court judge before whom the action was tried nonsuited the plaintiffs, who appealed.

Joseph Walton for the plaintiffs.—The County Court judge was wrong in nonsuiting the plaintiffs. The bill of lading contained the words, "and all other conditions as per charter-party," and the fact that the defendants claimed and took delivery of the goods under the bill of lading is strong, if not conclusive, evidence that they accepted the duty of paying the claim for demurrage. In the case of *Allen* v. *Coltart* (48 L. T. Rep. N. S. 944; 5 Asp. Mar. Law Cas. 104; 11 Q. B. Div. 782), Cave, J. says: "It appears to me, however, that the plaintiffs are entitled to maintain this action quite independently of 18 & 19 Vict. c. 3. As far back as 1811 it was held, in *Cock* 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 or their assigns, he or they paying freight for the said goods. It is true that that 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, in *Wegener* v. *Smith* (24 L. J. 25, C. P.; 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 demurrage, stipulated for by the charter-party, notwithstanding his refusal at the time of receiving the goods to pay the demurrage." The

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facts in this case are precisely similar to those in *Wegener* v. *Smith* (*ubi sup.*), as the consignees here claim the goods only under the bill of lading, and yet protest against the validity of the plaintiff's claim for demurrage. [MATHEW, J.—In the case of *Wegener* v. *Smith* (*ubi sup.*) the repudiation was after the acceptance of the goods, and the defendants there were not agents.] The case of *Gray* v. *Carr and another* (25 L. T. Rep. N. S. 215; 1 Asp. Mar. Law Cas. 115; L. Rep. 6 Q. B. 522) was also cited.

T. G. Carver for the defendants.—The County Court judge was sitting without a jury, and found as a fact that the defendants did not accept this liability, and that there was no contract on his part to pay the demurrage claimed. The expression "nonsuit" in his note amounts to no more than that. The defendants were merely agents to pay freight and take delivery, but not to pay demurrage. The acceptance of goods under a bill of lading which incorporates the charter-party may be some evidence of an implied contract to pay demurrage, but it is by no means conclusive. In this case the defendants refused to take the cargo if the plaintiffs insisted on their paying demurrage. If any promise to pay demurrage can be implied from the evidence, it was merely a promise by the defendants acting as agents on behalf of their principals:

Amos v. *Temperley*, 8 M. & W. 798;
Moller v. *Young*, 25 L. J. 94, Q. B.

The liability of the consignee only arises when the loading is at an end:

Gullischen v. *Stewart Brothers*, 50 L. T. Rep. N. S. 47; 5 Asp. Mar. Law Cas. 200; 13 Q. B. Div. 317.

The case of *Gray* v. *Carr* (25 L. T. Rep. N. S. 215; 1 Asp. Mar. Law Cas. 115; L. Rep. 6 Q. B. 522) is a decision upon the question as to the shipowners' right to lien.

Joseph Walton in reply.—In the case of *Jesson* v. *Solly* (4 Taunt. 52), Heath, J. says: "It is clear that the plaintiff is entitled to demurrage either from the consignor or consignee. Demurrage is only an extended freight, and the consignee by adopting this bill of lading, makes himself liable to demurrage as well as to freight." In the same case Chambre, J. says: "It would be monstrous if the consignee, accepting the contract with knowledge of the terms, should not be bound by it, and could send the captain back to the consignor for demurrage." The principle to be deduced from this case is that acceptance of goods by a consignee is evidence of his accepting the terms of the bill of lading.

HUDDLESTON, B.—The County Court judge decided this case on the evidence which was before him, though he appears to have said that he nonsuited the plaintiffs. I think that, acting as judge and jury, he arrived at the conclusion that the plaintiffs had not made out their case. Now, the claim of the plaintiffs is for demurrage. On the arrival of the vessel at Liverpool, on the 29th March, a discussion arose as to delivery. The defendants at once repudiated all liability for demurrage, but expressed their willingness to pay freight, and take delivery of the goods. It is not denied that the defendants were acting merely as agents, and that that fact was known to the plaintiffs is obvious from the evidence, for in the charter-party the defendants are described as agents for the charterers. There is this further noticeable fact, that they offered to procure the bond of their principals to meet the claim for demurrage. The plaintiffs, therefore, had full notice of the defendants' objection to satisfy their demand, and, notwithstanding this, they proceeded to deliver a portion of the cargo to them, at the same time retaining in their possession a sufficient portion to cover demurrage. Mr. Walton contended that the action of the defendants in claiming and taking delivery of a portion of the goods under the bill of lading which contains the clause, "all conditions as per charter-party," one condition therein being the payment of all claims for demurrage, imported a contract on the part of the defendants to pay demurrage. It is not suggested that they have incurred any liability under the Bills of Lading Act (18 & 19 Vict. c. 111). The County Court judge was correct in holding that there was not enough evidence to support the plaintiffs' contention that the defendants had incurred any liability in respect of demurrage. The case of *Wegener* v. *Smith* (24 L. J. 25, C. P.; 15 C. B. 285) was relied upon by Mr. Walton, but, as my brother Mathew has pointed out, in that case the defendants were not agents, and it appears to be clear that the repudiation of liability took place subsequent to the delivery of the goods, whereas in this case the defendants repudiated their liability prior to the delivery of the goods, and as soon as the question was raised. Under these circumstances the County Court judge was right in coming to the conclusion that there was no contract, or if there was evidence of a contract there was not sufficient evidence to render the defendants liable. This appeal must be dismissed.

MATHEW, J.—I am of the same opinion. There can be no doubt that if the evidence showed that any part of the cargo had been received by the defendants under the terms of the bill of lading it was evidence that they undertook to pay the claim for demurrage. Mr. Walton was unable to show that any part of the cargo had been so received. The defendants appear to have only taken the goods on the terms that they would not be liable for demurrage incurred. The case of *Wegener* v. *Smith* (24 L. J. 25, C. P.; 15 C. B. 285) has been relied on, but that case is not conclusive. There the defendants repudiated the claim for demurrage after they had received delivery of the goods under their bill of lading. That view of the case is confirmed by the words of Jervis, C.J. in *Smith* v. *Sieveking* (5 E. & B. 589), where he says that the demurrage for which the consignee was held liable accrued "from his own delay at the port of discharge," and not at the port of loading. The liability was due to his own misconduct after the arrival of the vessel. Doubtless repudiation of such a liability after acceptance of the goods would amount to nothing, as Maule, J. said in that case.

Appeal dismissed.

Solicitors for the plaintiffs, *Norris, Allens*, and *Chapman*, agents for *J. M. Quiggin* and *Brothers*, Liverpool.

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

Wednesday, Nov. 13, 1889.

(Before Mathew and Wills, JJ.)

Jones *v.* The Bangor Mutual Shipping Insurance Society Limited. (*a*)

Insurance—Marine— Mutual insurance society—Rules—Double insurance — Mortgage on ship, notice of by member—Waiver.

By one of the rules of a mutual marine insurance society, it was provided that vessels of a certain class should not be insured for more than three-fourths of their value, and that "if any member insure or attempt to insure elsewhere any ship share or shares in any ship already insured in this society, he shall be liable to immediate expulsion and to forfeiture of any claim or demand he may have against the society." By another rule it was provided as follows: "If it comes to the notice of any member that any vessel or share of a vessel insured by the society is mortgaged, he shall immediately give notice in writing of the name and address of the mortgagee. The board of directors may then require the mortgagee to give such security as they deem necessary for the payment to them of all sums which are or may become due on account of such insurance. If such notice is not given, or if the mortgagee refuse to give such security as the society requires, the member in whose name the insurance is registered shall during the existence of such mortgage forfeit all claims upon the society in respect of such vessel or share to the extent of such mortgage thereon."

P. on behalf of the owner of the ship "Bolina" insured her in the defendants' society for 600l. P. was entered in the society's books as the policy-holder, and the policy was issued to him. The "Bolina" was at the time when the insurance was effected insured in another society for 300l., of which insurance the defendants had knowledge, and the sum of 300l. together with the 600l. above-mentioned amounted to more than three-fourths, but less than the whole amount at which the directors of the defendant society valued her. During the subsistence of the policy P. became aware that the "Bolina" had been mortgaged by the owner for 300l., but no notice of the mortgage was ever given to the society. In an action by the representatives of the owner:

Held, that the society after issuing the policy of insurance on the "Bolina," with knowledge that she was insured elsewhere, were estopped from relying on the rule as to double insurance; but that as P., who was a member of the society, had not given notice of the mortgage of which he had knowledge, the amount of that mortgage must be deducted from the sum payable under the policy.

Special case stated by an arbitrator under an order of Mathew, J., dated the 29th June 1889. The facts of the case were, so far as material, as follows:

The action was commenced on the 24th March 1888 by the plaintiff, who, as administratrix of Robert Jones deceased, claimed 600*l.* as the amount of insurance money due under a policy of marine insurance on the ship *Bolina* dated the 18th Jan. 1887.

The ship *Bolina* was a vessel of 98 tons registered tonnage, and was built in the year 1867. From the register it appeared that forty-eight shares stood in the name of Robert Jones the deceased, and four shares in the name of Robert Pritchard, and the remainder in the names of three other persons. Robert Jones died on the 26th Sept. 1886. On the 9th Feb. 1882 the said forty-eight shares belonging to Robert Jones were mortgaged by him to W. Jones, and they continued so mortgaged till the loss of the vessel. The first application to insure the *Bolina* was made by Robert Jones, and the entrance fees were paid by him. The defendants sent to R. A. Pritchard, appointed by Robert Jones as the ship's husband, a proposal form for insurance, which was duly filled up by him. In this proposal form it was stated that the *Bolina* was already insured to the extent of 300*l.* at Nevin. The ship, classed A 1 at Lloyd's, was valued at 1200*l.*, and the sum for which she was to be insured was set down at 600*l.* The proposal was accepted by the defendants, and a policy of insurance in the sum of 600*l.* was issued by the defendants in accordance therewith. The said policy was as follows:

Whereas Mr. R. A. Pritchard, shipbuilder, Pwllheli, has become a member of the Bangor Mutual Ship Insurance Society Limited, and in respect of the ship afternamed entitled to this policy. Now this policy of insurance witnesseth that, in consideration of the premises and of the observance by the assured of the provisions of the articles of association of the said society, the said society hereby agrees with the insured to pay and make good all such losses and damages as according to the same it shall be liable for in respect of the sum of 600*l.* hereby insured, which insurance is hereby declared to be upon the ship called the *Bolina*, valued at 1200*l.*, whereof Robert Jones is at present master, or whoever else shall go for master of the said ship, lost or not lost. And the said association promises and agrees that the insurance aforesaid shall commence upon the said ship at and from noon of the 1st day of Jan. 1886 until noon of the 1st day of Jan. 1887.

The name of the policy-holder was entered in the society's register as R. A. Pritchard, shipbuilder, Pwllheli. R. A. Pritchard carried on the business and performed all the duties of his father, Robert Pritchard, who appeared from the ship's register to be the managing owner, and in whose name stood four shares in the vessel. R. A. Pritchard never held any shares in the ship. The *Bolina* was insured in the Carnarvon and Nevin Mutual Marine Insurance Company for a sum of 300*l.* on the 1st Jan. 1886, in the name of R. A. Pritchard, to whom the policy was forwarded, and this fact was known to the defendants at the time of the issue of the above policy. The *Bolina* was, in Nov. 1886, valued by the directors of the defendant society at 1050*l.*, and notice of the reduction was forwarded to R. A. Pritchard. On the 1st Jan. 1887 the insurance of the *Bolina* for 300*l.* in the Carnarvon and Nevin Mutual Insurance Company was renewed, and in the policy then issued the vessel was valued at 1000*l.* On the 18th Jan. 1887 a new policy in the same form as the first was issued by the defendants and forwarded to R. A. Pritchard, in which the amount of insurance was continued at 600*l.*, but the valuation was reduced to 1050*l.* On the 12th Jan. 1887 the *Bolina* became a total loss off the Scilly Isles, and the sum of 300*l.*, for which she was insured in the Carnarvon and Nevin Mutual Insurance Company, was duly paid to the plaintiff by the company. Notice of the loss was at once telegraphed to the defendants. The defendants, after a claim had been made by

(*a*) Reported by Alfred H. Lefroy, Esq., Barrister-at-Law.

R. A. Pritchard for payment of the insurance moneys, raised the objection that the ship had been insured for more than three-fourths of her value, and that they were not liable, under the rules of the society, to pay the full amount of 600*l.* for which she was insured with them. A notice was sent to R. A. Pritchard on the 3rd Sept. 1887 of a call in respect of the insurance on the *Bolina*. No notice of the existence of any mortgage upon the vessel was given to the defendants at any time, nor had they any knowledge of the mortgage above referred to until some time during the year 1889. R. A. Pritchard was first informed of the existence of the said mortgage soon after the death of Robert Jones in Sept. 1886. No notice to terminate the insurance effected with the defendants in 1886 was given by them at any time.

The rules of the society, which formed part of the case, were as follows:—

By rule 43 it was provided that:

The value of every vessel or share of a vessel offered to the society for insurance shall be fixed by the board of directors. Vessels A 1 at Lloyd's will be placed in the first class; all other vessels will be placed in the second class. First-class vessels shall not be insured beyond three-fourths of the value, and second-class vessels shall not be insured beyond two-thirds of the value fixed by the board. Immediately after any vessel has been surveyed and valued by the board, they will give notice in writing to the person proposing the insurance, of the amount of risk the society are willing to accept on the share or shares in the ship proposed for insurance. If any member insure or attempt to insure elsewhere, any ship, share, or shares in any ship already insured in this society, he or she shall be liable to immediate expulsion, and to forfeiture of any claim or demand he or she may have against the society, but shall nevertheless remain liable in every respect to any claim the society may have against her or him.

The marginal note to the latter part of the rule was, "Duplicate Insurance not allowed."

By rule 51 it was provided as follows:

If it comes to the notice of any member that any vessel or share of a vessel insured by the society is mortgaged, he shall immediately give notice in writing of the name and address of the mortgagee. The board of directors may then require the mortgagee to give such security as they deem necessary for the payment to them of all sums which are or may become due on account of such insurance. If such notice is not given, or if the mortgagee refuse to give such security as the society requires, the member in whose name the insurance is registered shall, during the existence of such mortgage, forfeit all claim upon the society in respect of such vessel or share to the extent of such mortgage thereon, but shall nevertheless continue liable for any payments due to the society, in like manner as if such mortgage had not been made, and such member were the absolute owner of such vessel or share.

The defendants appeared before the arbitrator and gave evidence, but protested that there having been no arbitration, as provided by one of the society's rules, the plaintiff had no right of action. They further contended that the value of the *Bolina* having been fixed by the defendants' board of directors at 1050*l.*, and notice thereof having been duly given to the person proposing the insurance, the ship was only entitled to be insured under rule 43, to the extent of three-fourths of that value, viz., 787*l.* 10*s.* less the insurance effected with the Carnarvon and Nevin Company, or a net sum of 487*l.* 10*s.*; and that that rule having been infringed, the plaintiff was not entitled to maintain the action at all, or alternatively that she was only entitled to recover the said sum of 487*l.* 10*s.* from the defendants, less certain deductions for expenses of surveying the wreck, &c. They also contended that Robert Jones or R. A. Pritchard, or one of them, was a member of the defendants' society, and that they having notice of the mortgage above referred to, and neither of them having given notice to the defendants, as required by rule 51, the defendants were further entitled to deduct the amount of such mortgage from the amount which would have been otherwise due under the policy.

For the plaintiff it was contended (*inter alia*) that rule 43 only applied to insurances in the defendants' society, irrespective of any insurances that might be effected elsewhere; that the defendants, having issued the policy of the 18th Jan. 1887, with knowledge that the vessel was then insured in the Carvarvon and Nevin Company for 300*l.*, and with knowledge of the loss of the vessel, having given a notice of call on the 3rd Sept. 1887 in respect of the loss of the *Bolina*, they had waived the requirements of the rule. It was further contended for the plaintiff that neither Robert Jones nor R. A. Pritchard was a member of the society, and that the object of rule 51 was only to secure payment of calls, and also that the mortgage came to an end when the vessel became a total loss.

The questions for the opinion of the Court were:

1. Whether the *Bolina* was entitled to be insured in the defendants' society for 600*l.* or for 487*l.* 10*s.* only, and whether the plaintiff was entitled to maintain the action at all.

2. Whether Robert Jones or R. A. Pritchard was a member of the society within the meaning of the rules, and if either of them was such a member, as no notice was given by them or either of them to the defendants of the existence of the mortgage referred to in paragraph 2, whether the amount of that mortgage was to be deducted by the defendants from the amount, if any, found to be due from them to the plaintiff.

Maclachlan for the plaintiff.—The order of Mathew, J. was right, and was confirmed by the Court of Appeal. [*Crump*, Q.C. for the defendants, withdrew the objection taken before the arbitrator as to the plaintiffs' right of action.] The *Bolina* had been already insured when she was valued and accepted by the directors of the defendant society. She was not over insured, and not even insured for her full value. The rule was never intended to prevent insurance by the members of the society of the risk which the society would not take. As to the rule dealing with mortgages, Pritchard cannot be considered as a member of the society; and, secondly, the mortgage came to an end with the destruction of the subject-matter, and the 300*l.* for which the vessel was mortgaged is a mere personal debt.

Crump, Q.C. and *Douglas* for the defendants.—The owner of this vessel was not entitled under rule 43 to insure for more than three-fourths of 1050*l.* It was intended by these rules that every member should be his own underwriter to the extent of one-fourth of the value of his ship. The effect of rule 51 is to prevent the plaintiff from recovering the amount for which the vessel was mortgaged, notice not having been given to the society by Pritchard, who, without doubt, was a member. They cited

Turnbull v. *Woolfe*, 11 W. R. 55; and
Alexander v. *Campbell*, 27 L. T. Rep. N. S. 462.

Maclachlan in reply.—The object of rule 51 is merely to secure that the society shall obtain payment of all calls that may be made.

Mathew, J.—In this case the purely technical point that the proceedings should have been by arbitration has been very properly abandoned. If it had been necessary to interpret the order of the Court of Appeal, I should have considered that the intention of that court was that the case should come before us as if it had been stated by an arbitrator appointed under the rules. The first point made against the plaintiff is, that the action should have been brought by R. A. Pritchard. I think that there is no force in that objection, for though by the terms of the rules Pritchard is a member of the association, it does not follow that because he could sue he would be the real plaintiff. In an action on such a policy of insurance interest must be averred, and it must be stated in whom the interest is and for whom the policy has been effected. The person for whom the policy has been effected, and in whom the interest is, becomes the real plaintiff, and bears all the obligations and liabilities of the action. Secondly, it was said that rule 43 was an answer to this action. That rule was framed to prevent double insurance, but as counsel pointed out to us, the terms of the rule go beyond that. No member is allowed to insure more than three-quarters of the value of his ship, and if any member attempts to insure elsewhere, he is liable to expulsion and forfeiture. Mr. Crump said that the object of the rule was to compel every member to remain his own underwriter to the extent of at least one-fourth of the value of his ship. But I am not satisfied that that contention is well founded. I do not think that the rule is a bar to insurance elsewhere. But it is not necessary to decide that point. The defendants in this case have not brought themselves within the terms of the rule. They knew from the first that there was another insurance on the ship, and it is obvious from their conduct that they did not intend that this rule should destroy the value of policies on the ship, so long as they did not exceed her insurable value. The total amount for which the policies were effected was below that value. The directors of the society, therefore, knowing that another policy had been effected, and having taken the premiums on the policy granted by themselves, are estopped by their conduct from relying on rule 43 as a defence to this action. Their proper course was to have expelled the member and forfeited the insurance at once, and then the owner of the vessel might have insured elsewhere.

With regard to the last point made by the defendants—namely, that rule 51 debars the plaintiff from recovering to the extent of the mortgage, I regret that it must prevail. The real object of the rule was to secure that there should be a proper person to provide for the payment of all calls to be made by the society. It is clear that Pritchard was a member of the society, and had notice of the mortgage soon after the death of Jones, and some time therefore before the loss of the ship, though his attention was not called to the rule. He did not give the defendants notice of the mortgage, and we cannot evade the clear words of the rule which in terms apply to the case. It was contended, on behalf of the plaintiff, that the mortgage ceased at the date of the destruction of the ship. No doubt it was at an end so far as the security was concerned, but the other obligations under the mortgage subsisted, and we must hold that the plaintiff forfeited her claim on the society to the extent of the mortgage. She must have interest at the rate of 5 per cent. on the remainder of the sum for which the vessel was insured, to be computed from six months after the date of the loss.

Wills, J.—I am of the same opinion. These rules are only the terms of a contract between the parties, and rule 43 cannot be treated as one of the terms of this particular contract. Every member of the association knew that the insurance with the Carnarvon and Nevin Society was in existence, and it must have been understood by the parties to this insurance policy that that rule as to double insurance was not to apply, but was to be omitted from the contract.

Solicitors for the plaintiff, *Robbins, Billing, and Co.*

Solicitors for the defendants, *Simonds and Goolden*, for *Hughes and Pritchard*, Bangor.

Nov. 4 and 11, 1889.

(Before Mathew and Wills, JJ.)

The London Steamship Insurance Association v. The Grampian Steamship Company. (*a*)

Marine insurance—Mutual insurance for protection—Ordinary running-down clause—Collision—Assured's ship in equal fault—Non-liability of insurers.

The defendants insured their ship in the "protecting" class of the plaintiff association, a limited mutual marine insurance association, to indemnify them against any loss or damage to any other vessel not covered by the usual Lloyd's policy with the running-down clause attached. The defendants' ship came into collision with another ship, and caused and suffered damage; both ships were to blame. The defendants' ship was fully insured by policies in the usual form of Lloyd's policy with the running-down clause attached. It was admitted that the damage suffered by the defendants' ship exceeded that inflicted by her on the other ship, and that the owners of the other ship paid to the defendants a sum equal to the difference between half of the amount of the damage sustained by their ship and half of the damage sustained by the defendants' ship. The plaintiffs brought their action to recover a sum of money which was in the hands of the defendants in respect of a different transaction. This sum the defendants claimed to be entitled to retain as an indemnity in respect of the proportion of the damage to the colliding ship which had been taken into account in adjusting the amount to be paid by the other ship, and which proportional sum was not covered by the ordinary running-down clause in their policies.

Held, that the true principle for adjusting the loss from collision in such a case was that of a single liability, and not cross-liabilities, and that, as the defendants had not been called upon to con-

(*a*) Reported by W. P. Eversley, Esq., Barrister-at-Law.

tribute anything in respect of the damage done to the other vessel, they were not entitled to call upon the plaintiffs to indemnify them in respect of a loss or damage which they had not sustained.

This was an action to recover money had and received by the defendants for the use of the plaintiffs, and was commenced on the 14th May 1889 by writ of summons, but the parties concurred in stating the question of law arising herein for the opinion of the court in the following

Case.

1. The plaintiffs were a limited mutual marine insurance association, composed of several different classes or clubs. By Class I., "The London," the plaintiffs insured against the ordinary marine risks the hulls of the ships of the members of that class; and by Class V., "The Protecting," they undertook to indemnify the members of that class against (*inter alia*) "loss or damage to any other vessel . . . so far as such loss or damage was not covered by the usual form of Lloyd's policies with the clause commonly known as the "Running-down Clause" attached. (*a*)

2. The defendant company was at all material times the owner of the s.s. *Balnacraig*.

3. On the 10th Dec. 1886 the said s.s. *Balnacraig* was insured in the said Class I., "The London," for 1000*l.*, and was also entered in the said Class V., "The Protecting," of the plaintiff association in respect of a portion of her tonnage; and the defendant company was duly registered as a member of the plaintiff association in respect of such entries.

4. The following is the clause commonly known as the "Running-down Clause" referred to in rule 6, sub-sect. (*b*) of the rules of the said Class V., "The Protecting":

> And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay and shall pay any sum or sums not exceeding the value of the said vessel hereby insured, we the assurers will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions thereto bear to the value of the said ship.

5. The *Balnacraig* was at all material times fully insured by policies in the usual form of Lloyd's policy with the said running-down clause attached.

6. On the 10th Dec. 1886, and while the said s.s. *Balnacraig* was entered as aforesaid in the said Class V., "The Protecting," and was also insured as aforesaid, she came into collision with the s.s. *Karo*, whereby both ships received damage, but the damage sustained by the *Balnacraig* largely exceeded that sustained by the *Karo*.

7. Both ships were to blame for the said collision, and if there had been cross-actions or claim and counter-claim by the owners of the respective vessels, the decree which would have been pronounced by the Admiralty Division of the High Court of Justice on a finding or admission that both vessels were to blame, would in the usual form have adjudged that the damage arising from the said collision ought to be borne equally by the owners of both ships, and would have condemned the owners of the *Karo* in half the damage sustained by the *Balnacraig*, and the owners of the *Balnacraig* in half the damage sustained by the *Karo*. As a matter of fact, the owners of the *Karo* paid to the defendants as owners of the *Balnacraig* a sum equal to the difference between half of the amount of the damage sustained by the *Karo* and half the amount of the damage sustained by the *Balnacraig*, that being the sum for which the defendants as owners of the *Balnacraig* would have been entitled to issue a monition if a decree of the Admiralty Division had been obtained as aforesaid.

8. The defendants had in their hands 51*l.*, being moneys which they had received for the use of the plaintiffs. (*a*) Before action brought the plaintiffs applied to the defendants to pay the said sum, which the defendants declined to do, alleging that they were entitled to set off against the said sum a like sum of 51*l.* claimed to be due to the defendants from the plaintiffs in respect of the entry of the *Balnacraig* in the said Class V., "The Protecting," as the proportion of the damage done to the *Karo* in the said collision, for which the defendants were liable, and which, as the defendants contended, was not covered by the policies on the *Balnacraig* with running-down clause attached. The said sum of 51*l.* so sought to be set off by the defendants was arrived at on the footing that the defendants became liable to pay half the damage of the *Karo*, and did pay that amount by deduction from half the amount of their own damage; that three-fourths of the sum so alleged to have been paid was recoverable by the defendants under the running-down clause in their policies on ship, and that the remaining fourth was therefore recoverable from the plaintiffs under the indemnity provided by rule 6, sub-sect. (*b*) of the said Clause V., "The Protecting." If this was the correct view of the rights of the parties, the plaintiffs admit that 51*l.* was the correct measure of their liability to the defendants under the said indemnity, and that that sum was properly set off against the like sum belonging to the plaintiffs in the defendants' hands.

9. The plaintiffs, however, contended that, inasmuch as the damage done to the *Balnacraig* in the said collision exceeded the damage done to the *Karo*, the defendants, as owners of the *Balnacraig*, were not liable to pay, and did not pay, anything to the owners of the *Karo*, and that the only liability arising out of the said collision was a liability on the part of the owners of the *Karo* to pay to the defendants, as owners of the *Balnacraig*, one half of the difference between the amounts of the damage sustained by the two ships respectively, and that consequently the plaintiffs were not liable to sue defendants under

(*a*) A copy of the rules of the plaintiff association, including the rules of Class I., "The London," and Class V., "The Protecting," accompanied and formed part of this case. The foregoing quotation was from rule 6, sub-sect. (*b*) of the rules of Class V., "The Protecting."

(*a*) This 51*l.* was in the defendants' hands in respect of a different transaction. In consequence of the plaintiffs refusing to pay what the defendants contended was their contribution of the liability incurred to the *Karo*, and which amounted to 51*l.*, the defendants, who had moneys in their hands belonging to the plaintiffs, retained out of such moneys the said sum of 51*l.*, and it was to recover this sum of money that this action was brought.—Ed.

the indemnity provided by the rules of the said Class V., "The Protecting."

10. The question for the opinion of the court was: In the events which had happened were the plaintiffs liable, under the indemnity provided by rule 6, sub-sect. (*b*) of the rules of the said Class V. of the plaintiff association, to pay to the defendants any sum in respect of the damage to the *Karo* sustained in the said collision?

If the court should be of opinion that the plaintiffs were so liable, then judgment was to be entered for the defendants with costs. If the court should be of opinion that the plaintiffs were not so liable, then judgment was to be entered for the plaintiffs for 51*l.*, with costs.

Cohen, Q.C. appeared for the plaintiffs.

Barnes, Q.C. appeared for the defendants.

The arguments appear sufficiently in the judgment. The following cases were cited:

The Sea Insurance Company v. *Hadden*, 5 Asp. Mar. Law Cas. 230; 50 L. T. Rep. N. S. 657; 13 Q. B. Div. 706;

The Stoomvaart Maatschappy Nederland v. *The Peninsular and Oriental Company* (*The Khedive*), 4 Asp. Mar. Law Cas. 567; 47 L. T. Rep. N. S. 198; 7 App. Cas. 795.

Cur. adv. vult.

Nov. 11.—Mathew, J.—This special case was so stated as to make it difficult to discover what the parties were disputing about; but it appeared upon the argument that what was really in controversy was the mode of dealing correctly with a loss due to a collision of two ships, as between two sets of underwriters, viz., the members of a mutual insurance association on the one hand, and underwriters at Lloyd's on the other. As the difference arose out of a transaction of ordinary occurrence, the case is one of some general importance. We are indebted to the learned counsel on each side, who argued with equal ability, and apparently with equal confidence. The action was brought to recover a sum of 51*l.*, for which it was admitted the defendants were liable. The question in the case was, whether a cross-claim for the same amount made by the defendants could be maintained. The defendants were the owners of a steamship called the *Balnacraig*, which they had insured at Lloyd's under a policy in the ordinary form with a collision clause annexed in the following terms: [His Lordship here read it.] The liability to contribute one-fourth under this clause was insured by the defendants with the plaintiff association under the following rule: "The risks, events, and occurrences under which members shall be entitled to protection are (*inter alia*) loss of or damage to any other vessel . . . or to any property on board such other vessel, so far as such loss or damage is not covered by the usual form of Lloyd's policy with the clause commonly known as the running-down clause attached." The *Balnacraig*, while covered by these insurances, came into collision with the steamship *Karo*. Both vessels were to blame, and the loss, which in each case was for damage to ship only, had to be borne equally. The *Balnacraig* was damaged more than the *Karo*, and the loss was equalised between the two vessels in the usual way by the payment of a sum of money to the owners of the *Balnacraig* by the owners of the *Karo*. The case for the plaintiffs was, that the defendants had not become liable to pay any sum in respect of the collision, and therefore had no claim for an indemnity under their insurance with the plaintiffs. The defendants, on the other hand, contended that they had become liable to contribute a sum of 51*l.* to the loss occasioned by the collision, and that the plaintiffs were bound to indemnify them to that amount. Now, it is quite clear that without the collision clause the underwriters on the ship would not have been liable under any circumstances to bear any portion of the damage payable by the assured in consequence of a collision. This was settled by the case of *De Vaux* v. *Salvador* (4 Ad. & El. 420). The clause came into existence in consequence of that decision. With such a clause, where the ship insured is solely to blame, the owner is entitled to call on his underwriters, not merely to pay the cost of repairs, but also to bear three-fourths of his liability to the other ship. When the insured ship is free from blame, the owner is entitled to call upon his underwriters to repair, but the whole amount received for the damage done to the insured ship passes to them by subrogation. It was contended for the plaintiffs that the same principle must apply where both vessels are in fault, and where a balance to equalise the loss is paid to the assured. He is entitled, it was said, to call on his underwriters to repair the damage done his ship, and must surrender to them any part of the balance paid him which may be applicable to the repairs of the vessel insured. But there is no need in such a case, where the assured receives and does not pay, to have recourse to the collision clause, and neither the insurers nor the insured become liable to pay, or in fact pay anything. Again, if in order to balance the loss the assured had made a payment to the other shipowner, he would upon this principle be entitled in addition to the cost of repairs to call on his underwriters to pay three-fourths of that amount and no more. Accordingly the plaintiffs contended that in this case the defendants were under no liability to make any payment under their Lloyd's policy, and that they therefore had no claim under their insurance with the plaintiffs. The loss from the collision should be dealt with on the footing of what was called in the agreement a "single liability," viz., the liability for any balance which the assured had to pay. But the defendants, on the other hand, acting as they were entitled if not bound to do in the interests of the underwriters on ship, insisted that they had become liable to contribute under the collision clause, and were therefore entitled to an indemnity from the plaintiffs. In other words, the defendants contended that a proper adjustment of the loss required a contribution from the plaintiff association to the defendants' underwriters at Lloyd's. It was stated in support of this view that some average adjusters dealt with a loss like this upon the theory, as it was described, of "cross-liabilities," and it was argued that this was the true principle. The claim against the insured ship was treated, according to this system, as if it were actually paid by her owner to the owner of the other vessel; and to that payment his underwriters under the collision clause thus became liable to contribute three-fourths, while the owner was bound to contribute one-fourth. The sum that the assured received from the other ship passed by subrogation, it was said, to his underwriters on ship. As the under-

writers on ship and under the collision clause were the same persons, they in the result remained liable to pay three-fourths of the claim of the other ship for the collision, while the owner, or his underwriters, paid the other one-fourth. Thus, suppose each ship to be damaged to the extent of 1000*l.*, the underwriters under the collision clause would pay 750*l.* and the owner 250*l.*, while in respect of the damage to ship the underwriters on ship would receive by subrogation as much as they had to pay. If this were correct, the underwriters at Lloyd's in cases like this would cast a part of the loss which they must have borne if there had been no collision clause on the assured or his underwriters. As against this practice of settlement by the theory of "cross-liabilities," it must be admitted that its application assumes that a payment is made which is not made in point of fact. It is not correct to say that the owner of the assured ship pays the damage done the owner of the other ship. He only does so on the condition that he is paid his claim by the other shipowner. Neither in fact nor in law is the owner of the assured ship liable to pay or entitled to receive more than the balance which equalises the loss: (see *The Khedive*, 47 L. T. Rep. N. S. 198; 4 Asp. Mar. Law Cas. 567; 7 App. Cas. 795.) This balance would therefore seem to be the assessment upon which the collision clause was intended to operate, and it can only operate according to its terms in those cases where the assured has had to pay. To construe the collision clause to apply to anything else would be to substitute a far-fetched theory for plain fact. The form of the clause seems to forbid any such construction. The words "become liable to pay and shall pay" point to a real and not to some imaginary outlay.

But the supposed principle of adjustment by cross-liabilities was sought to be supported by the argument that a settlement upon the footing contended for by the plaintiffs might in some cases lead to results which would be unjust and contrary to the true principles of insurance law. Cases were put where the damage to the ship insured was made up of claims for detention, repairs, or loss of freight, or damage to cargo. It was said that the underwriters on ship ought not to receive by subrogation a balance arrived at after the allowance in account of such claims. This is quite clear, and was not disputed by the counsel for the plaintiffs. But it does not follow that the adjustment in this case as contended for by the plaintiffs is wrong, or that the theory of cross-liabilities should be adopted in every case of collision. There is, however, a view of the matter which seems to us to demonstrate that the plaintiffs are right in this case, and that the theory of adjustment by cross-liabilities is fallacious. The contention of the defendants seems to lead inevitably to the conclusion that the assured with a collision clause in his policy might incur a greater liability than if he had none. The clause was annexed to the ordinary policy not to diminish but to increase the protection afforded the assured, and any construction which made the assured liable for a loss which otherwise would have fallen on his underwriters would defeat the object with which the insurance in this form is effected. Let us suppose a case where the damage to each ship is the same amount—say 1000*l.* Where the policy contains no collision clause the underwriters on each ship would pay the cost of repairs, viz., 1000*l.* Now, suppose the policy to contain a collision clause, and the claims to be adjusted on the footing of cross-liabilities, the underwriters under the collision clause would have to pay three-fourths of 1000*l.*, viz., 750*l.*, and the owner or his underwriter one-fourth, viz., 250*l.* The underwriters on ship would have to pay 1000*l.* for repairs of the assured ship, and they would receive by subrogation 1000*l.* from the other ship. In the result the owner would be liable for 250*l.*, and to that extent worse off than if there was no collision clause in his policy. Our judgment is, that the defendants have not become liable to pay any sum in consequence of the collision within the meaning of the collision clause, and therefore that their defence cannot be maintained. We give judgment for the plaintiffs.

Judgment for the plaintiffs.

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

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

Supreme Court of Judicature.

COURT OF APPEAL.

March 5 *and July* 13, 1889.

(Before Lord Esher, M.R., Bowen and Fry, L.JJ.)

The Mogul Steamship Company Limited *v.* McGregor, Gow, and Co., and others (*a*).

Conspiracy—Combination of shipowners—Restraint of trade—Exclusion of rival traders.

The defendant shipping companies and owners had combined together and formed a "conference" or "ring," and their agents in China had issued circulars to shippers there to the effect that exporters in China who confined their shipments of goods to vessels owned by members of the "conference" should be allowed a certain 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 such shipment should have been made. The plaintiffs, who were owners of vessels in the same trade, had thereby suffered damage.

Held (by Bowen and Fry, L.JJ., Lord Esher, M.R. dissenting), affirming the judgment of Lord Coleridge, C.J., that the "conference," being formed by the defendants with the view of keeping the trade in their own hands, and not with the view of ruining the trade of the plaintiffs, or through any personal malice or ill-will towards them, was not unlawful, and that no action for conspiracy was maintainable.

This was an appeal from a judgment of Lord Coleridge, C.J. in an action tried without a jury, reported at 6 Asp. Mar. Law Cas. 320; 21 Q. B. Div. 544; 59 L. T. Rep. N. S. 514.

The plaintiffs were a shipping company incorporated in 1883, owning shares in certain steamships, viz., the *Sikh*, *Afghan*, *Pathan*, and *Ghazee*,

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

trading between Chinese and Australian ports and London, and the defendants, McGregor, Gow, and Co., T. Skinner and Co., D. J. Jenkins and Co., the Peninsular and Oriental Steam Navigation Company, William Thomson and Co., and others, were shipping companies and owners trading in the same seas.

The facts appear sufficiently from the pleadings, which are substantially as follows:

The plaintiffs in their statement of claim alleged that they had suffered damage by reason of the defendants, as and being owners of numerous steamers trading between ports in the Yangtse-Kiang River and London, conspiring together to prevent the plaintiffs from obtaining cargoes for steamers owned by the plaintiffs from shippers to be carried from ports in the said river to London, for reward to the plaintiffs in that behalf. That the said conspiracy consisted of a combination and agreement by and amongst the defendants, as and being owners of steamers trading as aforesaid, and having by reason of such combination and agreement control of the homeward shipping trade, pursuant to which shippers were bribed, coerced, and induced to agree to forbear, and to forbear from shipping cargoes by the steamers of the plaintiffs. It was alleged, in the alternative, that the said conspiracy consisted of a combination and agreement by and amongst the defendants, as and being owners of steamers as aforesaid, pursuant to which the defendants, with the intent to injure the plaintiffs, and to prevent them from obtaining cargoes for their steamers trading between the said ports, agreed to refuse, and refused to accept cargoes from shippers, except upon the terms that the said shippers should not ship any cargoes by the steamers of the plaintiffs, and by threats of stopping the shipment of homeward cargoes altogether, which threats they had the power and intended to carry into effect, did prevent shippers from shipping cargoes by the plaintiffs' steamers, and threatened and intended to continue to do so. The plaintiffs claimed damages, and an injunction to restrain the defendants from continuing the wrongful acts above mentioned.

In particulars delivered by the plaintiffs, they stated that the combination and agreement consisted of a combination and agreement by and amongst the defendants, as being a number of wealthy shipowners and shipping companies, formed and entered into for the purpose of creating a "conference" or "ring," and thereby acquiring the control of the shipping trade between China and England, and for the purpose of compelling their agents in China and Hong Kong not to load any cargoes on the plaintiffs' vessels, and for the purpose of preventing shippers and merchants from shipping by the plaintiffs' vessels by imposing penalties on those who did so by granting a rebate of 5 per cent. on the freight charged to such shippers as had not made any shipments for certain six-monthly periods by the plaintiffs' vessels, and generally for the purpose of boycotting and ruining the plaintiffs as shipowners, and of driving them out of the trade, thus preventing the plaintiff company from carrying on their lawful business as shipowners and carriers in the said trade. With this object the defendants had widely distributed among the China merchants circulars to the following effect:

Shanghai, 10th May 1884.

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 P. and O. Steam Navigation Company, Messagerie Maritime Company, Ocean Steamship Company, McGregor, Gow, and Co., Glen, Castle, Shire, and Ben Lines, and to the steamships Copack 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 or been interested in any shipment of tea or general cargo to Europe by any other than the said lines.

Shipments by the steamships Afghan, Pathan, and Ghazee, on their present voyage 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 the 30th Oct. next.

Shipments by an outside steamer at any of the ports in China or Hong Kong will exclude the firm making such shipments from participation in the returns during the whole six-monthly period within which they have been made, even although its other branches may have given entire support to the above lines.

The foregoing agreement on our part to be in force from the present date till the 30th April 1885.

In May 1885 the defendants caused to be issued to the shippers and merchants in China another circular as follows:

Shanghai, 11th May 1885.

Referring to our circular dated the 10th May 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.

In consequence of the circulars and the conduct of the defendants, the plaintiff company complained that they had been unable to obtain freights for their ships, and had been virtually driven out of the China trade.

The defendants, in their defence, contended that, as a matter of law, the statement of claim disclosed no cause of action against the defendants, and they denied any conspiracy as alleged, or that shippers were bribed, coerced, or induced to abstain from shipping cargoes by the plaintiffs' steamers; and they alleged the real facts of the case to be that, in the year 1884 an agreement or conference was entered into by the defendants, for working the homeward carrying trade in steam-vessels sailing from China by regular departures of such vessels during the year 1884 and 1885, and so affording inducements to merchants and shippers in and from China to support such vessels, and, in order further to induce such support, to give to such merchants and shippers as should ship only by the conference vessels a return or rebate of five per cent. off all freights paid by such shippers by such vessels; and that the vessels *Pathan* and *Ghazee* belonging to the plaintiffs were actually admitted to the benefit of this agreement for one voyage each in the tea season of 1884 from Hankhow to London; but that the plaintiffs in breach of their agreement prior to the Hankow tea season of 1885 threatened the defendants that, unless their vessels were admitted to the privileges of the conference for the tea season of 1885 they would oppose and enter into competition with the conference vessels, and cut down and smash the rates of freight to such

a low rate as would cause great loss to all conference vessels; and that the defendants, declining to accede to the plaintiffs' demands, the plaintiffs did carry out their threat and so cut down the rates of freight that the defendants were compelled to accept rates of freight largely below the then prevailing rates.

Lord Coleridge, C.J. gave judgment in favour of the defendants (59 L. T. Rep. N. S. 514; 6 Asp. Mar. Law Cas. 320; 21 Q. B. Div. 544).

The plaintiffs appealed.

March 5.—Sir *H. James*, Q.C.; *Crump*, Q.C.; *Barnes*, Q.C., and *Sims Williams*, for the plaintiffs.

Sir *Charles Russell*, Q.C.; Sir *Horace Davey*, Q.C.; *Finlay*, Q.C., and *Pollard*, for the defendants. *Cur. adv. vult.*

July 13.—Lord Esher, M.R.—In this case the evidence is voluminous and complicated. On carefully dissecting it, it seems to prove the following facts: At some time before an agreement, which will hereafter be referred to, was entered into between the defendants, it appeared to the defendants that if more than a certain number of ships loaded tea at Hankow or Shanghai for England the freights before charged could not be maintained. This is shown by "suggestions to be considered as strictly confidential between the managers of the P. and O., the Glen, and the Ocean Steamship Companies." It begins, "So long as there is a glut of tonnage at Hankow, whether 'conference' or not, it is impossible to maintain freights." The defendants therefore resolved upon a plan by which the number of vessels loading at those places should be limited. The plan was that a certain number of shipowners' firms — namely, the defendant firms — should enter into an agreement with each other that each of them should send an agreed number of ships to Hankow in the season, and that they should not admit more than a certain number of firms to be parties to the agreement, and that they should do certain things then agreed upon, and certain other things which should be afterwards agreed upon if thought necessary, in order to prevent any of those whom they did not admit to be parties to the agreement from being able to load tea at Hankow with any profit. Thus they would after a time drive any of such parties out of the carrying trade from Hankow or Shanghai to England, and then they, the confederated firms, could maintain the high freights which a free competition would inevitably lower. The means of prevention first agreed upon were an agreement that any shipping agent or shipping principal who agreed to ship and who shipped only on conference steamers throughout a season should receive a rebate of 5 per cent. on the agreed rate of freight of each shipment; but if any such agent, though directed by his principal to do so, or if any principal should ship any one cargo in a named period on board a non-conference steamer, he should not receive any rebate in respect of any cargo he should, either before the shipment on a non-conference ship or after it, during the period have shipped on board a conference ship. The means afterwards agreed upon and added were that if any non-conference steamer should proceed to Hankow to load independently, any necessary number of conference steamers should be sent at the same time to Hankow in order to underbid for the freight which the independent steamer might offer without any regard to whether the freight they should thus bid would be remunerative or not. The plan was reduced into a written agreement signed by the defendants, dated originally the 7th April 1884, and renewed or enlarged by verbal agreement before May 1885. This agreement stipulated that it was to bind each defendant until he should give a particular notice—namely to all the principals at home. The agreement having been entered into by the defendants, they, in May 1885, refused to admit the plaintiffs to be parties to it. The plaintiffs thereupon resolved to send, and did send two of their steamers, the *Pathan* and the *Afghan* to Hankow in order to obtain freights independently. The defendants issued circulars on the 11th May 1885:—"That shipments by the steamships *Pathan*, *Afghan*, and *Aberdeen*, or by other non-conference steamers at any of the ports in China or at Hongkong, 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 may have given exclusive support elsewhere to the conference lines." Besides this the defendants agreed to send, and did send, as many vessels as their agents thought necessary for the purpose to Hankow for the express purpose of obtaining the carriage of all tea at any freight, however small, which might underbid and so oust the *Pathan*, the *Afghan*, or any other vessel of the plaintiffs' from the carrying trade. The ultimate objects of the defendants was no doubt to benefit themselves; but the immediate purpose was to drive out the plaintiffs. (See letters May 1, 1885, May 8, 1885, and May 8, 1885.) By the means agreed upon by the action directed by the defendants the freight from Hankow to England was lowered from 50*s.* and upwards to 25*s.*, which was a wholly unremunerative freight, which could not be called an ordinary business freight, and which was an artificial freight produced by the action of the defendants, in order to carry out their immediate purpose of driving out the plaintiffs. The plaintiffs carried at the 25*s.* freight on that occasion rather than sail their ships, which were already there, home empty. But it is obvious that, if the contest were to be continued, the plaintiffs could not send their ships again to Hankow; they must be effectively driven out of the Hankow carrying trades, just as certainly and effectively as if their ships were physically stopped from going there. The plaintiffs being by the acts of the defendants driven from the trade, the defendants would resume their old rates of freight, freights fixed without competition. The plaintiffs on the season of 1885 would have earned a higher freight than 25*s.* In respect of subsequent years they were prevented from attempting to earn, according to circumstances and their own judgment, any freight from Hankow to England.

The question is whether what the defendants did and its consequences to the plaintiffs gave the latter any legal cause of action. It seems to me well to consider first what view the law takes of the agreement of the 7th of April 1884, renewed or enlarged in 1885. In *Hilton* v. *Eckersley* (6 E. & B. 47) a bond was executed by certain masters by which they agreed to be bound to each other

in a penalty, nominally payable to one of them, if any one of them should carry on his works in regard to amount of wages to be paid to persons employed therein and as to the times or periods of the engagement of workpeople and the hours of work otherwise than in conformity with the resolution of the majority of the said masters. The defendant, one of the signing masters, carried on his works contrary to a resolution of the others, whereupon he was sued on the bond for the penalty. Crompton, J. said: "I am of opinion that the bond is void as being against public policy. I think that combinations like that disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture." "One of the most objectionable parts of this bond is that it takes away the freedom of action of the individual to carry on the trade and to open and close his works according, as it may be, for his interest or that of the public." He held that the bond was void as between the parties to it, because it was illegal as being in restraint of trade. Lord Campbell doubted whether the bond was illegal to the extent of rendering the parties to it indictable, but agreed that it was illegal as between the parties and was therefore void. In the Court of Exchequer Chamber Alderson, B. gave the judgment. "The question," he said, "is whether this is a bond in restraint of trade: and we think it is so. *Primâ facie* it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it on according to his own discretion and choice." Speaking of the regulations, he said: "All these are surely regulations restraining each man's power of carrying on his trade according to his discretion for his own best advantage, and therefore are restraints on trade, not capable of being legally enforced." "We do not say that they are illegal in the sense of being punishable and criminal. The case does not require us; and we think we ought not to express any opinion on that point." He then goes on to say that the fact of the combination of masters being formed to counteract a combination of workmen cannot render the masters' combination legal. "The maxim *Injuria non excusat injuriam* is a sound one both in common sense and at common law." *Hornby* v. *Close* (15 L. T. Rep. N. S. 563; L. Rep. 2 Q. B. 153) is to the same effect. These cases decide that there is still according to law a restraint of trade which is contrary to law. They decide that an agreement whereby traders bind themselves not to carry on their trade according to their own judgment, but according to the judgment of others, is an agreement in restraint of trade. They decide that if such an agreement is made out, it is not made legal because it is entered into as a counter move against another similar agreement. Applying these propositions to the agreement of 1885, the defendants by it agree to carry on their trade of shipowners, not each according to his own judgment as circumstances may arise, but according to an agreed rule arrived at by the consent of others, not to be departed from without the consent of all. Unless the law holds this agreement to be void, the defendants have bound themselves to it by mutual agreement, which would be a sufficient consideration to bind each of them. They have bound themselves not to depart from the agreement without a particular kind of notice. The agreement in accordance with the cited cases must be held to be in restraint of trade, and therefore void as between the parties to it. The only reason why it can be held void is because it is illegal; a legal agreement voluntarily come to cannot be held by law to be void. The cited cases leave open the question whether such an agreement amounts to an indictable conspiracy. They do not hold that it is not. But before considering that point, it must be observed that the agreements held to be illegal, because in restraint of trade, must have been so held, not because there was any wrong done to the traders who agreed, for they all agreed to what was to be done, but because there was a wrong to the public. The restraining themselves from a free course of trade was held to be a wrong to the public. If that be so when parties agree to restrain themselves, it must be much more so when they agree to do acts which will restrain and are intended to restrain another trader from a free course of trade. That restraint is equally a wrong to the public. The present agreement is therefore illegal and void as in restraint of trade on that ground also.

The cases cited do not determine whether an agreement which is void as between the parties to it because it is in restraint of trade is or is not an indictable offence. But if such an agreement is illegal because it is a wrong to the public, it seems to me impossible to say that it is not indictable. An illegal act which is a wrong against the public welfare seems to have the necessary elements of a crime. If, however, all agreements in restraint of trade are not necessarily indictable offences, yet some may be. And if the agreement is one intended to interfere with the free course of trade of a trader who is not a party to the agreement, and can, if carried out, have that effect, then if such an interference is an illegal act as against that trader, it seems clear that the act of agreement is a wrongful act, both as against an individual and as against the public welfare, and then I am of opinion it must be an indictable conspiracy. "There seems," says Sir William Erle, in the most admirable essay styled "The Law relating to Trade Unions," a book more full of careful and accurate law than is to be found in many judgments, "to be authority for saying that a combination to violate a private right, in which the public has a sufficient interest, is a crime, such a violation being an actionable wrong" (page 32). Unless the public has an interest in traders being left to their own judgment and to a free course of trade there is no foundation for the law as to agreements in restraint of trade being illegal. The public, therefore, has an interest which such agreement injures. It follows that if the agreement be an agreement to violate the right of an independent trader by restraining his trade, there is a sufficient public interest which is also injured, and the agreement is an indictable conspiracy.

It becomes necessary now to consider what interference with an independent trader will be a violation of his private rights. Now, a long line of cases has determined that every trader in the Queen's dominions has, by law, a legal right to carry on his trade in ordinary course of trade according to his own will and judgment; and the

law has decided that for some kinds of interference with that right the trader interfered with has a right of action. Alderson, B., in the Exchequer Chamber, in *Hilton* v. *Eckersley*, says: "*Primâ facie* it is the privilege of a trader in a free country, in all matters not contrary to law, to regulate his own mode of carrying it on according to his own discretion and choice." Turning again to the careful analysis of law in Sir W. Erle's book, I agree with him (page 13), that "this proposition assumes that a person has a right to do as he chooses with his own, whether labour or capital, within the limits set by law; that a right involves a prohibition against the infringement thereof; and that a prohibition involves a remedy for the violation thereof." The particular right of a trader which we are considering is his right to carry on his trade according to a free course of trade. The plaintiff had that right on his side; but so also had the defendants on their side. The next question is what will amount as between rival traders to an encroachment by the one on this right of the other. Each has a right to carry on his trade in a free course of trade, according to his own free will and judgment. So long as the one so carries on his trade, the other cannot, without infringing on the rights of his rival, effectively complain. So long as each so carries on his trade, though such carrying on produces the utmost extent of competition and consequent lowering of gain, neither can validly complain. Each is exercising the free course of trade. But if one goes beyond the exercise of the course of trade, and does an act beyond what is the course of trade in order—that is to say, with intent—to molest the other's free course of trade, and which does molest the other's free course of trade, he is not exercising his own freedom of a course of trade, he is not acting in but beyond the course of trade, and then it follows that his act is an unlawful obstruction of the other's right to a free course of trade, and if such obstruction causes damage to the other he is entitled to maintain an action for the wrong. "At common law," says Sir W. Erle (page 6), "every person has individually, and the public also have collectively, a right to require that the course of trade should be kept free from unreasonable obstruction." "Every person has a right, under the law as between him and his fellow subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition, and the violation of this prohibition by a single person is a wrong to be remedied either by action or indictment as the case may be. It is equally wrong whether it be done by one or by many, subject to this observation—that a combination of many to do a wrong in a matter where the public has an interest is a substantive offence of conspiracy:" (page 12.) The limitation of the competing rights, then, is that the act which has, in fact, obstructed the full right of the one must, in order to be actionable, be an act done by the other beyond the exercise of the actor's own right, and for the purpose of obstruction. In *Lumley* v. *Gye* (2 E. & B. 216; 22 L. J. 463, Q. B.) and in *Bowen* v. *Hall* (44 L. T. Rep. N. S. 75; 6 Q. B. Div. 333) the act done which obstructed the plaintiff's right was the persuading a person employed by the plaintiff under contract to break that contract. Such persuasion is not in ordinary course of trade. The ordinary competition of trade is a fair competition, not a secret persuasion of others to do wrong. The next question in those cases was whether what was done was intended to obstruct the plaintiff. With regard to that point, it is laid down in *Bowen* v. *Hall*: "The act of the defendants which is complained of must be an act wrongful in law and in fact. Merely to persuade a person to break his contract may not be wrongful in law or fact. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it." The law there is laid down that a malicious motive in the defendants may make an act which would not be wrongful without the malice, a wrongful act when done with malice. It was thought that the judgment in *Lumley* v. *Gye* was founded on the view that there was malice in the defendant. And that view was adopted and approved in *Bowen* v. *Hall*. The word "malice" is satisfied by the thing being done with knowledge of the plaintiff's right, and with intent to interfere with it "maliciously," or, which is the same thing, "with notice" (per Crompton, J. in *Lumley* v. *Gye*). This effect of malice is adopted by Sir W. Erle, and so long ago as by Lord Holt in *Keeble* v. *Hickeringhill* (11 East, note, page 574). "Suppose," he says, "the defendant had shot in his own ground; if he had occasion to shoot it would have been one thing: but to shoot on purpose to damage the plaintiff is another thing and a wrong." In truth, I have never known this rule doubted.

The propositions applicable to the present case, which are to be deduced from the above considerations, are the following (1) That the head of law which we are considering applies only to trade and to traders; (2) that the law has a peculiar care for the preservation of a free course of trade as between traders, because such freedom is for the benefit of the public; (3) that the principal formula of law for the purpose of enforcing this peculiar care is that every trader has a legal right to a free course of trade, meaning thereby a legal right to be left free to exercise his trade according to his own will and judgment; (4) that if any one by an act wrongful as against that right interferes with it to the injury of a trader, an action lies against such person by such trader; (5) that any act of fair trade competition, though it injure a rival trader even to the destruction of his trade, is not a wrongful act as against such rival trader's rights, but is only the exercise of the first-mentioned trader's equal rights, and is therefore not actionable; (6) but any act, though of the nature of competition in trade, but which is an act beyond the limits of fair trade competition, and which

is therefore not an act of any real course of trade at all, and the immediate and necessary effect of which is such an interference with a rival trader's right to a free course of trade as prevents him from exercising his full right to a free course of trade, leads to an almost irresistible inference of an indirect motive, and is, therefore, unless, as may be possible, the motive is negatived, a wrongful act as against his right and is actionable if injury ensue; (7) an act of competition, otherwise unobjectionable, done not for the purpose of competition, but with intent to injure a rival trader in his trade, is not an act done in an ordinary course of trade, and therefore is actionable if injury ensues; (8) an agreement among two or more traders, who are not and do not intend to be partners, but where each is to carry on his trade according to his own will, except as regards the agreed act, that agreed act being one to be done for the purpose of interfering—*i.e.*, with intent to interfere with the trade of another—is a thing done not in the due course of trade and is therefore an act wrongful against that other trader, and is also wrongful against the right of the public to have free competition among traders, and is therefore a wrongful act against such trader, and, if it is carried out and injury ensues, is actionable; (9) and such an agreement being a public wrong is also of itself an illegal conspiracy, and is indictable. It follows that in the present case the agreement of 1885 was within the rules 8 and 9 an indictable conspiracy, and that when it was carried out to its immediate and intended effect, which was an injury to the plaintiff's right to a free course of trade, the plaintiff had a good cause of action against the defendants. It follows that the act of the defendants in lowering their freights far beyond a lowering for any purpose of trade—that is to say, so low that if they continued it they themselves could not carry on trade—was not an act done in the exercise of their own free right of trade, but was an act done evidently for the purpose of interfering with—*i.e.*, with intent to interfere with—the plaintiff's right to a free course of trade, and was therefore a wrongful act as against the plaintiff's right, and, as injury ensued to the plaintiff, he had also in respect of such act a right of action against the defendants. The plaintiff in respect of that act would have had a right of action if it had been done by one defendant only; he has it still more clearly when that act was done by several defendants combined for that purpose. For these reasons I come to the conclusion that the plaintiffs were entitled to judgment. The damages, if that be the correct conclusion as to the right of action, are to be ascertained. They are, in my opinion, the difference between the freight of 25*s.*, which the plaintiff was to accept, and the freight he would have obtained without other interference than a legal, fair competition in 1885, and damages at large for being prevented from endeavouring to earn freights from Hankow to England in subsequent years, after taking into account the probability of using his ship in some other trade. I am of opinion that the appeal should be allowed.

Bowen, L.J.—We are presented in this case with an apparent conflict or antinomy between two rights that are equally regarded by the law—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits, and, inasmuch as for the purposes of the present case we are to assume some possible damage to the plaintiffs, the real question to be decided is whether on such an assumption the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law. The defendants are a number of shipowners who formed themselves into a league or conference for the purpose of ultimately keeping in their own hands the control of the tea carriage from certain Chinese ports, and for the purpose of driving the plaintiffs and other competitors from the field. In order to succeed in this object and to discourage the plaintiffs' vessels from resorting to those ports the defendants during the "tea harvest" of 1885 combined to offer to the local shippers very low freights, with a view of generally reducing or "smashing" rates, and thus rendering it unprofitable for the plaintiffs to send their ships thither. They offered, moreover, a rebate of 5 per cent. to all local shippers and agents who would deal exclusively with vessels belonging to the conference, and any agent who broke the condition was to forfeit the entire rebate on all shipments made on behalf of any and every one of his principals during the whole year—a forfeiture of rebate or allowance which was denominated as "penal" by the plaintiffs' counsel. It must, however, be taken as established that the rebate was one which the defendants need never have allowed at all to their customers. It must also be taken that the defendants had no personal ill-will to the plaintiffs, nor any desire to harm them except such as is involved in the wish and intention to discourage by such measures the plaintiffs from sending rival vessels to such ports. The acts of which the plaintiffs particularly complained were as follows: (1) A circular of the 10th May 1885, by which the defendants offered to the local shippers and their agents a benefit by way of rebate if they would not deal with the plaintiffs, which was to be lost if this condition was not fulfilled; (2) the sending of special ships to Hankow in order by competition to deprive the plaintiffs' vessels of profitable freight; (3) the offer at Hankow of freights at a level which would not repay a shipowner for his adventure, in order to "smash" freights and frighten the plaintiffs from the field; (4) pressure put on the defendants' own agents to induce them to ship only by the defendants' vessels and not by those of the plaintiffs. It is to be observed with regard to all these acts of which complaint is made that they were acts that in themselves could not be said to be illegal, unless made so by the object with which or the combination in the course of which they were done; and that in reality what is complained of is the pursuing of trade competition to a length which the plaintiffs consider oppressive and prejudicial to themselves. We were invited by the plaintiffs' counsel to accept the position from which their argument started—that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition.

The terms "maliciously," "wrongfully," and "injure" are words all of which have accurate meanings well known to the law, but which also have a popular and less precise signification into which it is necessary to see that the argument does not imperceptibly slide. An intent to "injure" in strictness means more than an intent to harm. It connotes an intent to do wrongful harm. "Maliciously," in like manner, means and implies an intention to do an act which is wrongful, to the detriment of another. The term "wrongful" imports in its turn the infringement of some right. The ambiguous proposition to which we were invited by the plaintiffs' counsel still therefore leaves unsolved the question of what, as between the plaintiffs and the defendants, are the rights of trade. For the purpose of clearness I desire as far as possible to avoid terms in their popular use so slippery, and to translate them into less fallacious language wherever I shall employ them. The English law, which in its earlier stages began with but an imperfect line of demarcation between torts and breaches of contract, presents us with no scientific analysis of the degree to which the intent to harm, or, in the language of the civil law, the *animus vicino nocendi* may enter into or affect the conception of a personal wrong: (see *Chasemore* v. *Richards*, 7 H. of L. Cas. 349, at p. 388.) All personal wrong means the infringement of some personal right. It is essential to an action of tort, say the Privy Council, in *Rogers* v. *Rajendro Dutt* (13 Moore P. C. 209), "that the acts complained of should be, under the circumstances, legally wrongful as regards the party complaining—*i.e.*, they must prejudicially affect another in some legal right. Merely that it will, however directly, do a man harm in his interests, is not enough."

What, then, were the rights of the plaintiffs as traders as against the defendants? The plaintiffs had a right to be protected against certain kind of conduct, and we have to consider what conduct would pass this legal line or boundary. Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage, another in that other person's property or trade is actionable if done without just cause or excuse. Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong: (see *Bromage* v. *Prosser*, 4 B. & C. 247; *Capital and Counties Bank* v. *Henty*, 47 L. T. Rep. N. S. 662; 7 App. Cas. 772, per Lord Blackburn.) The acts of the defendants which are complained of here were intentional, and were also calculated, no doubt, to do the plaintiffs damage in their trade. But, in order to see whether they were wrongful, we have still to discuss the question whether they were done without any just cause or excuse. Such just cause or excuse the defendants on their side assert to be found in their own positive right (subject to certain limitations) to carry on their own trade freely, in the mode and manner that best suits them, and which they think best calculated to secure their own advantage. What, then, are the limitations which the law imposes on a trader in the conduct of his business as between himself and other traders? There seem to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader, and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognises and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence (*Tarleton* v. *M'Gawley*, Peak N.P.C. 270), the obstruction of actors on the stage by preconcerted hissing (*Clifford* v. *Brandon*, 2 Camp. 358; *Gregory* v. *Brunswick*, 6 M. & G. 205), the disturbance of wildfowl in decoys by the firing of guns (*Carrington* v. *Taylor*, 11 East, 571; and *Keeble* v. *Hickergill*, 11 East, 574, n.), the impeding or threatening servants or workmen (*Garret* v. *Taylor* Cro. Jac. 567), the inducing persons under personal contracts to break their contracts (*Bowen* v. *Hall*, 6 Q. B. Div. 333; *Lumley* v. *Gye*, 2 E. & B. 216), all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than pursue to the bitter end a war of competition waged in the interests of their own trade. To the argument that a competition so pursued ceases to have a "just cause or excuse," when there is ill will or a personal intention to harm, it is sufficient to reply (as I have already pointed out) that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of "just cause or excuse" acts done in the course of trade which would, but for such a motive, be justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract their business to his own shop, would be a strange and impossible counsel of perfection. But we were told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not "fair or reasonable." The offering of reduced rates by the defendants in the present case is said to have been "unfair." This seems to assume that, apart from fraud, intimidation, molestation, or obstruction of some other personal right *in rem* or *in personam*, there is some natural standard of "fairness" or "reasonableness" to be determined by the internal consciousness of judges and juries beyond which competition ought not in law to go. There seems to be no authority, and I think, with submission, that there is no sufficient reason for such a proposition. It would impose a novel fetter upon trade. The defendants, we are told by the plaintiffs' counsel, might lawfully lower rates, provided they did not lower them beyond a "fair freight"—whatever that may mean. But where is it established that there is any such restriction upon commerce, and what is to be the definition of a "fair freight?" It is said that it ought to be a "normal" rate of

freight, such as is reasonably remunerative to the shipowner. But over what period of time is the average of this reasonable remunerativeness to be calculated? All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices in order by driving competition away to reap a fuller harvest of profit in the future, and until the present argument at the bar it may be doubted whether shipowners or merchants were ever deemed to be bound by law to conform to some imaginary "normal" standard of freights or prices, or that law courts had a right to say to them in respect of their competitive tariffs—"Thus far shall they go and no further." To attempt to limit English competition in this way would probably be as hopeless an endeavour as the experiment of King Canute. But on ordinary principles of law no such fetter on freedom of trade can, in my opinion, be warranted. A man is bound not to use his property so as to infringe upon another's rights—*Sic utere tuo ut alienum non lædas*. If engaged in actions which may involve danger to others, he ought, speaking generally, to take reasonable care to avoid endangering them. But there is surely no doctrine of law which compels him to use his property in a way that judges and juries may consider "reasonable:" (see *Chasemore* v. *Richards*, 7 H. of L. C. 349.) If there is no such fetter upon the use of property known to the English law, why should there be any such a fetter upon trade?

It is urged, however, on the part of the plaintiffs, that even if the acts complained of would not be wrongful had they been committed by a single individual, they become actionable when they are the result of concerted action among several. In other words, the plaintiffs, it is contended, have been injured by an illegal conspiracy. Of the general proposition that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy: (see *Skinner* v. *Gunton*, 1 Wm. Saund. 229; *Hutchins* v. *Hutchins*, 7 Hill's N. Y. Cas. 104; Bigelow's Leading Cases on Torts, 207.) But what is the definition of an illegal combination? It is an agreement by one or more to do an unlawful act or to do a lawful act by unlawful means: (*Reg.* v. *O'Connell*, 11 Cl. & F. 155; *Reg.* v. *Parnell*, 14 Cox C. C. 508.) And the question to be solved is whether there has been any such agreement here. Have the defendants combined to do an unlawful act? Have they combined to to do a lawful act by unlawful means? A moment's consideration will be sufficient to show that this new inquiry only drives us back to the circle of definitions and legal propositions which I have already traversed in the previous part of this judgment. The unlawful act agreed to, if any, between the defendants, must have been the intentional doing of some act to the detriment of the plaintiffs' business without just cause or excuse. Whether there was any such justification or excuse for the defendants is the old question over again, which, so far as regards an individual trader, has been already solved. The only *differentia* that can exist must arise, if at all, out of the fact that the acts done are the joint acts of several capitalists, and not of one capitalist only. The next point is whether the means adopted were unlawful. The means adopted were competition carried to a bitter end. Whether such means were unlawful is in like manner nothing but the old discussion which I have gone through, and which is now revived under a second head of inquiry; except so far as a combination of capitalists differentiates the case of acts jointly done by them from similar acts done by a single man of capital. But I find it impossible myself to acquiesce in the view that the English law places any such restriction on the combination of capital as would be involved in the recognition of such a distinction. If so, one rich capitalist may innocently carry competition to a length which would become unlawful in the case of a syndicate with a joint capital no larger than his own; and one individual merchant may lawfully do that which a firm or a partnership may not. What limits on such a theory would be imposed by law on the competitive action of a joint-stock company (limited) is a problem which might well puzzle a casuist. The truth is, that the combination of capital for purposes of trade and competition is a very different thing from such a combination of several persons against one with a view to harm him as falls under the head of an indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former. There are cases in which the very fact of a combination is evidence of a design to do that which is hurtful without just cause—is evidence, to use a technical expression, of malice. But it is perfectly legitimate, as it seems to me, to combine capital for all the mere purposes of trade for which capital may, apart from combination, be legitimately used in trade. To limit combinations of capital when used for purposes of competition in the manner proposed by the argument of the plaintiffs would in the present day be impossible—would be only another method of attempting to set boundaries to the tides. Legal puzzles which might well distract a theorist may easily be conceived of imaginary conflicts between the selfishness of a group of individuals and the obvious well-being of other members of the community. Would it be an indictable conspiracy to agree to drink up all the water from a common spring in a time of drought, to buy up by preconcerted action all the provisions in a market or a district in times of scarcity (see *R.* v. *Waddington*, 1 East, 143), to combine to purchase all the shares of a company against a coming settling day, or to agree to give away articles of trade gratis in order to withdraw custom from a trader? May two itinerant match vendors combine to sell matches below their value in order, by competition, to drive a third match vendor from the street? In cases like these where the element of intimidation, molestation, or the

other kinds of illegality to which I have alluded are not present, the question must be decided by the application of the test I have indicated. Assume that what is done is intentional and that it is calculated to do harm to others. Then comes the question—Was it done with or without "just cause or excuse?" If it was *bonâ fide* done in the use of a man's own property, in the exercise of a man's own trade, such legal justification would, I think, exist not the less because what was done might seem to others to be selfish or unreasonable: (see the summing up of Erle, J. and the judgment of the Queen's Bench in *R.* v. *Rowlands*, 17 Q. B. 671.) But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell. But if the real object were to enjoy what was one's own or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that it was done without just cause or excuse. One may with advantage borrow for the benefit of traders what was said by Erle, J. in *R.* v. *Rowlands* (17 Q. B. at p. 687) of workmen and of masters: "The intention of the law is to allow them to follow the dictates of their own will with respect to their own actions and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage."

Lastly, we are asked to hold the plaintiffs' conference or association illegal as being in restraint of trade. The term "illegal" here is a misleading one. Contracts, as they are called, in restraint of trade are not, in my opinion, illegal in any sense except that the law will not enforce them. It does not prohibit the making of such contracts—it merely declines after they have been made to recognise their validity. The law considers the disadvantage so imposed upon the contract a sufficient shelter to the public. The language of Compton, J. in *Hilton* v. *Eckersley* (6 E. & B. 47) is I think not to be supported. No action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade. Lord Eldon's equity decision in *Cousins* v. *Smith* (13 Ves. 542) is not very intelligible even if it be not open to the somewhat personal criticism passed on it by Lord Campbell in his "Lives of the Chancellors." If indeed it could be plainly proved that the mere formation of "conferences," "trusts," or "associations" such as these was always necessarily injurious to the public—a view which involves perhaps the disputable assumption that, in a country of free trade and one which is not under the iron *régime* of statutory monopolies, such confederations can ever be really successful—and if the evil of them were not sufficiently dealt with by the common law rule, which held such agreements to be void as distinct from holding them to be criminal, there might be some reason for thinking that the common law ought to discover within its arsenal of sound common-sense principles some further remedy commensurate with the mischief. Neither of these assumptions are to my mind at all evident, nor is it the province of judges to mould and stretch the law of conspiracy in order to keep pace with the calculations of political economy. If peaceable and honest combinations of capital for purposes of trade competition are to be struck at, it must, I think, be by legislation, for I do not see that they are under the ban of the common law. In the result I agree with Lord Coleridge, C.J. and differ with regret from the Master of the Rolls. The substance of my view is this, that competition, however severe and egotistical, if unattended by circumstances of dishonesty, intimidation, molestation, or such illegalities as I have above referred to, gives rise to no cause of action at common law. I myself should deem it to be a misfortune if we were to attempt to prescribe to the business world how honest and peaceable trade was to be carried on in a case where no such illegal elements as I have mentioned exist, or were to adopt some standard of judicial "reasonableness," or of "normal" prices, or "fair freights" to which commercial adventurers, otherwise innocent, were bound to conform. In my opinion, accordingly, this appeal ought to be dismissed with costs.

Fry, L.J.—The plaintiffs and defendants in this case are owners of steamships, and the plaintiffs allege in substance that the defendants have unlawfully conspired together and done certain acts in pursuance of their conspiracy whereby the plaintiffs have sustained both damage and injury. Both plaintiffs and defendants were concerned in the trade with China, and their steamships visited amongst other ports Shanghai, at the mouth of the Yangstze, and Hankow, which is 600 miles up that great river. The defendants' ships were more regularly employed in the China trade than those of the plaintiffs, which appear only to have visited Hankow at the height of the season for shipping tea—that is, in the months of May and June. In 1884 the defendants had formed a combination substantially like the one which I shall presently mention in detail, but it was part of the arrangement of 1884 that the employment of certain ships of the plaintiffs should not entail on the shippers the loss of rebate. In 1885 the defendants again formed amongst themselves an arrangement which they call a conference, and which the plaintiffs call a conspiracy. The terms of that arrangement are embodied in a written agreement dated the 7th April 1885. This agreement regulated as between the defendants themselves the trade with China and Japan; it provided for a certain division of cargoes and for the determination of the rates of freight. But with regard to Hankow, not only did these general stipulations apply to it, but certain special stipulations were come to, having clearly for their object the prevention of competition for freights at Hankow by any of the class of ships described as outsiders—*i.e.*, vessels not belonging to any member of the conference. This object was to be accomplished in three ways: (1) It was stipulated that if outsiders should start for Hankow, they were to be met by conference steamers and encountered with "effective opposition," the determination of what conference ships should be employed for this purpose being left to the agents at Shanghai of the defendants' firms; (2) it was stipulated that the

agents of the conference ships should be "prohibited," and here, again, I use the words of the agreement, from being interested directly or indirectly in outsiders—*i.e.*, they were to be removed from the agency of the defendants' ships if they took any part in the business of non-conference steamers; (3) the agreement provided for a rebate of 5 per cent. being made to firms which shipped exclusively by conference ships, a benefit which was to be denied if a single shipment were made by an outsider, except in case of there not being a conference steamer in port or named for despatch within a week with available cargo space, in which event shipments by an outsider would not work a loss of the rebate. The only other provision of the agreement to which it is necessary to refer is that each of the parties to it was at liberty to withdraw from the agreement on notice. Upon this document I pause to make certain observations. In the first place, I am of opinion that it discloses the real bargain between the defendants, and that its purport is not substantially altered by any evidence in this case. In the next place, I conclude that at the date of the agreement the plaintiffs were probably in the contemplation of the defendants as persons who might possibly send ships to compete, but that with that exception the plaintiffs were not objects in the minds of the defendants when they entered into the agreement, and that the defendants were actuated by no personal ill-feeling or malice in fact towards the plaintiffs. Thirdly, in my judgment, the real object of the agreement was the acquisition of gain by the defendants, and the means by which they sought to accomplish this end was a competition on the part of the united shipowners against all the world so vigorous as to drive outsiders from the field and thus to prevent competition in the future. This was the direct scope of the provisions as to meeting outsiders and as to rebate, and the stipulation as to agents I regard as incidental to it, for the members of the conference might well desire that in such a conflict they should be represented by men entirely devoted to their plans and interests and not by agents acting for shipowners engaged on both sides in the struggle. Fourthly, I am of opinion that competition was in substance the only weapon which the defendants intended to use against their rivals in trade. No thought of using violence, molestation, intimidation, fraud, or misrepresentation was entertained by the defendants. Briefly speaking, therefore, the scheme of the conference was by means of competition in the near future to prevent competition in the remoter future. On the 22nd April interviews took place between Mr. Gellatly, the managing director of the plaintiff company, and the defendants, Swire, Macgregor, Holt, and Sutherland, which have been insisted on as important by both sides in argument before us. Mr. Gellatly tried to persuade the defendants to allow him to have a place in their arrangements, and, failing this, threatened, to use his own language, "to smash rates" at Hankow. What then passed between the parties does not seem to me very material. Shortly after the agreement was entered into copies of it were transmitted by most or all of the defendant firms to their agents in Shanghai in order that they might act upon it. On the 1st May it was known to the defendants' agents at Shanghai that the *Pathan*, one of the plaintiffs' steamships, was going up the river to Hankow to look for a cargo of tea at the height of the season; and she was to be followed by the *Afghan*, another of the plaintiffs' fleet. On the 8th May three of the conference vessels were sent up the river to add to the conference vessels already at Hankow, and to take part in competing against the outsiders for homeward freight; and three days afterwards a circular was issued by the conference agents at Shanghai to shippers at Hankow, referring by name to the *Pathan* and *Afghan*, and warning shippers that the rebate would be lost by shipment by these or any other outside ships. This circular was much insisted on by the plaintiffs' counsel as an act of hostility directed against the plaintiffs' vessels in particular, and as an act of malice towards the plaintiffs personally; and they further observed that it did not disclose to the shippers the provision of the agreement of the 7th April, by which in certain cases shipments might be made on board outsiders without loss of the right to rebate. In my opinion the circular was the natural result of the agreement of the 7th April, and does not carry the case of the plaintiffs further than as an overt act giving effect to that agreement. Considering that the *Pathan* and *Afghan* had in 1884 been allowed to receive cargo without its entailing a loss of the rebate on the shippers, I think that the reference to those ships by name was fair towards the shippers and does not show any personal malice against the plaintiffs. On the 14th May the conference agents met at Shanghai and determined on a general reduction of freights at Hankow as a means of depriving the *Pathan* and *Afghan* of the chance of a successful venture, and in the pious hope that they might go down the Yangtsze as they had come up—in ballast. Instructions were accordingly sent to Hankow, freights were reduced, and the plaintiffs' ships obtained freights, but at rates so low as to leave little or no profit, rates which, on the evidence, I conclude were brought down by the action of the defendants, and were lower than would have been obtained if there had been open competition and no combination amongst the defendant firms. On the 29th May, whilst the *Pathan* was full at Hankow and on the point of sailing, and whilst the *Afghan* was rapidly taking her cargo on board this action was brought. The parties having agreed to leave the question of damages, if any, to reference or arbitration, I shall assume that the plaintiffs may show that in point of fact they have sustained damage from the defendants' acts. The plaintiffs allege that the conference was an unlawful conspiracy; that the agreement then entered into was carried into execution by the sending up of the three ships expressly to compete with the plaintiffs' vessels, by the circular, and the reduction of freights; that these acts were wrongful and have caused damage to them, and consequently were actionable. I cannot doubt that whenever persons enter into an agreement which constitutes at law an indictable conspiracy, and that agreement is carried into execution by the conspirators by means of an unlawful act or acts which produce private injury to some person, that person has a cause of action against the conspirators.

Was the agreement in the present case an un-

lawful conspiracy? "The crime of conspiracy," said Tindal, C.J., speaking for the judges attending the House of Lords in *O'Connell's case* (11 Cl. & Fin. 233)—"the crime of conspiracy is complete if two or more than two should agree to do an illegal thing—*i.e.*, to effect something in itself unlawful, or to effect by unlawful means something which in itself may be indifferent or even lawful." "A conspiracy," said Willes, J., "consists in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means." In all cases, therefore, a conspiracy is an agreement to do an unlawful act. It is immaterial whether that act be (*a*) the principal object and end of the agreement, as an agreement to kill, or (*b*) a subordinate act towards the principal object, as in an agreement to support a true title by forged deeds or suborned witnesses. Again, the act may be unlawful (*a*) because it would be unlawful in each of the agreeing parties even if he did it alone; or (*b*) because though lawful in one it is unlawful in two or more. The first inquiry then which arises is this — was the principal object and end of the agreement illegal? I answer that that object and end was the acquisition of gain by the defendants. That is lawful, and I suppose even commendable according to the law of this country, provided the means used be lawful. What, then, were the means intended to be used? They were, as I have already said, the exclusion of competition in the remoter future by severe competition in the near future. Was that lawful or unlawful? It is not necessary to consider whether competition directed by one man or by a combination of men against another man, if instigated and put in motion from mere malice and ill-will towards him, as a means of doing him ill-service and for no benefit to the doer would or would not be unlawful or actionable. There is in the present case no evidence of express malice or of any activity of the defendants against the plaintiffs except as rival and competing shipowners. The defendants did not aim at any general injury of the plaintiffs' trade, or any reduction of them to poverty or insolvency; they only desired to drive them from particular parts where the defendants conceived that the plaintiffs' presence interfered with their own gain; the damage to be inflicted on the plaintiffs was to be strictly limited by the gain which the defendants desired to win for themselves. In the observations I am about to make I shall therefore lay out of consideration the case of competition used as a mere engine of malice even where I do not in terms repeat the exception. I will only add on this part of the case that the charge of Erle, J. in the case of *Reg.* v. *Rowlands* (17 Q. B. 687, n.) draws the same distinction which I have taken between combinations to promote the interests of those who combine and combinations of which the hurt of another is the immediate purpose. We have then to inquire whether mere competition directed by one man against another is ever unlawful. It was argued that the plaintiffs have a legal right to carry on their trade, and that to deprive them of that right by any means is a wrong. But the right of the plaintiffs to trade is not an absolute but a qualified right—a right conditioned by the like right in the defendants and all Her Majesty's subjects, and a right therefore to trade subject to competition. Now, I know no limits to the right of competition in the defendants; I mean no limits in law; I am not speaking of morals or good manners. To draw a line between fair and unfair competition, between what is reasonable and unreasonable, passes the power of the courts. Competition exists when two or more persons seek to possess or to enjoy the same thing; it follows that the success of one must be the failure of another, and no principle of law enables us to interfere with or to moderate that success or that failure so long as it is due to mere competition; I say mere competition for I do not doubt that it is unlawful and actionable for one man to interfere with another's trade by fraud or misrepresentation, or by molesting his customers or those who would be his customers whether by physical obstruction or moral intimidation. The cases of *Garratt* v. *Taylor* (Cro. Jac. 567); *Tarleton* v. *M'Gawley* (Peake, N. P. 270); *Keble* v. *Hetheringill* (11 East, 574); *Carrington* v. *Taylor* (11 East, 571) are all cases of interference by physical acts, driving away either the birds or the customers from the plaintiffs' places of business. Other cases were cited in which one man has persuaded another who is under some contract of service to a third to break that contract to the damage of such third person, and the persuasion has been held actionable. But no case has been or I believe can be cited where the only means used by the defendant to injure the plaintiff has been competition pure and simple. I think that if we were now to hold interference by mere competition unlawful we should be laying down law both novel and at variance with that which modern legislation has shown to be the present policy of the State. But if one man may by competition strive to drive his rivals out of the field, is it lawful or unlawful for several persons to combine together to drive from the field their competitor in trade? It is said that such an agreement is in restraint of trade and therefore illegal. Be it so. But in what sense is the word "illegal" used in such a proposition? In my opinion it means that the agreement is one upon which no action can be sustained, and no relief obtained at law or in equity, but it does not mean that the entering into the agreement is either indictable or actionable. The authorities on this point are, I think, with a single exception, uniform. In *Mitchell* v. *Reynolds* (1 Sm. L. C. 430, 9th edit.) Parker, C.J., in discussing contracts in restraint of trade, says: "It is not a reason against them that they are against law, I mean in a proper sense, for in an improper sense they are." In *Price* v. *Green* (16 M. & W. 346) Patteson, J., in delivering the judgment of the Exchequer Chamber upon a covenant held void as in restraint of trade, said expressly that it was "void only, not illegal." In *Hilton* v. *Eckersley* (6 E. & B. 47) the bond was addressed, not as in *Mitchell* v. *Reynolds*, only to negative acts, such as not trading, but to positive acts, such as carrying on works under particular directions and closing the works at the dictation of a majority of the combining owners. In this case all the judges both in the Courts of Queen's Bench and the Exchequer Chamber held that the bond could not be enforced, but Crompton, J. alone thought it created an indictable offence, Lord Campbell, C.J. and Erle, J. expressing an opposite opinion, and the Court of Exchequer Chamber carefully abstaining from

expressing any opinion on the point. The language of all the judges in the cases of *Hornby* v. *Close* (L. Rep. 2 Q. B. 153) and *Farrer* v. *Close* (L. Rep. 4 Q. B. 602) is consonant with that of Lord Campbell and Erle, J. in *Hilton* v. *Eckersley*; and Crompton, J. is, I believe, the only judge who has ever hitherto held such contracts illegal as well as void. If every agreement in restraint of trade were not only void but unlawful in the stricter sense of the word, it would follow that, as every agreement must be at least between two persons, every such agreement would constitute an indictable offence, and yet not a single case has been cited of a conspiracy constituted by a mere agreement between two persons in undue restraint of the trade of one of the contractors. This silence of the books is very significant.

It was forcibly urged upon us that combinations like the present are in their nature calculated to interfere with the course of trade, and that they are therefore so directly opposed to the interest which the State has in freedom of trade and in that competition which is said to be the life of trade, that they must be indictable. It is plain that the intention and object of the combination before us is to check competition; but the means it uses is competition, and it is difficult, if not impossible, to weigh against one another the probabilities of the employment of competition on the one hand and its suppression on the other; nor is it easy to say how far the success of the combination would arouse in others the desire to share in its benefits and by competition to force a way into the magic circle. In *Wickens* v. *Evans* (3 Y. & J. 318) it was suggested that the brewers or distillers of London might enter into an agreement to divide the metropolis into districts, the effect of which might be to supply the public with an inferior commodity at a higher price. This argument was met by Hullock, B. by this observation: "If the brewers or distillers of London were to come to the agreement suggested, many other persons would soon be found to prevent the result anticipated, and the consequence would perhaps be that the public would obtain the articles they deal in at a cheaper rate." A similar observation may be made in the present instance and corroborated by what has actually happened. For the case before us strikingly illustrates the difficulty of foretelling the probable results of such a combination in the public interest. In fact, the competition between the plaintiffs and defendants in May and June 1885 brought down the freights from Hankow to the benefit, it must be supposed, of the consumer in England. The conference came to an end in Aug. 1885, and in the summer of 1886 the rate of freight from Hankow was determined by free competition in an open market, in which the defendants were competing with one another. But I do not rest my conclusion on any speculations as to the probable effect of such agreements as the one before us, but on this—that the combination, if in restraint of trade, is *primâ facie* void only and not illegal; that no statute in force makes such competition criminal; and that the policy of our law, as at present declared by the Legislature, is against all fetters on combination and competition unaccompanied by violence or fraud or other like injurious acts. The ancient common law of this country and the statutes with reference to the acts known as badgering, forestalling, regrating, and engrossing indicated the mind of the Legislature and of the judges that certain large operations in goods which interfered with the more ordinary course of trade were injurious to the public; they were held criminal accordingly. But early in the reign of George III. the mind of the Legislature showed symptoms of change in this matter and the penal statutes were repealed (12 Geo. 3, c. 71), and the common law was left to its unaided operation. This repealing statute contains in the preamble the statement that it had been found by experience that the restraint laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, had a tendency to discourage the growth and to enhance the price of the same. This statement is very noteworthy. It contains a confession of failure in the past, the indication of a new policy for the future. And this new policy has been more clearly declared and acted upon in the present reign, for the Legislature has by 7 & 8 Vict. c. 24, altered the common law by utterly abolishing the several offences of badgering, engrossing, forestalling, and regrating. At the same time this repeal was accompanied by a proviso that nothing in the Act contained should apply to the offence of knowingly and fraudulently spreading, or conspiring to spread, any false rumour with intent to enhance or decry the price of any goods or merchandise, or to the offence of preventing, or endeavouring to prevent, by force or threats, any goods, wares, or merchandise being brought to any fair or market, but that every such offence might be punished as if this Act had not been made. The comparison of the operative part of the statute with this proviso goes far to draw the line between lawful and unlawful interference with the ordinary course of trade or of the market.

A consideration of the statutes relative to trade unions leads me to a similar conclusion. It is not necessary to consider in detail the provisions of the statutes of 1871 and 1876 (34 & 35 Vict. c. 31—39 & 40 Vict. c. 22); but one of their principal results was to enlarge the power of combination between workmen and workmen, and between masters and masters, for the purpose of maintaining and enforcing their respective interests, and to remove the objection of being in restraint of trade to which some of such combinations had been obnoxious. But whilst the Legislature thus set masters and men respectively free to combine, they reasserted the illegality of using violence, threats, molestation, obstruction, or coercion; and here, again, the contrast between the two pieces of legislation which stand side by side in the statute-book, the one declaring mere combinations lawful, and the other declaring violence and other like acts unlawful, helps to draw the line in the same direction as does the legislation in respect of trade combinations: (*cf.* the statutes 34 & 35 Vict. c. 31 and c. 32.) Thus the stream of modern legislation runs strongly in favour of allowing great combinations of persons interested in trade and intended to govern or regulate the proceedings of large bodies of men, and thus necessarily to interfere with what would have been the course of trade if unaffected by such combinations. I therefore conclude that the

combination in the present case cannot be held illegal as opposed to the policy of the law.

It remains to inquire whether the authorities assist in the decision of the question before us. As regards an individual, I have already pointed out that for one man to interfere with the lawful trade or business of another by molestation or any physical interference, or by fraud or misrepresentation, may be an actionable wrong. But no authority appears to show that for one man to injure the business of another by mere competition, even though it may be successfully directed to driving the rival out of the town where he dwells, or out of the business which he carries on, is actionable. And the silence of the books is strong evidence that such acts are not actionable. With regard to like acts done by a combination of persons, the authorities are not very numerous. There are certain general statements in text-books, of which the passage in Hawkins' Pleas of the Crown, vol. 1, p. 446, may be taken as a fair specimen. "There can be no doubt," he says, "but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law, as where divers persons confederate together by indirect means to impoverish a third person." For this proposition Hawkins cites authorities relative to two cases: First, *Rex* v. *Kimberly* (1 Lev. 62), which was a conspiracy to indict the prosecutor for having begotten a bastard child on the body of one of the conspirators—a case, therefore, which has nothing to do with the question now in hand. Secondly, *Rex* v. *Stirling* (1 Lev. 126), in which the indictment charged certain brewers of London with a conspiracy to refuse to sell small beer, with a view to impoverish the excisemen, and with intent to move the common people to pull down the Excise house, and to bring the excisemen into hatred of the people, and to impoverish and disable them from paying their rent to the King. The defendants were found guilty of counselling and assembling to impoverish the excisemen, and not guilty of the residue; and thereupon ultimately judgment went for the Crown. The real ground of the decision was, as stated by Holt, C.J. in *Reg.* v. *Daniell* (6 Mod. 99), that the offence of the defendant was of a public nature, and levelled at the Government, and it is therefore no authority in respect of a combination which has no such object or effect. But one argument as it appears in Siderfin is important. It was urged for the defendants that it was not an offence punishable by our law for one man to depauperate another, with a view to enrich himself, by selling commodities at cheaper rates. The court did not deny this proposition, but drew a distinction based upon the allegations of the information, which were supported by the verdict, that the Excise was parcel of the revenue of the King, and that to impoverish the excisemen was to render them incapable of paying these revenues to the King. So far, therefore, as the case goes, it is an authority rather for the defendants than for the plaintiffs in this case. The next case that seems relevant is *Rex* v. *Eccles* (1 Lea C. C. 274), before Lord Mansfield and the Court of King's Bench. The defendant and six other persons had been convicted on two counts, charging that the defendants and others, devising unlawfully and by indirect means to impoverish one Booth, and to hinder him from exercising the trade of a tailor, conspired by wrongful and indirect means to impoverish him, and to hinder him from exercising his said business; and the defendants, according to their said conspiracy, did so hinder him. It was moved, in arrest of judgment, that the means by which the mischief was to be effected ought to have been set out, but the indictment was held sufficient. The nature of the acts done by the defendants does not appear, nor is it easy to learn precisely on what principles the court proceeded. Lord Ellenborough in *Rex* v. *Turner* (13 East, 228) said that the case seemed to have been determined on the ground of restraint of trade, in which case it would probably be no authority since the legislation of this reign with reference to trade unions. If regarded as an authority merely on the sufficiency of the indictments, it appears open to some question. In any event, it throws no clear light on the matter now for decision. The case of *Cousins* v. *Smith* (13 Ves. 542) is probably not applicable, since it proceeded on the view of a court of equity of forestalling and regrating, and those practices are not now unlawful. The equitable shadow of these crimes must, I think, have disappeared from the crimes themselves. These are, so far as I am aware, all the relevant authorities, and none of them appears to me to support the proposition that mere competition of one set of men against another man, carried on for the purpose of gain, and not out of actual malice, is actionable, even though intended to drive the rival in trade away from his place of business, and though that intention be actually carried into effect. For these reasons, I hold that the judgment of the Lord Chief Justice was right, and that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs, *Gellatly* and *Warton*.
Solicitors for defendants, *Freshfields* and *Williams*.

Tuesday, Dec. 3, 1889.

(Before Lord Esher, M.R., Lindley and Lopes, L.JJ., assisted by Nautical Assessors.)

The River Derwent. (a)

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

Collision—River Thames—Vessel crossing river—Rules and Bye-laws for the Navigation of the River Thames, arts. 24, 25.

A steamship ceases to be "crossing from one side of the river towards the other side" within the meaning of art. 24 *of the Rules and Bye-laws for the Navigation of the River Thames when her stem has got so far across that it can go no further, although she is still athwart the stream; but where a vessel is swinging for the purpose of turning in the river with her anchor down but not holding, she is not a crossed ship if she is still moving towards the shore, although she may have got more than athwart, and although her stern may be swinging to the tide.*

The steamship A., having come up the Thames as far as Bugsby's Reach on the flood tide, was about

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

to turn head down, and, having whistled, her helm was ported and anchor let go so that it might dredge, and she began to swing round. Meanwhile the steamship R. D., which had been coming up the river astern of the A., instead of taking any steps to keep out of the way of the A., although she saw that the A. was doing nothing to keep out of her way in obedience to art. 24 of the Thames Rules and Bye-laws, came on and collided with the A.

Held, that both vessels were to blame, the A. because, being a crossing ship, she neglected to keep out of the way of the R. D., and the R. D. because, after she saw that the A. was neglecting her duty to keep out of the way, she failed to take any steps in sufficient time to avoid the collision.

This was an appeal by the defendants in a collision action *in rem* from a decision of Butt, J. finding their vessel, the *River Derwent*, solely to blame.

The collision occurred between the plaintiffs' steamship the *Allendale* and the defendants' steamship the *River Derwent* in the river Thames on the 19th Dec. 1888.

The facts alleged by the plaintiffs were as follows:—Shortly before 10.20 a.m. on the 19th Dec. the *Allendale*, a steamship of 569 tons register, laden with a cargo of coals, was, whilst on a voyage from Newcastle-on-Tyne to London, in Bugsby's Reach in the river Thames. The *Allendale*, which had been on the south side of mid-channel, had received orders from the coal derricks to bring up, and accordingly her whistle was blown three blasts, her engines were moved easy ahead, and her helm was ported, and when she had got across mid-channel and her stem was eighty feet from the north shore, her engines were stopped and her anchor was let go to swing her round head down stream. Before the *Allendale* had finished swinging and was still heading towards the north shore, the steamship *River Derwent* (which had been previously seen from a half to three-quarters of a mile lower down the river) was observed six or seven ship's lengths off on the starboard quarter, and coming up the river at considerable speed. Instead of going under the stern of the *Allendale*, the *River Derwent* was suddenly seen to come to starboard, and, although the engines of the *Allendale* were at once reversed full speed, the *River Derwent* came on and with her stem struck the *Allendale* on the starboard side just before the engine room.

The facts alleged by the defendants were as follows:—Shortly after 10 a.m. on the 19th Dec. the *River Derwent*, a screw steamship of 504 tons register, laden with a general cargo, was in the river Thames, in the course of a voyage from Terneuzen to London. The weather was fine and clear, and the tide was first quarter flood. The *River Derwent* was at the top of Woolwich Reach, on the north side of mid-channel. She was making about two knots through the water, following nearly in the wake of a steamship called the *James Sothern*, and being followed by another steamship. In these circumstances those on board the *River Derwent* observed the *Allendale*, which had previously passed the *River Derwent*, distant about a quarter of a mile, about two to three points on the port bow of the *River Derwent*, and lying well over on the south shore apparently stationary. At about this time the *James Sothern* was observed to begin to swing with her head to the north shore, and the engines of the *River Derwent* were stopped and her helm starboarded so as to pass under her stern. When the *River Derwent* had answered her helm about a point, the helm was steadied and the engines set ahead dead slow. The *River Derwent* was then in a position to pass astern of the *James Sothern* and well clear of the *Allendale*, when the latter was observed to be coming rapidly ahead across the river, and across the course of the *River Derwent*. The engines of the *River Derwent* were at once reversed full speed, her helm was starboarded, and her whistle was blown three short blasts. The *Allendale* and the steamer following the *River Derwent* were hailed to go astern, but the *Allendale* was now seen to have her anchor down, and, instead of doing anything to keep out of the way of the *River Derwent*, she came on and with her starboard side struck the stem of the *River Derwent*.

It appeared that the *Allendale's* anchor was not let go for the purpose of holding, but merely in order to check her round by its dredging over the ground.

The main allegation against the *River Derwent* was, that she came up the river without keeping a good look-out, and that, instead of acting with her engines, they were only stopped about two minutes before the collision. It appeared from her own engineer's log that her engines were stopped and reversed only two minutes before the collision, and that previously to that they had been going ahead for seven minutes.

The main allegation against the *Allendale* was, that she had broken art. 24 of the Rules and Bye-laws for the Navigation of the River Thames in neglecting to keep out of the way of the *River Derwent*, whose duty it was, under art. 25, to keep her course. The defendants alleged that the *Allendale* began to turn and cross the river when she was only one and a half ship's lengths above the *River Derwent*, and that she was still moving across the river at the time of the collision. The plaintiffs alleged that she had begun to turn some four to six minutes before the collision, and had got over as far as she could to the north shore, and had ceased to be moving towards the shore for some appreciable time before the collision.

Butt, J., having taken time to consider, gave judgment in favour of the plaintiffs, stating that the Elder Brethren differed as to the time it would take the *Allendale* to turn in the river. He found that at the time of the collision the *Allendale* had begun to tail up the river; that she had begun to turn about five or six minutes before the collision; that the *River Derwent* was a considerable distance below the *Allendale* when she turned; that the *Allendale* had in fact crossed the river before the *River Derwent* was so close as to involve any risk of collision; and that in the circumstances the *River Derwent* was alone to blame.

The following Rules and Bye-laws for the Navigation of the River Thames were referred to and are material to the decision:

Art. 24. Steam vessels crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river.

Art. 25. Where by the above rules one of two vessels is to keep out of the way, the other shall keep her course.

Sir *Walter Phillimore* and Dr. *Raikes*, for the defendants, in support of the appeal.—The *Allendale* was alone to blame for the collision. She was crossing from one side of the river towards the other, and it was therefore her duty to keep out of the way of the *River Derwent*. The duty of the *River Derwent* was to keep her course, and the *Allendale* did wrong in putting herself in the way of the course of the *River Derwent*. The mere fact that the *Allendale* had stopped her engines and was being checked round did not entitle her to treat herself as outside art. 24.

Barnes, Q.C. and *J. P. Aspinall* for the respondents, *contra*.—The words of art. 24 cast a duty upon a vessel to keep out of the way only when she is "crossing from one side of the river towards the other side." The *Allendale* had ceased to be doing this. She had got as far across the river as she wished, and was at the material time straightening down the river, not crossing towards the north shore. Assuming her to have been in motion at the time of the collision, it was only the motion incidental to straightening in the river. In fact, her engines were stopped, and she had already begun to swing with the assistance of her anchor.

Lord Esher, M.R.—The decision in this case depends mainly upon the true construction of arts. 24 and 25 of the Rules and Bye-laws for the Navigation of the River Thames, whether they are applicable, and if so what is their applicability to the facts of this case. The first thing to be observed about these two rules is that their applicability in conterminous; they must both begin to apply to a given case at the same moment, and they must both cease to apply at the same moment. Art. 25 is applicable to a case while art. 24 is, and neither of them is applicable unless both are. Therefore the question in this case is, were these two articles applicable at any time, and if they were did their applicability end before the collision took place? Now we are advised that from the time when the *Allendale* finally made up her mind to cross until the time she and the *River Derwent* were in the position in which they were when the collision took place would be about four minutes; and of course more than four minutes would have elapsed before the *Allendale* would have got head on tide. Therefore four minutes passed from the time when the *Allendale* finally made up her mind to cross to the time of collision. During those four minutes the *River Derwent* was coming up the river at a moderate speed. It seems to me to follow as an irresistible inference that from the moment when the *Allendale* began to cross, that if she continued doing so and the *River Derwent* continued coming up the river there must have been danger of collision. Now what is the governing principle as to the time when the navigation rules are to begin to apply? It is at the moment when if both vessels continue to do what they are doing there will be danger of collision. That is the time when these rules invariably begin to apply. Rule 24 is, "steam vessels crossing from one side of the river towards the other side shall keep out of the way of vessels navigating up and down the river." That rule fixes the duty of a steam vessel which is crossing from one side of the river towards the other side. The reciprocal rule which takes immediate effect and lasts just as long as the other says, "where by the above rules one of two vessels is to keep out of the way the other shall keep her course." That rule fixes the duty of the *River Derwent*.

But, now, when is the application of these rules ended? That depends upon the true construction of art. 24. There is no difficulty about the construction of art. 25. The question is when does art. 24 end, because immediately it ends art. 25 ends. The words are "steam vessels crossing from one side of the river towards the other side," that is the time when the rule is to apply. One question to consider is whether the word "crossing" as used in the rule is to have a nautical meaning, different from its ordinary meaning. In my view it has not; I think it is an ordinary English phrase of crossing a given space, and that it ought to be construed so as to have its ordinary meaning. But we are not all agreed upon that point, and therefore we have asked this question of our nautical advisers: "In nautical language, is a ship which is crossing the river still a crossing ship when her head has got as far across the river as it can go, while her stern is still athwart the river?" They tell us in nautical language in their opinion under such circumstances she would be a crossed ship. I must, however, give vent to my own view much as I respect theirs, and I think that is a wrong and most dangerous interpretation of the rule. I should have thought that, as long as a ship is in the course of performing the manœuvre of crossing, as long as she is in motion performing the manœuvre, she is still a crossing ship. Take this example: when a ship lets go an anchor for the purpose of checking herself round she is still in motion, and when she is still bodily moving towards the north side, as in the present case, I should have thought that she continued to be a crossing ship until the whole of her was at the place across the river where she intended to be. I myself think that if you fall short of that, that if you say that whilst her stern is athwart the river, as in the case of a long ship it may be up to mid-channel, she may be regarded as a crossed ship, such interpretation will be very dangerous. I know that my learned brothers differ from me, and think that when a vessel's head has got as far across the river as it can go she is a crossed ship although her stern is still athwart the river. But I do not think either of them would say this, that if a ship stops while crossing at a place short of that, for any purpose you please, but intending to go on further, she is to be regarded as a crossed ship. Therefore, assume the interpretation of the rule to be as they suggest, the question is, has this ship fulfilled that condition so as to be a crossed ship? Of course on my interpretation there can be no doubt that she was not a crossed ship. If you adopt my brothers' view it comes to be a question of fact whether she was a crossed ship. If she was not, the rule was still in force, and it was her duty to keep out of the way. She is also bound not to put herself in such a position that she cannot keep out of the way. Now, was she in such a position that the rule did not apply? Before I state the result of the evidence, let me say this, that we are not bound down to say that one set of witnesses has told the exact truth, and that the other has told the contrary of the truth. We are bound to con-

sider, taking all the evidence together, what we think is the true state of the facts. When the *Allendale* put her anchor down, had she determined not to go nearer towards the north shore, or was she still, in fact, going towards that shore? She had put her anchor down, not for the purpose of coming to anchor, but in order to check herself round. When she put her anchor down to do that she was not stopped in the water. She was still going on. We are all agreed as to that. Now, if she was still going on, she was going on towards the north shore, though, no doubt, at the same time trying to get round. She was making a circle as it were, and we are told that for the purpose of performing the manœuvre of turning it would be to her advantage to get near to the north shore. The nearer she got to the north shore the less the difficulty in bringing her head to tide, because the flood tide would not have so much power on her starboard bow to prevent her coming round. Therefore, she was in fact still moving towards the shore, in a circle if not in a straight line. I know her engines had been stopped, but that does not at once stop the way of the ship, and was not intended to stop the way of this ship. It was not intended that she should then be still in the water. She was checking herself round by her anchor, which was moving on the ground. It was not intended to hold. Had it been a great deal more chain would have been paid out. Therefore, if the *Allendale* was still moving towards the shore she does not bring herself within the meaning of a crossed ship, because her head had not got as far across as it could go, not even so far across as it was intended to go. Therefore art. 24 was still applicable. If the rule was applicable her duty was to keep out of the way. In my opinion, she has not done so. She had got into such a position that she could not get out of the way, a thing which she had no right to do. If she had taken proper notice of the *River Derwent* she ought to have seen that if she, the *Allendale*, persisted in going across she would certainly bring about a collison unless the *River Derwent* stopped. But she had no right to act so as to throw the obligation on the *River Derwent* to stop. She ought to have got out of the way, but she did nothing to do so. She persisted in doing what she wished to do.

It has been said that if she did not do that, grave mercantile inconvenience would result —viz., that she would have to go up the river a very considerable distance before she could turn. In my opinion that signifies nothing. This regulation is not made with regard to mercantile convenience. It is made for the safety of lives and property on the river Thames, and if it were true that a ship would have to go a mile up the river before she could turn in safety, in my opinion she would be bound to go that distance. But I do not believe it to be a fact that she would have had to go up a considerable distance. On the whole, therefore, I think she broke art. 24, but she also broke another rule in not giving the proper whistle signal. I abjure absolutely and entirely what has been urged on that point in her defence, that though a rule existed she is to be excused for not obeying it on the ground that she did not know it. Were that so it would make these rules a farce. Therefore she broke that rule, but inasmuch as the collision happened in daylight, and those on the *River Derwent* had an opportunity of seeing what the *Allendale* was doing, her disobedience to that rule is immaterial. The *River Derwent* had all the notice, all the knowledge that she would have had even if the *Allendale* had given the signal.

With regard to the *River Derwent*, there is a governing rule of navigation applicable to all vessels which come into close proximity with one another. It is a rule of navigation which does not require any statutory force. Those who have command of a ship have intrusted to them the property of another, and the lives of those on board the ship. Therefore they must not do that which is unreasonable; that is to say, that which is unskilful and negligent, which will put in jeopardy the property and lives intrusted to them. They also owe this duty to other ships navigating near them. Did the *River Derwent* obey that rule? She was coming up the river, she saw that the *Allendale* was crossing the river, and, in my opinion, she must have seen that the *Allendale* intended to continue crossing the river, and that she did not intend to take any steps to keep out of her way. I think there had come a time when she must have seen that the *Allendale* had gone so far that she could not get out of the way. The officer in charge of the *River Derwent* ought to have seen that if he kept on there would be the greatest danger of collision. I am of opinion that he showed a want of due care and skill in not stopping his way, and perhaps also in not starboarding sooner. I think, therefore, that we must hold both these vessels to blame, with the usual consequences as to costs, both in the court below and here.

Lindley, L.J.—With respect to the want of care on the part of the *River Derwent*, it is unnecessary to say much. I do not think anybody who takes the trouble to master the evidence is likely to come to the conclusion that the *River Derwent* was not to blame. Therefore it is not necessary to enlarge upon that point. But the other question is a much more difficult matter—I mean the question whether the *Allendale* is to blame. That depends on the construction of art. 24, as applied to the two vessels in this case. Up to a certain point, anyone can understand what is meant by a crossing ship; but there is or may be a point of time when it is extremely difficult to say whether a ship which had been crossing has ceased to cross. I for one had very grave doubt about it, and we have consulted the gentlemen who assist us as to whether a ship which has got so far across the river that her stem cannot get further across with safety can still be considered a crossing ship because her hull projects athwart the stream. It struck me that the true construction of the rule, apart from scientific evidence, is that, in such circumstances, a vessel ought not to be considered as a crossing vessel. That is my opinion, and I am glad to say that that opinion is confirmed by the gentlemen who assist us; that is to say, men skilled in navigation and seafaring life are of opinion that a vessel in such circumstances would not be a crossing vessel. Therefore, if the *Allendale* had got into that position, I should have said that her crossing had ceased, and that she was no longer a crossing vessel. But I do not think

that she had got into anything like that position. If she had got her head up or down the river, then of course her crossing had ceased. But it appears to me that a vessel which is short of that, and was actually coming round as this was, is not so near the other side as to incur the benefit of the construction I have referred to, so as to be no longer a crossing vessel within the meaning of the rule. I think that from first to last she was a crossing vessel, and neglected the duty cast upon her as such. I therefore think that both these vessels are to blame.

Lopes, L.J.—This case depends upon the construction of art. 24, and how far it is applicable to the circumstances proved by the evidence. I throughout have entertained a strong opinion as to what the true interpretation of the rule is; I was not able to interpret it in its nautical meaning, if it had a nautical meaning, but I was prepared to interpret it according to the ordinary meaning of the language used. We have had advice from the assessors as to the nautical meaning of the rule, and it is satisfactory to find that it agrees with my view. Giving an ordinary meaning to the language used, I think that a ship crossing has crossed when she approaches the other side as near as she safely can, though she be angling to the bank and athwart the stream. Applying the rule so interpreted to the present case, how does it stand? At the time of the collision the *Allendale* had not approached the other side as near as she could. Indeed, we are told by the assessors that, having regard to the purpose for which she had gone towards the north shore, she might with advantage have approached nearer. At the time of the collision she was, in my opinion, still nearing the northern side of the river. If that is so, the article was applicable to this case, and the *Allendale* at the time of the collision was still a crossing ship. Under these circumstances I am of opinion that the judgment of the learned judge below must be varied by holding both ships to blame.

Solicitors for the appellants, *W. A. Crump* and *Son*.

Solicitors for the respondents, *Botterell* and *Roche*.

Saturday, Dec. 7, 1889.

(Before Lord Esher, M.R., Lindley and Lopes, L.JJ., assisted by Nautical Assessors.)

The Duke of Buccleuch. (*a*)

Collision—Lights—Obscuration—Regulations for Preventing Collisions at Sea, art. 6—*Merchant Shipping Act* 1873 (36 *&* 37 *Vict. c.* 85), *s.* 17.

In a collision action where either party has infringed the Regulations for Preventing Collisions at Sea, he is deemed to be in fault unless he can establish that the infringement could not possibly have caused or contributed to the collision; and it is the duty of the judge to determine upon the evidence whether or not the party committing the breach has satisfied the burden of proof that the breach could not possibly have occasioned or contributed to the collision.

The steamship A. collided with the sailing ship B., striking her on the port bow with her stern. The red light of the sailing ship was obscured by the foresail to a vessel substantially right ahead. The steamship approached the sailing ship on a bearing never less than one point to two and a half points on the port bow, and the red light of the sailing ship was in fact always open to the steamship.

Held, that, on the proper construction of sect. 17 *of the Merchant Shipping Act* 1873, *although the sailing ship had infringed the regulations as to lights, the court was bound to consider the evidence as to whether such infringement could in fact have contributed to the collision, and that, as in the circumstances the infringement could not possibly have contributed to the collision, the owners of the sailing ship were not to blame.*

This was an appeal by the plaintiffs in a collision action from a decision of Butt, J. holding both ships to blame.

The collision occurred in the English Channel on the 7th March 1889 between the plaintiffs' full-rigged sailing ship the *Vandalia* and the defendants' steamship the *Duke of Buccleuch*, when the *Duke of Buccleuch* was lost with all hands.

The facts alleged by the plaintiffs were as follows: At about 10.45 a.m. on the 7th March 1889 the *Vandalia*, a full-rigged sailing ship of 1422 tons register, was on a voyage from New York to London, laden with a cargo of petroleum. She was in the English Channel, the *Owers* lightship bearing about N. by W., distant thirteen miles, sailing close-hauled on the starboard tack, heading about E. ¾ S. magnetic, under three whole topsails, courses, foretopmast staysail, and two jibs. 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 her saw a bright light, which proved to be the masthead light of the *Duke of Buccleuch*, about one and a half points on the port bow, and distant about four or five miles. Soon afterwards the green light of the *Duke of Buccleuch* came into view on about the same bearing. The *Vandalia* was kept on her course close by the wind. The *Duke of Buccleuch* rapidly approached, still on the same bearing, and, although loudly hailed, she came on apparently under a starboard helm, and with her stem struck the port bow of the *Vandalia*.

In consequence of the *Duke of Buccleuch* having been lost with all hands, the defendants gave no evidence as to the circumstances of the collision. They proved that the *Duke of Buccleuch* was a screw steamship of 2023 tons net register, and that at the time of the collision she was on a voyage from Antwerp to India, laden with a general cargo. They also gave evidence, from measurements taken subsequently to the collision, to show that the port side light of the *Vandalia* was obscured by the foresail, and contended that therefore the *Vandalia* was to blame for a breach of the Regulations for Preventing Collisions at Sea.

At the close of the case Butt, J. stated that he had determined to send his assessors to inspect the *Vandalia*, giving liberty to the parties to be represented at such inspection by one surveyor each. This was accordingly done, and the effect of the inspection appears in the judgment.

The judgment of Butt, J., so far as is material,

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

was as follows:—Coming now to this case, I have had the advantage of a consultation with the Elder Brethren, who have been down and inspected this ship, and I will state the result of their observations. They tell me that their observations have convinced them of this: that with the yards absolutely sharp-braced, and without allowing for any bellying of the sails, the line of light shows outside the foresail, but that the line of light is above the bottom of the foresail; that is, the horizontal line of light. They also tell me this: that if the yards, instead of being sharp-braced, were checked, or, still more, if they were square, the line of light parallel with the keel of the vessel would be considerably inside the outer edge of the sail, and would also be above the bottom of the sail. In other words, it would be seriously obscured from forward. I have now to consider what the result of that information must be. Now, assuming that the yards were absolutely sharp-braced, I am advised that, apart from the bellying of the sail, there would be no obscuration of the lights even right ahead; but that it is impossible to say with a little bellying the obscuration might not happen. Are the owners of the *Vandalia* to be held to blame by virtue of the 17th section of the Merchant Shipping Act 1873? That section is as follows: "If in any case of collision it is proved to the court before which the case is tried that any of the regulations for preventing collisions contained in or made under the Merchant Shipping Acts 1854 to 1873 has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulations necessary." Now, it follows from what I have stated that, in consequence of this ship's lights being placed where they were, she was guilty of a breach of the regulations. Whether the infringement of the regulation operated at the time in question is another matter; but I cannot hesitate to say, upon the advice I have received, and the evidence, that these side lights were improperly placed. How am I to apply the Act of Parliament? It may be that, if the yards were braced absolutely sharp up at the time, the lights would not have been obscured by the sail from ahead. Here let me state what I had forgotten to do before—that the Elder Brethren satisfied themselves that with the foresail carried as a mainsail, that sail on the mainyard would cause no obscuration. It is the foresail proper of which I have been speaking, and with which I have been dealing. Am I to take it that this vessel had her yards absolutely sharp-braced? I do not think I can. I think the Act of Parliament was passed to prevent me going into those nice questions of fact, and I think that the decisions upon this section have gone upon that view. That being so, I must hold that there was an infringement of art. 6 of the Regulations for Preventing Collisions at Sea, which "might possibly"—I am using the words which I think were used in the Privy Council and also in the Court of Appeal—"have contributed to or caused this collision." That being so, I must hold the *Vandalia* to blame. The next question I have to consider is totally different—viz., whether the violation of the regulation did, as a matter of fact, cause the collision. I think it clear that, if the evidence from the *Vandalia* is to be accepted as accurate, there would have been no obscuration at all to the *Duke of Buccleuch* approaching as she was, because the evidence is that the witnesses saw the *Duke of Buccleuch* at a bearing which they describe as a point to a point and a half on their bow. At that breadth of bearing there would be no obscuration. I am not quite certain that I am safe in taking that bearing—I doubt whether I ought to take it; but the Elder Brethren tell me this—that, even from right ahead, in the existing state of the weather, the lights of the *Vandalia* must certainly have been visible as she rose and fell in the seaway. Therefore a vigilant look-out on the *Duke of Buccleuch* would have informed her, long before she came into close proximity, of the approach of the *Vandalia*. I therefore hold that there was an infringement of art. 6 of the Regulations for Preventing Collisions at Sea, for which I must under sect. 17 of the Merchant Shipping Act 1873, hold the *Vandalia* to blame. On the other hand, I think it impossible to acquit the *Duke of Buccleuch* from blame, inasmuch as, upon any view, we think they ought—at intervals, at all events—to have seen the side light of the *Vandalia*. In the result, I pronounce both vessels to blame.

From this decision the plaintiffs now appealed.

The Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 17:

> If in any case of collision it is proved to the court before which the case is tried that any of the regulations for preventing collisions contained in or made under the Merchant Shipping Acts 1854 to 1873, have 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 a departure from the regulations necessary.

Cohen, Q.C. and *Myburgh*, Q.C. (with them Dr. *Raikes*) for the appellants.—The breach of the regulations did not in fact contribute to the collision. It is also submitted that it could not possibly have done so. The obscuration of the light was only to a vessel right ahead, whereas the *Duke of Buccleuch* was always one or two points on the bow of the *Vandalia*. The learned judge was wrong in refusing to inquire into those facts. His finding is confined to the fact that the obscuration of the light was only to a vessel right ahead. The evidence showed that the *Duke of Buccleuch* was always from one to two points on the bow of the *Vandalia*. It is submitted that the learned judge ought to have inquired into the truth of this alleged fact, and also whether the light would be obscured to a vessel approaching on such a bearing. If it would not in fact have been obscured to the *Duke of Buccleuch*, then the infringement could not possibly have contributed to the collision, and therefore sect. 17 of the Merchant Shipping Act 1873 is not applicable to this case:

The Fanny M. Carvill, 32 L. T. Rep. N. S. 646; 2 Asp. Mar. Law Cas. 565; 13 App. Cas. 455, n.

Sir *Walter Phillimore*, *Barnes*, Q.C., and *F. Laing*, for the respondents, *contra*.—The decision of Butt, J. is right. The Act of Parliament was meant to cast liability upon parties infringing the regulations unless upon the undisputed facts it is clear that the infringement could not possibly have caused or contributed to the collision. It was never intended that the court

should inquire into nice questions of fact, about which it might come to an erroneous conclusion, as to whether it was possible that the infringement could have contributed to the collision:

The Fanny M. Carvill (ubi sup.);
The Dunelm, 51 L. T. Rep. N. S. 214; 9 P. Div. 164; 5 Asp. Mar. Law Cas. 304;
The Arklow, 50 L. T. Rep. N. S. 305; 9 App. Cas. 136; 5 Asp. Mar. Law Cas. 219.

Lord Esher, M.R. — The law applicable to this case is that which was laid down in *The Fanny M. Carvill (ubi sup.)*. It has been suggested that the case has not, as to the point for which it has been used before us, been approved by the House of Lords. I think it has been approved as to the very point by the House of Lords. I think that tribunal has expressed approval of it as a whole; but, whether that is so or not, I am of opinion that I should, even without the authority of the House of Lords, adopt the judgment in *The Fanny M. Carvill (ubi sup.)*. I think the decision was a right and wholesome one, and one to which the judges who decided the case must inevitably have come. They could not construe this stringent Act of Parliament literally, for, if they did, it would lead to manifest absurdities. I think their rule of construction was right. They in effect say: "We must construe it literally as nearly as possible; we must construe it as strictly as is possible, but so as not to lead to the various absurdities which have in argument been pointed out to us; short of that we must construe it to its full extent." On referring to the judgment, I find they say this: "Their Lordships are so far from dissenting from this finding, that they are prepared to go beyond what is directly expressed by it, and to hold on the evidence before them, and for the reasons next to be stated, that, in the circumstances in which these vessels were placed, the green light of the *Peru* could not by any possibility have been seen by those on board the *Fanny M. Carvill*." Later on they say: "They conceive that the Legislature intended at least to obviate the necessity for the determination of this question of fact—often a very nice one—upon conflicting evidence." They again say: "The presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision." They then lay down the rule in these words: "It gives effect to the statute by excluding proof that an infringement which might have contributed to the collision did not in fact do so; and by throwing on the party guilty of the infringement the burden of showing that it could not possibly have done so." I take it that that case decides this: that if it can be shown that a vessel —I will confine my remarks to lights—has not complied with the regulations as to lights, she must be held to blame, unless she can prove that the defect as to her light or lights could not by any possibility have contributed to the collision. The whole burden of proof lies upon her; but the court must try the question of fact, whether the defect could by any possibility have contributed to the collision. That may sometimes be a very easy matter to decide. For instance, if an approaching vessel is always broad on the port side of a vessel which has a defect in her starboard light, it does not take a moment's consideration to see that the defect in the green light could not by any possibility have contributed to a collision with this vessel which approached on the port side. Another example of the absurd consequences of construing the section strictly would be this: Assume a ship which has a defective foghorn on board collides in clear weather with another ship. Must the breach of the regulation as to the foghorn force the court to hold her in fault? Those are simple cases. Let us consider a less simple one. Assume a defect in a light the effect of which is to obscure it to another ship approaching end on, or nearly so, but not to do so to a vessel approaching about abeam. If that is proved, it is as clear as in the first two cases that the defect in the light could not by any possibility affect a collision with a vessel coming up on the beam. It may not be so easy to prove, but that is immaterial.

Assume that state of things to be alleged, what must the court do? There may be a dispute of evidence as to the quarter from which the other ship approached, and if at the end of the case the evidence leaves the court in doubt whether the other ship was coming up on the beam or not, then the vessel which has infringed the regulations has failed in the burden of proof which the law casts upon her. She has not shown that the defect in her light could not by any possibility have affected the collision, because, if there is any doubt whether the other vessel was coming towards her from nearly ahead, there is still a doubt whether the defective light may not have affected the collision. Therefore, if the evidence leaves in doubt the position of the ships, the burden of proof is not satisfied. But if, there being a conflict of evidence, the court in the result is of opinion that the approaching vessel was coming towards the other on the beam, and that the light would only be obscured to a vessel approaching one or two points on the bow, the burden of proof is satisfied, because the vessel on whom the burden lies has proved beyond all reasonable doubt that the defective light could not have had any effect on the collision. That is a broad case; but the principle is applicable to any other analogous case. If there is a dispute as to how a vessel is approaching, the evidence on one side showing that the defect could not possibly have any effect on the collision, and the evidence on the other side showing that it might, then the court must try the question of fact of how the ship was approaching. If, as I said before, the court is left in any doubt at all, the ship which has infringed the regulation fails in the burden of proof. But, though there is a conflict of evidence, if the court, after having heard it, comes to a clear conclusion that the vessels were so approaching one another that the defect in the light could not possibly affect the collision, the court must say so, and the defect then becomes immaterial. Therefore I say that the burden of proof lies on the ship whose lights are shown to be defective, and she must satisfy the court clearly of this, but if she leaves it in doubt she has failed in the burden of proof.

Let us see how that will apply to the present case. There is a defect in the *Vandalia's* light. If there had been any doubt as to the extent of that defect, we must have taken the worst view of it as against her. If it had been in doubt whether the obscuration was ½ point or 2½ points, we must have taken it as being 2½ points. But in this case we

have had not merely the evidence of witnesses, but also the result of an inspection of the vessel by two Trinity Masters, who had an opportunity of judging exactly of the nature and extent of the obscuration—what did they report to the learned judge? I have seen him personally, and he has told me exactly what his assessors reported to him. After the most careful examination, they came to the conclusion that, if the sails of this vessel were braced absolutely sharp, there would be no obscuration of the lights, even to a ship straight ahead; but that if they were not braced absolutely sharp, there was—not a continuous obscuration—a casual and occasional obscuration of lights to a ship coming end on, or nearly end on, and this obscuration would only take place if the ship was pitching, and then only for a short time. But a vessel approaching end on has a right to have the full extent of the lights open to her continuously during the time she is called upon to act. If, therefore, a vessel were approaching her end on or nearly end on, the question would not be whether the partial and momentary obscuration of the light prevented her from seeing the *Vandalia*. The question would be whether it might not prevent her seeing the *Vandalia* during any part of the time during which she might have to act, and so affect her conduct. If that were so, the *Vandalia* would fail, because the court could not say that by no possibility could the obscuration have any effect on the conduct of the other vessel. I may say that the gentlemen who assist us have made calculations from the measurements, and, from the drawing they have made, I at first thought that they were going to tell us that this light was never obscured at all. The obscuration is as fine as that. But, as a matter of fact, they agree with the report of the Trinity Masters, and give us the same advice as was given to the learned judge. If that is so, the question is, are we satisfied that these vessels were approaching each other so that such an obscuration could not possibly have affected the conduct of the steamer in the then existing circumstances? That depends on how the steamer was approaching the *Vandalia*. We are satisfied on the evidence that the *Vandalia* was kept close-hauled on the starboard tack, heading as nearly as possible east by her compass. Now, how was the steamer approaching her? We know pretty well where the *Vandalia* was with regard to the Channel and the coast, and we know that the steamer was coming out from the land towards her, and showing the green light to her. It is argued that those on the *Vandalia* might see the steamer's green light nearly ahead at a distance of two miles and yet come into collision with her. That I think impossible; if that bearing and distance were true the steamer must have crossed. Therefore I do not think she was ahead of the *Vandalia* at a distance of two miles, or at any time. On the whole, I have come to the conclusion that it is satisfactorily proved that the steamer never was ahead of the *Vandalia*—when I say ahead, I do not limit myself to a quarter or half a point. I say she never could have been within 1½ points of being ahead of her. Now, the steamer was approaching showing her green light, the bearing of which gradually diminished to 1½ points. Therefore we have got these facts: The light is only obscured to a vessel approaching ahead or nearly ahead, and cannot have any effect on a vessel which is approaching on a bearing of 1½ points, and the steamer is never less than 1½ points on the bow. What is the conclusion? It is that the obscuration of this light could not possibly have been apparent to this steamer, as she was in fact approaching her. If that is so, the decision in *The Fanny M. Carvill* (*ubi sup.*) applies. Those on whom the burden of proof rested have made out all that they need establish. Therefore I think that the defect in this light ought not to have the result of making me declare the *Vandalia* to be in fault, being perfectly convinced that in point of truth it never had any effect on the collision. Where I venture to differ from Butt, J. is, that I think he narrowed the case too much from *The Fanny M. Carvill* (*ubi sup.*). He came to the conclusion that he ought not to inquire into the position of the vessels. I think he was bound to inquire, and, had he done so, I think he would have come to the same conclusion as we have done. Therefore the point of law on which I differ from him is this: He said he ought not to inquire into the position of these two vessels. I think he ought. I have endeavoured to show that the whole burden of proof rests on the vessel whose lights were defective, and that she must show that that defect could not have any effect on the collision. I think the *Vandalia* has satisfied that burden, and that therefore she is not to blame. If the defect as to her light could not have obscured it from the steamer, nobody can have any doubt but that the steamer was solely to blame. The judgment of the Admiralty Court must be varied, and the finding must be that the steamer was solely to blame.

Lindley, L.J.—There are, as I understand, three questions in this case—two of fact, and one of law. The first is, whether the rule relating to the red light has been infringed. That depends upon the wording of the rule, and the evidence relating to the red light. It must be taken from the report of the assessors in the court below that in certain circumstances the red light would be, or might be, obscured by the sails in the ordinary course of navigation. If that is true, then it appears to me to follow that the rule as to the red light has been infringed. Unless the rule has been infringed, there is no ground for applying sect. 17 of the Merchant Shipping Act 1873. But when you get it as a fact that the red light was not what it ought to be—was not so constructed as to give the unbroken range of light required by the regulations—then arises the question, what must be the legal consequences of that infringement? That question of law appears to me to be satisfactorily and rationally settled in the case of *The Fanny M. Carvill* (*ubi sup.*). We are not to construe the Act of Parliament so as to reduce it to absurdity. We are not to attribute to general language used by the Legislature a meaning that would not only not carry out its object, but produce consequences which to the ordinary intelligence are absurd. We must give it such a meaning as will carry out its object. The construction put on this section by the Privy Council is, in my opinion, based on the soundest principles.

We must next consider the question of fact. Could this departure from the requisites of the rule as to lights have any effect in this case upon the collision? It is for the infringing ship to prove that it could not—a very diffi-

cult burden sometimes, and at other times a very easy burden to discharge, as in the cases put by the Master of the Rolls. In some cases the burden becomes impossible. In this case it is not impossible. To investigate the question of fact, we must ascertain where the ships were, what they were doing, and what the surrounding circumstances were. Now, having regard to the fact that all the evidence comes from one side, it is necessary to be very cautious, and therefore we must look at it with care. It appears to me to be established that this steamer was at least a point or a point and a half on the port bow of the sailing vessel. I do not believe that she could have been less, for if she had I am satisfied that she would have crossed. The steamer was never narrower on the sailing ship's bow than I have said. It therefore follows that the obscuration of the light could not possibly have had any effect on the collision. Under these circumstances it appears to me that the plaintiffs' appeal is successful, and that the steamer is alone to blame.

LOPES, L.J.—The Merchant Shipping Act 1873 (36 & 37 Vict. c. 85), s. 17, 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 collisions contained in or made under the Merchant Shipping Acts 1854 to 1873 have 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 a departure from the regulations necessary." The object of the statute is to enforce the observance of the regulations; but if the infringement is one which has no possible connection with the collision, and could not by any possibility have contributed to it, then the section does not apply. That, as I understand, is the decision in *The Fanny M. Carvill* (*ubi sup.*). I entirely agree with that decision and the law laid down. I think it is sound, reasonable, and right. Now, apply that decision to the present case. In the first place, there are certain facts to be determined in order that we may apply it, and we have to inquire into the facts in such cases and consider the surrounding circumstances. In the present case the court has specially to consider and inquire into the relative positions of these vessels. Now, I am of opinion, and we are so advised, that the green light of the steamer was at least a point or a point and a half on the port bow of the *Vandalia*, and if so, it appears to me that by no possibility could there have been any obscuration of light to the steamer In these circumstances, therefore, I agree with the rest of the court that the steamer was alone to blame.

Appeal allowed.

Solicitors: for the plaintiffs, *Thos. Cooper* and *Co.*; for the defendants, *Gellatly, Son,* and *Warton.*

Tuesday, Dec. 10, 1889.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ., assisted by NAUTICAL ASSESSORS.)

THE CITY OF LINCOLN. (*a*)

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

Collision — Stranding — Consequential damage— Remoteness.

In an action for damages by collision, a claim for consequential loss, caused by a mistake of the master of the injured vessel after the collision, is recoverable from the wrongdoer in the absence of negligence or want of ordinarg skill on the part of the master, provided such mistake was one which might reasonably have been made in consequence of the damaged condition of the vessel.

A collision between the Swedish barque A. and the steamship C., about 6 p.m. on the 7th Nov., about twelve miles N. of the Hinder Lightship, was solely caused by the negligent navigation of the steamship. In consequence of the collision the barque's starboard quarter was cut off, and her steering compass, log glass, and gear for rudder and wheel were lost. The steering compass having been replaced by a spare compass and tackles having been rigged on to the rudder, the master of the A., with a view to saving the vessel, sailed up the Thames, but between three and four p.m. next day the A. went ashore in consequence of her master mistaking the Tongue Lightship for the Kentish Knock. The owners of the barque (inter alia) claimed for the loss occasioned by the stranding:

Held, that the stranding was due to the master of the barque being deprived by the collision of the ordinary means of navigation, and that in the circumstances the owners of the steamship were liable.

THIS was an appeal by the plaintiffs from a decision of Butt, J. in a collision action.

The collision occurred on the 7th Nov. 1888 between the plaintiffs' barque the *Albatross* and the defendants' steamship the *City of Lincoln.*

The defendants having admitted liability, the assessment of damages was referred to the registrar and merchants. At the reference the plaintiffs claimed (*inter alia*) for the loss of their barque subsequently to the collision, when she was making for a port of safety in a damaged condition.

The registrar allowed this claim. His report was as follows:

On the 29th Oct. 1888 the Swedish barque *Albatross* of 483 tons left Sundswall for Cardiff with a cargo of battens, and with a crew of ten hands all told. On the 7th Nov., at about 6 p.m., the defendants' steamship *City of Lincoln* of 2103 tons, bound to Bremerhaven collided with her about twelve miles north of the North Hinder Light, cutting off her starboard quarter and doing other damage. The mate of the *City of Lincoln* came on board her and remained whilst the steamship proceeded on her voyage. With the view of saving the barque, she was taken, though difficult to manage, towards the English coast, and between 3 and 4 p.m. a lightship was discerned, which those on board the barque, as well as the mate of the *City of Lincoln*, supposed to be the *Kentish Knock*, and thereupon, after sounding, the barque's course was altered to the north, and the vessel almost immediately grounded on what proved to be the Long Sand, and it became necessary for those on board to abandon the vessel, and to make for

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

the lightship, which turned out to be the *Tongue Lightship* instead of the *Kentish Knock*. On the following morning they were landed at Gravesend, while the barque was found by salvors and taken into Harwich. Under these circumstances, which it is not necessary I should state more fully, counsel on both sides have requested me to report at this stage solely on the question whether the grounding of this vessel under the circumstances stated in the evidence is to be considered as damages consequential on the collision, and for which the defendants, the owners of the wrong-doing ship, are liable. Having heard counsel on this point, I am of opinion, and the merchant assessor concurs in it, that the grounding of the barque was not due to any culpable negligence or want of skill of those on board her, and that the defendants are liable for all additional damages which may have resulted from such grounding.

The defendants appealed from this finding.

Barnes, Q.C., *H. Stokes*, and Dr. *Stubbs* for the plaintiffs.

Sir *Walter Phillimore* and *J. P. Aspinall* for the defendants.

Butt, J.—A question of more or less nicety has been discussed in this case, and authorities as to what damages are recoverable and what are too remote have been cited. I do not think it is necessary to go into that, because, if the view I take of this case, under the advice of the Elder Brethren, is right in point of fact, no nice questions of law arise. I have asked the Elder Brethren this question: "Was the stranding of the *Albatross*, having regard to the condition in which she was, the result of accident alone, or was it brought about by want of ordinary care and skill on the part of those in charge?" They advise me that there are several respects in which those in charge of the barque were wanting in the exercise of ordinary care and skill; a cast of the lead would have shown them that the lightship they saw could not have been the *Kentish Knock*, and the neglect to take that precaution in itself was want of ordinary care. Again, they had set their course from the position indicated to them as the position in which they were by the officer of the *City of Lincoln*, and were steering with a compass which, I believe, they got up from the hold, and was in fact a make-shift compass. That in itself was a matter which ought to have induced rather more than ordinary care. They set a course, and on that course they ought to have known that they should pass close by the *Galloper* lightship, and the fact of their not making that lightship ought to have told them that they were not in the position they imagined they were. The Elder Brethren advise me that all these matters amount to want of ordinary care and skill, and so far as I am able to form an opinion upon such a subject I entirely agree with them. Therefore the conclusion to which I have come is, that the damages arising out of the stranding of the *Albatross* are not the direct consequences or result of the collision. That being so, the plaintiffs are not entitled to recover in respect of the stranding.

The plaintiffs appealed.

From the evidence given before the registrar it appeared that the *Albatross* had her starboard quarter cut off in the collision, that she was making a considerable quantity of water, that she lost her steering compass, log, glass, and gear for rudder and wheel. After the collision the steering compass was replaced by a spare one from below, and tackles were rigged on to the rudder.

Barnes, Q.C., *H. Stokes*, and Dr. *Stubbs* for the plaintiffs in support of the appeal.—The learned judge was wrong in finding that the stranding was occasioned by the negligence of those in charge of the *Albatross*. Assuming them not to have been negligent, then these damages are recoverable:

The Pensher, Swab. 213;
The Countess of Durham, 9 Monthly Law Magazine, 279;
The Notting Hill, 51 L. T. Rep. N. S. 66; 5 Asp. Mar. Law Cas. 241; 9 P. Div. 105;
Hadley v. *Baxendale*, 9 Ex. 341; 23 L. J. 179, Ex.;
Wilson v. *Newport Dock Company*, 14 L. T. Rep. N. S. 230; L. Rep. 1 Ex. 177.

Sir *Walter Phillimore* and *J. P. Aspinall*, for the defendants, *contra*.—The judge was right in finding that the stranding was occasioned by the negligence of those in charge of the barque. Assuming them to have been guilty of no negligence, the plaintiffs are not entitled to recover these damages. There is no connection between the collision and the stranding. The stranding is the result of a mistake by the master of the barque:

The Flying Fish, Br. & L. 436.

The true test is, that wherever the act of man comes in the chain of consequence is broken, so as to relieve the original wrongdoer from subsequent liability, unless the claimant has no time to deliberate, and in consequence of the position in which he has been placed by the wrongdoer he has to act on a sudden emergency. [Lopes, L.J. referred to *Jones* v. *Boyce*, 1 Stark. 493.] That case refers only to a sudden emergency, and not to a case like the present where there was ample time for deliberation. The distinction between the case of *Jones* v. *Boyce* (*ubi sup.*) and the present is pointed out in *Adams* v. *Lancashire and Yorkshire Railway Company* (L. Rep. 4 C. P. 742). In *The Argentino* (59 L. T. Rep. N. S. 914; 13 P. Div. 198; 6 Asp. Mar. Law Cas. 348), the Master of the Rolls said that if the damage "is only brought to be the result of the act complained of by reason of some intermediate act or circumstance which might or might not have happened between the act complained of and the result relied on," then the damage is not recoverable. Those words are applicable to the present case. The master mistook the lightship and so brought about an accident, and this is an accident which might have happened to a ship in perfect condition just as well as to this ship, and the condition of the ship has no connection with its loss. Consequently the cause is not the collision but something else, to wit, the mistake of the master, and this is an intermediate act which might or might not have happened between the act complained of, the collision, and the result relied on, the stranding.

Barnes, Q.C. in reply.

Lord Esher, M.R.—In this case it seems to us, after having carefully considered all the evidence, that the wrongful act of the defendants did not merely damage the barque, but had this further effect, that it deprived the captain of his best charts, of his best compass, and his best log line. It was very difficult for him to know where he was. In these circumstances he resolved, and it is not contended wrongly, to make for the Thames. But he had to make for the Thames not exactly knowing his place of departure,

without having the usual means of marking off his course on a proper chart, and without having the usual means of calculating his speed. We are advised by the gentlemen who assist us that in those circumstances he was not guilty of any want of skill in not knowing whereabouts on the sea he was. It almost necessarily follows from that that he was not guilty of any want of skill in not knowing what the light was which he saw; *i.e*, in other words in concluding that the light was the *Kentish Knock* when, in fact, it was not. Now, if that be true, then comes this question: If he was not wrong in assuming the light to be the *Kentish Knock*, did he, upon that assumption, do anything which was wrong? Was he wrong in not going up close to the lightship to see its name, as it is suggested he ought to have done? It is the first time I ever heard such a suggestion advanced. Whether it may be right in some circumstances, although to me it seems a strange thing, is immaterial for the present purpose. In this case his omission to do so was not a want of care and skill. Taking into account the various assumptions I have referred to, there next comes the question whether the master of the barque was wrong, when he sounded and got five fathoms, to port his helm for the purpose, as he thought, of going round these sands? We are advised that he was not wrong in so doing. The result is, that he was guilty of no want of ordinary care and skill, unless it is established that he ought to have sounded as the barque sailed along. Considering how and where the barque was sailing, I doubt whether, until she came near the lightship, her master could be said to be guilty of any want of care or skill in not sounding as she came along. There is this much to be said, that if he had sounded it would have told him nothing. He did sound when he saw the light, and that was at a time when, assuming it to be the *Kentish Knock*, it was a proper thing to do. On the whole, the result is that we have come to the conclusion, assisted by advice from our assessors, that this captain was not guilty of any want of care and skill. I do not think that the mere fact of a master being put into the position this master was by the wrongful act of the defendants, and his not acting negligently necessarily concludes such a case as this, and necessarily makes the defendants liable for all the damage which occurred after their wrongful act. I agree that there may be intermediate circumstances which prevent the ultimate damage being regarded as the result of the wrongful act of the defendants so as to make them liable. But in this case it seems to me to be the inevitable conclusion that the ultimate loss of the ship was caused by her master being deprived of the means of calculating where he was, such deprivation being the direct result of defendants' wrongful act. Where defendants do a wrongful act which deprives the plaintiff or those for whom he is responsible of the means of averting that which ultimately happens, I think it follows, as a matter of course, that that which ultimately happens is the result solely of the wrongful act of the defendants. Therefore, without considering cases in which the damage may be too remote, I think that in this case it is clear that the ultimate damage is not too remote. Under those circumstances, I think the registrar and merchants must assess the damages upon the principle we have indicated. I do not think that any of the cases cited are contrary to what I have said.

Lindley, L.J.—I am of the same opinion. As regards the evidence of the officer from the *City of Lincoln*, who was on board the sailing vessel, it is obvious that it was given with a view to minimise the loss to his owners. I think that the view of the facts taken by the registrar who saw the witnesses was correct, and having regard to what the Master of the Rolls has said, it will not be necessary for me to go over them again. We are advised that there was nothing negligent or unseamanlike in the conduct of the master of the *Albatross*. We cannot therefore accept the view that it was his negligence or want of skill which led to the ultimate loss of this ship. On that point we differ from Butt, J. But that does not dispose of the case, because assuming there was no negligence on the part of the master of the *Albatross*, the question arises whether her ultimate loss is not too remote a consequence of the collision to render the defendant liable for it. That depends on the application to this particular case of the general rule applicable to damages, and for that I refer to Mayne on Damages. He says: "Damage is said to be too remote when, although arising out of the cause of action, it does not so immediately and necessarily follow from it as that the offending party can be made responsible for it." Later on he says: "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 defendants' 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." That is a general method of stating the rule which as I understand was applied by Lord Herschell in the case of *The Argentino* (*ubi sup.*), and without criticising it, I take it to be sufficiently accurate for the purpose. What we have to consider is, what is meant by "the ordinary course of things." Sir Walter Phillimore has asked us to exclude from the "ordinary course of things" all human conduct. I cannot do anything of the kind. I take it that reasonable human conduct is part of the "ordinary course of things." So far as I can see, the ordinary course of things, so far from excluding human conduct, includes the reasonable conduct of those who, having sustained damage, seek to save themselves from further loss. Let us see what are the facts. What was the real cause of the mischief? It seems to me that it was the deprivation of the barque's master of the means of ascertaining his position, and properly navigating his ship. He was deprived of his compass, his logline, and his charts, and his vessel was practically waterlogged. I do not say that the barque was utterly unmanageable, for she was, as we know, navigated a considerable distance, but in any event I do not think that her master was to blame for making the mistake he did. In these circumstances it appears to me that this case is one of those in which the ultimate loss was within the rule I have stated as to the "ordinary course of things," and that therefore the defendants must pay for the damages incidental to the stranding of the barque.

Lopes, L.J.—We have been advised that, having regard to the condition of the *Albatross*, her loss

was not caused by a want of proper care or skill on the part of those in charge of her. That being so, it appears to me that the case may be stated thus: By the misconduct of the defendants the plaintiffs' ship was placed in a position of the utmost peril. The plaintiffs, to save their ship and minimise as far as possible the loss to the defendants, endeavoured to reach a place of safety. Whilst so endeavouring, without any negligence on the part of those in charge of her or any want of skill, and without any intervening independent cause, the *Albatross* ran ashore. In those circumstance are the defendants liable for the stranding? In my opinion they are. The original fault being the defendants', they are broadly speaking responsible for what follows. They are responsible for all the natural consequences occasioned by their original misconduct; when I say original misconduct, I mean not only the collision but also the deprivation of the *Albatross* of the usual means of navigation. If those consequences were caused by any want of skill on the part of those in charge of the *Albatross*, no liability would attach to the defendants. If the consequential loss had been brought about by the independent act of a third party no liability would attach. If the consequential loss had been caused by anything which those on board the *Albatross* by the exercise of proper skill and care could have prevented, no liability would attach. But in this case we are advised that there was no want of skill on the part of those on board the *Albatross*, and it is not suggested that there was any interposition or act of a third party. In these circumstances I am clearly of opinion that what happened to the *Albatross* subsequently to the collision was the natural result of the wrongful act of the defendants, and I think, therefore, that the decision of the learned judge should be reversed.

Appeal allowed.

Solicitors for the plaintiffs, *Stokes, Saunders*, and *Stokes*.

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

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Thursday, Nov. 28, 1889.

(Before Butt, J., assisted by Trinity Masters.)

The Constantia. (*a*)

Collision—Sailing ships—Fog—Regulations for Preventing Collisions at Sea, art. 12.

Where a sailing vessel is tacking in a fog, she is not relieved during the manœuvre from giving the signals prescribed by art. 12 *of the Regulations for Preventing Collisions at Sea, and it is her duty until she gets the wind on to the side other than that on which she has had it to treat herself as still on the tack on which she was when she began to go about and to make the prescribed signal, and only to change that signal when she gets the wind on the other side.*

This was a collision action *in rem* by the owners of the schooner *Iona* against the owners of the Norwegian barque *Constantia*.

The collision occurred in the Bristol Channel about 5.30 a.m. on the 29th March 1889.

The facts alleged by the plaintiffs were as follows: Shortly before 5.30 a.m. on the 29th March the *Iona*, a schooner of ninety-nine tons register, manned by a crew of five hands all told, and laden with a cargo of coals, was in the Bristol Channel in the course of a voyage from Newport to Portugal. She was about ten miles N.N.E. of Lundy Island. The wind was a moderate breeze from the N.W. and the weather was thick. The *Iona* was on the starboard tack heading about W.S.W., and making about three knots an hour under all plain sail. Her lights were duly exhibited and burning brightly, her foghorn was being duly sounded, and a good look-out was being kept on board of her. In these circumstances those on board the *Iona* saw the green light and sail of a vessel which proved to be the *Constantia* distant about half a mile, and bearing about three points on the port bow. The *Iona* was kept close to the wind and her foghorn blown, and as the *Constantia* approached she was loudly hailed, but she nevertheless came on at great speed, and with her stem struck the bowsprit of the *Iona*, and afterwards with her starboard anchor struck the port bow of the *Iona* and did her great damage.

The plaintiffs (*inter alia*) charged the defendants with failing to give proper or any indication of their position and the course they were on.

The facts alleged by the defendants were as follows: Shortly before 5.30 a.m. on the 29th March the *Constantia*, a foreign barque of 427 tons register, manned by a crew of eleven hands all told, and laden with a cargo of coals, was in the Bristol Channel in the course of a voyage from Cardiff to Africa. There was a light breeze from W.N.W., and the weather was a thick fog. The *Constantia*, which had been on the starboard tack, was put into stays for the purpose of being put on to the port tack, and in consequence of the wind being light she hung a little, and was in the wind for eight minutes before she began to fill on the port tack. The foghorn had been duly sounded when she was on the starboard tack, and was sounded two blasts as soon as she got on the port tack. At this time those on the *Constantia* saw the red light of a ship which proved to be the *Iona* distant about a ship's length, and about two to three points on the starboard bow. The helm of the *Constantia* was immediately put hard-a-port and the mizzen sheet slacked, but having little or no headway she did not pay off, and with her stem struck the *Iona* on her bowsprit and port bow.

Regulations for Preventing Collisions at Sea:

Art. 12. A steamship shall be provided with a steam-whistle or other efficient 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—(*a*) A steamship under way shall make with her steam whistle or other steam sound signal at intervals of not more than two minutes, a prolonged blast. (*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

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

the wind abaft the beam three blasts in succession. (c) A steamship and a sailing ship when not under way shall at intervals of not more than two minutes ring the bell.

Barnes, Q.C. and *Raikes* for the plaintiffs.—The *Constantia* is alone to blame for want of look-out and breach of art. 12 of the Regulations for Preventing Collisions at Sea. She neglected for eight minutes to give the signal prescribed by the article. The mere fact that she was in stays did not relieve her from the duty of giving an indication of her presence. The words of the article are not that the vessel is to give a certain signal when she is close-hauled on any particular tack, but merely when she is on the port or starboard tack. So long as the *Constantia* had the wind on the starboard side, her duty was to blow one blast, and as soon as she got the wind on the port side, she ought to have blown two blasts.

Sir *Walter Phillimore* and *J. P. Aspinall*, for the defendants, *contrà*.—The *Iona* is alone to blame. There is no duty on a sailing vessel to blow her foghorn while she is coming round from one tack to the other. To do so would be misleading, as she is in fact at that time on neither one tack nor the other. A vessel in stays is under no obligation to get out of the way of another.

Barnes, Q.C. in reply.

BUTT, J.—One question in this case is, what was the density of the fog? Was it so thick that those on board the *Constantia* could only see the schooner about a ship's length off; or was it such weather as would have enabled the *Constantia* with a proper look-out to have seen the schooner at a greater distance than she did, and so have avoided the collision? It has been contended that the density of the fog has been overstated by the defendants, but we do not think it likely that a vessel's lights could be seen so far as the plaintiffs make out. But, apart from the question of the fog's density, I think that the *Constantia* was most improperly and negligently navigated. Whilst she was going about from the starboard to the port tack, instead of calling up men from below to help, the look-out man, whose duty it was also to blow the foghorn, is called away to help at the braces, and is absent from his post for some ten minutes. Therefore on that view the *Constantia* is to blame. But I also think that it is quite unjustifiable for a vessel while going about to lie in a dense fog like this without giving any signal whatever. Various difficulties have been suggested which will arise whatever interpretation I put on the rule, but I think the real interpretation is, that so long as the wind is on the starboard side, the ship for the purposes of the rule must be taken to be on that tack and blow one blast, and as soon as she gets the wind on the other side she must blow two blasts. Therefore, for various reasons, I think that the *Constantia* was to blame.

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitors for the defendants, *Thos. Cooper* and *Co.*

HOUSE OF LORDS.

May 14, 15, 1888, *April* 1, 2, *and July* 1, 1889.

(Before the LORD CHANCELLOR (Halsbury), the EARL of SELBORNE, Lords WATSON, BRAMWELL, FITZGERALD, HERSCHELL, and MACNAGHTEN.)

OWNERS OF THE LEBANON *v.* OWNERS OF THE CETO; THE CETO. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Fog—Regulations for Preventing Collisions at Sea, art. 18.

If a steamship is approaching another in a dense fog, without the means of ascertaining, except by fog signals, the course which the other is pursuing, unless there are indications to convey to a seaman of reasonable skill that they are in such a position as to pass well clear of each other, it is her duty to stop and reverse, under art. 18 *of the Regulations for Preventing Collisions, and (in the absence of other circumstances making it dangerous to do so) she will be held to blame if she does not, and a collision takes place.*

Judgment of the Court of Appeal reversed, the Earl of Selborne and Lord Fitzgerald dissenting.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Bowen and Fry, L.JJ.) affirming a judgment of Sir James Hannen.

The action arose out of a collision between two steamships, the *Lebanon* of 595 tons and the *Ceto* of 612 tons, which took place in a dense fog off Whitby on the 20th Aug. 1886. By reason of the collision the *Ceto* and her cargo were totally lost. The courts below, who were both assisted by nautical assessors, held that the *Lebanon* was solely to blame for the collision, and the fact that she was to blame was not disputed on the appeal; the only question raised was whether the *Ceto* was also to blame.

The facts and arguments are set out fully in the judgments of their Lordships, especially so in Lord Watson's.

May 14 *and* 15, 1888.—The case came on for argument before the Lord Chancellor (Halsbury), the Earl of Selborne, Lords Watson, Fitzgerald, and Macnaghten.

The *Attorney-General* (Sir R. Webster, Q.C.), *C. Hall*, Q.C., and *J. P. Aspinall* appeared for the owners of the *Lebanon*, the appellants.

Bucknill, Q.C. and *Nelson* for the owners of the *Ceto*, the respondents.

The following cases were cited:

The Khedive, 5 App. Cas. 876; 4 Asp. Mar. Law Cas. 360; 43 L. T. Rep. N. S. 610;
The Kirby Hall, 8 P. Div. 71; 5 Asp. Mar. Law Cas. 90; 48 L. T. Rep. N. S. 797;
The John McIntyre, 5 Asp. Mar. Law Cas. 278; 51 L. T. Rep. N. S. 185; 9 P. Div. 135;
The Dordogne, 10 P. Div. 6; 51 L. T. Rep. N. S. 650; 5 Asp. Mar. Law Cas. 328;
The Ebor, 54 L. T. Rep. N. S. 200; 11 P. Div. 25; 5 Asp. Mar. Law Cas. 560;
The Theodore Rand, 12 App. Cas. 247; 56 L. T. Rep. N. S. 343; 6 Asp. Mar. Law Cas. 122;
The Beryl, 51 L. T. Rep. N. S. 554; 9 P. Div. 137; 5 Asp. Mar. Law Cas. 321;
The Frankland, 27 L. T. Rep. N. S. 633; L. Rep. 4 P. C. 529; 1 Asp. Mar. Law Cas. 489;
The Rhondda, 5 Asp. Mar. Law Cas. 114; 8 App. Cas. 549; 49 L. T. Rep. N. S. 210.

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

Their Lordships requiring further argument, the case was re-argued on April 1st and 2nd, 1889, before the same noble and learned Lords, with the addition of Lords Bramwell and Herschell.

The *Attorney-General* (Sir R. Webster, Q.C.) (*J. P. Aspinall* with him) appeared for the appellants.

Finlay, Q.C. (*Bucknill*, Q.C. and *Nelson* with him) for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 1, 1889.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: If this were a question of nautical skill or of the credit due to particular witnesses, I should be very reluctant to interfere with a judgment arrived at upon the advice of skilled persons, or differ from a court which had had the advantage of hearing and seeing the witnesses whose credit was in question. I am unable to acquiesce in the view that the matter which your Lordships are called upon to decide is either a question of nautical skill or of the credit to be attributed to the witnesses. So far as the accuracy of the witnesses is involved, I principally rely upon the evidence of those called in support of the case against which I feel called upon to decide. As to the question of nautical skill, I must deal with it more at large presently. Now, the question, shortly stated, is whether two vessels approaching each other, and knowing that they were approaching each other, in a dense fog, through which it was impossible to see lights or signals, or any part of the vessels by either of them, were not both to blame for not stopping and reversing until they had ascertained more distinctly their respective courses. I quite agree that the solution of that question must depend not upon the state of facts afterwards ascertained, unless there was enough to tell both parties at the time what the condition of facts was. The rule which is supposed to govern the decision of this case, though I am not quite certain that the existence or non-existence of that rule would necessarily be decisive, is that "a steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse, if necessary." As I have said, each of these vessels knew that they were approaching another ship. Each of them was aware, or ought to have been aware, that their approach did involve risk of collision, and the question is whether the facts were such in the knowledge of each that as prudent and reasonable persons those responsible for the navigation of the ship should have stopped and reversed. As to the facts giving rise to the question, there is, in my judgment, very little conflict. The preliminary acts of the parties seems to me to show that there is very little room for contradiction between the witnesses, and the difference, so far as there is a difference, is limited to questions of time and bearing. I do not mean to say that the facts that there was a fog and that the vessels were approaching so as to involve risk of collision are necessarily conclusive. But the fog was of such a character that it is admitted that, apart from the sound, no conclusion could be arrived at as to the course of either vessel by the other, and, so far as those facts raise a question of skill, it seems to me that no more nautical skill is involved, nothing upon which nautical men would be better able to judge, than would occur if two carts were approaching each other on an ordinary highway, and the sole method of judgment were the sounds of the cart wheels. This is indeed understating the case, since on the open sea there is no road, the general direction of which might be a guide. Not the slightest indication of what course either vessel was on could be derived from the sounds, which were ultimately proved to have been made by the fog signals. That the *Lebanon* did wrong is certain, and that the *Ceto* in the first instance did right is also certain. But it seems to me that the master of the *Ceto* admits facts which to a seaman must have shown that the *Lebanon* had starboarded her helm. I confess I cannot doubt that a reasonably prudent master, in order to avoid risk of collision, should have stopped and reversed when to his mind at the time it must have been clear that, notwithstanding his persistent porting of the helm of his own vessel, the approaching vessel remained steadily four points on his bow—which condition of facts was only reconcilable with what he admits he observed, and what we now know to be the fact, that the *Lebanon* was improperly starboarding her own helm. It is admitted on all sides that when the vessels came within sight of each other it was too late to do anything but what was in fact done to avoid or diminish the effect of the collision.

I do not understand the judgment of the Master of the Rolls to be based upon a comparison of the witnesses of either side as to their credit or accuracy, but almost, if not altogether, entirely upon the inferences which he draws from the fracture of the *Lebanon* upon the starboard side of her stem and the appearance of that fracture as indicated by the photographs. I do not think that inferences of that character can properly be described as questions of nautical skill at all. They are rather questions which should be addressed to mechanical engineers; but, in order to place much reliance on them, I should think myself that they ought to have been submitted to some person who had with accuracy and minuteness examined the fracture and had been capable of stating to the proper tribunal both the inferences he derived from the appearances which he observed and the reason for such inferences; subject, of course, to the ordinary test of cross-examination, in which event probably the rival theories presented in argument to your Lordships at the bar might have been minutely discussed, and each hypothesis, namely, the blow from the starboard side, or the dragging of the stem itself after the vessels were in actual contact, might have been considered. But in truth no such question ever was discussed at the trial. So far as I can see, the Master of the Rolls was the first to point out the nature of the blow as indicated by the photograph, which he regarded as sufficient to decide the case without reference to the witnesses called on the one side or on the other.

Under these circumstances it appears to me to reduce itself to this: Two vessels approaching each other in a dense fog, without the means of ascertaining the course which either ship is pursuing, continue to approach each other, and when one of them which has pur-

sued a correct course finds that the other is pursuing a wrong one, which must almost inevitably lead to a collision, she still continues a course which was originally right, but which on these facts it appears to me threw upon her the duty of stopping and reversing. And, inasmuch as she did not pursue that course, I think she was to blame. In the result, I move your Lordships that the judgment of the court below, so far as it acquitted the *Ceto* from blame, be reversed, and both ships be declared to be in fault.

The EARL of SELBORNE.—My Lords: At the end of the first argument in this case, the impression left on my mind was, that sufficient ground had not been shown for a reversal of the concurrent judgments of both the courts below, which held the *Lebanon* solely to blame for the collision which took place on the 20th Aug. 1886, by which the *Ceto* was wholly lost (with her cargo), and the *Lebanon* slightly injured. The effect of the second argument has been to confirm me in that impression; and I think it due to the learned judges below that I should state the reasons for my opinion, though I cannot feel that confidence in them which I should feel if they were shared by the majority of your Lordships. The question is, whether, under the circumstances appearing by the evidence, the 18th sailing rule of 1884 made it the duty of the *Ceto* to stop and reverse? It appears to me that, under the terms of that rule, the burden of proof was upon the *Lebanon*. The Judicial Committee so held in the case of *The Rhondda* (49 L. T. Rep. N. S. 210; 5 Asp. Mar. Law Cas. 114; 8 App. Cas. 549). The judgment of the Court of Appeal, in the case of *The Beryl* (51 L. T. Rep. N. S. 554; 5 Asp. Mar. Law Cas. 321; 9 P. Div. 137), laid it down, I think correctly, that "the application of the rule by the officer in charge of a ship depends on whether the circumstances were such that he should, as a prudent and reasonable officer, have come to the conclusion that, in order to avoid risk of collision, he should stop and reverse." That is matter, not for presumption, but for proof. The rule is: "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse, if necessary." There is no obligation to stop and reverse unless it is "necessary" to do so in order to avoid the risk of collision; and this is a question of fact, which must in every case depend upon the whole circumstances, and is not solved by the 17th section of the Merchant Shipping Act of 1873 (36 & 37 Vict. c. 85). The *Ceto*, in the present case, was going as slow as she possibly could; she complied, therefore, with the rule, unless the circumstances were such as to make it "necessary" for her to stop and reverse. If it has not been settled by any binding authority that a fog (such as existed in this case) always creates such a necessity when ships on opposite courses are approaching each other, as these ships did, I should not infer it from the terms of the sailing rules, or from the reason of the thing. The 18th sailing rule does not refer to fog more than to any other state of weather, and in those rules which expressly apply to the case of fog, there is nothing about stopping and reversing. The 13th rule, which is that most nearly in point, only says "that every ship, whether a sailing ship or steamship, shall in a fog, mist, or falling snow, go at a moderate speed." And to stop and reverse blindly in a fog (unless the other ship did the same thing at the same time) might, as it seems to me, be quite as likely sometimes to cause as to avoid risk of collision. To establish contributory negligence against a ship whose course would have been right if the other ship had not done what was wrong, it ought, in my opinion, to be made out that she had sufficient knowledge of the wrong course which the other ship was taking, within sufficient time, to enable her officer or officers in charge to perceive that they ought to alter or stop their own course in order to avoid the risk of collision, and that by doing so that risk would certainly be diminished and might perhaps be avoided.

The *Lebanon* was approaching the *Ceto* on her port bow, nearly "end on;" and, as she did so, sounded her whistle from time to time. The *Ceto* ported her helm, and kept porting it more, from time to time, as she heard the *Lebanon's* whistle. If the *Lebanon* had not improperly starboarded her helm, this would have kept her clear, and made a collision impossible. So far the *Ceto* was right, and the *Lebanon* wrong. When the helm signal from the *Lebanon*, indicating that she was starboarding, was heard by the *Ceto*, the evidence appears to me very clearly to show that the ships were already so close to each other as to make it impossible for the *Ceto* to avoid or diminish the risk of collision in any other way than by remaining under her port helm, and going "full speed ahead," as she did, and as the people on board the *Lebanon* had called out to her to do. It is not alleged that she could then have done anything better. The only question is, whether, before that time, she ought to have stopped and reversed. The appellants' contention is, that there were earlier indications of the approach of the *Lebanon* under a starboard helm, which a prudent and reasonable officer ought to have understood, and that these made it "necessary" for the *Ceto* to stop and reverse, within the meaning of the 18th rule. So far as the testimony of the witnesses for the *Lebanon* went, they endeavoured to make out a quite different case against the *Ceto*, in which they failed, namely, that she misled the *Lebanon* by signalling that she was starboarding when she was porting. I do not say that this ought necessarily to prejudice the argument on this appeal from the statements of the *Ceto's* witnesses, but, at least, it does not help the appellants' present case. The statements elicited in cross-examination from Captain Gibson, the master of the *Ceto* (on which the appellants' reliance was mainly placed), were to the effect that, having ported his helm when the whistle of the *Lebanon* was first heard on the *Ceto's* port bow (the effect of which would naturally be to "bring the whistle of the *Lebanon* still broader on the port side"), the next whistle seemed to be at the same distance as the first—viz., four points on their bow, and that, instead of the distance of the sounds afterwards diminishing, they came nearer, and kept coming nearer, in spite of the *Ceto's* porting. This evidence was compared with that which in the case of *The John M'Intyre* (51 L. T. Rep. N. S. 185; 5 Asp. Mar. Law Cas. 278; 9 P. Div. 135), under circumstances in many respects similar was held by Butt, J., and by Brett, M.R. and Bowen and Fry, L.JJ. in the Court of Appeal, to establish the necessity of stopping and reversing, under the 18th rule; and other fog cases were also cited (*The Dordogne*, 51 L. T.

Rep. N. S. 650; 5 Asp. Mar. Law Cas. 328; 10 P. Div. 6; and *The Ebor*, 54 L. T. Rep. N. S. 200; 5 Asp. Mar. Law Cas. 560; 11 P. Div. 25), in the first of which Butt, J., and in the second Sir James Hannen, and in both the Court of Appeal, arrived at a like conclusion. Of the *Khedive* (43 L. T. Rep. N. S. 610; 4 Asp. Mar. Law Cas. 360; 5 App. Cas. 876) and *Lutetia* (9 App. Cas. 640), both cases of clear weather, I do not think it necessary to speak. There is danger, I think, in taking one particular part of a witness's evidence without its qualifications, and treating such authorities as these as laying down an inflexible rule for every case in which similar evidence (however qualified) is found. I am the more impressed with that danger because those three judges in the Court of Appeal who decided the present case in the *Ceto's* favour were the same who held, in the case of the *John M'Intyre*, that there was contributory negligence; and Sir James Hannen, who in the case of the *Ebor* came to a like conclusion, was the judge of first instance who in the present case decided for the *Ceto*. In both courts these learned judges were assisted by competent nautical assessors. I have spoken of the danger of separating from its context one particular portion of the evidence given on cross-examination by the witnesses for the *Ceto*. The context to which I refer, in the evidence of the witness Gibson, is to the effect that, as the sound of the *Lebanon's* whistle came nearer, he said—"Port, and give him plenty of room; he is well on our port side;" that he did not stop and reverse "because he thought by the sound of his whistle" that the *Lebanon* was "well clear of him." The sound "appeared to get broader, it might be a point, as it went amidships." He "could not tell that the vessel must be coming towards him if it did not get broader than that." "He could not tell that he" (*i.e.*, the master of the *Lebanon*) "must be starboarding." He "never thought about such a thing as the man starboarding when he was on a ship's port side." That it would not have been right to stop and reverse at the last moment was, as I understood the argument, conceded. To stop and reverse earlier (when there was no indication that the *Lebanon* was also stopping or reversing) might (as far as I can judge) have been reasonably thought dangerous rather than conducive to safety. If it might reasonably be thought safer to attempt to get out of the way than to lie in the way of the approaching vessel like a log upon the water, the 18th rule would not, in my judgment be broken; and it appears to me as it did to the Master of the Rolls (though I am better satisfied to look for that purpose to the fracture of the *Lebanon* just on the starboard side of her stem than to the mere displacement of her stem itself), that the impact took place in such a way as would not have been possible without some extraordinary deviation by the *Lebanon* from her proper course very soon before. Of the whole effect of this evidence, the nautical assessors who assisted Sir James Hannen, and saw and heard the witnesses, were much more capable judges than I can pretend to be. They cannot have thought it, taken altogether, sufficient to show that the circumstances made it necessary for the *Ceto* to stop and reverse under the 18th rule. The question was one of degree and of time. The *Lebanon* was moving much faster than the *Ceto*. The ships did not see each other until it was too late to stop and reverse. The *Ceto* by porting and continuing to port took in the meantime a proper course, and one which "a prudent and reasonable officer" might well believe to be the best course for safety. If the distance between the ships, as indicated by the sounds of the *Lebanon's* whistle, appeared nevertheless to diminish rather than increase (except by about a point as it "went amidships"), I am not convinced that this was enough to prove the *Ceto* in the wrong, as long as a prudent and reasonable officer might judge that he was at a safe distance. I think it easy to lay too much stress upon impressions of this sort derived from sound only when the ships were approaching, and could not see each other. To some extent the distance might naturally diminish under conditions of safety, as the courses of the two ships came nearer before they passed each other. In order to get rid of the weight of the decision of Sir James Hannen, and his assessors, it was assumed that the question raised by the present appeal was overlooked, and not urged before that learned judge. But it arose directly out of the evidence then as much as now; the cross-examination had been directed to that very point; and, if it was not then raised by the appellants, I cannot but infer that the appellants' own counsel did not at that time take the same view of its importance as that on which the appellants now insist. If that is the explanation, I must confess that it seems to me of bad example, that a party should succeed in your Lordships' House upon such a point when it was not taken before the court of first instance, and has not been held to be established by the Court of Appeal. Upon the whole, I am unable upon this question (which I regard as one not of law but of fact, and of nautical skill and judgment) to give my voice for reversing the order appealed from.

Lord WATSON.—My Lords: On the 20th Aug. 1886, between 2.30 and 3 a.m., two steamships, the *Lebanon*, of 595, and the *Ceto*, of 612 tons register, came into collision, in the open sea, off the Yorkshire coast. A dense fog had prevailed for some time, and the *Lebanon* had reduced her speed to "easy," whilst the *Ceto*, which had already been crippled by another collision in the same fog, was going "dead slow;" and both vessels kept repeating, at intervals, the signals required by the 12th article of the regulations. From first to last both ships had abundance of sea room, no signals having been heard by either of them except their own. At the time when the vessels came within such a distance of each other that their fog signals could be mutually heard, the course of the *Lebanon*, according to the evidence of the chief mate, who was in charge of her navigation, was south-by-east half east. On hearing the first whistle from the *Ceto*, about two points on his starboard bow, he starboarded two points, and then steadied his helm on a south-east course. The course of the *Ceto* is stated by her master to have been north-by-west. When he first heard the whistle of the *Lebanon* it appeared to him to come from a distance, which he judged to be not less than a mile, and from a direction which seemed to be four points upon his port-bow. The helm of the *Ceto* was thereupon ported, and she was gradually edged off to starboard, in order to keep her clear of what was conjectured to be the course of the *Lebanon*;

but, owing to the slowness of her speed, the only effect of the port-helm was to bring her head round about two points to starboard before the *Lebanon* was sighted. Up to that time, notwithstanding the *Ceto's* change of helm, the sound of the *Lebanon's* whistle steadily continued to draw nearer; and it still appeared to bear, as when first heard, four points on the port-bow of the *Ceto*. When the two vessels, though still invisible, were very close, the *Lebanon* starboarded, and also gave the signal that she was starboarding, and in a few seconds they came into sight of each other. As stated in the preliminary acts, the *Ceto*, as observed at that moment from the *Lebanon*, was two or three points on the starboard bow, distant about a ship's length; and the *Lebanon*, as seen from the *Ceto*, bore three or four points on the port-bow, distant about sixty yards. The master of the *Ceto* says that he then observed the white light of the *Lebanon* just in front of his port-beam, when he at once put his helm hard-a-port; but the order was scarcely given before the engines of the *Ceto* were turned full speed ahead, in obedience to a hail from the *Lebanon*. At the same instant the engines of the *Lebanon* were stopped and reversed; but, having still way on her, she struck the port side of the *Ceto*, thirty feet from the taffrail, cutting her down below the water and sinking her. The *Lebanon* sustained no injury from the collision except that her metal stem was crushed aside in the direction of the port-bow.

At the trial before the Admiralty Court, the appellants endeavoured to cast the whole blame of the collision upon the *Ceto* in respect of her having, as they alleged, misled the *Lebanon* by a false signal into the belief that she was starboarding, when, in point of fact, she was porting. They did not press their alternative case that the *Ceto* ought to have stopped and reversed; probably because that line of argument would necessarily have involved the *Lebanon* in fault for not doing the same. The result was that the President negatived the allegation that the *Ceto* signalled she was going to starboard, and found the *Lebanon* alone to blame on the ground that she ought, like the *Ceto*, to have reduced her speed to dead slow. In the Court of Appeal, the learned judges were also of opinion that the *Lebanon's* rate of speed was not "moderate" within the meaning of rule 13; but the point chiefly discussed before them was the duty of the *Ceto* to stop and reverse, and they all came to the conclusion that no such duty was incumbent upon her. The Master of the Rolls and Bowen, L.J. were of opinion, upon the evidence, that the *Lebanon* was well abeam of the *Ceto*, on the port side; that there was no danger of collision until the *Lebanon* starboarded; and that the effect of her manœuvre was to bring her right round in the water, so that she struck the stern quarter of the *Ceto* with her starboard side of her bow. Their opinion appears to be mainly, if not wholly, rested upon the condition of the *Lebanon's* stem, as shown in a photograph taken after the vessel was docked. Fry, L.J. expresses doubt as to their inference from that exhibit; but states his own opinion to be "that the whistling of the *Lebanon* was broad on the port side of the *Ceto*, and, that being the state of things, it was not an imprudent course for the *Ceto* to advance in the direction in which she was advancing." If I could agree with the conclusions of the learned judges as to the facts of the case, I should have no hesitation in exonerating the *Ceto*. But the view which they take appears to me to be irreconcilable, not only with the evidence, but with the case made by both parties in their pleadings. According to their preliminary acts, when the vessels first saw each other the *Lebanon* was ahead and not abeam of the *Ceto*, the *Lebanon's* bearing being not more than three or four points upon the *Ceto's* port bow, and the *Ceto's* two points on the *Lebanon's* starboard bow. No witness from the *Ceto* places the *Lebanon* at any time broad upon their vessel's port side. The master, to whose evidence I shall have to refer hereafter, places the *Lebanon* throughout "about" four points upon his port bow. Wynpenny, the look-out of the *Ceto*, says that when she first whistled the *Lebanon* was two points upon their port bow, and that her bearing had changed to about three points when her masthead light became visible; and he also says that between these two periods of time the *Lebanon's* whistle "gradually drew a little more aft, and seemed to be getting nearer." The difference between the master and his look-out as to the bearings of the *Lebanon* when first heard is no doubt due to the circumstance that, whilst both agreed she was on their port bow, the number of points was matter of estimate, or rather of conjecture. In delivering judgment, the Master of the Rolls is reported to have said: "You can never try an Admiralty case so as to get at the truth, unless you look with great scepticism on the evidence on both sides." Unfortunately that observation is too frequently justified by the conflict of testimony which occurs in such cases. But I am not prepared on that account, and without very strong cause, to question the credibility of nautical witnesses when their testimony relates to facts which it was their special duty to observe, and is not only free from contradiction, but in strict accordance with the particulars given by the parties to the suit. I am unable to derive from the photograph, so much relied on by the respondents, any good reason for disbelieving the witnesses, rejecting the preliminary acts, and accepting the theory which found favour with the majority of the Appeal Court. The condition of the *Lebanon's* stem after the collision is, to say the least, a very uncertain guide to the truth, in the absence of precise information as to the force of her impact upon the *Ceto*, or as to the time during which the two vessels were engaged. The engines of the *Lebanon* were at that time reversed, and the *Ceto* was getting into full speed across her bows from starboard to port. Assuming that the stem of the *Lebanon* was started, as it well might be, by the first force of the blow, it might naturally be crushed over to her port side if the vessels remained for an appreciable time in contact, as they possibly, if not probably, did. In the circumstances I am constrained to believe that, as the witnesses state, the *Lebanon* struck the *Ceto* at nearly right angles, and that before the collision the relative bearings of the two ships continued to be as they allege.

Your Lordships were not asked to disturb the finding of both courts below, to the effect that the *Lebanon* was to blame, but the appellants maintain that the *Ceto* was also in fault. They admit that after the vessels were within sight,

the *Ceto* did not transgress the rules by going full speed ahead instead of stopping and reversing. They could hardly escape from the concession, because the *Ceto* was invited to take that course by the officer of the *Lebanon*; but it does not follow that the *Ceto* was free from blame in getting into a position which necessitated the manœuvre. The appellants argued that it was the duty of both vessels to stop and reverse before they came in sight, and that the *Ceto*, having failed in that duty, must be deemed to have been in fault. The point thus argued by the appellants is raised upon the pleadings as well as upon the evidence, and was fully discussed in the Court of Appeal. That being so, I think we are bound to consider it upon its merits. Rule 18 requires that every steamship, when approaching another ship so as to involve risk of collision, "shall slacken speed or stop and reverse, if necessary." There is this distinction between the two alternatives which the rule enjoins, that the first is imperative, whereas the second is only required where there is necessity for it. But as Lord Bramwell observed in the course of the argument, the necessity to which the rule refers is that of avoiding, not collision, but the risk of collision. In consequence of the shape in which the case was presented to the Admiralty Court, and the view which was taken of the facts in the Court of Appeal, there is no expression of opinion by their respective assessors upon the facts of the case as they appear to some of your Lordships and to myself to be established in evidence. That is a circumstance to be regretted, and great stress was naturally laid upon it in the able argument of the respondents' counsel. At the same time I do not think that circumstance ought to interfere with our disposal of the case, because I agree with those of your Lordships who think that the question which arises upon the facts as we are prepared to find them depends very much upon the construction of rule 18, and involves considerations as much of common prudence as of nautical skill. Whether it was, in a reasonable sense, necessary for the master of the *Ceto* to stop and reverse his engines before the *Lebanon* hove in sight is a question not of law but of fact. His duty in that respect must depend, not upon the result of the whole facts now disclosed in evidence, but upon his own observations of the *Lebanon's* fog signals, and the indications of the position and course of the *Lebanon* relatively to his own vessel, which these observations ought to have conveyed to a prudent seaman of ordinary skill. I shall therefore limit my consideration of the evidence to such parts of it as relate to what was heard and done by the officer who was navigating the *Ceto*. When the master first heard the signals of the *Lebanon* he seems to have come to the conclusion that the vessels were approaching each other, and also to have formed the surmise that they might possibly be approaching so as to involve risk of collision. Having only heard a single whistle he had at that moment no data from which a trustworthy inference could be drawn as to the course which the *Lebanon* was pursuing; but he assumed that she would pass on the port side of his vessel, and he accordingly ported a little in order to give her room. As the two ships advanced he heard several signals from the *Lebanon*, each successive whistle sounding nearer than the preceding one. As the sounds grew closer, still assuming that the course of the *Lebanon* would carry her to port of the *Ceto*, he gave a second order to his steersman. According to his own evidence, he said—"Port, and give him plenty of room; he is coming well upon our port side." I have already noticed the fact that the effect of her port helm was to bring the head of the *Ceto* two points to starboard before the collision. What appears to me to be the most important part of the evidence of the master is his distinct statement, more than once repeated, that both before and after his second order to port was given, or, in other words, from the time when the signal of the *Lebanon* was first observed until she was just coming into sight, the sound of her whistle whenever it was heard continued to bear steadily about four points on the port bow of the *Ceto*. He does, indeed, attempt to say that at one time (he does not say when) it appeared to broaden a little, and on his being pressed to say how much, his reply was, "It might be a point." The circumstances in which he was placed, as detailed by the master of the *Ceto* appear to me to involve considerations of general importance, touching the application of the second alternative of the 18th rule. In broad daylight, or in the night time so long as ships' lights are discernible at a moderate distance, I do not think that it is within the meaning of the rule "necessary" for two approaching steamers to stop and reverse until it becomes apparent that if they continue to approach they will in all likelihood either shave close or collide. When the approaching vessels are enveloped in fog, and cannot see each other, the rule must, in my opinion, apply with greater stringency. Their respective officers are, in that case, guided solely by their sense of hearing, which may enable each of them to speculate with more or less accuracy as to the position of the other vessel at the time when its fog whistle is heard. But the direction from which the whistle comes can afford no indication of the course of the approaching vessel unless the sound is repeated, and its bearing is, on each repetition, carefully observed. Even then the bearing of the vessel and its course are more or less matters of speculation, and cannot be ascertained with the same certainty as if her hull or lights were in view. When two steamships, invisible to each other by reason of a thick fog, find themselves gradually drawing nearer, until they are within a few ship's lengths, they are, in my opinion, within the second direction of rule 18, and each of them ought at once to stop and reverse, unless the fog signals of the other vessel have distinctly and unequivocally indicated that she is steered on a relatively safe course, and will pass clear, without involving risk of collision. In the absence of such indications, it appears to me that to negative the necessity for stopping and reversing when the vessels are near to each other, though still unseen, would be to thwart the very purpose for which the rule was enacted. I do not think that the effect which, in my opinion, ought to be given to the second branch of the rule, when approaching ships are enveloped in a fog, is at variance with the judicial construction which it has already received. In the case of *The Frankland* and *The Kestrel*, the opinion of the Privy Council with respect to *The Frankland* was thus stated by Sir Robert Collier (27 L. T.

Rep. N. S. 633; 1 Asp. Mar. Law Cas. 489; L. Rep. 4 P C. 529): "That she was navigating in a fog at a moderate speed, that she heard a whistle sounded many times, indicating that a steamer was approaching her, and had come very near to her—so near, indeed, that if the vessels had stopped they would have been within hailing distance; that at that point of time it was necessary for the captain of the *Frankland*, under the terms of the rule, not only to stop the motion of the engines, but to reverse them so as to stop the motion of his vessel, and that he ought not to have waited until the vessels sighted each other." Sir Robert Phillimore, in *The Kirby Hall* (48 L. T. Rep. N. S. 797; 5 Asp. Mar. Law Cas. 90; 8 P. Div. 71), explained the rule in terms even broader than I should consider necessary for the purposes of this case. The doctrine laid down by the Privy Council in *The Frankland* has been recognised by the Court of Appeal in *The John McIntyre* (51 L. T. Rep. N. S. 185; 5 Asp. Mar. Law Cas. 278; 9 P. Div. 135). *The Dordogne* (51 L. T. Rep. N. S. 650; 5 Asp. Mar. Law Cas. 328; 10 P. Div. 6), and *The Ebor* (54 L. T. Rep. N. S. 200; 5 Asp. Mar. Law Cas. 560; 11 P. Div. 25), all of which were cases of collision in dense fog. In the first of these cases, the present Master of the Rolls said: "It may be laid down as a general rule of conduct that it is necessary to stop and reverse, not indeed every time that a steamer hears a whistle or fog horn in a dense fog, but when in such a fog it is heard on either bow and approaching, and is in the vicinity, because there must be a risk of collision." To the proposition so stated I entirely assent. When the approaching vessel is nearly ahead, the duty to stop and reverse is obvious; but it appears to me to be equally imperative when the other vessel is drawing near upon either bow. It matters not whether the bearings of the approaching ship be one point or four; either position is fraught with danger of collision if it continues to advance without change of bearing. The reason which the master of the *Ceto* assigns for not stopping and reversing when the *Lebanon* came near is this: "Because I thought by the sound of his whistle that he was well clear of me." I regret to say that I am unable to find in his evidence a single circumstance which could justify the conclusion that the *Lebanon* was going clear of him. I need hardly say that if the *Lebanon's* course had been such as would carry her clear of his ship on the port side, the sound of her whistle as the vessels drew nearer would have gradually broadened until it was a-beam of the *Ceto*. The fact, which he did observe, that, notwithstanding their mutual advance and his own change of helm, the *Lebanon* still continued to approach upon his port bow with unaltered bearing, indicated that the two vessels were sailing on intersecting lines, and that, unless there was a change in the bearing of the *Lebanon*, they would, as a matter of mathematical certainty, meet at the point of intersection. In these circumstances, I am of opinion that his continuing to advance when he knew that, in spite of his port helm, the *Lebanon* was coming nearer without any appreciable change of bearing, was a violation of the second part of the 18th rule; and I am of opinion that the *Lebanon* was equally within the rule, and was also to blame for not stopping and reversing. I have for these reasons come to the conclusion that the orders appealed from ought to be reversed, and that it ought to be declared that both vessels were in fault.

Lord BRAMWELL.—My Lords: I am fully sensible of the strength of Mr. Finlay's remark, viz., that we are called upon by the *Lebanon* to overrule the judgments of two courts assisted by nautical advisers, and that without having ourselves the benefit of such experts. The latter is a very weighty consideration. One may hope with care and attention to come to a right conclusion on matters of ordinary everyday life; but this is not such a case. We are not (at least, I am not) familiar with nautical matters, and may go wrong from sheer ignorance. I do not feel the want of such advice in the present case, for reasons which I will mention hereafter. The two vessels were approaching each other, and that there was a risk of collision is certain, for there was a collision. But, as Mr. Finlay says, the question is, Did the *Ceto* know that? Now, the captain of the *Ceto* says he knew that the *Lebanon* was getting nearer. Then, was it necessary for him to stop and reverse? That word "necessary" does not mean that the situation was such that, without stopping and reversing, a collision would take place; it means rather "prudent or expedient." The answer seems to me to be this: That he did not know where the other vessel was, nor what she was doing; that he thought something; that he speculated; and that he acted on his opinion, instead of making sure by stopping and reversing. There was no reason why he should not; it was a calm, and no other vessel was near. The captain does not give the reason of the second officer for not doing so—viz., that he would have been run into amidships; and that reason is a bad one, for the reversing and going astern should have taken place in time to prevent the collision at any part. I think, therefore, that the *Ceto* was to blame. I should think so if there were no statutory rule. I cannot see what Mr. Finlay says is the question that was put to the nautical assessors. Therefore I cannot think I am differing from them. I refrain from going into the nice questions of where the *Ceto* might reasonably judge the *Lebanon* to be; I purposely abstain. The *Ceto* should not have judged, but have made sure. To discuss the probabilities is to do what I think the *Ceto* should not have done. I may, however, say that I think that the *Ceto* might well have judged without imputing too much stupidity to the *Lebanon* (as was suggested in the argument), that it was nearing her. These are the grounds of my opinion. They are short, and I am unable to say more.

Lord FITZGERALD.—My Lords: I concur in the reasoning and in the conclusion of the Earl of Selborne, and, as my opinion has not been changed by the re-argument, I will read the judgment I prepared immediately after the first argument. The question is resolved into one substantially of fact, and is thus put in the appellants' case: "On the appeal the only question is, whether the *Ceto* was to blame for not slackening speed, and stopping and reversing." The *Ceto* did slacken speed; the order had been given in due time that she should go as slowly as she possibly could; that order was acted on, and she had for some time before the collision been going as slowly as she could.

That matter of fact is stated in all the judgments below, and was not controverted here. The 18th article of the Orders in Council, on which the decision turns, points out that when approaching another ship so as to involve risk of collision a steamship "(1) shall slacken her speed; (2) or stop and reverse if necessary." The question, then, is narrowed to this: Were the circumstances such as to render it necessary for the *Ceto* to stop and reverse? or, as put in the appellants' case, Had it become the duty of those in charge of the *Ceto* to do so? "Necessary," as here used, is a word of flexible meaning, to be interpreted according to the surrounding circumstances. Were, then, the circumstances such as to convey to the mind of a skilled mariner that the risk of collision was so imminent as to make it indispensable to stop and reverse? The action was instituted by the *Lebanon* against the *Ceto* alleging that (1) a good look-out was not kept on board the *Ceto*; (2) the helm of the *Ceto* was improperly ported; (3) the *Ceto* improperly neglected to comply with articles 12, 13, 18, 19, 22, and 24 of the Regulations for Preventing Collisions at Sea. In these allegations the plaintiffs failed in the courts below, and fail here unless your Lordships should be satisfied that there was a breach of duty on the part of the *Ceto* within the concluding sentence of rule 18. The case came before the President of the Admiralty Division, aided by two naval captains, and on reading the evidence there given it cannot be affirmed that the question on which the appellants now rely was brought under the notice of the court, and it is quite certain that no decision was asked on it; on the contrary, the allegations appear to have been that the *Ceto* had improperly ported, had not slackened her speed, and had misled the *Lebanon* by an erroneous signal. The result has been that your Lordships have lost, on the very question now before the House, the aid of that skilled tribunal. That court does determine, "We are of opinion that the *Lebanon* was alone to blame." The appeal did not question the judgment, save on the word "alone," and alleged that both vessels were to blame. On this head the Master of the Rolls observes: "Then the question arises whether the *Ceto* broke the second rule. That the *Lebanon* was in the wrong for breaking the first rule is clear. If she broke the first rule, and kept breaking it up to the moment of the collision, she not only broke the first rule, but she broke the second also. Therefore her case is hopeless. In that case the question is whether the *Ceto*, who obeyed the first rule, broke the second rule." The Court of Appeal was also assisted by its nautical assessors, by whose opinion on a question expressly put to them they were aided. That question was, whether it was necessary (in a nautical sense) for the *Ceto* to have stopped absolutely dead on the water, to which the assessors answered "No." That court was unanimous, "that the *Ceto* did nothing to break the rule, because there was nothing to show her that it was necessary to stop and reverse." She was ignorant of the false manœuvre of the *Lebanon* in starboarding. The noble Earl quoted a sentence taken from the judgment of the Master of the Rolls in the case of *The Beryl* (51 L. T. Rep. N. S. 554; 9 P. Div. 137). I recall attention to it because it has received the sanction of this House in *Baker* v. *The Owners of the Theodore H. Rand* (56 L. T. Rep. N. S. 343; 12 App. Cas. 247). Lord Herschell there gives the quotations more at large, and includes this passage: "But when you speak of rules which are to regulate the conduct of people, those rules can only apply to circumstances which must or ought to be known to the parties at the time. You cannot regulate the conduct of parties as to unknown circumstances." Lord Herschell adds: "I entirely concur in the view thus expressed, and adopt the language of the learned judge." The noble Earl now gives his approval of the judgment in *The Beryl* case, so far as it has been quoted. We have to consider this narrow question of fact, and under circumstances not favourable to the *Lebanon*. There is a finding not now contested that she was to blame, and there can be no doubt that her erroneous manœuvres and breaches of the rules to prevent collision led directly to the calamity which otherwise would not have happened. But for the error of the *Lebanon* in starboarding both ships would have passed each other in safety. The *Lebanon* undertakes to establish that the *Ceto* was also to blame, and seeks the protection of the Admiralty rule in such cases. The onus lies on the *Lebanon* on the maxim *Qui dicit non qui negat*. The *Lebanon* undertakes to establish affirmatively from the evidence that the circumstances in proof were such as ought to have conveyed to the mind of the master of the *Ceto* at a time before the collision became inevitable that it had become his duty to "stop and reverse." From the preliminary acts it appears that the parties stated that the time was 2.30 a.m. or about 3.0, weather calm, dense fog. The fog was so dense, that when each ship saw the masthead and side light of the other, and "almost similtaneously," they were not more than a ship's length asunder. The fog was so dense that "to see," in the sense of being guided by sight, was impracticable. The master of the *Ceto* had nothing to guide him but his sense of hearing, and that sense certainly or probably rendered less acute, less to be relied on, by the fog. The evidence on which we have to act comes from Gauntlett on the part of the *Lebanon* and Gibson for the *Ceto*. The former scarcely touches the question, and seems to be mainly directed to establish a false manœuvre by the "porting" of the *Ceto*, and that the *Lebanon* was misled by her signals. At the close of Gauntlett's direct evidence he says he spoke to the captain of the *Ceto* when he got aboard the *Lebanon* and asked him "why he blew two blasts of his whistle and ported." "When he ported, why he gave the starboard signal for the port helm." That was then substantially his case, and that case entirely failed. Gibson, on the other hand, seems completely to meet and negative that case; he heard the whistle of the *Lebanon* apparently about a mile and a half off, and the *Ceto* was then fairly "dead slow, just merely turning over to keep the ship steering," and gave the signal "to indicate that I was going on my regular course and keeping to port." I have to confess that I am ignorant on the subject of navigation, but I gather from this appeal that to stop a ship dead, to take all the way off her so that she would cease to be under command and be as a log on the water, is a manœuvre that might often lead directly to calamity, and could only be excused by the existence of actual

necessity. That is really what article 18 points out. If the *Ceto* had actually stopped and a collision taken place notwithstanding, an event by no means improbable, it would lay her open to the imputation that the calamity arose from her stopping without necessity. It seems to me, on the fullest consideration, that the position was not such as to show to a skilled seaman that there was then that imminent risk of collision which would create a necessity for stopping and reversing. There was no such risk of collision until the starboarding of the *Lebanon*, that manœuvre could not have been foreseen, and could not have been known to the master of the *Ceto* until the *Lebanon* actually hove in view, and all parties agree that then the *Ceto* took the only step that might by possibility avert the danger, but it was too late. If there was an error on the part of the officers of the *Ceto* it does not appear to have arisen from negligence or want of skill. If an error was committed it was an error of judgment under circumstances of embarrassment and difficulty.

Lord HERSCHELL.—My Lords: I have been somewhat embarrassed as to the course which your Lordships ought to take in this case. The sole question is, whether the *Ceto* should be held to blame in respect of having disobeyed the requirements of art. 18, which provides that every steamship when approaching another ship so as to involve risk of collision shall, if necessary, stop and reverse. This resolves itself into the further question whether under the circumstances, in a dense fog and with the indications which the master of the *Ceto* had of the position of the other vessel, he ought by the exercise of reasonable care and prudence to have known that it was necessary to stop. For I agree that the necessity must not be such as to become manifest only when all the facts are ascertained; but must be such as would be apparent to a seaman of ordinary skill and prudence with the knowledge which he possesses at the time. This may properly be said to be a question of navigation; and if in such a case the four nautical assessors by whom the courts below were assisted had concurred in thinking that in abstaining from taking the course suggested as the proper one, the master had exercised reasonable care and prudence, and the same view had been adopted by the courts, I think your Lordships ought to have held the matter concluded, unless you saw that there had been some erroneous interpretation of the law. Your Lordships have no nautical assistance. I have in a previous case expressed my opinion that this is to be regretted, so long as the law permits such questions to be submitted for your Lordships' consideration. But, being without this assistance, I think that in such circumstances as I have indicated it would be better and safer that your Lordships should hold yourselves bound by the concurrent findings thus arrived at upon a question of navigation, than that you should act upon the impression produced on your own minds by the evidence. In the present case, however, you have not these concurrent findings. The question whether the *Ceto* ought to have stopped is not touched upon in the judgment of the President of the Admiralty Division, who says: "Having come to the conclusion that she was going at as slow a pace as she possibly could, there was at the time when she came in sight nothing else for her to do than what she did on the spur of the moment at the instigation of those on board the *Lebanon*—viz., to go full speed ahead. I am advised that that was the best thing that she could do under the circumstances, and, therefore, that she is not to blame." It is evident that neither the President nor his assessors dealt with the question whether the *Ceto* ought to have stopped. It has been explained to your Lordships that this arose from the point not having been distinctly taken before that tribunal. In the Court of Appeal, however, it was definitely put forward by the present appellants, and the opinion of that court was pronounced upon it. It has been said that there was nothing to prevent this course being pursued—that any question arising upon the pleadings and evidence was open in the Court of Appeal, even though not taken in the court below. This is, no doubt, true as a general rule. I do not think it necessarily applies where, if the point had been distinctly taken, it might have suggested, either to counsel or to the court, questions to the witnesses which were not put. The matter, however, was entertained by the Court of Appeal, without objection, apparently, on the part of the respondents. That court, assisted by its nautical advisers, adopted a view adverse to the appellants. Under all the circumstances, I should have felt well satisfied if your Lordships could have seen your way to leave the judgment pronounced undisturbed. As, however, I understand that a majority of your Lordships have come to the conclusion that the judgment ought to be reversed, I feel bound to state the reasons why I am by no means prepared to dissent from the view taken of the evidence by those of your Lordships who have arrived at that conclusion. I think that when a steamship is approaching another vessel, in a dense fog, she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another. I, of course, except a case where there is some other circumstance existing which renders it more prudent not to stop. In the present case no such circumstance was suggested. The weather was calm, and there was nothing to indicate the presence of more than one vessel in the neighbourhood. We have, therefore, only to consider whether the circumstances might properly convey to the mind of the master of the *Ceto* that the course of the other vessel was such that they would pass clear of each other. This is the test put by the Master of the Rolls in the court below. He thought the *Ceto* was bound to stop, unless the sound of the whistle showed that the *Lebanon* was broadening on her port bow. He intimated the opinion that a point or two would not suffice; but that, to absolve her from the obligation, the other vessel must have got broad off as she approached. Now, what is the evidence? The master states that he first heard the whistle about five points on his port bow. He ported a little to give her more room. When he next heard the whistle it was still four points on the port bow. He continued porting, and altered his course under a port helm about two points. The utmost change in the bearing of the whistle of the other vessel to which he speaks is, that he thought it might get a point broader. None of the other witnesses put the case more favourably

for the *Ceto*. I quite agree with the Master of the Rolls that rigorous accurary is not to be expected in the evidence of seamen in cases of this description. It would be a mistake to tie them down too rigidly to the letter of their evidence as to the exact number of points that are mentioned, either in relation to the bearing of the other vessel, or to the alteration of their course. I think we must treat the matter somewhat broadly. But, allowing all this, I fail to see what justification the master had for supposing that the vessels were approaching on such courses that they would pass clear. When the second whistle was heard there was no broadening, and, notwithstanding the fact that the *Ceto* had been porting, the broadening never became substantial. In taking this view of the evidence, I do not think I differ from the Master of the Rolls. But he thought that the direction and force of the blow conclusively showed that the *Lebanon* only starboarded at a very late period; that she must have got very broad off the port side of the *Ceto*, and that the whistles must have been heard by the master broader and broader on his port bow, so as to intimate to him that she was getting broader and broader. I think it is a serious matter thus to set aside the evidence of the witnesses, and to assume in favour of the ship that the facts were not as they represent them, and to find the master justified on the ground that something was observed by him very different from that which he tells us he did observe. Nevertheless, if such a fact were conclusively proved, I agree that it might be sufficient to determine the case. I frankly admit that I have approached this point with every desire to take the same view of it as the Master of the Rolls, and to support the judgment of the court below. But I have found myself unable to see that the circumstances relating to the blow, its position, force, and direction, do afford the conclusive proof which has been attributed to them, and to justify the view which has been taken of the whole of the evidence.

Lord MACNAGHTEN.—My Lords: I agree in the result at which the majority of your Lordships have arrived. After the first hearing, I had the advantage of considering the opinion of Lord Watson, and concurring in it, as I do entirely, I have not thought it necessary to trouble your Lordships with any further observations in this case.

Judgment appealed from reversed. Respondents to pay to appellants their costs below and in this House.

Solicitors for the appellants, *Botterell* and *Roche*.

Solicitors for the respondents, *Lowless* and *Co.*

July 9 and 11, 1889.

(Before the LORD CHANCELLOR (Halsbury), Lords FITZGERALD, HERSCHELL, and MACNAGHTEN.)

LIVERPOOL, BRAZIL, AND RIVER PLATE STEAM NAVIGATION COMPANY *v.* CAMPANHIA BAHIANA DE NAVEGACIO A VAPOR.

THE MEMNON. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Crossing ships — Risk of collision— Regulations for Preventing Collisions at sea, arts. 16, 18, 23.

When two steamships are approaching so as to involve risk of collision, and it is the duty of one to keep out of the way, and of the other to keep her course, the latter is bound to comply with art. 18 *of the Regulations as to slackening her speed or stopping and reversing if necessary, and if she does not do so the onus lies upon her to show that to continue her speed was in fact the best and most seamanlike manœuvre under the circumstances.*

Semble, that if it is shown by a ship not complying with art. 18 *of the Regulations that, taking into consideration all the circumstances of the case, compliance with the regulation would have increased the risk, such non-compliance will not cause the ship to be held in fault.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lindley and Bowen, L.JJ.), reported in 59 L. T. Rep. N. S. 289; 6 Asp. Mar. Law Cas. 317, who had affirmed a judgment of Butt, J.

The case arose out of a collision between the British steamship *Memnon* and the Brazilian steamship *San Salvador*, which took place on the 20th Aug. 1885 off the coast of Brazil. The court below held that both ships were to blame.

The owners of the *Memnon* appealed.

Sir *W. Phillimore* and *J. P. Aspinall* appeared for the appellants.

Myburgh, Q.C. and *Raikes*, who appeared for the respondents, 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 (Halsbury).—My Lords: In this case I am anxious not to be supposed to be placing any particular construction on the rules, such as they are, which have been quoted as applicable to circumstances not identical with those which your Lordships have now under review. I do not believe that mere words, necessarily in relation to a set of facts to be ascertained at the time, can ever be so precisely construed or expounded as to be applicable to all cases alike. Therefore, when we are dealing with such a rule as that when two ships "are approaching so as to involve risk of collision," it shall be the duty of one of them, I do not say which at the moment, to "slacken speed or stop and reverse if necessary," however those words may be construed, whether distributively, that is to say that the words "if necessary" are to be applied to each of them in turn, or collectively, that is to all of them in combination—whatever is the true construction of it, it is impossible to

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

lay it down as applicable to all cases and all circumstances that that rule is to be so obeyed as, with all submission, the Court of Appeal seem to have assumed, without reference to the necessity which is raised by the circumstances under which the rule is to be obeyed. If therefore in this particular case it could be suggested that, as a matter of seamanship, or as a matter of ordinary common sense, it could be ascertained that the stopping, or the reversing, or the slackening would itself produce or increase the danger of collision which would be incurred by the approach of the two ships to each other, I should think myself that it would be impossible to say that, upon the true construction of the words in that rule "if necessary," such facts would show that in the particular case which I have supposed it was necessary to do either the one or the other of those things which, upon the supposition I have made, would either create or increase the danger of collision. I cannot understand how any court could suppose that those words "if necessary" should be so construed as to apply to a case where upon the hypothesis it is not only not necessary but injurious; and if in the whole of this case I could find out either from the evidence or from the argument that that case had been made and put before the court, so that we could review it, I myself should certainly preserve an independent judgment as to what the decision of the court should be. But I have looked with some care at the evidence, and I cannot find that that question, though ably and powerfully urged at your Lordships' bar, was ever really the subject of discussion in the court below. It may have been argued in the court below—that I cannot say; but so far as the evidence is concerned I cannot find a trace of it. What was argued apparently was this, that the captain of the *San Salvador* had so acted as to mislead the *Memnon*, and to place her in a considerable difficulty as to what course she should pursue; and I think it was established that the *San Salvador* had exhibited bad and reckless seamanship. Then, there being no doubt that the *San Salvador* was to blame, the question which appears to have been debated was, whether the *Memnon* had been so misled, and had so acted in pursuance of her duty to keep on her course, that she was entirely blameless; and that which was argued, and that which the nautical assessors appear to have affirmed, is this, that she did observe the bad seamanship of the *San Salvador* at such a time and under such circumstances that she must have known that, if she kept on her course, if there would not be actual collision there was so serious a risk of collision that the rule became immediately applicable, and that she ought to have slackened her speed, and if necessary stoped and reversed. Well, now, it cannot be said as an abstract proposition that that must necessarily either create or increase the risk of collision. That must depend upon circumstances, and what the nautical assessors have found as a matter of nautical skill (and certainly without evidence on the other side I should feel myself bound by it) is, that the captain of the *Memnon* was not justified in supposing that if he went on as he was going he would not incur risk of collision. To put it as the Master of the Rolls himself puts it: there is plenty of sea room, you are on the open sea, and if you see that an approaching vessel is not skilfully navigated, and is being navigated in such a way that you may anticipate that a slight deviation from what she is doing may involve the risk of collision, you are not justified in supposing that she will be so exact in her irregularity that you can calculate upon it that the vessel will go under your stern at a distance of a length and a half, when she may by a decrease or variation of her irregularity come within half a length, and if so no one can doubt, says the Master of the Rolls, that that will involve a risk of collision. Therefore, the Court of Appeal and Butt, J. all find the *Memnon* guilty of disobedience to the rule in such a way as that they think that her master did not take that course which the Act of Parliament prescribed when the facts were to his mind such that if he did not obey that course there must be risk of collision. So far, in that condition of things, I assent to the judgment at which they have arrived.

Mr. Aspinall has made a very powerful attack upon the reasoning of some parts of the judgments of the Court of Appeal. It appears to me that it is very difficult to say, if that is right, that it is also right to say that the person who was responsible for the navigation of the *Memnon* did no wrong, and was not guilty of anything which a seaman ought not to have been guilty of. One can understand, no doubt, the sympathy which Butt, J. and the learned judges in the Court of Appeal feel for a sailor who has been placed in a very difficult position by the misconduct of another, that other representing a rival ship which comes into collision with his, and being certainly, if one might take degrees in this matter, very much more to blame than himself. But the question which we have to consider is, whether both vessels were to blame, and not to apportion the degree of blame which is to be attached to each; and though I confess myself that I have great difficulty in following the initial portion of the judgment of the Master of the Rolls and reconciling it with the conclusion and any part of the judgment of Lindley, L.J., yet with the result I am content, namely, that they affirm the judgment of Butt, J., in which they have the assent of both sets of nautical assessors. I am not quite able to see what the question put to the nautical assessors in the Court of Appeal was, but I gather that, if the question which was put was not in the terms which I think the Master of the Rolls uses, namely, "that the best thing as a matter of simple navigation for this officer to have done was what he did do," it was something like it; but whether or not, notwithstanding that, apart from the Act of Parliament, his conduct as a sailor could not be complained of, yet considering that the rule had informed him of the course which he was to pursue, namely to slacken speed, or stop and reverse, he disobeyed that rule, and having disobeyed it, and the Act of Parliament having provided that in such a case that rule is to be obeyed, the nautical assessors take that as part of a sailor's duty, and therefore they agree that under those circumstances the facts were sufficiently present to his mind to make that rule operative upon him, and that he disobeyed it. I am not quite certain that even that is a very satisfactory explanation of what the Master of

the Rolls does mean; but, as I say, it is enough for me that both sets of nautical assessors assent to the blame being cast upon the *Memnon*, and under these circumstances, entirely disclaiming any notion of laying down any abstract application of this rule to facts which are not before me, I am content with the judgment of Butt, J., and think that this appeal ought to be dismissed with costs, and I so move your Lordships.

Lord FITZGERALD concurred.

Lord HERSCHELL.—My Lords: I am of the same opinion. The main question—indeed, I think the only question—is, whether the *Memnon* has been properly held to have been to blame on the ground of disobedience to a statutory rule, which provides "that every steamship, when approaching another ship so as to involve risk of collision, shall slacken her speed or stop and reverse if necessary." Now it has been held, in the case of *The Beryl* (51 L. T. Rep. N. S. 554; 5 Asp. Mar. Law Cas. 321; 9 P. Div. 137), and the view taken there has been adopted by this House, (*a*) that the rule only becomes applicable where the circumstances are such as to bring to the mind of the master who is navigating a vessel that they involve risk of collision. Once it is proved that the circumstances were such as would show a seaman of reasonable skill that there was risk of collision owing to the course on which, and the circumstances under which, the vessels were approaching one another, then it is clear that it was imperative upon him to slacken speed or stop and reverse if necessary. Now, although I have said that it is imperative upon him to do so, yet it must be borne in mind that the statute only provides that his vessel, if it does not take that course, shall be deemed in fault unless it be shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary; and there is also another regulation which provides that, in obeying and construing the rule, "due regard must be had to all the dangers of navigation and to any special circumstances which may exist in any particular case rendering a departure from the above rule necessary in order to avoid immediate danger." But it appears to me that, when once it is shown that it was brought home, or ought to have been brought home, to the mind of the master of a vessel that the courses upon which the ships were approaching, and the circumstances, involved risk of collision, the onus is thrown upon him of justifying his not doing that which the rule prescribes. If under those circumstances he does not slacken speed, and does not stop and reverse, he cannot be held to be excused, he cannot be held to be otherwise than to blame. The question whether a departure was necessary or not must no doubt be determined by the court; but it must be determined upon the point being raised, and upon some evidence being tendered to the court to show that to have followed the rule would either have created that very risk of collision which it was the purpose of the rule to avoid, or have increased instead of diminished the risk of collision. If either of those things were shown, then I cannot doubt that the courts would hold that the rule which applies to the course to be taken in order to avoid risk of collision could not justify holding a master to blame who had only omitted to do that which would of itself either have created or have increased the risk of collision. I can find no case in which the law has been differently laid down. But in the present the nautical assessors below, who assisted the court in both courts, have found that, as a matter of seamanship, the master of the *Memnon* ought to have seen that the vessels were so approaching as to involve risk of collision. That is the finding which is distinctly to be inferred in both courts, and the learned judge who presided in the Admiralty Division, and all the judges in the Court of Appeal, have adopted that view. Therefore I think it would be out of the question that your Lordships should take any other view here. We start with this, that the master of the *Memnon* ought to have known and seen that the vessels were so approaching as to involve risk of collision. That being so, we have it as an admitted fact that, at the time when he ought to have seen and known it, he did not do that which the rule prescribes, he neither slackened speed nor stopped. *Primâ facie*, therefore, he has broken the rule, and must be held to have been to blame.

Has he shown any reason for not taking that course? It is suggested that, if he had slackened speed, it would have increased and not diminished the risk of collision. I do not see the slightest evidence to support such a contention. No question upon that point was ever put to the master of the vessel, and it would be impossible, as it seems to me, for your Lordships, without any such evidence, to arrive at any such conclusion. As I have said, the circumstances throw the burden upon the master of excusing himself, and he has not given any evidence which supports any such excuse as has been suggested for him here to-day. Mr. Aspinall, on behalf of the appellants, has argued that if the master of the *Memnon* had slackened speed it would in one particular event, namely, in the case of one manœuvre being taken by the master of the *San Salvador*, have increased the risk of collision, namely, if the master of the *San Salvador* had ported. Well, supposing that to be true, supposing also that it had been made out that if the master of the *San Salvador* had continued his course there would have been some increase to the risk of collision by the master of the *Memnon* slackening speed, yet there was a third alternative, and it may be that, in spite of that, and looking at the circumstances altogether, the total risk would have been less by the master slackening, even if in the case of a particular manœuvre being taken by the *San Salvador* it would have caused some increase of the risk. What must be looked at is the risk as a whole. In order to excuse the master for his non-compliance with the rule you must show that under all the circumstances, and considering all the possibilities, the total risk would have been greater if he had slackened speed than it would have been if he had not complied with the rule Even if there be ground for the suggestion that in certain events there might have been an increase of risk, I do not see the shadow of a case for the suggestion that as a whole the risk of collision would have been increased rather than diminished by the master slackening speed,

(*a*) In *The Theodore H. Rand* (56 L. T. Rep. N. S. 343; 6 Asp. Mar. Law Cas. 122; 12 App. Cas. 247).

and so obeying the rule. Under these circumstances it seems to me that the decision of the court below was right.

Lord MACNAGHTEN concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors: For the appellants, *Pritchard* and *Sons*, for *Thornely* and *Cameron*, Liverpool; for the respondents, *Waltons, Bubb*, and *Johnson*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Saturday, Nov. 30, 1889.

(Present: The Right Hons. Lord MACNAGHTEN, Sir BARNES PEACOCK, and Sir R. COUCH.)

THE ARRATOON APCAR. (*a*)

ON APPEAL FROM THE VICE-ADMIRALTY COURT OF THE STRAITS SETTLEMENTS (SETTLEMENT AT SINGAPORE).

Collision—Risk—Engines—Regulations for Preventing Collisions at Sea, art. 18.

Where one of the Regulations for Preventing Collisions at Sea has been infringed by a vessel, the fact that the infringement is comparatively venial, and that the reckless navigation of the other vessel is the principal and primary cause of the collision, does not justify the court in absolving the vessel guilty of infringement from blame unless necessity for such infringement is established.

THIS was an appeal by the owners of the steamship *Hebe* from the decision of the judge of the Vice-Admiralty Court at Singapore in a damage action holding the *Hebe* alone to blame for a collision with the steamship *Arratoon Apcar*.

The collision occurred about 3.35 a.m. on the 22nd May 1888 in the Straits of Malacca.

The learned judge below accepted the evidence of the witnesses from the *Arratoon Apcar* and disbelieved the evidence of the witnesses from the *Hebe*.

The appellants admitted that the *Hebe* was to blame, but contended that, on the respondents' evidence, the *Arratoon Apcar* was also to blame for breach of article 18 of the Regulations for Preventing Collisions at Sea, which 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 facts of the case are sufficiently stated in the judgment.

Nov. 7.—The *Attorney-General* (Sir Richard Webster, Q.C.) and *Kennedy*, Q.C. (with them *J. P. Aspinall*), for the owners of the *Hebe*, in support of the appeal.

Sir *Walter Phillimore* and *Hollams*, for the owners of the *Arratoon Apcar, contra.*

The following cases were cited:

The Ceto, 62 L. T. Rep. N. S. 1; 14 App. Cas. 670; 6 Asp. Mar. Law Cas. 479;
The Beryl, 51 L. T. Rep. N. S. 554; 9 P. Div. 137; 5 Asp. Mar. Law Cas. 321;
The Benares, 48 L. T. Rep. N. S. 127; 5 Asp. Mar. Law Cas. 171; 9 P. Div. 17;
The Khedive, 43 L. T. Rep. N. S. 610; 5 App. Cas. 876; 4 Asp. Mar. Law Cas. 360;
The Jesmond, 25 L. T. Rep. N. S. 514; L. Rep. 4 P. C. 1; 1 Asp. Mar. Law Cas. 150;
The Emmy Haase, 50 L. T. Rep. N. S. 372; 9 P. Div. 81; 5 Asp. Mar. Law Cas. 216;
The Rhondda, 49 L. T. Rep. N. S. 210; 5 Asp. Mar. Law Cas. 114; 8 App. Cas. 549.

Cur. adv. vult.

Nov. 30.—Judgment was delivered by

Lord MACNAGHTEN.—The collision which led to this litigation took place in the Straits of Malacca on the 22nd May 1888, about 3.35 a.m., between the s.s. *Hebe* and the s.s. *Arratoon Apcar*. Both vessels were under steam alone. The wind was southerly and moderate. The weather was fine and the sky clear. The regulation lights of both vessels were in order and burning brightly. Both vessels were considerably damaged by the collision. Cross-actions were brought in the Vice-Admiralty Court of the Straits Settlements. Each vessel accused the other of being the sole cause of the disaster. The actions were consolidated, and tried together. Judgment was given on the 3rd Aug. 1888. The learned judge found the *Hebe* alone to blame. He accepted the account given by the witnesses for the *Arratoon Apcar* and came to the conclusion that the *Hebe* was navigated with reckless negligence, and that the persons in charge of her at the time of the collision were, one and all, ignorant and incompetent. From the decree founded on this judgment the owners of the *Hebe* appealed. At the hearing before their Lordships the learned counsel for the appellants did not deny that the *Hebe* was to blame; but they contended that the evidence of the respondents' own witnesses proved that the *Arratoon Apcar* was also in fault. The facts of the case as they may be gathered from the evidence on behalf of the *Arratoon Apcar* are in substance as follows: The *Arratoon Apcar*, steering S. 60 degrees E., sighted the masthead light and the red and green lights of the *Hebe* when the two vessels were about five miles apart, and apparently as nearly as possible on opposite courses. The *Arratoon Apcar* was going about ten knots an hour at the time. She ported one point, and in about two minutes lost the *Hebe's* green light, and then she steadied on that course. Shortly afterwards the green light of the *Hebe* appeared again about two points on her port bow. The *Arratoon Apcar* then ported another point and again lost the *Hebe's* green light, and kept on that course until the *Hebe*, being about two and a half points on the port bow, suddenly shut out her red light and showed her green light for the third time. It is impossible to determine the distance between the two vessels at this moment; but their Lordships think that the learned judge was probably right in supposing that it must have been a little more or a little less than half a mile. The officer in charge of the *Arratoon Apcar* at once saw his danger. He gave the order "hard-a-port," and went himself to the wheel-house to make sure that the order was carried out. He saw his vessel beginning to come round before he left the wheel. Then he went to the telegraph and stopped the engines. The collision took place almost immediately afterwards, the starboard bow of the *Hebe* which was still going full speed striking the port bow of the *Arratoon Apcar* at something

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

less than a right angle. The engines of the *Arratoon Apcar* were not reversed until after the collision.

On this state of facts it was contended by the learned counsel for the appellants that the *Arratoon Apcar* infringed the Regulations for Preventing Collisions at Sea in three particulars. They argued (1) that the *Arratoon Apcar* ought to have slackened speed before the green light of the *Hebe* came into view the third time; (2) that the engines of the *Arratoon Apcar* ought to have been stopped and reversed at the time when the officer in charge gave the order "hard-a-port"; and (3) that at any rate the engines of the *Arratoon Apcar* ought to have been reversed as well as stopped before the collision. The learned judge in the Vice-Admiralty Court, who does not seem to have had the assistance of nautical assessors, appears to have felt little or no difficulty upon any point of the case except upon the one question, whether it was the duty of the officer in charge of the *Arratoon Apcar* to reverse as well as to stop. The excuse put forward at the trial for not reversing was that the *Arratoon Apcar* had a left-handed screw, and that its action would have "deadened" the effect of the port helm if the engines had been reversed. With some hesitation the learned judge accepted this excuse, and exonerated the *Arratoon Apcar* from all blame. Their Lordships are however compelled to take a different view. They are advised by their nautical assessors that before the green light of the *Hebe* appeared the third time there were sufficient indications to the officer in charge of the *Arratoon Apcar* (supposing him to have been a person of ordinary skill, using reasonable care) to show that the two vessels were approaching so as to involve risk of collision. They are further advised that a prudent seaman in the position in which that officer was placed by the conduct of those on board the *Hebe* would have stopped, or at the least have slackened speed, until the course of the approaching vessel could be made out with something like certainty. Under any circumstances their Lordships would be slow to differ from their nautical assessors on a question of navigation. In the present case, thinking as they do that the risk of collision was not determined when the *Arratoon Apcar* ported the second time, they see no reason for not giving effect to the advice which they have received. They are therefore obliged to hold that the *Arratoon Apcar* was to blame for not slackening speed in good time, before the third appearance of the *Hebe's* green light.

The error on the part of the *Arratoon Apcar* may seem venial compared with the misconduct of those on board the *Hebe*. But their Lordships have no power to absolve a vessel which infringes the Regulations for Preventing Collisions at Sea from the consequences prescribed by statute, unless a plea of necessity is made out. The view which their Lordships have taken under skilled advice renders it unnecessary to pronounce an opinion on the conduct of the officer in charge of the *Arratoon Apcar* after the *Hebe's* green light appeared the third time. It was probably too late then to prevent a collision. Their Lordships, however, think it right to say that they are not satisfied that the excuse for not reversing ought to have been accepted as sufficient, nor are they convinced that the officer in charge of the *Arratoon Apcar* after he saw the danger was justified in going to the wheel before giving orders to stop. Though the time lost was short, there was an appreciable delay in complying with the regulations. In the result their Lordships will humbly advise Her Majesty that the decree under appeal ought to be varied by pronouncing the *Arratoon Apcar* to blame as well as the *Hebe*, with the usual consequences, including a direction to assess the damages sustained by the *Hebe*, and by discharging the order as to costs. There will be no costs of the appeal.

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

Solicitors for the respondents, *Hollams, Sons, Coward*, and *Hawkesley*.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 21, 22, 23, 24, *Dec.* 2 *and* 3, 1889.

(Before COTTON, BOWEN, and FRY, L.JJ.)

DREYFUS AND CO. *v.* THE PERUVIAN GUANO COMPANY. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Inquiry—Damages—Wrongful detention of goods—Damages for being kept out of possession—Measure of damages—Lord Cairns' Act (21 *&* 22 *Vict. c.* 27), *s.* 2*—Jurisdiction—Damages—Threatened injury.*

The plaintiffs commenced an action against the defendants claiming delivery of certain cargoes of guano (then on their way to this country), and an injunction to restrain the defendants from dealing with such cargoes. The defendants denied the title of the plaintiffs to the cargoes.

An order was made by consent for the appointment of a receiver, and the defendants were allowed to receive the cargoes, without prejudice to any question, on an undertaking to keep accounts and to abide by any order the court might make. The statement of claim was subsequently amended by claiming damages for detention of the cargoes. At the trial of the action judgment was given in favour of the plaintiffs, declaring them to be entitled to the cargoes; and that the defendants were not entitled to be reimbursed certain expenses incurred by them in respect of the cargoes; and directing an inquiry what damages had been sustained by the plaintiffs by reason of the detention by the defendants of the cargoes.

The defendants appealed from this judgment, claiming to be reimbursed for expenses incurred by them in respect of the cargoes received under the consent order. The appeal was dismissed, but on appeal to the House of Lords the judgment was varied by allowing the claim to expenses, but no application was made to alter the terms of the inquiry. The chief clerk by his certificate awarded a sum as damages on the footing that there had been a wrongful detention of all cargoes commencing on their arrival in this country. The defendants applied to have the certificate

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

varied, on the ground that the effect of the decision of the House of Lords was that there had been no wrongful detention, and that the plaintiffs were entitled to nominal damages only.

Held (Bowen, L.J. dissenting), that the inquiry directed affirmed that there had been an unlawful detention by the defendant company of the eleven cargoes in question which gave rise to damages; that the inquiry could not be satisfied by finding merely nominal damages; that it was not competent to the court in working out the inquiry, not reversed by any court, to deprive it of all meaning by reviewing the circumstances under which it was made; that the inquiry was not affected by the decision of the House of Lords, and the certificate was right.

Decision of Kay, J. (61 *L. T. Rep. N. S.* 180; 42 *Ch. Div.* 66) *affirmed.*

Per Bowen, L.J.: The effect of the decision of the House of Lords was, that the taking possession by the defendants of the cargoes under the consent order was not wrongful, and gave no right to damages; that the court had no jurisdiction to give damages where there was only a threat to do a wrongful act; that the terms of the inquiry did not prevent the chief clerk from finding that there were nominal damages only; that, as he had apparently proceeded on the ground that taking possession under the consent order was itself an act of detention which entitled the plaintiffs to damages, the certificate was wrong, and it ought to be referred back to him to state what were the wrongful acts of detention in respect of which he found damages, and what damages he found in respect of them.

The court has no jurisdiction under Lord Cairns' Act (a) *to award damages where no wrongful act has been actually committed by the person against whom the injunction is claimed.*

This was an appeal from a decision of Kay, J. (reported 61 L. T. Rep. N. S. 180; 42 Ch. Div. 66) refusing an application by the defendants to vary the certificate of the chief clerk, made in the action.

On the 7th June 1876 the Peruvian Government entered into a contract (known as the Raphael contract) with the defendant company to consign to them for sale eleven cargoes of guano, in respect of which the company were to receive 4*l.* 15*s.* a ton for freight and other expenses, and the rest of the proceeds were to be held on account of the Government, to whom the company were to make certain advances against the cargoes. The eleven cargoes were shipped at Lobos on the coast of Peru about Dec. 1879.

Disputes arose between the Government and the company as to whether the cargoes were within the contract; and the result of such disputes was, that the Government purported to determine the right of the company under the contract, and sent the bills of lading of the cargoes to the plaintiffs Messrs. Dreyfus. The company, however, claimed possession of the cargoes, and with regard to four of the ships gave directions at the port of call to the masters as to the ports at which they were to discharge.

On the 27th April 1880 the writ in this action was issued by Messrs. Dreyfus against the company and the masters of the ships, claiming delivery of the cargoes to the plaintiffs, and an injunction to prevent the company from receiving them. The plaintiffs moved for an injunction and receiver, and on the 30th April 1880 an order was made on that motion by which, the company consenting, the action was dismissed against the masters of the eleven ships without costs; and the company undertaking that the receipt by them of the cargoes should be without prejudice to any questions between the parties, and that they would keep separate accounts of expenditure and receipts in respect of these cargoes, and abide by any order the court might make as to them or the proceeds of them, it was ordered that the costs of the motion were to be costs in the action, and that the order was to be without prejudice to any question in the action. At the date of this order only two of the ships had arrived, and none of the cargoes had been actually received by the company.

On the 16th July 1880 the statement of claim was delivered, and was amended on the 10th March 1881. It claimed delivery to the plaintiffs of the cargoes, damages for their detention, and an injunction against the receipt of them by the company.

On the 9th Nov. 1880 the defence was put in, stating that the company had taken possession of the cargoes under the Raphael contract, denying that such possession was wrongful, and denying the plaintiffs' claim to the property in the cargoes, and claiming for the company the right to receive them.

By an order of the 16th Sept. 1880 the company was allowed to receive the cargo of one of the ships, without prejudice to any question.

On the 17th Dec. 1880 an order was made for the appointment of a receiver of all the eleven cargoes or the proceeds of any sold, and on the 23rd Feb. 1881 a receiver was appointed.

By an order of the 8th March 1881 the company were, nevertheless, permitted to sell the cargoes of two other ships, and to pay the gross proceeds to the receiver; and by another order of the 26th Feb. they were permitted to retain 6366*l.* 4*s.* received for cargo of another ship on account of expenses, which were to be paid to them without prejudice to any question.

On the 13th Jan. 1885 Bacon, V.C. gave judgment in the action declaring the plaintiffs entitled to the cargoes, and that the company were not entitled to be reimbursed any expenses incurred by them in respect of any of the cargoes except under the order of the 8th March 1881, and the judgment directed an inquiry "what damages have been sustained by the plaintiffs by reason of the detention by the defendant company of the cargoes of guano in question in the action."

The company appealed from this judgment, but at the hearing of the appeal abandoned it, except as to their claim to be paid 4*l.* 15*s.* per ton under the Raphael contract, or, in the alternative, to be allowed the freight and landing charges paid by them in respect of the cargoes which

(a) Sect. 2 is as follows: In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the court shall direct.—Ed.

they had received under the order of the 30th April 1880. On the 12th Feb. 1886 the Court of Appeal affirmed the judgment of Bacon, V.C.

The company appealed to the House of Lords, and on the 18th July 1887 the House of Lords varied the judgment by allowing to the company the freight and landing charges in respect of the cargoes received by them, "so far as the same have not been already repaid to them or allowed to them in account with the Peruvian Government." Lord Watson, who occupied the woolsack, stated that he thought under the circumstances the actual receipt by the company must at least be regarded as a neutral, and not an adverse, act of possession. The counsel for the parties were invited by their Lordships to make any suggestions for varying the terms of the judgment, but no such suggestions were made, and accordingly the inquiry directed by Bacon, V.C. remained as part of the judgment.

The inquiry resulted in a finding by the chief clerk of a large sum for damages for detention of cargoes in respect of diminution of gross proceeds owing to sale by the receiver instead of the plaintiffs themselves; increased expenses of sales under orders of court; and damages for loss of interest on those sums and on actual proceeds of the cargoes, computed at 5 per cent. till judgment, less interest gained in court or paid by receiver; and damages for nonpayment of these moneys at 4 per cent. from judgment to the date of the certificate, amounting in all to over 30,000*l.*

The company took out a summons asking that the certificate might be discharged, and the inquiry proceeded with on the footing that the plaintiffs were entitled to no damages, or that the certificates might be varied by finding that no detention took place, or that, if any detention took place, it occurred at Lobos; and lastly, by striking out the whole of the sum found, and by finding that the plaintiffs had sustained no damages.

Kay, J. refused the application, and the defendants appealed.

On the 21st Nov., previously to the hearing of the appeal, the defendants applied by motion to the Court of Appeal, for liberty to appeal from the portion of the judgment of Bacon, V.C. which directed the above inquiry, but the court refused the motion on the ground that after the proceedings in the House of Lords it was not competent to the court to accede to it.

The appeal from the decision of Kay, J. was then heard.

Sir *Richard Webster* (A.-G.), *Rigby*, Q.C., and *Haldane* for the appellants.

Sir *Horace Davey*, Q.C., *Bigham*, Q.C., and *Ingle Joyce* for the respondents.

The following authorities were referred to:

Wren v. *Weild*, L. Rep. 7 Q. B. 730, 734;
Quartz Hill Consolidated Gold Mining Company v. *Eyre*, 49 L. T. Rep. N. S. 249; 11 Q. B. Div. 674;
Williams v. *Peel River Land and Mineral Company*, 55 L. T. Rep. N. S. 689;
Attorney-General v. *Tomline*, 43 L. T. Rep. N. S. 486; 15 Ch. Div. 150;
Chapman, Morsons, and Co. v. *Guardians of Auckland Union*, 61 L. T. Rep. N. S. 446; 23 Q. B. Div. 294;
Ferguson v. *Wilson*, 15 L. T. Rep. N. S. 230; L. Rep. 2 Ch. App. 77;
Eastwood v. *Lever*, 9 L. T. Rep. N. S. 615; 4 De G. J. & S. 114, 128;
Catton v. *Wyld*, 32 Beav. 266;
Davenport v. *Rylands*, 14 L. T. Rep. N. S. 53; L. Rep. 1 Eq. 302;
Fritz v. *Hobson*, 42 L. T. Rep. N. S. 225, 677; 14 Ch. Div. 542;
Cooper v. *Cooper*, 59 L. T. Rep. N. S. 1; 13 App. Cas. 88;
Dent v. *The Auction Mart Company*, 14 L. T. Rep. N. S. 827; L. Rep. 2 Eq. 238;
Lord Cairns' Act (21 & 22 Vict. c. 27).

Cotton, L.J.—This is an appeal from the decision of Kay, J. refusing to vary the chief clerk's certificate. [His Lordship stated the nature of the proceedings, and continued:] Under these circumstances, the defendants have put us in the greatest difficulty. In my opinion we cannot inquire whether the portion of the judgment of Bacon, V.C. which is now in question—no longer his judgment, no longer our judgment, but the judgment of the House of Lords—is right or wrong. But, as there was no actual possession of these cargoes, and therefore detention, in that sense, before the order of the 30th April 1880, it is necessary to ascertain what this inquiry can refer to. I have not thought it right to go through the evidence in this case for the purpose of seeing whether the decision of the Vice-Chancellor was right or wrong, but that decision does assume, and in fact give directions founded only upon this, that there had been that which amounted to detention so as to justify the plaintiffs in asking for and the judge in awarding damages which had been sustained by reason of that detention. It is, however, right to look at the pleadings, because they show what was the case on which the Vice-Chancellor was deciding. [His Lordship referred to the pleadings, and continued:] Now, having regard to these pleadings, in my opinion what the Vice-Chancellor decided was that the defendant company had been guilty, not by setting up this claim in this action but by their action in the matter, of such conduct as amounted to detention, thus preventing the plaintiffs from getting as they would otherwise have done under their bills of lading possession of these cargoes. I do not at all enter into the question whether that was right or wrong. We are not at liberty, in my opinion, to discuss or enter into that question, because the defendants have prevented us from doing so. They contended at the hearing that they had taken possession; they stated how it was that they got possession, and whether they were right or wrong, whether their counsel was right or wrong, in that view or not, in my opinion we must take it that the view of the Vice-Chancellor was based upon that. And it must be remembered that this inquiry was directed after the judgment was delivered, and when the minutes, which as I gather from the shorthand-writer's notes had been prepared by the plaintiffs' counsel, had been handed up, and the Vice-Chancellor requested the counsel then present for the defendants to consider carefully whether the minutes were right and whether the order which he was going to pronounce was right or not, and not one single word was said against this inquiry being directed. Well, therefore, here is the inquiry which embodies in fact a declaration that there had been a detention. It is founded on a decision of the Vice-Chancellor that there was a detention

of which the defendants had been guilty, which justified him in holding them liable to damages. In my opinion (it may be very unfortunate) we are not in a position to inquire into that. Whether the House of Lords will think that it can do so I give no opinion at all; but Fry, L.J. suggested that the appellants should go and see whether the House of Lords would think that was still open, having regard to what they had done when the appeal came before them; but the Attorney-General declined, and I think reasonably, to accept that offer and desired the appeal to continue. Then it is said that this finding as to damages is inconsistent altogether with the finding of the House of Lords when that appeal was before the House, and when it was decided that the defendants appealing were entitled to such payments as they had made in consequence of the order of the 30th April 1880. If it could be seen that in fact the decision of the House of Lords was at variance with any such finding we should be put into a great difficulty by the action of the defendants; but I do not think that is really the result of the decision. [His Lordship referred to the proceedings before the House of Lords, and continued:] I think we cannot say that this decision of Bacon, V.C., on which the certificate is founded, is at variance with the decision of the House of Lords. If it be so, the House of Lords, when the matter comes before them, will, if they think they have any power to do so, act upon it as justice may require.

Then the real argument against this certificate was, that there was nothing in fact done which would justify the court in granting to the plaintiffs any damages for anything which can be called detention on the part of the defendants. That is in fact to reverse the decision, and to strike out this inquiry, which the Vice-Chancellor has directed, because, although it was said that that might be done by giving nominal damages, yet, as I put it to Mr. Rigby, I cannot understand how, if no act has been done by the defendants which justifies any damages being given against them, even nominal damages could be given. If that course is taken, it is assumed that an act has been committed which justifies a claim for damages, but that the damages are so small that the court will not give substantial damages. Very likely juries in exercising their peculiar function do sometimes deal with a case in the way which has been mentioned; but it will not do for Kay, J., or for this court, to exercise that unknown equity which is sometimes exercised by juries; and, in my opinion, we cannot, unless there is some reasonable ground for differing from the finding of the chief clerk as to damages, in any way vary the certificate. It was said that here the chief clerk and Kay, J. have put all the cargoes upon the same footing, and that interest was calculated from the time when the cargoes were landed. That, I think, was on this footing that, if the defendants had not by their acts detained these cargoes, thus preventing the plaintiffs from getting them without recourse to a court of equity, then at that time the plaintiffs would have got possession of the cargoes; and from that time it is that the interest is calculated; that is to say, as from the time when, but for the detention of the defendants, the plaintiffs would have got possession of these cargoes. I cannot see therefore that we can interfere there. There was another point that was argued by Mr. Rigby, namely, that these cargoes could not all have been sold immediately. That really caused some doubt in my mind, whether the certificate was quite correct in fixing a date as if they could be sold immediately. But that point was never raised at all, either in chambers, so far as one can see, looking only to the evidence, or before Kay, J., nor was it really raised by the summons to vary. Therefore, in my opinion, we should be wrong, even if *primâ facie* it seemed to us that the matter might have been differently treated both by the chief clerk in chambers, and by Kay, J., when the matter was before him, when this point was not raised at all by the defendants, to allow them now to have the matter sent back on a point which they had not raised, and which has only occurred to them at the last moment. In my opinion the appeal fails. I should mention that *Cooper* v. *Cooper* (*ubi sup.*) was referred to by Mr. Rigby as a decision of the House of Lords which would enable us and require us to act according to his contention here as regards this inquiry as to damages. But that was a different case. There the matter was before the House of Lords, and, although there was a question whether the interlocutor of the Court of Session could be appealed from, yet the matter was before them, and they taking a different view as to the law which ought to govern the case, and having the matter before them, were at liberty to act, and did act upon that view so as to decide the case on the law really applicable to the case before them. But here we are in a very different position after the affirmation of the judgment of the Vice-Chancellor, both on appeal to this court and on appeal from this court to the House of Lords.

Bowen, L.J.—I regret that I am unable to take the same view as the Lord Justice. This unhappy case has got into a tangle, which my brother Cotton, L.J. thinks absolutely desperate, but which I think is capable, even at this eleventh hour, of still being remedied without there being applied to it so drastic a measure as that which destroyed the Gordian knot. To put it broadly, it seems to me that the conclusion at which the Lord Justice has arrived does not give adequate effect to the law as laid down in the judgment of the House of Lords, and I do not myself feel the same difficulty that he does in discovering a way in which due effect can be given to it. Now, the facts of this case I do not propose to discuss, except so far as they are uncontroverted. I will only mention a few of the uncontroverted facts, in order to make the remainder of my reasoning intelligible. Eleven cargoes of guano started from Lobos for England in ships which were chartered at the risk and on account of the Peruvian Government by the company, the defendants in this action. A quarrel took place on the other side of the seas, in consequence of which the Peruvian Government determined the right so far as they could, and in law I think they did determine the right of the guano company to take delivery of these cargoes as agents for the Peruvian Government or otherwise upon the remainder of the ships, and they further transferred the title to the guano which was in themselves, and the right accordingly to take delivery, to the plaintiffs in this action. The title of the plaintiffs accrued while the ships were sailing

across the seas. The ships arrived at intervals. Two of them, I will assume, were taken possession of, and wrongfully taken possession of, by the defendants. I will assume that for the purposes of my judgment. The remainder were still on their way when a writ was issued to raise the real question between the parties, which was as to the right to take possession of the cargoes—a writ which, as regards the two ships which had already arrived, might be based upon a wrong already done and threatened to be continued, but which, with regard to the other ships which were still on the sea, for anything we know, was simply in the nature of a *quia timet* action to prevent a threat which had been expressed from being exercised. A few days after the writ an order was made in the action by consent, in which it was agreed, obviously in the interests of both parties as they thought—for it is unimportant to consider whether the order has worked out to the detriment of one more than the other—that the receipt of the cargoes of guano by the defendants should be without prejudice to any question between the parties, that they would keep separate accounts of expenditure and receipts in respect of the cargoes and abide by any order which the court should make with respect to the cargoes. Now, two things seem to me to be perfectly clear: the one, that eight or nine of the ships—I will call it nine for the purposes of my judgment without investigating the question as to the number—were upon the high seas at the time when that order was made, and the cargoes were taken possession of by the defendants under that order. The second thing that seems to me to be perfectly clear is, that the *ratio decidendi* of the House of Lords in the case which went before them was, that no wrongful act consisted in the taking possession of any cargoes under that order. It was necessary for the House of Lords so to decide. The point made was, that the reimbursement of the freight which the defendants claimed would be inequitable and unjust, as they were wrongdoers in respect of the taking of possession. The House of Lords said they were not wrongdoers in respect of the taking of possession, and that therefore the point made could not arise. I pause for one moment to observe that the House of Lords did not feel themselves hampered in coming to that conclusion as to the wrongful possession taken under the order by the mere fact that an order for an inquiry had been made in the action, which was not appealed against, and which seemed to assume the detention of all the cargoes. Now, these two things seem to me to be perfectly clear: first, the *ratio decidendi* of the House of Lords; and secondly, that, as regards nine of the ships, if no other act were done in respect of them—and, as far as we know, nothing was done, though it will be seen presently I do not conclude that question—than the mere taking possession under that order, that was not wrongful. Having said so much as to what seems to me to be clear, I proceed to state wherein the difficulty now arises, and in order to explain that I must review shortly the course which this action took. The action when launched, as I have said, was, for anything that appears to the contrary on the facts before us as regards several of the cargoes, a *quia timet* action. At the time when the action came to be tried, and I think at the time when the pleadings were delivered, the cargoes had been successively arriving. At the time when the action was tried they all had arrived, and had been taken possession of. In the pleadings after the order of the 30th April 1880, it was useless for the defendants to deny the mere fact of possession of the cargoes. They either had received them, or were going to receive them. The point they desired to make was, that they had a right to receive them and a title to the proceeds after the sale under a contract with the Peruvian Government. Now I do not myself see that the mere fact that on their pleadings, when the question was one of right, they allege that the possession which they had admitted they had of the cargoes was under a contract with the Peruvian Government in any way prevents them setting up the fact that the possession was rightful, if that particular point under which they sought to justify it should fail. I think it was an alternative allegation which does not prevent them showing that the court had decided the truth. If it did, it seems to me it ought to have been an answer on the appeal to the House of Lords that they had admitted a wrongful possession, and had claimed a possession only in virtue of a contract which could not avail them, and that therefore there was a wrongful act or a detention. At the time when the Vice-Chancellor tried the action it appears to me (I do not hesitate to say it, because one can say it without disrespect to the eminent counsel who have conducted the case) that by an error in judgment counsel did not address themselves to one of the real points in the action, which since has been seen, by the light of subsequent investigation to be important, namely, whether there was any wrongful act at all in respect of nine at least of the cargoes. They admitted the possession, justifying it only upon their title. The Vice-Chancellor found that they were in possession. It was not disputed. He said it was admitted, and he ordered an inquiry as to damages upon that footing. The matter came to this court, and though the order as to damages was in form appealed from, it was not in fact, because that portion of the appeal was abandoned during the argument. From this court they went to the House of Lords, and they still continued their policy of abandoning the appeal against that order for inquiry, and accordingly in the event the House of Lords did not disturb the portion of the judgment of Bacon, V.C., which they were not asked to disturb, and nobody perceiving the importance of the lapse, this strange result has followed, that the House of Lords have declared that there was no wrongful act done in taking possession under the order of the 30th April 1880, but have left undisturbed an order for an inquiry which proceeds upon the footing that there was detention of all the cargoes, an order the maintenance of which can only be explained in one of two ways, either that it was an oversight, or that there were other possible acts of detention in respect of all the cargoes over and above the mere taking possession under the order of the 30th April. But, as I said before, one thing is clear, that the House of Lords have declared that one class of acts done in respect of these ships was not a wrongful detention, namely, the taking possession under the order of the 30th April 1880.

Now, the parties went back under this inquiry. The chief clerk in his certificate has, in my opinion, fallen into error. The vice of his certificate appears to me to be this, that, although it is evident that it was necessary to discriminate between the various acts done with respect to these cargoes, because as to one class of acts the House of Lords has declared nothing to be wrongful in that particular, the chief clerk has lumped all the ships together and assessed the damages upon a footing which leaves it open at all events to the view, and in my opinion necessitates the view, that he has as regards the whole of the ships treated as a wrongful act that very matter which the House of Lords said was not wrongful. The vice of the certificate is, that it lumps the ships together. Can that be set right? Sir Horace Davey, in the first place protesting that he was not bound to argue the facts of the case, assumed for the purpose of his argument that there had been no tortious act in law at all; nevertheless he said there was nothing wrong in giving damages, because Lord Cairns' Act clothed the Court of Chancery with the jurisdiction, where no wrong had been done in law at all, nevertheless on a threat of injury which would give rise to the jurisdiction for injunction, to give damages in substitution for such injunction. I speak with perfect consciousness that I am only a proselyte at the gate in matters of equity, and what I have learned about it has been learned from wiser people than myself who sit with me; but I am still giving my opinion as I am entitled and bound to do. I am of opinion that the 2nd section of 20 & 21 Vict. c. 27, commonly called Lord Cairns' Act, did not clothe the Court of Chancery with such a jurisdiction. It is true the section applies in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction, but the only weapon with which the court is armed by virtue of the section is to award damages to a party injured, which must, I think, mean damages where damages have arisen, and in a case where no damages have arisen in the ordinary sense of the term as known to lawyers, I am of opinion the court has no power to give damages. I should be alarmed if that were my opinion only; but I believe I am justified in saying that my learned brother Cotton, L.J. agrees with me in that, and I will leave my other learned brother to say whether he differs from me or not. But this I may say, as it was asserted by Sir Horace Davey—at least Sir Horace Davey seemed to put it forward as a proposition—that the practice in the Courts of Chancery had been in favour of his view. I have consulted others who are familiar with the practice among my colleagues, and I am told they are not aware of any such practice. I am specially informed by one who certainly can speak with authority on the point, that the view which I am now taking on this subject is the view taken by the late Master of the Rolls. Sir Horace Davey, however, went further and put forward a moral justification of the view. He said that these plaintiffs had been kept out of their property for many years, and that they ought to be compensated. The term "kept out of their property," seems to me to beg the question. If all that has been done is to threaten, and in consequence of a threat they have come to an arrangement that the cargoes shall be placed in the hands of the defendants to do their best with them, that threat and that consent order, although it may have been detrimental to the interests of the plaintiffs, is not a keeping out of possession which may give rise to damages under Lord Cairns' Act. The truth is, that the expression begs the question. They were kept out of a great portion of their property by reason of entering into the order of the 30th April 1880; that is to say, they kept themselves out of it. I regret very much that they were driven by a wrongful threat into consenting to that order, but it does not enable anyone to strain the law and to find under the heads of damages any acts which, as far as I know, there is no authority for treating as a source from which damages can flow. But then, if Lord Cairns' Act does not apply, is there any wrongful act which can be assigned as an explanation of the Vice-Chancellor's judgment? Sir Horace Davey protested against being compelled to discuss that question, and I do not propose to decide it, because I do not consider that we have the materials on this appeal, or certainly they have not been brought to our attention in argument in a way that enables one to be quite certain on the point. One thing I do myself think, and that is, that Bacon, V.C. only proceeded, so far as I read his written judgment, upon the assumption that there had been a possession taken, and that that possession could not be justified, and he assumed that that made an act of detention—a view which is, as regards a certain number of the cargoes, invalidated in my mind in law by the judgment of the House of Lords. There was the carriage of the guano across the Atlantic. The title of the plaintiffs began after it arrived, and the defendants were merely charterers of the vessels. There were directions given at the ports of call. I can conceive directions given as to a port of discharge which might amount to acts of trespass; but we have not got the facts here before us to enable us to say what was done in respect of the indication at the port of discharge, if any thing was done which could by any human imagination be construed as amounting to a wrongful act or an act of trespass. But I do not investigate the question as to what was done with respect to it, because I do not know that I can do so effectively. There may have been, and I believe there was with regard to one cargo, a wrongful act even after the order of the 30th April was agreed to, and in respect of any wrongful sale after the order I am not prepared to say that that might not be a source of damages under Lord Cairns' Act done before the inquiry as to damages; and it might be that the extension—if it be an extension—of the principle laid down in the case of *Williams* v. *Peel River Land and Mineral Company*, and acted upon by brother Fry, L.J. in the case which was cited of *Fritz* v. *Hobson*, and subsequently embodied, I believe, in an order under the Judicature Act, would apply to such a case. I leave that open. Finally, there is the possession under the order of the 30th April 1880; but I will not assume for this purpose that even that order justifies everything that was done as regards all the cargoes. I should require, before I came to that conclusion, to know exactly what was done with respect to the two which had been already landed, and whether it was possible, not-

withstanding the expression of opinion of the House of Lords, that for the purposes of freight all the cargoes were to be taken as being in the same boat, still to differentiate the case of these two cargoes in respect of the acts done before the order of the 30th April 1880. I leave that still open.

I come back to this, that although the history of these cargoes differs, that although as regards a large number of them it is obvious that the possession was taken under the consent order, and was not wrongful according to the view of the House of Lords, the chief clerk has made no distinction between any of those cargoes, has lumped them together, has possibly, I say probably or certainly, proceeded upon the view that the taking possession under the order was itself an act of detention from which damages would flow, and in that view to my mind his certificate is bad. His certificate states that he takes the damages from the arrival of the cargoes upon land. Now how far is it true that he was driven by this order of inquiry to go this length? That order of inquiry directs that there shall be an investigation as to what damages have flowed from the detention of the eleven ships. Sir Horace Davey suggested that, if there had been no possible damages at all, the words "if any" ought to have been introduced after "damages;" and that the order ought to have run for an investigation as to the damages, if any, which flowed from the detention of any of the eleven cargoes. I think that is so. I think the stage at which this order was made indicates that the court assumed that there would be damages in respect of these cargoes; but I draw the line there, and I protest that it does not follow from that that the court declared that substantial damages must be given. No authority can be found for that proposition. It is untrue as regards the form of rules of inquiry with which I am acquainted. I will mention, for example, the case of bonds and the inquiry directed by statute with regard to them, and also the form of a writ of inquiry under the Judicature Act when a judgment is given by default. The court to my mind does not find that there are substantial damages. What is true is, that the court finds that there has been a wrong and assumes that there may be substantial damages, not that there must be. It is for the chief clerk to inquire, it seems to me, and I cannot myself understand why a chief clerk would not be justified under such an order in finding there were nominal damages only in respect of one or more or all of these ships. Suppose for a moment the case of a single one of these ships; suppose it was clear to demonstration that one of these ships had been inserted in the order by a mere mistake, that there had been no detention at all of the ship, and that the ship, so far from being taken possession of by the defendants, had been taken possession of by the plaintiffs, had been sold by them, and they had appropriated the profits. Is the chief clerk positively bound to give more than nominal damages in such a case? He may be constrained by the form of the order to assume that there is a detention, but he may look to see what the detention is in order that he may know what damages flow from it. To my mind it would be extraordinary indeed if a chief clerk was bound to look to find damages without knowing what the acts of detention were in respect of which he found them. He must look to see what the detention is in order to know whether the damages are too remote, and I think that, if it was clear that there had been no possible act of detention as to any one or more of these ships, I should feel myself no hesitation (but then, as I said before, I am only a proselyte at the gate) in saying that, upon tender of nominal damages in such a case, and payment of nominal damages all further proceedings on the inquiry might be stayed. But this is not really necessary, from my point of view, to decide. As I said, I consider the vice of the chief clerk's certificate is that he has lumped all these ships together. I am ready to assume that there may be in the case of all the ships some other acts of detention than those which lie upon the surface in respect of what was done under the order of the 30th April 1880. There may have been something done in the indication at the port of discharge, and there may have been something done in respect of the ships taken possession of whose cargoes were landed, and there may have been something wrongfully done in respect of the cargoes that were landed under the order of the 30th April 1880. All that is for the chief clerk to state. As soon as it is seen that by lumping the ships together he has done injustice, he ought to be called upon to state, as he has acted upon this view hitherto, what are the acts of detention in respect of each of these ships on which he relies, and what are the damages which he assesses in respect of them. To my mind therefore the right way of dealing with this case is to declare, in accordance with the opinion of the House of Lords, that no act of possession merely taken under the order of the 30th April is a wrongful act or gives right to any damages at all; refer back to the chief clerk to state with regard to these eleven ships what are the wrongful act or acts of detention in respect of which he finds damages, and what damages he finds in respect of them. I ought to say that that form of reference, if it was followed by the court, would leave it open to the chief clerk, as I understand it and as I intend it, to rectify the error into which he seems to have fallen (for no argument was addressed to us by Sir Horace Davey to prove that he had not fallen into it) as to the calculation of the dates from which the interest should run. There is a difficulty about costs. The costs of the inquiry are reserved. I think the costs of the appeal in this case ought to be borne by the respondents. As to the costs in the court below, in consequence of the tangle in which the case has been involved I should make no order, but should leave either party to bear those.

Fry, L.J.—In my judgment, the course pursued by the appellants has placed the court in a cruel difficulty, and I have never felt myself so much embarrassed as I have in this case. It appears to me that, whatever course this court takes, there is a danger that we are acting in some way at variance with the decision of the House of Lords. If we take one course, we seem to me to be going counter to the expressed opinion of the learned Lords; if we take the other, we seem to me to be reversing a portion of the decree which the House of Lords has thought fit to affirm. I will consider the case in the first place independently of the recent decision of the House of Lords, and I shall imagine

myself to be filling the chair filled by Kay, J. as successor to Bacon, V.C., and as working out the judgment which the Vice-Chancellor pronounced. Of course, when the same judge works out the decree which he himself has pronounced, he probably knows without difficulty the meaning of that decree; but, if I were the successor of the judge who made the decree, the first inquiry I should address to myself would be, What is the meaning of the inquiry under which I am now proceeding? and I should hold myself precluded from considering the propriety of that inquiry, or from in any way attempting to evacuate that inquiry of its true and real meaning, or from in any way reviewing or reversing the decision of the learned judge who directed the inquiry. Now, what is the inquiry in the present case? It is couched in these terms: "An inquiry what damages have been sustained by the plaintiffs by reason of the detention by the defendant company of the cargoes of guano in question in this action." We know that the cargoes in question in the action were the eleven cargoes, and the inquiry, therefore, seems to me to affirm and judicially to determine certain things. It determines that there has been a detention by the defendant company of the eleven cargoes in question. It determines that that detention has been unlawful because it gives rise to damages, and it determines that those damages were substantial, because, in order to sustain such an inquiry, it is requisite that the damages should be substantial. From any investigation of the rightness of that decision I should feel myself precluded when working it out, and the only question open would seem to me to be, what is the quantum of damages? But then, outside of that, I must know and inquire what is the meaning of the detention of the eleven cargoes by the defendant company, so affirmed by the Vice-Chancellor in his judgment, and endeavour to ascertain the meaning of these words so used in the judgment by a reference to the pleadings, and also, if necessary, to the evidence and the presentation of the cases of both sides before the Vice-Chancellor. [His Lordship referred to the pleadings, and continued:] It appears to me that the case made by the defendants was shortly this: "We are in possession of the eleven cargoes, and our possession is rightful under the contract and the bills of lading." The plaintiffs, on the other hand, say, "You are in possession, and your possession is wrongful, because the property is in us." And in that state of things it appears to me that the Vice-Chancellor—whether rightly or wrongly I do not feel myself at liberty to inquire—determined that there was a detention of the eleven cargoes by the defendants, and that that detention was not only wrongful, but gave rise to damages. No doubt it is quite true of several of the cargoes, that the greater portion of them was received after the order of the 30th April 1880; but the view which the Vice-Chancellor appears to me to have entertained with regard to that order was this, that the defendants, by their wrongful acts on the 22nd, 26th, and I think the 29th April, several of which preceded the commencement of the action, had driven the plaintiffs into equity, and that the order of the 30th April 1880 was the natural result of the wrongful acts of the defendants. That, I think, is the meaning of the Vice-Chancellor's affirmation of the detention of the eleven cargoes, which he says gave rise to a claim of damages on the part of the plaintiffs against the defendants. Now, if the matter had stood merely on the judgment of the Vice-Chancellor, and upon the affirmation of it by this court, I should have felt little or no difficulty in the matter. But the matter went to the House of Lords, not upon appeal against that part of the judgment, because that was abandoned in this court, but against the decision of this court on the main question in the action, and also with regard to the expenses incurred in the landing and freight, and in dealing with that latter question, namely, the freight and landing charges, the learned Lords expressed their opinions in a way which I confess seems to me to be not consistent with the view of the Vice-Chancellor, and therefore great embarrassment is caused in acting on that view.

But then what did the learned Lords do? It appears from the shorthand-writer's notes that the learned Lord who presided on that occasion wrote down the order of the House which he proposed that the House should pronounce, and that having dealt with the two specific matters before the House, namely, what I may call the general question of title and the question of the freight and landing charges, he then dealt with the rest of the order of the Vice-Chancellor, and, as to that, affirmed the order of the Vice-Chancellor. Now there was hardly anything left in the order except this inquiry as to damages. It was by far the most important of the residual portions of the order, and that inquiry as to damages involving the affirmation of the detention of the whole eleven cargoes and the damages resulting from it the House of Lords thought fit to affirm. Knowing the care with which the business of that House is conducted, and the care with which we see this particular case was conducted by the learned Lords—because not only did Lord Watson write down the order he proposed to make, not only did he read it, but he invited the attention of the learned counsel to it, and gave them an opportunity of making any observations upon it—I say, having regard to that, I cannot believe that the affirmation of that inquiry, involving all that it does, was made *per incuriam* by the House; and therefore I am driven to conclude that my own view that the opinion of the learned Lords tended to evacuate that inquiry and to deny the detention cannot be the accurate one. It appears to me, therefore, that, inasmuch as the House of Lords have reaffirmed the necessity of the inquiry, and that I can give no meaning to the detention if the view which is suggested to have been taken by the House of Lords is the true one, I am bound to follow out this inquiry in the spirit and meaning in which it was directed by the Vice-Chancellor. It does not appear to me that it is competent, in working out an inquiry of that description not reversed by any court, to deprive it of all meaning by reviewing the circumstances under which it was made. And therefore I am not able to follow the view taken by my brother Bowen, L.J., who reviewing all the circumstances comes to the conclusion that we ought to treat it as an idle inquiry, and to deprive it, as it seems to me, of any force and meaning. It is quite true that he has suggested that there may have been some detention *ultra* and beyond that which was in evidence before the Vice-Chancellor; but it

appears to me that the history of these cargoes had been threshed out by the time this matter was before the House of Lords. It is impossible to conceive that anything more can be known about them. The whole case was before the House of Lords when they affirmed this inquiry, and therefore I do not see my way to suppose that it is possible that there was any other construction to be put upon it, or that the House of Lords thought the inquiry to relate to any other detention which was not in issue nor in evidence, and which was really not the subject of consideration. That being so, I think we are bound to proceed as if the matter was in the first instance before the Vice-Chancellor. Now, what do I find that the appeal before us is? It is not an appeal directed to any particular cargo. It is not an appeal directed to any particular part of the inquiry, but it goes to the whole matter, and seeks to deprive the whole inquiry of any value. [His Lordship referred to the terms of the summons to vary the certificate, and continued:] That being so, I do not feel myself at liberty to condescend upon the details of the particular detentions of the particular cargoes in the way in which my learned brother thinks it open to him to do. I abstain from doing so, because I confess I am greatly apprehensive of two things. I am apprehensive of there being no finality in litigation if upon an inquiry the whole matter is to be gone into again. And, further, I am apprehensive that, if we entertain objections of which due notice has not been given by the summons, we shall often be led *per incuriam* into doing what would seem to us to be justice, but would really be injustice. I therefore feel constrained, though extremely embarrassed as to what is the true course to take, to concur in the view of Cotton, L.J., and think that this appeal must fail with the usual results. I have only one other observation to add. I entirely agree with what has been said by Bowen, L.J. on the subject of Lord Cairns' Act. I am clear that the statute often enables the court where a wrong has been done to give damages upon a different scale from what was done by the courts of common law, because it may give them in substitution for an injunction; but where there has been no wrong done, it appears to me that Lord Cairns' Act confers no power to give damages.

Cotton, L.J.—I agree with what has been said by Fry, L.J. as regards Lord Cairns' Act. I did not advert to it because I did not think it a matter which arose, taking my view of the case before us.

Solicitors for the appellants, *C.* and *S. Harrison* and *Co.*

Solicitor for the respondents, *G. M. Clements.*

Monday, Dec. 9, 1889.

(Before Lord Esher, M.R., Lindley and Lopes, L.JJ.)

The Batavier. (a)

Collision — Inevitable accident — Costs — Special circumstances.

As a general rule a defendant relying upon and succeeding upon the defence of inevitable accident in a case of collision is entitled to his costs, but there may be exceptions to this rule as where, in addition to such defence, the defendant alleges facts inconsistent therewith and fails in establishing their truth.

This was an appeal from a decision of Butt, J. finding the full-rigged ship the *Batavier* to blame for a collision with the steamship *New Pelton.*

The collision occurred in the river Tyne about 5.30 p.m. on the 20th March 1889. The defendants counter-claimed.

The facts alleged by the plaintiffs were as follows: Shortly before 5.30 p.m. on the 20th March 1889 the *New Pelton*, a screw-steamship of 525 tons register, laden with a cargo of coal and bound on a voyage from the Tyne to London, was coming down the river to the south of mid-channel. There were passing showers of sleet and rain, the wind was blowing a gale from the N.E., and the tide was just turned high water. In those circumstances those on board the *New Pelton* observed a ship, which proved to be the *Batavier*, lying athwart the stream with her head to the northward and distant about a mile, bearing about one or two points on the port bow of the *New Pelton.* The two topsails and foresail of the *Batavier* were partly clewed up, but loose. Shortly after seeing her, the speed of the *New Pelton* was eased, and then reduced to slow. The *Batavier* was seen to be still lying athwart stream with her head towards the lower tier of the Commissioners' buoys, apparently for the purpose or in the act of making fast to one of them. She had two tugs ahead of her, with long scopes of hawser out which were between the said buoys and the spouts, and she had two other tugs fast, one on her port and the other on her starboard side, all apparently engaged in keeping her in the aforesaid position. With the *Batavier* lying as she then was there was ample room and all was clear for the *New Pelton* to pass to the southward of her. The *New Pelton* was accordingly kept going ahead slow, making about two to three miles an hour. When the *New Pelton* had approached to within about a hundred feet of the *Batavier* the latter was observed by those on board the *New Pelton* to be suddenly coming astern with her sails aback. The helm of the *New Pelton* was at once hard-a-ported and her engines stopped and reversed full speed astern, and the tugs were loudly hailed to tow the *Batavier* ahead, but the *Batavier* continued to come astern fast and with the round of her stern struck the *New Pelton* abaft the port fore rigging, doing her much damage.

The facts alleged by the defendants were as follows: Shortly before 5.30 p.m. on the 20th March 1889 the *Batavier*, a Dutch full-rigged ship of 1616 tons register, laden with a cargo of sugar, was in the Tyne in charge of a duly licensed pilot, having put in from stress of weather while in the course of a voyage from Java to Leith. The wind was blowing a violent gale from N.N.E., the weather was clear with occasional showers of rain, and the tide was the first of the ebb. The *Batavier* had been driven by the force of the gale almost into the Tyne Dock entrance, and was proceeding thence to the Commissioners' buoys on the north side to make fast there. All her sails had been taken in and made fast as far as possible. She had two tugs ahead of her, and one on each side of her, and

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

was athwart the river just moving ahead. In these circumstances a steamship which proved to be the *New Pelton* was seen coming down the river in mid-channel about three-quarters of a mile distant on the port beam of the *Batavier*, and the *Batavier* went over to the said buoys, and was being made fast to one of the buoys, being held there by her tugs, but the *New Pelton*, instead of keeping clear of the *Batavier*, came on, and with her port side abreast the forerigging struck the stern of the *Batavier*.

The defendants denied that the *Batavier* ever came astern, and alleged that the collision was wholly caused by the negligence of the *New Pelton* in not keeping clear of the *Batavier*.

In paragraph 11 of the defence, the defendants alleged as follows:

In the alternative the defendants say that if the *Batavier* did come astern as alleged which they deny as aforesaid, she did not come astern so as to cause or contribute to the said collision, but that if the said collision was caused or contributed to thereby (which they also deny) the said coming astern was solely caused by the weather then prevailing, and the said collision, so far as the *Batavier* was concerned, was an inevitable accident but they say that so far as the *New Pelton* was concerned the said collision was caused or contributed to by those in charge of her in manner hereinbefore alleged.

Butt, J. held the *Batavier* solely to blame, on the ground that, when the *New Pelton* was approaching, the two tugs alongside the *Batavier* were ordered to ease their speed, and hence the *Batavier* came astern and caused the collision.

The defendants appealed.

The Court of Appeal allowed the appeal, and while holding that the *Batavier* did come astern, and that her coming astern was the cause of the collision, found that it was solely occasioned by the severity of the weather, and not by the negligence of those in charge of the *Batavier*, and that therefore the *Batavier* was not to blame.

Sir *Walter Phillimore* (with him *J. P. Aspinall*), for the appellants, asked for costs.

Barnes, Q.C. (with him *L. Pyke*), for the respondents, *contrâ*.

The following cases were cited:

The Monkseaton, 60 L. T. Rep. N. S. 662; 6 Asp. Mar. Law Cas. 383; 14 P. Div. 31;
The Marpesia, 26 L. T. Rep. N. S. 333; 1 Asp. Mar. Law Cas. 261; L. Rep. 4 P. C. 212;
The Condor, 40 L. T. Rep. N. S. 442; 4 P. Div. 115; 4 Asp. Mar. Law. Cas. 115.
The Naples, 11 P. Div. 124; 55 L. T. Rep. N. S. 584; 6 Asp. Mar. Law Cas. 30.

Lord Esher, M.R.—It is time that it should be laid down once for all in all cases, unless there are special circumstances, the party who wins gets his costs, and the party who loses pays the costs. Here, therefore, if the defendants had not so complicated the case, but had set up the defence of inevitable accident alone, they would have got their costs. But I think there are special circumstances in this case. From first to last the witnesses from the *Batavier* told a story which was outrageously false, and consequently the same story is pleaded in the defence. I cannot help thinking that such a false defence, persisted in from the beginning, may have had great effect upon the conduct of the plaintiffs, and that when they found the defendants relied upon such an impossible and improbable story they may have naturally concluded that their own story was right. Therefore, on account of the untruthful story of the defendants persisted in from beginning to end, I think the circumstances are such that the plaintiffs ought not to pay all the costs of the defendants. Each party must pay their own costs in the court below, but the appellants are to have the costs of the appeal.

Lindley and Lopes, L.JJ. concurred.

Solicitors for the appellants, *Botterell* and *Roche*.

Solicitors for the respondents, *Gellatly* and *Warton*.

Wednesday, Feb. 12, 1890.

(Before Lord Coleridge, C.J., Lord Esher, M.R., and Fry, L.J.)

The Orchis. (a)

Mortgage — Co-owners—Arrest of ship—Master's claim—Priorities—Compulsion of law—Bristol Dock Act 1881—*Harbours, Docks, and Piers Clauses Act* 1847.

The arrest of a ship in an action in rem for a claim legally due from the owners of the ship, although there be no maritime lien, is a sufficient compulsion of law to entitle mortgagees of part of the shares in the ship paying off the claim in order to get possession to recover from the owners of the remaining shares the amount so paid.

The owner of 44/64th shares in the steamship O. mortgaged them to the plaintiffs. Subsequently the O. was arrested in the Admiralty Court at the suit of her master for disbursements. The mortgagor being insolvent, and the plaintiffs wishing to realise their security, paid the master's claim and the ship was released. The plaintiffs then took possession of the O. on behalf of themselves and the other co-owners, and it was thereupon arranged between the plaintiffs and the co-owners that the O. should be sold on behalf of all parties and this was eventually done. Whilst the plaintiffs had possession of the O. she was lying in the Bristol Dock, and they paid the necessary dock dues. In the event of the dock dues not being paid, the O. was liable to seizure and sale by the dock authorities under the Bristol Dock Act 1881, *and the Harbours, Docks, and Piers Clauses Act* 1847. *In an action against the co-owners to recover the payments made by the plaintiffs:*

Held, that, in the circumstances, there was an implied promise in law by the co-owners to pay back the plaintiffs all the money paid by them to release the ship; and that the defendants were also liable to pay their proportion of the dock dues, the payment thereof by the plaintiffs being necessarily made on behalf of all the owners.

This was an appeal by the defendants from a decision of Butt, J. in an action by Smith, Brothers, and Co., the mortgagees of 44/64th shares in the steamship *Orchis*, against certain of the owners of the said steamship.

The plaintiffs had been mortgagees of 44/64th shares in the ship, belonging to one Hornstedt, who had been the managing owner up to May 1886.

The defendants were Hornstedt and the owners of 16/64th shares. The owners of the remaining

(a) Reported by J. P. Aspinall and Butler Aspinall, Esqrs., Barristers-at-Law.

shares were not proceeded against, as they were not in a position to pay in the event of the plaintiffs getting judgment against them.

In 1886 the plaintiffs took possession of the ship, and then incurred the expenses in respect of which they now sought contribution from the defendants in the circumstances hereinafter stated.

The statement of claim, so far as is, material was as follows:

5. The plaintiffs became and were at all times material hereto the duly registered mortgagees of the defendant Claude A. Hornstedt's 44/64th shares in the said steamship, under two mortgages dated respectively the 14th Oct. 1882 of 30/64ths, and the 12th June 1884 of 14/64ths.

6. On or about the 14th May 1886 the defendants were jointly and severally liable to Lewis Alexis Leslie, the master of the said steamship, for coals and other necessary disbursements incurred while the said steamship was prosecuting a voyage for the joint benefit of the defendants, and amounting to the sum of 422*l.* 15*s.* 7*d.*, and the said master instituted in the Admiralty Division of this court an action *in rem* against the said steamship to recover the same, and the said ship was duly arrested in the said action, and the plaintiffs after and during such arrest having sought to take possession of the said steamship under the said mortgages in order to obtain the release of the said steamship, were compelled to pay and did pay the said sum of 422*l.* 15*s.* 7*d.* together with a further sum of 18*l.* 9*s.* 3*d.* for costs due to the plaintiff in the said action in order to obtain the release of the said steamship, and upon payment thereof the plaintiffs did obtain possession of the said steamship under their said mortgage.

7. The defendant Claude A. Hornstedt was at the time of arrest of the said ship and the said payment by the plaintiffs, and still continues, insolvent, and has not paid and cannot pay any portion of the said sum so expended by the plaintiffs as aforesaid.

8. After the plaintiffs took possession of the said steamship, and until the plaintiffs sold the 44/64th shares in the said steamship of which they were mortgagees, on the 18th June 1887 the said ship was in a dock at Bristol, and the plaintiffs during that period incurred for the owners of the said ship certain necessary and reasonable expenses amounting to 67*2l.* 11*s.* 1*d.* in and about payments for dock dues and for watching and caring for the said steamship and for other charges in and about the inspection and repair of the said ship, full particulars whereof have been given by the plaintiffs to the defendants.

9. The defendants are jointly and severally liable to indemnify the plaintiffs as to the payments referred to in paragraph 6 hereof, and to contribute in respect of their shares to the payments referred to in the 8th paragraph.

10. In the alternative the plaintiffs say that they are entitled to contribution as to the payments referred to in the said 6th paragraph as well as to those in the said 8th paragraph.

The defendant Hornstedt admitted liability.

The defence, so far as is material, was as follows:

2. The defendants deny that they were or that any of them was on the 14th May, or at any other time, jointly or severally or at all liable to Lewis Alexis Leslie for the sum of 422*l.* 15*s.* 7*d.* or any other sum. The plaintiffs were not compelled to pay the said sum of 422*l.* 15*s.* 7*d.* or any other sum or sums. If they paid anything (which the defendants do not admit), they paid it voluntarily, and not for or at the request of these defendants, or any of them.

3. The defendants do not admit any of the allegations contained in paragraphs 6, 7, 8, 9, and 10 of the statement of claim.

4. The defendants deny that the plaintiffs have at any time incurred any expenses for the owners of the said ship. If the plaintiffs did spend the said sum of 67*2l.* 11*s.* 1*d.*, or any other sum (which is not admitted), they did so voluntarily, and not for or at the request of these defendants, or any of them. They deny that the said expenses were necessary or reasonable, and that they were incurred for the purposes alleged.

5. The plaintiffs have never paid any sum or sums whatever for or at the request of these defendants, or any of them.

6. The defendant Claude Andrew Hornstedt had in his hands at the time of the arrest of the said ship, and of the alleged payments, moneys of the defendants sufficient to pay the said sums, and upon the accounts as between him and the defendants it was his duty to pay the said sums, and the same were payable by him, and not by these defendants.

7. The defendants further say, that they have since the 14th May 1886 been compelled to pay large sums of money in respect of liabilities necessarily incurred for the maintenance and repair and insurance of the said vessel.

8. The defendants claim that an account be taken of the payments and transactions hereinbefore mentioned, and that they may be allowed to set off in this action such amounts as may, upon the taking of such account, be found chargeable against the plaintiffs.

By order of the judge the issues of fact raised in the pleadings were referred to the registrar, who found as follows:

First. That the plaintiffs in this action did pay the sum of 422*l.* 15*s.* 7*d.*, and also the sum of 18*l.* 9*s.* 3*d.* costs, as pleaded in paragraph 6 of the statement of claim.

Secondly. That the plaintiffs did pay the sum of 67*2l.* 11*s.* 1*d.*, as pleaded in paragraph 8 of the said statement of claim, and we are of opinion that such payment was reasonable and necessary.

Thirdly. That the defendants since the 14th May 1886, and prior to the 11th July 1888, have paid various sums of money, amounting to 2193*l.* 3*s.* 10*d.*, for the maintenance, repair, and insurance of the said vessel, as pleaded in paragraph 7 of the defence, and in addition thereto have in the month of March last paid the further sum of 111*l.* 5*s.* 4*d.* for the same purposes, making a total sum of 2304*l.* 9*s.* 2*d.* paid in respect of liability incurred before the 14th May 1886. Against that sum they have to give credit for 452*l.*, the value as estimated by us of four shares, formerly belonging to the defendant Claude A. Hornstedt, and mortgaged by him to Earle's Shipbuilding Company, as security for their account against the ship, and which shares were subsequently transferred by the said building company to the defendants on their account being settled, thus leaving a balance of 1852*l.* 9*s.* 2*d.* which the defendants are entitled to bring into account.

Fourthly. That at the time of the arrest of the vessel on the 14th May 1886 the said C. A. Hornstedt had not money in his hands to the amount of 1324*l.* 17*s.* 6*d.*, or any other sum, as pleaded in paragraph 6 of the said defence; but on a balance of accounts to that date the defendants were in debt to the said C. A. Hornstedt on the ship's account to the amount of 845*l.*

It appeared that, during the time the *Orchis* was in the dock at Bristol, negotiations were going on between the plaintiffs and the defendants as to the sale of the ship, which eventually took place. The dock in question was the property of the Bristol Corporation, and the payment of the dock dues and rates were regulated by the following Acts of Parliament:

The Bristol Dock Act 1881, sect. 2, incorporates the Harbours, Docks, and Piers Clauses Act 1847; sect. 6 prescribes the fees payable for using the docks.

The Harbours, Docks, and Piers Clauses Act 1847:

Sect. 3. The following words and expressions in both this and the special Act and any Act incorporated therewith, shall have the meanings hereby assigned to them, unless there be something in the subject or context repugnant to such construction; (that is to say) . . . The word "rate" shall mean any rate or duty or other payment in the nature thereof, payable under the special Act.

Sect. 44. If the master of any vessel in respect of which any rate is payable to the undertakers, refuse or

neglect to pay the same, or any part thereof, the collector of rates may, with such assistance as he may deem necessary, go on board of such vessel, and demand such rates, and on nonpayment thereof, or of any part thereof, take, distrain, or arrest, of his own authority, such vessel, and the tackle, apparel, and furniture belonging thereto, or any part thereof, and detain the matters so distrained or arrested until the rates are paid; and in case any of the said rates shall remain unpaid for the space of seven days next after any distress or arrestment so made, the said collector may cause the matters so distrained or arrested to be appraised by two or more sworn appraisers, and afterwards cause the matters distrained or arrested, or any part thereof, to be sold, and with the proceeds of such sale may satisfy the rates so unpaid, and the expenses of taking, keeping, appraising, and selling the matters so distrained or arrested, rendering the overplus (if any) to the master of such vessel upon demand.

There was a long correspondence between the parties, setting out the negotiations in regard to the sale of the ship, and it was contended, on behalf of the plaintiffs, that this correspondence authorised them to incur on behalf of all parties the expenses at Bristol.

Barnes, Q.C. and *J. P. Aspinall* for the plaintiffs.—The defendants are liable to pay the whole money paid by the plaintiffs to release the ship. The plaintiffs were entitled to possession of their shares, and the only way they could get it was by paying off the master's claim. The defendants were clearly liable for the master's claim, and in the circumstances the law implies a promise that the defendants will pay to the plaintiffs the money they have paid on their behalf:

Johnson v. *Royal Mail Steam Packet Company*, 17 L. T. Rep. N. S. 445; L. Rep. 3 C. P. 38; 3 Mar. Law Cas. O. S. 21;
Lamplough v. *Braithwaite*, Smith's Leading Cases, 8th edit. 151;
Edmunds v. *Wallingford*, 52 L. T.Rep. N. S. 720; 14 Q. B. Div. 811.

The defendants are also liable to pay their contributions towards the dock expenses. At the time they were incurred the plaintiffs had possession of the ship on behalf of themselves and the defendants, and such expenses were incurred with the authority and knowledge of the defendants.

Joseph Walton (with him *French*, Q.C.) for the defendants.—Both payments were made voluntarily by the plaintiffs, and they cannot look to the defendants for repayment. The plaintiffs were under no compulsion to release the ship, and did so merely to benefit themselves. The case of *Johnson* v. *Royal Mail Steam Packet Company* (*ubi sup.*) is not in point. In the present case the plaintiffs were only mortgagees of a part of the ship, and hence there is no privity between them and the defendants. Since the arrest of the *Orchis* by her master, it has been decided that masters' disbursements do not give a maritime lien (*The Sara*, 61 L. T. Rep. N. S. 26; 14 App. Cas. 209; 6 Asp. Mar. Law Cas. 413); and hence the mortgagees had a prior right to the master, and could have protected their shares from sale by intervening in this action.

Butt, J.—This is a suit by Messrs. Smith Bros. and Co., who are mortgagees of forty-four sixty-fourth shares of the ship *Orchis*, which were mortgaged to them by one Hornstedt, who was managing owner, against the defendants, who are owners of sixteen sixty-fourths. It appears that before the mortgagees entered into possession one Leslie, the master of the ship, had incurred a debt for disbursements, which together with the costs of suing for recovery amounted to 444*l.* 4*s.* 10*d.* To recover that money the master instituted proceedings *in rem* against the ship, and arrested her in this court. There she lay properly arrested by the master in the enforcement of his claim by virtue of the Act of Parliament, which gave him a right to proceed *in rem*. At that time it was supposed, upon the authority of certain decided cases, that a ship's master had a maritime lien for disbursements. But, by a decision of the House of Lords, subsequently given, it appears that that was an erroneous view of the law, and that the master never had any maritime lien at all for his disbursements, but only a claim against the ship which he had a right to enforce *in rem*, or rather a claim against the owners which he had a right to enforce against the ship *in rem*. I shall of course follow the law as laid down by the House of Lords, and I may add that I always had a strong impression that that was what the law ought to be. The ship, as I have said, being under arrest in this court, and the plaintiffs wishing to get possession of that to which they were entitled, paid off the master's claim and so discharged the ship. They did so without any express authority from the defendants in this suit, and they do not base their claim to reimbursement by the defendants on any express promise to pay, but on the promise which they maintain the law implies under these circumstances, that they have been compelled to pay a sum which the defendants were legally compellable to pay. To deal with the last part of their contention first: it is quite clear that the defendants were legally compellable to pay the 444*l.* 4*s.* 10*d.*, because it was a joint liability of theirs for disbursements made by their servant in an adventure in which they were jointly interested. But it is said, admitting that the defendants were legally compellable to pay this sum of 444*l.* 4*s.* 10*d.*, it is not accurate to say that the plaintiffs have been compelled to pay it. What is the position? The plaintiffs could not get possession of their shares or of the ship except by paying this sum. It is perfectly clear on authority that if a man is entitled to possession of a chattel, and he can only get possession of it by paying a debt which another is legally compellable to pay, and he does pay it, the law will imply a promise on the part of the other to repay what he disburses. But it is said, taking that to be the law, the facts of this case do not warrant the implied promise from the defendants to recoup the plaintiffs, because it is said that the plaintiffs were the mortgagees of forty-four sixty-fourth shares in the ship, and were not entitled to possession of the whole ship; and it is also said that they could have protected the forty-four sixty-fourth shares mortgaged to them from sale under process of the court by intervening and showing that they as mortgagees had a superior right or lien or claim to that of Leslie, the master. It is true they might have done so, but it would not have given them possession of the ship or their shares in the ship. What really was their right with reference to this ship? It is quite correct, as has been contended, to say they were not entitled to all, but only to their shares; but they were entitled to

possession, jointly, it is true, with the others, of the whole sixty-four sixty-fourth shares, and they could not get that joint possession without paying off this debt of Leslie's. Their intervention as mortgagees and proof to the court that they had a superior claim to Leslie would not have given them possession. There would still have been a lien attaching to the other shares, and the court would not have taken its hands off the ship merely on its being shown that the plaintiffs were mortgagees of forty-four sixty-fourths. Therefore, in order to get what they were entitled to, viz. joint possession with the holders of shares other than Hornstedt's shares, they really were compelled to pay this sum of money. The law implies a promise to repay on the part of those owners who are legally compellable to pay, and on that promise the plaintiffs rely, and I hold that they are entitled to recover. Then it was said that, even so, the plaintiffs here ought only to recover so much of the 444*l.* 4*s.* 10*d.* as the defendants other than Hornstedt would be liable to pay, and that in equity at all events the present plaintiffs ought to bear Hornstedt's proportion of that sum. I do not agree to that proposition at all. One of the principal objects of having a mortgage security on land or chattels is to secure the performance of the mortgagor's promise to pay, or, in other words, to secure the mortgagor's inability to pay—to secure the mortgagee against the insolvency of the mortgagor. That is what has been done here. Why are those who have advanced money on the mortgage of these shares, because the mortgagor has been unable to perform his liability to them and to the ship, why are they to forfeit part of their security? I fail to see it, and therefore I hold that the plaintiffs are entitled to recover the whole of the sum of 444*l.* 4*s.* 10*d.* from the defendants. There is only one other matter in dispute, and that relates to the sum of 672*l.* 11*s.* 1*d.* expenses which the plaintiffs have incurred for disbursements on behalf of this ship since they got possession of her jointly with the others. Their possession was a joint possession. They have paid dock dues and other disbursements during that possession. They allege that the possession which they held was not for themselves alone, but for themselves and the tenants in common in this ship. If tenants in common and holding possession in the joint interest of all, the presumption would be, unless it is rebutted, that payments made in the course of holding the joint possession would be made with the consent of the other tenants in common, and they would be liable to reimburse their share. But I do not base my decision on that, because I think from a perusal of the correspondence it appears that the owners of the shares in this ship other than the shares which were mortgaged to the plaintiffs agreed that if the plaintiffs would go on disbursing the ship they would contribute their quota. I hold that to be the result of the correspondence, and therefore I hold that the plaintiffs establish their claim to this item of 672*l.* 11*s.* 1*d.* Of course when I say establish their claim, I mean that they have established their claim to a contribution from the defendants, the owners of sixteen sixty-fourth shares, and are entitled to judgment for sixteen sixty-fourths of that sum.

From this decision the defendants appealed.

French, Q.C. and *Joseph Walton*, for the defendants, in support of the appeal.—The plaintiffs paid both sums of money voluntarily and cannot recover them from the defendants. They were under no legal compulsion to pay such moneys. As to the master's claim, it was not entitled to priority; there was no maritime lien for it: (*The Sara* (*ubi sup.*) If so, the court could not have sold the plaintiffs' shares to satisfy the master's claim. The master merely had a right *in rem* against the property of those persons who were personally liable to him. The plaintiffs' proper remedy was to have intervened in the master's action. [Lord Esher, M.R.—But the court would not have released the ship until the master's action had been tried and determined and until then the plaintiffs would have been kept out of possession of their shares.]

The Heinrich Bjorn, 55 L. T. Rep. N. S. 66; 11 App. Cas. 270; 6 Asp. Mar. Law Cas. 1;
The Cella, 59 L. T. Rep. N. S. 125; 6 Asp. Mar. Law Cas. 293; 14 P. Div. 82;
Dickinson v. *Kitchen*, 8 E. & B. 789;
Edmunds v. *Wallingford* (*ubi sup.*).

Assuming the plaintiffs are entitled to recover in respect of the master's claim, they are only entitled to a proportion of it. As to the second item of claim, it is submitted that the correspondence shows it was a voluntary payment by the plaintiffs.

Barnes, Q.C. (with him *J. P. Aspinall*), for the plaintiffs, was called upon only as to the dock expenses, but upon his stating that the dock company had a lien for the same under the Bristol Dock Act 1881 and the Harbour, Docks, and Piers Clauses Act 1847, the contention on this head was not further pressed by the other side.

Lord Coleridge, C.J.—This action, although tried in the Probate, Divorce, and Admiralty Division, is in all its incidents and character a common law action. It is an action by the mortgagees of the ship *Orchis* to recover two sums of money, one being 441*l.* 4*s.* 10*d.*, the other being 672*l.* 11*s.* 1*d.*, the rights as to which stand upon somewhat different grounds. The action was tried by Butt, J., who decided in favour of the plaintiffs as to both sums. Different points have been raised as to the two sums, and somewhat different arguments advanced. The sum of 441*l.* 4*s.* 10*d.* was money paid by the plaintiffs in an action to release the ship of which they were mortgagees from the hands of the Admiralty Court, which had seized the ship at the suit of her master who had brought an action against her owners for disbursements which he had made for necessaries for the ship. Under the practice of the Admiralty Court he had a right, in order to enforce the payment of his claim, to seize the ship and take proceedings against her *in rem*. That was done, and the seizure was according to the practice of the Admiralty Court a legal seizure. In those circumstance the mortgagees, the plaintiffs in the present action, wanted to get possession of the ship; but they could not do so as long as the hand of the Admiralty Court was upon it, and therefore they paid 441*l.* 4*s.* 10*d.* for the release of the ship, which was in consequence released. At the time when the mortgagees paid the sum of 441*l.* 4*s.* 10*d.* to release the ship there was that amount of pressure which the law requires in order to found a claim for and enforce a repayment of a sum of money paid

by one person for the benefit, or partly for the benefit, of another. That principle of law was laid down in the case of *Edmunds* v. *Wallingford* (*ubi sup.*), which was decided by this court in 1885. The decision is directly in point. It was decided by Sir James Hannen, Lindley, L.J., and myself, the judgment of the court being delivered by Lindley, L.J. I will read so far as is material two or three sentences from the judgment. He says: "In order to bring the present case within the general principle alluded to above it is necessary that the goods seized shall have been lawfully seized; and it was contended before us that the son's goods were in this case wrongfully seized and that the defendant therefore was not bound to indemnify them. But when it is said that the goods must be lawfully seized, all that is meant is that, as between the owner of the goods and the person seizing them, the latter shall have been entitled to take them. It is plain that the principle has no application except where the owner of the goods is in a position to say to the debtor that the seizure ought not to have taken place; it is because as between them the wrong goods have been seized that any question arises." Then the learned judge goes on to show what application that principle had to the facts of that particular case. There is the principle clearly enough stated. The result is this: where there is a seizure rightfully as between the parties (rightfully I mean in point of law), then the person who claims for money paid in extricating property of his own from being subject to what is a lawful seizure, if in extricating that property he pays money for the benefit of somebody else, he has a remedy over to recover that from somebody else. The principle laid down in *Edmunds* v. *Wallingford* is directly applicable to the present case. The process of the Admiralty Court was properly applied to the seizure of the ship; the payment of the 441*l.* 4*s.* 10*d.* was necessary to obtain the release of the ship, and therefore it follows that those who paid it can recover it from the defendants.

The 672*l.* 11*s.* 1*d.* stands upon a somewhat different footing. It was argued by counsel for the defendants that there was no liability on their part to pay that sum, because they had never agreed to the ship being kept in the dock, and that the ship remained in the dock simply by the orders and on the responsibility of the plaintiffs. They argue that the plaintiffs must pay that sum of money, and that they have no remedy against the defendants, who had not been parties to the payments, and had not agreed to the course of conduct out of which the necessity for those payments arose. I confess I should have thought from the correspondence between the parties, quite apart from Mr. Barnes' argument, that there was great reason for holding the defendants liable. The substance of the transaction was this: Here is a ship which the plaintiffs are anxious to sell. The plaintiffs only own a portion of the whole shares. The defendants own sixteen sixty-fourth shares. The plaintiffs say, "We shall be glad to sell, but no doubt selling the whole ship will be a much better thing for all of us. We, unless you concur, can only sell our forty-four sixty-fourth shares. Will you agree to sell her as a whole?" The answer in substance is, "Yes, we will agree." I should have said that in those circumstances, without any more evidence, any man of business would know that it must take some time to carry the negotiations attending the sale into effect, and that the parties must be taken to have agreed to the incidental expenses. They were men of business, and knew perfectly well that the ship could not be sold without certain expenses being incurred. I quite admit that letters are not always clear; but assume they are not, and assume there was no specific and definite consent to the payment of the incidental expenses, Mr. Barnes has pointed out that by the Bristol Dock Act 1881, and the Harbours, Docks, and Piers Clauses Act incorporated therewith, the Bristol Dock owners had a lien upon this ship in respect of her use of their dock; and I understand Mr. Barnes to say that they had a right to sell the ship to pay themselves their dock dues. I should have said that the defendants, as men of business and co-owners in this ship, must have perfectly well known the state of affairs at Bristol, and what were the powers of the dock owners. They having that knowledge, and having arranged that the ship should lie there for the purpose of being sold, must be taken to have agreed to bear the incidental expenses which they knew would be incurred. More than that, they practically placed this ship in the dock, and did not take any steps to take her out. Therefore, the dock dues were the direct and immediate result of the act of their agent. I therefore think that this appeal must be dismissed, and the judgment of Butt, J. affirmed.

Lord Esher, M.R.—The first point is of some general importance, but the second point is a mere question of considering the correspondence and what passed between the parties. This is really a purely common law action, being an action for money paid by the plaintiffs on behalf of the defendants, there being an implied promise to repay it. Before the Judicature Act the action could not have been brought in the Admiralty Court, but must have been tried at common law. The only reason that it is necessary to consider Admiralty procedure is to see whether that pressure which must exist in order to found an implied promise to pay exists in this case. The plaintiffs were mortgagees of forty-four sixty-fourth shares in this ship, and the defendants owners of sixteen sixty-fourth shares. The captain was employed by all the owners, by those who had mortgaged their shares and those who had not. They were not merely co-owners, but also partners in the adventure. The mortgagees, the plaintiffs in this case, were not the employers of the captain. He was not their captain, and they were not liable to him. The captain made the disbursements for the benefit of the ship; he acted for the persons who employed him. What were his rights according to Admiralty law? They were, in the event of his not being paid for the disbursements, to have a warrant from the Admiralty Court to seize the ship. The effect of that, according to Admiralty law, is that the ship from the time of her arrest is held as security for the captain's claim in the event of his establishing it. The seizure of a ship by the Admiralty Court in an action *in rem* is a good seizure against all the world. Her seizure was, according to Admiralty law, good as against the mortgagees, although they

owed the captain nothing. What in point of fact were the consequences of such a seizure by Admiralty law against these mortgagees? The mortgagees had acquired the right under their mortgage of a joint possession of the ship, but by reason of Admiralty law the Admiralty Court could step in and prevent the mortgagees exercising that right. They could not acquire joint possession of the ship without an order of the Admiralty Court, and that order could not be made, because the Admiralty Court would not take off its hand until the suit between the captain and those owners of the ship who had employed him was determined, and until his claim was paid. If his claim was paid or bail put in the ship would be released. But if the ship was released what would be the position of affairs? Why, the mortgagees and co-owners would be entitled to joint possession, and if either of them took possession, that would not only be for themselves but for others. Now the mortgagees desired to have possession; they desired to exercise that right which, but for the Admiralty Court, they would be entitled to do. They had good reasons for wishing to do so, and it was in many ways their interest to do so. How came the law to prevent them exercising their rights? Solely for the benefit of the defendants. They were liable, and the Admiralty Court had the right to seize the ship in consequence of their default. The debt was due from the defendants to the captain, and by reason of the defendants' default the law was put into effect. The law seized the property in which the plaintiffs had an interest, and to which in ordinary course they were entitled to immediate possession. In those circumstances, in order to get immediate possession, they pay according to the law. The case is within the decision of *Edmunds* v. *Wallingford* (*ubi sup.*). It is within the rule that, if by reason of the default of one person the property of another becomes subject to seizure by the law, and the person whose property is thus seized pays the debt, the law implies a promise from the one whose debt is paid to repay it to the person who paid it. A more just principle of law I cannot conceive. Were it not the law, what would be the consequence? Why this, that the debt of a debtor would be paid by another man not liable to pay it, and that the debtor would get the use of his property without paying a penny. I therefore have no hesitation in saying that I think the judge below was perfectly right upon this point.

As to the other point I agree with what has already been said. Having regard to the correspondence and the other evidence, I have no doubt but that the defendants, whether they expressly stated it or not, did agree with the plaintiffs that the ship should be kept so as to be sold partly for their own benefit and partly for the plaintiffs' benefit, and I therefore think that the defendants ought to pay their share of the expenses of the ship being kept in dock. I think the decision of Butt, J. was correct, and that this appeal should be dismissed.

Fry, L.J.—I am of the same opinion. The pressure upon the plaintiffs arose from the right of the Admiralty Court to seize the entire vessel until the rights of the parties to the action before it were ascertained. It was argued that the shares of the plaintiffs in this vessel could not be made responsible to satisfy the master's claim. That may be so; but, inasmuch as according to the practice of the Admiralty Court the whole vessel was seized and would in ordinary course be detained till the rights of the parties were ascertained, the plaintiffs were put to that kind of inconvenience or pressure which they might reasonably try to escape by paying the claim against the vessel. As to the second point, I concur in the conclusion of the court upon the ground that the defendants were the principals of the plaintiffs, who were in the position of managing owners and as such had placed this vessel in the dock, and were therefore liable to pay the incidental expenses.

Solicitors: for the appellants, *Wynne, Holme, and Wynne*; for the respondent, *F. B. Moss.*

Thursday, April 24, 1890.

(Before Lord Esher, M.R., Fry and Lopes, L.JJ.)

The London Steamship Insurance Association *v.* The Grampian Steamship Company. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance—Mutual insurance for protection—Ordinary running-down clause—Collision—Assured's ship in equal fault—Non-liability of insurers.

The defendants insured their ship in the "protecting class" of the plaintiff association, a limited mutual marine insurance association, to indemnify them against any loss or damage to any other vessel not covered by the usual Lloyd's policy, with the running-down clause attached. The defendants' ship came into collision with another ship, and caused and suffered damage; both ships were to blame. The defendants' ship was fully insured by policies in the usual form of Lloyd's policy with the running-down clause attached. It was admitted that the damage suffered by the defendants' ship exceeded that inflicted by her on the other ship, and that the owners of the other ship had paid the defendants a sum equal to the difference between half of the amount of the damage sustained by their ship and half of the damage sustained by the defendants' ship. The plaintiffs brought their action to recover a sum of money in the hands of the defendants, which sum the defendants claimed to be entitled to retain as an indemnity in respect of the proportion of the damage to the colliding ship which had been taken into account in adjusting the amount to be paid by the other ship, and which proportional sum was not covered by the ordinary running-down clause in their policies.

Held, that the true principle for adjusting the loss from collision in such a case was that of a single liability and not cross-liabilities, and that, as the defendants had not been called upon to contribute anything in respect of the damage done to the other vessel, they were not entitled to call upon the plaintiffs to indemnify them in respect of a loss or damage which they had not sustained.

This was an appeal from the judgment of the Queen's Bench Division (Mathew and Wills, JJ.) on a special case reported (61 L. T. Rep. N. S. 774; 6 Asp. Mar. Law Cas. 452; 24 Q. B. Div. 32).

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

The special case is given at length in the report of the case in the court below, but more shortly the facts are as follows: The plaintiffs were a limited mutual marine insurance association composed of several different classes. The defendants were owners of a steamship called the *Balnacraig*, which they entered in class 5, called "The Protecting," of the plaintiff association. By rule 6, sub-sect. (*b*) of that class, the plaintiffs undertook to indemnify the owners against "loss or damage to any other vessel . . . so far as such loss or damage was not covered by the usual form of Lloyd's policies with the clause commonly known as the 'Running-down Clause' attached." That clause is "that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay and shall pay any sum or sums not exceeding the value of the said vessel hereby insured, we the assurers will severally pay the assured such proportion of three-fourths of the sum so paid as our respective subscriptions thereto bear to the value of the ship." By rule 7 of class 5, in case any member of the class should, under rule 6, "become liable for and be required to pay any claim or demand," such member should be entitled to recover, and the members should contribute to satisfy and make good the amount of such claim or demand. The *Balnacraig* came into collision with another ship the *Karo*, both ships being to blame; but the damage sustained by the *Balnacraig* largely exceeded that sustained by the *Karo*. The action was brought to recover a debt of 51*l*. due by the defendants to the plaintiffs, and the defendants desired to set off a like amount as due to them in respect of the damage suffered in the collision between the *Balnacraig* and the *Karo*. It was admitted that if there had been cross actions between the owners of the two ships, the decree which would have been pronounced by the Admiralty division would have been that the owners of each ship should pay half the damage suffered by the other ship, and as the *Balnacraig* suffered the greater damage the monition that would have issued from the Admiralty division would have been that the owners of the *Karo* should pay the defendants a sum equal to the difference between half the amount of the damage sustained by the *Karo* and half the amount of the damage sustained by the *Balnacraig*. The owners of the *Karo* had in fact paid this sum.

The Queen's Bench Division gave judgment for the plaintiffs.

The defendants appealed.

Gorell Barnes, Q.C. (*Arthur Russell* with him) for the defendants.—The question is whether the collision resulted in one liability of the owners of the *Karo* to the owners of the *Balnacraig*, or in two cross liabilities:

Chapman v. *The Royal Netherlands Steam Navigation Company*, 40 L. T. Rep. N. S. 433; 4 Asp. Mar. Law Cas. 107; 4 Prob. Div. 157.

The question here is between the owners and the insurers, not between the owners of the two colliding vessels which distinguishes this case from:

The Stoomvaart Maatschappy Nederland v. *The Peninsular and Oriental Steam Navigation Company* (*The Khedive*) 47 L. T. Rep. N. S. 198; 7 App. Cas. 795; 4 Asp. Mar. Law Cas. 567.

Cohen, Q.C. (*B. A. Cohen* with him) for the plaintiffs.

Lord ESHER, M.R.—The question in this case is as to the construction and meaning of the running-down clause of a policy. The case is decided by the decision of the House of Lords in *The Khedive* (*ubi sup.*), which it is true did not relate to a policy of insurance, but in which it was held that where two ships come into collision, both being to blame, there is, according to Admiralty law, only one liability, not two liabilities. If the damage to one ship is equal to the damage to the other, the liability is cancelled, and there is then none; but if the damage to one ship is less than the damage to the other, the owners of one ship will, under a monition from the Court of Admiralty, pay the owners of the other half the difference between the damages to the two ships. There is only one liability and one compulsory payment. It is the rule after discovering the amount of damage suffered by the two ships to divide the difference by a simple sum in arithmetic, and, as a result, to decide upon the amount of the one liability. That being so, it is plain that there is nothing here to which the words of the running-down clause can attach. The clause does not apply to damage done to the *Balnacraig*, but refers to the sums which the assured might become liable to pay, and should pay, to the owners of another ship with which their ship might have had a collission. The owners of the *Balnacraig* had not become liable to pay anything to the owners of the other ship, because the *Balnacraig* had suffered greater damage than the *Karo*. Therefore I think the judgment of the court below was correct, and this appeal should be dismissed.

FRY, L.J.—I agree. In this case it is suggested that the owners of the *Balnacraig* became liable to a claim or demand under rule 7. This contention is the very opposite of what was laid down in the case of *The Khedive* (*ubi sup.*), in which it was determined that in case of a collision, both ships being to blame, there was only one liability. The appellants are trying to make out that there were two liabilities in such a case, but they never became liable for any claim or demand. They cannot be entitled to recover in respect of their insurance with the plaintiffs. Therefore I think the appeal must be dismissed.

LOPES, L.J. concurred. *Appeal dismissed.*

Solicitors: for plaintiffs, *Parker, Garrett*, and *Parker*; for defendants, *Waltons, Bubb*, and *Johnson*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Thursday, March 13, 1890.

(Before BUTT, J.)

THE CARISBROOK. (*a*)

Carriage of goods—Charter-party—Demurrage—Lay days—Place of discharge.

Where by the terms of a charter-party a ship was

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

to proceed to Odessa, or so near thereto as she might safely get, and deliver her cargo alongside any safe wharf, store, craft, steamer, depôt, ship, or arsenal, as ordered by the receiver, the time for unloading to commence from the time she was ready and intimation thereof has been given in writing, and after her arrival in the harbour, she being ready to discharge, was ordered by the receiver to a quay which was the usual place for the discharge of the cargo in question, but she had to wait her turn before she could get alongside the quay to discharge, it was

Held, that the lay days commenced to run from the time when she was ready to discharge, and that the consignees were liable for the delay during the time she was waiting for her turn.

Davies *v.* McVeagh (41 *L. T. Rep. N. S.* 308; 4 *Ex. Div.* 265; 4 *Asp. Mar. Law Cas.* 149) *followed.*

THIS was a claim by the owners of the steamship *Carisbrook* for demurrage against the consignees of a cargo of coals, who were the endorsees of the bill of lading of the cargo.

By the charter-party the *Carisbrook* was to load a cargo of coals at Glasgow, and proceed therewith to Odessa, and there deliver the said cargo, the time for loading and unloading to commence from the time the steamer was ready. On the ship's arrival at Odessa, notice was given that she would be ready to discharge next day, but, in consequence of her not being able to get her turn at the quay for some thirty-two hours after she was ready, her owners sued the holders of the bill of lading for demurrage in respect of such delay.

By agreement between the parties the following facts were agreed to for the trial:

1. That the s.s. *Carisbrook* was loaded by Messrs. Lietke and Co. at Glasgow with 1855 tons of coal, pursuant to a charter-party dated the 11th Oct., a copy of which is annexed hereto.

2. That the master by his agents signed a bill of lading for the said cargo of coals.

3. That the said bill of lading of the said cargo was duly indorsed to the defendants, to whom the property in the coals passed by reason of such indorsement..

4. That due notice of the vessel having passed Constantinople was despatched on the 14th Nov. 1888, and received by the defendants or their agents at Odessa in due course.

5. That the *Carisbrook* arrived at Odessa, laden with the said cargo, at 9.15 a.m. on Friday, the 16th Oct., and came to anchor within the Mole, but not in any usual discharging berth, and that at noon due notice of the ship's readiness to discharge cargo was given to the defendants.

6. That the ship was ordered by the defendants to proceed alongside the wharf or quay to discharge (where she afterwards did discharge). The said wharf or quay was the usual place for the discharge of coal cargoes at Odessa.

7. That at 11 a.m. on the 20th Nov. the *Carisbrook* got alongside the said quay. It was impossible to get there earlier, as she had to wait her turn before the harbour officials permitted her to go to the quay. That the defendants knew when they gave such orders that all the berths of the said quay were occupied, but there was no other place of discharge for coal cargoes at Odessa, and there were no lighters available.

8. That the cargo was all discharged at 3.30 p.m. on Sunday, the 25th Nov. 1888.

The charter-party, so far as is material, was as follows:

It is this day mutually agreed . . . that the said steamer . . . shall . . . proceed to a customary loading berth as ordered at Glasgow (General Terminus) and there load coals, . . . and being so loaded shall therewith proceed to Odessa, or so near thereunto as she may safely get, and deliver the same to the said freighters or assigns alongside any safe wharf, store, craft, steamer, depôt, ship, or arsenal, as ordered by receiver. . . . Cargo is to be discharged at the average rate of not less than 300 tons per working day, Sundays and holidays excepted, and ten days on demurrage over and above the said lay days at 16*s.* 8*d.* per hour, except in cases of strike, lock-outs, colliery holidays, strikes at mines where steamer is booked, detention by railway, stoppage of trains, accidents to machinery, or any other causes beyond the control of the charterers or receivers, or their respective agents, delaying the due loading and unloading. Time for loading and unloading to commence from the time the steamer is ready and intimation has been given in writing.

The bill of lading incorporated the conditions in the charter-party.

L. E. Pyke, for the defendants, was called on.—The defendants are not liable. By the terms of the charter-party the lay days were not to commence until the ship was alongside the quay. There was no default on the part of the defendants. They were not answerable for the fact that the *Carisbrook* had to wait before she could be discharged. Although the ship had arrived at Odessa, she was not an arrived ship within the meaning of the charter-party till she was alongside the quay in the usual discharging place:

Nelson v. *Dahl*, 44 L. T. Rep. N. S. 381; 12 Ch. Div. 568; 4 Asp. Mar. Law Cas. 392;
Murphy v. *Coffin*, 5 Asp. Mar. Law Cas. 531, n.; 12 Q. B. Div. 87;
Davies v. *McVeagh*, 41 L. T. Rep. N. S. 308; 4 Ex. Div. 265; 4 Asp. Mar. Law Cas. 149;
Pyman Brothers v. *Dreyfus Brothers*, 61 L. T. Rep. N. S. 724; 6 Asp. Mar. Law Cas. 444; 24 Q. B. Div. 152.

The decision in *Murphy* v. *Coffin* (*ubi sup.*) is in point, and shows *Davies* v. *McVeagh* (*ubi sup.*) has no application to this case.

Robson, for the plaintiffs, was not called on.

BUTT, J.—I have no hesitation in this case in deciding that the charterer is liable for the demurrage claimed. The ship arrives at Odessa, and there is no doubt that she was ready to deliver her cargo, if not at the exact spot where she was, yet at any place where she might have properly been unloaded by lighters within the port of Odessa. The charterer instead of doing as he might have done, and arranging to unload the cargo into lighters, chooses to exercise the option which he has of ordering her to a quay which was crowded, and to which she consequently could not get. He has a perfect right to do so if he chooses, but under the terms of the charter-party he has to pay for exercising that option. I think the principle is correctly and properly laid down in *Davies* v. *McVeagh* (*ubi sup.*), first of all by the then Brett, J., and on appeal by several distinguished judges; and I must add that the authority of that case is, to my mind, quite in accord with previous decisions. I am asked on the authority of *Murphy* v. *Coffin* (*ubi sup.*), a decision of the Divisional Court, to treat the conclusions laid down in *Davies* v. *McVeagh* (*ubi sup.*) as of no value. The learned judges who decided the case of *Murphy* v. *Coffin* (*ubi sup.*) do not say that the case of *Davies* v. *McVeagh* (*ubi sup.*) does not apply; but they say boldly they think it is a wrong decision, because it is, they say, inconsistent with other cases, and because they think that some facts in the case

were not properly brought before the attention of the Court of Appeal. With all deference to the Divisional Court, I should be bound to prefer the judgment of the Court of Appeal to theirs, even if I had no opinion in the matter; but I have a strong opinion that the Court of Appeal knew perfectly what it was about when it decided the case of *Davies* v. *McVeagh*. I give my judgment for the plaintiffs.

Solicitors for the plaintiffs, *Turnbull, Tilly*, and *Mousir*.

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

Monday, March 24, 1890.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE HERMOD. (*a*)

Collision—Lights—Ship at anchor—River Mersey—Merchant Shipping Act 1873 (36 *&* 37 *Vict. c.* 85), *s.* 17—*Merchant Shipping Act Amendment Act* 1862 (25 *&* 26 *Vict. c.* 63), *s.* 32.

In considering whether a breach of the Regulations for preventing Collisions could possibly have contributed to a collision, the court must take into consideration the whole of the evidence even where there is a conflict, subject to the qualification that the onus of proof lies on those infringing the Regulations; and if upon such evidence the court comes to the conclusion that the breach could not possibly have contributed to the collision, the ship committing it is not to be deemed to blame in respect thereof

The steamship H. at night ran into the barque E. at anchor in the river Mersey. By Order in Council of the 5th Jan. 1881, *every vessel when at anchor in the river Mersey shall carry two white lights, the after light being carried double the height of the foremost light. The E. exhibited two anchor lights both of which were about twenty feet above the deck. It was admitted by the defendants that they only saw the after light.*

Held, that the H. was to blame for a bad look out, and the E. to blame for a breach of the regulation, it not being shown that in the circumstances of the case the breach could not have contributed to the collision.

The Duke of Buccleuch (6 *Asp. Mar. Law Cas.* 471; 15 *P. Div.* 86; 62 *L. T. Rep. N. S.* 94) *considered.*

THIS was an action *in rem* by the owners of the Norwegian barque *Ebenezer* and others against the owners of the Danish steamship *Hermod*, to recover damages occasioned by a collision between these two vessels.

The collision occurred in the river Mersey on the 13th Feb. 1890.

The facts alleged by the plaintiffs were as follows: Shortly before 4.45 a.m. on the 13th Feb. 1890 the *Ebenezer*, a barque of 577 tons register, manned with a crew of eleven hands all told, was, whilst on a voyage from Liverpool to Buenos Ayres, laden with a cargo of coals, at anchor in the Mersey to the westward of mid-river, off Laird's Yard. The wind was a moderate breeze from about S.S.E., and the weather was fine, clear, and moonlight. The *Ebenezer* was heading from S. to S.S.E., and she had the regulation lights for a vessel at anchor in the Mersey, duly exhibited and burning brightly. In these circumstances those on board the *Ebenezer* observed the masthead red and green lights of a steamship which proved to be the *Hermod*, from a quarter to half a mile distant, and bearing about seven points on the port bow. The *Hermod* came on, taking no measures to keep out of the way, and although loudly hailed by those on board the *Ebenezer*, she with her stem struck the port side of the *Ebenezer*, causing her shortly afterwards to sink.

The facts alleged by the defendants were as follows: Shortly before 4.55 a.m., on the 13th Feb., the *Hermod*, a steamship of 743 tons register, manned by a crew of twenty-two hands all told, and laden with a general cargo, was proceeding down the river Mersey, heading about N., in charge of a duly licensed pilot, in the course of a voyage from Liverpool to Gothenburg. In these circumstances those on board the *Hermod* observed the bright light of a vessel which afterwards proved to be the *Ebenezer*, distant from three to four ships lengths, and nearly ahead, but a little on the port bow, withal. As only a single bright light was visible at this time, the pilot of the *Hermod*, believing it to be the stern light of a vessel going down the river, hard-a-starboarded the helm of the *Hermod*. But immediately after a second bright light at about the same height as, or rather lower than the first bright light came into view, a little on the starboard bow of the *Hermod*. The engines of the *Hermod* were at once reversed full speed, but, before her headway could be stopped, she with her stem struck the port side of the *Ebenezer* about amidship.

The defendants charged the plaintiffs with having failed to carry their anchor lights as required by rule 4 of the Rules for Preventing Collisions in the river Mersey. They also alleged that at the time in question, the *Hermod* was in charge of a pilot by compulsion of law, and that if there was any negligence attributable to the navigation of the *Hermod*, such negligence was solely that of the pilot.

According to the evidence of a diver called on behalf of the defendants, the forward anchor light was twenty-two feet above the main deck, and the after light seventeen feet six inches from the poop deck, which was about three feet six inches above the main deck, the result of his evidence (which was accepted as true by the court) being that the lights were within about a foot exhibited at the same height.

It appeared that the light first seen by those on board the *Hermod* was the after light, and that they did not see the forward light either until the collision, or at a time when the collision was inevitable.

The regulation in question as to lights is as follows:

> Every vessel when at anchor in the river Mersey, shall carry two white lights in globular lanterns of not less than eight inches in diameter, and so constructed as to show a clear uniform and unbroken light visible all round the horizon for at least one mile; one of which lights shall be placed at a height not exceeding twenty feet above the hull on the forestay, or otherwise near the bow where it may best be seen, and the other at the main or mizen peak, or on the boom topping light, or other position near the stern, at double the height of the bow light before mentioned.

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

This regulation was made under sect. 32 of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63).

Sir *Walter Phillimore* (with him *J. P. Aspinall*) for the plaintiffs.—The *Hermod* is alone to blame. The *Ebenezer* was exhibiting two anchor lights, which ought to have been seen in sufficient time by those on board the *Hermod* to have enabled them to avoid the *Ebenezer*. Even assuming the *Ebenezer* to have infringed the strict letter of the regulations as to lights, the infringement was not of such a character as to make her owners liable, under sect. 17 of the Merchant Shipping Act 1873. Those on the *Hermod*, in consequence of bad look-out, admittedly never saw the foremost light, and therefore the fact whether the after light was double the height, became immaterial. It is submitted that, in the circumstances of this case the infringement of the regulation could not possibly have contributed to the collision:

The Duke of Buccleuch, 62 L. T. Rep. N. S. 94; 6 Asp. Mar. Law Cas. 471; 15 P. Div 86;
The Fanny M. Carvill, 32 L. T. Rep. N. S. 646; 2 Asp. Mar. Law Cas. 565; 13 App. Cas. 455, n.

Barnes, Q.C. (with him *Joseph Walton*) for the defendants.—The *Ebenezer* is alone to blame. She clearly committed a breach of the regulations which may have contributed to the collision, and therefore, on the proper construction of sect. 17 of the Merchant Shipping Act 1873, her owners are liable. The after light being carried only twenty feet above the deck must have been many feet less than double the height at which at its lowest the foremost light could be carried consistently with the regulation. To say that in the circumstances of this case the breach of the regulation could not possibly have contributed to the collision is to give no effect to the Act of Parliament at all, and render it practically nugatory.

Butt, J.—This action arises out of a night collision in the river Mersey between the barque *Ebenezer* and the steamship *Hermod*. The barque was at anchor, and had two anchor lights, one forward and the other aft, both of them burning brightly. It is perfectly clear that neither the pilot nor the look-out on the *Hermod* perceived the barque's lights till they were close upon her, and I think that the prime cause of this collision was the defective look-out on board the steamer. The defence of compulsory pilotage has been pleaded by the defendants, but it necessarily fails, inasmuch as the defective look-out was not the fault of the pilot alone, but was a fault shared by the officers and crew of the ship. The owners of the *Hermod* are therefore liable. Upon that part of the case we have no doubt.

But a far more difficult question arises as to whether the *Ebenezer* is also in fault. It is said that she must be held to blame for improperly placing her lights, or rather the after light. Now there were two lights as prescribed, one forward, the other aft, but it appears from the evidence that they were somewhere about twenty feet above the deck, and that at the outside there was not more than three or four feet difference between them, if there was so much. There has been some conflict of evidence on this point, but the clear conclusion to which I come as to the relative heights of these lights is that which I have stated. On this point I accept the evidence of Lawson the diver. His evidence is very precise. He found by measurement that the forward light was fixed twenty-two feet above the main deck, and the after light seventeen feet six inches from the poop deck which was about three feet six inches above the main deck. It has been suggested for various reasons that he may have been mistaken in his measurements. It appears to me that that man's evidence is trustworthy. I know there is evidence to the contrary, but there is considerable corroboration of the diver's evidence in the evidence called on behalf of the plaintiffs. I do not think a single witness has ventured to say that the after light was being carried at double the height of the forward light. I know certain witnesses have said that the after light was some few feet higher than the other, but no one has gone further than that. The evidence has brought me to the clear conclusion that there has been a manifest infringement of the regulations. It was suggested by Sir Walter Phillimore that inasmuch as those on board the steamer did not see the foremost light before the collision, it ought not to be taken that the after light should have been twice eighteen or twenty feet above the level of the deck. The suggestion is this: the *Ebenezer* was not bound to carry the foremost light so high as eighteen or twenty feet above the deck, and, therefore, the people on board the *Hermod* not having seen the foremost light, it is argued that there was no breach of the regulations. I have considered the suggestion, but I think it is clear that the after light, carried at the height it was, was fully ten feet less than double the height at which at its lowest the foremost light could have been carried consistently with the regulations. I therefore think there was a breach of the regulations, for a departure from which, to use the language of the Act of Parliament, there was no necessity. The regulation in question is as follows: "Instead of the light prescribed by art. 8 of the said regulations every vessel when at anchor in the river Mersey shall carry two white lights in globular lanterns of not less than eight inches in diameter, and so constructed as to show a clear, uniform, and unbroken light visible all round the horizon for at least one mile; one of which lights shall be placed at a height not exceeding twenty feet above the hull on the forestay, or otherwise near the bow, where it may best be seen; and the other at the main or mizen peak, or on the boom topping lift, or other position near the stern at double the height of the bow light before mentioned." The regulation is made under one of the Merchant Shipping Acts, and by sect. 17 of the Act of 1873, "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 default, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary." If the section is applicable in the circumstances of the present case, then the *Ebenezer* must be held to blame. The case of *The Fanny M. Carvill* (*ubi sup.*), decides that this enactment only applies where the infringement of the statutory regulation is one which, by possibility, might have contributed to the collision. The enactment in question is

based on broad grounds of public policy, and ought therefore to be strictly enforced. Until lately I had considered that in cases of clear infringement of the regulations unless the facts—either admitted or established beyond the reach of controversy—show that the infringement could not possibly have conduced to the collision, the ship unnecessarily infringing it must be held to be in fault. In other words that the object of the enactment was to preclude the court from entering into the region of disputed facts, or of evidence of facts and circumstances, which, from the nature of the case would probably be changing each moment with the altered position of the ships coming into collision. I acted on that view in *The Duke of Buccleugh* (*ubi sup.*). The Court of Appeal, however, held that that was taking too narrow a view of the judgment of the Privy Council in the case of *The Fanny M. Carvill* (*ubi sup.*); that in such cases the court ought to go into the evidence, and, if satisfied on the balance of that evidence that the state of things was such that the infringement of the regulation could not have conduced to the collision, should hold that such infringement would not entail the consequences provided by the Act of Parliament. That is what I understand the judgment of the Court of Appeal in *The Duke of Buccleugh* (*ubi sup.*) to be. It is true that in that case there was no conflict of evidence as to the material facts. There could be no such conflict because the *Duke of Buccleugh* went down immediately after the collision, and every one on board her perished. The judgment of the Court of Appeal therefore was given in a case in which the evidence was all on one side; but as I understand it the Lords Justices held that even if there had been a conflict of evidence the court should have gone into the matter, and if satisfied on the whole that the state of things was such, that the infringement of the regulation could not possibly have contributed to that collision, should have declined to pronounce the ship infringing it to blame in the action. It is of course my duty to give effect to that judgment, and I have carefully considered the evidence in the case before me with the intention of so doing. Although, as I have said, I think I am bound to go into the evidence on the one side and the other, and to decide on the balance that must be taken with one qualification expressly stated by the Lords Justices, viz., that the onus of proof rests entirely on those by whom the regulation has been infringed, and that, before exonerating them from the somewhat penal provisions of the 17th section of the Act of 1873, the court must come to the clear conclusion that the facts were such that by no possibility could its infringement have conduced to the collision.

I have considered the matter in that light, and I have not been able to come to such a clear conclusion in the present case. The pilot and the first officer of the *Hermod* state that they did, as a matter of fact, mistake the aftermost light of the *Ebenezer* for the stern light of a vessel going down the river in front of them, and, although there is much in the facts of the case which makes me hesitate to accept their evidence as altogether trustworthy, I am not prepared to say that I am satisfied that the evidence establishes a state of things such that the breach of the regulation could not possibly have conduced to the collision. I do not forget that the pilot of the *Hermod* said in answer to me that he should have starboarded as he did even had he known that the light he saw was the light of a vessel at anchor. I think, however, he was somewhat confused, and failed to realise the situation when he gave the answer. The result is that I must hold the *Ebenezer* to have been in fault, and pronounce both vessels to blame.

Solicitors for the plaintiffs, *Hill, Dickinson, Dickinson*, and *Hill*.

Solicitors for the defendants, *Bateson, Warr*, and *Bateson*.

Tuesday, April 22, 1890.

(Before the Right Hon. Sir JAMES HANNEN.)

THE ENDEAVOUR. (*a*)

Collision—Reference—Repairs to damaged ship—Bankruptcy.

Where in the registrar's report in a collision action it appears that the claimant claims (inter alia) as part of his damages the cost of repairing his ship, but has not paid the shipwright, and has since the repairs were effected become insolvent, and the registrar allows such item, the court has no power to do anything to ensure the money being paid over by the claimant to the shipwright, and will not retain the money in the registry until the claimant has given satisfactory evidence that he has paid the shipwright.

THIS was a collision action *in rem* by the owners of the s.s. *Darenth* against the owners of the s.s. *Endeavour*. The defendants counter-claimed.

At the trial the *Darenth* was found alone to blame, and the defendants' claim was referred to the registrar and merchants to assess the amount of damages due to them.

The registrar by his report allowed (*inter alia*) as part of such damages a sum of 464*l*., being the cost of the repairs effected to the *Endeavour*. These repairs were done by a shipwright named Jarvis, who intervened in the action.

It appeared that subsequently to the repairs being effected the defendants, who were a limited liability company, went into liquidation, and an official liquidator was appointed; and that Jarvis had not been paid anything in respect of the repairs, either by the defendants or the official liquidator.

At the reference Jarvis, having intervened, appeared by counsel, but took no part in the proceedings.

Subsequently to the report being made, Jarvis moved the court for an order that the amount allowed by the registrar and merchants in respect of the intervener's account for repairs executed by him to the defendants' steamship *Endeavour* might when assessed be paid to the intervener instead of to the defendants as owners of the said steamship *Endeavour*.

On the motion coming on for hearing, Butt, J. held that the intervener had no *locus standi*, but suggested that, in order to enable the question to be brought before the court, the plaintiffs should object to the report, and in their petition ask the court to vary the report by withholding payment

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

of the amount for repairs until the defendants satisfied the registrar that they had paid the money to Jarvis, although the learned judge stated that in his opinion Jarvis had no remedy.

The plaintiffs accordingly filed a petition objecting to the report, in which they alleged, so far as is material, as follows:

5. Neither the defendant nor the official liquidator has paid the said Richard Jarvis anything in respect of the said repairs, and the said Richard Jarvis has not sent into the official liquidator any claim against the defendants' estate in respect of the said repairs.

5*a*. Further, since the date of the said report, the said Richard Jarvis formally and finally withdrew, gave up, and waived any right of proof or claim he had, or might have, against the owners of the *Endeavour* or the official liquidator in respect of the said repairs.

6. After the said repairs were finished, and since this action was begun, the official liquidator sold the *Endeavour*, repaired as aforesaid, for a sum of about 3500*l*.

7. By reason of the premises the defendants have had the *Endeavour* repaired without having paid, or being under any liability to pay, the said Richard Jarvis or any other person anything in respect of the said repairs.

8. In the alternative, the plaintiffs will object that the registrar's report should be varied by stating that the said item will only be allowed when vouchers for a satisfactory evidence of the payment thereof have been duly furnished to the registrar, or that so much only of the said item be allowed as the defendants produce vouchers for payment or satisfactory evidence of having paid.

The allegations in the answer to the petition in objection, so far as they are material, were as follows:

3. That the nonpayment of the account for the repairs to the *Endeavour* does not affect the right of the defendants to recover the amount of damages due for the injury sustained.

4. That the plaintiffs are not entitled to be heard to allege nonpayment of the account for the said repairs.

5. That the defendants, a limited liability company, are in fact liable to pay, so far as their assets will allow, the amount of the repairs, and the claim in respect thereof can only be made against the defendants in the liquidation proceedings.

6. That there is no jurisdiction to withhold payment of the amount found due, or any part thereof, on the ground stated in the said petition.

7. That, as to paragraph 5*a* of the petition, the defendants deny the allegations therein contained, and, further, that the facts alleged in the petition are wholly immaterial and irrelevant, and do not affect the right of the defendants to be paid the said sum of 464*l*.

L. E. Pyke, for the plaintiffs, in support of the objection to the report.—The defendants are only entitled to a *restitutio in integrum*: (*The Clarence*, 3 W. Rob. 286.) That they have had in having their ship repaired. If this report is confirmed, they get more than a *restitutio in integrum*, and the intervener, who has expended money and labour on the ship, practically gets nothing. In the circumstances the court ought in its equitable jurisdiction to refuse to order us to pay this money to the defendants until they have satisfied the registrar that they have paid the intervener. This has not unfrequently been done in other actions.

Sir *W. Phillimore* (with him *J. P. Aspinall*), for the defendants, in support of the report, was not called upon.

Sir JAMES HANNEN.—I think everyone must feel sympathy with Mr. Jarvis at his not securing the fruits of his labour. But this is just that sort of misfortune which so often happens where bankruptcy intervenes and causes the bankrupt's property to pass into the hands of his creditors. This application is based upon a fallacy. The *Endeavour* has been injured. Her owners are entitled to be paid the amount of such injuries. It has been ascertained that that amount is 464*l*. That is the measure of the defendants' damages, and is the amount they are entitled to recover. If somebody out of kindness were to repair the injury and make no charge for it, the wrongdoer would not be entitled to refuse to pay as part of the damages the cost of the repairs to the owner. It seems to me that the intervener's claim cannot be supported, and I must therefore confirm the report.

Solicitors for the plaintiffs, *Gellatly* and *Warton*.

Solicitor for the defendants, *Wm. Batham*.

Wednesday, April 23, 1890.

(Before the Right Hon. Sir JAMES HANNEN, assisted by NAUTICAL ASSESSORS.)

THE HIGHGATE. (*a*)

Collision—Steamship and sailing ship—Keeping course—Regulations for Preventing Collisions at Sea, arts. 17, 22, *and* 23.

The fact that a steamship is neglecting to keep out of the way of a sailing ship does not make it the duty of the sailing ship to take measures to avoid a collision, except possibly in very exceptional circumstances, because it is possible for a steamship to act for a sailing ship up to almost the last moment, and any action on the part of the sailing ship might be liable to increase risk of collision.

The s.s. H. was approaching the sailing ship S. for several minutes, with her masthead and red lights open, on the starboard bow of the S. The S. kept her course till a collision was imminent, and then hard-a-ported, but the H. with her port side struck the stem and port bow of the S. The H. admitted that she was to blame, but contended that the S. was also to blame for breach of art. 23 *of the Regulations in not manœuvring for the H. after she saw the H. persisting in doing nothing to keep out of her way.*

Held, that the S. was not to blame, as the circumstances were not such as to require the S. to alter her course and manœuvre for the H.

The Tasmania (60 *L. T. Rep. N. S.* 692; 6 *Asp. Mar. Law Cas.* 381; 14 *P. Div.* 53) *distinguished.*

THIS was an action *in rem* instituted by the owners of the sailing ship *Sovereign* against the steamship *Highgate* to recover damages occasioned by a collision between the two vessels.

The collision occured on the 19th Feb. 1890, in the Bristol Channel.

The facts alleged by the plaintiffs were as follows:

Shortly before 1.30 a.m. on the 19th Feb. 1890, the *Sovereign*, a full-rigged sailing ship of 1192 tons register, laden with a cargo of coals, was about twelve miles N.N.E. of Lundy Island, on a voyage from Cardiff to Monte Video. The wind was a fresh breeze from about E. by S.,

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

and the *Sovereign* was steering about N.W. by W. ½ W., making from six to seven knots an hour. In these circumstances those on board her saw the masthead light of a steamship, which proved to be the *Highgate*, distant between two and three miles, and bearing from a point to a point and a half on the starboard bow. The *Sovereign* was kept on her course, and the *Highgate* approached, showing first both side lights, and then her red light only; but instead of keeping clear of the *Sovereign*, as she could and ought to have done, the *Highgate* came on, still showing her red light, and rendered a collision imminent, and, although the helm of the *Sovereign* was then put hard-a-port, the *Highgate* with her port side struck the stem and port bow of the *Sovereign*, doing her so much damage that she shortly afterwards sank.

The facts as pleaded by the defendants were as follows:

Shortly after 2.15 a.m. on the 19th Feb. the *Highgate*, a steamship of 889 tons register, was on a voyage in ballast from Mostyn to Cardiff. She was in the Bristol Channel, steering S.E. by S. magnetic, making about three and a half knots an hour. In these circumstances those on board her saw the green light and immediately afterwards the red light of the *Sovereign*, distant half a mile, and bearing about four points on the port bow. On the green light being seen, the helm of the *Highgate* was starboarded, but on the red light coming into view the helm was ported, and the vessels were brought red to red. Shortly afterwards the *Sovereign* again opened her green light and shut in her red, when about three or four ships' lengths off, causing imminent risk of collision. As the only chance of avoiding a collision, the *Highgate's* helm was put hard-a-port, and her engines full speed, but the *Sovereign* came on, and with her stem struck the port side of the *Highgate*.

At the trial the defendants, after having called their master, admitted that the *Highgate* was to blame, but contended that the *Sovereign* was also to blame for breach of art. 23 of the Regulations for Preventing Collisions in not taking steps to keep clear of the *Highgate*. The defendants practically admitted the truth of the plaintiffs' story, and their master, in cross-examination, said that if he had reversed his engines at the time when he thought the *Sovereign* ought to have ported, these conjoint manœuvres would probably have brought about a collision.

Regulations for Preventing Collisions at Sea:

Art. 17. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

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 circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Sir *Walter Phillimore* (with him *J. P. Aspinall*) for the plaintiffs.—The *Sovereign* is not to blame. It was her duty to keep her course in obedience to art. 22, and that she did. The Court of Appeal in *The Tasmania* (60 L. T. Rep. N. S. 692; 14 P. Div. 53; 6 Asp. Mar. Law Cas. 381) did not lay down any general principle, but merely decided that in the circumstances of that case the vessel whose primary duty was to have kept her course ought, from the indications which she had from the manœuvres of the other vessel, to have altered her course. This case is also distinguishable from that, because there both ships were sailing ships, whereas in the present case one is a steamer and the other a sailing ship. Hence different considerations arise. A steamship, in consequence of her form of motive power, need not manœuvre until very close to a sailing ship. Her duty is to keep out of the way of the sailing ship, and she may do it how she pleases. Were it to be laid down that a sailing vessel ought, because she see the red light of a steamer on her starboard bow for some few minutes, to manœuvre for her, the consequence would be to increase risk of collision. As a matter of fact, a sailing ship is bound to anticipate that a steamer will do her duty, and therefore she ought to keep her course till the last. There are no circumstances here calling on the *Sovereign* to depart from art. 22:

The Byfoged Christensen, 41 L. T. Rep. N. S. 535; 4 App. Cas. 669; 4 Asp. Mar. Law Cas. 201.

Myburgh, Q.C. (with him Dr. *Raikes*) for the defendants.—*The Tasmania* lays down the principle that, where a vessel whose primary duty it is to keep her course sees another vessel whose duty it is to keep out of the way persistently neglecting to do so, she is then bound under art. 23 to manœuvre in such way as circumstances require. [Sir JAMES HANNEN.—Does that case do more than say that the facts there brought the case within art. 23? In that case there was a clear necessity for departure from the rule as to keeping course. What I have to consider is whether in this case there was any necessity.] The Court of Appeal meant to lay down a principle applicable to all the analogous cases. There was every indication that the *Highgate* meant to do nothing to get out of the way, as the event showed, and hence it became the duty of the *Sovereign* to do something to avoid a collision which is inevitable unless she manœuvres. The same principle was acted upon by Dr. Lushington in the case of *The Commerce* (3 W. Rob. 287). Had the *Sovereign* ported, no collision would have taken place.

Sir JAMES HANNEN.—I need scarcely say that I should give every attention to any decision of the Court of Appeal if I thought that any principle had been laid down by that tribunal of which I could avail myself. But, as a matter of fact, no principle was laid down in *The Tasmania* (*ubi sup.*). It is, indeed, impossible to lay down any principle which must necessarily bring a particular case within art. 23 of the Regulations. In these cases the question must always be whether the "special circumstances" bring the case within rule 23. The circumstances vary infinitely, and it is almost impossible to find a case so completely on all-fours with the reported decisions as to make them binding in the particular case. In the present case the circumstances are very different from those in *The Tasmania* (*ubi sup.*), which was a case of two sailing vessels, whilst here the collision was between a sailing vessel and a steamer—a state of circumstances which gives rise to a totally different set of considerations. I need not comment on the manœuvring of the *Highgate*; it was obviously

and strangely wrong. This steamer being so extremely uncertain in her manœuvres, the question arises, What were those on the *Sovereign* to do when they saw the *Highgate* approaching in this way? A clear rule that a sailing vessel is to keep her course has been laid down and enforced very strictly, it being thought necessary in the interest of life and property to do so. It is therefore only where a clear case of necessity for departing from the rule is made out that the captain of a vessel can excuse himself for not following the rule. In the case of *The Tasmania* (*ubi sup.*), where the circumstances were different from this case, the Court of Appeal, fortified by the advice of its assessors, held that there were reasons for departing from the rule. In this case the Elder Brethren who assist me are of opinion that there was no necessity for departing from the rule; in other words, that there were no circumstances justifying the sailing vessel in not keeping her course. A steamer is able to manœuvre so as to keep out of the way of another vessel even when very close to her. I have had occasion to comment on the practice with reprobation, as experience in this court teaches that steamers very often cut it exceedingly fine. How is a sailing vessel to know that a steamer is not going to cut it fine, or to know in what particular direction she will move at the last moment? The guide of the steamer's action is the presumption that the sailing vessel will keep her course. It has been suggested that if the steamer had stopped, as she might have done when she saw that she had got herself into a position of danger, the porting of the sailing vessel would have increased the danger of collision. That is admitted by the captain of the steamer. He says: "If I had stopped and reversed, and she had ported, a collision would have occurred." It is clear that it was impossible for the sailing vessel to know with certainty what the steamer was going to do, or to be certain that she would not stop at the last moment. Acting, therefore, upon the advice of the Trinity Brethren, in which I entirely concur, I think that there was no such case of necessity made out as called upon the captain of the sailing vessel to depart from this rule, which is always so stringently enforced against sailing vessels. I therefore pronounce the *Highgate* alone to blame.

Solicitors for the plaintiffs, *Thos. Cooper* and *Co.*
Solicitors for the defendants, *Walton, Bubb,* and *Johnson.*

Friday, April 25, 1890.

(Before the Right Hon. Sir JAMES HANNEN.)

THE CORIOLANUS. (*a*)

Salvage—Apportionment—Crew—Cattlemen.

Where a salving ship, trading between England and the United States, carried cattlemen, whose duties were to attend to a cargo of live cattle, they being paid a lump sum for the voyage by the owners of the cattle, the fact that they are on the ship's articles at a nominal rating, in order to satisfy the requirements of the American authorities, does not of itself make them part of the crew, so as to entitle them to share with the ship's crew in the award.

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

THIS was a salvage action instituted by the owners, master, and crew of the steamship *Bostonian* against the s.s. *Coriolanus*, her cargo and freight.

At the time of the said services, the *Bostonian*, a steamship of 2925 tons nett, was on a voyage from the United States to England, and was carrying 600 head of live cattle. The cattle were in charge of eighteen cattlemen, who, in order to comply with the requirements of the American authorities, were on the ship's articles, but as a matter of fact they took no part in the navigation of the ship, and were rated at the nominal sum of one shilling for the voyage. Their real remuneration was a lump sum for the voyage, paid them by the shippers of the cattle, their food being provided by the shipowners.

The services consisted in towing the disabled sailing ship *Coriolanus* into Queenstown. The value of the salved property was 13,000*l.* By reason of the services the voyage of the *Bostonian* was delayed one and a half days.

The cattlemen took no part in the services, but claimed to share in the award.

Sir *Walter Phillimore* (with him *J. P. Aspinall*) for the owners, master, and crew of the *Bostonian.*

Manisty for the cattlemen.—My clients are entitled to participate in the award. They are on the ship's articles, and legally form part of the crew. Moreover, the voyage was in fact delayed by reason of the services, and they therefore have lost time. Passengers have been given salvage, and therefore my clients ought to share in the award:

The Hope, 3 Hagg. 423.

Myburgh, Q.C. and Dr. *Raikes* for the defendants.

Sir *Walter Phillimore* (with him *J. P. Aspinall*) for the owners, master, and crew of the *Bostonian.*—The cattlemen took no effective part, directly or indirectly, in these salvage services, and therefore are not entitled to anything. Moreover, they are not really part of the ship's crew, and are only on the articles for nominal purposes. Passengers have only been given salvage where they have taken part in the services:

The Salacia, 2 Hagg. 269;
The Branston, 2 Hagg. 3, n.;
Bond v. *The Brig Cora*, 2 Washington, 80.

Sir JAMES HANNEN.—I thought the question raised by Mr. Manisty was of such importance, not only in this particular case, but in the very numerous cases in which it might arise, that it was advisable to consult Butt, J. upon it. I have done so, and he agrees with me that this is not a case in which anything should be allowed the cattlemen. It is not a case which calls for an allowance to them on the ground of their being salvors. They did absolutely nothing toward saving the salved property; they are only nominally on the rating of the ship, and if they were dealt with in the usual way of apportioning the amount, it would be a mockery to allow them to share in salvage at the rate of one shilling a voyage. One must look at the real facts of the case and see whether persons in the position of passengers, which practically these men were, have contributed in any way towards the saving of the salved property. They have not; all that has happened to them is that they have been delayed one and a half days. Now, in *The*

Hope (*ubi sup.*), which has been referred to, the claim was put forward generally on behalf of the crew and passengers. We have not got the circumstances in that case before us, but it appears that all parties had joined in making the claim, and that the judge had therefore only to fix the amount to be awarded to the passengers who had been allowed by the crew to join in making a claim. No opposition was raised in that particular case to their being treated as salvors. Here opposition is raised. I do not think that decision is any authority in the present case. I come to the conclusion that no right to salvage has been shown in this case; and that that upon which a claim for salvage rests, viz., contributing to the actual saving of the property, has not been made out in the case of these men, and that therefore their claim must be rejected. [The learned Judge then dealt with the merits of the case, and awarded 5000*l.*]

Solicitors for the plaintiffs, *Rowcliffes, Rawle, and Co.*

Solicitors for the cattlemen, *Ridsdale* and *Co.*

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

Monday, April 28, 1890.

(Before Sir J. HANNEN and BUTT, J.)

THE CASHMERE. (*a*)

ON APPEAL FROM THE COUNTY COURT OF GLAMORGANSHIRE.

Practice — Collision—County Court—Costs—Witnesses—Interlocutory order — Appeal — County Courts Admiralty Jurisdiction Act 1868 (31 & 32 *Vict. c.* 71), *s.* 26—*County Courts Act* 1888 (51 & 52 *Vict. c.* 43), *s.* 120—*County Court Rules* 1889, *Order L., r.* 16.

A County Court judge cannot lay down a general practice that only the costs of such witnesses who have been called at the trial shall be allowed, and that if it be desired to have witnesses allowed who have not been called application is to be made to him, such practice being contrary to the provisions of Order L., r. 16, *of the County Court Rules.*

Under sect. 26 *of the County Courts Admiralty Jurisdiction Act* 1868 *leave to appeal from an interlocutory order in County Court actions on the Admiralty side must be obtained from the County Court judge, and this enactment is still applicable to such actions, notwithstanding the general provisions of sect.* 120 *of the County Courts Act* 1888, *and hence a party cannot appeal from such orders without leave.*

THIS was an appeal by the plaintiffs in a County Court collision action *in rem* from a decision of the judge affirming the registrar's taxation of costs.

By arrangement between the parties the following statement of facts was agreed to for the purposes of the appeal:

1. The appellants, the plaintiffs, appeal against the decision of the judge of the above-named County Court upholding the decision of his registrar disallowing certain items in the plaintiffs' costs.

2. This was a suit for damage by collision. Judgment was given for the plaintiffs with costs. The plaintiffs' solicitors made no application to the judge of the County Court on the hearing of the action in respect of the witnesses' costs or allowance of their expenses.

3. The registrar, on taxing the plaintiffs' costs, disallowed the expenses of all the witnesses who were not actually put into the box and examined.

4. The registrar disallowed the expenses on the grounds as certified by him in the following words: "The practice in this court is by direction of his Honour to allow the costs of witnesses called; if it be desired to have witnesses allowed who have not been called, application should be made to the judge for their allowance."

5. The plaintiffs filed objections to the taxation.

6. The plaintiffs appealed against such disallowance of witnesses to the judge.

7. The judge dismissed the plaintiffs' appeal with costs on the ground that no application was made to him at the trial for the allowance of these witnesses' costs and expenses, and on the ground that it was agreed at the time of the hearing that only two witnesses should be called on each side.

From an affidavit filed by the plaintiffs' solicitors it appeared that the witnesses in respect of whom he claimed costs were in attendance in court at the trial, but that after the plaintiffs' first witness had been cross-examined, in consequence of a suggestion from the judge, it was arranged between the advocates that each side should limit themselves to two witnesses, and this was accordingly done.

The plaintiffs had not asked permission of the County Court judge to institute the present appeal.

The following Acts of Parliament were cited in the argument, and are material to the decision:—

County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71):

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 costs being first given, and subject to such other provisions as general orders shall direct.

County Courts Act 1888 (51 & 52 Vict. c. 43):

Sect. 120. If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court in such manner and subject to such conditions as may be for the time being provided by the rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court.

Order L., r. 16, of the County Court Rules:

The costs of witnesses, whether they have been examined or not, may, unless otherwise ordered by the judge, be allowed, though they have not been summoned, and except in cases referred to in rule 18 of this order their allowance for attendance shall not exceed the highest rate of the allowances mentioned in the scale in the appendix.

L. E. Pyke, for the respondents, took the preliminary objection that the court could not hear the appeal. This is an appeal from an interlocutory decree or order, and by the provisions of sect. 26 of the County Courts Admiralty Jurisdiction Act 1868 the permission of the judge of the County Court is a condition precedent to appealing. No leave has been obtained, and therefore the appeal cannot be heard.

Sir *Walter Phillimore* (with him *A. E. Nelson*), for the appellants, *contrâ*.—Sect. 120 of the County Courts Act 1888 is applicable to Admiralty appeals, and allows an appeal in any "action or

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

matter" without requiring the appellant to obtain the judge's leave. This section is applicable to interlocutory orders, and therefore applies to the present case:

Carr v. *Stringer*, Ell. Bl. & Ell. 123;
Jacobs v. *Dawkes*, 56 L. J. 446, Q. B. Div.; 56 L. T. Rep. N. S. 919;
Jonas v. *Long*, 58 L. T. Rep. N. S. 787; 20 Q. B. Div. 564.

The general provisions of the County Courts Act 1868, s. 120, repeal the specific provisions of the County Courts Admiralty Jurisdiction Act 1868, sect. 26:

Garnett v. *Bradley*, 39 L. T. Rep. N. S. 261; 3 App. Cas. 944.

Pyke for the respondents.—The general enactment in the County Courts Act 1888 does not repeal the particular enactment in the County Courts Admiralty Jurisdiction Act 1868. Had the Legislature intended to repeal sect. 26 of the County Courts Admiralty Jurisdiction Act 1868 they would have done so in express terms:

Conservators of the River Thames v. *Hall*, 18 L. T. Rep. N. S. 361; L. Rep. 3 C. P. 415;
Mitchell v. *Simpson*, 23 Q. B. Div. 373.

[Sir J. HANNEN.—We reserve this point until we have heard the grounds of the appeal.]

Sir *Walter Phillimore* in support of the appeal.—The practice which the County Court judge has laid down and followed in this case is directly opposed to the provisions of Order L., r. 16, of the County Court Rules. Moreover, costs being in the discretion of the judge, he cannot fetter that discretion by any hard-and-fast rule:

The Friedeberg, 52 L. T. Rep. N. S. 837; 10 P. Div. 112; 5 Asp. Mar. Law Cas. 426.

The registrar ought to have considered the question of these costs on the merits.

Pyke, for the defendants, *contrà*.—Assuming the principle on which the registrar acted to be incorrect, nevertheless the judge who tried the case and knew the facts has exercised his discretion by refusing to allow these costs. This court ought not to overrule his discretion.

Sir *Walter Phillimore* in reply.

Sir JAMES HANNEN.—The main question in this case is of importance, whatever decision we may come to as to the preliminary objection, and therefore I think we ought to express our opinion so that in future the learned County Court judge may be influenced by it. It is for that reason, before we give judgment on the preliminary question, that I think it necessary to state our decision before deciding whether this appeal can be entertained. It appears that a practice has prevailed in this County Court which is directly opposed to a statutory rule which has been framed by a proper authority. It is obvious that the learned judge has no right to establish a local practice of this kind, and that it cannot prevail as against the County Court rule. It is plain that the registrar based his judgment solely upon the local practice, and in our opinion that was an insufficient reason. Then when the matter came before the judge he dismissed the plaintiff's appeal with costs on the ground that "no application was made to him at the trial for the allowance of these witnesses' costs and expenses." That is a re-assertion of his own local practice as against the general statutory rule by which he ought to have been governed. The other ground of his affirming the registrar is, that it was agreed at the time of the hearing that only two witnesses should be called on each side. But what has that to do with the question of what costs and what witnesses shall be allowed? The parties practically said, "We will not trouble the court with a great number of witnesses on the one side or the other, but will each be content with two." How does that show that the plaintiffs were not quite right in bringing down other witnesses than the two men whom they called? This last ground is no reason at all for disallowing the witnesses. It only says that the parties agreed to something which has no bearing on this question, for it is obvious that, although witnesses be not put into the box, yet it may be proper that they should be summoned. For these reasons, unless we are of opinion that we cannot entertain this appeal, we must allow it.

BUTT, J.—I am entirely of the same opinion. If witnesses are summoned to a County Court and their expenses are not allowed because they are not called, the result will be that a solicitor who has a number of witnesses in attendance will go on calling them all, even if his case is substantially proved, because he knows that if he does not he will not get their costs allowed. That would lead to a great waste of time, and is obviously objectionable. I think that on the main question this appeal should be allowed; but we will take time to consider the preliminary objection.

April 28.—BUTT, J. delivered the judgment of the court.—This is a case of an appeal from the decision of the Glamorganshire County Court on a question of costs. The registrar disallowed the costs of certain witnesses who were in attendance at the trial. From that there was an appeal to review the taxation, but the learned judge refused to allow the costs. Upon that an appeal was brought to us, and came on for hearing on the 10th March. We then came to the conclusion that the learned judge was wrong in refusing to allow the costs in question. As the question was one of principle, my Lord and I thought that we ought to state our opinion upon it, irrespective of how we decided a preliminary objection about which we have taken time to consider. The objection was, that this was an appeal against an interlocutory order of the County Court judge, and that as his leave had not been obtained no appeal could be brought. Sect. 26 of the County Courts Admiralty Jurisdiction Act 1868 was relied on in support of the objection. That section is as follows: "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 an interlocutory decree or order therein, on security for costs being first given and such other provisions as general orders shall direct." If that section is read alone, it would seem clear that there is no appeal in such a matter as this without the judge's leave. But it is said that the County Courts Act 1888 alters that, and sect. 120 is relied upon. The material part of the section is as follows: "If a party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the

judgment, direction, decision, or order of the judge may appeal from the same to the High Court in such manner and subject to such conditions as may be for the time being provided by the rules of the Supreme Court." There are certain other provisions which it is not necessary to consider for the present purpose. I should have been inclined to think that the first of the two Acts of Parliament to which I have referred had reference to the Admiralty jurisdiction of the County Courts, and the latter being a general County Court Act—even if it gave a right of appeal from interlocutory orders without leave of the judge—would not repeal the provisions of the special Admiralty Act. But it seemed to me, on first reading the words of sect. 128 of the Act of 1888, that they applied to proceedings at the trial and to appeal from final judgment, and had no reference to interlocutory orders. I find that in the case of *Carr* v. *Stringer* (*ubi sup.*) the Court of Queen's Bench held that the words of sect. 14 of 13 & 14 Vict. c. 61, which are almost similar and very analogous to the language of the Act of 1888, only gave an appeal in cases of final judgment, and had no reference whatever to interlocutory orders of a judge. That would seem to me to be conclusive of the case. That is the view I have taken of these Acts of Parliament, and I am authorised to say that my Lord agrees in that view. Therefore our judgment is that the appeal must be dismissed; but, as the appellants ought to succeed on the merits, we think that there should be no costs.

Solicitors for the appellants, *Lowless* and *Co.*

Solicitors for the respondents, *Ingledew*, *Ince*, and *Vachell.*

HOUSE OF LORDS.

April 25, 28, 29, *and May* 22, 1890.

(Before Lords HERSCHELL, MACNAGHTEN, and MORRIS.)

THE OWNERS OF THE TASMANIA *v.* THE OWNERS OF THE CITY OF CORINTH.

THE TASMANIA. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Sailing ships—Practice—Regulations for Preventing Collisions at Sea, arts. 14 (*a*), 22, 23.

Where a point which has not been taken in the court below is put forward by an appellant for the first time in a Court of Appeal, that court ought not to decide in his favour on such point unless it is satisfied beyond doubt, (1) *that it has before it all the facts bearing upon the new contention as completely as if it had been raised in the court of first instance;* (2) *that no satisfactory explanation could have been given if it had been so raised.*

Very great allowances should be made for an officer in charge of a ship suddenly placed in difficult circumstances by the wrongful act of another ship.

Judgment of the court below reversed upon the facts and evidence.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Fry and Lopes, L.JJ.), reported in 60 L. T. Rep. N. S. 692, 6 Asp. Mar. Law Cas. 381, and 14 P. Div. 53, reversing a judgment of Butt, J., by which he pronounced the *City of Corinth* alone to blame for a collision which took place between that ship and the *Tasmania* under circumstances which are set out in the judgments of their Lordships.

Barnes, Q.C., *Raikes*, and *A. Russell* appeared for the appellants.

The *Attorney-General* (Sir R. Webster), Sir *C. Hall*, Q.C., and *Pyke* for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgments.

May 22.—Their Lordships gave judgment as follows:—

Lord HERSCHELL.—My Lords: This action was brought by the owners of the *City of Corinth* against the owners of the *Tasmania*, to recover the loss and damage sustained owing to a collision between the two vessels. The collision took place about 7 p.m. on the evening of the 8th March 1888, in the English Channel, about twenty miles S.S.W. of St. Catharine's Point. It is not in dispute that, when the vessels were approaching one another prior to the collision, the course of the *Tasmania* was about W.N.W., she being close-hauled to the wind on the port tack, and that the *City of Corinth* was running free. Her course is stated in the preliminary act, filed on behalf of the plaintiffs, to have been E. by N. when the other vessel was first seen, the wind being S.W. by S. It is clear that under these circumstances it was the duty of the *City of Corinth*, in obedience to the rules, to get out of the way of the *Tasmania*, whilst the latter vessel was bound to keep her course. That the *City of Corinth* starboarded, and so brought herself across the bows of the *Tasmania*, could not be contested; but it was attempted at the trial to justify this manœuvre on her part by the allegation that the *Tasmania* had luffed so as to show her green light to the other vessel. The learned judge who tried the action came to the conclusion that the *City of Corinth* had wholly failed to establish this case. He accordingly found that she was to blame for improperly starboarding, and so bringing herself across the course of the *Tasmania* instead of getting out of her way. The Court of Appeal took the same view, and it was not contended at your Lordships' bar that the finding that the *City of Corinth* was to blame ought to be disturbed. At the trial no other point was taken for the plaintiffs except that which I have mentioned. It was not argued, or suggested, that even if the *City of Corinth* was to blame for improperly starboarding, the *Tasmania* was also to blame. But in the Court of Appeal this point was for the first time raised. It was contended that the *Tasmania* had kept her course too long, and that she ought to have earlier taken the step which she ultimately did, viz., putting her helm down, and so coming up to the wind. I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested; and it is obvious that no care is exercised in the elucidation of facts not material to them. It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground

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

there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an an opportunity for explanation had been afforded them when in the witness-box. Although, having regard to the relative position of the two vessels, it was the duty of the *Tasmania* to keep her course, it is clear that she would not be justified in blindly persisting in that course if it were manifest that disaster must result from it. It is provided by rule 23 that, in obeying and construing the rules, due regard shall be had to any special circumstances which may render a departure from them necessary in order to avoid immediate danger. As soon then as it was, or ought to a master of reasonable skill and prudence to have been, obvious that to keep his course would involve immediate danger, it was no longer the duty of the master of the *Tasmania* to adhere to the 22nd rule. He was not only justified in departing from it, but bound to do so, and to exercise his best judgment to avoid the danger which threatened. But, in estimating the conduct of the master, it must be remembered that it was the gross negligence of the other vessel which placed him suddenly in the difficult position of having to judge when he was justified in departing from the rule, and what manœuvre he ought to adopt. In the case of *The Bywell Castle* (41 L. T. Rep. N. S. 747; 4 Asp. Mar. Law Cas. 207; 4 P. Div. 219), Brett, L. J. said: "I am clearly of opinion that when one ship, by her wrongful act, suddenly puts another ship into a difficulty of this kind, we cannot expect the same amount of skill as we should under other circumstances. Any court ought to make the very greatest allowance for a captain or pilot suddenly put into such difficult circumstances, and the court ought not, in fairness and justice to him, to require perfect nerve and presence of mind enabling him to do the best thing possible." With this I entirely agree, though of course the application of the principle laid down must vary according to the circumstances.

One other fact must be borne in mind. The occurrences we are considering happened at night, so that the only information either vessel had of the position or movements of the other was derived from the lights exhibited. If it had been daylight, so that the master of the *Tasmania* could have seen what the other vessel was, and how it was manœuvring, the obligation to act might have been more imperative and immediate. I do not think the master of the *Tasmania* was bound to alter his course directly he saw the green light of the other vessel. And this, I gather, was the view taken in the court below. It was said by Lord Esher, M.R., that his obligation to do so arose as soon as it was clear that the *City of Corinth* had made up her mind to go straight across the bows of the *Tasmania*, and that the action of the *City of Corinth* was so determined, so clear, that he must and ought to have known this almost immediately after he saw the green light. The first question that arises is, how long did he delay before he took action with his helm? I agree with the Master of the Rolls that in these cases it is not of much use talking of minutes or seconds, that time can only be judged by ascertaining what was done in the interval. It appears certain that but a short period must have elapsed between the time when the green light of the *City of Corinth* was first seen and the collision. That light was seen by the *Tasmania* about two points on her port bow. The *City of Corinth* was running before the wind, making six to seven knots; the speed of the *Tasmania* was only three to four knots, yet, without any substantial alteration of the course of the *Tasmania*, she struck the other vessel nearly amidships. The Master of the Rolls founded his conclusion that the captain of the *Tasmania* delayed too long to order his helm to be put hard down, upon the evidence as to what was done after the captain saw the green light, and before he gave this order. He says: "We have now the length of the ship—she is a long ship—and the lights are placed on the forecastle, or at the edge of the forecastle. The captain was on the poop; he sent an apprentice, or a man, along the length of the ship, and told that man to see whether his lights were burning or not. It must have taken time to go forward and come back again. After that man had gone forward and come back he delays still. He calls the mate upon the poop to be a witness that it was not his fault, and that the collision was inevitable. There is another delay; and it is not until after he has sent the man forward, and he has come back, and he has called the mate on the poop, and consulted with him, that he then gives an order." Now, I cannot feel satisfied that, if the point now taken had been taken at the trial, so that we had an exact narrative of the events and their sequence, the delay of the captain would have appeared to be anything like so considerable as is suggested. It must be remembered that these events were not material to any issue raised at the trial, and therefore not carefully inquired into. There can be no doubt that the master did hail the second mate, who, as we know, was occupied at the cross-jack, to send a man forward to see if the lights were burning brightly, and that the man sent forward reported that they were, though it does not follow that he came back for this purpose to where the captain was standing. He might well make his report without doing so. It is stated by the learned judges in the court below that it was not until after the man had returned with this report that the captain called the second mate on to the poop. In the absence of any questions upon the point at the trial, I do not think it is right to assume this. It is true that the master mentions the report received about the lights in connection with the order to look at them, and before he says anything about hailing the mate to come on the poop. The questions and answers run thus: "(*Q.*) Then you told us that you kept your course, and you sent a man forward to look at your lights, and he reported they were all right? (*A.*) Yes. (*Q.*) What order did you give? (*A.*) Then I hailed out to the second mate to come on to the poop and see what this light was going to do." But I think it is consistent with this that he called the mate on to the poop directly after he had hailed him to send a man forward. It would be quite natural for the master to complete the narrative as to the ship's lights by stating what

was reported about them, even although the next order was given before that report was received. At all events, I cannot think that it is right to assume, as against the master, that he waited until the report came back before he ordered the mate on to the poop. The second mate, who was called as a witness, makes no mention in his evidence of the order to send a man forward. After stating that he got an order to haul the cross-jack up, after the red light was seen, he is asked: "(*Q.*) What was the next thing that you heard, after you got the order to haul the cross-jack up? (*A.*) The captain called me up on the poop and showed me a green light on the port bow." No question was put to him as to whether this was before or after the report as to the light. In his deposition before the Receiver of Wreck he mentions one of the apprentices having been sent forward, but it comes in his narrative after the mention of his having been called aft to see the green light, and after he had observed that the light was exhibited by a full-rigged ship. I do not think it possible to suppose that he has here narrated the events in their order.

Again, I can find no evidence that any appreciable delay was caused by the master consulting with the mate. The master says nothing of any conversation with the mate after he hailed him to come on the poop to see what the light was going to do, nor does the mate, whose evidence seems to me to suggest that the order to luff was almost immediately given. There is no allusion to any consultation in the deposition of the master, and all that the mate says in his deposition is, that "the master suddenly called him aft and pointed out a green light on the port bow, observing that the red light had disappeared." Naturally enough no question was asked of the master as to this statement, which was then regarded by both sides as quite immaterial. Lord Esher, M.R. comments with severity upon the act of the master in sending to see whether his lights were burning. "What did it signify," he asks, "whether his lights were burning or not? It looks to me as if he was getting evidence to show that he was not in the wrong. It was a mere waste of time." Now, I cannot help observing that the mater was never asked his reason for taking this step, and it seems to me hard that he should have had no opportunity of explaining his act. It was suggested in the argument at the bar that his conduct was not so unreasonable as it might at the first blush appear to be. Attention was called to the evidence of the master that he did not in the first instance suppose that the green light was borne by a ship, and that he, consequently, did not expect to see one. "(*Q.*) What was it you expected? (*A.*) A small cutter asking me to take a pilot ashore, or something like that; I did not think a ship would do such a thing as cross a ship's bows." He was not cross-examined with reference to this statement, and it does not appear to me to be unnatural that this should have been his first idea. If this was the state of his mind it might excuse some hesitation in arriving at the conclusion that it was his duty to alter his course. But, further, it is suggested that it might occur to him at the same moment to inquire whether his lights were burning, in order to learn whether the other vessel could be acting in ignorance of his presence. These suggestions do not seem to me so improbable that they ought to be summarily rejected. Upon a careful review of the whole of the evidence, I am not prepared to say that, if the question now in issue had been raised at the trial, it would not have appeared that the delay was less than has been supposed; nor is it clear to my mind that the captain could not have satisfactorily accounted for such delay as there was, and thus shown that he could not justly be held, in the difficult circumstances in which he was placed, to have exhibited a want of reasonable care and skill. On the contrary, I think it quite possible that a sufficient explanation might have been forthcoming, and I cannot feel that under these circumstances the very meagre and unsatisfactory evidence bearing upon the point now in controversy warrants a finding that the master was guilty of negligence on account of which the *Tasmania* should be held to blame. It may be that if the point had been raised at the trial, and the evidence touching it more fully taken and probed, it would have appeared that the master was in default. But, if so, the respondents must take the consequences of the course which they adopted. In my opinion it would be wrong, where a point has not been taken that might have been, to run any risk of doing injustice to the party against whom it is afterwards made by acting upon evidence which does not establish beyond doubt that the occurrences, if fully investigated, would have justified the conclusion at which the court is asked to arrive.

A subordinate point was urged on behalf of the respondents. It was said that after the master gave the order to put the helm down the mate interfered with that order, and told the man at the helm to put his helm up, so as not to get the sails aback. This point also is a new one, though there was some cross-examination with regard to it at the trial, the object being to support the contention that the *Tasmania* had luffed at an earlier period, and by showing her green light had deceived the *City of Corinth*. The respondents' case, on this point, rests upon the evidence of the man who was at the wheel at the time, and upon statements alleged to have been made by him after the collision. The mate denies that he gave such an order, and the captain, who is stated to have been close by, so that he could have heard what the mate said, denies that he heard any such order given, or gave it himself. I do not think the charge is made out. It seems to me extremely improbable that, on such an occasion, with a collision imminent, the mate should, immediately after the order had been given, take upon himself the responsibility of interfering with it. The witness was extremely ill after the shock of the collision, and had to be taken to hospital when he left the ship; and I think it would be unsafe to rely on his somewhat confused statements, as against the positive evidence of the mate, supported, as I think it is, by the probabilities of the case. For these reasons, I think the judgment of the Court of Appeal ought to be reversed, and the judgment of Butt, J. restored.

Lord MACNAGHTEN.—My Lords: On the evening of the 8th March 1888 the *Tasmania*, an iron sailing ship, of 2175 tons register, outward bound from London to San Francisco with a general cargo, was in the English Channel, off the Isle of

Wight, about twenty miles S.S.W. of the St. Catharine's Light. There she came into collision with another iron sailing ship, the *City of Corinth*, of 1220 tons register, manned by a crew of thirty hands, on a voyage from South America to Hamburg, laden with a cargo of nitrate of soda. The *City of Corinth* sank immediately with all hands but two, who managed to clamber on board the *Tasmania*. The *Tasmania* was seriously injured, and had to put back for repairs. Butt, J. found the *City of Corinth* alone to blame for the disaster. The Court of Appeal held both ships in fault. The *Tasmania* was condemned, not for infringing any of the precise and positive rules laid down in the Regulations for Preventing Collisions at Sea, but because, in the opinion of the Court of Appeal, the officer in charge of the *Tasmania* ought to have acted sooner than he did, on the view that a departure from those rules was necessary in order to avoid immediate danger. The singular part of the case is, that the error attributed to the *Tasmania* does not seem to have been apparent to anyone until the parties came before the Court of Appeal. It was not noticed at the trial by the presiding judge; it was overlooked by his nautical assessors, and though a foundation for the charge has been discovered in the pleadings, it escaped, for the time, the attention of the learned counsel for the *City of Corinth*. [After going through the facts of the case, his Lordship continued:] On the facts, it cannot be disputed that, under the Regulations for Preventing Collisions at Sea, it was the duty of the *City of Corinth* to keep out of the way of the *Tasmania*, and the duty of the *Tasmania* to keep her course. It is clear, therefore, that up to the time when the green light of the *City of Corinth* was opened, the *Tasmania* was not in the slightest degree in fault. Further, it is not disputed that, when the *City of Corinth* loomed in sight, the captain of the *Tasmania* acted rightly in departing from the statutory rules. The time, therefore, to be accounted for is the interval between the appearance of the green light of the *City of Corinth* and the moment when the *City of Corinth* herself became visible. The interval was not long. The distance between the two ships when the green light first appeared is put at four ship's lengths, or 400 yards, the *Tasmania* being 278 feet long. It is put at 200 yards when the *City of Corinth* became visible. If those estimates are at all to be trusted, the time to be accounted for, having regard to the speed at which the ships were going, would be something over half a minute. The Court of Appeal held that the *Tasmania* ought to have altered her course immediately after the green light of the *City of Corinth* appeared, and that the captain wasted precious time, owing either to the want of presence of mind, or to a desire to secure evidence as to the state of his own vessel. Lord Esher, M.R. thought that it was an idle thing on the part of the captain to inquire about his own lights, and a mere waste of time. He also thought that the captain had no business to summon the mate on to the poop and hold a conversation with him. His view was, that if the captain had kept his presence of mind, he would have known that the *City of Corinth* had made up her mind to go straight across his bows, and he would have done at once, when he saw the green light, that which he did at the last moment, when it was too late. Whether any action on the part of the *Tasmania*, when the green light was first seen, could have prevented a collision is a matter on which no certain opinion is expressed. I am unable to agree with the view of the Court of Appeal. It must be borne in mind that, until the hull and sails of the *City of Corinth* came in view, the officer in charge of the *Tasmania* could know nothing of the approaching vessel or of its course, except what he could infer from the lights which he had seen. He knew that it was a sailing vessel; he knew that it had starboarded; but he could not know what sort of a sailing vessel it was. In his examination in chief, the captain of the *Tasmania* says, that when he first saw the green light he did not expect to see a ship; he expected to see a small cutter asking him to take a pilot ashore or something like that; he did not think a ship would do such a foolish thing—he did not expect a ship would do such a thing as cross his ship's bows. It was said in argument that this was an afterthought, a mere invention on the part of the captain; but it does not seem to be an improbable story. It seems to have been accepted as a rational explanation at the trial, and there was not a word of cross-examination about it.

Nor can I agree with the Master of the Rolls that it was an idle thing on the part of the captain to inquire whether his own lights were burning. If his lights were not burning there would be nothing to warn the approaching vessel of its danger; the only chance of escape would be for the captain of the *Tasmania* to alter his course at once, without regard to the regulations. On the other hand, if the *Tasmania's* lights were in order, it would be a most imprudent and dangerous thing to alter the *Tasmania's* course so long as there was any possibility of the approaching vessel avoiding collision by keeping out of the way of the *Tasmania*. For anything that the captain of the *Tasmania* could have known, it might have been the case that at the very moment when the green light opened the approaching vessel was in the act of altering her helm in order to pass the *Tasmania* on her port-side, trusting to the *Tasmania* keeping her course, as she was bound to do under the regulations. If that had been the case, and if the *Tasmania* had not kept her course, it would have been difficult indeed for the *Tasmania* to have justified her action in a court of law. She might have been held solely to blame. How could the captain of the *Tasmania*, having seen nothing but the lights of an approaching vessel, know what was passing in the mind of that vessel's captain? How could he tell that that vessel had determined at all hazards to cross his bows? In point of fact, judging from what appears in the evidence of the survivors of the *City of Corinth*, she had formed no determination whatever with reference to the *Tasmania* when she opened her green light; apparently she had not seen the lights of the *Tasmania*, and did not know that she was in the way. Nor, again, do I think that it ought to be assumed that the inquiry as to the lights took any appreciable time. Certainly there is no evidence that it did. There is evidence that there was a man whose duty it was to attend to the lights; there is evidence that the man on the look-out turned round the moment he saw the green light and ascertained that the *Tasmania's* lights were burning brightly, so that

it would be a mere matter of hailing along the deck, and the answer might have been, and probably was, reported instantly. But it is to be observed that, whether the inquiry took any time or not, it is clear, if you accept the evidence of the captain, it did not delay his action for a single moment. He did not think he would be justified in departing from the regulations until he could see something of the approaching vessel. The moment he caught a glimpse of her he put his helm hard down. Further, I am unable to find any trace of anything like a consultation between the captain and the mate at the critical moment. It seems to me that there was nothing improper, nothing tending to show irresolution or hesitation on the part of the captain in his desiring to have the mate beside him when he was watching to see what the light would do and what sort of a vessel it was that was coming. Certainly it was an advantage to have the mate there, if it were only for the purpose of helping to carry out such orders as the exigency of the case might require. A suggestion was made that the captain's orders to the helmsman were interfered with by the second mate. I notice the suggestion merely for the purpose of saying that, in my opinion, it is not supported by the evidence. In the result, therefore, I am of opinion that the charge of negligence against the *Tasmania* has not been established. It is not without much consideration that I have come to the conclusion that the unanimous judgment of the Court of Appeal, supported as it is by the opinion of their nautical assessors, ought to be reversed. Speaking for myself, I could have much wished that in this case, and in all cases of this sort, your Lordships also could have the advantage of skilled advice. But I must say that I am disposed to mistrust a view of the facts of the case which did not present itself at the time to those who heard the story from the lips of the witnesses, and I cannot help adding that I think it would have been a matter of regret, and not perhaps of the best example, if your Lordships had been compelled to determine the case against the captain of the *Tasmania*, upon a ground that was not urged during the trial, and in reference to which he was asked no questions, and given no opportunity of explanation. I concur in the motion which has been proposed.

Lord Morris.—[After stating the facts, his Lordship continued:] My Lords: On the evidence I would incline to the opinion that the captain of the *Tasmania* acted as promptly as a reasonable, prudent man could, who was called on suddenly on seeing the green light of the *City of Corinth* within about four lengths of his vessel. He knew he was on his own right course, and it seems to me an awkward argument on the part of the respondents that the captain of the *Tasmania* was at once to arrive at a distinct and clear conclusion that the *City of Corinth* was pertinaciously to continue in the wrong course which she had taken since he had first sighted her. From the time he saw the green light of the *City of Corinth*, and thereby could for the first time at all know or anticipate anything of danger from the wrong course taken by the *City of Corinth*, until the collision actually took place, was a matter of seconds of time, not more certainly than a minute. He should consider the gravity of departing from his right course, and whether it would be justifiable to do so in consequence of the imminent danger. The policy of making rules is that they should be observed. In my opinion, large allowance should be made for sudden consideration whether directory rules should be disobeyed in order to avoid collision, and, when such collision is caused by the misconduct of the party complaining, there should, in my opinion, be very clear proof of contributory negligence. I cannot concur in the opinion that the inquiry by the captain of the *Tasmania* whether his own lights were properly burning, was a useless one. If his own lights were not right it might account for the strange course the *City of Corinth* had taken; while, if burning properly, he might expect that the *City of Corinth* would, at the last moment, alter her helm and pass the *Tasmania*. Nor do I consider it at all unreasonable that at such a supreme moment he should have called his mate beside him. In my opinion, the captain of the *Tasmania* did not act with irresolution, but gave his order to put his helm hard down, reasonably, promptly, and with decision. I should, however, have felt great, if not insuperable difficulty, acting on my own opinion, in reversing the order of the Court of Appeal in a case of this kind, except for this reason: the whole course of the trial before Butt, J. was on an entirely different contention on the part of the respondents. There is no trace of any contention that the captain of the *Tasmania* delayed improperly in changing his course when it became necessary to avoid imminent danger; on the contrary, the charge was that he had improperly altered his course, and thereby led to the collision. The evidence was addressed to that contention, and it would be most dangerous and unfair, in my opinion, to spell out conclusions on a new issue from answers in the evidence which were given to questions on a different and inconsistent issue. I confess I should have much wished for the assistance of skilled nautical assessors in dealing with such a case as the present; but, as I cannot find satisfactory evidence on which the *Tasmania* should be held to blame, I think the judgment of Butt, J. should be restored.

Order appealed from reversed. Decree of Butt, J. restored, with costs in this House and below.

Solicitors for the appellants, *Waltons, Bubb,* and *Johnson.*

Solicitors for the respondents, *Gellatly* and *Warton.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Dec. 3, 4, 5, 6, 10, 1889, *and April* 30, 1890.

(Present: The Right Hons. the Lord Chancellor (Halsbury), Lord Bramwell, Sir Barnes Peacock, and Sir Richard Couch, with Nautical Assessors.)

The Shaw, Savill, and Albion Company *v.* The Timaru Harbour Board. (*a*)

ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND.

Pilot—Negligence—Liability of harbour board—New Zealand Harbours Act 1878, *ss.* 49, 75, 76, 215, 227.

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

A harbour board was empowered by statute to license pilots for the purpose of acting within their district. Pilotage was not compulsory in the district, and the pilot made his own bargain with the shipowner. The harbour master, who was also a duly licensed pilot, was acting as pilot to a vessel, engaged by the owners themselves, when she was wholly lost, through his negligence and default.

Held, that the harbour board were not responsible, as they were only entitled under the statute by which they were constituted to issue licences, and were not liable for the negligence of those they licensed.

Judgment of the court below affirmed, upon different grounds, and with a variation.

THIS was an appeal by the Shaw, Savill, and Albion Company Limited from a judgment or order of the Court of Appeal of New Zealand, dated the 7th May 1888, whereby on motion by the present respondents for a nonsuit or a new trial in an action in the Supreme Court of New Zealand, Canterbury District, in which action the appellants were plaintiffs and the respondents defendants, it was adjudged that judgment should be entered for the defendants with costs 300*l.*, and disbursements exclusively attributable to the defence of want of notice of action, and that the plaintiffs should have all costs and disbursements of the proofs of all matters of fact in the case except the costs relative to proof of notice of action.

The appellants were a company, incorporated under the Companies Acts, having their head office in London, and an agent in New Zealand named Ritchie. They carried on business with New Zealand, and were on the 12th June 1886 the owners of a vessel called the *Lyttelton*, of 1110 tons register, then lying with a cargo of wool and merchandise on board in the port or harbour of Timaru, in New Zealand.

The respondents were the Timaru Harbour Board, a body corporate under the Timaru Harbour Act 1876 and the Harbours Act 1878, having jurisdiction over and within the port or harbour of Timaru.

The action was brought by the appellants to recover the sums of 15,500*l.*, the value of their vessel the *Lyttelton*, and 17,302*l.* 16*s.* 8*d.*, the value of the cargo on board her, as damages for the negligence and default of the respondents' servant Robert Storm, the deputy harbour master and pilot, who was in charge of the *Lyttelton* at the time of the loss and damage hereinafter mentioned, and by whose negligence it was alleged by the appellants the *Lyttelton* and her cargo were wholly lost.

The respondents in their amended defence by virtue of sect. 227 of the Harbours Act 1878 pleaded the general issue, denying all the allegations in the statement of claim, and in the second paragraph pleading:

That the alleged acts and defaults mentioned in the said amended statement of claim, as constituting the plaintiffs' alleged cause of action, took place after the passing of the above Act, and after it had come into operation, and no notice in writing signed by the plaintiff or his solicitor specifying the cause of such action was given to the defendant one month before such action was commenced, pursuant to the provisions of sect. 227 of the above Act;

and in the third paragraph of their defence,

That the alleged acts and defaults mentioned in the amended statement of claim, as constituting the plaintiffs' alleged cause of action, took place after the passing of the Harbours Act 1878, and after the said Act came into operation, but the said action was not commenced within three months after the commission of such alleged acts and defaults, or any of them, pursuant to the provisions of sect. 227 of the above Act.

The defendants in their defence further traversed the incorporation of the plaintiff company, the ownership of the *Lyttelton* and her cargo, and their respective values. They denied that the vessel was lawfully using the harbour; that she was under the care or control of the defendants, or their servants; that they had control of the navigation of the vessel in leaving the harbour; that the defendants caused Robert Storm to take charge of the vessel for any purpose; that Robert Storm, in what he was alleged to have done, was acting within the scope of his authority or duty; that there was any negligence on the part of Storm; and that the wreck of the *Lyttelton* was caused by any act or default on the part of the said Robert Storm, whether negligent or otherwise. They admitted that under the Harbours Act 1878, and certain bye-laws thereunder made, the defendant board had jurisdiction over and within the port or harbour of Timaru. They alleged that if Storm rendered any such services as alleged, he did so merely on behalf of the plaintiffs and not as the servant of the defendants; that no pilotage district had been created, and no pilotage rates were charged by the defendants, and that the services rendered by Storm were gratuitous; that the proximate cause of the loss was the negligence of the master and crew of the plaintiffs' vessel, or the negligence of the master of the steamship *Grafton*, in tow of which vessel (engaged by the plaintiffs' agents) the *Lyttelton* was, shortly before the accident causing her loss, and that after the sinking of the vessel she and her cargo might have been saved by the exercise of due care and skill on the part of the plaintiffs, their servants, or agents.

The action was tried at Wellington, in New Zealand, before Richmond, J. and a special jury, on March 1887.

The outline of the circumstances giving rise to the action and the facts as regards the notice of action and the commencement of the said action proved or admitted at the trial were as follows:—

The port of Timaru is on the eastern coast of Middle Island, New Zealand, and is a roadstead harbour facing north-easterly. A curved breakwater leading about N.E. and by N. protects the harbour to the southward and eastward. On the northern side of the breakwater is a wharf, opposite to and in a line with the seaward end of which are three—buoys a chequered buoy, distant about 60 fathoms from the end of the wharf; a red buoy, about 300 feet from the chequered buoy; and a buoy known as the wreck buoy, about 954 feet from the red.

The limits of the harbour were defined by Governor's warrant in the *Gazette* of 22nd Feb. 1883, and it was proved that the *Lyttelton* was at the time of the accident, and at the time at which she sank, within the limit so defined.

The respondent board had under sect. 49 of the Harbours Act 1878 power to appoint and employ a harbour master, pilots, and other officers and servants, the salaries to be paid out

of the harbour fund, and one person being competent to hold two or more of such offices.

Under sect. 76 of the above Act, the board had power to appoint licensed pilots to act within a district attached to the harbour under their control, the limits of such district to be defined by the Governor under sect. 75, and the limits so defined to be gazetted. The board to fix the pilotage rates to be paid within such district.

Sects. 109 to 131 deal with the powers to charge dues. Sect. 171 of the Act of 1878 provided as to what the harbour fund should consist of, and sect. 172 as to how the fund should be disposed of. By sect. 8 of the Harbours Act 1878 Amendment Act 1886, sect. 172 of the Act of 1878 was repealed, and it was enacted that all moneys arising from any of the sources mentioned in the said Act shall . . . be paid into an account called the Harbour Fund Account . . . which by sect. 9 of the said amending Act shall be applied by the board in payment of all charges and expenses incurred in carrying the Harbours Act 1878 into execution, and in doing and performing all acts and things which the board are by the said Act . . . empowered or required to do, execute, and perform.

By sect. 215 of the Act of 1878, the harbour board was empowered to make bye-laws, pursuant to which power the following amongst other bye-laws had been made by the respondent board: On the 6th May 1880 a bye-law authorising the levying of certain port charges; on the 22nd Feb. 1881 a bye-law authorising the levying of harbour master's fees; on the 11th Sept. 1884 a bye-law fixing dues, tolls, and charges, and regulating the conduct of shipping in the harbour; on the 12th Oct. 1882 a bye-law to further regulate the mode and place of mooring and anchoring of ships within the limits of the harbour, their position and government whilst there, and their unmooring and removal out of the harbour, and giving certain powers to the harbour master or his deputy.

No pilotage district attached to the harbour over which the respondent board had control was ever defined by the Governor. Pilotage was not compulsory at Timaru, nor did the board license any pilot or pilots or charge any specific pilotage rate under sects. 75 and 76 of the Harbours Act 1878. Vessels coming into port were charged under the Acts and bye-laws amongst other things with certain port charges and harbour master's fees. The *Lyttelton* was charged with and paid these. The moneys so obtained formed the harbour fund, used for the general purposes of the harbour as by the above Acts provided, and out of that fund the salaries of the officers of the board were paid. The board employed a harbour master, Captain Webster, and one Robert Storm as deputy harbour master and pilot, whose duty it was to take charge and control of vessels entering or leaving the harbour, and to regulate the moorings whilst there, but he had no certificate or licence as a pilot.

The *Lyttelton* was loaded at Timaru with a cargo of wool, frozen mutton, and general merchandise, which was shipped on board for carriage to England, and of this the appellants were the bailees. The respondents' tug left Timaru for repairs about the 31st May and did not return until after the 12th June, on which date Captain Webster, the harbour master, who left Timaru on the 9th June, was also absent. It was arranged that the *Grafton*, a powerful twin-screw coasting steamer, should tow the *Lyttelton* out.

On the 11th the *Lyttelton* was ready for sea, and Storm, the deputy harbour master, informed the captain that early on the morning of the 12th he would unmoor her, and that although the tide would not be high until eleven, with the *Grafton* to tow her it would be all right.

On the morning of the 12th, Storm came on board the vessel and took charge, acting as pilot, and the *Lyttelton* was hauled out from the wharf under his orders, and made fast by his directions to the chequered buoy. She drew 17 feet 2 inches forward and 18 feet 8 inches aft, and was in good sailing trim. At 6 a.m. the pumps were sounded, and it was found that she was tight. The *Grafton* was at the red buoy, and her master was informed that the *Lyttelton* was ready and her hawser was sent on board the tug and made fast, and the captain of the *Grafton* proceeded to take steps to bring the *Grafton* ahead into position, but whilst so doing Storm cast off from the buoys, and directed the *Grafton* to tow to the shore side of the red buoy.

The *Grafton* accordingly commenced towing with 60 or 70 fathoms scope of hawser between the vessels, the *Grafton* then being broad-off on the port bow of the *Lyttelton*, and having the red buoy on her starboard side. The hawser then fouled the buoy, tightened, and brought the head of the *Grafton* about north. The helm of the *Lyttelton* was starboarded, her head brought to the north-west, the hawser cleared, and the vessels passed the red buoy. The *Lyttelton* kept her helm a-starboard until about her own length past the buoy, when Storm ordered the helm to be steadied. The *Grafton* was still endeavouring to get into position, the *Lyttelton* not being properly astern of her, and they thus passed the wreck buoy.

In these circumstances those on board the *Lyttelton* felt her twice touch slightly aft, and her helm was by Storm's orders immediately ported and she was brought head to sea with the *Grafton* abaft the beam, and as in the position in which the vessels then were it was useless to continue towing, the *Grafton* came astern, cast off, and prepared to come up on the starboard side, and take the rope again.

Before the *Lyttelton* had lost way Storm ordered her anchor to be let go in shallow water. The port anchor was then let go in obedience to Storm's orders, and the vessel was felt to strike twice heavily. It was shortly afterwards found that the vessel was making water fast forward; she settled down, and in about twenty minutes from the time the anchor was let go the vessel sank.

After the accident the harbour was dragged in order to discover the port anchor, and divers employed by various parties examined the wreck, with the result that in Sept. 1886 the port anchor was found by a diver, its stock bent, and the stock, shank, and one fluke through the bottom of the vessel forward of the step of the foremast.

The defendants' case as to the sinking of the vessel was, that she was making water when she

started, and that this caused her to sink; but according to the finding of the jury the plaintiffs' case that the vessel was holed by her anchor being improperly let go by Storm's orders was clearly established.

By sect. 227 of the Harbours Act 1878 it is enacted that

> No plaintiff shall recover in any action commenced against any harbour board or person for anything done in pursuance of this Act unless such action be commenced within three months after the act committed, and unless notice has been given to the defendant one month before such action is commenced of such intended action, signed by the plaintiff or his solicitor, specifying the cause of such action.

The steps taken by the appellants to comply with the requirements of the above section were as follows: Mr J. M. Ritchie, of Dunedin, the agent of the appellant company, instructed Mr. Maude, a solicitor of the Supreme Court of New Zealand, to give the notice on behalf of the appellant company, claiming 41,500*l.* for ship and cargo, by written instructions, dated the 7th July 1886, and notice of action, signed by Mr. Maude, was duly given to the respondents on the 9th Aug. 1886. On the 9th Sept. 1886 a warrant to sue, authorising Mr. Maude to act on behalf of the appellants, was sealed in London, and on the 11th Sept. 1886 the action was commenced.

At the close of the plaintiffs' case on the sixth day of the trial, the Attorney-General asked for a nonsuit: the learned judge refused a nonsuit, but stated he would reserve all or any of the points. The defendants then called their evidence.

The jury found a verdict for the plaintiffs for 14,490*l.* the ship, and 17,302*l.* 16*s.* 8*d.* cargo.

Richmond, J. then gave judgment for the plaintiffs with costs according to scale, reserving leave to the defendants to move for a nonsuit, or to enter a verdict and judgment for defendants, or to reduce the damages by the value of the cargo.

On the 26th March 1887 the defendants (respondents) gave notice of motion in accordance with the leave reserved at the trial for a nonsuit or judgment for the defendants, or for a new trial.

On the 12th Sept. 1887 the defendants served the plaintiffs with notice of motion to enlarge the time for moving for a new trial, and for a new trial on the ground of the alleged discovery of evidence since the trial which it was alleged could not before the trial of the action have been foreseen or known.

By order of the Supreme Court of New Zealand, Canterbury District, dated the 12th Oct. 1887, the defendants' two motions were removed into the Court of Appeal.

The motions were heard before the Court of Appeal of New Zealand, consisting of Prendergast, C.J., Richmond and Gillies, JJ., in Nov. 1888. The Court, on the 5th June 1888 (Gillies, J. dissenting), directed judgment to be entered for the defendants (respondents), on the ground of want of proper notice of action, but found and decided against the defendants (respondents) on all the other points raised by the notices of motion.

The appellants moved the court for leave to appeal to Her Majesty in Council, which leave was granted, subject to the usual conditions.

On the 26th March 1889 the respondents presented a petition to Her Majesty in Council, praying for special leave to prefer and prosecute a cross-appeal. The appellants appeared by counsel at the hearing of this petition, and the following terms were arranged:—Respondents on this motion agreeing that in the event of the board on the principal appeal entering upon and disposing of the merits of the case apart from any question of want of notice, the respondents in principal appeal shall not be prejudiced as regards the matter of costs by reason of their not having presented a cross-appeal. No order, except that the question of costs of this application be reserved to the hearing of the principal appeal.

Finlay, Q.C., *J. F. Clerk*, and *Batten* appeared for the appellants.

Sir *H. Davey*, Q.C., *Kennedy*, Q.C., and *Lush Wilson* for the respondents.

A considerable part of the argument was taken up with the question whether sufficient notice of action under the local Act had been given, which, in the view taken by their Lordships, it is not necessary to report, and also with the questions of fact as to the loss of the ship. It was further argued for the respondents that Storm, in acting as pilot, was not acting as servant of the board so as to make them liable for his acts, and that the board was under no statutory duty or obligation to provide pilotage, and there could be no remedy against the funds in their hands, and that Storm was not acting within the scope of his duties as harbour master, and had no authority, except from the appellants themselves, to take charge of the ship. The board had no power to enter into pilotage contracts at all.

At the conclusion of the argument their Lordships took time to consider their judgment.

April 30.—Their Lordships' judgment was delivered by

The Lord Chancellor (Halsbury).—This is an appeal by a company carrying on business as shipowners against a judgment of the Court of Appeal of New Zealand, whereby judgment was entered for the defendants, the Timaru Harbour Board. The plaintiff company owned a vessel called the *Lyttelton*, and on the 12th June 1886, while under the conduct and management of a person named Storm, the *Lyttelton* was sunk, as was alleged, by want of due care by Storm, who was a licensed pilot, and also was the deputy harbour master of the harbour of Timaru. The cause was tried before Richmond, J. and a special jury, and a verdict was found for the plaintiffs both for the value of the ship (14,000*l.*) and for the value of the cargo (17,000*l.*). Leave was reserved at the trial to enter a verdict for the defendants in lieu thereof upon various points of law. The majority of the Court of Appeal, on the ground that no sufficient notice of action as required by a local statute had been given by the plaintiffs, entered judgment for the defendants, and this appeal is brought against that order of the New Zealand Court of Appeal.

With respect to the questions of fact involved in this appeal, their Lordships are of opinion that no ground has been shown for disturbing the verdict of the jury. They are of opinion that the loss of

the vessel was due to the mismanagement and want of skill of the person then acting as pilot, and that the management of the tug did not in any material degree contribute to the catastrophe which happened. In this view of the facts they are confirmed by the opinion of the nautical assessors. The next question raised on the appeal is the validity of the notice of action, and this in turn depends upon the proof of agency in the person by whom, in fact, the notice of action was given. That question was a question of fact, and if no arrangement had been arrived at by the parties must have been submitted to the jury. By consent, that question was withdrawn from the consideration of the jury and left for the determination of the court. It is not necessary for their Lordships to express any opinion upon this part of the case, inasmuch as the serious and important ground upon which the case was argued depended on the competency, in point of law, of the Timaru Harbour Board as constituted by statute to enter into pilotage contracts, or in their corporate capacity to employ a person as pilot for the conduct and management of a particular vessel. Now, the ambit of the harbour board's powers is prescribed by statute. That for their own purposes they might employ a pilot for the purpose of moving vessels which neglected the orders of the harbour master in his capacity of administering the shipping in and about the harbour, may be true enough. But their sole duty, as constituted by statute, in respect of pilots was to license pilots between whom and themselves the only relation which the law contemplated as existing was that they should be under their supervision and under their jurisdiction for the purpose of being duly licensed; but once licensed the pilot had to make his own bargain with the shipowner, and would incur in that contract of pilotage only his own personal liability for the due performance of his duty. The statute and the rules made under it seem carefully worded so as to exclude the notion that the harbour board, in its corporate capacity, is acting as pilots for the vessels frequenting the harbour, and their Lordships are of opinion that what is not permitted to the harbour board under the statute is prohibited; they are not therefore authorised to pledge public funds for the purpose of entering into private engagements, and cannot be held responsible for the default of their harbour master, who in fact was acting as pilot for the vessel, not in the view their Lordships take of the facts as harbour master, but as pilot engaged by the parties themselves, and was only himself personally liable for acting in the capacity of pilot, though he happened to fill the character of deputy harbour master at the same time.

The facts of the case are peculiar in this respect, that the transaction in question was out of the ordinary course of duty in more aspects than one. It would be intelligible that the harbour board should with their own tug and harbour master aid vessels in entering or departing from the harbour, having taken care that both their harbour master and the appliances at his command were sufficient for the purpose of effecting the object desired. In this case the tug boat (by which the harbour board were in the habit of assisting vessels as they did) was out of repair; the parties, at their own risk, appear to have employed a steam-tug not the property of or habitually under the command of the harbour master. And, when it is remembered that the accident itself happened partly by reason of the inappropriateness of the steam-tug employed for the purpose, it is not an unimportant topic for consideration that even the ordinary practice of the harbour board, whether authorised or not by law, was not the practice in following which this accident happened, but the error of the pilot in attempting to conduct an operation by a vessel not used by the harbour board, and inappropriate for the purposes for which it was selected by the parties now complaining. Their Lordships, however, are of opinion that, even had the misfortune happened in the use of the steam tug according to the ordinary practice and by the person who, as a matter of fact, was the harbour master, the harbour board had no authority to enter into such a contract, as they were not entitled by statute themselves to become pilots, but only to license others for that vocation. Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed, and that the judgment of the Court of Appeal of New Zealand should be varied by entering judgment for the defendants, and that the appellants pay the costs of the suit and of this appeal.

Solicitors for the appellants, *Waltons, Bubb*, and *Johnson*, for *Harper* and *Co.*, Christchurch, New Zealand.

Solicitors for the respondents, *Longbourne, Stevens*, and *Powell*, for *Perry* and *Perry*, Timaru, New Zealand.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, May 15, 1890.

(Before Lord ESHER, M.R., FRY and LOPES, L.JJ., assisted by NAUTICAL ASSESSORS.)

THE ASSYRIAN. (*a*)

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

Damage to cargo — Screw alley — Matters of nautical skill — Trinity Masters — Evidence — Practice.

In Admiralty actions, where the court is assisted by nautical assessors, evidence as to matters of nautical skill and knowledge is not admissible, and hence, where in a damage to cargo action the judge found on the advice of his assessors that all screw alleys, however well made, may emit smells which may damage sensitive cargo stowed in the vicinity, the Court of Appeal, being assisted by assessors, refused to allow the appellants, the shipowners, at the hearing of the appeal, to call evidence to show that the particular screw alley did not emit a smell, on the ground that it was a question of nautical skill about which evidence could not be given.

THIS was an appeal by the defendants from a decision of Butt, J. in a damage to cargo action.

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

The action was instituted by the owners of a cargo of flour against the owners of the steamship *Assyrian*, which carried the flour from America to Liverpool.

On delivery of the cargo to the plaintiffs, part of it was found to be tainted with a smell, and it was in respect of this damage that the action was brought.

It appeared that part of the cargo was stowed in the immediate neighbourhood of the ship's screw alley.

Butt, J. gave judgment for the plaintiffs, finding as a fact that the flour when shipped was in good order and condition, and was delivered damaged. In the course of his judgment the learned judge stated that, whilst he could not state the precise cause of the injury, he had been advised by his assessors that all screw alleys, however well made, may emit smells which may damage sensitive cargo stowed in the vicinity, and that that perhaps was the cause of the present damage.

The question of the damage being caused by the screw alley had not been raised at the trial by counsel, and no evidence had been directed to it.

Sir *Walter Phillimore* (with him Dr. *Raikes*), for the appellants, asked leave to call evidence to show that this particular screw alley did not emit any smell. The mind of the judge was influenced by this advice of the Elder Brethren. We could have given evidence to show that the *Assyrian's* screw alley was so constructed as to make it impossible to emit a smell. [ESHER, M.R. —This is a matter depending on a nautical knowledge of ships, and when the court has skilled advice you cannot give such evidence.] It may be that in most ships the screw alleys do emit smells, but I can show that in this particular case no smell could be emitted. The assessors have never seen this particular ship, and however valuable their advice, they cannot speak with certainty as to this ship.

Barnes, Q.C. (with him *Joseph Walton*), for the respondents, was not called on.

Lord ESHER, M.R.—It seems to us that this advice which was given by the Trinity Masters to Butt, J. was founded upon a nautical knowledge of ships. That is a matter about which evidence cannot be given at all, and therefore we cannot admit any evidence on this appeal.

FRY and LOPES, L.JJ. concurred.

The appeal was then heard, and dismissed with costs.

Solicitors for the appellants, *Waltons, Johnson,* and *Bubb.*

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

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

June 16 *and July* 1, 1890.

(Before HUDDLESTON, B.)

SERRAINO AND SONS *v.* CAMPBELL. (*a*)

Charter-party—Bill of lading—Incorporation of conditions of charter-party in bill of lading.

Where a bill of lading contains certain excepted perils, and after them the words "paying freight for the said coals and all other conditions as per charter-party," the latter words do not incorporate the excepted perils in the charter-party, but they only refer to the conditions in the charter-party ejusdem generis with the payment of freight.

The plaintiffs, the indorsees of a bill of lading, sued the defendants for damages for loss of goods shipped on board the defendants' vessel.

The goods were shipped by the charterer, the charter-party contained the following exceptions in print: "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 nature and kind soever, during the said voyage," and in writing at the end: "Negligence clause as per Baltic Bill of Lading 1885."

The clause in the Baltic Bill of Lading 1885 *excepted "Strandings, collisions, and all losses, even when occasioned by the negligence, default, or error of judgment of the pilot, master, mariners, or other servants of the shipowner."*

The bill of lading provided that the goods were to be delivered, "the act of God, &c., excepted, unto order or to assigns, they paying freight for the said coals, and all other conditions as per charter-party with average accustomed."

Held, that the reference to the charter-party did not extend the exceptions contained in the bill of lading, and that, as the goods were lost through the negligence of the master of the vessel, the plaintiffs were entitled to judgment.

THE plaintiffs sought to recover the sum of 447*l.* 1*s.*, the amount which they alleged they had lost as indorsees of a bill of a lading for a cargo of coals shipped on board the defendants' vessel *John Banfield.* The vessel sailed from Newcastle-upon-Tyne upon the 20th Dec. 1887, for the port of Trapani, but was lost near Mazzara, on the coast of Sicily. A naval court of inquiry was held at Palermo, and it was found that the cause of the stranding of the vessel was the careless navigation of the master and mate of the vessel. The plaintiffs alleged that careless navigation was not one of the exceptions contained in the bill of lading, but the defendants contended that the bill of lading incorporated all the conditions of the charter-party which was subject to the negligence clause, as per Baltic Bill of Lading 1885, which excepted careless navigation, and that they were therefore not liable.

The charter-party was dated the 12th Dec. 1887, and was, so far as is material to the present case, in the following terms:

It is this day mutually agreed between Henry Campbell, of the good ship *John Banfield*, of the burden of 750 tons or thereabouts, now in the Tyne, and Fisher, Renwick, and Co., as agents for charterers, that the said ship being tight, staunch, and strong, and in every way fitted for the voyage, shall with all convenient speed proceed to a loading-place in the Tyne as ordered, and there load a full and complete cargo of large steam coals, &c., and being so loaded shall therewith proceed to Trapani and deliver the same according to the laws and customs of the port of discharge to the order of the said freighter or his or their assigns, on being paid freight at and after the rate of eleven shillings and threepence per ton of 20 cwts. delivered.

The freighter paying all customary dues and duties on the cargo and the ship all other charges. (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 nature and kind soever, during the said voyage, always excepted.) . . .

Negligence clause as per Baltic Bill of Lading 1885.

(*a*) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

The negligence clause in the Baltic Bill of Lading 1885 was as follows:

The act of God, perils of the sea, fire, barratry of the master and crew, enemies, pirates, and robbers, arrests and restraints of princes, rulers, and people, and other accidents of navigation excepted. Strandings and collisions, and all losses and damages caused thereby, are also excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners. . . .

The following was the form of the bill of lading given by the master of the *John Banfield*, and was dated the 20th Dec. 1887:

Shipped in good order and well condition by Fisher, Renwick, and Co., in and upon the good ship called the *John Banfield*, whereof is master for the present voyage, Anderson, and now lying in the river Tyne, and bound for Trapani, 752 tons, large Newcastle steam coals, and are to be delivered in the like good order and well conditioned at the aforesaid port of Trapani (the act of God, the Queen's enemies, fire, and all and every other the dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted), unto order or to assigns, they paying freight for the said coals, and all other conditions, as per charter, with average accustomed. . . .

The question whether the vessel was lost through the negligence of the master was left by the learned judge to the jury, and they found that it was. The jury were then discharged, and it was agreed that the construction to be put upon the bill of lading, and the question whether Fisher, Renwick, and Co. were acting as agents for the plaintiffs when they entered into the charter-party, should be decided by the judge alone.

On behalf of the plaintiffs it was argued that they had bought the cargo of coals from Fisher, Renwick and Co., to be delivered at Trapani, and that Fisher, Renwick, and Co., although they described themselves in the charter-party as agents for the charterers, were really acting as principals in the matter.

Barnes, Q.C., *Lawson Walton*, Q.C., and *Lowenthal* for the plaintiffs.

French, Q.C. and *Joseph Walton* for the defendants.

Cur. adv. vult.

July 1.—HUDDLESTON, B. delivered the following written judgment: — This was an action brought by the plaintiffs, indorsees of the bill of lading and owners of goods intrusted to the defendants as owners of the vessel *John Banfield*, for delivery at Trapani, in the island of Sicily, shipped by Messrs. Fisher, Renwick, and Co., and lost by reason of the negligence and want of skill of the officers and crew in charge of the ship near Mazzara on the coast of Sicily. The vessel stranded at Mazzara, and the plaintiffs' goods were lost. Witnesses being called, the jury found that the loss was due to the negligence of the master. On that finding it was agreed that the jury should be discharged, and that the rest of the case should be decided by me alone. The charter-party, which was in the ordinary form, was described to be by Fisher, Renwick, aud Co., as "agents for the charterers." It contained in print the usual exceptions—"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 nature and kind soever during the said voyage," and in writing at the end, "Negligence clause, as per Baltic Bill of Lading 1885." It was contended on the part of the defendants that the plaintiffs were parties to the charter-party, Fisher, Renwick, and Co. being their agents, and that therefore the plaintiffs, as principals, were bound by all the terms of the charter-party; that if not actual parties, as principals, to the charter-party, they were so to the bill of lading, which, it was argued, incorporated all the provisions of the charter-party, including the Baltic Bill of Lading clause of 1885. Apart from Fisher, Renwick, and Co. describing themselves as agents for the charterers, there was no evidence to show that they were so in fact. The contract between them and the plaintiffs was contained in letters and telegrams discussing the price, and concluded with a letter of Dec. 12, in which Fisher, Renwick, and Co. write: "Referring to telegrams exchanged between us, we confirm sale to your good selves of a cargo of large Newcastle steam coals at 19*s.* 6*d.* per ton c. i. f. Trapani." The invoice was made out by Fisher, Renwick, and Co. as vendors to the plaintiffs as vendees. I was clearly of opinion that the contract was one of sale, and not of agency, and that Fisher, Renwick, and Co. were principals in the charter-party, and that the plaintiffs were not parties directly bound by it.

It was, however, contended that the bill of lading incorporated all the provisions of the charter-party, and amongst those the Baltic clause. The bill of lading provided that the goods shipped in the *John Banfield* by Fisher, Renwick, and Co. were to be delivered at the port of Trapani, "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 nature and kind soever, excepted, unto order or to assigns, they paying freight for the said coals, and all other conditions as per charter, with average accustomed." And it was argued that the word "all other conditions as per charter" imported into the bill of lading the Baltic clause. The Baltic clause provided that strandings and collisions and all losses and damages caused thereby were to be excepted, even when occasioned by the "negligence, default, or error of judgment of the pilot, master, mariners, or other servants of the shipowners." I am of opinion that "all other conditions" must be connected with the words "paying freight for coals," and include only such conditions as are *ejusdem generis* to paying freight, importing into the bill of lading so much of the charter-party as is referable to the subject-matter of the discharge and receipt of the cargo at the port of discharge, and do not include a clause which would add to the exceptions already recited, and very materially alter the contract on the face of the bill of lading. *Russell* v. *Niemann* (10 L. T. Rep. N. S. 786; 2 Mar. Law Cas. O. S. 72; 17 C. B. N. S. 163) is directly in point, and was referred to and approved in *Taylor* v. *Perrin* in the House of Lords, the shorthand-writer's judgment in which has been furnished to me as the case does not seem to have found its way into any of the regular reports. In that case Lord O'Hagan described *Russell* v. *Niemann* as a perfectly well-decided case. Lord Blackburn says: "I am very clearly of opinion that, on the true construction of the bill of lading, the reference to the charter-party does not extend the exceptions by adding those that are put in the charter-party. In the case which has been referred to, *Russell* v. *Nie-*

mann, in which Willes, J. gave judgment, it was perfectly correctly decided, as it seems to me, that the reference to the charter-party is meant to bring in those conditions which would apply to the person who has taken the bill of lading and is taking the delivery of the cargo, such as the paying of demurrage, the paying of freight, the manner of paying, and so on, and by no means extends to incorporate all the conditions in the charter-party." It was said that Lord Fitzgerald appeared to dissent in the House of Lords, but I do not so read his judgment; he merely says that it is not necessary to discuss the point for the decision of the particular case before them. Mr. French argued that *Gray* v. *Carr* (25 L. T. Rep. N. S. 215; 1 Asp. Mar. Law Cas. 115; L. Rep. 6 Q. B. 522) and *Porteus* v. *Watney* (39 L. T. Rep. N. S. 195; 4 Asp. Mar. Law Cas. 34; 3 Q. B. Div. 534) must be considered to overrule *Russell* v. *Niemann* (*ubi sup.*), but in both those cases the conditions imported into the bill of lading were of the same character, *ejusdem generis*, as those contained in the charter-party. The other authorities *Gullischen* v. *Stewart* (50 L. T. Rep. N. S. 47; 11 Q. B. Div. 186; 5 Asp. Mar. Law Cas. 200; 13 Q. B. Div. 317), *Gardner* v. *Trechman* (53 L. T. Rep. N. S. 518; 15 Q. B. Div. 154), and *Hamilton* v. *Mackie* (Times L. Rep., vol. 5, p. 677) amount to this—that all the provisions of the charter-party with such words of reference in the bill of lading are to be considered as introduced into the bill of lading, and that if then any of those are contradictory to the terms of the bill of lading or insensible they may be rejected. In this case as the parties have agreed that there should be only certain exceptions mentioned in the bill of lading, the introduction of the Baltic clause altogether overrides those exceptions, and therefore is inconsistent with the provisions which in the bill of lading were agreed to by the parties. Under these circumstances I am of opinion that, the negligence having been proved, the defendants are not exempted from the consequences thereof, either by the terms of the bill of lading or the charter-party, and that therefore the plaintiffs are entitled to a verdict and judgment for the full amount claimed 447*l.* 0*s.* 1*d.*

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *H. C. Coote* and *Ball*, for *Adamson*, South Shields.

Solicitors for the defendants, *Stocken* and *Jupp*.

June 16, 17, *and July* 10, 1890.

(Before CAVE, SMITH, and WILLIAMS, JJ.)

NORMAN *v.* BINNINGTON AND CO. (*a*)

Bill of lading—Damage to cargo—Liability of shipowners—Exceptions—Negligence—"In navigating the ship or otherwise."

The exceptions in a bill of lading of "negligence or default of the pilot, master, mariner, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise," apply to damage done to goods whilst being stowed and before the voyage has commenced.

The above exceptions are to be read as meaning an absolute exemption from liability for damage caused, whether in negligently navigating the ship, or in negligently bringing about any other losses from which the shipowner has exempted himself in the bill of lading.

The plaintiff shipped in good order and condition on board the defendants' vessel at Galveston certain bags of cotton-seed cake, and, by the terms of the bill of lading, the defendants undertook to deliver them in like good order and condition at Liverpool.

Amongst other exceptions in the bill of lading it was provided that the defendants should not be liable for the "negligence or default of the pilot, master, mariner, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise."

Whilst the ship was loading other goods, there was a heavy storm of rain and the plaintiff's goods were damaged, either by the rain falling direct upon them through the open hatchways, or by bales of cotton, which had become wet through standing in the rain, being placed in contact with them.

The jury found that the defendants were guilty of negligence in the stowing of the cargo, and Charles, J., upon that finding, entered judgment for the plaintiff.

Held, that, under the above exception, the defendants were exempt from liability for injury caused to the plaintiff's goods, after they were shipped, by the negligence of the persons in the service of the ship, and that judgment must therefore be entered for the defendants.

THIS was a motion on behalf of the defendants for a new trial, or in the alternative that the judgment entered for the plaintiff at the trial should be set aside and judgment entered for the defendants.

The action was tried before Charles, J. and a common jury at the Liverpool Winter Assizes; the jury found that the defendants' servants had been guilty of negligence, and upon that finding the learned judge entered judgment for the plaintiff.

The plaintiff sought to recover damages for injury to 1280 bags of cotton-seed cake shipped in good order and condition on board the defendants' steamship *Glenfield*, and which, by the terms of the bill of lading given by the defendants, they undertook to deliver in like good order and condition.

The defendants denied that the bags were injured, and in the alternative said that if they were, the defendants were exempt from liability under the provisions of the bill of lading.

The bill of lading under which the goods were shipped described them as being shipped in good order and condition, and stated that they were to be delivered from the ship's deck when the ship's responsibility should cease, subject to certain undermentioned conditions, in the like good order and well condition at Liverpool. The exceptions were as follows: The act of God, Queen's enemies, pirates, robbers, thieves, vermin, jettison, barratry, misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship whether in navigating the ship or otherwise, restraints of princes, rulers or people, inaccuracies, obliteration or absence of marks, numbers, or address, loss or damage arising from insufficiency in

(*a*) Reported by W. H. HORSFALL, Esq., Barrister at-Law.

strength of packages, from sweating, leakage, breakage, rain, spray, rust, decay from storage or contact with other goods, or from the boilers, steam or machinery, heat or fire on board, and all and every the dangers and accidents of the seas, land, and rivers, and of navigation, of whatever nature or kind being excepted, and the ship not being liable for any consequences of the causes herein excepted however caused or originated.

The plaintiffs' cotton-seed cake was loaded on board the *Glenfield* while the vessel was alongside the quay at Galveston, as was also some cotton in bales which did not belong to the plaintiff. The vessel then proceeded outside the bar and completed her loading from barges, the remainder of her cargo consisting of cotton in bales. While she was lying outside the bar there was very heavy rain, and it was suggested that the damage caused to the cotton-seed cake arose either from the rain falling down the hatchways on to the cake direct, or from the bales of cotton getting wet and then being placed upon the cake. Evidence was called at the trial on behalf of the plaintiff in support of this suggestion, and, no evidence having been called for the defendants, the jury found that the defendants were guilty of negligence in the stowing of the cargo. Upon this finding, as stated above, judgment was entered for the plaintiff.

Bigham, Q.C. and *Joseph Walton* for the defendants.—The jury at the trial found that the defendants had been guilty of negligence, and we rely upon that finding, and submit that the negligence of which the defendants have been found guilty is one of the exceptions specially mentioned in the bill of lading, and that the defendants are thereby freed from all liability in respect of the same. The case really turns upon the construction to be put upon the words "negligence or default of the master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise." Charles, J., in the course of his judgment, said: "I think here that the words "or otherwise" must mean something in connection with the navigation of the ship as a ship." We submit that the construction to be put upon the words "or otherwise" is exactly the opposite, and that they refer to negligence which had nothing to do with navigating the ship. They referred to

Crow v. *Palk*, 8 Q. B. 467;
The Duero, 22 L. T. Rep. N. S. 37.

Kennedy, Q.C. and *P. C. Morris* for the plaintiff.—The cause of damage as found by the jury was negligence during the course of loading the vessel. The exemptions refer to matters happening after the sailing of the vessel with the goods on board:

Steel v. *State Line Steamship Company*, 3 Asp. Mar. Law Cas. 516; 37 L. T. Rep. N. S. 333; 3 App. Cas. 72.

[SMITH, J.—The seed cake was shipped in good order and condition, and the bill of lading attaches as soon as that takes place. CAVE, J.—In the passage you have referred to the Lord Chancellor was dealing only with "perils of the seas."] These exceptions are put into the bill of lading by the shipowner for his own protection, and, if there is any ambiguity about the terms, they must be construed in favour of the shipper and against the shipowner:

Burton v. *English*, 49 L. T. Rep. N. S. 768; 5 Asp. Mar. Law Cas. 187; 12 Q. B. Div. 218;
Taylor v. *Liverpool and Great Western Steam Company*, 30 L. T. Rep. N. S. 714; 2 Asp. Mar. Law Cas. 275; L. Rep. 9 Q. B. 546.

The words "or otherwise" in the expression "in navigating the ship or otherwise" mean something akin to navigating. [CAVE, J.—What general word do you say would cover "or otherwise"? Acts relating to the service of the ship. The defendants called no evidence to remove the doubt as to how the damage to the cargo was caused; the only evidence at the trial was what appeared in the log. They also referred to

Ah Kang v. *Australasian Steam Navigation Company*, 9 Victorian Law Rep. 171;
Guillaume v. *Hamburg and American Packet Company*, 42 New York (C. A.) Rep. 212;
Gleadell v. *Thompson*, 56 New York (C. A.) Rep. 194;
Smith v. *Hunt*, 54 L. T. Rep. N. S. 422;
Carmichael v. *Liverpool Sailing Shipowners Association*, 56 L. T. Rep. N. S. 863; 19 Q. B. Div. 242; 6 Asp. Mar. Law Cas. 130;
Canada Shipping Company v. *British Shipowners Mutual Protection Association*, 61 L. T. Rep. N. S. 312; 23 Q. B. Div. 343; 6 Asp. Mar. Law Cas. 422;
Thames and Mersey Marine Insurance Company v. *Hamilton, Fraser, and Co.*, 57 L. T. Rep. N. S. 695; 12 App. Cas. 484; 6 Asp. Mar. Law Cas. 200;
Hayn v. *Culliford*, 4 Asp. Mar. Law Cas. 128; 40 L. T. Rep. N. S. 536; 4 C. P. Div. 182.

Bigham, Q.C., in reply. *Cur. adv. vult.*

July 10.—SMITH, J. delivered the following judgment of the court:—This is an action by a shipper of goods against shipowners upon a bill of lading for damage to goods after being loaded on board the defendants' ship. The facts are as follows: The plaintiff's goods (cotton-seed cake) were loaded in the hold of the defendants' ship at the port of Galveston, and certain cotton in bales (not the plaintiff's) was also there put on board. It thereupon became necessary to complete the loading of the ship outside of the bar in the outer roads, and for this purpose the ship, with the plaintiff's goods on board, proceeded outside, and there anchored. Other cargo, viz., cotton bales (not the plaintiff's), was then brought alongside in lighters, and loaded in the ship, and the jury have found that the plaintiff's cake was then damaged by rain-water, either by it falling directly through the open hatchway on to the cake, or by reason of wet bales of cotton being then placed upon it, and that there was negligence on the part of those on board the ship in allowing the plaintiff's cake to be so damaged.

Upon these facts the question arises whether the plaintiff can maintain an action against the defendants for damage to his goods, or whether the defendants are protected by the exemptions in the bill of lading upon which the action is founded. The bill of lading, so far as is material, is as follows: "Shipped in good order and condition to be delivered, subject to the undermentioned conditions, in like good order and well conditioned, the act of God, the Queen's enemies, misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise . . . loss or damage arising from in-

sufficiency in strength of packages, from sweating, leakage, breakage, rain, spray, rust, decay, from storage or contact with other goods, or from the boilers, steam, or machinery, or from the consequences of any damage or injury thereto . . . and all and every the dangers and accidents of the seas, land, and rivers, and of navigation of whatever kind, being excepted, and the ship not being liable for any consequences of the causes herein, excepted, however, caused or originated." Under the bill of lading the shipowner became bound to deliver the goods at the port of discharge in like good order and condition as when shipped unless absolved by any of the excepted exemptions. My brother Charles, who tried the case, was of opinion that, inasmuch as the jury had found that the rain, or the contact with other wet goods, which damaged the plaintiff's goods, was permitted by reason of the negligence of those for whose acts the defendants were responsible, the defendants were not exempted from liability by the terms of the bill of lading and gave judgment for the plaintiff. In my judgment there was ample evidence to support the finding of the jury that the damage was occasioned by the negligence of those for whom the defendants were responsible. It has been held that in construing a clause in a bill of lading exempting a shipowner from liability, which is ambiguous and of doubtful meaning, the construction most in favour of the shipper, and not such as is most in favour of the shipowner, for whose benefit the exemptions are framed, is to be applied. See per Lush, J. in *Taylor* v. *Liverpool and Great Western Steam Company* (30 L. T. Rep. N. S. 715; 2 Asp. Mar. Law Cas. 275; L. Rep. 9 Q. B. 549); and per Bowen, L.J. in *Burton* v. *English* (49 L. T. Rep. N. S. at p. 769; 5 Asp. Mar. Law Cas. 187; 12 Q. B. Div., at p. 224). I do not understand this to mean that the true canon of construction is not to be applied, but that, when applied, if ambiguity or doubt still exists, the construction is to be in favour of the shipper rather than of the owner. In this bill of lading the shipowner has exempted himself from damage to the shipper's goods by reason of rain or of contact with other goods. This is not disputed, but the shipper contended that this exception did not apply, first, to damage done before the voyage had actually commenced, and secondly, that it did not apply when the damage was brought about by the negligence of those for whose acts the defendant was responsible. As regards this first point I do not agree with it. In my judgment, when once a shipowner has received a shipper's goods on board his ship, and has by his captain given a bill of lading in the ordinary form for them, he is bound to deliver them at the port of discharge in like good order and condition as when shipped, except he is exempted by exemptions therein, and it is immaterial when the voyage in fact commences. The case of *Hayn* v. *Culliford* (39 L. T. Rep. N. S. 288; 40 L. T. Rep. N. S. 536; 4 Asp. Mar. Law Cas. 48, 288; 3 C. P. Div. 410; 4 C. P. Div. 182) was cited to support this contention, but in my opinion it does nothing of the kind. In that case the bill of lading exempted the shipowner "from any act of neglect or default whatever of the pilot, master, or mariner in navigating the ship," and it was held in the Court of Appeal that this clause did not exempt the shipowner from the default of their other agents and servants, and consequently not from the acts and defaults of the stevedore: (see judgment of the Court of Appeal, per Bramwell, L.J., 40 L. T. Rep. N. S. 537; 4 Asp. Mar. Law Cas. 129; 4 C. P. Div. 185.) This is all that case decided in the Court of Appeal. I desire to point out the difference between the bill of lading in the present case, and that in *Hayn* v. *Culliford* (*ubi sup.*). In the present case the words "engineers or other persons in the service of the ship" after the words "pilot, master, or mariners" were added, as it seems to me, expressly to meet the point taken successfully by the shipper in that case, and it also appears to me that the phrase "whether in navigating the ship or otherwise" was inserted to meet a point also taken in that case, but left expressly undecided by the Court of Appeal, viz., whether damage to goods in stowing them was damage done in "navigating the ship," which Denman, J. in the court below had held not to be so. Moreover, upon the facts of this case, the whole of the damage done to the plaintiff's goods was after they had been safely stowed in the defendants' ship and not in the process of stowing, as in *Hayn* v. *Culliford*. In my judgment the shipowner, under this bill of lading, was *primâ facie* exempted from liability for damage by rain or by contact with other goods after the goods had been shipped, whether the ship had started on her voyage or not.

I now come to the other contention of the shipper, viz., that, if the defendants' servants have brought about the damage by rain or contact with other goods by their negligence, the simple exception of liability from damage by rain or by contact with other goods would not exempt them. In this I agree, but it is answered by the shipowner that he is exempt by reason of the further exception in this bill of lading, viz., "negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship whether in navigating the ship or otherwise always excepted." It is upon the construction of these words "whether in navigating the ship or otherwise" that the decision of this case really depends. Mr. Kennedy says that the words "or otherwise" may mean two things, either (*a*) something akin to navigating the ship, or (*b*) something dissimilar to it, and that being so, under the rule laid down in the cases above cited, he asserts that they must be construed in favour of the shipper, and consequently held to mean something akin to navigating the ship. He was unable, when pressed, to give any intelligible instance of what came under the terms "akin to navigating the ship" which was not covered by the words "in navigating the ship." To read the words "or otherwise," as meaning "akin to navigating the ship" is to give no meaning in my judgment to the preceding words "in navigating the ship." It should be noticed that they are not words enumerating a class with general words following to which the doctrine of limiting the general words to the class is ordinarily applied. To read the words "or otherwise" as including everything besides navigating the ship is to render the words "in navigating the ship" inoperative, but to read the words "whether in navigating the ship or otherwise" as meaning an absolution from liability for damage brought about whether in negligently

navigating the ship or in negligently bringing about those other losses or damages from which the shipowner has exempted himself in the bill of lading, is in my judgment the true reading of the bill of lading. By this means the true canon of construction is followed. The natural meaning is given to the words. A meaning is given to every word, and no word is rendered inoperative. When this is done there is no ambiguity or doubtful meaning. The shipowner by the bill of lading contracts to carry and deliver the shipper's goods in like good order and condition as when shipped, excepting that he will not be liable for damage thereto brought about either by the negligent navigation of his ship or for any of the losses and damages excepted in the bill of lading, even though brought about by the negligence of those for whose acts he is responsible. It is unnecessary to determine in this case whether the damage accrued was to the plaintiff's goods whilst the ship was or was not being navigated.

Our attention was called to a decision given in Australia in the case of *Ah Kang* v. *Australasian Steam Navigation Company* (9 Victoria L. Rep. 171), in which it was held upon demurrer that the words in a bill of lading "or under any other circumstances" following the general words of "restraint of princes or rulers, accident, loss, or damage from any act, neglect, or default whatsoever of the pilot, master, or mariner, and other servants of the company, in navigating the ship," did not cover the confiscation of the plaintiffs' goods at a foreign port by reason of the omission of the master to insert an entry of them in the ship's manifest, as required by the law of the port, a matter wholly dissimilar from any of the exceptions in the bill of lading, and in no way excepted therein, as in the present case the damage by rain and contact is. In my opinion, this fact distinguishes that case from the present, and I see no reason to dispute its accuracy even if it were binding upon us, which it is not. In my judgment the defendants in this case are exempt, under the terms of the bill of lading, from the liability sought to be imposed upon them, and that judgment should be entered for the defendants, and with costs. My brother Cave and my brother Williams wish me to state that they agree with this judgment.

Judgment for the defendants.

Solicitors for the plaintiff, *Wynne, Holme*, and *Wynne*, for *Forshaw* and *Hawkins*, Liverpool.

Solicitors for the defendants, *W. A. Crump* and *Son*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Wednesday, April 23, 1890.

(Before Sir JAMES HANNEN and BUTT, J., assisted by TRINITY MASTERS.)

THE MAGNETA. (a)

ON APPEAL FROM THE COUNTY COURT OF YORKSHIRE HOLDEN AT KINGSTON-ON-HULL.

Collision—Lights—Vessel at anchor—Rules for the Navigation of the River Humber.

Art. 2 *of the Rules for the Navigation of the River Humber requiring that vessels having two or more masts when at anchor shall exhibit two white lights, one near the bow the other near the stern, the latter of which shall be exhibited "at double the height of the bow light" does not require that the stern light shall be precisely double the height of the other; and therefore, where the lights were exhibited ten and twenty-five feet respectively from the deck, it was held that there was no breach of the regulation.*

THIS was an appeal by the defendants in a collision action from a decision of the judge of the Hull County Court, holding both vessels to blame.

The plaintiffs were the trustees of the Aire and Calder Navigation, and sought to recover compensation for damage to certain of their fly-boats whilst in tow of a tug by collision with the steam-trawler *Magneta*. The collision occurred about 5 a.m. on the 6th Jan. 1889 in the river Humber.

The *Magneta* was at anchor, and carried two anchor lights. Her forward light was at the forestay, about ten feet from the deck. Her after light was hung by a rope from the mizen-mast at about twenty-five feet from the deck. The after light was immediately above the top of a funnel which led up alongside the mast, and the fire was lighted at the time of the collision.

The judge found the tug-boat in charge of the fly-boats to blame for navigating in the fog then prevailing, and found the *Magneta* to blame for a breach of art. 2 of the Humber Navigation Rules in carrying her after light at five feet more than double the height of the forward light.

Rules for the Navigation of the River Humber, art. 2:

All vessels as aforesaid, when at anchor in the river Humber, or in any part of the river Ouse below the North-Eastern Railway bridge crossing the river Ouse at or near Hook, or in any part of the river Trent at or below Gainsborough, shall, between sunset and sunrise, instead of the light prescribed by art. 8 of the said regulations (*i.e.*, the Regulations for Preventing Collisions at Sea), exhibit from the forestay or otherwise near the bow of the vessel where it can be best 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 mizzen peak or the boomtopping lift or other position near the stern where it can best be seen.

Regulations for Preventing Collisions at Sea, art. 8:

A ship, whether a steamship or a sailing ship, when at anchor shall carry, where it can best be seen, but at a height not exceeding twenty feet above the hull, a white light in a globular lantern of not less than 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.

Sir *Walter Phillimore* (with him *L. Pyke*), for the defendants, in support of the appeal.—There has been no infringement of the Humber Navigation Rules by the defendants. The rule does not mean that the after light shall be double the bow light; all it requires is that it shall be at least double the height of the other. To fix it at exactly double the height is in practice impossible; and were that the meaning of the rule nice ques-

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

tions would arise in every case as to how much latitude was to be allowed:

The Vera Cruz, 51 L. T. Rep. N. S. 24; 5 Asp. Mar. Law Cas. 254; 9 P. Div. 88.

Moreover, the judge has assumed that the heights are to be measured from the deck. I contend that they are to be taken from the water. If this be so, there was no evidence to justify the court in holding that the provisions as to heights had not been complied with. The rule itself does not say from where the height is to be measured; and it is to be noticed that in the article of the Sea Regulations which this rule replaces, the words "from the hull" are to be found. Their absence in these rules suggests that the hull or deck is not to be taken as the datum line. Lights are meant to be an indication to those on another vessel at night. In such circumstances they do not know the distance of the deck from the water, as they cannot see the hull, and the fact that one light is double the height of another from a deck tells them nothing. On any construction of the rule the difference in this case is not sufficient to amount to an infringement.

J. P. Aspinall, for the plaintiff, *contrâ*.—The height must be taken from the deck. In all regulations dealing with lights their height is taken from the deck. If so, the excess of five feet clearly amounts to a breach of the rule. It is also contended that the rule was broken in two other respects. The light is to be exhibited near the stern. This light was immediately forward of the mizzenmast, and therefore not near the stern. The rule also requires it to be exhibited where it can best be seen. As a matter of fact it was hung above a funnel, which was emitting smoke, and therefore calculated to obscure its visibility. If so, it was not exhibited where it could best be seen.

Sir *Walter Phillimore* in reply.

Sir JAMES HANNEN.—Counsel for the respondents has raised a point before us which does not seem to have been brought to the attention of the County Court judge; at least I can find nothing to show that it was raised in the court below. The rule says that the light, whatever its height may be, is to be exhibited "where it can best be seen," but the mere fact that the light was near the funnel does not show that the light was obscured, and I do not think the fact has been established so as to justify Mr. Aspinall in raising this new point. It has therefore not been shown that the rule was broken in that respect. As regards the more important point, as to the construction of rule 2 of the Humber Navigation Rules, it is remarkable that the words differ from the Regulations for Preventing Collisions at Sea in such a way as to leave in uncertainty the datum line as to height. In art. 8 of the Regulations for Preventing Collisions at Sea the words "above the hull" fix the height of the light. I think a great deal might be said in favour of the water being the datum line, because that would enable the second light to be carried with approximate certainty at double the height of the other. But I do not think it necessary to express an opinion as to what ought to be the datum line, for reasons which I am about to state. The words of the rule may mean, as has been suggested, that the after light shall be at least double the height of the other; but to say that a few inches one way or the other would be an infringement is to my mind utterly unreasonable. Now, in this case, has there been a substantial compliance with the rule? The Elder Brethren tell us that in their opinion this difference of height would make no difference for practical purposes of navigation. As I said before, it could not even be suggested that the rule would be violated in consequence of a difference of a few inches. And although I recognise that there might be such an excess of height as to be a non-compliance with the rule, yet I think that is not the case here, and I am of opinion that the difference of height was not such as to amount to a breach of the rule. The appeal must therefore be allowed.

BUTT, J. concurred.

Appeal allowed.

Solicitors for appellants, *Bell, Brodrick*, and *Gray*, agents for *J. T.* and *H. Woodhouse*, Hull.

Solicitors for respondents, *Pritchard* and *Sons*, agents for *A. M. Jackson*, Hull.

Tuesday, May 15, 1890.

(Before Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

THE STAKESBY. (*a*)

Collision—Stern light—Overtaking ship—Regulations for Preventing Collisions at Sea, arts. 2 *and* 11.

In crowded waters, where a vessel is being frequently overtaken by others, she does not contravene the Regulations for Preventing Collisions at Sea by carrying a fixed stern light.

THIS was a collision action *in rem*, instituted by the owners of the barque *Dilbhur* against the owners of the steamship *Stakesby*.

The defendants counter-claimed.

The collision occurred in the North Sea, on the 2nd March 1890.

The facts as alleged by the plaintiffs were as follows: The *Dilbhur*, a barque, of 1280 tons register, was at about 9.45 p.m., on the 2nd March about eleven miles N. by E. of Whitby, in the course of a voyage from Middlesbrough to Monte Video, and was making about four to five knots an hour on a S.E. by S. course, in tow of the tug *Cruiser*. In addition to her regulation side light, she carried a fixed bright light over her stern. In these circumstances those on board the *Dilbhur* saw the masthead and green lights of the steamship *Stakesby* about two miles off on the port quarter. The *Stakesby* was overhauling the *Dilbhur*, and as she came nearer her red light came into sight. The *Dilbhur* was kept on her course, and the *Stakesby* was hailed, but instead of keeping out of the way she came on, and with her starboard bow struck the *Dilbhur* in the port fore-rigging, doing her considerable damage.

The facts alleged by the defendants were as follows: Shortly before 9.45 p.m., on the 2nd March 1890, the *Stakesby*, a steamship, of 919 tons register, bound on a voyage from South Shields to Malta, was in the North Sea, N. by E. of Whitby Light. She was steering S.S.E., making about seven and a half knots an hour. In these circumstances those on board her observed

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

smoke ahead, which proved to come from the tug towing the *Dilbhur*. The engines of the *Stakesby* were at once stopped and her helm hard-a-starboarded. Immediately afterwards the loom of the *Dilbhur* was made out about two to three points on the starboard bow, and, although the engines of the *Stakesby* were at once reversed full speed, she struck the *Dilbhur*.

It appeared that at the time of and for some time before the collision, a considerable number of vessels were in the vicinity passing and overtaking the *Dilbhur*.

The Regulations for Preventing Collisions at Sea material to the decision are as follows:

Art. 2. The lights mentioned in the following articles numbered 3, 4, 5, 6, 7, 8, 9, 10, and 11, and no other, shall be carried in all weathers from sunset to sunrise.

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.

Barnes, Q.C. (with him Dr. *Raikes*) for the plaintiff.—The *Dilbhur* was carrying a fixed stern light, and by so doing did not infringe the Regulations for Preventing Collisions at Sea. She was navigating in crowded waters, and was being continuously overtaken by other vessels. It was therefore necessary for her to continuously show a stern light. The regulations do not in terms prohibit a fixed light:

The Imbro, 60 L. Rep. N. S. 926; 6 Asp. Mar. Law Cas. 392; 14 P. Div. 73;
The Palinurus, 58 L. T. Rep. N. S. 533; 6 Asp. Mar. Law Cas. 271; 13 P. Div. 14.

Sir *Walter Phillimore* (with him *J. P. Aspinall*) for the defendants.—It is contended that in fact the *Dilbhur* exhibited no stern light. But even if she did, it is submitted that to carry a fixed stern light is contrary to the regulations. In *The Imbro* (*ubi sup.*), Butt, J. said that the article contemplated only the holding up or flashing of a light. In practice a flash light is shown. Moreover where it has been deemed necessary to carry a fixed stern light, the regulation has always said so in express terms. To allow a vessel to carry a fixed stern light might in many case be misleading.

Sir JAMES HANNEN having found that the stern light was exhibited and burning brightly as alleged by the plaintiffs, and that the collision was due to a bad look-out on the *Stakesby*, proceeded as follows:—There has been raised this question, whether or not there has been an infringement of the article as to the exhibition of a stern light. I observe that Butt, J. in his judgment in *The Imbro* (*ubi sup.*) refers to my decision in *The Palinurus* (*ubi sup.*); but from my recollection of that case I do not think that the point in this case was present to my mind. I do not think that I have given any decision on the point. Two things occur to my mind. It cannot be that the mere fixing is an infringement of the rule, because that would lead to this conclusion, that the rule could only be complied with by a waving movement. There is nothing in the article pointing to anything of that sort. The question one has to consider is, whether or not in the state of navigation in this place where the collision occurred, it was a proper thing that there should be a permanent light exhibited to overtaking vessels. It appears that there were a great many vessels about, and I am advised by the Trinity Masters that it was a proper thing that there should be a permanent light to be a guide to the vessels which were going by, remembering also that several vessels had previously passed which would also need the assistance of a stern light. Their opinion is in accordance with my own views. I am therefore of opinion that there has not been an infringement of the regulations in carrying this fixed light during the time the barque was navigating this place where numbers of vessels were in fact overtaking her, and others might be likely to overtake her.

I should myself be inclined to construe the article thus—that the flashing-light which is a thing done on the sudden is sufficient; but I should not myself be inclined to draw the inference that, because the light was fixed, there was therefore an infringement of the regulations. The circumstances here justified the plaintiffs in doing something more than flashing a light, on account of the number of vessels which had been overtaking and which were likely to overtake her. Further than that, I am of opinion, that there was such a bad look-out on the steamer that it was not the difference between a flashing and a fixed light which prevented their seeing it. If there had been a good look-out I have no doubt that they would have seen the stern light and would have seen the tug's light at an earlier period than in fact it was seen. I come to the conclusion that there was a great want of vigilance on the part of the steamer, and that that being so it sufficiently accounts for what happened. I pronounce the steamer alone to blame.

Solicitors for the plaintiffs, *Farlow* and *Jackson*.
Solicitors for the defendants, *Thomas Cooper* and *Co.*

Thursday, June 12, 1890.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE GENERAL GORDON. (*a*)

Collision—Fishing smacks—Regulations for Preventing Collisions at Sea, arts. 14, 22—*Both ships to blame—Costs.*

It is the duty of a sailing smack during the day to have more than one hand on deck, and where a collision occurs between her and another smack, the primary cause of which is the wrongful manœuvre of the other smack, she will also be held to blame if it appears that had she had two hands on deck they might have taken means to have obviated the other's wrongful manœuvre.

In a collision case where both ships are to blame, the plaintiff is entitled to his costs if in his statement of claim he admits that he is to blame.

THIS was a collision action by the owners of the sailing smack *Almoner* against the owners of the sailing smack *General Gordon*.

The collision occurred in the North Sea on the 7th Nov. 1889. The plaintiffs by their statement of claim admitted that the *Almoner* was to blame, but alleged that the *General Gordon* was also to blame.

The facts alleged by the plaintiffs were as follows: At about 2 p.m. on the 7th Nov. the *Almoner*, a dandy rigged smack of 78 tons register, was with the fishing fleet in the North Sea. There

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

was a moderate breeze from the W. N. W., and the weather was fine and clear. The *Almoner* had not long before gone about on to the starboard tack, and to enable her foresheet to be hauled to the windward she was allowed to fall off from the wind, which gave her a speed of from four to five knots an hour. At the time she was allowed to fall off, the smack *General Gordon* was on the starboard tack, a little abaft the port beam of the *Almoner*, distant about 100 to 130 yards. The *General Gordon's* helm was lashed amidships, and although she was loudly hailed by those on board the *Almoner*, no steps were taken to avoid a collision, and the *Almoner*, with her port side amidships, struck the stem of the *General Gordon*, thereby sustaining damage.

The facts alleged by the defendants were as follows: The *General Gordon*, a fishing smack of 80 tons, manned by a crew of five hands, was on the afternoon of the 7th Nov. in the North Sea. The wind was W. N. W. and the *General Gordon* was laid to on the starboard tack, with the foresheet to windward, heading about W. S. W., and making from two to three knot an hour. Her helm was lashed amidships, and there was one hand on deck. The *Almoner*, which had been previously seen on the port tack on the lee bow, crossed ahead of the *General Gordon*, and went about on the starboard tack, a little forward of the starboard beam of the *General Gordon*, distant from 80 to 100 yards. The *General Gordon* continued laid to; but the *Almoner* suddenly came off the wind, and, coming on at considerable speed with her port side amidships, struck the *General Gordon* on her stem, doing her damage.

Sir *Walter Phillimore* (with him *J. P. Aspinall*) for the plaintiffs.—The *General Gordon* is to blame for neglecting to take steps to avoid a collision when the *Almoner* came off the wind. Had there been two hands on deck, they might have let go the foresail sheet and put the helm down. It is negligence for a smack to have only one hand on deck.

Barnes, Q.C. (with him *H. Stokes*), for the defendants, *contrâ*.—In daylight when the weather is clear there is no necessity to have more than one hand on deck. It was the duty of the *Almoner* to keep out of the way of the *General Gordon*, and therefore her duty to keep her course. For that purpose one hand was sufficient. Had there been two hands on deck, there was not time to do anything to avoid the collision.

BUTT, J.—The *Almoner* is no doubt the chief offender in this collision. There was negligent navigation on her part, which was the primary cause of it; and in that state of circumstances I should be disposed to take as favourable a view as I could of the case of the *General Gordon*. But there are certain facts to which I must give effect. In the state of things which existed there ought to have been two hands on deck; and, according to the rules of an association of which these owners were members, smacks when under way are required to have two hands on deck. That requirement was not complied with. A further question has been raised as to the speed of this smack, and although I am not going to hold that she was sailing as fast as the plaintiffs' witnesses would have us believe, I think that she was going faster than her own witnesses have admitted. I think I must tie her at least to the two or three knots stated in her preliminary act. That is not mere pleading; it is an answer to a direct question of importance. On the whole the inference that I draw from the evidence is, that she was sailing faster than two or three knots an hour. But the Elder Brethren advise me that, whether that be so or not, knowing what they do of the capabilities of these smacks, that had there been two men on deck, one aft and one forward, who observed what was happening, they have no doubt that the foresail sheet, even if it was lashed to windward, might have been let go and the tiller unlashed and put down in time to bring the *General Gordon* far enough round to have avoided the collision. That being so, the want of a proper number of hands on deck really contributed to the collision; and though, as I have said, the plaintiffs are to blame, I must hold that there was negligence on the part of the *General Gordon* which directly contributed to the collision. I must therefore pronounce her to blame as well as the *Almoner*. As the plaintiffs have by their statement of claim admitted that they were to blame, and have only asked for a decree of both to blame, they are entitled to costs.

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

Solicitors for the defendants, *Stokes, Saunders*, and *Stokes*.

Tuesday, June 10, 1890.

(Before BUTT, J.)

THE ISLE OF CYPRUS. (*a*)

Interrogatories—Collision—Preliminary act—Evidence.

In a collision action, where the plaintiffs' vessel was lost with all her crew who could give evidence as to the collision, the Court allowed the plaintiffs' before filing their statement of claim, to administer interrogatories to the defendants as to the circumstances of the collision, including information given in the preliminary act.

THIS was a motion by the plaintiffs in a collision action for an order directing the defendants to file further and better answers to the plaintiffs' interrogatories.

The collision occurred between the plaintiffs' steamship the *Cleddy*, and the defendants' steamship the *Isle of Cyprus*, in the English Channel, on the 29th Dec. 1889.

The *Cleddy* sank, and all her crew who were on deck and could give evidence as to the collision were drowned.

In these circumstances the plaintiffs, prior to delivering their statement of claim, administered the following interrogatories:

1. Is it not the fact that a collision occurred between the steamship *Cleddy* and the steamship *Isle of Cyprus*, about 0.30 a.m., or at some other and what time on the 20th Dec. 1889, in the English Channel, off the Isle of Wight?

2. Did not the said steamship *Isle of Cyprus* at the time of the said collision belong to you, or some of you, who were the managing owners of the said steamship?

3. Upon what course or courses was the *Isle of Cyprus* in the half hour preceding the said collision? If there were any changes of course during that period, what were such changes, and at what time or times did such

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

changes respectively take place? If more than one change, what were such changes respectively, and how long before the collision did such changes respectively take place?

4. Was not one, and which, of the mates of the *Isle of Cyprus* in charge of the watch at the time of, and for some and what time before the collision? What number of hands had he on deck in his said watch, and where were they stationed respectively?

5. Was not the master of the *Isle of Cyprus* below until shortly before the said collision? How long before the said collision did he come on deck? What called his attention and brought him on deck? How long after he got on deck did the said collision occur? How far from the *Isle of Cyprus* was the *Cleddy* when he got on deck, and how did the *Cleddy* then bear from the *Isle of Cyprus*? How was the helm of the *Isle of Cyprus*, and how was the telegraph pointer standing; at what speed were her engines working when he got on deck? What orders did he give to the helm and engines after he so got on deck?

6. Was the helm of the *Isle of Cyprus* altered in any way and what way, and by whose and what orders, after the *Cleddy's* lights were sighted, and before the said master came on deck? If so altered once or more than once, how was the *Isle of Cyprus* heading by compass immediately before such alteration, or each of such alterations respectively, and to what extent did the heading of the *Isle of Cyprus* alter under each of such alterations of her helm? State how the *Cleddy* bore from the *Isle of Cyprus* just before each of such alterations—what light or lights of the *Cleddy* were seen from the *Isle of Cyprus* whilst the latter was on the said courses and each of them? When and at what distance did such lights and each of them come into view?

7. How was the *Isle of Cyprus* heading by compass at the time of the said collision? About how far from the stern was the *Cleddy* struck?

8. How were the engines of the *Isle of Cyprus* working at the time of the said collision, ahead or astern, and if astern, how many revolutions had they made astern before the collision from the last order astern?

9. What was the bearing and distance of St. Catherine's Light at the time of the collision?

10. After the said collision did the *Isle of Cyprus* make any water, and if so, how much, and where? How long did the *Isle of Cyprus* remain near the place of collision? Were any boats of the *Isle of Cyprus* put into the water to go to the assistance of the *Cleddy*, and if not, why not? How soon after the said collision was the *Cleddy* or the lights of the *Cleddy* lost sight of by those on board the *Isle of Cyprus*.

The defendants answered the first four interrogatories, but they refused to answer the remaining interrogatories upon the grounds "that the matters inquired into are not sufficiently material at the present stage of the proceedings; that the said interrogatories are exhibited unreasonably and vexatiously; and that they are oppressive and unnecessary, and are an attempt to obtain that part of the defendants' case which the defendants only know from information or documents which are privileged."

Barnes, Q.C., for the plaintiffs, in support of the motion.—This class of interrogatories has been allowed in this court before; and in the present case the circumstances are so special as to warrant the court in allowing them:

The Biola, 34 L. T. Rep. N. S. 185; 3 Asp. Mar. Law Cas. 125;
The Radnorshire, 43 L. T. Rep. N. S. 319; 5 P. Div. 172; 4 Asp. Mar. Law Cas. 338.

Raikes, contrà.—This is an attempt to obtain information of facts set out in the preliminary act. The plaintiffs are seeking to know our case before they file their statement of claim.

BUTT, J.—These interrogatories must be answered. It is not usually the practice in this court to give in the answers the facts stated in the preliminary acts; but, as the plaintiffs desire to have the facts on oath, the interrogatories must be answered. There are special circumstances in this case which justify me in granting the motion.

Solicitors for the plaintiffs, *Thomas Cooper* and *Co.*

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

Wednesday, June 18, 1890.

(Before BUTT, J.)

THE ACCOMAC. (*a*)

Carriage of goods—Charter-party—Excepted perils—Negligence.

A provision in a charter-party exempting the owners from liability for loss of or damage to cargo caused by the "act, neglect, or default of the master or crew in the navigation of the said vessel in the ordinary course of the voyage," does not relieve them from liability for damage to cargo caused by the joint negligence of one of their crew and shore engineers employed by them to repair the ship's machinery.

By a charter-party the shipowners were exempted from liability for loss of or damage to cargo caused by the "act, neglect, or default of the master or crew in the navigation of the said vessel in the ordinary course of the said voyage." Whilst the cargo was being discharged in port parts of the main engine and donkey pump were taken ashore by shore engineers for repairs. To do this a cock connecting the forward bilge-pump with the pipes of the ballast tank had to be removed, and the ship's engineer thereupon gave orders to the shore engineers to plug the pipe where the cock had been removed. Subsequently the ship's engineer, believing this had been done, whereas in fact it had not been, opened the sea-valve to run up the ballast tanks in order to keep the ship steady. After the ballast tanks had been filled the water found its way into the disconnected pipe, and thence into the holds, causing damage to the cargo.

Held, that the shipowners were liable, as the damage was caused by the joint negligence on the part of the shore engineers and of the ship's engineer, and that the exception in the charter-party did not apply to joint negligence.

Semble, that the negligence of the ship's engineer was not in the navigation of the ship in the ordinary course of the voyage within the meaning of the said charter-party.

THIS was an action *in personam* by the owners of a cargo of rice against the owners of the steamship *Accomac*, to recover compensation for damage to the cargo.

The plaintiffs shipped the rice at Rangoon for carriage to London, and 3316 bags were delivered to them in a damaged condition.

By the terms of the charter-party and bill of lading it was provided (*inter alia*) that the shipowners should not be liable for "any act, neglect, or default whatsoever of pilots, masters, or crew in the navigation of the ship in the ordinary course of the voyage."

The *Accomac* arrived at Victoria Docks, in

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

London, on the 31st July 1889, and commenced discharging on the 2nd Aug. Subsequently to her arrival, and before all the cargo was discharged, it was found that her engines required certain repairs, and accordingly certain parts of the main engine and donkey pumps had to be taken ashore for repairs. The repairs were executed by a firm of engineers by name Rait and Gardiner, who in order to remove the machinery requiring the repairs had to take off a cock connecting the forward bilge-pump with the pipes of the ballast tanks. The result of the removal of this cock was to leave open the pipe from which it was taken.

It appeared that on the removal of the cock in question the ship's engineer had given orders to Rait and Gardiner's men to plug it. They, however, failed to do so, subsequently excusing themselves on the ground that they had not had time by 6 p.m., when they stopped work, and that the ship's engineer had not ordered them to work overtime in order to do the job.

The same evening the ship's engineer, thinking the pipe had been plugged, but without taking any steps to inform himself what the fact was, opened the sea-valve for the purpose of running up the ballast tanks to keep the ship steady. The sea-valve was left open all night, the result being that after the tanks were filled the water found its way into the pipe from which the cock had been removed, thence into the engine-room, and thence through the sluice valves into the hold, and so caused the damage complained of.

Finlay, Q.C. (with him *Hollams*) for the plaintiffs.—The defendants are not entitled to the protection of the excepted perils. The negligence was solely that of the shore engineers, and not of the ship's engineer. Moreover the negligence was not "in the navigation of the ship in the ordinary course of the voyage."

Joseph Walton (with him *Barnes*, Q.C.), for the defendants, *contrà*.—The negligence which caused the damage was that of the ship's engineer. But for his opening the sea-valve and leaving it open after the ballast tanks were filled, the damage would not have occurred. He ought before he opened the sea-valve to have ascertained whether the pipe in question had been plugged. The voyage was not at an end, and the engineer's act was an act in the ordinary course of the voyage:

Laurie v. *Douglas*, 15 M. & W. 746.

Finlay, Q.C., for the plaintiffs, was not called upon to reply.

BUTT, J.—This is a case in which the plaintiffs claim from the defendants damage caused by injury to rice carried from Rangoon in the defendants' steamship *Accomac*. She arrived in London on the 31st July of last year, and she appears to have brought her cargo, including the rice in question, home in good condition. The rice was delivered to the plaintiffs in a bad and damaged condition. The ship went into the Victoria Dock to discharge, and whilst there one of the bilge-pumps which had been found to be defective during the voyage home was removed by a firm of engineers called Rait and Gardiner for repairs. In order to get the bilge-pump out it was necessary to take off a certain cock which closed one of the pipes. This was connected with the tanks, and in such a way that although it was above the level of the tanks, nevertheless, if the sea-cock was left open after the tanks were filled, the water seeking to rise to the level of the water outside the ship would in doing so find its way into the pipe in question. The cock was taken off and not replaced, neither was the pipe stopped by a plug or by the bolting on of a blank flange. There was a change of the ship's engineer on the 6th Aug., and it appears that the outgoing chief engineer pointed out to his successor, one Douglas, who has given evidence, that the cock was off, and that if the sea-cock was opened and kept open after the tanks were filled, there would be a flow of water into the engine-room. It also appears that Douglas himself told Messrs. Rait and Gardiner's leading hand to put a blank flange on to the end of the pipe, intending that it should be done at once, and thinking it would be done before the men struck work that evening. As a matter of fact it was not done. Douglas, assuming it was done but without taking the trouble to ascertain the fact, opened the sea-cock for the purpose of filling the ballast tanks in order to stiffen the ship, out of which cargo had been taken. The sea-cock was left open all night. The water came in, filled the tanks, and during the night overflowed into the engine-room, and so into the holds of the ship, the sluices being up, and so damage was caused.

Now, unless the defendants can bring themselves within the exceptions in the charter-party or bill of lading, it is perfectly clear that they are liable for that damage. The question is therefore, do they bring themselves within the exceptions? Even assuming that the act, neglect, or default which caused this damage was that of Douglas alone, I doubt if the damage would be within the exceptions. I doubt whether it could be properly said to be caused in the navigation of the ship in the ordinary course of the voyage. The removal of the bilge-pump in question was not done for any purpose of the voyage or by the crew of the ship, but was done for the purpose of preparing the ship for a future voyage, and was done by engineers employed from the shore. But I do not decide the case upon that ground, because, having heard the evidence, I find as a fact that the damage was occasioned by the joint negligence of Rait and Gardiner, and Douglas, the chief engineer; and that being a joint default and not exclusively the fault of any member of the crew, the defendants are liable. I give judgment accordingly, and refer the amount to the registrar and merchants.

Solicitors for the plaintiffs, *Hollams, Son, Coward*, and *Hawksley*.

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

Saturday, June 28, 1890.

(Before BUTT, J.)

THE THAMES. (*a*)

Mortgage—Ship—Act of bankruptcy—Fraudulent preference—Bankruptcy Act 1883 (46 & 47 *Vict.* c. 52), *ss.* 4, 43, 48, 49.

A mortgagor who conveys all his property with the

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

main object of securing further advances, does not thereby commit an act of bankruptcy, even though the mortgage also secures a past debt due from the mortgagor to the mortgagee.

Where under a mortgage of a ship to secure further advances, an advance is made on the date of a receiving order against the mortgagor, who is subsequently adjudicated bankrupt in respect of acts of bankruptcy committed prior to the execution of the mortgage, the mortgagee is entitled, under sect. 49 of the Bankruptcy Act, 1883 as against the trustee in bankruptcy, to recover such advance, where before the date of the receiving order there was an existing contract between mortgagor and mortgagee to make future advances and a positive promise by the mortgagee to make this specific advance.

A. mortgaged his shares in a ship to B., to secure further advances, and also a small past debt due from A. to B. Prior to the mortgage, A. had committed acts of bankruptcy in respect of which he was subsequently to the date of the mortgage adjudicated bankrupt. B. had no notice or knowledge of the acts of bankruptcy, and made advances to enable A. to carry on his business. On the date of the receiving order, B. made A. an advance of 250l. in consequence of a prior agreement between them to make future advances, and a positive promise to advance this specific sum. In an action by B. to establish the validity of his mortgage and recover against the respondent the amount of his loans:

Held, that the mortgage was valid, and that B. was entitled, as against the trustee in bankruptcy, to recover not only all advances prior to the date of the receiving order, but also the advance of 250l. made on the date of the receiving order, as it was made in consequence of the contract and promise made before the date of the receiving order.

THIS was a mortgage action by Barter and Co. Limited against the proceeds of forty-two sixty-fourth shares in the steamship *Thames*, asking the court to pronounce for the validity of the mortgage and payment to the plaintiffs of the amount due. The trustee in bankruptcy of the mortgagor intervened and put in a defence,

By the mortgage, which was dated 30th May 1889, one John Young, the owner of forty-two sixty-fourth shares in the *Thames*, mortgaged them to the plaintiffs to secure the repayment by the mortgagor to the plaintiffs of a balance of 55*l.* 11*s.* 2*d.*, together with interest thereon at the rate of 10 per cent., and any subsequent advances and interest which might be made by the plaintiffs to the mortgagor. The mortgage was in the form prescribed by the Merchant Shipping Act 1854, and was registered on the 5th June 1889.

On the 28th May 1889 a petition in bankruptcy was presented against the mortgagor. On the 13th June a receiving order was made, and on July 17th he was adjudicated bankrupt.

According to the evidence of the plaintiffs and the mortgagor it appeared that the plaintiffs had no knowledge of any act of bankruptcy by the mortgagor prior to the execution of the mortgage. It also appeared that, at the time of the making of the mortgage, there was a contract between the mortgagor and mortgagee that the latter should make advances to the mortgagor when he was in need of money, but the amount of such advances was not fixed. Advances were made by the mortgagee to the mortgagor subsequently to the execution of the mortgage, and amongst others was a sum of 250*l.* which was advanced on the 13th June. The receiving order was made on the same day, but at a later hour. As to this 250*l.*, the plaintiffs stated that there was a promise by them on June 12 to advance this sum.

It appeared that at about the date of the execution of the mortgage, the mortgagor had mortgaged his interest in two other steamships, the *Mona* and the *Saga*, to the plaintiffs. In these circumstances the trustee in bankruptcy alleged that the mortgages were a conveyance of the whole of the bankrupt's property. The plaintiffs denied this, and alleged at the time in question moneys amounting to a large amount were due from third parties to the bankrupt.

The *Thames* had been sold by the court in a collision action, and it was against the balance of the proceeds of such sale that the plaintiffs claimed.

The Bankruptcy Act 1883 was referred to, and the following sections are material to the decision:

Sect. 4 (1). A debtor commits an act of bankruptcy in each of the following cases: (*b*) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof.

Sect. 43. The bankruptcy of a debtor, whether the same takes place on the debtor's own petition, or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within the three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication, shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor.

Sect. 48. Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months of the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

Sect. 49. Subject to the foregoing provisions of this Act, with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate in the case of a bankruptcy: (*a*) Any payment by the bankrupt to any of his creditors; (*b*) any payment or delivery to the bankrupt; (*c*) any conveyance or assignment by the bankrupt for valuable consideration; (*d*) any contract, dealing, or transaction by or with the bankrupt for valuable consideration, provided that both the following conditions are complied with, namely: (1) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; and (2) the person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed or entered into has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

Cohen, Q.C. (with him *L. Pyke*) for the plaintiffs.—The mortgage transaction in respect of the

three ships was not a transfer of all the bankrupt's property, but, even if it was, the transaction would be valid:

Ex parte Johnson; Re Chapman, 50 L. T. Rep. N. S. 214; 26 Ch. Div. 338;
Ex parte Fisher; Re Ash, 26 L. T. Rep. N. S. 931; 7 Ch. App. 636.

The mortgage was not a fraudulent preference. The advances were made in order to enable the debtor to carry on his business:

Ex parte Taylor, 18 Q. B. Div. 295;
Ex parte Griffiths, 48 L. T. Rep. N. S. 450; 23 Ch. Div. 69;
Ex parte Hill, 49 L. T. Rep. N. S. 278; 23 Ch. Div. 695;
Williams Bankruptcy Practice, 1886 edit., p. 205.

It is established as a fact that the mortgagee had no notice of any prior act of bankruptcy. If so the mortgage is protected by sect. 49, notwithstanding that these were acts of bankruptcy prior to the mortgage. As to the 250*l.*, although it was only advanced on the date of the receiving order, there was a binding agreement that it should be advanced before that date, and therefore the plaintiffs are entitled to recover it under the mortgage.

Jelf, Q.C. and *Boyd* for the trustee in bankruptcy,—The mortgage was a conveyance of all the bankrupt's property in order to secure a past debt, and was therefore a fraudulent conveyance within the meaning of sect. 4, sub-sect. (*b*) of the Bankruptcy Act 1883. If so, the mortgage is void, and cannot avail as against the trustee in bankruptcy:

Bevan v. *Nunn*, 9 Bing. 107;
Ex parte Johnson; Re Chapman (*ubi sup.*);
Smith v. *Cannan*, 22 L. J. 290. Q. B.;
Re Wood, 26 L. T. Rep. N. S. 113; 7 Ch. App. 302;
Ex parte Snowball, 26 L. T. Rep. N. S. 894; 7 Ch. App. 534;
Williams Bankruptcy Practice, edit. 1886, p. 7.

The mortgage was a fraudulent preference in favour of the mortgagee. If the mortgage was an act of bankruptcy, then sect. 49 does not protect the transaction against the operation of sect. 48, even assuming the conditions in sect. 49 are complied with. But, even assuming the mortgage not to be an act of bankruptcy, the transaction is not protected, because the mortgagee had, or ought to have had, notice of prior acts of bankruptcy:

Ex parte Snowball (*ubi sup.*);
Bird v. *Bass*, 6 M. & G. 143.

As to the advance of 250*l.*, which was made on the same day as the receiving order, it is submitted that it cannot be recovered, as, in order to be protected by sect. 49, it ought to have been made before the date of the receiving order, whereas it was made on the same date.

Cohen, Q.C. in reply.

BUTT, J.—This is a case in which the plaintiffs claim judgment pronouncing for the validity of a certain mortgage of shares in the steamship *Thames*, and for a reference, if necessary, to assess the amount due to them. Now, there is no doubt that the mortgage was duly made and executed on the 30th May 1889, but the defendants for several reasons attack the transaction and say the mortgage is invalid. They contend that this and the other two mortgages on the *Mona* and the *Saga* — the transactions really being one—constitute a conveyance of substantially the whole of the mortgagor's property to the plaintiffs, and if that is so they argue that the transaction was in itself an act of bankruptcy, and therefore void. They also argue that it is void as being a fraudulent preference and as being contrary to the provisions of the statute 13 Eliz. c. 5. Now, as I understand, it is a fact that charges by way of mortgage were given by Mr. Young, the debtor, on the three steamers, the *Thames*, the *Mona*, and the *Saga*, at about the same time, and for the same purpose, and to the same persons, viz., the plaintiffs in this action. I have to take into account the fact that these mortgages on these other two vessels existed, though the mortgage on the *Thames* is the only one which is actually before me. There has been a good deal of evidence both oral and documentary, and my conclusion is that these mortgages were executed in pursuance of an arrangement, the main object of which was to provide advances to enable Mr. Young to carry on his business as a shipowner, and that the main object was not to defeat or delay creditors, or to give one creditor a preference over others; in other words, that the main object was not to pay or secure past debts due to Messrs. Barter and Co., the plaintiffs, but to enable Mr. Young to carry on his business. And notwithstanding Mr. Young's difficulties, which were certainly serious at the time, yet, having regard to the real value of these three steamers, and to the fact that freights had begun to rise and that a better time had just commenced for shipowners, I have no hesitation in saying that I have come to the conclusion that the plaintiffs and the mortgagor, Mr. Young, expected that, if the advances contemplated by this arrangement were made, Mr. Young would be able to carry on his business at a profit and probably redeem his position, and that neither he nor the plaintiffs entered into this arrangement in contemplation of his bankruptcy. And I go further. I think they not only had that expectation, but I think it was a reasonable expectation. I think there was a reasonable prospect, had nothing intervened, of Mr. Young clearing the charges on these steamers and carrying on this business with a profit. The truth is, that the result of these bankruptcy proceedings was that these three steamers were practically sacrificed, all of them being sold by compulsory sale by the court at very inadequate prices. Added to this, when the proceeds were realised they were eaten up by a number of privileged claims which were made and allowed in amounts in excess of what they really ought to have been, and simply because they were allowed, so to speak, to go by default. Mr. Young was then a bankrupt. He had nothing to do with the matter. The trustee, whose business it was to defend these claims and see that no more than was due should be allowed, was unable to protect this estate because he had not the money to do it with. In other words, I believe that the bankruptcy had the effect of sacrificing what was an estate of considerable value, and hence the present state of circumstances.

Now, it is said that this mortgage transferred the whole, or practically the whole, of the debtor's property to the plaintiffs. I do not think it did. I think there was a substantial property beyond the mortgaged property; and I think the reason why the book-debts and other assets such as claims on insur-

ance companies have not been realised is due to the bankruptcy and the inability of the trustee through want of funds to press these claims. But even assuming that substantially all the debtor's property was assigned by these mortgages, I should still have been prepared to hold that they were valid, and that the transaction did not constitute an act of bankruptcy. It is quite clear to my mind that, although there was a small past debt due from the mortgagor to the plaintiffs which it was the object of the mortgage to secure, that was by no means the principal object. The mortgagor's principal object was to get advances to enable him to carry on his business, and it was with a *bonâ fide* intention of that sort that he entered into this transaction. Moreover Messrs. Barter and Co. are shipbrokers; they therefore not only got handsome interest on their loans, but more than that, they had the business of chartering the ships and taking the profits incidental thereto.

I will now consider the effect of the Bankruptcy Act. The defendants say that this transaction was an act of bankruptcy under sect. 4, sub-sect. (*b*). The words are: "A debtor commits an act of bankruptcy in each of the following cases: (*b*) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property or any part thereof." I think it is established beyond all doubt that where further advances are contemplated—even if the person assigns all his property — it is not fraudulent within the meaning of that section, and I shall so hold. Then it is said that under sect. 43 all the property of the bankrupt vested in the trustee at the time when the act on which Mr. Young was made a bankrupt was committed. That I think is true, and therefore *primâ facie* all property of the bankrupt, including these ships, would be vested in the trustee from some date prior to the mortgage, and, if that section stood alone, that to my mind would be conclusive against the plaintiffs' claim. But there is sect. 49, which is in these words: "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate in the case of a bankruptcy. (*a*) Any payment by the bankrupt to any of his creditors; (*b*) any payment or delivery to the bankrupt; (*c*) any conveyance or assignment by the bankrupt for valuable consideration; (*d*) any contract, dealing, or transaction by or with the bankrupt for valuable consideration, provided that both the following conditions are complied with, namely: (1) the payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; and (2) the person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time." Now, as to the first condition, every transaction except the advance of 250*l.* took place before the date of the receiving order. As to the second condition, I think it is perfectly clear that the plaintiffs had no notice of any act of bankruptcy committed before the 30th May, or indeed before the 13th June. But it is said by Mr. Jelf that, however that may be, the very execution of these mortgages was in itself an act of bankruptcy, and that therefore would prevent the second condition of sect. 49 operating in favour of the creditor. But I have already held that it was not an act of bankruptcy, and therefore Mr. Jelf's contention on that point falls to the ground. But, even if it had been, I should still have been prepared to hold that it would not deprive the creditor of the benefit of this proviso, because the act of bankruptcy must have been committed before the time of the conveyance or transaction. I therefore hold that the property did not pass to the trustee under sect. 43, as it otherwise would have done. But it is said, even so the conveyance is void as a fraudulent preference. Notwithstanding the view I have already taken, it might very well have been so as a matter of fact; that is to say, it might have been a conveyance executed with a view of giving to these particular creditors, Messrs. Barter and Co., a preference over others. But, in order to be a fraudulent preference under sect. 48, the sole object, or at all events the principal object, must have been to give Messrs. Barter that preference. I have already found that I do not think that was anything like the principal object. The principal object was to secure future advances to enable Mr. Young to carry on his business. I therefore hold there was no fraudulent preference under sect. 48. As to the statute of Elizabeth, I assume Mr. Jelf did not rely upon it, as he never argued the point. For these various reasons I hold that this is a valid mortgage, and I pronounce for it, referring the amount, if necessary, to the registrar and merchants.

But I am asked to accompany my judgment with a direction as to the 250*l.* That was a payment made on the 13th June, which was the date of the receiving order. The material words of sect. 49 in connection with the 250*l.* are these: "Provided . . . the payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order." There is to my mind some difficulty in saying what is the exact meaning of those words "before the date of the receiving order." But I am quite clear that there was a contract to make advances long before the date of the receiving order; and I also think that there was on the 12th June, the day before the date of the receiving order, a positive promise to advance this 250*l.* I therefore hold that the advance of 250*l.* is protected by sect. 49 in favour of the creditor, and I direct the registrar to allow it. I therefore pronounce for the validity of this mortgage with costs, and refer the assessment of the damages to the registrar.

Solicitors for the plaintiffs, *J. A.* and *H. E. Farnfield.*

Solicitors for the intervener, *Williams* and *Neville.*

Tuesday, June 24, 1890.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE MARK LANE. (*a*)

Salvage—Agreement—Unreasonableness—Costs.

A steamship in the Atlantic fell in with another which had lost her propellor and was leaking. It was agreed in writing between the masters that the owners of the ship in distress should pay the owners of the other 5000l. for being towed into Halifax, and if the towage had to be abandoned through stress of weather the salvors were to be paid for service rendered. The master of the vessel in distress had reasonable grounds for believing that, unless he consented to the above terms, the other ship would not assist him. The salvage was successfully accomplished without any special difficulty or danger. The distance towed was about 350 miles. The value of the salved property was about 23,000l. In a salvage action to recover the 5000l., or such sum as the court thought just, the Court held that in the circumstances the agreement was signed under compulsion, that 5000l. was exorbitant, and awarded 3000l. and costs.

THIS was a salvage action by the owners, master, and crew of the steamship *Crete* against the steamship *Mark Lane*, her cargo and freight, for services rendered in the Atlantic Ocean.

The facts alleged by the plaintiffs were as follows: At about 3.30 p.m. on the 13th April 1890 the *Crete*, a screw-steamship of 1725 tons gross, manned by a crew of twenty-two hands, and laden with a cargo of Indian corn, was in the Atlantic Ocean, in about latitude 39.55 N. and longitude 60.2 W., in the course of a voyage from Philadelphia to Denmark. The weather was fine and clear, and there was a slight wind from the S.E. and the sea was moderate. In these circumstances those on board the *Crete* sighted a steamship, which proved to be the *Mark Lane*. She had three black balls on her foremast, and on coming up with her it was learnt that she had lost her propellor blades and was leaking through the stern tube. The master of the *Mark Lane* boarded the *Crete*, and after some negotiations between him and the master of the *Crete* the following written agreement was entered into:

About lat. 40.0 N. long. 59.50 W., Sunday, 13th April 1890.—It is now agreed between Enoch James, master of the s.s. *Crete*, and John Pengelly, master of the s.s. *Mark Lane*, of London, that the master of the s.s. *Crete* will make the attempt to tow the s.s. *Mark Lane* to Halifax, Nova Scotia, for the sum of 5000*l.* British sterling. In case of failing in the attempt to reach Halifax, and obliged to abandon through stress of weather, the s.s. *Crete* to be paid for service rendered.—(Signed) ENOCH JAMES, master of s.s. *Crete*, JOHN PENGELLY, master of *Mark Lane*. JOSEPH HENDERSON, first mate s.s. *Crete*.

Tow ropes were then passed between the vessels and eventually made fast. This operation took from three to four hours. Towing then commenced and continued without interruption till between 1 and 2 a.m. on the 15th April, when a thick fog set in, and the engines of the *Crete* were reduced to half speed. The fog cleared at 11.30 a.m., when the wind began to blow strong and gradually increased to a strong gale from the westward with a high beam sea. The *Mark Lane* was rolling and steering badly, and on the 16th, in consequence of a heavy sheer, the mooring bitts of the *Crete* were broken and damaged and the hawsers strained. When the *Crete* got straight again towage was resumed, and shortly after the *Mark Lane* was safely brought up in Halifax harbour. The value of the salved property was about 23,000*l.* The value of the *Crete*, her cargo and freight, was 30,000*l.*

The defendants, while admitting that salvage services had been rendered, alleged that the plaintiffs had greatly exaggerated the particulars thereof, and denied that the *Mark Lane* was ever in any immediate danger. As to the agreement they alleged in paragraph 9 of the defence as follows:

The defendants say that the said agreement is not binding upon them on the grounds that it was unreasonable, and that the said sum of 5000*l.* was exorbitant, and that the master of the *Mark Lane* signed the same under duress and because he was led to believe by the master of the *Crete* that unless he signed it the *Crete* would not take the *Mark Lane* in tow.

The master of the *Crete* denied that he exercised any compulsion or said anything which justified the master of the *Mark Lane* in thinking that the *Crete* would leave him unless he signed the above agreement.

The plaintiffs claimed the agreed sum of 5000*l.*, or alternatively such sum as to the court should seem just.

Barnes, Q.C. and *J. P. Aspinall* for the plaintiffs.—The plaintiffs are entitled to the agreed sum of 5000*l.* The master of the *Crete* was under no duress, and was competent to make the agreement. The service was a valuable one, and 5000*l.* is a reasonable award:

The Cargo ex Woosung, 35 L. T. Rep. N. S. 8; 1 P. Div. 260; 3 Asp. Mar. Law Cas. 230;
The Medina, 35 L. T. Rep. N. S. 779; 2 P. Div. 5; 3 Asp. Mar. Law Cas. 305;
The Silesia, 43 L. T. Rep. N. S. 319; 5 P. Div. 177; 4 Asp. Mar. Law Cas. 338.

Sir *Walter Phillimore* and *Joseph Walton* for the defendants.—5000*l.* is an exorbitant sum to pay for these services. The master of the *Mark Lane* was practically forced to sign this agreement. Had he not done so, the master of the *Crete* led him to believe that he would give him no assistance. Not only would 5000*l.* be a large salvage award, but by the agreement the *Crete* was to get paid even if the salvage was not successful.

BUTT, J.—In this case the value of the salved property is in all somewhat under 30,000*l.*, and that of the salving property a little over 24,000*l.* The plaintiffs are not claiming for an amount to be awarded by the court, but are seeking to recover 5000*l.* as due to them on an agreement which is set out in the statement of claim. Now, I feel quite satisfied that for services such as these, rendered with no more risk, no more exertion, and no more loss of time, the Court of Admiralty has never given so large an award as 5000*l.* I think a claim for 5000*l.* for towing this ship in the state she was, and from the place in which she was found, to Halifax is an exorbitant claim. I think that would be so if it was simply a salvage agreement for 5000*l.*; but it is much more than that. The reason why salvage awards are so large is, that if there is a failure to complete the salvage, no matter at what risk and what labour the services may have been per-

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

formed whilst in operation, the salvor gets nothing unless he succeeds; whereas by this agreement, in the event of the *Mark Lane* being lost during the services, the salvors were to be paid all the same; in other words, if successful the plaintiffs are to receive 5000*l.*; if unsuccessful they are to be paid for services rendered.

Now, I have already said that I consider the claim to be exorbitant. In some of the cases referred to —nay, in most of them—the word "inequitable" has been used. I cannot help thinking that what is at the root of this question is, that where it is found that a wholly unreasonable price has been insisted on, and eventually agreed to, the court looks not only to the unreasonableness of the agreed amount, but also to the position of the parties. Now, in this case, were the two parties to the agreement contracting on equal terms? It is perfectly clear that they were not. It is very true that that amount of duress which is an answer to an agreement at common law did not exist in this case; but in this court, and I believe in the courts of equity, the same amount of compulsion or duress is not necessary to induce the court to refuse to give effect to an agreement as would be necessary in a common law action. The captain of the *Crete* appears in effect, though not in so many words, to have said, "Mind, if you do not sign this agreement to pay 5000*l.*, I will go away and leave you." His manner and demeanour was such that it led the captain of the *Mark Lane* to believe that that was what he meant to do, and he has not, from first to last, until leaving the witness-box to-day, said he would have taken less or stayed by the *Mark Lane*. The fact is, the captain of the *Mark Lane* signed this agreement under compulsion. That is really the right way of putting it. I think he did so, and the amount being exorbitant, the agreement cannot be upheld, and I decline to give any effect to it.

Now comes the question, what are the salvors entitled to if the agreement is not upheld? I have talked that over with the Elder Brethren, and we have come to the conclusion, considering that the weather was fine during the greater part of the services, though there was fog at one time; and that there was very little risk to the salvors —no more than the usual risk incurred when a steamer of some size takes a larger steamer in tow—and that the towage was 350 miles or thereabouts; that a fair and a somewhat liberal award will be the sum of 3000*l.* As I am asked to apportion the amount, I direct that 2500*l.* shall be paid to the owners of the *Crete*, 150*l.* to the master, and 350*l.* to the officers and crew, according to their rating.

Sir *Walter Phillimore* for the defendants.—The plaintiffs are not entitled to costs. On previous occasions the court, in similar cases, has ordered that there should be no costs on either side:

The Medina, 35 L. T. Rep. N. S. 779; 2 P. Div. 5; 3 Asp. Mar. Law Cas. 305;
The Silesia, 43 L. T. Rep. N. S. 319; 5 P. D. 177; 4 Asp. Mar. Law Cas. 338;
The Cargo ex Woosung, 35 L. T. Rep. N. S. 8; 1 P. Div. 260; 3 Asp. Mar. Law Cas. 230.

J. P. Aspinall for the plaintiffs.—The plaintiffs are entitled to costs. They have been successful, and have recovered a substantial sum.

BUTT, J.—There has been no tender in this case, and the plaintiffs have recovered a large sum of money. The court is desirous of acting, so far as possible, in conformity with the practice in the other divisions of the High Court. The plaintiffs must have their costs.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Pritchard* and *Sons*.

Friday, July 11, 1890.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE SCOTIA. (*a*)

Collision—Steamship and barge—Both to blame—Consequential loss.

Whilst a barge was by night lying astern of a steamship in a dock the latter moved her propeller and cut a hole in the barge. It appeared that there was no one on board the barge at the time of the accident. In a collision action:

Held, that, although the steamer was to blame, the barge was also to blame for not having anyone on board of her, as, had there been, the collision might have been avoided, and in any event the barge might have been beached before she sank, and therefore the plaintiffs could only recover half their damages.

THIS was a collision action by the owners of the barge *Blue Bell* against the owners of the screw-steamship *Scotia*. The collision occurred in Tilbury Dock in the early morning of the 13th March 1890.

The *Blue Bell*, which was a dumb barge of seventy tons burthen, laden with a cargo of rice, was lying in the dock moored astern of the steamship *Scotia*. On the morning of the 13th March, whilst it was still dark, the *Scotia* cast off and proceeded to leave the dock, with the assistance of two tugs. For this purpose the plaintiffs alleged that the propellor was moved, and that whilst in motion it struck the port-quarter of the barge, cutting a hole in her, and thereby causing her to sink.

At the time in question there was no one on the barge, and the plaintiffs were not able to call a witness who saw the injury done. Their evidence went to show that only three steamers were under way in the dock that night, and that from the circumstances of the case the *Scotia* was the only one that could have done the damage.

The defendants by their defence denied that the *Scotia* had been in collision with the barge.

Sir *Chas. Hall*, Q.C. (with him *J. P. Aspinall*) for the plaintiffs.

Sir *Walter Phillimore* (with him Dr. *Raikes*) for the defendants.

BUTT, J.—This is a case in which the owners of the barge *Blue Bell* claim damages against the steamship *Scotia* for injury which caused the barge to sink in the dock at Tilbury. There was no one on board the barge at the time she sustained the injury. But there seems reason to believe that there was no one on board the barge or attending to it for a considerable time after she had received the injury. The nature of the injury she received scarcely seems to be contested. The question as to the way in which she sustained that injury is another matter. [The learned

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

Judge then dealt with the evidence, and found as a fact that the injury to the barge had been caused by the propeller of the *Scotia* whilst in motion.] I must therefore condemn the steamer.

Now comes the question, was the barge free from blame? It appears that a bargeman should in the ordinary course of things have been on board the *Blue Bell*. He was taken away by a man in the employment of his own owners to attend to some other barges at the entrance to the dock. I have asked the Elder Brethren whether they consider it negligence, whether it is proper to leave a barge for the night totally unattended in the dock. They tell me that unfortunately it is not at all an uncommon practice, but they do not think it justifiable. On the answer they have given me I hold that it was negligence to leave the barge unattended as it was. What do we know? We know that while the man is away the barge drifts down upon and rests upon the rudder of the steamer, a position she was never intended to lie in, having regard to the way in which they had moored her. If that man had been on board her at the time, it is very probable that the injury would not have occurred. Either by shouting to warn the steamer or by pushing his own barge out of the way, it is not improbable that the damage might have been avoided. But even if it could not, there would have been somebody on board the barge to take notice of the hole cut in her and to beach her, so as to prevent her sinking in the dock as she did. We think therefore it was negligence for the barge to be unattended, and that it was negligence which contributed to the collision, or at all events materially affected the amount of the injury done. We therefore think the barge is also in fault, the result being that her owners recover half their damage.

Solicitors for the plaintiffs, *Keene, Marsland,* and *Bryden.*

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

Tuesday, Aug. 5, 1890.

(Before BUTT, J.)

THE HERALD. (*a*)

Collision—High Court—County Court—Costs—County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *ss.* 3 *and* 9.

Where successful plaintiffs in a collision action in the High Court recovered less than 300*l. they were allowed no costs, although they claimed more than the County Court limit.*

THIS was a motion by the plaintiffs in a collision action *in rem*, asking the court to confirm the registrar's report and to order the defendants to pay to the plaintiffs the costs of the action and reference.

The collision occurred on the 20th July 1889 at Clacton-on-Sea between the plaintiffs' steamship the *Glenrosa* and the defendants' steamship the *Herald*. The *Glenrosa* was discharging passengers at the pier when she was run into and damaged by the *Herald*.

The plaintiffs originally instituted an action in the City of London Court, but then abandoned it and instituted the present action in the High Court in the sum of 400*l.*

The defendants admitted liability subject to a reference.

At the reference the plaintiffs claimed 328*l.* 0*s.* 5*d.*, of which the registrar allowed 246*l.* 2*s.* 6*d.*

The reduction was chiefly made by the registrar disallowing 75*l.* off 200*l.* claimed for permanent repairs.

County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71):

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 three hundred pounds.

Sect. 9. If any person shall take in the High Court of Admiralty of England, or in any Superior Court, proceedings which he might without agreement have taken in a County Court, except by order of the judge of the High Court of Admiralty or of such Superior Court or of a County Court having Admiralty jurisdiction, and shall not recover a sum exceeding the amount to which the jurisdiction of the County Court in that Admiralty cause is limited by this Act, and also if any person without agreement shall, except by order as aforesaid, take proceedings as to salvage in the High Court of Admiralty or in any Superior Court, in respect of property saved, the value of which when saved does not exceed one thousand pounds, he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the judge of the High Court of Admiralty or of a Superior Court before whom the cause is tried or heard shall certify that it was a proper Admiralty cause to be tried in the High Court of Admiralty of England or in a Superior Court.

L. E. Pyke, for the plaintiffs, in support of the motion, stated the facts.

Butler Aspinall, for the defendants, *contrà*.—The plaintiffs ought not to have instituted this action in the High Court. The circumstances of the case were of a simple character, and moreover they have only recovered 246*l.* In such circumstances they ought to be condemned in costs, or in any event they ought not to get costs. Although costs are now in the discretion of the court, yet sect. 9 of the County Courts Admiralty Jurisdiction Act 1868 is a guide to that discretion. On the common law side, by sect. 116 of the County Courts Act 1888 there are stringent provisions adverse to a plaintiff who brings in the High Court an action which could have been commenced in the County Court.

L. E. Pyke, contrà.—The plaintiffs have recovered a substantial sum very near the County Court limit. Moreover they had reasonable anticipation to think their damages would exceed the limit. It is difficult to estimate with accuracy what are the consequential damages of a collision.

BUTT, J.—Plaintiffs have no right to bring actions in this court which could have been instituted in the County Court, and unless they can show there were special circumstances, they must bear the penalty. I accede to that part of the motion asking me to confirm the report, but make no order as to costs.

Solicitors: for the plaintiffs, *Arnold Williams and Co.*; for the defendants, *Pritchard* and *Sons.*

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

Tuesday, Aug. 5, 1890.

(Before the Right Hon. Sir JAMES HANNEN.)

THE CARRON PARK. (*a*)

Damage to cargo—Charter-party—Excepted perils — Seaworthiness — Commencement of voyage— General average.

Where by the terms of a charter-party a ship described as being at A. is to proceed to B. and there load a cargo for delivery at C., the shipowner not to be liable (inter alia) for the negligence of the master or crew, or other servants, "during the said voyage," and after part of the cargo has been taken on board at B., and before the ship has started, such cargo is damaged by water which gets into the hold through a valve in the engine-room being left open by the negligence of one of the engineers, such damage is caused by the above excepted peril "during the said voyage," nor is the ship to be deemed to be unseaworthy, and therefore the shipowner is not liable.

Where general average expenses are incurred by a shipowner in consequence of damage caused to ship and cargo by the negligence of his crew, he is entitled to contribution from the cargo owner where by the terms of the contract of carriage he is not liable for the negligence of his master and crew.

THIS was an action for breach of charter-party instituted by J. V. Drake and Co. against the owners of the s.s. *Carron Park*, to recover damages for damage to the plaintiffs' cargo caused by water getting into the defendant's vessel. The defendants counter-claimed for general average contribution incurred in clearing the vessel of water and discharging and warehousing the cargo.

By agreement between the parties the action was tried upon the following admitted facts:

1. That the defendants by their authorised agents, by a charter-party dated the 9th Oct. 1889 (a true copy of which is hereto annexed), chartered to the plaintiffs the s.s. *Carron Park* upon the terms and conditions therein contained.

2. That the said vessel, in pursuance of the said charter-party, arrived in New Fairwater in ballast on the 13th Oct 1889, being at that time tight, staunch, and strong, and in every way fitted to receive and carry a cargo in accordance with the said charter-party.

3. That on the 14th Oct. the plaintiffs by their agents commenced to load the said vessel, in accordance with the said charter-party, with sugar, in bags, the property of the plaintiffs, and that the loading was continued until the evening of the 15th Oct., but was not then completed.

4. That on the morning of the 16th Oct., while the said vessel was still lying moored at her loading berth, when preparations were made to continue the loading of the said cargo, three feet of water or thereabouts was discovered in the after-hold, engine-room, and stoke-hole.

5. That the water was pumped out and cargo discharged, when it was found that the portion of the cargo in the after-hold, the property of the plaintiffs, was damaged and injured in consequence of the water getting into that hold.

6. That the water found its way into the vessel through a valve in the engine-room which had negligently been left open by one of the engineers of the vessel for some period between the time when work was left off on the evening of the 15th Oct. and the time when the water was first discovered in the hold.

7. That in all other respects the vessel was in good condition.

8. That in consequence of the aforesaid accident the plaintiffs' cargo has been damaged, and they have suffered loss, and have incurred divers expenses, and that other expenses have been incurred by the defendants in discharging and warehousing the said goods, and pumping the water out of the said vessel.

The charter-party, so far as is material, was as follows:

It is this day mutually agreed . . . that the good steamship or vessel called the *Carron Park* . . . now on passage Fraserburgh to Libau . . . being now tight, staunch, and strong, and every way fitted for the voyage, shall with all convenient speed sail and proceed to New Fairwater . . . and there load from the factors of the said affreighters a full and complete cargo of sugar, and being so loaded shall therewith proceed to Greenock . . . and there deliver the same . . . the act of God . . . any act, neglect, or default whatsoever of the pilot, master, crew, or other servants of the shipowners, 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 excepted.

L. Batten for the plaintiffs.—The *Carron Park* was rendered unseaworthy at the port of loading, and the defendants therefore are not entitled to the benefit of the exceptions:

Steel v. *The State Line Steamship Company*, 37 L. T. Rep. N. S. 333; 3 Asp. Mar. Law Cas. 516; 3 App. Cas. 72;
Tattersall v. *National Steamship Company*, 50 L. T. Rep. N. S. 299; 12 Q. B. Div. 297; 5 Asp. Mar. Law Cas. 206.

The damage was not caused by negligence "during the voyage" within the meaning of the charter-party. The voyage of the ship and the cargo-carrying voyage are distinguishable. The latter commences "when she sets sail with her cargo on board for her port of destination:

Crow v. *Falk*, 8 Q. B. 467;
Cohn v. *Davidson*, 36 L. T. Rep. N. S. 244; 2 Q. B. Div. 455; 3 Asp. Mar. Law Cas. 374;
Valente v. *Gibbs*, 28 L. J. 229, C. P.
Baker v. *McAndrew*, 34 L. J. 191, C. P.

The defendants are not entitled to general average contribution. The expenses were incurred by reason of the negligence of the shipowners' servants, for whom the plaintiffs are not liable. The exceptions in the contract of carriage do not so far exempt the shipowners from liability for the negligence of his servants as to entitle him to claim for contribution in respect of expenditure occasioned by such negligence:

The Glenfruin, 52 L. T. Rep. N. S. 769; 10 P. Div. 103; 5 Asp. Mar. Law Cas. 413;
Burton v. *English*, 49 L. T. Rep. N. S. 768; 5 Asp. Mar. Law Cas. 187; 12 Q. B. Div. 218;
Crooks v. *Allan*, 41 L. T. Rep. N. S. 800; 5 Q. B. Div. 38; 4 Asp. Mar. Law Cas. 216.

The defendants were, by their servants, the sole cause of the danger necessitating the expense:

Mousir's case, 12 Co. 63;
Pirie v. *Middle Dock Company*, 44 L. T. Rep. N. S. 426; 4 Asp. Mar. Law Cas. 388;
Worms v. *Storey*, 11 Exch. 427;
Schloss v. *Heriot*, 8 L. T. Rep. N. S. 246; 14 C. B. N. S. 59; 1 Mar. Law. Cas. O. S. 335;
Fawcus v. *Sarsfield*, 6 E. & B. 193.

Barnes, Q.C. and *Joseph Walton* for the defendants.—The decision in *Crow* v. *Falk* (*ubi sup.*) is no longer law:

Baker v. *McAndrew* (*ubi sup.*);
Bruce v. *Nicopulo*, 24 L. J. 321, Ex.

The loss was occasioned by negligence during the voyage, and therefore the defendants are protected by the charter-party. The cause of the loss was not unseaworthiness. The ship was

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

seaworthy. In these circumstances the defendants are entitled to recover general average contribution:

Strang, Steel, and Co. v. *Scott and Co.*, 62 L. T. Rep. N. S. 14; App. Cas. 601; 6 Asp. Mar. Law Cas. 419.

The necessity for the general average expenditure was caused by the negligence of the defendants' servants, for which by the contract of carriage they were not liable.

Batten in reply.

Cur. adv. vult.

Aug. 5.—Sir JAMES HANNEN.—The plaintiffs, Messrs. Drake and Co., sued the defendants, the owners of the *Carron Park*, for breach of charter-party, entered into on the 9th Oct. 1889, by which it was agreed that the *Carron Park* therein described as, "now on passage Fraserburgh to Libau," being "now tight, staunch and strong, and every way fitted for the voyage," should proceed to New Fairwater, and should there load a full and complete cargo of sugar in bags, and being so loaded, should therewith proceed to Greenock and there deliver the same, "the act of God, or any neglect or default whatsoever of the pilot, master, crew, or other servants of the shipowners during the said voyage always excepted." The *Carron Park* arrived in New Fairwater in ballast on the 13th Oct., being at the time tight, staunch, and strong, and in every way fitted to receive and carry a cargo in accordance with the charter-party. On the 14th Oct., the loading of the cargo was commenced and continued until the evening of the 15th Oct., but it was not then completed. On the morning of the 16th it was discovered that three feet of water had found its way into the vessel through a valve in the engine-room, which had negligently been left open by one of the engineers of the vessel during the night of the 15th. In all other respects the vessel was in good condition. In consequence of the water thus getting in, the plaintiffs' cargo was damaged, and the plaintiffs have incurred expenses. Other expenses were incurred by the defendants in discharging and warehousing the cargo and pumping the water out of the vessel. The plaintiffs claim for damages for the injury sustained by their cargo in the above circumstances. The defendants deny their liability, alleging that the injury was caused by the neglect or default of the engineers of the said vessel during the said voyage, and that therefore it is within the excepted perils enumerated in the charter-party. The defendants also counter-claim for general average contribution for expenses incurred by them in saving, discharging, and warehousing the plaintiffs' goods, and otherwise for the common safety of the ship and cargo.

There can be no doubt that the defendants would, unless exempted by the last clause of the charter-party, be liable for the damage caused to the plaintiffs' cargo by the admission of water to the hold of the vessel. It arose from the direct negligence of the defendants' servants, and was a breach of the obligation of the shipowner that his servants should not be negligent in and about the carrying of the goods. The question then arises, whether the shipowners have freed themselves from liability for this negligence by the terms of the charter-party, which stipulates that they shall not be responsible for any act, neglect, or default whatsoever, of their servants "during the said voyage." It was contended for the plaintiffs, that this only related to the voyage from New Fairwater to Greenock, and did not include the period of time during which the vessel was being loaded. For this contention, the case of *Crow* v. *Falk* (*ubi sup.*) was cited. There the Court of Queen's Bench held, that "during the voyage" could only apply to the time after the voyage commenced, and that the voyage could not begin before the ship's loading was completed. Willes, J., who was counsel for the successful party in *Crow* v. *Falk* (*ubi sup.*), stated in his judgment in the case of *Baker* v. *McAndrew* (34 L. J. 191, C. P.) that he did not concur in the judgment in *Crow* v. *Falk*. In *Baker* v. *McAndrew* it was decided that, where a ship was described as then at N., being tight and staunch, and was to proceed to the usual place of loading, and there load and proceed to A., with the usual exceptions "during the said voyage," that the voyage commenced from her starting from her then berth, and that the exception applied to the preliminary transit to the port of loading. In *Bruce* v. *Nicopulo* (*ubi sup.*) Pollock, C.B. stated that he could not subscribe to the case of *Crow* v. *Falk*, and held, with the other members of the court, that a preliminary voyage was to be considered part of the voyage contemplated by the contract. These cases appear to me to be conclusive in the present case, and to lead to a result consistent with the intention of the parties, for I cannot doubt that the exemption was intended to apply not only to the time after the vessel left the port of loading, but also to the whole time during which this vessel was engaged in performing the contract contained in the charter.

It was further argued that the leaving open of the valve rendered the ship unseaworthy, and that thus the defendants were liable for breach of warranty. It is admitted that the vessel was when the loading commenced fit to receive and carry the cargo, and that it was during an interval in the loading that the water was by the negligence of the engineer allowed to enter the ship and damage the cargo already there. Holding as I do that the exemption extends to a period anterior to the vessel leaving the port of New Fairwater, the negligent letting of the water into the vessel would be within the exemption. It did not render the vessel unseaworthy for the reception of this cargo which had already been loaded on board the vessel when in good condition. It is, for the purposes now under consideration, as though during the passage from New Fairwater the valve had been negligently opened; that is, as Lord Blackburn said, *Steel* v. *The State Line Steamship Company* (*ubi sup.*), like leaving a port-hole open at sea, negligence on the part of the crew, and not unseaworthiness of the ship.

With regard to the counter-claim for general average, I think the defendants are entitled to recover. The claim for contribution as general average cannot be maintained where it arises out of any negligence for which the shipowner is responsible; but negligence for which he is not responsible is as foreign to him as to the person who has suffered by it. The loss would not have fallen on the shipowner, and the expen-

diture or sacrifice made by him is not to avert loss from himself alone, but from the cargo-owner. This question was considered in the case of *Strang, Steel, and Co.* v. *Scott and Co.* (*ubi sup.*). That was a case of jettisoned cargo. Lord Watson, in delivering judgment, says: "The fault of the master being matter of admission, it seems clear upon authority that no contribution can be recovered by the owners of the ship unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers." Here it appears to me that the relation of the goods owner to the shipowner has been altered by the contract that the shipowner shall not be responsible for the negligence of his servants in the events which have happened. I therefore give judgment for the defendants on the claim and counter-claim with costs.

Solicitors for the plaintiffs, *Waltons, Johnson,* and *Bubb.*

Solicitors for the defendants, *W. A. Crump* and *Son.*

Tuesday, Aug. 5, 1890.

(Before the Right Hon. Sir JAMES HANNEN and BUTT, J.)

THE WARWICK. (*a*)

Collision—Fishing smack—Trawl warp—Arbitration—Smackowners Mutual Collision Club—Fog—Regulations for Preventing Collisions at Sea, arts. 10 *and* 12—*County Courts Admiralty Jurisdiction Act* 1868 (31 *&* 32 *Vict. c.* 71), *s.* 3, *sub-sect.* 3—*County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 *&* 33 *Vict. c.* 51), *s.* 4.

Where a fishing vessel becomes stationary in consequence of her gear getting fast to a rock or other obstruction it is her duty, under art. 10 (*d*) *of the Regulations for Preventing Collisions, to make the fog-signal for a vessel at anchor, even though there be no fog, and if she fails to do so she is guilty of a breach of the Regulations.*

A. and B. were members of a Smackowners Mutual Collision Club. By art. 52 *of its articles of association the club was liable only up to* 30*l. By art.* 56 *it was provided that "in the event of a collision occurring between two vessels insured in this company, or their respective trawling gear, and damages being caused thereby to either or both of the said vessels, or their gear, the owners of such vessel shall immediately submit a statement of the whole circumstances of the collision, and the directors, after receiving such statement, shall have power to arbitrate on the matter, and their decision in the matter shall be final and conclusive."*

A. gave notice to the club that the trawl warp of his fishing smack had been cut by B.'s fishing smack drawing her trawl across A.'s trawl.

A.'s master was subsequently taken by A.'s agent to a meeting of the directors, and there examined as to the alleged collision, and his evidence was reduced into writing by the secretary. The secretary then gave notice to B. of A.'s claim, and thereupon B.'s mate attended a meeting of the directors and gave evidence, the effect of which was that the damage had not been done by his ship or trawl gear. His evidence was also reduced into writing. At a subsequent meeting of the directors B.'s master was examined, the written statements of the two other witnesses were then read over, and the directors then passed a resolution that B.'s trawl had not been in collision with A.'s. The plaintiff was not present when either of the defendant's witnesses were examined, nor when his claim was adjudicated upon, and had no notice that the meetings were to take place. A. having sued B. in rem in the County Court, B. alleged that the decision of the directors was final.

Held, that the plaintiff had never submitted his claim against B. to the directors; that there had been no proper hearing of the case by the directors, and that the alleged arbitration was no defence to the action.

Semble, a County Court having Admiralty jurisdiction has jurisdiction, under the County Courts Admiralty Jurisdiction Act 1868 *and the County Courts Admiralty Jurisdiction Amendment Act* 1868, *to entertain a cause of collision between the trawl gear of two fishing smacks.*

THIS was an appeal by the plaintiff in a collision action *in rem* from a decision of the County Court of Kingston-upon-Hull.

The action was instituted by the owner of the fishing smack *E. Birkbeck* against the owner of the fishing smack *Warwick*, to recover compensation for damages to the plaintiff's trawl warp and gear.

The damage occurred on the 27th Jan. 1889 in the North Sea, and was occasioned by the *Warwick* sailing across the bows of the *E. Birkbeck*, and with her trawl warp cutting the warp of the *E. Birkbeck*.

The facts alleged by the plaintiff were as follows: On the night of the 27th Jan. the *E. Birkbeck*, a trawler of eighty-six tons, was fishing in the North Sea, in company with the fishing fleet. About 10 p.m. her fishing gear got fast to some obstruction, whereupon the stopper was let go and the vessel was brought head to wind and rode to her warp. When fishing the *E. Birkbeck* was exhibiting a masthead light, visible all round the horizon, and this she continued to show after she was brought up by her warp. She also showed flares. In these circumstances those on board the *E. Birkbeck* saw another trawler, which proved to be the *Warwick*, fishing away on the starboard bow. The *Warwick* was approaching the *E. Birkbeck* so as to cross her bows, and although the *Warwick* was loudly hailed she held on and came so close that with her warp she cut the warp of the *E. Birkbeck*, and did the damage complained of.

The defendant denied that the *Warwick* was ever sufficiently near to the *E. Birkbeck* to cut her warp, and said that, if her warp was cut as alleged, it was done by some other vessel's warp and not by the *Warwick's*.

The plaintiff and defendant were members of the Hull Smackowners Mutual Collision Club, of which club the following articles of association are material to this action:

52. The perils insured against are damages caused by collision only, up to a sum not exceeding 30*l.*, and are more particularly mentioned and specified in the articles following.

53. The owner of any vessel entered in this company

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

shall immediately on her causing or incurring damage from collision communicate and give notice in writing to the secretary, and inform him of the damage sustained and of the whole of the circumstances of the collision, and shall call not less than three directors on board the vessel in respect of which the claim is made within forty-eight hours after her arrival at port, to survey any damage which such vessel may have sustained before any steps whatever are taken to repair such damage.

56. In the event of a collision occurring between two vessels insured in this company, or their respective trawling gear, and damages being caused thereby to either or both of the said vessels or their gear, the owners of such vessel shall immediately submit a statement of the whole circumstances of the collision as mentioned in art. 53, and the directors after receiving such statement shall have power to arbitrate on the matter, and their decision in the matter shall be final and conclusive. Under no circumstances whatever shall one member of the company be allowed to go to law with another, but in all cases he shall abide by the decision of the directors. In the event of any member declining to fulfil the conditions of this article he shall forfeit all claim upon the company in respect of the collision which is the subject-matter of the dispute.

It appeared that subsequently to the collision the plaintiff gave notice thereof to the club, and on the 18th Feb. his agent, one Cooke, who was a director, took the master of the *E. Birkbeck* to attend a meeting of the directors. The master was then examined as to the circumstances of the collision, and his evidence was taken down by the secretary of the club, and then signed by the witness.

The secretary then wrote to the defendant, and informed him of the plaintiff's claim, and a few days later the mate of the *Warwick* was examined before the directors, and his evidence also committed to writing. On the 20th March another meeting of the directors was held, when the master of the *Warwick* was examined, and the statements of the two previous witnesses were read over. The whole matter was then discussed, and a resolution was passed that the *Warwick* was not in collision with the *E. Birkbeck* on the date stated. The plaintiff was not present when either of the defendant's witnesses was examined, and received no notice that they were to be examined, or that his claim was to be adjudicated upon.

The following Regulations for Preventing Collisions at Sea are material to the decision:

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.

(*d.*) If a vessel when fishing becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall show the light and make the fog-signal for a vessel at anchor.

(*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.

(*f.*) Every fishing vessel and every open boat when at anchor between sunset and sunrise shall exhibit a white light visible all round the horizon at a distance of at least one mile.

(*g.*) In fog, mist, or falling snow, a drift net vessel attached to her nets, and a vessel when trawling, dredging, or fishing with any kind of drag net, and a vessel employed in line fishing with their lines out, shall at intervals of not more than two minutes make a blast with her fog horn and ring her bell alternately.

Art. 12. 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, (*c.*) A steamship and a sailing ship, when not under way, shall at intervals of not more than two minutes ring the bell.

The County Court judge gave judgment for the defendant on the ground that the plaintiff had submitted his claim to the arbitration of the club, whose decision was final. He also found as a fact, that the warp of the *E. Birkbeck* had been cut by the warp of the *Warwick*, that the *Warwick* was negligent, and therefore to blame; and also found the *E. Birkbeck* to blame for a breach of art. 10 (*d.*) of the Regulations for Preventing Collisions at Sea, in not making a fog-signal for a vessel at anchor.

At the trial, counsel for the defendant had submitted that the court had no jurisdiction, as the collision being between warp and warp, and not between ship and ship, was not within the County Courts Admiralty Jurisdiction Acts 1868 and 1869, and the County Court judge held that he had jurisdiction. The defendant did not take this point on appeal.

Bucknill, Q.C., for the plaintiff, in support of the appeal.—The plaintiff is not bound by the so-called award. He never submitted his claim against the defendant to arbitration, and even if he did, the proceedings were so irregular as to deprive them of any effect. He was not present, and had no opportunity of cross-examining the defendant's witnesses. It is also contended that the articles of association do not give the club power to decide whether there has been a collision or not, but only what the merits of a collision are, assuming there to have been one:

Edwards v. *Aberayon Mutual Ship Insurance Society*, 1 Q. B. Div. 563; 3 Asp. Mar. Law Cas. 154; 34 L. T. Rep. N. S. 457.

The plaintiff did not commit a breach of the Regulations for Preventing Collisions. Art. 10 (*d*), which was applicable to this case, says, that a trawler when stationary in consequence of her gear getting fast to a rock, shall show the light and make the fog-signal for a vessel at anchor. That means, if it is dark, she shall show an anchor-light, and if there is fog she shall ring a bell. In this case there was no fog, and therefore no duty to ring a bell.

Sir *Walter Phillimore* and *Butler Aspinall* for the defendant, *contra*.—The plaintiff did not submit his claim to arbitration, and therefore the decision of the directors is final, unless it is set aside. If the arbitration was irregular, the plaintiff's remedy was to have moved to set it aside:

Cleworth v. *Pickford*, 7 M. & W. 321;
Thornburn v. *Barnes*, 2 Mar. Law Cas. O. S. 459; L. Rep. 2 C. P. 384; 16 L. T. Rep. N. S. 10;
Braddick v. *Thompson*, 8 East, 344;
Scot v. *Avery*, 5 H. of L. Cas. 852.

The judge was right in finding the *E. Birkbeck* to blame for a breach of the regulations. Art. 10 (*d.*) says that in the circumstances of this case a trawler shall make a fog-signal irrespective of whether there be a fog or not. Where the regulations are dealing with the case of an existent fog, the words "in fog, mist, or falling snow" are used. A trawler which is brought up by her trawl is differently situated from a vessel at anchor, and therefore it is probable that the Legislature intended that she should give indica-

tion of that fact by the abnormal signal of ringing a bell. [He was stopped on this point by the Court.]

Bucknill, Q.C. in reply. *Cur. adv. vult.*

Aug. 5.—The judgment of the court was delivered by

Butt, J.—On the argument of this appeal we intimated—in fact, there was no serious contest on the matter—that the learned judge of the court below was right in deciding that he had jurisdiction to try the case. We also think that the plaintiff must be held to blame for a breach of the statutory Regulations for Preventing Collisions at Sea. We also agree with the learned judge in holding that the evidence establishes a case of negligence against the *Warwick*, and that she must be pronounced in fault as well as the plaintiff's vessel, unless her owner can show that the matters in dispute have been determined by arbitration. It was on this point that we required time for consideration. At the hearing in the County Court the defendant contended that there had been a valid submission to arbitration of the whole of the plaintiff's claim, a proper hearing of the case by the arbitrators, and a binding award; and the learned judge, although his language intimates considerable doubt, must be taken to have so decided. We are unable to agree with that decision.

The first question arises on clause 56 of the articles of association of the Hull Smack-owners Mutual Collision Club Limited. It is worthy of remark that this clause only authorises the directors to act as arbitrators "in the event of a collision between two vessels insured in this company, or their respective trawling gear," words which seem to imply an agreement between the parties concerned as to the fact of a collision having happened as a condition precedent to the right of the directors to arbitrate. Construed literally the clause authorises the directors to adjudicate on the incidents of a collision which has occurred, and not to determine whether there has been a collision. The resolution of the board, relied upon by the defendants as an award, asserts that no such collision happened. It is not clear what clause 56, either alone or read and considered in conjunction with some of the other provisions of the articles of association, means, whether it contemplates a reference to the directors of the question of the rights and liabilities of the club and its members *inter se*, as mutual insurers to the extent of 30*l.* on each vessel, or of all the rights and liabilities of the owners of smacks that have come into collision, or of both these matters. One thing seems clear from the book of the society produced on the trial, viz., that it is not the practice of the directors, acting under clause 56 and in ordinary circumstances, to decide the whole matter including the quantum of damage done and suffered by the respective parties. In the only case in which they have done so, they procured an express authority from the parties in dispute over and above the prescriptions of clause 56. Now it is true that it may not be proper to invoke the practice of the directors in order to interpret the meaning of the clause; but the various clauses of the articles of association being contradictory and practically unintelligible, we think it open to us, when certain acts of the plaintiff or his agent are relied upon by the defendant as evidence of his intention to submit, and of his having in fact submitted his whole claim to arbitration, to inquire what the practice of the directors in these cases has been. On the best consideration that we have been able to give to the case we have come to the conclusion that the case does not establish the contention that the plaintiff ever intended to submit, or did in fact submit, the whole of his claim against the *Warwick* to the decision of the directors.

We moreover differ from the finding of the learned judge that there was a hearing—which must be taken to be a proper hearing—of the case by the directors. Clause 56 of the articles of association provides for arbitration by the directors, and not by a quorum of the directors of the company, and it is not perfectly clear that a hearing and decision by some of the directors, although sufficient in number to form a quorum in ordinary matters, would constitute a valid and binding award. However this may be, there certainly never has been a proper hearing of the case by the directors. It is clear from the evidence of the secretary of the association that the notice convening the meeting of the directors on the 20th March 1889, the day of the alleged hearing, contained no reference to this matter; that the plaintiff had no notice of such meeting; that neither he nor his agent was present; that, although the captain of the defendant vessel was then examined, no opportunity was afforded the plaintiff of testing his evidence by cross-examination, or of calling any witnesses on his own behalf. The plaintiff was in fact not heard. It was urged that this objection to the proceedings at the hearing could only be properly raised on a motion to set aside the award. However this may be—and the matter is not free from doubt—we have thought it right to state our opinion, because the learned judge in the court below says in his judgment, "I felt bound to hold that, whilst the so-called arbitration hardly deserved that name, still it was a hearing, and that the resolution was an award." On the whole, and while the case is not free from doubt, we have come to the conclusion that the defendant has failed to establish that part of his case which sets up a reference and award in answer to this action, and that the judgment of the court below must be altered by a decree holding both vessels to blame.

Solicitor for the plaintiff, *E. Laverack*, Hull.

Solicitors for the defendant, *Locking* and *Holditch*, Hull.

QUEEN'S BENCH DIVISION.

June 10 *and* 11, 1890.

(Before Lord Coleridge, C.J. and Wills, J.)

Reg. *v.* The Judge of the City of London Court and the Owners of the Michigan. (*a*)

Seaman's wages — Recovery of — Maritime lien of mate for wages earned in port—No agreement—Ship in dock—Action in rem—County Court Admiralty Jurisdiction Act 1868 (31 & 32 *Vict. c.* 71), *s.* 3, *sub-sect.* 2 — *County Court Admiralty Jurisdiction Amendment Act* 1869

(*a*) Reported by T. R. Bridgwater, Esq., Barrister-at-Law.

(32 & 33 *Vict. c.* 51), *s.* 3 — *Merchant Shipping Act* 1854 (17 & 18 *Vict. c.* 104), *s.* 181.

Where, in an action in rem by the plaintiff, the chief mate of a ship, against the owners, for wages, the plaintiff having been paid off with the rest of the crew after the arrival of the ship in port, but by direction of the owners remaining on board at the same rate of wages as during the voyage; the judge of the City of London Court refused to hear the action, on the ground that the agreement between the plaintiff and defendant had ended on the arrival of the ship; no fresh articles having been signed, the plaintiff had no maritime lien, but only a common law right of action, and therefore dismissed the action for want of jurisdiction.

On an application for a mandamus requiring the judge of the City of London Court to hear and determine the action:

Held, that the County Court judge had jurisdiction to try the claim, and ordered the rule nisi for a mandamus directed to the judge of the City of London Court to hear and determine the action under its Admiralty jurisdiction, to be made absolute.

Application for a rule *nisi* for a writ of *mandamus* to issue to the judge of the City of London Court requiring him to hear and determine a certain action brought by the applicant against the owners of the steamship *Michigan*.

The applicant was the plaintiff in the action, and was chief mate of the steamship *Michigan*, which arrived in London early in Nov. 1889, when all the crew, including the plaintiff, were paid off in pursuance of the Merchant Shipping Act 1854.

The plaintiff, by direction of the owner, remained on board to superintend and assist in the loading of the vessel at the same rate of wages as he had received during the voyage, and his wages were paid to him up to the 30th Nov.

In an action *in rem* brought by the plaintiff against the owners of the *Michigan*, in the City of London Court, to recover the wages due to him from the 30th Nov. to the date of the action being brought, the judge of the City of London Court held that the applicant had no maritime lien for his wages, as the plaintiff's articles for the former voyage were at an end, and as he had not signed articles for another voyage he was not a seaman and was not serving on board ship as a seaman, but only had a common law right of action, and refused to try the action on the ground that he had no jurisdiction to do so.

By 31 & 32 Vict. c. 71, s. 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):

Sub-sect. (2) as to any claims for towage, necessaries, or wages. Any cause in which the amount claimed does not exceed 150*l*.

By 32 & 33 Vict. c. 51, s. 3:

The jurisdiction conferred by this Act and by the County Court Jurisdiction Act 1868 may be exercised by proceedings *in rem* or by proceedings *in personam*.

By 17 & 18 Vict. c. 104, s. 181:

A seaman's right to wages and provisions shall be taken to commence either at the time he commences work, or at the time specified in the agreement for his commencement of work, or presence on board, whichever first happens.

J. P. Aspinall, for the owners of the *Michigan*, showed cause against the rule being made absolute.—The learned judge of the City of London Court was right in holding that he had not jurisdiction in this case. The Admiralty jurisdiction of the County Court is limited to the jurisdiction which the High Court of Admiralty had at the passing of the County Courts Admiralty Jurisdiction Act 1868:

Allen v. *Garbutt*, 6 Q. B. Div. 165; 4 Asp. Mar. Law Cas. 520, n.;
The Dowse, L. Rep. 3 A. & E. 135; 3 Mar. Law Cas. O. S. 424; 22 L. T. Rep. N. S. 627.

That jurisdiction was limited to wages of seamen, and the plaintiff was during the time for which he claimed wages not a seaman within the true meaning of the word, but was merely a caretaker, his name was not on the ship's articles, he was not a seaman, and his claim was not for seaman's wages, within the Admiralty jurisdiction of the County Court; wages run from the signing of the ship's articles, according to the Merchant Shipping Act of 1854. In the cases of *Wells* v. *Osman* (2 Lord Raym. 1044); *Re The Great Eastern Steamship Company* (5 Asp. Mar. Law Cas. 511) the work done by the claimants was in anticipation of and preparation for a voyage. In the latter case they were about to sign the ship's articles, and were therefore held to be seamen; but the present case is different.

Nelson, contrà.—The judge of the City of London Court was wrong in holding he had no jurisdiction. Only the ordinary crew were paid off. The plaintiff remained on board doing ordinary duties as mate; his position was not altered. The case of the *Great Eastern Steamship Company* is in point. The mate is a seaman. In *The Great Eastern* case the men had not signed the articles. The plaintiff remained with the ship to superintend the discharge of the old cargo, and the loading of the cargo for the next voyage, and is entitled to sue *in rem* under the Admiralty jurisdiction of the County Court for his wages, and it is immaterial that the old articles had been signed and had come to an end. *Wells* v. *Osman* (2 Lord Raym. 1044) and *Re The Great Eastern Steamship Company* (5 Asp. Mar. Law Cas. 511; 53 L. T. Rep. N. S. 594) are exactly in point. Under the Merchant Shipping Act 1854 a "seaman" is defined as any person employed on board a ship in any capacity. Here the man was certainly a seaman, for he was mate, and certified as such, and he therefore had a right to resort by the maritime law to the lien against his ship. In *The Jane and Matilda* (1 Hagg. Adm. 187) a woman was allowed to sue *in rem* in the Admiralty Court for wages:

The Blessing, 3 P. Div. 35; 3 Asp. Mar. Law Cas. 561; 38 L. T. Rep. N. S. 259;
The Cella, 57 L. J. 43, 55, P. D. & A.; 6 Asp. Mar. Law Cas. 293; 59 L. T. Rep. N. S. 125; 13 P. Div. 82.

Cur. adv. vult.

June 11.—Coleridge, C.J.—Since hearing this case yesterday, I have taken the opportunity of consulting Butt, J., a judge of the Admiralty Division, and I defer to his authority (rather against what at first had been my own opinion), and I come to the conclusion that the judge of the City Court was wrong in holding

he had no jurisdiction, and that he had jurisdiction in the action, and that he must hear and determine the case on the merits. It appears that, according to the practice of the Admiralty Court, persons in this position could maintain actions of this kind in that court. That determines the case, for the question depends upon what was the jurisdiction of the Admiralty which has been transferred by an Act of Parliament to the County Court.

WILLS, J.—I concur in this decision, not merely in deference to the authority of my brother Butt, but also on my own view, and upon consideration of the authorities I have independently come to the same conclusion. The case of *The Jane and Matilda* (1 Hagg. Adm. 187), where Lord Stowell held that a woman who had acted as caretaker was entitled to claim against the ship, seems to govern practically the present case; that decision appears to be entirely in accordance with the uniform current of authority. The right to proceed *in rem* for services rendered on board a ship apparently extended to every class of persons connected with the ship as a ship, and to services rendered by such persons in harbour as much as to services rendered by them at sea. I am of opinion that the services rendered by the plaintiff were maritime services, although the vessel was actually in harbour at the time.

Solicitors for the applicant, *Lowless* and *Co.*

Solicitors for the owners, *Bolterell* and *Roche.*

June 14, 17, *and* 28, 1890.

(Before DENMAN and CHARLES, JJ.)

BUDGETTS *v.* BINNINGTON. (*a*)

Charter-party — Bill of lading — Demurrage — Unloading grain cargo — Shipowner and consignee—Liability of latter for delay in unloading caused by a strike at the docks—Shipowner "ready and willing to deliver."

Plaintiffs, being the consignees under a bill of lading, incorporating a clause in the charter-party fixing the number of lay days for unloading, and allowing other days for demurrage, sought to recover from the defendants, who were the shipowners, a sum of money paid to them under protest in respect of a claim for demurrage. Neither the bill of lading nor charter-party said anything about dock strikes. By the custom of the port of Bristol cargoes were discharged by the joint act of the shipowner and consignees. There being a strike among the labourers employed by the ship as well as by the consignees during the lay days, so that the unloading was prevented and could not be continued until after the expiration of the lay-days:

Held, that the number of lay days having been fixed for discharging the ship, the consignees were liable for demurrage, notwithstanding the shipowners, owing to the strike, were prevented doing their part of the unloading.

THIS was a motion for judgment in an action tried before Cave, J. and a jury at the assizes held at Bristol.

The plaintiffs were the indorsees of a bill of lading of a cargo of barley, shipped on board a steamship named the *Fairfield* belonging to the defendants.

The plaintiffs sought to recover the sum of 147*l.* 15*s.* 11*d.*, which was paid by them to the defendants, under protest, in respect of a claim by the defendants for keeping the vessel on demurrage at the port of Bristol.

In the bill of lading it was stated that the cargo was shipped at Feisk, for delivery at a port as ordered to the shippers, or to their assigns, "they paying freight and demurrage if any, . . . all conditions as charter-party."

The charter-party stated, that the cargo was "to be brought and taken from alongside the steamer at freighter's expense and risk;" the crew, however, were "to render all customary assistance in hauling lighters alongside," and that "thirteen running days, Sundays excepted," were "to be allowed the freighters (if the steamer be not sooner despatched) for sending the cargo alongside and unloading; but in no case should more than seven running days, Sundays excepted, be allowed for unloading, and ten days on demurrage over and above the said lay days, at 4*d.* per ton on the steamer's gross register tonnage per running day," and that "the freighter's liability" was "to cease when the cargo was shipped, the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average." At the port where the ship was loaded the lay days had been exhausted, so the defendants and the shipper agreed by letter to allow six additional running days, Sundays being excepted, for discharging the cargo.

The bill of lading was in the usual form, and contained the usual exceptions, but said nothing about strikes. Neither did the charter-party say anything about strikes.

After arriving at the Portishead Dock, at Bristol, the *Fairfield* began to unload her cargo. The lay days commenced on Monday the 25th, and ended on Saturday, the 30th Nov. 1889.

The custom of the port of Bristol is for grain cargoes in bulk from the Black Sea ports to be discharged by the joint efforts of shipowners and consignees.

During the present unloading the following was the system adopted: The plaintiffs' part of the discharge was performed by the Bristol Docks Committee, who employed a firm of master stevedores; the defendants' part was performed by another firm of master stevedores, but besides these there was a large number of dock labourers, on the part of both, but the number employed by the consignees was much larger than the number employed by the shipowners. First of all "bushellers" employed by the consignees go into the holds of the vessel and put the grain into sacks; the sacks are attached to a running noose, and then hoisted by "winchmen," these "winchmen" being employed by the shipowners. When the sacks are hoisted out of the hold on to the deck, they are put into scales by men who are called "bearers in;" these are employed by the shipowners. Then they are weighed by "weighers," who are employed by the consignees, and are then carried into trucks or into lighters, or into a warehouse, as required; this is done by men called "landers," and these are employed by the consignees. "Talleymen" are employed both

(*a*) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

by shipowners and consignees, but the "foreman" is employed by the shipowners.

On Monday the 25th, Tuesday the 26th, and Wednesday the 27th Nov., being the first three lay days, more than half the cargo was discharged. On Thursday, the 28th Nov., the dock labourers employed by both firms of stevedores struck, and on that day and on Friday the 29th Nov., Saturday the 30th Nov., Monday the 2nd Dec., and Tuesday the 3rd Dec., no cargo was discharged. On Wednesday the 4th Dec. the strike ended, and the discharge commenced again, and owing to the gangs working night and day it was completed on Thursday the 5th Dec. Under these circumstances demurrage for the days occupied in unloading after the 30th Nov. was claimed by the defendants, and they exercised their lien upon the cargo for the sum claimed in the action, which was paid under protest, and was now sought to be recovered back. For them it was contended that the plaintiffs were, under the contract, bound to pay demurrage, that the officers and men had remained on board after the steamer arrived in the dock, and that the master stevedores employed by the defendants were quite ready to do their part of the discharge, but owing to the strike they were unable to find dock labourers ready to work.

The following question was by the consent of the parties left by the judge to the jury:

"Were the shipowners ready and willing to do their part of that which it was customary for them to do?"

In answer to a question by one of the jurymen, the learned judge (Cave, J.) said that, if the shipowners were not able to do their part, they could not be said to be ready and willing to do it, and upon this the jury found the defendants were not ready and willing to perform their part of the discharge.

The learned judge left either party to move for judgment.

Bucknill, Q.C. and *J. V. Austin*, on behalf of the defendants, contended that they were entitled to judgment, and cited as an express authority

Thiis v. *Byers*, 34 L. T. Rep. N. S. 526; 3 Asp. Mar. Law Cas. 147; 1 Q. B. Div. 244.

There the same question arose upon a clause in the charter-party similar to the one in question. It was held that, as the clause prescribed the time for unloading, there was at once an absolute contract upon the charterer's part to unload within the prescribed time, although during a part of the time he had been prevented doing so because of the weather. In the present case, strikes are not excepted in the bill of lading or in the charter-party. The shipowner therefore in this case is in a similar position to the shipowners in the case of *Thiis* v. *Byers*, and the present consignees, the plaintiffs, are in the same position as the charterers in that case. The same rule has been similarly applied in the following cases:

Randall v. *Lynch*, 2 Camp. 352;
Lees v. *Yates*, 3 Taunt. 387;
Harper v. *McCarthy*, 2 B. & P. (N. R.) 258;
Brown v. *Johnson*, 10 M. & W. 331;
Porteous v. *Watney*, 39 L. T. Rep. N. S. 195; 4 Asp. Mar. Law Cas. 34; 3 Q. B. Div. 543;
Postlethwaite v. *Freeland*, 42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 618.

Cohen, Q.C. and *Pyke* (*E. U. Bullen* with them), on behalf of the plaintiffs, contended that they were entitled to judgment, there being no case in which demurrage can be recovered where the detention of the ship is due partly to the fault of the shipowners. In the case cited, *Thiis* v. *Byers*, the shipowners were not in default; bad weather set in during the time they were actually performing their duty. Every decision presupposes readiness and willingness on the part of a shipowner to perform his part of his duty. In the case of *Mackay* v. *Dick* (6 App. Cas. 251) Lord Blackburn in his judgment says, on p. 263: "Where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing." In this case the defendants as shipowners ought to have had a sufficient number of dock labourers and appliances to do the work that ought to have been done by the ship, and this duty on the part of the defendants could not be affected by the number of lay days having been fixed. By this the plaintiffs undertook to discharge the steamer in a fixed time, and they would be liable for delay caused by their own default, but they could not be so liable, because the dock labourers employed by the defendants refused to do their duty. Had any accident happened to the ship itself, the lay days would not have run against the plaintiffs during the time it was taking to repair the ship. The following cases were cited:

Barret v. *Dutton*, 4 Camp. 333;
Straker v. *Kidd*, 3 Q. B. Div. 213; 4 Asp. Mar. Law Cas. 34, n.;
Benson v. *Blunt*, 1 Q. B. Div. 870;
Appleby v. *Myers*, 14 L. T. Rep. N. S. 594; 16 L. T. Rep. N. S. 669; L. Rep. 2 C. P. 651;
Ford v. *Cotesworth*, 3 Mar. Law Cas. O. S. 468; 23 L. T. Rep. N. S. 165; L. Rep. 5 Q. B. 544;
Grant v. *Coverdale*, 5 Asp. Mar. Law Cas. 353; 51 L. T. Rep. N. S. 472; 9 App. Cas. 470;
Morton v. *Lamb*, 7 T. R. 125;
Bankwart v. *Bowers*, L. Rep. 1 C. P. 484;
Pordage v. *Cole*, 1 Wms. Saund. 319, 320.

Bucknill, Q.C. in reply.

The judgment of the court (Denman, Charles, and Williams, JJ.) was delivered on the 28th June, and was read by

WILLIAMS, J.—The question in this case is whether, under the circumstances of it, the shipowners are entitled to charge demurrage. The shipowners refused to give up the goods of the consignees unless the demurrage claimed was paid, and the consignees having paid under protest, seek to recover what they paid in this action. The facts of the case are these: The plaintiffs are indorsees of a bill of lading in respect of the cargo of the steamer *Fairfield*. Such bill of lading incorporates the terms of a charter-party wherein the plaintiffs were allowed thirteen running days (Sundays excepted) for sending the cargo alongside and unloading, but in no case should more than seven running days (Sundays excepted) be allowed for unloading, demurrage over and above the said lay days at 4*d.* per ton on the steamer's gross register tonnage per running day. By the charter-party the master undertook to deliver the cargo from alongside. By the custom of the port of Bristol the unloading of cargo is the joint act of the ship and the consignee. In the case of a grain

cargo the first act done is, that the consignee sends on board men with shovels and bushels and sacks. Then the master nominally (but the stevedores in fact as his agents) raises the sacks from the hold and brings them to the bulwarks ready to deliver overside to the consignee or his agents, viz., in the port of Bristol, the stevedores employed by the dock company. The ship in question arrived on the 23rd Nov., and the unloading was began on Monday, the 25th; but in the midst of the unloading on the 28th the dockers and stevedore struck as well those employed by the dock company as those employed by the ship, and the result of this was that neither was the master in a position that he could deliver, nor the consignees that they could receive, or otherwise do their part of the unloading. The jury were by agreement of the parties asked the following question, viz., "Was the shipowner ready and willing to do his part of that which it was customary for him to do?" The answer of the jury was, "No." The learned judge, in the course of his summing up, in answer to a juror, said that if the master was not able to do his part he was not ready and willing.

The question is, for whom judgment ought to be entered under such circumstances. It is said by the plaintiff that readiness and willingness of the master to deliver the cargo to the consignees is a condition precedent, the non-existence of which, according to the finding of the jury, disentitles the master from claiming this demurrage; and it is further said that, even though readiness and willingness to deliver the cargo may not be a condition precedent, it is something which the master has to do on his part concurrently with the part which the consignee has to take in the loading of the ship, and that, therefore, on the well-known principle established by the cases cited in the notes to *Peters* v. *Opie* (2 Wms. Saunders, 346); *Armitage* v. *Insole* (14 Q. B. 728), and many other cases, the master cannot demand performance by the consignee of his part without averring readiness and willingness, if not a tender of performance of the conditions concurrent due from him, which for the purpose of effectively making his demand on the consignees, become conditions precedent. While approving of these contentions so far as relate to conditions precedent, we are of opinion that they are not applicable to the present case, and therefore afford no ground for holding that the master was not entitled to claim demurrage. The fact is, that the obligation of the consignees to pay demurrage "is absolute," as was decided in the case of *This* v. *Byers*. The readiness and willingness of the master to make delivery is not the consideration of or condition precedent to the undertaking to pay demurrage for the detention of the ship; and this being so, it is not sufficient to relieve the consignee of the obligation to pay demurrage that he should show that the master was unable to perform some obligation undertaken by him in the charter-party, but it must appear that the consignee was prevented from discharging the ship within the time allowed for unloading by the act of the master, or those for whom he was responsible. If this were not so, the master would not have been entitled to recover demurrage in the cases of *This* v. *Byers*, *Porteous* v. *Watney*, and *Straker* v. *Kidd*, for in each of these cases it is plain from the facts that the master was not ready and willing to make delivery, because he was prevented in the one case by the weather, and in the other two cases by the non-removal by third persons of the superincumbent cargo. It is quite true that in *Straker* v. *Kidd* Lush, J. speaks of "an implied condition that the shipowner shall be ready and willing to deliver;" but his meaning is made plain by the next sentence in his judgment where he says: "If he (the master) wrongfully refuses to give over his goods, or if by reason of any default of his, or of any obstacle for which he is responsible, the consignee is unable to get his goods, this would afford a good answer to the claim." And again, after stating that the contract is absolute and not conditional, the learned judge says: "The defendants are therefore liable unless they can show that some act or default of the owner, or of some one for whom he is responsible, prevented them from performing their contract." In the present case the plaintiffs were not prevented from performing their contract by any default of the shipowner or those for whom he was responsible. It was the action of the stevedores and dockers which alike prevented the plaintiffs and defendants from doing their part in the unloading. This in no way relieves the charterer or consignee from the absolute contract to pay demurrage for delay and detention of the ship during unloading. If the strike of the stevedores had resulted from unreasonable conduct of the master in refusing reasonable wages asked by the stevedores, the case might have been different; for then perhaps it might have been said that the shipowners prevented the charterers performing the contract, and that the act of the shipowners was the *causa causans* preventing the charterer; but even in such a case the charterer would, in our opinion, have to show that he was actually prevented by the default of the shipowner, *i.e.*, that there was not available means of performing the contract, notwithstanding the default of the shipowner: (see *Alston* v. *Herring*, 11 Exch. 822.) If such means were available the charterer must avail himself of them to discharge the ship, and take his remedy by suing the shipowner for breach of contract, or he will be liable to demurrage. The result in the present case is, that judgment must be entered for the defendants, with costs of action and of this motion.

Solicitors for the plaintiffs, *Whites* and *Co.*, agents for *Henry Brittan* and *Co.*, Bristol.

Solicitors for defendants, *W. A. Crump* and *Sons*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

July 11 *and* 15, 1890.

(Present: The Right Hons. Lords WATSON and HERSCHELL, Sir BARNES PEACOCK and Sir RICHARD COUCH.)

LYONS *v.* HOFFNUNG. (*a*)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Sale of goods—Stoppage in transitu—Delivery to shipping agent for shipment abroad.

Where goods have not been delivered to the pur-

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

chaser, or to any agent of his, to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such, and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are in transitu, and may be stopped.

The right to stop under such circumstances is not affected by the facts (1) *that the purchaser has handed to the shipping agents the shipowners' receipts for the goods received by him from the vendor, and has received from them in exchange a bill of lading*; (2) *that the purchaser is himself a passenger by the vessel on board which the goods are shipped as cargo for conveyance to their ultimate destination.*

Judgment of the court below affirmed.

Bethell *v.* Clarke (59 *L. T. Rep. N. S.* 808; 6 *Asp. Mar. Law Cas.* 194; 20 *Q. B. Div.* 615) *approved.*

THIS was an appeal from a judgment of the Supreme Court of New South Wales (Windeyer and Foster, JJ., Innes, J. dissenting), making absolute a rule for a new trial in an action brought by the appellant against the respondents, on the ground that the verdict was against the weight of evidence, and for misdirection.

The action was brought by the appellant as official assignee of the estate and effects of one William Clare, who was insolvent, to recover certain goods from the respondents. The respondents pleaded a right to stop *in transitu*.

The facts and evidence appear from the judgment of their Lordships.

The case was tried before Darley, C.J. and a jury, and upon the findings of the jury, which are set out in the judgment of their Lordships, the learned Chief Justice directed a verdict for the plaintiff for 505*l*.

Barnes, Q.C. and *Howard Smith* appeared for the appellant, the plaintiff below.—In addition to the cases referred to in the judgment of their Lordships, they cited

Kendall v. *Marshall*, 48 L. T. Rep. N. S. 951; 11 Q. B. Div. 356;
Valpy v. *Gibson*, 4 C. B. 837;
Ex parte Miles, 15 Q. B. Div. 39;
Ex parte Watson, 36 L. T. Rep. N. S. 75; 3 Asp. Mar. Law Cas. 396; 5 Ch. Div. 35;
Whitehead v. *Anderson*, 9 M. & W. 518.

Finlay, Q.C. and *Pollard*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellant, their Lordships' judgment was delivered by

Lord HERSCHELL.—The question raised in this action is, whether the respondents, who are merchants carrying on business in Sydney, were entitled to stop *in transitu* certain goods which were purchased of them by William Clare, the trustee under whose insolvency is the appellant on the present appeal, and was the plaintiff in the action below. At the trial evidence was given by William Clare that when he purchased the goods he gave instructions to Davis, who was acting on behalf of the vendors, to mark the packages $\frac{WC}{K}$, that is: William Clare, Kimberley, and that he told him to send the goods, when packed and marked, down to Howard Smith and Co.'s wharf in Sydney. He stated that he gave no other instructions, but on cross-examination he admitted that he had told Marks that the goods were going to Kimberley; that he was going to take the goods there; that they were going with him. The evidence given by Marks was, that a day or two before the purchase he saw Clare, who told him that he was going to Kimberley; that he wanted the goods he was purchasing to be shipped by the first boat, which was the *Gambier*; and evidence was also given by Davis that at the date of the purchase Clare had stated that he was undecided whether the goods were to go by the *Gambier* or some other vessel, but that he would let them know; and that he came two days later and told them the goods were to be shipped by the *Gambier* to Kimberley. Messrs. Howard Smith and Co., to whose wharf the goods were to be sent, are shipowners, and were known to both parties to be then loading vessels for the port of Kimberley, the earliest of their vessels to sail being the *Gambier*. The goods were sent by the respondents to Howard Smith and Co.'s wharf, and a document was sent with them which was initialed on behalf of Howard Smith and Co., by one of their *employés*, which was in these terms: "Wm. Howard Smith and Sons Limited, Sydney, 20/5/86. Steamer *Gambier*. For King's Sound. Shipper, S. Hoffnung and Co. Consignee, W. Clare. Goods, Kimberley." It appears that in respect of some of the goods, those apparently that were in bond, a more elaborate form of receipt was given by the shipowners, but in those receipts also Hoffnung and Co. were described as the shippers of the goods, Clare as the consignee, and the place of destination as Kimberley. At the trial before the Chief Justice several questions were put to the jury. The first three were in these terms: (1) "Did Clare instruct the defendants to deliver the goods to Clare at Howard Smith and Co.'s wharf, and did the defendants accept such instructions?—Yes. (2) If so, did the defendants in fact deliver the goods at Howard Smith and Co.'s wharf in accordance with such instructions?—Yes. (3) Did Clare instruct the defendants to ship the goods by the s.s. *Gambier*, and consign them to him at Kimberley?—No." The fourth is immaterial, and it was not answered by the jury. The fifth was in these terms: "After the goods were in fact delivered at Howard Smith and Co.'s wharf, was any contract entered into between Clare and Howard Smith and Co. to ship the goods to Kimberley on his account?—Yes." Upon those findings the Chief Justice entered the verdict for the plaintiff. A rule was afterwards obtained to set aside that verdict and for a new trial, on the ground that the findings of the jury were against the weight of evidence, and also on the ground that the learned Chief Justice had misdirected the jury on a point to which their Lordships will call attention hereafter. That rule came on for argument before three learned judges in the Supreme Court, and was made absolute for a new trial by a majority of those judges. The first question their Lordships have to consider is, whether the verdict can, as the appellant alleges, be supported as being right upon a true view of the facts proved at the trial, or at least as being one which might reasonably be found by the jury. The first two

questions put to the jury appear to their Lordships to be possibly open to the charge of ambiguity. If the meaning of the language used: "Did Clare instruct the defendants to deliver the goods to Clare at Howard Smith and Co.'s wharf?" and "Did the defendants in fact deliver the goods at Howard Smith and Co.'s wharf in accordance with such instructions?" be: were the instructions to deliver them to Clare personally at Howard Smith and Co.'s wharf, and were those instructions obeyed?—it is obviously impossible to support the finding. But even if the meaning be, were the defendants to deliver the goods to Clare at Howard Smith and Co.'s wharf in this sense, that they were to be held by Howard Smith and Co. for Clare, not as carriers, but as his agent in some other capacity?—the verdict appears to their Lordships to be entirely against the weight of evidence, or indeed to have no evidence at all to support it. If all that was meant be: were the goods to be delivered to Clare at Howard Smith and Co.'s wharf in this sense, that the transaction of sale and delivery was to be then completed, so that the property should pass to Clare and he should become the owner of the goods?—the finding would be perfectly correct, but wholly immaterial upon the question whether the respondents had a right to stop the goods *in transitu*.

Reliance was placed by the appellant on the fact that the receipts which have been mentioned were handed over by the respondents to Clare, and that being in possession of these receipts, he obtained from Howard Smith and Co. a bill of lading. He stated that in that bill of lading he was named as consignee, but that the name of Hoffnung and Co. did not appear as shippers. Their Lordships think that some doubt may well be entertained whether he is accurate in that statement, having regard to the evidence as to the course of business, and indeed applying common knowledge as to the course which such a transaction would ordinarily take. But however that may be, and assuming it to be the fact that he did obtain such a bill of lading, in their Lordships' opinion the circumstance is wholly immaterial. The goods were undoubtedly carried by the vessel *Gambier* on a voyage to Kimberley, and were in transit upon that voyage at the time when, owing to the insolvency of Clare, the respondents stopped them. The arrangement for the freight at which the goods were carried appears to have been made in contemplation of this and other purchases by Clare before the date when those purchases were effected. The shipowners undertook, in consideration of the fact that he was about to have a considerable quantity of goods shipped, to carry them somewhat below the ordinary freight. As far as the evidence goes, no transaction with regard to the carriage of these goods took place between Clare and the shipowners after the date of the purchase, except the exchange of the receipts which have been mentioned for the bill of lading. Even assuming that the jury were entitled to disregard the oral evidence in the case except that given by Clare, and to act upon that evidence alone, in the opinion of their Lordships the decision ought to have been in favour of the defendants in the action. It appears to their Lordships that, upon the undisputed facts of the case, the right to stop *in transitu* under the circumstances proved at the trial was clear. The goods at the time of the purchase were undoubtedly intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier to be carried to a destination intimated by the purchaser to the vendors at the time of the sale; because, although the language used by Clare, according to his evidence, was that he was going to Kimberley, and going to take these goods with him, that language must be interpreted according to the ordinary course of business as it would be understood by business men; and it is obvious that Clare was not going to take these goods with him in any other sense than that he intended himself to be a passenger by the vessel on which they were to be shipped, and by which they were to be carried, his intention being that the goods should be shipped on board that vessel as cargo in the ordinary way, carried by carriers to their destination, and there delivered to him. These circumstances appear to their Lordships sufficient to indicate that the right to stop *in transitu* existed. The test laid down by Lord Ellenborough in the case of *Dixon and others* v. *Baldwen and another* (5 East, 175) appears clearly to cover such a case as this. Alluding to the case of *Hunter* v. *Beale* (cited in *Ellis* v. *Hunt*, 3 T. R. 464), in which it was said that "the goods must come to the corporal touch of the vendees, in order to oust the right of stopping *in transitu*," Lord Ellenborough says that this was "a figurative expression, rarely, if ever, strictly true. If it be predicated of the vendee's own actual touch, or of the touch of any other person, it comes in each instance to a question whether the party to whose touch it actually comes be an agent so far representing the principal as to make a delivery to him a full, effectual, and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier or mean of conveyance to or on the account of the principal in a mere course of transit towards him." Their Lordships think it cannot be doubted that, in the present case, putting the case most favourably for the appellant, the goods came into the hands of Howard Smith and Co. as carriers on Clare's account.

The law appears to their Lordships to be very clearly and accurately laid down by Lord Esher, M.R. in the case of *Bethell* v. *Clarke* (59 L. T. Rep. N. S. 808; 6 Asp. Mar. Law Cas. 194; 20 Q. B. Div. 615). He says: "When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped." The present case appears to fall distinctly within the terms there employed. The goods had not been delivered either to Clare or to any agent of his to hold for him otherwise than as a carrier, but were still in the hands of the carrier as such and for the purposes of the transit. There does not seem to be any pretence for the allegation that Howard Smith and Co. were ever intended to receive or hold, or ever did receive or hold, these goods except as carriers, to convey them to their destination, Kimberley. No

arrangement other than an arrangement with reference to the terms of freight had been made by Clare before the goods were put into the possession of Howard Smith and Co. They were received by Howard Smith and Co. upon the terms—for they signed receipt notes to that effect—that they should be carried by them to Kimberley, by means of a particular vessel. Those receipts, showing the terms upon which the goods had been received, passed into the hands of Clare, and were acted upon by him without the slightest objection to their form. After he had obtained possession of the receipt notes, all that he did was to exchange them for a bill of lading, in order that they might, under that bill of lading, be carried to Kimberley, their destination. There does not therefore seem to be throughout the whole transaction the slightest evidence that Howard Smith and Co. ever held, or were intended to hold, these goods otherwise than as carriers to take them to their destination.

Under these circumstances it seems difficult to understand the contention that the right of stoppage *in transitu* did not exist. The learned Chief Justice, in summing up to the jury, appears to have told them that, if Clare made a new contract with Howard Smith and Co. in respect of the carriage of these goods after they came into their possession, that would be sufficient to constitute a delivery to Clare, which would put an end to any right to stop *in transitu*. Their Lordships gather this from the particular direction complained of, which formed one of the grounds on which the rule was granted. The ground was: That his Honour, it is submitted, erroneously told the jury that if Clare handed up to Howard Smith and Sons Limited the bills of lading, or shipping receipts, received by him from the defendant, and received from Howard Smith and Son Limited another bill of lading, it was of no moment whether the latter bill of lading contained the names of the defendants as shippers, because, if at that time they entered into a contract with Clare to carry these goods and were paid freight, then there would be a fresh contract with Clare, under which Howard Smith and Sons Limited became Clare's agents, and it would be equivalent to a delivery to Clare." No doubt it might be equivalent to a delivery to Clare, for the purpose of passing the property to Clare; but if his Honour intended to instruct the jury that such a contract entered into between Clare and the shipowners would be equivalent to the shipowners holding the goods for Clare otherwise than as carriers, and becoming his agents so as to create a new transaction, having its initiation only at that time, their Lordships are unable to agree with the law which appears to have been laid down. If the goods were received by Howard Smith and Co. to be carried to Kimberley, and this was indicated as the destination of the goods at the time when the vendors were instructed to deliver the goods to the carriers, then, in the view which their Lordships take, it is immaterial whether a fresh bill of lading was obtained by Clare or whether that bill of lading contained the name of Clare or of the defendants as shippers. The appellant relied upon several cases which were pressed by the learned counsel on their Lordships, in which it had been held that, although the vendor knew that some foreign destination was intended for the goods, yet if he delivered them to a shipping agent to be by him sent abroad, the transit, so far as the vendor was concerned, then came to an end, and that there was no right in the vendor to stop on the subsequent voyage. Their Lordships do not think that those cases are in any way applicable to the circumstances existing here. There the delivery was not a delivery by the vendor to the carrier to be carried to a destination indicated at the time of sale. A new transit commenced which had its origin in the action of the shipping or forwarding agent, as the case might be, which appears to be an altogether different case from that with which their Lordships have to deal, where the goods passed direct from the hands of the vendors into the hands of the carriers to be carried to the destination then contemplated by both parties. Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from be affirmed. The appellant must pay the costs of the appeal.

Solicitors for the appellant, *Walker* and *Mewburn-Walker*.

Solicitors for the respondents, *Hemsley* and *Hemsley*.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, July 15, 1890.

(Before Lord ESHER, M.R., LINDLEY and BOWEN, L.JJ.)

PINK AND OTHERS *v.* FLEMING. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance — "Damage consequent on collision"—Proximate cause of loss.

The plaintiffs insured a cargo of fruit with the defendant by a marine policy against "damage consequent upon collision with any other ship." The vessel in which the cargo was shipped came into collision with another ship during the voyage, and was in consequence obliged to put into port for repairs. To enable the repairs to be made the fruit had to be discharged, and afterwards had to be reloaded. It was admitted that the discharge and reloading had been done with all reasonable care, but partly from this handling and partly from natural decay which arose during the delay in the voyage the fruit arrived damaged.

Held, that the collision was not the proximate cause of the loss, and that the plaintiffs could not recover.

THIS was an appeal from the judgment of Mathew, J. at the trial.

The action was brought on a policy of marine insurance on a cargo of oranges and lemons shipped from Messina in the steamship *Dithmarschen*. The policy was in the ordinary form of a Lloyd's policy, and contained the following clause:

Warranted free from particular average, unless the ship be stranded, sunk, or burnt, or unless damage be consequent on collision with any other ship.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

The *Dithmarschen* came into collision with another ship during the voyage, and was obliged to put into port for repairs. To enable the repairs to be made the fruit had to be discharged into lighters, and was afterwards reloaded. When the *Dithmarschen* arrived at her port of discharge the fruit was found to be much damaged, and the evidence showed this damage to have been caused partly by the handling necessitated by the discharge and reshipment and partly by the decay which had naturally begun during the delay in the voyage.

Mathew, J. held that the collision was not the cause of the damage within the meaning of the policy, and gave judgment for the defendant.

The plaintiffs appealed.

J. G. Witt and *Hurst* for the plaintiffs.—The handling of the fruit was necessary in order to do the repairs, and the repairs were necessary because of the collision, therefore the collision was the cause of the handling. There was no other reason for the handling of the fruit; so that the collision was the proximate cause of the injury to the cargo. *Taylor* v. *Dunbar* (L. Rep. 4 C. P. 206) is distinguishable, because there the cargo suffered damage only indirectly on account of the storm. They referred also to

Ionides v. *The Universal Marine Insurance Company*, 1 Mar. Law Cas. O. S. 353; 8 L. T. Rep. N. S. 705; 14 C. B. N. S. 259; 32 L. J. 170, C. P.;
The City of Lincoln, 62 L. T. Rep. N. S. 49; 6 Asp. Mar. Law Cas. 475; 15 Prob. Div. 15;
Gabay v. *Lloyd*, 3 B. & C. 793;
Montoya v. *The London Assurance Company*, 6 Ex. 451;
Lawrence v. *Aberdein*, 5 B. & Ald. 107;
Phillips on Marine Insurance, 1098, 1098 (*a*);
Bondrett v. *Hentigg*, Holt N. P. 149.

Myburgh, Q.C. and *J. A. Hamilton*, for the defendant, were not called upon.

Lord Esher, M.R.—In the law of England there is on this point a clearly-settled distinction between marine insurance and liabilities arising on other matters. In cases of marine insurance, the liability of the underwriters depends only on the proximate cause of the loss; in other matters liability depends on the *causa causans*. The question, which is the *causa proxima* of a loss, can only arise where there has been a succession of causes. When a result has been brought about by two causes you must, in marine insurance law, look only to the nearest cause, although the result would, no doubt, not have happened without the remoter cause. Here, of course, the collision was a cause of the damage, without the collision the damage would not have taken place. But is it the natural result of a collision that a ship should have to put into port for repairs, that the cargo should have to be taken out in order to make the repairs, and that it should be damaged by the handling necessary in the unloading and reloading? A collision might happen without any of these consequences. The collision was a cause and an effective cause. If the collision had not caused the ship to be put into port for repairs, the removal of the goods would not have been necessary, nor would the damage to the fruit have occurred. But the proximate cause of the loss was the handling of the fruit, though, no doubt, the cause of the handling was the necessary repairs, and the cause of putting into port for repairs was the collision. There were three causes of the result; but, according to the English law of marine insurance, only the last of them is to be looked at for the purpose of determining the liability of the underwriters. The cause of the damage to the fruit here was the handling, and there is nothing in the policy to make the underwriters liable for that. For these reasons, I think that the judgment of Mathew, J. was right. The case of *Taylor* v. *Dunbar* (*ubi sup.*) was decided on this point of law, and is an authority for our decision. With regard to the American authorities, the American law on the subject seems to differ materially from our law, and therefore it is not necessary to consider them.

Lindley, L.J.—I think the judgment of Mathew, J. was correct. It has long been settled that, in questions of marine insurance liability, only the *causa proxima* of the loss is to be considered, and it is upon that rule that people contract. The case before us is governed by the decision in *Taylor* v. *Dunbar* (*ubi sup.*). The immediate cause of the injury to the fruit was the handling it underwent, and, on looking at the policy, I can find nothing in it applicable to such a cause of loss.

Bowen, L.J.—I am of the same opinion Whether we deal with the injury to the fruit as caused by the delay or by the handling, the same principle applies. The proximate cause of the loss was not the collision or any peril of the sea, but the perishable character of the cargo combined with the handling and the delay. I think the case is governed by *Taylor* v. *Dunbar* (*ubi sup.*), and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the plaintiffs, *Courtenay, Croome, Son*, and *Finch*.

Solicitors for the defendant, *Waltons, Johnson*, and *Bubb*.

Wednesday, July 16, 1890.

(Before Lord Esher, M.R., Lindley and Bowen, L.JJ.)

Re An Intended Arbitration between Smith and Service and James Nelson and Sons. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Arbitration Act 1889 (52 *&* 53 *Vict. c.* 49), *ss.* 1, 5, 6—*Agreement to refer to three arbitrators—Refusal of party to appoint arbitrator—Charter-party—Power of court to order appointment—Effect of making submission a rule of court prior to Act of* 1889.

In the case of an agreement to refer disputes to three arbitrators, one to be nominated by each party, and the third by the other two, the court has no power to make an order calling upon one of the parties, who has been served with notice to appoint and neglects to do so, to appoint an arbitrator within seven days.

Sect. 1 *of the Arbitration Act* 1889 *is only intended to give to all submissions to arbitration the same effect as, prior to the Act, those submissions had which were made rules of court.*

This was an appeal by James Nelson and Sons from an order of the Divisional Court (Lord Coleridge, C.J. and Wills, J.) affirming an order made by Master Manley Smith and affirmed by Lawrance, J., sitting at chambers.

(*a*) Reported by Adam H. Bittleston, Esq., Barrister-at-Law.

The order appealed from required the appellants within seven days to appoint an arbitrator under the agreement to refer contained in a charter-party, dated the 28th Nov. 1889.

The facts were, that Nelson and Co. had chartered a vessel of Smith and Service, under a charter-party entered into on the 28th Nov. 1889, which stipulated that the vessel should arrive at a named port and be placed at the disposal of the charterers on a certain day, and which also contained a clause referring any dispute which might arise to three arbitrators, one to be appointed by each party, and the third by the two arbitrators so appointed.

Nelson and Co. subsequently refused to carry out their contract, on the ground that the vessel did not arrive at the port named until after the appointed day.

Smith and Service thereupon appointed an arbitrator under the reference clause in the charter-party, and served a notice upon Nelson and Co. to appoint another in accordance with the agreement.

Nelson and Co. not complying with this notice, Smith and Service took out a summons at chambers for an order that they should do so. An order was made accordingly, and, on appeal, was affirmed by the Divisional Court.

Nelson and Co. appealed.

French, Q.C. and *C. A. Russell* for the appellants—First, no dispute under the agreement to refer contained in the charter-party has arisen. It is a condition precedent that the ship should be ready to commence the voyage on the day named. The arbitration clause, therefore, does not apply at all here. But, secondly, assuming it to apply, there was no jurisdiction to make this order. This submission provides that the reference shall be to three arbitrators. Therefore it is not within sects. 5 or 6 of the Arbitration Act of 1889. The Divisional Court proceeded upon the supposition that sect. 1 of the Act gave them power to make this order. But it is submitted that, unless the court could before that Act have made the order in cases where the submission had been made a rule of court, sect. 1 gives no power to make it. Some little expense was necessarily incurred in making a submission a rule of court under the Common Law Procedure Act. The object of sect. 1 is to avoid that expense and formality by providing that every submission is to be dealt with as if it had been made a rule of court. The making a submission a rule of court never gave the court power to order one of the parties to appoint an arbitrator. The effect of making the submission a rule of court was to give the court power to enforce the award, and after the Act of Will. 4, to prevent either party revoking the authority of an arbitrator who had once been appointed.

Gorell Barnes, Q.C. and *Leck* for the respondents.—The making a submission to arbitration a rule of court caused the submission to be equivalent to an order by the court to proceed to arbitration. The refusal of one of the parties to appoint an arbitrator then becomes disobedience to the order of the court to submit to arbitration. The court could attach him for this disobedience, and it follows that they can make an order calling upon him to obey. [Lord Esher, M.R.—The Act of Will. 3 enabling parties to make their agreements to refer rules of court, was passed in 1697; and no one since that date; or, if you rely on the Act of Will. 4, which was passed in 1833, no one for fifty-six years has thought that the making a submission a rule of court had the effect that you suggest.] The reason that there is no reported case in point may be that parties never thought, generally speaking, of making their submissions to arbitration rules of court until they wanted to enforce the award.

The following cases were referred to in the course of the argument:

Gumm v. *Hallett*, 26 L. T. Rep. N. S. 468; L. Rep. 14 Eq. 555;
Re Rouse and Meier, 23 L. T. Rep. N. S. 865; L. Rep. 6 C. P. 212;
Davila v. *Almanza*, 1 Salk. 73.

Lord Esher, M.R.—In this case, in an ordinary mercantile agreement, a charter-party, there is, as is not unusual, an arbitration clause. The clause in question provides that the reference shall be to three arbitrators. It is not a reference to two arbitrators and an umpire; it is a reference to three arbitrators. The distinction is that, in the latter case, all three persons, when they have been named, are to go simultaneously into the inquiry, and all three are to come to a conclusion upon it. There being, then, this agreement to refer disputes to three arbitrators, one of the parties, alleging that differences have arisen to which the agreement to refer is applicable, has appointed an arbitrator and called upon the other party to appoint one. The other party has refused to nominate any arbitrator. Then an application is made at chambers for an order against the party so refusing, calling upon him to appoint an arbitrator within seven days. The order was made at chambers, and has been affirmed by the Divisional Court; and from that order an appeal is brought to this court. It is obvious that, if the court had no jurisdiction to order the party who refused to appoint an arbitrator to do so, it had no jurisdiction to order him to do so within seven days. Therefore, the whole question is, whether there is any jurisdiction in such an arbitration as this for the court to order either of the parties to appoint an arbitrator. The question depends on the construction to be placed on the Arbitration Act 1889. It is obvious, in my opinion, that this submission is not within sects. 5 or 6 of that Act, because it is a reference to three arbitrators; and I think that the contention that either of those sections applied was abandoned in the course of the argument. But it is said that the order that has been made is authorised by sect. 1 of the Act. Sect. 1 gives to the court, in every case of a submission to arbitration, the powers which the court had before the Act in cases where the submission had been made a rule of court. If the court had the power before the Act, when a submission had been made a rule of court, to order either of the parties to it to appoint an arbitrator, I think that sect. 1 now gives them that power in all cases. If the court had not that power before the Act, notwithstanding that the submission had been made a rule of court, I think that such a power is not given by sect. 1. The argument in support of the order that has been made amounts to this, that the court has had the power in question ever since

the time of William III., but that it has never occurred to anyone that there was such a power until the counsel in the present case thought of it. That is a proposition which I do not accept. We have the fact that no court has ever made such an order. It seems to me impossible for us to say that this is a power which has been overlooked for 190 years. Even supposing that the words of the Act of Will. 3 could be so construed as to comprise such a power, I should not, after that lapse of time, be a party to inventing a new practice founded upon a new construction of the Act. Further, applications have from time to time been made to courts of equity to order specific performance of agreements to refer. Those applications must have been founded upon the statement that the common law courts could not make an order calling upon the other party to appoint an arbitrator; otherwise, they would have been at once dismissed upon that ground alone. A court of equity would only entertain such an application when there was no remedy at common law. They refused the application on the ground that, under the Act of Parliament, they had no power to grant them, just as the common law courts had no such power. Before the statute 9 & 10 Will. 3, c. 15, was passed, there was no power to make a submission to arbitration a rule of court, unless the submission was made in an action. Then came the Act of Parliament, which, by the preamble, is expressed to be "for promoting trade and rendering the awards of arbitrators the more effectual in all cases," &c. The object was to enable the parties to obtain the assistance of the court, after the award was made, in order to enforce it. For that purpose the Act provided that, whenever a submission to arbitration contained an agreement that it should be make a rule of court, such submission might be made a rule of court accordingly. But, for some time after the passing of that Act, any party to a submission could revoke it, even after it had been made a rule of court. That is totally inconsistent with the argument which we have heard as to what the effect was of making a submission a rule of court.

Then came the Act of Will. 4, which made the submission irrevocable if the parties had agreed that it should be made a rule of court, except by leave of the court. Before that Act, one of the parties could not revoke the agreement to refer; but he could revoke the authority of the particular arbitrator. After the Act, he could not revoke the submission to a particular arbitrator if it had been made a rule of court. If that was so up to the time of the passing of the Arbitration Act 1889, let us see if sect. 1 of that Act has made any alteration. By that section, "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge." Pausing there, that could not have meant that the agreement to refer was to be irrevocable, because it always was so. It means that the authority of the particular arbitrator is to be irrevocable. Then it goes on, "and shall have the same effect in all respects as if it had been made an order of court." That is to say, it is to have the same effect in all respects as it would have had before this Act if it had been made a rule of court. The effect of making a submission a rule of court was, as I have said, to enable the assistance of the court to be obtained in carrying on the reference after arbitrators had been appointed, and to enable the award of the arbitrators to be enforced as if it had been a judgment of the court. That being the construction of sect. 1 of the Act of 1889, if there was no power to order the appointment of an arbitrator in such a case as the present prior to the Act, there is no power to make such an order now. It has been argued that the court had power to attach a party to a submission that had been made a rule of court for refusing to appoint an arbitrator. Even if the court had such a power, it would not necessarily show that there was power to order the party to appoint, as has been done in this case. But the court had no such power. The only remedy was to sue the party who refused to appoint for breach of agreement; and that is the only remedy in the present case. I do not think that Lord Coleridge or Wills, J. thought that this power existed before the Act of 1889, as has been argued before us; but I think that they gave to that Act an effect beyond what it was intended to have.

Lindley, L.J.—This is an appeal from an order that the appellants within seven days from the date of the order should appoint an arbitrator in the terms of the submission to arbitration contained in the charter-party dated the 28th Nov. 1889. The question is, whether the court had any jurisdiction to make such an order. It seems to me to be clear that there is no precedent for any such order up to the year 1889, when the last Arbitration Act was passed. It is said that, although no precedent can be cited, such an order as this could have been made whenever a submission was made a rule of court under the Act of Will. 3. The argument is put in this way: that by making the submission a rule of court, the agreement to refer becomes a rule or order of the court and can be enforced like any other order. If that argument was sound, the court could have done a number of things that it has always refused to do. In the first place, I cannot see why, in that case, such an order as the one appealed from should never have been made before. Nor can I see why an order for specific performance should have been always refused in such a case. The truth is that, however the Act of Will. 3. might have been construed, it has not in fact been construed in the way suggested. The consequence of making a submission a rule of court under the Act of Will. 3 was, that a party who disobeyed the award might be attached; but, so far as I know, no order was ever made to attach a man for not appointing an arbitrator. Then what is the effect of the Arbitration Act 1889? Sects. 5 and 6 of that Act are not applicable to the present case. The omission is no doubt a blot in the Act, but we cannot help that. Sect. 1 provides that a submission shall have the same effect as if it had been made an order of court. But the effect of making a submission an order of court before the Act was not to give power to make such an order as has been made here. The appeal must therefore be allowed.

Bowen, L.J.—I am of the same opinion. Sect. 1 of the Arbitration Act 1889 provides that: "A

submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the court or a judge, and shall have the same effect in all respects as if it had been made an order of court." The word "submission" has been used with some inexactness in the cases and text-books, the same word having been used to express two different things. A general agreement to refer disputes to an arbitrator was always irrevocable. On the other hand, an agreement to refer a particular dispute to a particular arbitrator could be revoked by either of the parties before the Act of 3 & 4 Will. 4 was passed. The distinction between those two cases is pointed out by Mellish, L.J. in *Randall and Co.* v. *Thompson* (35 L. T. Rep. N. S. 193; 1 Q. B. Div. 748). After the Act of 3 & 4 Will. 4 a submission to the arbitration of a particular person was under some circumstances revocable, and under others not. The present Act makes such a submission not revocable under any circumstances, unless a contrary intention is expressed or the leave of the court is obtained; because, by the definition clause (sect. 27), "In this Act, unless the contrary intention appears, 'submission' means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not." The Act of 3 & 4 Will. 4, c. 42, s. 39, which, as I have said, first made a submission to a particular arbitrator irrevocable, in cases where there was a stipulation that the submission should be made a rule of court, recognises the distinction that I have referred to, because it directs that "the power and authority of any arbitrator . . . shall not be revocable" in such cases. The statute is dealing, not with the agreement to refer, which could never have been determined, but with the mandate to the particular arbitrator, which at that time could be determined in all cases, and it provides that for the future that mandate shall not be determinable if it has been made a rule of court.

Then the present Act provides that every submission is to have the same effect as if it had been made an order of court. It is argued that, by reason of that provision, a general agreement to refer disputes contained in a charter-party is to have the same effect as if it had been an order of the court. It seems to me that the emphatic word "made" cannot be left out of view in construing the section. It is an act of the parties which is referred to. But no act of the parties could ever give the court the power, upon the application of either of them, to make an order compelling the other to appoint an arbitrator. I can find no case in which a party has been held liable to attachment for non-performance of an agreement to nominate an arbitrator. The judgment of Willes, J. in *Re Rouse and Meier* (*ubi sup.*), which was referred to, shows only that one of the parties to a submission, who revokes it after it has been made a rule of court, is liable to attachment. The object of making a submission a rule of court was to give the court authority over the conduct of the arbitration after it has been entered upon, that is, after the arbitrators have been appointed. No case of specific performance has ever been heard of in the Court of Equity, and I do not think anyone ever heard of a man being attached for not appointing an arbitrator at common law.

Appeal allowed.

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*, agents for *C. A. M. Lightbound*, Liverpool.

Solicitors for the respondents, *Field, Roscoe, and Co.*, agents for *Bateson* and *Co.*, Liverpool.

Wednesday, Dec. 3, 1890.

(Before Lord Esher, M.R., Lopes and Kay, L.JJ.)

Wright and Son *v.* Lethbridge and others. (*a*)

Government dockyard—Damage—Barge moored at unsafe berth—Damage to barge—Respondeat superior—Invitation—Liability of Government officials in charge of dockyard.

A barge belonging to the plaintiffs was moored in Chatham Dockyard at a berth pointed out by the foreman, and the barge was there damaged. In an action to recover the amount of the damage from the Port Admiral, the Admiral Superintendent, and the Queen's Harbour Master of Chatham Dockyard, being the officials in charge of the dockyard, the jury found that the berth was unsafe, and gave a verdict for the plaintiffs.

Held, on further consideration, that there being no Act of Parliament and no Order in Council rendering the defendants liable, their liability must be decided on common law principles, and that the doctrine of respondeat superior does not apply in such a case, but the doctrine of invitation does apply, and as there was no evidence that the defendants invited the plaintiff to moor the barge where they did, the defendants were not liable, and judgment must be for them.

Further consideration, before Mathew, J.

The action was brought to recover damages for injuries to a barge belonging to the plaintiffs, the damage to the barge having occurred in Chatham Dockyard, where the barge was moored. The defendants in the action were the Admiral Superintendent, the Port Admiral, and the Queen's Harbour Master of Chatham Dockyard, and the Commander-in-Chief at Sheerness, these being the officers or officials in charge of the dockyard.

The case was tried before Mathew, J. and a jury, and, according to the evidence, the foreman, of the dockyard pointed out to the bargee, who was in charge of the barge, where he was to go and where the barge was to be moored; and the barge was moored at the berth pointed out by the foreman, though it did not appear that any of the defendants saw the barge.

At the trial of the action the jury found that the berth was unsafe, and they gave a verdict for the plaintiffs for the amount claimed, but the learned judge left the parties to move for judgment before him on further consideration.

Raikes, for the plaintiffs, now asked for judgment.—The jury have found here that the barge was injured, and that the injury arose from the barge being moored at an unsafe berth. They found expressly that the berth was unsafe, and that was the cause of the injury. The defendants are liable for the injury so caused, as it was their duty to point out to the plaintiffs the place where the barge was to be moored, and whether they acted in that respect by themselves, or by their

(*a*) Reported by W. Orr and A. H. Bittleston, Esqrs., Barristers-at-Law.

own foreman, whom they had placed in authority for that purpose, is immaterial, as in either case they are liable. By the Dockyard Ports Regulation Act 1865 (28 & 29 Vict. c. 125), and by an Order in Council, dated the 29th June 1888, made in pursuance of that Act, it was the duty of the defendants, as officials in charge of the dockyard, to determine the place where the barge should be moored; and if an unsafe position be indicated and if damage result, the defendants are liable for such damage.

A. T. Lawrence for the defendants.—The defendants here are not liable. An officer is not responsible for the acts of a subordinate, as it is laid down in Story on Agency, par. 313: "No action will ordinarily lie against an agent for the misfeasance, or for the negligence of those whom he has retained for the service of his principal, by his consent or authority, any more than it will lie against a servant who hires labourers for his master, at his request, for their acts; unless, indeed, in either case, the particular acts which occasion the damage are done by the orders or directions of such agent or servant. The action, under other circumstances, must be brought either against the principal or against the immediate actors in the wrong." That is an undoubted principle. The only person responsible is the wrongdoer himself, if he be a wrongdoer. There was no negligence proved here on anybody's part. The jury no doubt found that the berth was unsafe, but there is no case in the books which shows that that would render the defendants liable. The furthest the cases go is this, that, if a man holds himself out as a wharfinger, he is bound to take reasonable care that his berths are safe. The wharfinger carries on his business for reward for himself, which is different from the present case. The strongest case against me is *The Moorcock* (60 L. T. Rep. N. S. 654; 6 Asp. Mar. Law Cas. 373; 14 P. Div. 64), and there it was found that there was a want of care on the part of the wharfinger.

Raikes, in reply, referred to

The Calliope, 61 L. T. Rep. N. S. 656; 6 Asp. Mar. Law Cas. 440; 14 P. Div. 138.

Mathew, J.—This case must be decided on common law principles. It has been said that the defendants are liable under an Act of Parliament and an Order in Council; but there is no such Act of Parliament and no such Order in Council which make the defendants liable in such a case as this. The case must therefore be decided on common law principles. It seems to me that the doctrine of *respondeat superior* does not apply in such a case as the present, but the case turns on the doctrine of invitation, and the plaintiffs are remitted to the doctrine of invitation to establish their case against the defendants, and, as it seems to me, there is no evidence of any such invitation, no evidence that the plaintiffs were invited by the defendants to place their barge where it was placed. [His Lordship then shortly stated the facts.] Upon these facts the defendants are not responsible; if they had invited the plaintiff to moor their barge at an unsafe place they would have been responsible, but no such invitation was offered here, and my judgment therefore must be for the defendants.

Judgment for the defendants.

The plaintiffs appealed.

Dec. 3.—Dr. *Raikes* for the plaintiffs.

A. T. Lawrence, for the defendants, was not called upon.

The Court of Appeal held that, upon the facts, there was no evidence that the man who pointed out to the plaintiffs the place where the barge was to be moored was the servant of any of the defendants.

Appeal dismissed.

Solicitor for the plaintiffs, *Farlow* and *Jackson*.
Solicitors for the defendants, *Hare* and *Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, Dec. 5, 1890.

(Before Kekewich, J.)

Williamson *v.* Hine Brothers. (*a*)

"Managing owner"—Duties of—Principal and agent—Secret profit—Commission—Brokerage—Charters—Freights.

A shipbroker, who is also managing owner of a ship and receiving a fixed sum as remuneration for his services as such, is not entitled to make an extra profit for himself by commission or brokerage for procuring charters and freights, it being one of the duties of a "managing owner" to procure charters and freights.

Adjourned summons.

The plaintiff James Williamson, a co-owner of certain ships, claimed by this action a declaration that the defendants Hine Brothers, who were a firm of ship and insurance brokers and the managing owners of the ships, were not entitled to retain for their own benefit certain secret profits alleged to have been made by them, consisting of brokerage on freights and charters, commissions on insurance, premiums, and other commissions.

The plaintiff's case was, that the ships' accounts had been purposely so framed as to bear on the face of them that the defendants, as agents for the owners, had made no other profits whatever, except the management expenses shown therein.

The plaintiff further claimed an account of the alleged secret profits and payment accordingly.

It appeared that the defendants received as their remuneration for management a fixed sum for each ship.

The question therefore was, whether the managing owners of ships, who were also shipbrokers and were in receipt of a fixed sum as remuneration for their services as managing owners, were entitled to retain for their own benefit, independently of that fixed remuneration, commission or brokerage for procuring charters and freights.

The action came on for trial in Dec. 1889, when Kekewich, J. delivered judgment, which was afterwards affirmed by the Court of Appeal, dismissing the greater part of the plaintiff's claim, but his Lordship directed an inquiry whether it was within the duties of the defendants, as managing owners of the ships, or otherwise as agents of the plaintiff and the other owners of

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

the ships, to procure charters and freights for the ships; and, if so, an account of the sums received by the defendants, as such owners or agents, by way of commission, discounts, or returns of premiums, or brokerage in respect of such chartering or freightage.

That inquiry the chief clerk, by his certificate, dated the 13th Nov. 1890, answered in the affirmative.

The defendants thereupon took out a summons to vary the certificate by striking out that finding, and by answering the inquiry in the negative.

The plaintiff's evidence showed that managing owners who were also shipbrokers did generally, if not always, procure charters and freights either from their own houses, or from outside brokers.

The defendants' evidence did not throw much light upon the question whether it was part of the bargain that the managing owner should be remunerated for that particular work in addition to remuneration for work falling within his ordinary duties. On the other hand, there was evidence on behalf of the plaintiff that it was no part of the duty of a managing owner to make a charge for the performance of such duties as against the ship.

The summons was adjourned into court, and now came on to be heard.

J. Gorell Barnes, Q.C. and *Farwell*, for the defendants, in support of the summons.

Warmington, Q.C. and *Ashton Cross*, for the plaintiff, *contrà*.

KEKEWICH, J.—The principle upon which this inquiry is based is abundantly clear. A paid agent—I am not now concerned with an unpaid agent—is bound to discharge for a reasonable remuneration all those duties, multifarious or otherwise and onerous or otherwise, in his personal contemplation, which the terms of the agency cover. He must make his own bargain with his principal, and it is his duty to do all that that bargain entails, and to be content with his remuneration. If he is called upon to do anything outside the terms of his agency, he is entitled to make a special bargain, or he can decline to do it unless he is remunerated on a special footing, or he may do the work and, provided everything is fair and above board, he probably would be allowed some fair remuneration according to some known measurement of the value. But if he does anything within the terms of his agency, however uncompensated it may seem to him personally, he can neither charge for it in his account, nor can he secretly take any commission for it. That is reasonably obvious. Take such a case by way of illustration as that of an estate agent. An estate agent's duties might be extremely difficult to define. But, if the landowner requires him to see after the building of a cottage which involves the purchase of timber, it would be, I apprehend, the duty of the estate agent to purchase the timber on the best terms obtainable, and if he himself happens to be a timber merchant, he cannot supply the timber at a profit. If he deals with another timber merchant, who is disposed to give him a commission for the introduction of the business, he must either resign that commission, or, accepting it, give his employer, the landowner, the benefit of it. If, on the other hand, the landowner requires a carriage for his own use, and he asks the estate agent to get it for him, the estate agent certainly can employ himself, or somebody else, or, provided it is all fair and above board, he can, if he happens to be a carriage builder, sell a carriage to his employer. It must be, of course, fair and above board. That is outside the limits of his agency, and, as long as it is all done fairly, no one could complain of a man making a profit in his own trade which was not within the terms of his agency. I certainly had a strong impression at the trial that it was part of a managing owner's duty to procure charters and freights for the ship he managed. And that strong impression is confirmed by reference to some works, of more or less authority, but still works which I do not think I can regard as really binding on me. As the point was argued strongly the other day, I thought it right to direct this inquiry, and it was based on the principle that I have just named. Nobody ever doubted that managing owners were at liberty to employ brokers. That never came into question, although a deal of evidence is directed to prove that they can. Nor was it, so far as I remember or know, at all doubted, nor do I doubt now, that if the managing owner is also, as frequently happens, a shipbroker, he can so to speak employ himself, if it is fair and above board. But there must be no secret arrangement, and no secret profit. If he employs another broker of course he can pay, on behalf of the shipowner, the moneys necessary to pay that broker. If he employs himself, he, of course, can pay what is necessarily expended in making a bargain. But unless it is outside his duty as managing owner, he cannot make a profit if he employs himself; and he cannot receive a commission for his own benefit from the outside broker.

The evidence has gone a long way to prove what did not really require to be proved, that brokers must necessarily be employed. But, as I understand it, the evidence on both sides goes to show that managing owners, being also shipbrokers, do not only constantly but always procure charters and freights in one way or the other, that is, either through their own firm or from outside brokers. The defendants' evidence does not throw much light on the question which I wanted answered, whether really it is part of the bargain—what I may call the common law of the trade—that the managing owner is to be remunerated for that particular work, in addition to whatever other work falls within his ordinary duty. On the other hand, I have had a considerable amount of evidence on behalf of the plaintiff to show that it is not part of the duty of the managing owner to make any such charge as against the ship. The strength of the defendants' evidence is this, that it is generally done, not always, but so often as to lead one to assume that it is the prevailing custom, not in the legal sense of the word, but in common parlance. But I have nothing whatever before me to show that it is assented to in such a way that shipowners regard it really as part of the terms of the employment of managing owners. I have nothing to show that, when managing owners do charge, as they frequently do, this extra payment for procuring charters and freights, they do it with the assent of the particular shipowner, and

exclusive of a special bargain. If you have a special bargain, then of course the custom fails. I have not before me satisfactory evidence that, in the absence of a special bargain, there is a right on the part of the managing owner to charge this extra payment against the ship. I think that that being so, I must adopt the evidence on the other side, which I think is more weighty, and hold that it is one of the duties of the managing owners to procure charters, and that it is such a duty as comes within the scope of their duties as managing owners, in respect of which they are not entitled to make a charge, and in respect of which they are not entitled to debit the ship with a commission. If they receive a commission, I think it belongs to the shipowner as the principal, and cannot properly be received by the managing owners for their own benefit. That being so, I think the chief clerk has come to a proper conclusion; and that the certificate must stand.

Solicitor for the plaintiff, *H. Nelson Paisley*, agent for *Paisley* and *Falcon*, Workington.

Solicitor for the defendants, *J. R. Hobson*, agent for *Tyson* and *Hobson*, Maryport.

QUEEN'S BENCH DIVISION.

Monday, April 21, 1890.

(Before HUDDLESTON, B. and GRANTHAM, J.)

GOLDSMITH AND ANOTHER (apps.) *v.* SLATTERY (resp.). (*a*)

Thames Conservancy—River Thames—Barge over fifty tons burthen—Navigation of same—"One competent man on board and one man in addition" — One competent man and boy on board — The Thames Conservancy Act 1857 (20 & 21 *Vict. c. cxlvii.*)—*Bye-law* 16 *of the Thames Conservators—The Watermen's and Lightermen's Amendment Act* 1859 (22 & 23 *Vict. c. cxxxiii.*), *s.* 66—*Bye-law* 35 *made under this Act.*

Bye-law 16 *of the Thames Conservators, made under the powers of the Thames Conservancy Act* 1857, *provides that all barges, boats, lighters, and other craft navigating the river Thames shall when under way have at least one competent man constantly on board for the navigation and management thereof, and all such craft of above fifty tons burthen shall when under way have one man in addition on board to assist in the navigation of the same.*

Held, that "one man in addition" in this bye-law means one competent and skilful man in addition, and that where the craft is above fifty tons burthen, the bye-law requires two competent men on board, and is not satisfied by having on board one competent man, being a licensed lighterman, and a boy about sixteen years of age.

Perkins *v.* Gingell (50 *J. P.* 277) *followed.*

CASE stated by the metropolitan police magistrate sitting at the Greenwich Police-court.

An information was laid before the magistrate by the respondent, a licensed lighterman, whereby the appellants were charged for that they, being the owners of a barge called *Pimlico*, of more than fifty tons burthen, did, on the 10th Oct. 1889, unlawfully permit or suffer the said barge to be navigated on the river Thames, not having two able and skilful persons on board, contrary to 22 & 23 Vict. c. cxxxiii., sect. 66, and bye-law 35, made in pursuance thereof, and the 16th bye-law of the Conservators of the River Thames.

On the hearing of this information the appellants were convicted under the said 16th bye-law, and were adjudged to pay a fine or penalty of 20*s.* and 2*s.* costs, such penalty being authorised by the 72nd bye-law of the Conservators of the River Thames, which imposes a penalty not exceeding 5*l.* for any breach of those bye-laws.

On the 10th Oct. 1889 the barge—which was over fifty tons burthen, and of which the appellants were the owners—was being navigated in Limehouse Reach, under the charge and control of one Edward Davies, who was then a lighterman licensed or qualified to take charge of craft, within the meaning of sect. 66 of 22 & 23 Vict. c. cxxxiii. Davies was at that time being assisted in the navigation or working of the barge by a boy, who was about sixteen years of age, and who was not a licensed lighterman or waterman, or an apprentice. The barge at the time was bound for Aldershot, and Davies was looking out for and expecting a tug, which had been engaged to tow the barge up the river as far as Teddington Lock.

By sect. 80 of the Thames Watermen's and Lightermen's Act, the Court of Master Wardens and assistants are empowered to make such bye-laws as they think proper for the government and regulation of lightermen and watermen, so that the same bye-laws be not inconsistent with the laws of the kingdom, or with this Act, or with any of the bye-laws, rules, orders, or regulations made or to be made by the Conservators of the River Thames, under the authority of the Thames Conservancy Act 1857, or of any Act for the time being in force relating to the conservancy of the river Thames, and provided that no such bye-laws shall be of any validity until approved by the Conservators of the River Thames.

By bye-law 35, made in pursuance of the above section of the Watermen's and Lightermen's Act, on the 2nd July 1860, and approved by the Conservators of the River Thames, it is provided:

> That in all cases in which it may be necessary or requisite under such Act or these bye-laws, or under the bye-laws of the Conservators of the River Thames, that for the benefit of the public using the river in boats, barges, or vessels, two able and skilful persons shall be employed in the management and navigation of passenger boats at Gravesend, and in vessels of more than fifty tons burthen navigated on the river, one waterman or lighterman licensed in manner provided by such Act and bye-laws, or an apprentice licensed to take the sole charge of craft, and an apprentice actually bound in manner provided by such Act, but not a person entered on liking for the purpose of being bound, shall be deemed and taken to be able and skilful persons within the meaning of such Act and bye-laws.

By bye-law 16 of the Conservators of the River Thames, made in pursuance of the Thames Conservancy Act 1857, and of the other Acts for the time being in force relating to the Conservators of the River Thames, it is provided as follows:

> All barges, boats, lighters, and other craft navigating the river shall when under way have at least one competent man constantly on board for the navigation and management thereof, and all such craft of above fifty tons burthen shall when under way have one man in addition on board to assist in the navigation and management of the same, with the following exceptions;

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

when being towed by a steam-vessel, or when being moved to and fro between any vessels or places a distance not exceeding two hundred yards. In case of non-compliance with this present bye-law the harbour master may take charge of and remove such craft to such place as to such harbour master may seem fit, and the amount of the charges and expenses of taking charge thereof under such removal shall be recoverable from the owner or owners or master thereof, to the use of the conservators, as provided by the Thames Conservancy Act 1857.

It was contended before the magistrate, on behalf of the appellants, that sect. 66 of 22 & 23 Vict. c. cxxxiii., the above-mentioned bye-law 35, and the 16th bye-law of the Conservators of the River Thames, did not create or contain any offence such as that which was charged or alleged against the appellants. It was also contended that there had been no violation or breach of sect. 66 of 22 & 23 Vict. c. cxxxiii., of bye-law 35, or of bye-law 16 of the Thames Conservators; that the appellants had discharged the duty imposed upon them by sect. 66 of 22 & 23 Vict. c. cxxxiii., by putting a licensed lighterman or qualified apprentice in charge of the barge; that bye-law 35 did not create any offence at all, or impose any duty upon the appellants for breach of which an information could be laid before a magistrate; that if bye-law 35 did create an offence, or impose any duty upon the appellants so as to extend the operation of sect 66 of 22 & 23 Vict. c. cxxxiii., the said bye-law was bad; that the bye-laws of the Conservators of the River Thames were not embodied in or incorporated with the bye-laws made under and in pursuance of 22 & 23 Vict. c. cxxxiii.; and that if the appellants had committed a breach of or an offence contrary to bye-law 16 of the Conservators of the River Thames, such as was alleged in the information, the only persons who could (if anybody could) lay an information in respect of such breach or offence were the Conservators of the River Thames, and that there was no jurisdiction in the magistrate in the present case to convict the appellants under the 16th bye-law. It was also contended that the barge, being on its way to and bound for Aldershot, was not being worked or navigated within the limits of the Act 22 & 23 Vict. c. cxxxiii. The magistrate held that the respondent was competent to lay the information; that bye-law 35 applied to the matter, and that the offence was committed within the limits of both the Thames Watermen's and Lightermen's Act and the Thames Conservancy Act, and he found that the barge when under way did not have on board two competent men as required by the said bye-law 16 (see *Perkins* v. *Gingell*, 50 J. P. 277), and he accordingly convicted the appellants.

The question for the opinion of the court was, whether the learned magistrate was right in point of law in so holding, and in convicting the appellants.

Gaskell for the appellants.

Bucknill, Q.C. for the respondent.

HUDDLESTON, B.—In this case the magistrate has convicted, as he says himself, under the 16th bye-law of the Thames Conservators, and adjudged the defendant to pay a fine or penalty, and the costs, and that he has decided this under the Thames Conservators' bye-laws is clear by his reference to the power under which he makes the conviction, namely, the 72nd bye-law, and that is what his decision is. The first Act in point of time is the Thames Conservancy Act, and under the 16th bye-law it is provided that all barges, boats, lighters, and other like craft navigating the river shall, when under way, have at least one competent man constantly on board for the navigation and management thereof, and all such craft above fifty tons burthen shall, when under way, have one man in addition. Now, what does that mean—in addition? It means one competent man in addition, and that is clear, from the case of *Perkins* v. *Gingell* (*ubi sup.*). What was there on board of this vessel? Clearly there were not two competent men. There was one man and a boy. There are circumstances under which a boy may be considered a competent man; and when we are referred to the Watermen's Act, which was passed after this Act, for this Act was passed, as I understand, in 1857, and the Watermen's Act in 1859, two years afterwards—there is a clause which explains what is required for persons navigating vessels and barges of this description. [Reads bye-law 35.] The 16th bye-law of the Thames Conservators requires that, where the burthen of the vessel is above fifty tons, there shall be two competent persons, one person and another person, which must mean a competent person. The Watermen's Act suggests that those two competent persons may be one, either a licensed waterman, or an apprentice licensed to take sole charge of the craft, or an apprentice actually bound. For the protection of the public it may be that the man duly qualified and the boy as an apprentice are equally as good as the competent men required by the Thames Conservancy Act. In that case, looking at bye-law 72 of the Thames Conservators, under which the magistrate says he convicted, the magistrate says in substance, This is an offence you have committed under the Thames Conservancy Act, and I inflict upon you the penalty mentioned. Now, we have been referred by Mr. Gaskell to the 66th section, but I really do not know what that has to do with this particular case. It says the vessel shall be in charge of a lighterman licensed in manner before mentioned, or an apprentice qualified as herein mentioned. It does not say with reference to what tonnage. That, however, does not seem to have anything whatever to do with the question which we are considering here, namely, whether there has been an offence under the Thames Conservancy Act, explained as it is by that bye-law to which I referred of the Watermen's Act. Mr. Gaskell further argued that this does not apply to this case, because the 16th bye-law applies; that in cases of non-compliance the harbour master may take charge of and remove such craft. He has no doubt that power, but that does not necessarily say that that abrogates the effect of the 72nd bye-law, which provides for a penalty when there has been an infringement of the bye-laws. Under these circumstances, fortified by the authority of *Perkins* v. *Gingell* (*ubi sup.*), I have no doubt that the conviction was a right one, and therefore this appeal must be dismissed, with costs.

GRANTHAM, J.—I am of the same opinion.

Appeal dismissed.

Solicitors for the appellants, *Furlow* and *Jackson*.

Solicitor for the respondent, *C. O. Pook*.

Wednesday, June 11, 1890.

(Before Lord COLERIDGE, C.J. and WILLS, J.)

ROLLES *v.* NEWELL. (*a*)

The Watermen's and Lightermen's Amendment Act 1859 (22 *&* 23 *Vict. c. cxxxiii.*)—*Navigation of the River Thames.*

Bye-law 59 *made in pursuance of and for carrying into effect the Watermen's and Lightermen's Amendment Act* 1859 (22 *&* 23 *Vict. c. cxxxiii., s.* 80), *provides that no person in charge of or navigating any steamboat on the river shall tow craft exceeding six in number; the person so navigating shall incur a penalty.*

Held, that pulling into a dock, barges which have been collected together for the purpose of being pulled in, from the river into the dock, and some or all of the barges being collected together within the ambit of the dock, near a dolphin that belongs to the dock, was not within the word "navigating."

THIS was a case stated by the deputy police magistrate for the borough of West Ham, under the statutes 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, for the purpose of obtaining the opinion of the court on certain questions of law, which arose before him, when the appellant was summoned for having unlawfully towed at the same time more than six barges, to wit, thirty-one barges exceeding ten tons each, between Vauxhall Bridge and the entrance to the Victoria Docks on the river Thames, contrary to bye-law 59, made under the provisions of the Watermen's and Lightermen's Amendment Act 1859 (22 & 23 Vict. c. cxxxiii.).

The facts of the case so far as material were as follows:

The appellant was master in charge of and navigating a steam-tug on the river Thames between Vauxhall Bridge and the entrance to the Victoria Docks, and at the same time had in tow thirty-one barges exceeding ten tons each attached to the steam-tug. For the purpose of taking the barges into the docks they were made up in lines, four abreast along the shore, extending from the upper dolphin, at the entrance to the Victoria Docks, for a distance of 250 or 300 yards up the river. The appellant afterwards with the steam-tug towed the whole thirty-one barges at the same time four abreast into the Victoria Docks. The towing was conducted under the direction of the pier-head foreman of the London and St. Katherine Docks Company, acting under the orders of the dock master of his company.

By sect. 80 of the Watermen's and Lightermen's Amendment Act 1859, the Court of the Company of Watermen and Lightermen of the River Thames is empowered to make bye-laws, and alter bye-laws by the company for carrying into effect the provisions of that Act, providing the said bye-laws are not inconsistent with that Act.

No. 59 of these bye-laws provides:

That if any person when in charge of and navigating any steamboat on the river between Vauxhall Bridge and the entrance to the Victoria Docks shall at the same time tow more than six barges, lighters, or other craft exceeding ten tons each attached thereto, or if such barges, lighters, or other craft, shall not be well and sufficiently attached and fastened to such steamboat and to each other so that the same or either of them shall go adrift, the owners thereof, or the persons in charge of or navigating the same, shall incur a penalty not exceeding forty shillings.

The Victoria Docks are regulated by the London and St. Katherine's Docks Act 1864 (27 & 28 Vict. c. clxxviii.) and the Acts incorporated therewith.

Among the provisions thereby incorporated is sect. 46 of the Victoria (London) Docks Act 1853 (16 & 17 Vict. c. cxxxi.), which prescribes the docks, works, and a distance of 100 yards into the river from the entrance gates of the dock as the limits within which the powers of the dock master shall be exercised; and sect. 52 of the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27), which provides that the "harbour master (which term also includes dock master) may give directions . . . for regulating . . . the manner in which any vessel shall enter into the dock."

The dolphin, from which the appellant commenced to tow the barges into the dock, is less than 100 yards from the said entrance gate of the Victoria Docks, and is situated between the entrance to the said dock and Vauxhall Bridge. The appellant was summoned for unlawfully towing more than six barges at the same time in breach of bye-law 59 of the bye-laws made under the Watermen's and Lightermen's Amendment Act 1859.

It was contended on behalf of the appellant that he was not, under the circumstances, navigating the steamboat on the river between Vauxhall Bridge and the entrance to the Victoria Docks within the meaning of the said bye-law, and that if he was the said bye-law was invalid and inconsistent with the Watermen's and Lightermen's Amendment Act 1859, and certain other Acts of Parliament.

It was contended on behalf of the respondent that the barges were navigated and towed in such a manner and for such a distance as to constitute an offence against the said bye-law. The deputy police magistrate decided that the said bye-law was a valid one, and that the appellant had towed more than six barges exceeding ten tons each at one time within the prescribed limit, and that such towing was navigating by the appellant with the said steamboat, and accordingly convicted the appellant.

The questions for the court were: (1) whether the appellant had, under the circumstances, committed a breach of the said bye-law; (2) whether the said bye-law was valid. If the questions are answered in the affirmative, the conviction is to stand; if either of the said questions are answered in the negative, the conviction is to be quashed.

Cohen, Q.C. and *Avory* for the appellant.—The conviction must be quashed. The appellant was not navigating a steamboat on the river between Vauxhall Bridge and the entrance to the Victoria Docks within the true meaning of the bye-law; but he caused the steamboat to tow four or five barges abreast, thirty-one in all, making them fast to a dummy barge alongside the upper dolphin

(*a*) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

of the Victoria Dock entrance, for the purpose of taking the barges into the dock; they were then made up in line four abreast along the shore extending from the upper dolphin at the entrance to the docks, and then were towed into the docks. If they had been made up in batches of six the whole could not have been got in, or else the barge owner would have had to employ several steam-tugs. The bye-law does not apply to that portion of the river over which the towing took place. By sect. 100 of the Watermen's and Lightermen's Act 1859 nothing in that Act is to lessen the rights and privileges of any company of proprietors of any docks within the limits of the Act, or any of their officers. with respect to the navigation of the said docks, or in anywise relating thereto. That section keeps alive the jurisdiction which is given by sect. 52 of the Harbours, Docks, and Piers Clauses Act 1847 to the dock masters of the Victoria Docks. During the whole period of the towing the tug was within the limits of the jurisdiction of the dock master. If the bye-law was intended to operate within these limits, it would be inconsistent with sect. 52, and consequently would be *ultra vires*.

C. E. Jones for the respondent.—The steam-tug was being navigated, and the barges were being towed, in such a manner as to constitute such an offence under bye-law 59; even though the steamboat and some of the barges might have been at the mouth of the docks, and within the distance mentioned by the Docks Acts, yet a great many of the barges, exceeding six in number, were beyond that distance, and therefore on that part of the river where they could be said to be navigating. The case of *Elmore* v. *Hunter* (3 Asp. Mar. Law Cas. 555; 38 L. T. Rep. N. S. 179; 3 C. P. Div. 116) is an authority that the act of applying motive power by means of a steamboat or tug, is itself navigation within the meaning of these bye-laws. Bye-law 61 draws a clear distinction between the application of motive power from shore and from the water. By excepting the former from the term "navigation" it impliedly includes all forms of the latter.

Lord COLERIDGE, C.J. — I have in this case to construe a bye-law, a very reasonable bye-law, and one which, properly construed and confined within reasonable limits and reasonably interpreted, I have no doubt is within the powers of the authorities who made it to make. The words are these: "That if any person when in charge of and navigating any steamboat on the river between Vauxhall Bridge and the entrance to the Victoria Docks, shall at the same time tow more than six barges, lighters, or other craft exceeding ten tons each, attached thereto, or if such barges, lighters, or other craft shall not be well and sufficiently attached and fastened to such steamboat, and to each other, so that the same or either of them shall go adrift, the owner thereof, or the person in charge of or navigating the same, shall incur a penalty not exceeding forty shillings." Now, what is the fair construction of that? What seemed to me yesterday, and still seems to me now, is the difficulty to bring the facts of this case within any reasonable construction of the word "navigating." I know very well that one cannot pronounce an opinion with any confidence on this matter, because, when you are construing an Act of Parliament, or interpreting a particular phrase, even the most powerful minds will occasionally differ. Therefore, speaking humbly for myself, I never feel confident in giving an interpretation of an Act of Parliament, or a bye-law made under it. I think I have had occasion more than once to say that the same view was taken by an illustrious and stronger mind also, for I know that the late Master of the Rolls always said the same thing. He gave the best opinion he could. When he was interpreting a phrase for the first time he always felt that another mind might take another view. We have no authority on the point, and we must do the best we can.

Now, in construing this bye-law, I look and see what was really the practical object of it. The object of it was to prevent those dangers which were pointed out in the very able judgment of my brother Grove in *Elmore* v. *Hunter* (*ubi sup.*); that is to say, that there should not be a very long tail of barges towed by one motive power a great way removed from the tail of them, having no power over the tail. In an ordinary river—a river subject like every other river to gusts of wind, and so forth, it would be quite reasonable that the towing power should have no control over the barges if more than six are towed behind. So far as the ordinary navigation of the river is concerned, it seems to me to be a very sensible and reasonable bye-law, and one which every court who had to construe it would desire to support. Now, what was done here? Here is a great dock called Victoria Dock; there is a large entrance to that dock, and about 300 yards I think it is, or rather more, further down, there is what is called a dolphin stuck out into the middle of the river, and alongside of and against this dolphin, and kept in, so to say, by this dolphin, a large number of lighters (more than six I agree, and it is not disputed that they were more than ten tons each, which if they had been going along the stream of the Thames would most undoubtedly have been within the terms of this bye-law) were collected together, and the question was how they were to be got into the Victoria Dock. The harbour master allowed eighty of them—a great many of them—a great many more than six—ten times more than six, to be tugged into the basin of the dock, that were brought out from this mooring place, so to say. The beginning of them was within 100 yards of the gate of the dock, and the tail of them may have been a few yards over 300 yards—I do not know, I am sure; it is not material to consider within a few yards—but I will assume for the purposes of argument that it was a few yards beyond 300 yards. Now, first of all, is that navigating? There are other questions, questions about the jurisdiction of the harbour master, upon which, as at present advised, I should be against Mr. Jones; but I will not decide on that, because I have not heard him on it, and it would not be right to do so. I have not heard him on the question, and he might persuade me to adopt his view of it. Therefore I am only saying, as at present advised, that I think the jurisdiction of the harbour extended thus far; but I cannot myself see, within any fair construction of the words, that the man who was in command of the steam-tug was navigating a steamboat on the river between

Vauxhall Bridge and the entrance to the Victoria Docks. It seems to me, to do so would extend the term "navigating" far beyond what would be reasonable. It would be making a bye-law apply to cases for which there was no necessity for its applying. It would inflict a considerable—I do not say hardship, because that is not the question—but it would inflict a wholly unnecessary expense upon the owners of these lighters, and altogether it would render the bye-law (which in itself is an excellent and reasonable one in this particular case) a most unreasonable and a very oppressive one. Now that is a good reason, I should say, for permitting the construction. I agree, if you come to the strict construction of words, it is difficult to say, if these barges are on the Thames, and the steamboat is still on the Thames and not inside the dock, that one bit of the Thames is not like another bit of the Thames, and if this steamer is pulling a lot of barges behind it, it is then difficult to say in a strict sense, if it was an abstract question, whether the matter was one of academic discussion, that you could not apply the term "navigating" to it. I should have some little difficulty in saying you could not. I freely admit that, but that is not really the question of the construction of an Act of Parliament, or rather, I should say, of a bye-law which was made under the authority of an Act of Parliament. You must look no doubt at what is said, and at the words used, but you must look also at the words in the light of what it was intended in common sense and good judgment they should mean. You must look really at the common object of the thing to see what in a particular case a word of large significance does or does not mean. I quite admit that another mind might come to the conclusion that to pull a barge, or twenty or thirty barges, a few hundred yards out of the Thames into the dock where they are all collected together within the ambit, so to say, of a dock, by a dolphin that belongs to the dock, was within the word "navigating." I can conceive a man saying that, and I should use no disrespectful terms of a man who came to the conclusion that that was within the word "navigating." I do not come to that conclusion. It seems to me it is not "navigating;" that it is a very different thing, the pulling into the dock barges which have been collected together there for the purpose of being pulled in. Then as to the harbour master's authority, I will not decide which way it is; but I have a right to use it as an argument, I think, in this way: Either the harbour master's authority does extend over this 300 yards (and it being an authority given by Parliament it cannot be interfered with) or it does not. If it does not extend over this 300 yards, it leaves the question exactly where it was before; it leaves it to the fair construction of the bye-law itself. If the harbour master's power does extend over this 300 yards, then of course it is a strong argument to say, there being parliamentary power, it cannot be taken away by a bye-law. I do not decide that in this case.

There is only one matter which Mr. Jones very properly brought to our attention which is necessary to notice further; that is to say, I asked him yesterday this question: Supposing instead of this being a steamer it had been a steam-engine (as in many cases there is such a thing), and if instead of a hawser being attached to the tail of a steamer it had been attached to the revolving wheel of a steam-engine, and made to wind-up and to pull the barges in, could that be said to be "navigating." Mr. Jones says, "Well, perhaps not, but then that is provided for otherwise, and there is a separate mode of dealing with it." Well, that may be so; but it does not show that this nearly exactly equivalent of it is therefore navigating. Because a stationary engine and boats, or what not, are excluded from navigation, it does not show that this is within it—not at all, the argument is not complete. And although it is an argument that is fair to use for the purpose of showing that the particular instance as put by the court is not a crucial instance because it is otherwise provided for, yet it does not at all show that something which is exactly equivalent to that which is otherwise provided for is within the bye-law under discussion. I think therefore that Mr. Jones has failed to satisfy me. Mr. Jones has done all he can, and I do not say that the matter is entirely free from difficulty. I always like, as I say, in interpreting a particular phrase, to look at these matters in the light of good sense and apply one's judgment and experience to these things. I do not think that this bye-law was meant to include such a dragging of barges into a dock, as there was in this case, by the term "navigating the Thames." It does not seem to me to be reasonably within the words "navigating the Thames"—navigating a steamboat on the river. It does not seem to me to fall fairly within that, and for that reason I think the magistrate was wrong, and that his decision must be reversed.

WILLS, J.—I am of the same opinion, and entirely for the same reasons.

Solicitors: for the appellants, *J. A.* and *H. E. Farnfield*; for respondent, *C. Sharman*.

Nov. 14 *and* 15, 1890.

(Before CHARLES, J.)

SMITH, HILL, AND CO. *v.* PYMAN, BELL, AND CO. (*a*)

Charter-party — Advanced freight — Clause in charter-party "one-third freight, if required, to be advanced, less 3 per cent. for interest and insurance" — Requirement made after loss of vessel—Shipowner's right to recover advanced freight after loss of vessel.

A charter-party contained the clause, "one-third freight, if required, to be advanced, less 3 per cent. for interest and insurance." The vessel sailed in the morning, and about an hour afterwards took the ground, becoming a total wreck in the afternoon. Soon afterwards charterers' bills of lading were presented to the owners' agents for signature, and the advanced freight was demanded, but was refused on the ground that the vessel had become a total loss. On a previous occasion between the same parties bills of lading were presented and advanced freight demanded and paid after the vessel had sailed. In an action by the shipowners to recover the advanced freight:

Held, that, as advanced freight is a payment made for taking the goods on board, and for the undertaking to carry them, and not for the safe car-

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

riage of them, the shipowners were entitled to recover the same, although the requirement was not made until after the vessel had become a total loss.

FURTHER CONSIDERATION of a case tried before Charles, J., at the last Leeds Assizes in August.

The action was brought to recover a sum of 245*l.* for "advanced freight," alleged to be due from the defendants to the plaintiffs under the following circumstances:

The defendants had chartered the plaintiffs' vessel, the *Gamma*, to carry a cargo of coals from Hull to Odessa. The charter-party, which was in the usual form, was dated the 30th Nov. 1888, and contained the provisions that the freight was to be paid on unloading and right delivery of the cargo, in cash at current exchange; that the captain or owners should sign charterers' bills of lading, and at the end of the charter-party there was the following clause, which was the material clause in the present case, namely, "one-third of the freight, if required, to be advanced, less 3 per cent. for interest and insurance." The vessel left Hull on the morning of the 19th Dec., and at the time of so leaving bills of lading had neither been presented nor signed. Soon afterwards, on the same morning, the vessel grounded on the Middle Bank in the Humber, and a little before noon became a wreck. Late in the afternoon of the same day the defendants presented the bill of lading to the plaintiffs at their offices, and the plaintiffs then demanded the advanced freight, saying that the payment of advanced freight was in consideration of the goods being received on board, and had no reference to the results of the voyage, and that therefore such advanced freight was payable to the plaintiffs, whether the vessel was lost at the time they required it or not. It was proved in evidence that, on a previous occasion, in a transaction between the same parties, where the charter-party was the same as in the present case, bills of lading had been presented after the vessel had sailed, and advanced freight required and paid.

The question argued now was, whether the plaintiffs were entitled to advanced freight under the circumstances; or whether the right to advanced freight was gone because there was a total loss of the vessel, and such advanced freight was not demanded until after the loss.

Cyril Dodd, Q.C. (*Montague Lush* with him) for the plaintiffs.—The real legal consideration for the payment of advanced freight is the receipt of the goods on board, and it follows from that, that when the goods are placed on board, then the advanced freight is due and payable. When once advanced freight has been paid, it cannot be recovered back, whatever happens to the vessel; and when once it is agreed to be paid, you can recover it, although the vessel has become a loss. In *Byrne* v. *Schiller* (23 L. T. Rep. N. S. 741; L. Rep. 6 Ex. 20; affirmed on appeal, 25 L. T. Rep. N. S. 211; 1 Asp. Mar. Law. Cas. 111; L. Rep. 6 Ex. 319) the Court of Exchequer Chamber held, that payments made in advance on account of freight cannot be reovered back, although the vessel is lost; it follows, therefore, that the right to recover advanced freight is totally independent of the loss of the vessel, or the failure of the voyage. The principle is, that when once there is advanced freight to be paid, then, whatever happens to the ship, that freight has to be paid; as Cockburn, C.J. said in that case, "It is settled that by the law of England a payment made in advance on account of freight cannot be recovered back in the event of the goods being lost, and the freight therefore not becoming payable." In *Andrew* v. *Moorhouse* (5 Taunt. 435) no doubt it was held that advanced freight was not recoverable; but that case was decided upon the ground that there were facts which would show an intention of the parties that it should not be paid, so that that case is no authority against the payment in the present case. In *Kirchner* v. *Venus* (12 Moore's P. C. Cases, 361) it was held that advanced freight is a payment made in consideration of taking the goods on board; and Lord Kingsdown, in delivering the considered judgment of the Privy Council, said, at p. 390: "But a sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, does not acquire the legal character of freight because it is described under that name in a bill of lading, nor does it acquire the legal incidents of freight. It is in effect money to be paid for taking the goods on board, and undertaking to carry, and not for carrying them." So Lord Tenterden, C.J., in delivering the considered judgment of the Court in *Winter* v. *Haldimand* (2 B. & Ad., at p. 659), says, speaking of advanced freight, "Such a payment is not properly freight, but the price of the privilege of putting the goods on board the ship, in order to have the opportunity of their being conveyed to the place of her destination;" and in *De Silvale* v. *Kendall* (4 M. & S. 37), which was an action brought by the charterer to recover back money paid in advance, it was held that, when money had been paid in respect of advanced freight, it could not be recovered back. The whole question was very fully considered before the House of Lords in the case of *Allison* v. *Bristol Marine Insurance Company* (34 L. T. Rep. N. S. 809; 3 Asp. Mar. Law Cas. 178; 1 App. Cas. 209), and there Brett, J. reviewed the whole of the cases, and pointed out the difference between advanced freight and ordinary freight, and the House of Lords there decided that the law is as I have already stated. Blackburn, J. said, at p. 229 (1 App. Cas.): "It" (that is advanced freight) "is in effect money to be paid for taking the goods on board and undertaking to carry and not for carrying them. This, which I have taken with a slight alteration from the judgment of Lord Kingsdown in *Kirchner* v. *Venus* (*ubi sup.*), in my opinion, is an accurate statement of the law." Up to this point the authorities are absolutely conclusive on the point in my favour. Then come the words in the charter-party, "if required." Now, how long have we got the option of "requiring" this payment? Until the proper time has come when we have to make our option; that is, when the documents are brought for signature in the ordinary course of business. We have got the option when the charterer brings up the documents and the bill of lading—probably so—certainly to the time when, according to commercial usage, this ought to have been done. The only difficulty in the case is as to the words "if required," but that does not make any real difference, as this advanced

freight was required. This payment is not freight at all; the moment the agreement is made the payment ceases to be freight and ceases to be payable in consideration of carrying the goods; it is not freight, but a payment made in consideration of taking the goods on board. We have the fact that on the previous voyage a course similar to the present was pursued, and the payment made, and that was the course of business between the parties. On a true construction of this charter-party this advanced freight is payable independently of the loss of the vessel. He referred to

Dufourcet v. *Bishop*, 56 L. T. Rep. N. S. 633; 6 Asp. Mar. Law Cas. 109; 18 Q. B. Div. 373.

Lawson Walton, Q.C. (*Robson* with him) for the defendants.—The short point here is whether, under the circumstances of this charter-party, advanced freight can be claimed after the loss of the vessel. I submit that there ought to be a further qualification read into the clause that advanced freight is to be paid if required, namely, that advanced freight cannot be required after the object of the voyage is frustrated, and the vessel disabled from earning freight. The reasonable construction of the clause itself requires that the option should be exercised within a reasonable time. The sinking of the ship makes it evident that no freight will ever be paid for carrying the goods, and that therefore no advanced freight can ever be paid or required. This charter-party is so framed as to leave the shipowner a choice whether he will require advanced freight or not, and he has the whole of the voyage to make up his mind; this shows that it is an obligation to pay it only while the voyage lasts; here the voyage was at an end before the demand was made. One conclusive test in the matter is this: the requirement cannot be made after we have lost the right to insure; the clause in the charter-party ends with the words "less interest and insurance." That shows that the demand for this advanced freight must be made while there is still time to effect an insurance, that is to say, before the loss of the vessel. The possibility of insuring the ship was at an end when the requirement was made. When the shipowners elected to demand this advanced freight our answer was that it was too late, that we were not in a position to insure the money, and that consequently our obligation was put an end to by the clause in the charter-party, and that the shipowners might have declined to go to sea until the bill of lading was signed and the advanced freight paid. [CHARLES, J.—Your argument as to insurance would apply to any of the cases cited.] No; in those cases the money was due before the ship sailed. The authorities establish this principle, that advanced freight in this country cannot be got back, and for this reason that there is an implied agreement that it shall not be got back; it cannot be got back even though the vessel is lost, because, if it could be got back, it would be a loan and therefore not insurable. This charter-party ought to be construed according to our construction, for the effect of deciding for the plaintiffs would be that they would be paid twice over for this sum, as they would get from the defendants the sum advanced, and also get from the underwriter the sum for which it was insured. The arrangement under this charter-party could not be carried out after the vessel was lost, and therefore on the face of the charter-party it is clear that the parties intended that the arrangement, if carried out at all, should be carried out before the loss of the vessel. This is an advance of freight, an advance in respect of freight, in respect of freight being earned, and therefore when no freight is earned there can be no advance in respect of it. The next point is, that the loss of the ship terminates the peril, and the enterprise is at an end, and the charterer is no longer bound to pay; that that is so is established by several authorities. In *Jackson* v. *The Union Marine Insurance Company* (31 L. T. Rep. N. S. 789; 2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125) the Court of Exchequer Chamber, affirming the decision of the Court of Common Pleas, held that, in circumstances somewhat similar to the present, there was a complete end of the voyage, entitling both parties to consider themselves released from their obligations under the charter-party. [CHARLES, J.—That must be too broadly stated, as, if the loss terminated the obligation to pay, that would be inconsistent with the cases which allow advanced freight even after the loss of the vessel.] No, as in those cases the obligation to pay the advanced freight had already accrued; it was already a *chose in action*. When the earning of freight is impossible, any advance in respect of it is a misdescription; on the ship going down the whole contract on both sides is at an end. In the case of *The Kathleen* (31 L. T. Rep. N. S. 204; 2 Asp. Mar. Law Cas. 367; L. Rep. 4 A. & E. 269) Sir R. Phillimore held that, in the absence of any agreement to pay *pro ratâ* freight, the obligation to pay freight at all was put an end to by the loss of the ship. He also referred to

The Cito, 45 L. T. Rep. N. S. 663; 4 Asp. Mar. Law Cas. 468; 7 P. Div. 5.

CHARLES, J.—In this case the plaintiffs seek to recover from the defendants the sum of 245*l*., being one-third advanced freight on the screw-steamship *Gamma*, payable by defendants to plaintiffs under a charter-party dated 30th Nov. 1888, less 3 per cent. for interest and insurance. The facts were very short and they were not in dispute, but they raise a question of law on the true construction of the charter-party. The plaintiffs are the owners of this vessel, and she was chartered by the defendants to proceed from Hull to Odessa, with a cargo of coal; she was loaded with coal, and upon the 19th Dec. she sailed from Hull about half-past six in the morning. Three-quarters of an hour after she sailed she took the ground on some sands called the Middle Sands, and at four o'clock the same afternoon, if not earlier, she broke her back, and this was an end of the voyage so far as the carriage of the cargo was concerned. Certainly, after the voyage had come to an end, and the purpose of the voyage had been frustrated by the stranding of the *Gamma* and the injury which she sustained, charterers' bills of lading were brought to the owners' agents with the colliery invoices of the coal, and thereupon one-third freight in advance was asked for, and payment was refused, upon the ground that the vessel had become a wreck, and therefore the adventure having come to an end the whole commercial object of the speculation was frustrated, and no obligation rested on the charterers to pay the advanced freight.

Now, with regard to the language of the charter-party itself, the clause with reference to freight is in these words: "The freight to be paid on unloading and right delivery of the cargo, in cash at current exchange; one-third freight, if required, to be advanced, less 3 per cent. for interest and insurance." The practice of the previous voyage was proved before me, and, according to the practice of the previous voyage, and upon the previous voyage, the requirement was made upon the presentation of the bills of lading. That was what was done upon the prior occasion. An admission was made at the trial before me at Leeds, that on the previous voyage bills of lading were brought after the vessel had sailed, and the advanced freight was then required to be paid. Bills of lading were brought after the vessel had sailed. That is possible under this charter-party, because the charterers' bills of lading are to be signed by the captain or the owners, and therefore it is immaterial whether they are brought before or after the vessel sailed. It was also proved that in the present case the bills of lading were made out in the ordinary course without delay, and that the colliery invoices were also made out in the usual manner, and it seems to me that there was nothing abnormal in the period at which this requirement was made. The owner could scarcely make the requirement till the charterer told him the amount of the whole freight. It was possible for him to do it, because he himself probably had someone to check the cargo as it was being shipped; and further, it was admitted at the trial that at the docks a record was kept of the weight shipped, and that record would have enabled the plaintiffs no doubt to find out the amount and weight shipped if they had inquired at the docks, and they might have found that out on the morning of the 18th that is to say before the loss of the vessel had occurred. However, it was admitted at the trial that it was neither the usual nor ordinary course of business to make any such application at the docks. Therefore the matter really stands thus: that there was nothing unusual or abnormal in the mode in which this requirement was made. Quite the contrary; it was made in accordance with what had been done on the previous occasion, and I gather, not from the admission, but from the evidence in the case, that the usual course was adopted between the parties—the course which was usual at the port.

But now comes the difficulty. Undoubtedly at the time the requirement was made the vessel had become a wreck, and the whole voyage was frustrated, and it is contended, that being so, that the requirement cannot be lawfully made, and that argument was enforced by the terms of the advance freight clause—that advance freight, if required, was to be paid. The freight, if required, was to be advanced, less 3 per cent. for interest and insurance, indicating, as it was argued, that clearly the requirement must be made when the subject-matter of the insurance is still in existence. Now, in order to arrive at a solution of this question, it is necessary to ask oneself what advanced freight is. Freight of course is a payment made for the safe carriage of the goods. There is no doubt about that. But advance freight, although in one sense it is freight, being a portion of the money which is to be paid for that safe carriage, it has been decided over and over again is a payment made for taking the goods on board, and for the undertaking to carry, not for the safe carriage of them, and that being the nature of advance freight it has been held, first, that if it had been paid in advance it cannot be got back again, even although the vessel is lost; secondly, that if there had been an absolute obligation to pay it, in other words, an absolute agreement to pay advance freight, that agreement can be put in action, although before the action the vessel was lost. Now those two propositions of law really go a very long way, if not the whole way, to decide the case, and the only difficulty that I have felt about it is, that in the present case the charter-party does not impose upon the charterer an absolute obligation to pay advance freight, but only to pay advance freight if required. The argument is that, inasmuch as a deduction is to be made for interest and insurance, the requirement must be made before the loss. That certainly is a very ingenious way of putting the case, but I am unable upon reflection to assent to it. It seems to me that here there was at the time of the entry into this bargain this obligation to pay advance freight if required. What right have I, having regard to the nature of advance freight, and remembering that it is money paid not for safe carriage, but merely for the undertaking to carry, to read into that clause the words "if required before the loss of the vessel?" The only possible justification for my doing so is to be found in the clause as to deduction for insurance; but it seems to me upon reflection only to mean this: that, inasmuch as the owner, who primarily would be the person who would insure the whole freight, would not want to insure so much of that freight as he gets safely into his pocket, he is to make a deduction when he gets the money into his pocket of so much money as it would have cost him to insure it, and the deduction does not necessarily mean that, at the time the requirement is made, the subject-matter of the insurance is still to be in existence. All it means is this: the owner being relieved from the necessity of insuring the whole freight inasmuch as the one-third paid to him is no longer a risk, he is to make a deduction of an amount equivalent to the amount he would have had to spend himself had none of the freight been advanced to him. In other words, that it is in the nature of a discount which he makes in order to get safely home the advance freight which he demands. That appears to me to give full effect to the construction of the words "less 3 per cent. for interest and insurance," and if it does, then there is simply the clause to be read as it stands—"one-third freight, if required, to be advanced," and there is nothing to show that that requirement must be made before the loss of the vessel itself. The case therefore really appears to me to be covered by the authorities. It is clear that advance freight is not money which is paid in any respect for safe carriage, but only for the loading of the goods and the undertaking to carry, and it is clear that the advanced freight cannot be recovered if it be paid, although the ship is lost. It is also clear that unqualified obligation to pay advanced freight can be insisted upon, even although the vessel be lost before it is insisted upon; and so

here I think that the claim may be made to pay the advanced freight, although the vessel be lost before the requirement in fact was made. That entitles the plaintiffs to my judgment for 245*l.*, and, as there is a counter-claim for 35*l.* 9*s.* 2*d.*, admitted by the reply, the judgment will be for the plaintiffs for 245*l.* and the costs of the claim, and judgment for the defendants, without costs, for 35*l.* 9*s.* 2*d.* on the counter-claim, and execution will issue for the balance.

Judgment for the plaintiffs.

Solicitors for the plaintiffs, *Pritchard* and *Sons*, for *J.* and *T. W. Hearfield* and *Lambert*, Hull.

Solicitors for the defendants, *Maples, Teesdale*, and *Co.*, for *Lietch, Dodd, Bramwell*, and *Bell*, Newcastle-upon-Tyne.

HOUSE OF LORDS.

Dec. 2, 4, *and* 5, 1890.

(Before Lords HERSCHELL, WATSON, BRAMWELL, and MORRIS.)

OWNERS OF THE VINDOMORA *v.* LAMB.

THE VINDOMORA. (*a*)

APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Fog—Alteration of helm.

Although where two vessels are approaching one another in a fog without sufficient indication to justify them in acting with their helm, neither vessel ought to alter her course, yet there is no hard-and-fast rule that a vessel hearing only a single whistle is never justified in manœuvring, and must be held to blame if she does so, but each case must be determined according to its own circumstances.

Those on board the H. in a dense fog heard the whistle of the V. about three and a half or four points on their starboard bow, distant apparently from half a mile to a mile, and thereupon starboarded their helm. A collision took place, the V. striking the H. on the starboard quarter.

Held, that the H. was not to blame for the collision.

Judgment of the court below affirmed.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Cotton and Lindley, L.JJ.), reported in 6 Asp. Mar. Law Cas. 438; 61 L. T. Rep. N. S. 655; and 14 P. Div. 172, who had varied a judgment of Butt, J.

The action was brought by the respondents, the owners of the steamship *Haswell*, in respect of a collision which occurred between that vessel and the appellants' steamship the *Vindomora* in a dense fog off Whitby on the 21st Sept. 1888.

The facts appear from the reports in the court below, and from the judgment of Lord Herschell.

Butt, J. found both vessels to blame, but the Court of Appeal found the *Vindomora* alone to blame.

The owners of the *Vindomora* appealed.

Sir *W. Phillimore* and *J. P. Aspinall* appeared for the appellants.

The *Attorney-General* (Sir R. Webster, Q.C.), Sir *C. Hall*, Q.C., and *Pyke*, who appeared for the respondents, were not called upon to address the House.

At the conclusion of the arguments for the appellants, their Lordships gave judgment as follows:—

Lord HERSCHELL.—My Lords: This appeal arises in an action brought by the owners of the *Haswell* against the owners of the *Vindomora* to recover damages in respect of a collision between those two vessels which took place in the North Sea, off Whitby, on the evening of the 21st Sept. 1888. The result of the collision was that the *Vindomora* cut into the *Haswell*, and the *Haswell* sank, the *Vindomora* herself sustaining some slight damage. The learned judge who tried the case in the Admiralty Division came to the conclusion that beyond all question the *Vindomora* was to blame. He found that it was clear that she was wrongly navigated, that she ported in an unjustifiable and reckless manner, and that her speed had not been reduced in the manner which the rules of navigation demanded under the circumstances which existed in this case. From that judgment there was no appeal, and therefore before the Court of Appeal, as before your Lordships' House also, it must be taken as undisputed that the *Vindomora* was to blame. But then arose the question whether the *Haswell* was also to blame. The learned judge of the Admiralty Division held that the *Haswell* was to blame, upon the ground that she starboarded her helm at an earlier period than was admitted by her witnesses. The evidence of the witnesses called for the *Haswell* was that she had not starboarded until very shortly before the accident. It is admitted that at that time hard-a-starboarding was the proper manœuvre. If it were true that she had not so manœuvred at an early period, no blame could possibly be imputed to her. But it was said that the *Haswell*, although she had properly diminished her speed so as to be going dead slow, had in truth wrongly performed the manœuvre of starboarding. The evidence of the witnesses on board the *Haswell*, as I have said, was directly the contrary, but the conclusion reached by the judge of the Admiralty Division was derived from a consideration of the nature of the collision between the two vessels; that is to say, the position of the vessels respectively at the time of the collision; the view taken being that that was more probably accounted for by some starboarding on the part of the *Haswell* and porting on the part of the *Vindomora* than by the porting of the *Vindomora* alone. And the learned judge relied further upon the circumstance that indications were given by the whistle on board the *Haswell*, which tended to show that she must have been at the time under a starboard helm. The view taken by the learned judge of the Admiralty Division appears to have been this: that if there was any appreciable starboarding on the part of the *Haswell* at that earlier period, so that the collision, such as it was, resulted in part from that starboarding and in part from the porting of the *Vindomora*, then the *Haswell* must be held to blame; and upon that ground accordingly he found both the vessels to blame.

From that judgment the case went on appeal to the Court of Appeal, the only question being, was the *Haswell* to be held in any respect to blame. Now it was argued by Sir Walter Phillimore on behalf of the appellants that, if once the conclusion was reached that there was any appreciable starboarding on the part of the *Haswell*

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

before those on board her knew the direction in which the *Vindomora* was going, the *Haswell* must be held to blame, because, he contended, there was a rule of practice always acted upon in the Admiralty Court, that where two vessels were approaching one another in a fog, neither vessel had a right to manœuvre in any way until she had a clear and unmistakable indication as to the course upon which the other vessel was proceeding or its relative position to her own. I do not think the cases which the learned counsel cited support the proposition that there is any such absolute hard-and-fast rule as that a vessel hearing only the indication of a single whistle from the other vessel is never justified in manœuvring, and must always be held to blame if she does manœuvre. I should be very sorry to say anything to indicate any dissent from the view that where two vessels are approaching one another in a fog without any sufficient indication to justify action, neither vessel would be justified in altering her course. I think the proper steps to be taken in such a case would be for each vessel to keep the course on which she was proceeding. But, although I entirely agree that that is a good general rule to lay down, yet that rule must nevertheless be interpreted in each case according to the circumstances of that case. It is impossible to lay down an abstract rule of that description which shall be applicable to all circumstances, to all parts of the seas, and to all positions of vessels. I do not understand the Court of Appeal to have thrown any doubt upon the suggestion that it is the general rule, and that in each particular case you must look to see what the circumstances were, and inquire in each particular case, were there circumstances existing which justified the manœuvre executed, or which prevented that manœuvre from being a wrong manœuvre. Now, when once you have reached the point that there is no arbitrary hard-and-fast rule, but that each case must be determined by a reference to the circumstances of the case, then we have to look and see at what conclusion the Court of Appeal arrived. The Court of Appeal, assisted by nautical assessors, arrived at the conclusion that, even assuming (they did not determine the point one way or the other) that there was some starboarding on the part of the *Haswell* at an earlier period than her witnesses admitted, yet nevertheless that manœuvre was not a wrong one. That question was distinctly put to the nautical assessors. They were asked this: "Taking the vessels to be in the part of the sea where they were, taking into account that which would be known as to the natural course of the vessels at that place, that which would be known as to the lay of the coast, and taking it that the whistle of the *Vindomora* was heard about as broad on the starboard bow as the witnesses of the *Haswell* allege, was there anything wrong in the *Haswell* starboarding?" To that question the nautical assessors answered, without hesitation, "Nothing." Now your Lordships are asked to disregard that finding and to overrule it. It is said, first, that the assumption upon which the question was founded was an assumption that ought not to have been made; and next, that the answer was wrong. I think your Lordships would hesitate much, unassisted as you are here by any nautical experience, before you arrived at the conclusion that the answer thus given by the nautical assessors upon a pure question of seamanship was an answer which you would pronounce to be erroneous; and therefore I for my part do not hesitate to say that it seems to me to be impossible for us, assuming the facts to have been properly put before them, to do other than follow the conclusion at which on a point of seamanship the nautical assessors arrived.

But then it is said that the question put to them was founded upon an assumption of facts which were not facts. No doubt, if that could be established, it would get rid of the importance and value of the nautical assessors' finding. That depends, and as I think from what I have heard solely depends, upon whether the Master of the Rolls was justified in coming to the conclusion, and assuming therefore in his question to the nautical assessors, that those on board the *Haswell* did hear the whistle of the *Vindomora* some three and a half to four points on the starboard bow. As regards that point the witnesses on board the *Haswell* state that they did so hear the whistle. Scarcely a question was put to them in cross-examination to throw a doubt upon the statement which they so made. It seems to me almost to have been accepted. There is certainly nothing in the findings in the court below by Butt, J. to justify the conclusion that he thought the statement on that point erroneous; on the contrary, he practically accepts as reasonable and consistent the whole of the story of the *Haswell* except as to the period of time at which she began to starboard. Then is there anything in the probabilities of the case to render it inconceivable that the witnesses on board the *Haswell* did hear the whistle of the *Vindomora* as they describe? I have listened with attention to the zealous and ingenious arguments which have been presented to your Lordships, but they have not infused into my mind any conviction that the story told is either an impossible or an improbable one. It seems to me that the suggested impossibility or improbability depends very much upon your accepting on certain points the story told by those on board the *Vindomora*; but, inasmuch as I am not disposed to place any reliance or to act in the least upon anything said by the witnesses on board the *Vindomora* after what the learned judge said in the court below as well as after the discussion of their evidence here, it seems to me that you cannot assume any of their statements to be facts for the purpose of showing that this story is inconceivable or improbable. Under these circumstances, I do not think it has been made out that the question put to the nautical assessors by the learned judge was founded upon any misconception of the evidence or upon any erroneous conclusion as to its effect. That being so, I am prepared to recommend to your Lordships to act upon that finding, and to come to the conclusion that it is not made out that the *Haswell* in this case acted wrongly. The *Vindomora* beyond all question broke the statutory rule. The utmost that can be said in the case of the *Haswell* is, that one has to consider whether there was an act or a neglect which would not have been done or omitted by a skilful and prudent seaman. It seems to me that that question is completely answered by the finding of the Court of Appeal, from which I am not disposed to differ.

Another question arises. Even assuming that

there was some improper starboarding on the part of the *Haswell*, it is necessary for the *Vindomora* to establish that that contributed or conduced to the accident, which I understand to mean this, that but for the starboarding by those on board the *Haswell* the accident would not have taken place. If there would equally have been a collision between the two vessels although the *Haswell* had not starboarded, then, although the collision might not have been exactly in the same place or the two vessels might not have struck one another in the same way, it cannot be said that the case against the *Haswell* has been made out. I do not think this proposition was denied by the learned counsel for the appellants, except that it was attempted to shift the onus of showing that from the *Vindomora* to the *Haswell*. I will not enter into the question now upon whom the onus lay, whether it was for the *Vindomora* to show that it was the act of the *Haswell* and that the collision would not have occurred if the *Haswell* had not so manœuvred, or whether it was for the *Haswell* to excuse herself in that way; because what we have to deal with is a determination by the nautical gentlemen, or rather a determination of the court on the answer of the nautical gentlemen to the question, "Did the starboarding of the *Haswell* in your opinion conduce to this collision?" and their answer is, "No, not at all." If that be the case, it has not been established that the *Haswell* is to blame for this collision so that she is to be held jointly responsible for it with the *Vindomora*. Your Lordships have heard a good deal of discussion upon that point, but I have myself heard nothing which places me in a position to pronounce an opinion upon that point, which is a point at least closely connected with nautical knowledge and skill, and to say that that finding was wrong, and that there would have been no collision but for the *Haswell's* starboarding as and when she did. Under these circumstances I submit that the judgment of the Court of Appeal should be affirmed, and this appeal dismissed with costs, and I move your Lordships accordingly.

Lord WATSON.—My Lords: In agreeing with the judgment which has just been moved, I have no wish to cast any doubt upon the soundness of the rule that when a vessel at sea, overtaken by a fog, becomes aware that another vessel is in her neighbourhood, she ought, whilst complying with the regulations as to speed, to keep on her course unless she has some indication more or less trustworthy that it would be proper or at least safe to change it. What indications would be sufficient to warrant a change of course is a question of fact which must depend upon the circumstances of each case. In the present case the Court of Appeal have not thought it necessary to decide whether the *Haswell* starboarded on the first or on the last whistle heard from the *Vindomora*. Their Lordships assumed that she began the starboarding as soon as she heard the first of those signals, and on that assumption they put a specific question to the nautical assessors, who, in answer, advised their Lordships that, taking into account these three things, first the part of the sea in which the two vessels were, secondly the natural course of the two vessels and the lay of the coast, and thirdly that the *Vindomora's* whistle was heard at from three and a half to four points on her starboard bow, the *Haswell* did nothing wrong in starboarding. That finding, if accepted, appears to me to be absolutely conclusive in favour of the *Haswell*. We have been asked to reject it. I can only say that I am not disposed to treat lightly any finding of nautical assessors, and least of all when, as in the present instance, their finding is plain and unequivocal. Notwithstanding the very plausible argument to which we have listened from the bar, I have heard nothing from the learned counsel which leads me to doubt the soundness of the advice which was given by the assessors to the Court of Appeal. I think as little cause has been shown by the learned counsel against the second finding of the assessors, which of itself would entitle the *Haswell* to a judgment exempting her from blame, even if the first had been against her.

Lord BRAMWELL.—My Lords: I concur.

Lord MORRIS.—My Lords: Accepting the rule as laid down by Lord Herschell and Lord Watson, it appears to me to be a rule founded upon common sense as well as upon seamanship, that if two vessels are in a fog in the same neighbourhood, it is better for them to continue on the course they are on instead of groping about and probably thereby causing a collision which might not otherwise occur. At the same time it appears also to me to be a principle of common sense and good seamanship that, when two vessels are near together in a fog, and the one receives a sufficient indication of the position of the other, there is no rule and there could be no rule, that the vessel which receives such an indication, and thereby has good reason for changing her course, should not do so. Accordingly, in this case, as I understand, those acting for the *Vindomora* do not allege that, if the *Haswell* had waited until the second whistle had been heard from the *Vindomora*, there would not have been sufficient indication and sufficient good reason for the *Haswell* starboarding her helm. That is the case made, as a matter of fact, by the *Haswell*, and for myself I must say that I am not all satisfied that it is not a true case. It was the case that was proved by the evidence at all events upon the trial before Butt, J. He was disposed not to give credence to it, relying upon reasoning not arising from matters of fact proved directly upon the point, but reasoning arrived at from other admitted facts, such as that the master had made a deposition somewhat inconsistent with that statement, and from the nature of the collision, and from other circumstances referred to by him. I merely guard myself by saying that I am not at all satisfied that the case made by the *Haswell* was an untrue one, and that they did not wait until the second whistle from the *Vindomora* was heard before starboarding. But it appears to me, that there is no magic in waiting for a second whistle rather than acting upon the first whistle, if the first whistle showed sufficient indication and gave good reason for the *Haswell* altering her course. A question on that point has been submitted to the nautical assessors, and the accepted state of facts to a great extent was put to them, namely, that the *Vindomora* at the time of the first whistle being heard was some three and a half to four points on the starboard bow of the *Haswell*. That is deposed to by several witnesses, and it does not appear to have been to any material extent controverted at the

trial before Butt, J. Upon that state of facts the nautical assessors say, that under the circumstances existing in this case upon the first whistle coming from a vessel that bore three and a-half to four points on the starboard bow of the *Haswell*, it would be a sufficient indication and a good reason for the *Haswell's* altering her course. Upon these grounds I entirely concur in the judgment which my noble and learned friend on the woolsack has moved.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Botterell* and *Roche*.

Solicitors for the respondents, *Gellatly* and *Warton*.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Saturday, July 12, 1890.

(Present: The Right Hons. Lords HOBHOUSE and MACNAGHTEN, Sir BARNES PEACOCK, and Sir R. COUCH.)

THE CITY OF PEKING. (*a*)

THE STEAMSHIP CITY OF PEKING *v.* COMPAGNIE DES MESSAGERIES MARITIMES.

Collision—Consequential damage — Demurrage—Restitutio in integrum—Loss of profits—Registrar and merchants.

To entitle a shipowner to recover demurrage he must show actual loss resulting from the detention of his ship, and give reasonable proof of its amount.

Where successful plaintiffs in a collision action claimed demurrage during the time their vessel was under repairs, and it appeared that the plaintiffs substituted another of their ships to do the work of the damaged ship, the expenses and loss incidental to this substitution being allowed against the defendants, and the plaintiffs failed to show that they had sustained any pecuniary loss by the detention of their ship, it was held that they were not entitled to recover demurrage; but that, if they could show an actual out-of-pocket expense usually included in the term demurrage, such as wages and maintenance of crew, they would be entitled to recover such sums.

Where, upon the hearing of an appeal to the Privy Council from a judgment upon the report of the registrar of a Vice-Admiralty Court the Privy Council is of opinion that the report must be referred back for the finding of other facts and figures, such reference will be to the Registrar of Her Majesty in Ecclesiastical and Maritime Appeals, if convenient and less expensive than a reference back to the Vice-Admiralty Court.

Semble, where an objection to a registrar's report is taken in general terms, as to the whole of an item allowed, it is open to the party objecting to seek to have part of the item disallowed.

THIS was an appeal by the defendants in a collision action *in rem* from a judgment of the Vice-Admiralty Court of Hong Kong, dated the 27th March 1888.

The action was instituted in respect of a collision which took place between the steamships *City of Peking* and the *Saghalien* in the harbour of Hong Kong, on the 29th Nov. 1886. The *City of Peking* was found alone to blame, and the plaintiffs' damages were referred for assessment to the registrar of the Vice-Admiralty Court, assisted by merchants.

The registrar reported that the several sums of 1491 francs 95 centimes for damage to cargo, 5819*l.* 0*s.* 9*d.* for demurrage and loss of time for another ship of plaintiffs substituted for the *Saghalien* and some small items for damage to cargo, and $66,068 for costs of repairs to the *Saghalien* and other expenses incurred in consequence of the collision, with interest at 8 per cent., were due to the plaintiffs.

The defendants objected to the item of 5819*l.* 0*s.* 9*d.* so far as it related to demurrage, and to the claim for loss of time for the substituted ship, upon the ground that the registrar had allowed the whole time that the *Saghalien* was in dock and rendered unserviceable to the company, viz., fifty-six days, and that the plaintiffs had no right to recover anything, because there was no loss of profit in the case of the *Saghalien*, and that, as regards the claim or loss of time for the substituted ship, they objected to it upon the ground that such loss did not arise out of the collision.

The judge of the Vice-Admiralty Court having heard the objection, referred the report back to the registrar, with a direction that the proper basis upon which the demurrage in the case of one of a line of steamers being detained should be calculated is the number of days between the time she would have sailed if no collision had taken place and the time she resumes her place on the line; but he affirmed the report so far as it related to loss of time of the substituted ship.

In pursuance of the said direction the registrar made a second report finding that fifty-six days' demurrage should be allowed.

The defendants objected to this further report, and contended before the judge that in the circumstances no demurrage should be allowed, but the judge affirmed the report.

From that decree the present appeal was brought asking the court to pronounce that no demurrage was due, or, in the alternative, that the demurrage allowed was for too many days and at too high a rate, and that the rate of interest was unreasonable.

The further facts sufficiently appear in the judgment.

Nov. 8.—Sir *Walter Phillimore* and *Joseph Walton* for the appellants.

Sir *Richard Webster* (A.-G.) and Dr. *Raikes* for the respondents.

The following cases were cited:

The Clarence, 3 Wm. Rob. 283;
Jebsen v. *East and West India Dock Company*, 32 L. T. Rep. N. S. 321; L. Rep. 10 C. P. 300; 2 Asp. Mar. Law Cas. 505;
The Black Prince, Lush. 568;
The Inflexible, Swa. 200;
The Argentino, 61 L. T. Rep. N. S. 706; 14 App. Cas. 519; 6 Asp. Mar. Law Cas. 433.

Cur. adv. vult.

Dec. 14.—Judgment was delivered by the Right Hon. Sir BARNES PEACOCK.—This is an appeal from a decree or order of the Vice-Admiralty Court at Hong Kong of the 27th March 1888. The point determined was the amount of damages

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

which the respondents the Compagnie des Messageries Maritimes were entitled to recover in a suit instituted by them against the appellant the steamship *City of Peking* in respect of a collision which took place on the 29th Nov. 1886 in the harbour of Hong Kong between the said steamship *City of Peking* and the steamship *Saghalien*, of which the company were the owners. In that suit the *City of Peking*, having been found to have been alone to blame, was condemned in damages and costs by a decree (subsequently affirmed by this board), by which it was referred to the registrar of the court to be assisted by merchants to ascertain the amount of damages and to report thereon. The company brought in their claim containing many items, amounting to 1491 francs and 95 centimes, 6035*l.* 12*s.* 11*d.*, and 66,133 dollars and 25 cents, together with interest thereon at eight dollars per cent. from the 29th Nov. 1886 until payment. One of the items of the claim is "No. 50, demurrage for the steamship *Saghalien* from the 29th November 1886 to the 25th January 1887, being 56 days, 5352*l.* 4*s.*" The *Saghalien* was a vessel of about 3823 tons gross, and M. de Champeaux, the agent of the company at Hong Kong, stated that he claimed demurrage at 6*d.* a ton a day on the gross tonnage. The assistant registrar, on the 6th Feb. 1888, after hearing both parties, reported that he allowed the amount, 5352*l.* 4*s.*, claimed for demurrage, and all the other items of the plaintiff's claim with some comparatively slight deductions, which are not material to be considered with reference to the present appeal. The total so allowed being 1491 francs 95 centimes, 5819*l.* 0*s.* 9*d.*, and 66,068 dollars and 79 cents, with interest at 8 per cent. until paid. No objection was made to this report by the plaintiffs, but the defendant appellant on the 21st Feb. 1888 objected to the item allowed for demurrage. The appellant also objected to several other items, the objection to which has since been abandoned, and is therefore not now material. The objections were heard by the learned judge who delivered judgment thereon, and by an order dated the 9th March 1888 referred back the report to the registrar and merchants, with a direction to ascertain the number of days the *Saghalien* was prevented by the collision from taking up her position on her own day from Marseilles, referring, as will hereafter appear, to the 30th Jan. 1887, a day on which the *Saghalien*, as one of a line of steamers belonging to the company, was appointed to commence a fresh voyage from Marseilles to Shanghai. The deputy registrar assisted by the same merchants having in pursuance of the last-mentioned order heard both parties, together with fresh evidence, including an affidavit of M. de Champeaux, again reported to the court on the 21st March 1888 that fifty-six days' demurrage be allowed, and also specified his reasons for such report. To that report the defendant on the 24th March 1888 objected, and contended that it should be varied, and that no demurrage ought to be allowed. The learned judge having again heard the case on the 27th March 1888, without assigning any further reasons, pronounced that the sums of francs one thousand four hundred and ninety-one centimes ninety-five (frs. 1491. 95), five thousand eight hundred and nineteen pounds and ninepence (5819*l.* 0*s.* 9*d.*), and dollars sixty-six thousand and sixty-eight and cents seventy-nine ($66,068. 79) to be due to the plaintiffs in respect of their claim, together with interest and costs. And he condemned the defendants and their bail in the said sums, interest, and costs. The sum of 5819*l.* 0*s.* 9*d.* so held to be due to the company includes the sum of 5,352*l.* 4*s.* claimed by them and allowed by the first report for demurrage.

From that order or decree the present appeal has been preferred by the defendant upon the ground that no demurrage ought to have been allowed, or in the alternative that the demurrage allowed was for too many days and at too high a rate, and also upon the ground that the rate of interest allowed was unreasonable. Their Lordships in the course of the argument intimated their opinion that no objection having been made in the Lower Court in respect of the interest allowed the appellant could not now support the appeal against such allowance. The only question now to be decided is whether the defendant ought to be held liable for the 5352*l.* 4*s.* allowed for demurrage, or any part of that amount. It was objected on behalf of the respondents on the argument of the appeal in support of the third reason of their case that the objection to the demurrage taken in the court below was not to the rate or number of days, but that no demurrage at all was due, and that the rate and number of days were not objected to in the court below and were therefore not subject to appeal to Her Majesty in Council; but their Lordships are of opinion that that objection cannot be supported. The objection to the first report was that the report be varied, the following items (of which No 50, "Demurrage for *Saghalien*, 5352*l.* 4*s.*, was one) being objected to." In the objection to the second report the language was, no doubt, altered, the objection being, "that the report be varied and that no demurrage be allowed." Their Lordships are disposed to think that even if the latter objection stood alone the appellant would have been at liberty to contend that part of the sum allowed for demurrage ought to be disallowed, even though it might fail in showing that no demurrage ought to be allowed; but reading the second objection coupled with the first, they have no doubt that the appellant is at liberty to show that the whole or some part of the item of 5352*l.* 4*s.* ought to be disallowed. In dealing with the case their Lordships consider that the plaintiffs must be held to their claim for demurrage, from the 29th Nov. 1886 to the 25th Jan. 1887, or in other words, during the detention of the *Saghalien* at Hong Kong, and that they are not at liberty to claim as demurrage any detention of the vessel at Marseilles after her arrival there on the 25th Feb. 1888, the 6*d.* a day claimed and allowed being limited to the period of her detention at Hong Kong, between the dates mentioned in item No. 50 of the claim. There is no doubt as to the rule of law according to which compensation is to be assessed in cases of this nature, where a partial loss is sustained by collision. The rule is *restitutio in integrum*: (*The Black Prince*, Lush. Rep. 573.) The party injured is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered. It does not follow as a matter of necessity that anything is due for detention of a vessel whilst under repair. In order to entitle a party to be indemnified for what is termed in the

Admiralty Court a consequential loss resulting from the detention of his vessel, two things are absolutely necessary, actual loss and reasonable proof of the amount: (*The Clarence*, 3 Wm. Rob. Rep. 283; *The Argentine*, 61 L. T. Rep. N. S. 706; 14 App. Cas. 519; 6 Asp. Mar. Law Cas. 433.)

There is no dispute as to the principal facts as stated by the learned judge: "The *Saghalien* is one of the steamers of the company which run regularly every fortnight from Marseilles to Shanghai. These steamers are subsidised by the French Government to carry mails from France to China and the ports on that course, and to take return mails to France. The China terminus is Shanghai, and it is from there that they commence their return voyage homewards after staying for a time at Shanghai, something between a fortnight and three weeks, it would seem from the evidence before the registrar. They also stop for a short time apparently at Marseilles after the completion of the round trip and before commencing a fresh voyage to China. On the 29th Nov. 1886 the *Saghalien* was lying in the harbour of Hong Kong, having arrived from Shanghai two days before. She was homeward bound next day at noon. The *City of Peking*, arriving with the American mails, in coming up to her anchorage, collided with and damaged the *Saghalien* so that she could not proceed on her journey to France, but had to be taken into dry dock. On the same day the steamship *Melbourne*, another of the company's steamers, arrived in Hong Kong from Europe with passengers, mails, and cargo, and in the ordinary course would have proceeded to Shanghai on the following day. The agent of the company, M. de Champeaux, at once decided to send on the *Melbourne's* cargo, mails, and passengers by outside steamers to Shanghai, and to send the *Melbourne* back to Europe instead of the *Saghalien*. This decision was very promptly executed, and the *Melbourne*, having discharged her northern cargo, had transferred to her the *Saghalien's* cargo, passengers, &c." The outward voyage of the *Saghalien* from Marseilles commenced on the 26th Sept. 1886. If the collision had not taken place she ought in ordinary course to have left Hong Kong on her homeward voyage on the 30th Nov, 1886, and to have reached Marseilles about the 3rd Jan. 1887, and according to the arrangements of the company would have remained there unemployed until the 30th Jan. in that year, when she was timed to take her turn and to start upon a fresh outward voyage to Shanghai. In consequence, however, of the collision she was detained at Hong Kong until the 25th Jan. 1887, fifty-six days after the collision. She left on that day, arriving at Marseilles on the 25th Feb. in that year, and remained there unemployed until the 27th March, when she again sailed for Shanghai. The *Melbourne* left Hong Kong on the 2nd Dec. 1886, two days after the *Saghalien* ought to have started, she arrived at Marseilles in due course early in Jan. 1887, and remained there unemployed until the 30th of that mouth, on which day she took the turn which, but for the collision, would have been taken by the *Saghalien*, and sailed on a fresh outward voyage for Shanghai. The *Melbourne* having been substituted for the *Saghalien* on the homeward voyage, was necessarily prevented from continuing her outward voyage to Shanghai and back, and other arrangements had to be made for carrying on to that port the mails, passengers, and cargo of the *Melbourne*, and for her return voyage to Marseilles. These arrangements were attended with very considerable expense, in addition to the loss sustained by the withdrawal of certain passengers and freight, booked by the *Melbourne* from Hong Kong to Shanghai, but the whole of these expenses and losses were included in the plaintiffs' claim, and have been allowed both by the assistant registrar and by the judge, in addition to the claim of 5352*l.* 4s. for demurrage. As to the homeward voyage from Shanghai, which would have been made by the *Melbourne* if she had not been substituted, M. de Champeaux, in his affidavit of the 18th March 1838, says: "The company's steamship *Amazone*, instead of remaining at Shanghai, according to the time tables of the company, until the 6th day of January 1887, was despatched from Shanghai on the 23rd day of December 1886, to supply the place of the steamship *Melbourne*, and the plaintiff company's steamship *Yangtse*, instead of remaining in Shanghai until the 20th day of January 1887, was despatched from Shanghai on the 6th day of January 1887, in the place of the said steamship *Amazone*. The company's steamship *Volga* was taken off the Hong Kong and Japan line, and was despatched from Shanghai on the 20th day of January 1887, in place of the said steamship *Yangtse*, and she carried the mails, passengers, and cargo to Hong Kong, where they were transshipped into the said steamship *Saghalien*, thus enabling that vessel to sail on the 25th January 1887 for Marseilles, otherwise the said steamship *Saghalien* would have had to proceed to Shanghai for the mails, passengers, and cargo, which would have caused her to leave Marseilles again two weeks later than the 27th day of March 1887, the day she did leave. The company's steamers usually remain at Shanghai for about seventeen to twenty-one days, in order to thoroughly overhaul their engines and machinery, and in consequence of the earlier despatch of the said steamships, *Amazone* and *Yangtse*, as aforesaid, they were only at Shanghai about three or four days, and the usual overhaul of the engines and machinery could not be and was not effected. The company's steamers usually remain at Marseilles for about four weeks after their arrival before being again despatched to China." M. de Champeaux, in his affidavit of the 9th Jan. 1888, paragraph 15, also stated that, in consequence of the detention of the steamship *Saghalien*, she lost her turn in the line of mail steamers, and the company suffered great inconvenience, and incurred heavy loss, both pecuniarily and in reputation; but on cross-examination, at page 15, he says: "I do not know if any loss has actually occurred. Loss might have occurred by the steamers not staying long enough at Shanghai to clean their engines. The service of the steamers was also made irregular. We were exposed to a claim from the French Government. If there had been no collision the *Melbourne* would have got to Shanghai about 3rd December, and would have stayed about fourteen days there, and ought to have left here, *i.e.*, Hong Kong, on 28th December. The *Yangtse* probably left on 28th December. The next steamer to the north after the *Melbourne* was the

Yangtse. These steamers were turned round at Shanghai. So far as profits were concerned the compagnie lost nothing. The crew and officers are engaged for the voyage, and some of the crew are discharged at Marseilles. Taking the *Volga* off did not interfere with the service from Yokohama to Hong Kong. I cannot say what extra expense was caused by taking the *Volga* off her proper voyage. I do not know if any actual gains were lost to the company by the change of steamers, nor can I say what actual expenses were incurred." There appears to be a slight mistake in the statement that the *Yangtse* was the next steamer north after the *Melbourne*, for it appears from a later affidavit, as already stated, that the *Amazone* was the next, and the *Yangtse* the next after the *Amazone*, and that the *Amazone* was the steamer which supplied the place of the *Melbourne* on the 23rd Dec., but the mistake does not in the least degree alter the case. M. de Champeaux again, at page 16, says: "The *Saghalien* is three times as large as the *Volga*. If I had sent the *Saghalien* up to Shanghai instead of using the *Volga* the expense would have been more, as a fortnight would have been lost. If I had sent the *Saghalien* the *Volga* would not have come down to Hong Kong. Whilst in dock other steamers were earning the profits of the *Saghalien*. I did not hear of any cargo being shut out at Shanghai." It seems clear that no damage was sustained by the company in consequence of the *Melbourne's* not having completed her outward voyage, and been at Shanghai for her return voyage. The profits of her homeward voyage, though earned by other steamers, were earned by other steamers of the company and for the company. As to the sending of the *Volga* to Shanghai to carry the mails, passengers, and cargo from thence to Hong Kong to be reshipped on board the *Saghalien*, and carried by her to Marseilles on her voyage which commenced on the 25th Jan., it seems clear that no damage has been sustained by the company, as all the expenses of the *Volga* were claimed by the company and have been allowed by the judge, the sums allowed being 433*l*. 4*s*. 4*d*. and 624 dollars and 77 cents. The learned judge, on allowing these amounts, remarked: "The allowance for the *Volga* in connecting the Shanghai end of the line with Hong Kong is most moderate, and seems to me to have been the cheapest service that could have been rendered for the *City of Peking*."

The learned judge was mistaken in treating the case of the *Black Prince* as analogous to the present. The two cases are very different. In the *Black Prince* the vessels belonged to different sets of owners, so that the profits earned by one ship belonged to one set of owners, and the profits earned by a different ship to another set of owners, whereas in the present case the profits earned, whether by one ship or another, all belonged to the company. Again, in the case of the *Black Prince*, the arrangement as to the turns fixed for the voyages to be made by several ships was made by the several owners, each set of owners having a distinct interest in having the arrangement adhered to, so that their ship might be employed in its proper turn; no set of owners had the power to alter the turns allotted without the consent of all the others. In the present case the order in which the ships were appointed to leave Marseilles, was one made for the company's own convenience and to preserve regularity in the departure of their own vessels. It could be changed or varied at any moment at the will of the company in the case of emergency, or if the interests of the company appeared to them to require it, and, in fact, it was very properly changed by M. de Champeaux in consequence of the inability of the *Saghalien* to proceed on her voyage. It appears to their Lordships that all the damages sustained by the company in consequence of the substitution of the *Melbourne* were included in the claim brought in before the registrar, allowed by him, and finally sanctioned by the court. The *Melbourne* and her crew had been substituted for the *Saghalien*, and her crew on her homeward voyage, at what may now be termed the expense of the defendant, was very properly, and perhaps necessarily, allowed to take the turn of the *Saghalien* on the next outward voyage from Marseilles on the 30th Jan. 1887. The company lost nothing, so far as the use of the ships was concerned, by substituting the *Melbourne*, for if she had not been engaged on the homeward journey she and her crew would have been occupied during the whole time in completing the voyage on which she was engaged at the time of the substitution. It would be very unjust to charge the defendant 95*l*. per day or anything for the loss of the use of the *Saghalien* during her detention at Hong Kong for the time during which the *Melbourne* and her crew were doing at the defendant's expense the work which the *Saghalien* and her crew ought to have done. This includes the period from the 2nd Dec. 1886 to the day in Jan. 1887 on which the *Melbourne* arrived at Marseilles. No loss was sustained by the company by the detention of the *Melbourne* from the day of her arrival at Marseilles and the day of her departure therefrom, for it was in consequence of the arrangements of the company that she remained unemployed during that period; so also no loss was sustained by the company in consequence of the *Saghalien's* not having been in Marseilles from the 3rd to the 30th Jan. 1887, as but for the accident she ought to have been, for if she had been there she would have been lying unemployed and earning nothing in accordance with the company's own arrangements. The learned judge was clearly in error in referring back the report by his first judgment to the registrar and merchants with a direction to ascertain the number of days the *Saghalien* was prevented by the collision from taking up her position on her own day, and to amend their report on the principles indicated, without directing them to ascertain whether the company sustained any loss in consequence. In giving that direction he was acting entirely upon the case of the *Black Prince*, without adverting to the difference between that case and the present. He said: "It may turn out that there were fifty-six days' delay, but although the *Araxes* (referring to the injured ship in the case of the *Black Prince*) was thirty-eight days in dock she was only allowed twenty-eight days' demurrage, such being the number of days she was prevented from taking her place on the line; in other words, that she was not earning money for her owners." The case went before the deputy-registrar, Mr.

Sangster, a different officer, and the same merchants, who reported that fifty-six days' demurrage be allowed. The report is not very clear; but reading the whole report together it seems to their Lordships that the deputy-registrar attributed the demurrage to the fifty-six days during which the *Saghalien* was in dock at Hong Kong, and not to any portion of the time during which she was unemployed at Marseilles. Be this as it may, the learned judge, acting upon the report without giving any further reasons than those in his first judgment, and apparently under the erroneous impression that this case was governed by the ruling in the case of the *Black Prince*, allowed the sum of 5352*l.* 4*s.* claimed for demurrage, being at the rate of 6*d.* per ton upon the gross tonnage of the *Saghalien*, or about 95*l.* a day for each of the said fifty-six days, and this without proof that any loss had been sustained by the company in consequence of that demurrage. It has been shown that the company has claimed and been allowed all the damages sustained in consequence of the inability of the *Saghalien* to proceed on her homeward voyage on the 30th Nov. 1886, so far as the loss by the company of the use of the vessel was concerned. Mr. Champeaux very properly, and, as it appears to their Lordships, correctly stated, "that, so far as profits were concerned, the company lost nothing," and also "that whilst in dock the other steamers were earning the profits of the *Saghalien*." The learned judge, however, remarked that that statement required some explanation, and added, "Should they have nothing for those services? I have stated why I think they ought to have," without adverting to the fact that he was allowing in other items of the claim all the expenses which had been incurred in consequence of the substitution of the *Melbourne*.

Their Lordships are of opinion that the decree or order appealed against ought to be reversed so far as it allows the sum of 5352*l.* 4*s.* claimed for demurrage, with interest thereon and costs. Mr. Champeaux stated in his affidavit of the 9th Jan. 1888 that the portage bill of the steamship *Saghalien*, whilst lying at Hong Kong during the time she was being repaired, amounted to from 95*l.* to 100*l.* a day, and that it could not have been reduced. There seems, however, to be some mistake in that statement, unless the portage bill, the items of which are not before their Lordships, included the 53,000 dollars claimed and allowed for the repairs of the vessel. Their Lordships are of opinion that the amount claimed and allowed for demurrage, so far as it includes any damage on account of the loss of the use of the *Saghalien*, ought to be disallowed. They cannot, however, say that the company may not have incurred some expenses in respect of the *Saghalien*, such, for instance, as the lodging, maintenance, and wages of the crew, and, it may be, other expenses incurred during the period of her detention which would not have been incurred if she had not been detained. These may have been included in No. 50, the item claimed for demurrage, and, if so, their Lordships think that the plaintiffs are entitled to recover them under that item. (See *The Inflexible*, Swabey's Admiralty Reports, p. 204.) It would be very inconvenient, and would be attended with considerable expense to the parties to send this case back to the registrar at Hong Kong. The head office of the company is in France, and they will doubtless be able to supply the necessary information and affidavits as to the items of the portage bill, and as to the nature and extent of the necessary and reasonable expenses, if any, incurred at Hong Kong with reference to the *Saghalien* during her detention there. Their Lordships are not prepared to make any report to Her Majesty before it shall have been ascertained whether any and what expenses of the nature above indicated were incurred by the company. They therefore refer it to the Registrar of Her Majesty in Ecclesiastical and Maritime Appeals, to ascertain and report whether, having regard to the above remarks, any and what expenses were properly incurred by the company with reference to the steamship *Saghalien* during her detention at Hong Kong between the 29th Nov. 1886 and the 25th Jan. 1887, in addition to the several items included in the claim made by the company at Hong Kong exclusive of that for demurrage in No. 50, and if the registrar find that any such expenses were necessarily and properly incurred, then to report the amount and the several items thereof. All further questions, including the question of costs, are reserved. The plaintiffs must bring in their claims in writing before the Registrar of Her Majesty in Ecclesiastical and Maritime Appeals within the space of one month from the 14th Dec. 1889, or within such further time as the said registrar may allow.

The Registrar of Her Majesty in Ecclesiastical and Maritime Appeals having investigated the plaintiff's claim upon the direction given in the above judgment, found that 2043*l.* 2*s.* 2*d.* was due to the plaintiffs.

July 12.—The defendants moved to disallow the sum of 2043*l.* 2*s.* 2*d.* or any other sum.

Joseph Walton, for the defendants, in support of the objection.

Dr. *Raikes*, for the plaintiffs, *contrà*.

(Present: Lord Watson, Lord Macnaghten, Sir Barnes Peacock, Sir Richard Couch.)

Judgment was delivered by

Sir BARNES PEACOCK.—Upon the hearing of this appeal their Lordships declared their opinion that the decree or order appealed against ought to be reversed, so far as it allowed the sum of 5352*l.* 4*s.* claimed for demurrage, with interest thereon and costs, but they added that they could not say that the company might not have incurred some expense in respect of the *Saghalien*, such, for instance, as lodging, maintenance, and wages of the crew, and, it might be, other expenses incurred during the period of her detention, which would not have been incurred if she had not been detained, and their Lordships referred it to the Registrar of Her Majesty in Ecclesiastical and Maritime Appeals to ascertain and report to this board in respect of those matters. Their Lordships having considered the report of the registrar, and the evidence adduced before him, are of opinion that the whole of the sum claimed for demurrage ought to be disallowed, and that the respondents have not shown that they are entitled to any sum in substitution thereof. Under these circumstances their Lordships will humbly advise Her Majesty that the decree or order appealed against ought to be reversed, so far as it allows the sum of 5352*l.* 4*s.*

claimed for demurrage, with interest thereon and costs, and that in other respects it ought to be affirmed. The respondents must pay the costs of this appeal, including the costs of the reference to the registrar, and of the motion to this board consequent upon his report.

Solicitors for the appellants, *Trinder* and Co.

Solicitors for the respondents, *Gellatly, Son,* and *Warton.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, July 22, 1890.

(Before Lord ESHER, M.R., LINDLEY and BOWEN, L.JJ.)

THE RUBY. (*a*)

Collision—Compulsory pilotage—Counter-claim—Costs—6 & 7 Vict. c. lxxxviii., s. 158—*21 & 22 Vict. c. lxxii. — Llanelly Harbour and Burry Navigation Bye-laws, arts.* 1, 2 — *Merchant Shipping Act* 1854 (*17 & 18 Vict. c.* 104), *s.* 353.

Pilotage is compulsory in the harbour of Llanelly by virtue of 6 & 7 Vict. c. lxxxviii. and 21 & 22 Vict. c. lxxii., and the bye-laws made thereunder.

It is competent for a harbour authority, which has power to make bye-laws regulating the navigation of their harbour and to appoint pilots, to make pilotage compulsory by means of such bye-laws, and to impose penalties for disobedience to them.

Per Butt, J.: In a collision action, where the defendants' vessel, although solely to blame on the merits, is relieved from liability on the ground of compulsory pilotage, a counter-claim will be dismissed with costs.

THIS was a collision action *in rem* by the owners of the steamship *Cambrian* against the owners of the steamship *Ruby.* The defendants counter-claimed.

The collision occurred on the 16th Feb. 1890 in the Burry river, in the harbour of Llanelly.

Both ships were British steamships bound to Llanelly laden with cargo. The *Cambrian* had come from Barrow and the *Ruby* from Ardrossan.

The defendants (*inter alia*) pleaded the defence of compulsory pilotage. The court found that the *Ruby* was at the time in charge of a duly licensed pilot for the harbour of Llanelly, and that the collision was solely occasioned by his default. The argument as to whether pilotage was compulsory was adjourned till

June 10.—The following Acts of Parliament are material to the decision:

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

Sect. 353. Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall also continue in force.

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

6 Geo. 4, c. 125:

Sect. 59. Provided always, and be it enacted, that for and notwithstanding anything in this Act contained the master of any . . . ship or vessel employed in the regular coasting trade of the kingdom . . . shall and may lawfully, and without being subject to any of the penalties by this Act imposed, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other persons or person than the ordinary crew of the ship or vessel.

Sect. 89. And be it further enacted, that nothing in this Act contained shall extend or be construed to extend to . . . alter or repeal any provisions contained in any Act of Acts of Parliament relating to the pilots of any ports or districts in relation to which particular provision shall have been made in any Act or Acts of Parliament as to the pilots or pilotage, or to the pilotage within the limits prescribed by any Act or Acts of Parliament relating so pilotage for such ports, or to the burthen of vessels navigating to or from such ports.

6 & 7 Vict. c. lxxxviii. Preamble:

Whereas by an Act of Parliament passed in the fifty-third year of the reign of his late Majesty King George the Third, intituled an Act for the improvement of the navigation of the rivers Burry, Longhor, and Lliedi, in the counties of Carmarthen and Glamorgan, powers were given to the commissioners thereby appointed, and their successors, to improve, deepen, widen, and maintain the navigation of the said rivers Burry, Longhor, and Lliedi, and of each and every of the said rivers within certain limits prescribed in the said Act, and whereas it is expedient to alter and amend the said Act in several respects, and to extend and enlarge the powers thereby vested in the said commissioners . . .

Sect. 158. And be it enacted that it shall be lawful for the commissioners from time to time to make such bye-laws as they shall think fit for all or any of the following purposes (that is to say); for regulating the entrance and departure of vessels resorting to the said harbour (Llanelli), and rivers, and the pilotage, good behaviour, and conduct of seamen, pilots, hobblers, watermen, and others, and the payment and reward to be made or given to them, and the mooring time and accommodation of such vessels.

Burry Navigation and Llanelly Harbour Act 1858 (21 & 22 Vict. c. lxxii.):

Sect. 3. The said Acts passed (the one in the fifty-third year of the reign of his late Majesty King George the Third, chapter one hundred and eighty-three, and the other in the session holden in the sixth and seventh years of the reign of Her present Majesty, chapter eighty-eight), shall, with the exception of the sections of the said Acts which are contained in the schedule hereto, be repealed, and the sections so remaining unrepealed shall be deemed to be part of this Act, and shall have the same operation and effect as they would have had in case this Act had not been passed.

Sect. 12. Notwithstanding such repeal all bye-laws, rules, and regulations made under the recited Acts, or any of them, and in force at the time of the passing of this Act, shall remain in force during the period six of calendar months next after the passing of this Act unless the same shall previously be altered by the commissioners; and all offenders against those bye-laws during the period aforesaid shall be liable to the like pains and penalties as if this Act had not been passed.

Sect. 158 of 6 & 7 Vict. c. lxxxviii. is contained in the schedule to the above Act, and is unrepealed by virtue of sect. 3.

Llanelly Harbour and Burry Navigation Bye-laws 1844:

Art. 1. All vessels registering 30 tons and upwards passing over the bar of Burry either inwards or outwards, and all vessels with cargoes though under that tonnage inwards, shall heave to and receive on board the first licensed pilot who shall offer, and the master of any vessel refusing or neglecting to do so shall pay the pilotage as though such pilot had been taken on board, and be subject to a penalty not exceeding 5*l.*

Art. 2. Masters of vessels shall employ a licensed

pilot, if one shall offer, in transporting their ships within the port, for which they shall pay according to the rates hereinafter specified.

Bye-laws were made in 1814, under the powers of 53 Geo. 3, c. lxxxiii., and continued to be made from time to time under the subsequent Acts of Parliament. At the time of the collision in question there were bye-laws in force to the like effect as those set out hereinbefore.

Sir *Walter Phillimore* (with him *J. P. Aspinall*) for the defendants.—Pilotage is compulsory in Llanelly Harbour. Power was given to the commissioners by sect. 158 of 6 & 7 Vict. c. lxxxviii. to make bye-laws, and the language of that section is sufficiently wide to justify them in imposing compulsory pilotage on vessels using their port. Similar bye-laws have been in force since 1814, and until the present time no one has ever questioned the right of the commissioners to enact that pilotage shall be compulsory. [He was stopped by the Court.]

Barnes, Q.C. (with him *Raikes*), for the plaintiffs, *contrà*.—Pilotage is not compulsory. If the bye-laws purport to make pilotage compulsory, they are *ultra vires*. The Legislature never intended to give the commissioners such wide powers as to allow them to say whether pilotage should be compulsory or not. Had it so intended, it would have done so in express terms. It is also submitted that the language of the bye-laws does not make pilotage compulsory. It is also submitted that this vessel was "employed in the regular coasting trade of the kingdom" within the meaning of 6 Geo. 4, c. 125, s. 59, and if so is exempt from compulsory pilotage, by virtue of sect. 353 of the Merchant Shipping Act 1854.

Sir *Walter Phillimore* in reply.—The exemptions in 6 Geo. 4, c. 125, s. 59, have no application to this case. That Act is limited in its application to the places therein named. [Butt, J.—I need not trouble you further on that point.]

Butt, J.—I have no doubt in my own mind that pilotage was compulsory on vessels trading to the port of Llanelly in the year 1854, and if so, by the terms of sect. 353 of the Merchant Shipping Act 1854, pilotage continued to be compulsory. It appears that the harbour authorities have from time to time made bye-laws which, if they have any operation at all, make pilotage compulsory. I can see no ground upon which it can be said that this vessel was not obliged to take a pilot. It is not necessary for me to go through the lengthy preamble and sections of 6 & 7 Vict. c. lxxxviii. and the bye-laws which have been brought before my notice. The Merchant Shipping Act was passed at a time when, as a matter of fact—although as a matter of law the plaintiffs in this case are now questioning it—pilotage was compulsory. What I mean is, that vessels were in fact taking pilots as if they were compelled to do so. I am of opinion that pilotage was compulsory on the *Ruby*. I accordingly dismiss the suit without costs.

A question then arose as to how the costs of the counter-claim were to be treated. The learned judge stated that before deciding the point he proposed to inquire of the registrar if there were any precedents on the point.

June 11.—Butt, J.—As regards the costs of the counter-claim, the registrar has supplied me with two precedents, viz. *The Cambria* (1887, Fo. 76) and *The Capella* (1887, Fo. 369), in which, under similar circumstances, the counter-claim was dismissed with costs. I therefore order the defendants to pay the costs incidental to the counter-claim.

From this decision the plaintiffs appealed.

July 22.—*Barnes*, Q.C. and *F. W. Raikes*, for the appellants, argued as in the court below, and also contended that by the terms of the bye-law the master was only bound to receive the pilot on board and avail himself of his advice, but was not bound to give charge of the ship to him:

The Guy Mannering, 46 L. T. Rep. N. S. 905; 7 P. Div. 132; 4 Asp. Mar. Law Cas. 553.

Sir *Walter Phillimore* and *J. P. Aspinall*, for the respondents, were not called upon.

Lord Esher, M.R.—In this case the question is, whether a ship on entering this harbour is bound to take a pilot on board, and whether, having done so, her master is bound to give up to him the navigation of the ship. In other words, the question is, whether pilotage is compulsory. Why is such an obligation put upon shipowners? It is for the safety of navigation. It is not for the benefit of particular shipowners, but it is for the protection of the general body of shipowners, and for the protection of navigation for commercial purposes. The entrances to this kingdom are often by narrow channels in which are shoals and rocks. Moreover, the very channel itself is sometimes shifting. If, therefore, a vessel is sunk, it is an impediment to the navigation of ships to which this country owes a large part of its commercial prosperity. If channels are blocked by wrecks they are useless, and it is to prevent such consequences that compulsory pilotage is enacted. The framers of this law were not concerned with collisions between ships. The consequences of this law as to the liability of owners arises under a wholly distinct head of law. The non-liability of owners is a legal consequence of compulsory pilotage, but is not part of the legislation prescribing compulsory pilotage.

We have to decide in this case whether the pilots taking ships in and out of the port of Llanelly are compulsory pilots. It is a small port, and not so well known to the Legislature as others. The method of legislation adopted by the Legislature with regard to small ports, is to give power to the local authorities to do that which in the great ports of the kingdom is done by the Legislature itself. It is to give power to the local commissioners to make bye-laws which would have the same effect as direct legislation has in the case of larger ports. What was the purpose of the legislation? You can gather it from the preamble of the local Act of 1813; it was that pilotage should be regulated and the entry to the port made safe. Whatever bye-laws the Legislature empowers the commissioners to make, the moment they are made they have the force of an Act of Parliament. Now, by sect. 158 of the Act of 1843, which continues the former Act, the commissioners are empowered to make bye-laws for governing and regulating the navigation of the river Burry and two others. They are to establish pilotage. That is one of the purposes for which the first Act according to its preamble was passed. When you are authorised to make bye-laws to govern navigation, it seems to me that it means that you are to control and direct

the navigation, and say how the river is to be navigated. How are rivers navigated? They are navigated by ships and vessels; therefore, you have got to regulate the navigation of ships and vessels. What would at once suggest itself to one? Here is a river in which it is for the advantage of everyone that the navigation of it by ships and vessels should be made safe. It is requisite that ships should be steered safely in and out of the harbour. What is the best way of effecting that object? This is a comparatively small and unknown port. Who would navigate a ship there most safely? Why a pilot who is there every day. Therefore, the most natural way of rendering the navigation of the river safe is to require ships to be piloted by pilots who know all the local peculiarities of the river and harbour. How can you enforce that? By a bye-law; and you have power to enforce it by imposing a penalty for disobedience to the bye-law. That is within the Act of Parliament. I have no doubt that that power is given by the words of sect. 158. I understand that the commissioners have made such a bye-law since 1814, and have gone on doing so ever since, which is a strong argument to show what is the opinion of everyone connected with this place as to the power given. Further, the fact of the making of these bye-laws seems to have been recognised by Act of Parliament, and acquiesced in by everyone for seventy years. If a pilot must be taken on board, it follows that he is to have charge of the ship. For these reasons I therefore think that the appeal ought to be dismissed with costs.

Lindley, L.J.—I am of the same opinion. The question really turns, when it is understood, upon the true construction of sect. 158 of the Act of 1843, which is kept alive by the Act of 1858. In order to understand sect. 158 of the Act of 1843, you must look a little further into the matter. The key to the question appears to me to be found in the preamble and sect. 17 of the Act of 1813. In addition to sect. 158 of the Act of 1843, there are a series of bye-laws which have been in force ever since 1814, and those which were in force in 1844 were recognised by the Legislature in the Act of 1858. When one bears all this in mind it appears to me to be impossible to say that the particular bye-law which governs this case is *ultra vires*, illegal, or unreasonable. That brings us to the construction of the bye-law itself. As to that, I have not the least doubt that the construction put upon it by the Master of the Rolls is the only rational one. I am of opinion that pilotage is compulsory, and that this appeal should be dismissed with costs.

Bowen, L.J.—I am of the same opinion. We are asked to say that a bye-law which directs the employment of a pilot in the river Burry is *ultra vires* and not within the Act which directs that bye-laws may be made for governing the navigation of the river. It is clearly not *ultra vires* if it is made for the navigation of the river. How can we assume that the navigation of this river does not require the commissioners so to protect it? On the contrary, from the preamble of the first Act, from the language of the second Act, and from the existence of bye-laws to that effect for over seventy years which have been submitted to apparently without demur, it seems to me that the strong probability is that the navigation of this river requires to be protected in this way.

Appeal dismissed.

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *T. Cooper* and *Co.*.

Thursday, Aug. 7, 1890.

(Before Lord Esher, M.R., Lindley and Bowen, L.JJ.)

The Accomac. (*a*)

Carriage of goods—Charter-party—Excepted perils—Negligence.

A provision in a charter-party exempting the owners from liability for loss of or damage to cargo caused by the "act, neglect, or default of the master or crew in the navigation of the said vessel in the ordinary course of the voyage" does not relieve them from liability for damage to cargo caused by the joint negligence of one of their crew and shore engineers employed by them to repair the ship's engines, whereby water gets to the cargo when the ship is moored in dock at her port of destination and after part of her cargo has been discharged.

This was an appeal by the defendants in an action *in personam* for damage to cargo.

The plaintiffs were the owners of a cargo of rice shipped under charter at Rangoon on board the defendants' vessel the *Accomac*. On the vessel's arrival in London 3316 bags of the rice were delivered to the plaintiffs in a damaged condition.

By the terms of the charter-party it was provided (*inter alia*) that the shipowners should not be liable for any "act, neglect, or default whatsoever of pilots, master, or crew in the navigation of the ship in the ordinary course of the voyage."

After the *Accomac* had discharged part of her cargo in the Victoria Docks certain parts of the main engine and donkey pumps were taken ashore for repairs. To disconnect these parts it was necessary to take off a cock which closed one of the pipes. This pipe was connected with the ballast tanks. The cock was removed by the shore engineers employed to do the repairs, and on its removal the ship's engineer had given them orders to plug the pipe. This they never did, and the ship's engineer, thinking it had been done, opened the sea-valve for the purpose of running up the ballast tanks to keep the ship steady, and left it open during the night. After the tanks were filled the water found its way into the disconnected pipe, thence into the engine room, thence through the sluice valves into the hold, and so caused the damage complained of.

The further facts of the case appear in the report below (63 L. T. Rep. N. S. 118; 15 P. Div. 208; 6 Asp. Mar. Law Cas. 535).

Barnes, Q.C. and *Joseph Walton*, for the defendants, in support of the appeal.—The defendants are not liable. The negligence was in the navigation of the vessel in the ordinary course of the voyage. The ship's engineer in opening the sea-valve was doing an act connected with the management of the ship before the voyage was at an

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

end. It is immaterial that the ship had arrived in her port of discharge. The voyage was not over:

Lawrie v. *Douglas*, 15 M. & W. 746;
Carmichael v. *Liverpool Sailing Shipowners Mutual Indemnity Association*, 57 L. T. Rep. N. S. 550; 19 Q. B. Div. 242; 6 Asp. Mar. Law Cas. 130;
Good v. *London Steamship Owners Association*, L. Rep. 6 C. P. 563;
Canada Shipping Company v. *British Shipowners Mutual Protection Association*, 61 L. T. Rep. N. S. 312; 23 Q. B. Div. 342; 6 Asp. Mar. Law Cas. 422;
Bruce v. *Nicolopulo*, 11 Ex. 129;
Barker v. *McAndrew*, 34 L. J. 191, C. P.

The words "in the ordinary course of the said voyage" were put in to disallow deviation.

Hollams (with him *Finlay*, Q.C.), for the plaintiffs, *contra*.—The defendants are not entitled to the protection of the excepted peril. The negligence was not in the navigation of the ship in the ordinary course of the voyage. It was not an act in the navigation of the ship or in the ordinary course of the voyage. Moreover, it has been found as a fact that the damage was occasioned by the joint negligence of the ship's engineer and the shore engineer. The defendants have only contracted themselves out of liability for the negligence of their ship's engineer, not of their shore engineer. [He was stopped.]

Joseph Walton in reply.

Lord ESHER, M.R.—I have no doubt that in this case the voyage, *i.e.*, the charter-party voyage, was not over, and that the ship might still be subject to many liabilities occurring during the charter-party voyage. But the question here is, what is the meaning of the exception within which the shipowner desires to bring what has happened. Assume that the charter-party voyage was not ended, nevertheless has he brought the case within the exception relied on? The exception is not any act, neglect, or default of the pilots, master, or crew during the voyage. That is not it. Supposing the act, neglect, or default to be during the voyage, that is not enough. They must be connected with a particular matter. What is that? It is the navigation of the ship. Now we must construe this document according to the meaning of ordinary sea language. Was the negligence in this case in the navigation of the ship? That there was negligence of a member of the crew which was partly the cause of the accident I do not doubt. I think the ship's engineer was negligent, as Butt, J. has found. I am equally certain that the shore engineers were also negligent. They were both negligent. Nevertheless, even assuming there to be only negligence on the part of the ship's engineer, I ask myself, was it negligence in the navigation of the ship? How can it be negligence in the navigation of the ship if it is not negligence in navigating the ship? Was the ship being navigated? Had she come to the end of her voyage, or rather of voyaging? The answer is, that she was no longer voyaging, sailing, or moving. She was finally moored to the quay. She was no longer intended to sail. If she had broken loose it may be that she would want navigating again; but as a matter of fact she was hard and fast to the quay, intentionally to so remain there until the cargo was out of her, and until her owners chose to move her again. Nothing happened to call for more navigation. In my opinion *Lawrie* v. *Douglas* (*ubi sup.*) does not touch the point raised in this case. I could decide this case upon the ground I have already stated, but I must say that the test suggested by Butt, J. is absolutely conclusive. What happened here was the result of two negligences, and it could not have happened unless both negligences had happened. In other words, there are two combining negligences which produce the mischief, viz., the negligence of a member of the crew, and the negligence of the servants of an independent tradesman who were repairing the engines. I cannot bring my mind to conceive that anybody would say that the servants of independent contractors were assisting in navigating the ship. That is conclusive to show that the cause of the accident was something which did not happen in the navigation of the ship. For these reasons I am of opinion that this case is not within the terms of the exception, and therefore I think that the appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. I do not think that anyone accustomed to the ordinary use of language can, without unduly straining it, hold that this damage to cargo occurred "in the navigation of the ship in the ordinary course of the voyage." If I understand the facts in *Lawrie* v. *Douglas* (*ubi sup.*), the ship broke away and was, in fact, never properly moored. That seems to me to be the explanation of that case. I think the appeal must be dismissed.

BOWEN, L.J.—I am of the same opinion. I will assume in favour of the shipowner that the mischief was caused by the negligence of the ship's engineer, and that it did not arise from joint acts of negligence. But giving him the benefit of that view, one question is, was the act which caused the mischief done during the charter-party voyage? Yes, perhaps. But that does not decide the matter. There is the further question, was it done in navigating the ship? Answer, no. The navigation of the ship was at an end. It seems to me that on this ground the appeal fails.

Appeal dismissed.

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

Solicitors for the defendants, *W. A. Crump and Son.*

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Wednesday, May 21, 1890.

(Before the Right Hon. Sir JAMES HANNEN, assisted by TRINITY MASTERS.)

FIVE STEEL BARGES. (*a*)

Salvage— Towage — Supervening circumstances— Action in rem—Action in personam.

Where the owners of a tug contracted to tow a number of barges at sea for an agreed sum of money, it being part of the contract that, if the barges or any of them broke adrift during the towage, the tug-owners were nevertheless to be entitled to the sum, and in consequence of the severity of the weather the voyage was unduly protracted,

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

the barges broke adrift on several occasions, and were picked up again, and men in charge of the barges were saved from possible loss of life, the Court awarded salvage on the ground that the services were beyond what was contemplated by the parties when entering into the towage contract.

An action in personam for salvage lies against the owners of salved property, although the salved property has been transferred to others before the institution of the suit.

The liability for salvage is not confined to those who have the absolute property in the thing saved, but extends to persons having a beneficial interest therein and subject to pecuniary loss if the property were not saved.

THIS was a salvage action by the owners of a steam-tug called the *White Rose*, against Messrs. Finch and Co., for alleged salvage services to five steel barges numbered 68, 69, 70, 71, and 72 respectively.

The action was *in rem* against Nos. 70, 71, and 72, and *in personam* against the defendants in respect of Nos. 68 and 69.

The facts alleged by the plaintiffs were as follows: On the 13th Jan. 1890 the plaintiffs contracted with the defendants' agent to tow the said barges from Chepstow to Portland for 85*l.*, it being a term of the contract that, if any of the said barges broke adrift and were lost, the plaintiffs were nevertheless to have the 85*l.* Accordingly on the 16th Jan. the *White Rose* took the said barges in tow, and left Chepstow, each barge being in charge of two men. Next day, in consequence of the weather, the tug and barges had to anchor under the shelter of Lundy Island. For this purpose the barges were cast off, and barge No. 68 was anchored, the others being attached to her. The tug and barges were then storm-stayed till the 27th, when those in charge of the *White Rose* thinking the weather had moderated sufficiently to proceed left Lundy with the barges for Portland. At a short distance from Lundy the heavy sea caused barge No. 72 to break adrift, and shortly afterwards Nos. 69, 70, and 71 also broke adrift. The *White Rose* then towed No. 68 back to Lundy, and having anchored her in safety returned for the other four, which with difficulty and danger she eventually secured and then brought them back to Lundy. That night the wind increased to such an extent that the men on the barges were taken off to the tug, In doing so the tug collided with the barges and sustained damage. Next morning, the wind having moderated, the men returned to the barges, and during the operation of getting hold of the barges the tug's boat capsized and three of the barges' men were drowned, and the remainder saved by the plaintiffs. Towing was then recommenced, but shortly afterwards barges Nos. 70, 71, and 72 again broke adrift in consequence of the severity of the weather; and the tug at considerable risk took the two men off barge No. 70, which was drifting rapidly away. The steam-tug *Dunrobin*, which was in the vicinity, then took hold of barges Nos. 70, 71, and 72, and towed them to Cardiff, and the *White Rose* towed barges Nos. 68 and 69 to Portland, where they arrived on the 30th Jan.

The defendants by their defence, after alleging that the weather and danger were greatly exaggerated, and that if any danger existed it was solely occasioned by the negligence of the plaintiffs, also pleaded that the services were within the scope of the towage contract, and were not salvage, and that, assuming the plaintiffs were entitled to salvage, they had lost it as against barges 68 and 69 by giving up possession of them without preserving their lien or obtaining bail.

It appeared that the defendants were sending the said barges to Portland to deliver the same to the Government in pursuance of a contract they had with the Government to build and deliver five barges. After the barges had been brought into port, and before the institution of the suit, the plaintiffs allowed the Government to take possession of barges No. 68 and 69, at Portland.

Barnes, Q.C. and *Pyke* for the plaintiffs.—The plaintiffs are entitled to salvage. The circumstances of the salvage were outside the towage contract, and were different from those contemplated by the parties:

The Annapolis, Lush. 355;
The Westbourne, 61 L. T. Rep. N. S. 156; 14 P. Div. 132; 6 Asp. Mar. Law Cas. 405;
The Minnehaha, 4 L. T. Rep. N. S. 811; Lush. 335.

The plaintiffs have a right *in personam* against the defendants in respect of the barges delivered to the Government. The defendants had an interest in those barges, and were benefited by the plaintiffs' services.

Bucknill, Q.C. and *Raikes* for the defendants.—The services were not outside the towage contract, and therefore the plaintiffs are not entitled to recover salvage. The circumstances of the towage as originally contemplated were of an unusual character, and no such facts have been proved as to justify the court in saying that more than towage services have been rendered:

The Neptune, 1 Wm. Rob. 297;
The Kingalock, 1 Spinks, 263;
The Robert Dixon, 42 L. T. Rep. N. N. S. 344; 5 P. Div. 54; 4 Asp. Mar. Law Cas. 246.

Technically the plaintiffs have no right to sue *in rem* and *in personam* in the same action as they are doing here. The defendants had no property or interest in the barges delivered to the Government, and therefore the plaintiffs conferred no benefit on the defendants by their alleged services:

Ex parte Lambton, 32 L. T. Rep. N. S. 380; L. Rep. 10 Ch. App. 405;
Woods v. *Russell*, 5 B. & A. 942.

Moreover, even if the property was in the defendants at the time of the services, no action *in personam* lies against them for salvage after the salved property has been transferred to others.

Barnes, Q.C. in reply.

Sir JAMES HANNEN.—The first question in this case is, whether or not as a matter of fact the services which were rendered by the tug were of such a character and were rendered under such circumstances as to take them out of the towage contract. From the examination I have given to the decisions in point, it appears to me that it is not necessary, in order to become entitled to salvage, that the supervening dangers should be of such a character as to actually put an end to the towage contract. It is sufficient if the services rendered are beyond what can be reasonably sup-

posed to have been contemplated by the parties entering into such a contract. It depends on the circumstances of each case whether or not the services are advanced in this way to a higher degree so as to establish a right to salvage. I have very carefully considered this matter with the Trinity Brethren, and we have come to the conclusion that in some particulars salvage services have been rendered. The character of the contract is of course to be looked at, and the circumstances to which it related, before we arrive at the point from which we have to start in estimating the value of the higher class of services. This was a towage of a very peculiar character, which those who undertook it must have known would be a difficult operation at that time of the year, towing as they would through a very exposed and dangerous tract of the sea. They must be assumed to have taken all that into their consideration when they made the bargain to do this peculiar work for 85*l*. They must also have taken into consideration that they were liable to delays, although they could not have contemplated so long a delay as was necessarily incurred in consequence of the extreme violence of the weather. But undoubtedly there did supervene some additional operations which had to be performed which I think cannot be considered as within the towage contract. I have dealt with the delay. No doubt it was somewhat longer than could be expected, but I do not attach great importance to the delay.

Then arises the question whether the tug was justified in going to Lundy. It has been said that that was wrong. I am advised that it was not an improper thing to do. There may possibly be a difference of opinion as to whether it would have been better to go to some other place; but at the utmost that can only be put as an error of judgment, if indeed it was that. I am, however, very strongly advised that it was highly injudicious to put to sea from the shelter of Lundy when they did. After the stormy weather which had prevailed for so long a time any nautical man ought to have known that in such circumstances to tow a string of barges was to expose them to serious danger, as the result proved, for they began to break adrift as soon as they got outside the shelter of Lundy. Therefore, in estimating the value of the plaintiffs' service I do not take into account the return to Lundy. But one of the barges—No. 71—was found by a steamer, which rendered it necessary that the tug should go to its assistance, and extricate it from the position of danger it was in; and at the same time, barge No. 72 was taken to a position of greater safety. That I am of opinion was a salvage service, arising as it did from necessity outside the contract. We are also of opinion that there was life salvage, in taking the men out of the sea after the boat had been upset by the tightening of the hawser. It seems to me to be perfectly clear that that was an accident for which no blame is imputable to the tug. The rising and falling of the sea would naturally cause a loosening and tautening of the rope; and unfortunately the boat got across the rope at a time when it was slack. The tug saved the lives of two men, and for that I think there should be an award, if there is property saved to which life salvage can attach. Then certain men were taken off one of the barges which went adrift. I think there can be no doubt that at the time those men were taken off everyone believed they were in danger; and though it was possible, and afterwards was the fact, that these men would have been saved by the barge being picked up by the steamer, yet I think there was some salvage service rendered to those men. Having regard to the circumstances which existed at the time, it was not certain that the barge would be picked up, and therefore I think there was life salvage in that respect. I therefore come to the conclusion that a sum is to be awarded as salvage for the extraordinary exertions which became necessary over and above those which were reasonably contemplated as within the towage contract.

But then it is argued that the plaintiffs are not entitled to recover, because, as against Nos. 68 and 69, they are not asserting their right as having a maritime lien, but have instituted their action *in personam*. The reason for doing this is because these barges are now in the possession of the Government, for whom they were made by the defendants. Those remarks do not apply to the other three barges, as to which a lien was asserted before they were given up to the Government. As to the two which have been given up to the Government, I think it is perfectly clear on the authorities that an action *in personam* lies against the owners of a vessel which has been saved, even though the property has been transferred to others and the lien lost. In this case, however, the property does not appear to have been in the defendants, because it would, I think, under the contract to which reference has been made, be in the Government. But on this point I am of opinion that the right to sue *in personam* is not confined to the case of the defendant being the actual legal owner of the property saved. I think it exists in cases where the defendant has an interest in the property saved, which interest has been saved by the fact that the property is brought into a position of security. The jurisdiction which the court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract, but it does not necessarily do so. It is a presumption of law arising out of the fact that property has been saved, that the owner of the property, who has had the benefit of it, should make remuneration to those who have conferred the benefit upon him, notwithstanding that he has entered into no contract on the subject. I think that proposition equally applies to the man who has had a benefit arising out of the saving of the property. In this case the defendants were under contract with the Government to supply them with barges at a certain price. Payment was to be made by certain instalments, of which only one remained unpaid at the time of these services. I think, if Mr. Barnes' argument is well founded, viz., that these instalments were all paid on condition that the barges should be delivered within twelve months of the date of the contract, it would follow that, if the defendants had not been in a position to deliver the barges within the twelve months, then either they would have been liable in damages for not performing the contract, or liable to make restitution of the instalments which had been paid them on conditions not fulfilled by them. It appears to me, therefore, that they substantially

had an interest to the full amount of the barges at the time of the services, and that the same moral obligation to which the law has given force in the case of an owner applies to those who have an interest in the property. That is certainly the business-like view of the matter; and I do not forget that the defendants insured themselves to the full value of these barges and described themselves as being the owners. In conclusion I award 200*l.* as salvage independently of the towage contract.

Solicitors for the plaintiffs, *Fielder* and *Sumner*.

Solicitors for the defendants, *Botterell* and *Roche*.

Tuesday, July 22, 1890.

(Before the Right Hon. Sir JAMES HANNEN.)

THE KONG MAGNUS. (*a*)

Collision—Institution of action—Delay—Maritime lien—Laches—Change of interest—Statute of Limitations.

In a collision action in rem the plaintiffs are not limited to any specified time during which they must institute their action, but where there has been a long lapse of time between the collision and the institution of the action, and the defendants seek to have the action dismissed on the ground of laches and delay, the question for the court in each case is whether it is inequitable to allow the action to proceed, and in determining this question the court will consider the opportunities the plaintiffs have had of arresting the defendants' ship, the availability of the defendants' witnesses, and all other circumstances affecting the possibility of securing a fair trial, and should the action be allowed to proceed every reasonable presumption will be made at the hearing in favour of the defendants.

A collision having occurred between the British ship M. and the Norwegian steamship K. M. in 1878, *the owners of the M. in* 1889 *instituted the present action in rem. The K. M. was owned by a limited company in which there had been changes of interest since the collision. Between the dates of the collision and action the K. M. had been thirty-five times in English ports, and twelve times in Scotch ports. Some of the crew of the K. M. were not available to give evidence. The defendants asked the court to refuse to entertain the action on the ground of laches and delay in its institution.*

Held, that, although the plaintiffs had had several opportunities of arresting the K. M., the circumstances were not such as to make it inequitable for the action to proceed, but that in trying the case the court would make every reasonable presumption in favour of the defendants.

THIS was a collision action *in rem* instituted by the owners of the British brigantine *Mizpah* against the owners of the Norwegian steamship *Kong Magnus*.

The collision occurred on the 19th April 1878, in the North Sea during a fog,

The action was commenced on the 8th Jan. 1889.

The defendants in their defence, after denying the acts of negligence alleged in the statement of claim against the *Kong Magnus*, said as follows:—

3. The *Kong Magnus* is a steamship of 418 tons, belonging to the port of Christiania, and at the time of the collision in question the said steamship was and still is owned by the Det Sondenfjelds-Norske Dampskibsselshab, which is a company incorporated under the Norwegian law, carrying on business at Christiania, in the kingdom of Norway. The *Mizpah* was a British ship, and the plaintiffs, the owners of the *Mizpah*, carry on business at Portmadoc in the county of Carnarvon.

4. The collision in respect of which this action is brought took place on the 19th April 1878, whilst the *Kong Magnus* was bound on a voyage from Christiania to Havre with a general cargo. The master and crew of the *Mizpah* were taken on board the *Kong Magnus* after the collision, and were landed from the said ship at Havre on the 21st April 1878.

5. The *Kong Magnus* discharged her cargo at Havre, and from the said month of April 1878 up to the date of the issue of the writ in this action the said ship has been running on short voyages, and during the last nine years she has repeatedly loaded and discharged cargoes at various ports in the United Kingdom within the jurisdiction of this honourable court.

6. The plaintiffs have always known the name and place of business of the owners of the *Kong Magnus*, and have always had knowledge and notice of the movements and voyages of the said ship, and since the said 21st April 1878 the plaintiffs have been in a position to prosecute their rights (if any) against the defendants in respect of the said collision, and to pursue their remedy in respect of the same either against the owners of the *Kong Magnus* or against the ship *in rem* by process of this honourable court, or of other courts of competent jurisdiction. Yet the plaintiffs until the institution of this action have neglected to do so, and have wilfully stood by and made no claim, and given no notice to the defendants of their intention to make any claim against the said ship in respect thereof or at all.

7. By reason of the laches and neglect and delay of the plaintiffs as aforesaid, the defendants have been induced to believe that no claim would be made against them by the plaintiffs for the said collision, and in consequence thereof the defendants are not now in the position to obtain and produce proper and sufficient evidence to establish their defence to this action which, but for such laches, delay, and neglect as aforesaid, they would have been in a position to obtain and produce and to have established, and witnesses who would have been and were available for the *Kong Magnus* are dispersed, and have been lost sight of by the defendants and are possibly dead, and the defendants cannot get their evidence, and are further and otherwise hampered and prejudiced in their defence.

8. Since the date of the said collision important changes of interest in the ownership of the *Kong Magnus* have taken place, and the rights of third parties have intervened.

9. By reason of the premises it is unjust and inequitable that the plaintiffs should be allowed to continue this action, and that the defendants should be put to trial upon the facts, and the defendants submit that the plaintiffs' claim is barred, and that their rights (if any) against the defendants are forfeited.

By order of the court the issue of whether the plaintiffs were in the circumstances entitled to prosecute their action was ordered to be tried before the merits of the collision were investigated.

At the trial of this issue it appeared that in 1881 there had been a new issue of shares in the company owning the *Kong Magnus*, and that the shares in the company were constantly changing. At the time of the collision the *Kong Magnus* was running regular voyages between Christiania and Havre, which voyages were duly advertised in the newspapers. She continued to be so employed (except during the winter months) till 1880, when she made one voyage from Christiania to Newcastle and back. She then returned to her old

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

line till 1882, when her place was taken by a new steamer, and she was employed as an ordinary cargo ship. From that time till the institution of this action she had been thirty-five times in English ports, and twelve times in Scotch ports. Evidence was given to show that her sailings were advertised in the *Shipping Gazette*, and that information as to her whereabouts could be obtained at Lloyd's.

The plaintiffs had instructed their solicitors in 1878, immediately after the collision, but according to their evidence, although they had made all reasonable inquiry, they never had an opportunity of arresting the *Kong Magnus*.

Three seamen, part of the crew of the *Kong Magnus*, who were on her at the time of the collision, were still in the employ of the defendants. The master was in business at Christiania, and the defendants had a statement from the engineer. Immediately after the collision a protest was noted by the defendants at Havre, and subsequently extended.

Cohen, Q.C. and *F. Laing* for the defendants.—The maritime lien has been destroyed by lapse of time. The rights of third parties have intervened, and will be prejudiced if this action is allowed to go on. There has been since the collision a new issue of capital, and a change of ownership in the shares:

The Bold Buccleugh, 3 W. Rob. 229; 7 Moo. P. C. C. 267;
The Charles Amelia, L. Rep. 2 Ad. & Ec. 330; 3 Mar. Law Cas. O. S. 203;
The Europe, Br. & L. 89;
The Juliana, Swab. 20;
The Mellona, 3 W. Rob. 10;
Abbot on Shipping, 12th edit. 601;
Parsons Law of Shipping, vol. 2, p. 361.

The plaintiffs have been guilty of laches, forfeiting their lien in delaying the action for so long. It would be inequitable that the defendants should be now called upon to meet a claim twelve years old. Their evidence is lost, and they are not now in a position to do justice to their case. Therefore, either by analogy to the Statute of Limitations, or by laches under the rule adopted by the courts of equity, the plaintiffs' claim is barred. Equity does not entertain stale claims, and sets its face against laches:

Greenfell v. *Girdlestone*, 2 Yo. & Coll. Ex. 679;
Pearson v. *Belchier*, 4 Vesey, 627;
Spackman v. *Evans*, L. Rep. 3 E. & I. App. 171;
Story's Equity Jurisprudence, ss. 64a, 529;
Lewin on Trusts, 7th edit., 742.

The court ought by analogy to apply the Statute of Limitations. The principle is as much applicable to an action *in rem* as *in personam*:

The Rebecca, 5 Ch. Rob. 102;
Gregory v. *Hurrill*, 5 B. & C. 341;
21 Jac. 1, c. 16, s. 3;
4 & 5 Anne, c. 16, s. 9;
19 & 20 Vict. c. 97, s. 12.

Sir *Walter Phillimore*, and Dr. *Raikes*, for the plaintiffs, *contrà*.—The plaintiffs have been guilty of no laches. They used all reasonable diligence. Pure delay only avails where it prejudices a fair trial, which is not the case here:

Thomson v. *Eastwood*, 2 App. Cas. 214.

There has been no change of ownership, and the rights of third parties are not affected:

The Bold Buccleugh (*ubi sup.*);
The Europa (*ubi sup.*);
The Sarah Ann, 2 Sumner, 206, 212;
Willard v. *Dorr*, 3 Mason, 91, 161.

The court will not stop the prosecution of a claim except under very exceptional circumstances. There is nothing in the present case which makes it inequitable that the action should proceed. The plaintiffs would be quite willing that the defendants' documents made at the time, or shortly after the collision, should be used as evidence for the defendants.

Sir JAMES HANNEN.—I have had an opportunity during the adjournment of this case of considering the authorities which have been referred to, and if I thought it necessary to go in detail through all those authorities I should not give my judgment now. But, having considered the cases referred to, and coming to the conclusion that there are certain guiding principles by which I ought to be governed, I propose to state shortly the conclusion I have arrived at. In the first place, it is admitted that there is no Statute of Limitations applicable to a case of this kind. But it is argued that I should adopt the analogy of the Statute of Limitations, and further, even if I do not adopt the fixed periods mentioned in the Statute of Limitations, that I should refuse to entertain this suit on the ground of laches on the part of those prosecuting it. Now I do not find in any of the authorities referred to that any court has ever fixed upon any period limited by the Statute of Limitations as applicable to suits of this kind. There are phrases about it which have been used by particular judges, but there is no case in which any particular period of time has ever been fixed upon. It is said that reference has been made by learned judges to laches which in some circumstances would be a bar to the claim; but there are no decisions which enable me to fix upon any particular period of time. I come to the conclusion that the principle which should guide my decision is this: that in each case it is necessary to look to the particular circumstances of the case to see whether or not it would be inequitable after a period of time—which of course has to be taken into account—and the various circumstances which may have occurred, for example, amongst others loss of time, loss of evidence, and change of property, whether it would be inequitable in the circumstances to entertain the suit. If the vessel had never been in this country or in the United Kingdom, it has not been contended that there would have been any necessity to come to this court, and I am of opinion that it cannot be asserted that there was any duty to go to Norway and prosecute the claim. It has been said that, though no claim was made abroad, it might have been advanced; but I think there was no obligation to do so, because it might have the effect of preventing the vessel being sent to this country. No doubt it was thought and expected that the vessel would come within the jurisdiction. The opportunity was waited for to enforce the lien if she should come. If she had never come here, there would therefore have been no ground for contending that there had been any laches. She did, however, come to this country on several occasions. I do not think it necessary to consider whether or not her coming into a Scotch port ought to be taken into account, because I think it is clear that there were several opportunities of having her arrested in English ports. Evidence has been given of a very great number of occasions on which she came into English ports. On very

many of those occasions it would not have been possible to arrest her, because she had come and gone before the information could come to the knowledge of Messrs. Pritchard and Co., who were acting for the plaintiffs in this matter. But, as I have said, there were several opportunities which I think, had other steps been taken, they might have made use of to arrest her. I do not say that I think something more might not have been done. I think some one might have been employed to look through the list of arrivals and departures of vessels which Lloyd's list gives, and I should think that would have been done for a very small remuneration. There must be many clerks engaged in the offices of the *Shipping Gazette*, who must have the names of the various vessels coming and going under their eyes. Very little extra trouble and remuneration would have ensured, I should have imagined, more specific knowledge of this vessel than seems to have reached Messrs. Pritchard. But I think the observation which has been made in some of the cases is applicable here, viz., that there are very few cases in which after the event it is seen that something more might have been done than was done. It is quite certain, and I am satisfied of it, that there may have been a falling off in the exertions which were made to trace this vessel; that, in the first instance, there was considerable activity on the part of Messrs. Pritchard in their endeavours to find this vessel; but I suppose, as in the ordinary course of things where there has been a failure to find a vessel during several years, the means taken were not so active as they had been. But certainly I do not see that there is anything to show that there was any acquiescence in the immunity of the *Kong Magnus*, or any idea of abandoning the claim.

The result therefore of my judgment is this, that there are circumstances which would make it the duty of the court to consider whether or not it has become impossible to do justice in the case by reason of the delay which has occurred. As I have said, if the vessel had never been here no such question need have arisen at all. The vessel having come here, the question which arises for my consideration is whether I consider that it would be inequitable in the existing circumstances that the plaintiffs should be allowed to enforce their claim against this vessel. I come to the conclusion that there are no such circumstances. It has not been shown that the merits of the case cannot be gone into. Several of the crew are living, and may be forthcoming. It is to be remembered that the defendants would certainly have the benefit of every presumption which can fairly be made in their favour by reason of the absence of witnesses. Certainly, if the case is tried before me, I should approach it greatly influenced by the fact—if fact it should turn out to be—that there are witnesses who cannot now be found upon whose evidence it would appear probable that the case would materially turn. I do not doubt that that would be equally the case should the action be tried by my colleague. There is one other point before I deal with the suggestions which have been made as to the mode of trial, and that is as to the change of ownership. I am clearly of opinion that this is not a change of ownership, and if I were to endeavour to act upon the suggestion of Mr. Cohen, I should not know by what principle my decision should be guided. He has given some instances which he thinks show the injustice which would arise from not allowing changes in the ownership of shares to be taken into account. But the first share sold after a collision which gives rise to a claim must have a different value. It would be impossible to define any time at which it can be said that the change of ownership of shares is to be a bar to the right of the injured person to pursue his remedy. I do not think that Mr. Cohen has argued that the question of interest is inconsistent with Sir Walter Phillimore's argument. I will not stop to consider that now, but I think it right to say that I do not consider my decision now in any way whatever prejudices the argument which I presume will be addressed to the court which is to determine it that the interest should not be forthcoming during the period. I have only further to allude to the proposals which were made by Sir Walter Phillimore. I do not consider that I have any right to impose those conditions. Taking the view that the plaintiffs are not debarred by the existing circumstances from pursuing their remedy, I have no right to say that they shall submit to some variation of the law of evidence. But, as I have said, every reasonable presumption in favour of the defendants ought to be, and if the case is tried before me will be, made, and it will be expedient on the part of the plaintiffs to make such concessions as have been indicated by Sir Walter Phillimore, in order that the plaintiffs may by those means meet any prejudices which the court might entertain were such facilities withheld. I do not impose that as a condition. I have no right to impose the condition that something which would not in ordinary circumstances be admissible in evidence should be admitted. But I do not in the least discourage any arrangement of that kind in order to guard against prejudice. I therefore think that the case must be allowed to proceed, and I reserve the question of costs.

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *Botterell* and *Roche*.

HOUSE OF LORDS.

Dec. 5, 8, 9, *and* 15, 1890.

(Before the LORD CHANCELLOR (Halsbury), Lords WATSON, HERSCHELL, and MORRIS.)

TREDEGAR IRON COMPANY *v.* OWNERS OF THE CALLIOPE.

THE CALLIOPE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Damage — Wharf—Obstruction in bed of river—Negligence.

Although it may be the duty of wharfingers in a public river, alongside whose wharf vessels lie to load and discharge, to warn the masters of such vessels of any unusual or extraordinary obstruction likely to injure them when coming alongside or leaving, it is not their duty to give information as to the condition of the ground alongside the wharf which is produced in the

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

ordinary way by the action of the tide and the user of it by vessels taking the ground.

The appellants were proprietors of a wharf on the river at N. There were two berths for vessels at the wharf, one alongside the wharf, and the other outside the first berth, near to mid-stream. When vessels were lying in these berths the action of the stream or tide caused a ridge of mud to accumulate between the two berths. There was evidence that the appellants were in the habit of scraping down at intervals the ridge so formed. By charter-party and bill of lading the respondents' ship was to deliver her cargo as directed by the consignees. The cargo was consigned to the appellants, and the ship was ordered by them to proceed to their wharf to discharge. In approaching the wharf she grounded on the ridge of mud above mentioned and sustained damage.

Held (reversing the judgment of the court below), that there was no breach of duty on the part of the appellants which could render them liable for the damage so caused.

The Moorcock *(60 L. T. Rep. N. S. 654; 6 Asp. Mar. Law Cas. 373; 14 P. Div. 64) distinguished.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Cotton and Lindley, L.JJ.), reported in 61 L. T. Rep. N. S. 656; 6 Asp. Mar. Law Cas. 440; 14 P. Div. 138, who had reversed a judgment of Butt, J., reported in 6 Asp. Mar. Law Cas. 359; 59 L. T. Rep. N. S. 901, in favour of the defendants, the present appellants.

The action was brought by the respondents, the owners of the steamship *Calliope*, in respect of damages sustained by the ship while attempting to come up to a berth at a wharf of the defendants, under circumstances which are fully set out in the judgments of their Lordships and in the reports of the case in the court below.

Finlay, Q.C., *J. Walton*, and *A. Adams* appeared for the appellants.

Barnes, Q.C., *Robson*, and *Holman* for the respondents.

At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury).—My Lords: I cannot help thinking that this case affords a somewhat important illustration of the necessity of calling upon litigants to place in some written form of pleading the precise cause of action upon which they rely, for I think that the time during which your Lordships have been occupied and the time which has been occupied in the courts below has to a considerable extent been the result of an oscillation in the minds of the advisers of the plaintiffs as to what was their cause of action. I cannot entertain a doubt, when I look at the form of the statement of claim as it originally stood, that the cause of action was originally founded upon the notion that this vessel was invited to a berth, in the strict and proper sense of that word, at which it was unfit for a vessel under any circumstances to lie, and that by reason of the inequality and unfitness of the berth the vessel being brought there was strained and injured. If that had been the complexion of the case, I certainly entertain no doubt that the law as laid down in the earlier cases and in the later case of *The Moorcock* (60 L. T. Rep. N. S. 654; 6 Asp. Mar. Law Cas. 373; 14 P. Div. 64) would have been applicable to that state of things. In this case the wharfinger, who happens to be the consignee, invites the vessel to a particular place to unload. If, as it is said, to his knowledge the place for unloading was improper and likely to injure the vessel, he certainly ought to have adopted one of these alternatives: either he ought not to have invited the vessel; or he ought to have informed the vessel what the condition of things was when she was invited, so that the injury might have been avoided. But, gradually as the case proceeded, it apparently occurred to the parties that this ground could not be maintained, and that the vessel if it had got there would have been perfectly well able to lie there in a fit and proper place for unloading, and no injury would have resulted; and then came an application to amend, to which the learned judge acceded. The amendment is of this character, that the persons who were in charge of the operation of bringing the vessel to the berth were guilty of negligence. Who those persons were I will say in a moment. The nature of the negligence alleged is this, that in the ordinary condition of things a vessel of that draught could not properly get to that berth at the particular time of the tide, and a Mr. Griffiths is alleged to have misled the pilot and the captain as to the safety with which that vessel might get there to lie there. Now, let us see what the meaning of this contention is, and upon what ground it is suggested that the wharfinger and consignee was guilty of the negligence imputed to him. He in the first instance, as he had a right to do, gave a direction that the vessel should come and unload at that wharf. If, under no circumstances and at no time, the vessel could have gone to that wharf—though in that case, as I think, a serious question would arise as to whether it is not for the captain or the pilot, as representing the shipowners, to make up his mind whether he can safely get to that place or not, and to make his election whether he will or will not attempt to do so with a view to safety—still, if under no circumstances the vessel could with safety have gone there, and if he had relied on that statement for the purpose of getting there, a different question would have arisen. But the facts do not raise that case, because, as I understand the facts relied upon, there is given in the letter the draught of water which under ordinary circumstances may be expected at the particular time, and at the same time as that direction is given the writer says, "But your pilot will tell you what to do." What is the meaning of such a phrase as that? What is the suggestion when the person to whom the direction is given is told to rely upon the pilot? What does a pilot do? What is a pilot's duty? It is impossible to doubt that, under ordinary circumstances, that would mean this: This is information which I give you for the purpose of forming your own judgment whether you can come there or not; that is to say, this is the height of water which may be expected at such and such a time, but you, the person in charge of the navigation of the vessel, the captain, or the pilot, must form your own judgment upon the matter, and you must not expect me to give you a warranty that that height of water will exist, but you, the captain or the pilot, must form your own judgment upon it and must act accordingly. Under the particular

circumstances of this case it appears that the utmost amount of water which could possibly be expected at the top of the tide was 18ft. 9in., and that depended upon a comparison between the Bathurst Basin at Bristol and this Tredegar Wharf, between which there was said to be, under the ordinary condition of things, a difference of two feet in favour of the Tredegar Wharf. The vessel in question was drawing aft 18ft. 3in. and at the top of the tide; therefore, assuming everything to be normal in the condition of things with which the parties were dealing, there would be six inches to spare, and that was all. The facts appear to be that about a hour and a half before the top of the tide the vessel attempted to get in. I think it is idle to say that she was there for the purpose of attempting to get in at the top of the tide. It is manifest to me from the evidence that she attempted to get in long before the state of the tide would have justified her doing so, and it was as absolutely certain as any calculation could make it not only that she was likely to ground, but that she must ground if she attempted it. Then it is said that Mr. Griffiths encouraged the pilot and the captain to come in, and in fact the phrase is used that he "gave orders." I think in the course of the argument it has been sufficiently pointed out that the use of those words is inaccurate if understood in the sense that Mr. Barnes has relied on. That a foreman who is concerned with the regulation and management of the wharf, in a certain sense "gives orders" is true enough. He has a right to assume that the captain and the pilot who are navigating the vessel alongside the wharf will navigate her safely; but when it comes to a question of what particular position alongside the wharf or what berth the vessel is to occupy with reference to the loading and unloading of the goods the person on the wharf is the person to give directions at what particular part of the wharf, and how the vessel shall be moored; because with reference to the cranes and other machinery at the wharf for loading and unloading the vessel it may be important that the person in charge of the wharf should give such directions, and accordingly Mr. Griffiths appears to have given such directions. But is it contended for a moment that either the captain or the pilot would understand that Mr. Griffiths' position there was such that he was in a position to give orders to the captain or the pilot with reference to the approach of the vessel, or information as to the water she would draw? The absurdity of such a proposition is at once apparent when it is remembered that this question not only depends upon the absolute depth of the water either at the top of the tide or an hour and a half before it, but also has relation to the draught of the vessel, with which the captain and the pilot may be supposed to be perfectly familiar, but which would be totally unknown to Mr. Griffiths on the wharf. That words which appeared to resemble orders may have been used by Mr. Griffiths when once the difficulty had arisen and it was found that the vessel was incapable of reaching the wharf, is exceedingly likely. I should concur with Butt, J. in the opinion that, while each side perhaps has given a colour to the particular language used, it is extremely likely that Mr. Griffiths used words which, understood literally and without reference to the relations existing between Mr. Griffiths and the captain or the pilot, might in one sense be described as orders; but that he gave orders in the sense of a command in relation to the approach of the vessel to the side of the wharf, or that they so understood it or placed any reliance upon his words as being orders, I certainly do not believe. But we are not left without guidance upon the subject, because the captain and the pilot themselves give, to my mind, an absolutely overwhelming proof that they knew perfectly well that what they were doing was an operation attended with risk, for the pilot himself said that he would not undertake the risk because he knew that he might lose his certificate, and that if it was done it must be done upon the responsibility of the captain. Now, what does that disclose? In the first place, it discloses an absolute intention not to rely upon any "orders" supposed to have been given to them; and in the second place, it also shows that they knew that the operation was one which was attended with danger. That brings me to the next point, what was the danger? The danger was a danger which has in fact been recognised by the pilot in the very first part of his evidence. He knew there were these inequalities in the bed of the river, inequalities owing to the nature of the river, to the nature of the soil of the bed of the river, and incident to the ordinary user of the bed of the river. Under those circumstances it is suggested that there was some duty, before any vessel came in, that this particular berth should be scraped even, so that the vessel should lie on an even keel the moment that she got up to within—I do not know that I am able to give verbal expression exactly to what is suggested—but to within some reasonable distance of the wharf, within what I think Mr. Robson called "the sphere of the operations." I am not quite certain that was not a phrase which was very adroitly used, because it would comprehend something that was so vague that one cannot quite grasp it. The berth itself is admitted now to have been perfectly proper to be in, and how far this alleged responsibility for the approach to the berth extends I really do not know. I suppose, to put it most in favour of the respondents, it would be suggested that it extends as far as vessels coming in and lying at this wharf by lying at that wharf raised the ridge upon which so much has been said. Now, upon that subject, whenever the question does arise, I hope I shall keep my mind perfectly free to have it discussed; but it is absolutely new to me to find that there is by law a responsibility or an obligation upon everybody using the river in a natural and normal way and by lying on mud flats raising by the operation described some of these inequalities, so that another vessel coming in and lying there transversely might suffer injury. It certainly is a new proposition for which I should like some authority before affirming that such an obligation exists by law. I can only say, from one's knowledge of that part of the world, that it would be an obligation which would raise a very serious question indeed, because in particular states of the wind many hundreds of vessels may be seen lying on Cardiff flats, and lying side by side; and the character of the mud there is very much the same as that of the mud in the Usk; and if upon those vessels or their owners there is cast an obligation when they sail

away after the tide has come in, having left this impression, to remove those ridges and flatten them again, or if they neglect to do so to be subject to an action by the owner of some other vessel that comes in afterwards and lies across the ridges, it throws an obligation on the shipowners which, I think, they will do well to consider. It certainly is a very serious and important proposition to lay down, and one for which I certainly should require some authority. Then, the accident having happened in this way, the contention is, that this obligation exists, and that, to put it plainly, there was a hard substance left in front of this berth which ought to have been cleared away, and that by reason of its not having been cleared away this accident happened. With regard to that, which is in plain terms the contention which has been made, all I shall say upon that part of the case is, that I do not know whether that is so or not; but one difficulty is, that there is no evidence. That this vessel was injured by lying in the place where she did lie is certain, but neither shipowner nor wharfinger ever intended that she should lie there. The mode in which she got stuck originally I have already referred to; but if it is said that that was not the normal condition of the bank in that place, all I can say is I have no evidence that that was so. There is the theoretic evidence (I admit) that whenever two vessels lie there they raise this ridge; but I do not know when two vessels did lie there; certainly there is no evidence of that sort before us. If two vessels did lie there, I do not know that the ridge that was raised by their lying there has not been scraped away. Then it is said, "Well, but that lies within the knowledge of the defendants." In one sense that is quite true. There is no pretence of it on the other side; and it is part of the case for the plaintiffs that that amount of negligence is in the management of the wharf. That is part of the evidence which the plaintiffs ought to give, and the plaintiffs have given no such evidence. I do not know when they last scraped the place, and I do not know that two vessels ever did lie there before this vessel, after the last scraping. In the result it appears to me that, putting it upon the grounds upon which this case was originally put, there is a complete answer to it; and putting it upon the grounds which have been gradually brought forward in lieu of those originally insisted upon, the whole case is left absolutely without evidence. The only explanation that I can give of that is, that the particular cause of action had not occurred originally to the advisers of the plaintiffs. Much as I respect any judgment of the Court of Appeal (particularly on such a case as this), when presided over by the Master of the Rolls, when I look to see the grounds upon which the judgment of the Court of Appeal proceeded in this case, it appears to me that they have assumed a state of facts without evidence to support it, and one which for my own part I am unable to affirm. I therefore move your Lordships that this appeal be allowed, and that the respondents pay to the appellants their costs, both here and below, and that there be a return of the 1000*l.* paid as a condition of this appeal.

Lord WATSON.—My Lords: Upon the facts proved this appears to me to be a very plain case. The cargo of the *Calliope*, consisting of iron ore, was deliverable at Newport to the appellant company, who were indorsees of the bill of lading. They were also in the occupation of a tidal wharf within the limits of the port of delivery known as the Tredegar Wharf. On the arrival of the *Calliope* atNewport, about 2.30 p.m. on Saturday, the 29th Jan. 1886, the captain received instructions from the appellants to bring her alongside the Tredegar Wharf for discharge. The vessel, which drew 18ft. 3in. aft, and 14ft. 7in. forward, did not then proceed to the wharf because the pilot advised that the depth of water at the next tide would be insufficient. On the afternoon of the same day the captain received a note from Griffiths, traffic foreman to the company, in these terms: "You can bring your steamer s.s. *Calliope* to the Tredegar Wharf Monday morning's tide, as we have two feet more water than at Bathurst Basin. Pilot will tell you what to do." The spring tides were just beginning, and it was, in my opinion, a matter left entirely to the pilot, who knew the draught and trim of the vessel, to judge whether she could be safely berthed on the Monday morning, or must wait for the tide of Monday afternoon or Tuesday morning. The captain, who was naturally anxious to avoid delay, read Griffiths' communication to the pilot. He admits that the pilot at once said that he did not think there would be water enough on Monday morning. The pilot says that he not only expressed that opinion, but distinctly told the captain that, inasmuch as he would incur the risk of losing his certificate, he would not take the vessel to Tredegar Wharf on Monday morning upon his own account, although he was willing to make the attempt if the captain would undertake responsibility for the consequences. The captain denies that such a statement was made to him, but the pilot's evidence is corroborated by two witnesses who were present on the occasion. There are two berths at the Tredegar Wharf, one alongside the quay and another just outside it, in which vessels lie when stranded by the receding tide. The *Calliope* was destined to the inner berth; and it is not now disputed that if she had got there she would have lain in perfect safety. At that part of the river Usk the foreshore is chiefly composed of mud, varying in consistency, becoming harder and harder as it approaches the underlying rock. A loaded vessel when stranded presses upward the mud on either side of it, and when two vessels are lying side by side that pressure tends to form a ridge of mud between them, which remains after they leave. From the action of the river a deposit of muddy silt rapidly accumulates upon the foreshore. The appellant company are neither owners nor lessees of the foreshore upon which their wharf abuts; they have no right except as members of the public, although their position as occupiers of riparian land gives them a use of the river and its adjacent solum for the purpose of loading and unloading craft which the members of the public cannot enjoy without their permission. They cannot interfere with the natural condition of the foreshore in any way which could possibly affect the flow of the river or its navigation; and such innocent operations as they may venture upon are only protected by the tacit consent of the owners of the solum. It appears that the appellant company and other wharfingers upon the Usk are in the habit at intervals of ten days

or a fortnight of removing from their berths the mud deposit, because it impedes the floating of vessels with the rise of the tide, and also of scraping down the ridge or mud bank between the berths.

On the Monday morning the *Calliope* was taken up the river under steam until she passed the Tredegar Wharf. She was then turned round to port, and her course directed straight to the wharf. When her stem had got within a few feet of the lower end of the quay her stern took the mud, and attempts made to berth her, by warping her stern towards the upper end of the quay, proved unsuccessful. The time at which she attempted to reach the berth was shortly after 4 a.m., more than an hour before full flood. She did not float at the top of the tide, and, at low water, her stem and stern were fast in mud, whilst amidships she rested upon, and was partly sunk into the ridge already described, which had been scraped down, as usual, about a fortnight previously. In that position her hull suffered damage, for which her owners are now seeking to make the appellants responsible. The sole cause of the action disclosed in the respondents' statement of claim was, that the berth which the appellants directed the *Calliope* to occupy was unfit for that purpose, being "in an uneven, dangerous, and defective condition." Had it been shown that such was the fact, and that the injuries sustained by the *Calliope* were due to that cause, the present case would have been within the principle followed both by the Admiralty judge and the Court of Appeal in *The Moorcock* (60 L. T. Rep. N. S. 654; 14 P. Div. 64). In the course of the trial before Butt, J., the respondents put forward two new grounds of action, and asked leave to amend their pleadings in order to introduce them. One amendment was allowed by the learned judge, "in order to raise the question of negligence on the part of Griffiths, upon the assumption that he was intrusted with the authority to bring this ship in, and that his acts were the acts of the defendants." The second amendment proposed, to the effect that the statement in Griffiths' note as to the excess of water at the wharf beyond its depth at Bathurst Basin was a material misrepresentation, by which the captain and pilot were misled, was reserved for consideration after the evidence was completed. So far as concerns the amendment allowed, it is obvious that Butt, J. did not attach implicit credence to the account of Griffiths' actings given by the *Calliope* witnesses, which was contradicted by Griffiths himself and other witnesses for the appellants. But, assuming that account to be true, it falls far short of showing that Griffiths was either intrusted with or exercised authority in bringing the vessel to the wharf. The fair inference to be derived from it is, in my opinion, that the whole charge of navigating the vessel, and of bringing her alongside the quay, was from first to last in the hands of her officers and pilot, and that Griffiths did and said no more than might naturally have been expected of a wharfinger's servant who was assisting to warp and moor her. The other amendment, which was not expressly allowed, but was dealt with by Butt, J. in the course of his judgment, is equally without foundation in fact. I think with Butt, J., that the representation made by Griffiths was substantially true. According to the register kept from actual observation at Bathurst Basin the extreme depth of water there on the morning in question was 16ft.; adding 2ft., that would only give 18ft. at Tredegar Wharf, whereas the after part of the *Calliope* was drawing 18ft. 3in. For these reasons Butt, J. dismissed the suit. On appeal his judgment was reversed by Lord Esher, M.R. with Cotton and Lindley, L.JJ., who condemned the present appellants in costs and damages. Their Lordships did not deal with any of the questions raised in the court below, but rested their decision on the ground, that the appellants were lessees of a portion of the river bed *ex adverso* of their wharf, including the space between the berths, and that they had failed in their duty to those in charge of the *Calliope* by neglecting either to remove the ridge or to warn the *Calliope* of its existence. In their argument at your Lordships' bar the respondents mainly relied upon the cause of action which has been affirmed by the Court of Appeal. I hesitate to affirm the principle that a court of review ought to entertain a new ground of action, of which the defendant had no previous notice, based upon inferences of fact derived from evidence directed to other points, inferences which the defendant might possibly have been able to explain away or contradict if he had been required to lead proof with reference to them. But in the present case I am satisfied that the inferences which the Court of Appeal has drawn are not warranted by the evidence. The assumption that the appellants were lessees of the river bed is expressly negatived by the only passage in the depositions to which the respondents were able to refer. Yet it seems to have been regarded as an important factor in the case, and Lindley, L.J. says that "the learned judge in the court below failed to attribute sufficient weight to the fact that the ship was injured by grounding on the ground of the defendants." I do not doubt that there is a duty incumbent upon wharfingers in the position of the appellants towards vessels which they invite to use their berthage for the purpose of loading from or unloading upon their wharf; they are in a position to see, and are in my opinion bound to see, whether the berths themselves and the approaches to them are in an ordinary and reasonable condition of safety for vessels coming to and lying at the wharf. If the approach to the berth is impeded by an unusual obstruction, they must either remove it, or, if that cannot be done, they must give due notice of it to ships coming there to use their quay. I think it would be altogether unreasonable to hold that the river-bed in front of the Tredegar Wharf was not in an ordinary condition of safety unless it was kept as level as a billiard-table; the evidence shows that in the river Usk the stranding of a vessel necessarily occasions a certain rise of the mud above the adjacent level; that the creation of such a ridge as that between the appellants' berths is incidental to all the wharves on the river as well as theirs; and also that the scraping down of such ridges at intervals of time is the usual and only method which has been followed at all these places for enabling vessels to enter the inner berth in safety. It is proved that the appellants had not neglected to take the usual precautions for reducing the ridge; and it is not even suggested in the evidence that, on the occa-

sion when the *Calliope* stranded upon it, the ridge had attained greater dimensions or height than it usually did before the process of scraping came to be repeated in course. In these circumstances I find it impossible to impute negligence to the appellants. I do not think that a seaman of ordinary skill would have experienced difficulty in ascertaining when the tide would be of sufficient depth to carry the *Calliope* safely into the inner berth; and I can hardly conceive conduct more reckless than that of the persons intrusted with the duty of taking her there. They knew that safe access was a mere question of time, and that by waiting for high water on the Monday afternoon, or Tuesday morning at furthest, it could be secured. The pilot did not think that there would be enough water; he knew that the attempt to take her in would put him in peril of losing his certificate; and the captain, who seems to have had no personal knowledge of the locality, was aware of the pilot's opinion. Both were in fault, and it is unnecessary to consider the proportion of blame attaching to either, because the present case is between ship and wharf, and the ship must be answerable for what they did either singly or jointly.

One other observation occurs to me upon the facts of this case. I think it is clearly proved that the existence of the ridge was not the cause which prevented the vessel from getting into berth. It has never been suggested that the muddy solum upon which her sternmost part rested was in an abnormal or unsafe condition, either as regards level or otherwise. According to the captain, whose evidence on the point is uncontradicted, her stern only was aground until after the tide began to ebb, when for the first time she grounded amidships: so that until she grounded on the ebb her midships must have been afloat above the ridge for the period of an hour at least. During that period efforts were made to warp her into the berth; and it is plain that these were defeated, not by the ridge, but by the fact that her stern was too fast in the mud. If the grounding of her stern was due to the negligence of those in charge of the *Calliope*, I cannot understand upon what principle the appellants could be made responsible for her being held fast by the stern in such a position that she stranded upon and was injured by the ridge when the tide ebbed. I therefore concur in the judgment proposed by the Lord Chancellor.

Lord HERSCHELL.—My Lords: I am of the same opinion. I think, as my noble and learned friend has pointed out, that there was some misapprehension on the part of the learned judges in the court below which influenced their decision and led, to some extent at all events, to their differing from the learned judge whose judgment they were reviewing. What I conceive to have been the misapprehension is put most pointedly in the judgment of Lindley, L.J., who says that he thinks "sufficient weight was not given by the learned judge in the court below to the fact that this ship was injured by grounding on the land of the defendants;" and later on he speaks of them "as occupiers of the place and having control of the bed of the river," and says that this "was not sufficiently attended to by the learned judge in the court below." Both the Master of the Rolls and Cotton, L.J., speak of the defendants having been lessees of the particular part of the bed of the river where the accident occurred. Now, the learned counsel for the respondents being pressed upon this point have entirely failed to show the slightest foundation for any such allegation. I do not understand that the appellants had in any way whatsoever a control of this part of the river; nor do I think it is accurate to say, as was said by Cotton, L.J., that the unevenness of the bed of the river was caused by the appellants mooring for their own purposes vessels opposite their wharf. The real position of things I take to be this: Persons navigating the river with vessels have a right to discharge those vessels at any convenient and suitable wharf along its course, and when a vessel grounds and lies near a wharf for the purpose of discharging, that is as much a natural use by the vessel of the river as is her use in being water-borne to the place where she is to discharge, and when she is in that position for the purpose of discharging, her situation there and the discharge are as much a matter of her concern as they are of the wharfinger's, and are as essentially a part of the mode of using the river for the purposes of navigation as any other. Therefore I approach the case from an entirely different standpoint, with all respect to the learned judges in the court below. It appears to me that these ridges or elevations in the bed of the river were caused by the use of the river by vessels navigating it in one of the ordinary modes in which a river is used; and to attribute them to the wharfinger, to speak of them as if they were his work and the result of acts done by him, is, in my judgment, with all respect, to misapprehend the real state of things and the relations of the parties. No doubt it is to his advantage that ships should discharge at his wharf. On the other hand, it is an advantage to the ships that they should go to the place of discharge where commercially the products which they carry are required. Therefore, I am by no means prepared to say that there was any legal obligation on the part of the appellants, when vessels had been lying at their wharf, to remove all unevenness from the bed of the river in order that it might become a perfectly level surface again, any more than there was an obligation on the ships which had caused the elevation to remove that elevation themselves. I will deal in a moment with duties which might, under certain circumstances, conceivably arise which might cast an obligation upon the wharfinger, but I am only saying that the mere fact that vessels so lie and cause a difference of elevation in different parts of the river does not in itself appear to me to involve necessarily any such obligation as is suggested.

Now, I do not for a moment deny that there is a duty on the part of the owner of the wharf to those whom he invites to come alongside that wharf, and a duty in which the condition of the bed of the river adjoining that wharf may be involved. But in the present case we are not dealing, as were the learned judges in the cases which have been cited to us, with a condition of the bed of the river in itself dangerous, that is to say, which is such as necessarily to involve danger to a vessel coming to use the wharf in the ordinary way; and we are not dealing with a case of what I may

call an abnormal obstruction in the river—some foreign substance or some condition not arising from the ordinary course of navigation. If the mischief had arisen from the bed of the river adjoining the wharf being in such a condition that a vessel invited there could not, even if she had come in at the most fitting and proper time of tides, have lain there in safety, it may well be that there would have been a cause of action. But the peculiarity of the present case is, that it was all a matter of time and degree; whether it was safe to come or not depended upon a variety of elements. There was no necessarily inherent danger in the condition of the bed of the river. If this vessel had been of a somewhat lighter draught she might have come safely to this wharf when she did, and, having got safely in, have remained uninjured. If, on the other hand, being of the draught that she was, she had waited for a later time of tide, she might equally have come in safely, and have discharged her cargo absolutely uninjured. But the mischief arose from the fact that, being of the draught she was, she came at the time she did, and attempted then to do that which she might safely have done later, or that which a vessel of a lighter draught or a more even keel might have done at that time. Now, under those circumstances, apart from the question of representation, with which I shall deal in a moment, can it be said that there was a breach of duty on the part of the appellants? What was their duty? Was it to keep the bed of the river adjoining their wharf in such a condition as that at all times any ship, however heavy her draught, might come in? Such a proposition surely can hardly be contended for. Then why was there an obligation in respect of this ship at that particular time, or at any particular time indeed that could be named? (I mean, of course, apart from the alleged representation.) That I am wholly unable to see. Therefore, that proves that this case differs altogether from any of those which have been cited, because here the accident, such as it was, arose entirely from the circumstance of a vessel with this draught coming in on this particular tide. I have said that, if the obstruction which created the difficulty in the approach of this vessel to the wharf at this particular tide had been one caused by some unusual and extraordinary circumstance, which those navigating the river would have no right to anticipate, but known to the wharfinger, then I quite agree that some duty on his part would arise towards them, and in the absence of warning it may be that he would be under some responsibility. But the truth is, that the pilot knew perfectly well that these inequalities did arise at all the berths in the river from time to time, owing to vessels lying there. No doubt from time to time at different places some scraping took place for the purpose of lowering the level of these elevations. I have already expressed my doubt whether, although that work was undertaken by the wharfingers, it was in pursuance of any duty incumbent upon them. It was perfectly natural, of course, that they should undertake it in their own interest, because of course, if these elevations were allowed to increase, it would render access to their wharves more difficult. The witness called for the defendants on this part of the case explained that it was for this reason that they did scrape from time to time in order that the access to their wharf might not be interrupted to the extent that it otherwise would be; but it may be doubted whether it was not in their interest rather than in the discharge of an obligation that they from time to time scraped these elevations. I would say this, that it was not by reason of their having any control over this part of the river in any peculiar sense, or having any superior right to that of any other member of the public, that they undertook this work, or would be able or entitled to undertake it; I mean any other member of the public who was, as they were, a riparian proprietor. I apprehend that, being riparian proprietors, they would have a right to execute such work in the neighbourhood for the purpose of improving the access to their wharves as they might be advised to execute, provided that in so doing they did not prejudicially affect or interfere with the rights of any third persons or the rights of the public. Subject to the rights of the public and subject to the rights of any third persons not being interfered with, I do not suppose that they could be in any way rendered liable for thus dealing with the bed of the river in the neighbourhood of their wharf. Now, as I have said, this is not a case of anything foreign or strange in the condition of the bed of the river. It is one of the results of the normal use of the river; and all that can be said is that the wharfingers may not on this occasion have done as much as they had previously done to remove the elevations caused by that use of the river; but certainly it is to my mind impossible to say that, even if they did to some extent omit to do what they had done on previous occasions (and all the evidence as to that is of the vaguest description), they failed in their duty towards those who were about to approach their wharf. That, to my mind, apart from the question of the letter and the representation which came in the letter, is sufficient to dispose of the case.

One observation I may make, although it is to some extent connected with the representation which the appellants made, it is this: that if on the one hand the condition of the bed of the river may be said to have been a matter peculiarly within the knowledge of the appellants, on the other hand the draught of the vessel, which was of at least as great importance in determining whether the vessel could have approached the wharf or not, was peculiarly within the knowledge of the respondents; and to say that the respondents who had this knowledge, which they would know would not in the ordinary course be in the possession of the appellants, were entitled to rely upon a statement made to them by the appellants as to their being able to get safely to the wharf at a particular time, appears to me a somewhat startling proposition. No doubt the letter of Griffiths does represent that in his opinion (and there is no reason to doubt that it was honestly his opinion) the captain could bring the steamer to Tredegar Wharf on Monday morning's tide. But surely that could not absolve the shipowners, or those who were in charge of the ship, from the responsibility of considering for themselves whether it was possible. As I say, presumably the man who gave that information would not know, as they would, the draught of the ship and her trim, because, if this ship had been of the same draught

but that draught had been on a different trim, it would very likely have been the case that the vessel would have made her way in with safety. Therefore, I do not think that this letter can be taken as an invitation to come in under all circumstances, or an assertion that they can come in under all circumstances; but it must be taken merely as a general statement of what the condition of the water at the wharf was in comparison with the berth at Bathurst Basin, and what therefore they would have a reasonable right to expect under ordinary circumstances, of course assuming that those who were navigating the ship would know that they must make sufficient allowance because the bed of the river in the neighbourhood of the wharf might not be in a perfectly even condition. It seems to me to be out of the question to suppose that it is a right and proper thing to run the matter so fine that, if you have six inches of elevation at any particular point near the wharf above the surface of the bottom of the berth itself, you will have too little water. I cannot think that it was really a prudent thing to run it so fine as that, and I think that a greater margin ought to have been left in order to ensure reasonable safety. With regard to the representation, it is alleged as a deceit—it cannot be put as a warranty. The utmost the plaintiffs can allege appears to be a representation by the foreman in charge of the wharf of his belief, he being ignorant of that which those on board knew, namely the draught of water of a vessel, on which depended the possibility or not of getting this ship on to the berth. Under these circumstances I am unable to see any breach of duty on the part of the appellants rendering them liable to this action, and I concur with the motion which has been made.

Lord MORRIS.—My Lords: I concur.

Order of the Court of Appeal reversed, and decree of Butt, J. restored with costs; cause remitted to the Admiralty Division.

Solicitors for appellants, *Pritchard* and *Sons*, for *Vaughan* and *Hornby*, Newport, Mon.

Solicitors for the respondents, *Downing, Holman*, and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Oct. 30 *and* 31, 1890.

(Before Lord ESHER, M.R., LINDLEY and LOPES, L.JJ.)

BUDGETT AND CO. *v.* BINNINGTON AND CO. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Charter-party—Demurrage — Dock strike—Delay in unloading without fault on part of shipowner or freighter—Liability of freighter.

The contract by the freighter to pay demurrage to the shipowner, if the ship is not unloaded at the expiration of a fixed number of lay days, is an absolute one, subject to the shipowner doing nothing to prevent the unloading; and, consequently, where the ship is being unloaded by the joint act of the shipowners and freighters, and under a contract between the shipowners and stevedores the latter employ the necessary dock labourers, and delay in unloading is caused by a strike of the labourers employed on behalf of the shipowners and freighter, the freighter is not relieved from his liability to pay demurrage, as the shipowners have no control over the labourers.

THIS was an appeal from the judgment of the Queen's Bench Division upon a motion for judgment.

The action was tried before Cave, J. and a jury, at the assizes held at Bristol.

The plaintiffs were the indorsees of a bill of lading of a cargo of barley, shipped on board a steamship named the *Fairfield*, belonging to the defendants.

The plaintiffs sought to recover the sum of 147*l.* 15*s.* 11*d.*, which was paid by them to the defendants, under protest, in respect of a claim by the defendants for keeping the vessel on demurrage at the port of Bristol.

In the bill of lading it was stated that the cargo was shipped at Feisk, for delivery at a port as ordered to the shippers, or to their assigns, "they paying freight and demurrage, if any . . . all conditions as charter-party."

The charter-party stated that the cargo was "to be brought and taken from alongside the steamer at freighters' expense and risk;" the crew, however, were "to render all customary assistance in hauling lighters alongside," and that "thirteen running days, Sundays excepted," were "to be allowed the freighters (if the steamer be not sooner despatched) for sending the cargo alongside and unloading; but in no case should more than seven running days, Sundays excepted, be allowed for unloading, and ten days on demurrage over and above the said lay days, at 4*d.* per ton on the steamer's gross register tonnage per running day," and that "the freighters' liability" was "to cease when the cargo was shipped, the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average." At the port where the ship was loaded the lay days had been exhausted, so the defendants and the shippers agreed by letter to allow six additional running days, Sundays being excepted, for discharging the cargo.

The bill of lading was in the usual form, and contained the usual exceptions, but said nothing about strikes. Neither did the charter-party say anything about strikes.

After arriving at the Portishead Dock, at Bristol, the *Fairfield* began to unload her cargo. The lay days commenced on Monday, the 25th, and ended on Saturday, the 30th Nov. 1889.

The custom of the port of Bristol is for grain cargoes in bulk from the Black Sea ports to be discharged by the joint efforts of shipowners and consignees.

During the present unloading the following was the system adopted: The plaintiffs' part of the discharge was performed by the Bristol Docks Committee, who employed a firm of master stevedores; the defendants' part was performed by another firm of master stevedores, but besides these there was a large number of dock labourers, on the part of both, but the number employed by

(*a*) Reported by ADAM H. BITTLESTON, Esq., Barrister-at-Law.

the consignees was much larger than the number employed by the shipowners. First of all, "bushellers" employed by the consignees go into the holds of the vessel and put the grain into sacks; the sacks are attached to a running noose, and then hoisted by "winchmen," these "winchmen" being employed by the shipowners. When the sacks are hoisted out of the hold on to the deck, they are put into scales by men who are called "bearers in." These are employed by the shipowners. Then they are weighed by "weighers," who are employed by the consignees, and are then carried into trucks or into lighters, or into a warehouse as required. This is done by men called "landers," and these are employed by the consignees. "Talleymen" are employed both by shipowners and consignees, but the "foreman" is employed by the shipowners.

On Monday, the 25th, Tuesday, the 26th, and Wednesday, the 27th Nov., being the first three lay days, more than half the cargo was discharged. On Thursday, the 28th Nov., the dock labourers employed by both firms of stevedores struck, and on that day and on Friday, the 29th Nov., Saturday, the 30th Nov., Monday, the 2nd Dec., and Tuesday, the 3rd Dec., no cargo was discharged. On Wednesday, the 4th Dec. the strike ended, and the discharge commenced again, and, owing to the gangs working night and day, it was completed on Thursday, the 5th Dec. Under these circumstances demurrage for the days occupied in unloading after the 30th Nov. was claimed by the defendants, and they exercised their lien upon the cargo for the sum claimed in the action, which was paid under protest, and was now sought to be recovered back.

For them it was contended that the plaintiffs were, under the contract, bound to pay demurrage; that the officers and men had remained on board after the steamer had arrived in the dock; and that the master stevedores employed by the defendants were quite ready to do their part of the discharge, but owing to the strike they were unable to find dock labourers ready to work.

The following question was by the consent of the parties left by the judge to the jury:

"Were the shipowners ready and willing to do their part of that which it was customary for them to do?"

In answer to a question by one of the jurymen, the learned judge (Cave, J.) said that, if the shipowners were not able to do their part, they could not be said to be ready and willing to do it, and upon this the jury found the defendants were not ready and willing to perform their part of the discharge.

The learned judge left either party to move for judgment.

The Queen's Bench Division (Denman, Charles, and Williams, JJ.) entered judgment for the defendants: (63 L. T. Rep. N. S. 493; 25 Q. B. Div. 320; 6 Asp. Mar. Law Cas. 549.)

The plaintiffs appealed.

Cohen, Q.C. and *Pyke* (*E. U. Bullen* with them) for the plaintiffs.—The detention of the ship was due in part to the default of the shipowners; they cannot, therefore, recover demurrage in respect of such detention. It is an implied term of the contract on the part of the consignees to unload within the specified time that the shipowners will do all that is necessary to enable the consignees to perform their contract. Default was made by the shipowners in this case in doing their part of the work under the contract. The plaintiffs cannot be liable for a delay caused by the dock labourers employed by the defendants refusing to do their duty. It makes no difference that the plaintiffs were also in default. Nor is it material that the labourers were engaged by the stevedores, and so were not directly in the defendants' employment. A man cannot free himself from a liability he has undertaken by employing a sub-contractor. The case of *Thiis* v. *Byers* (34 L. T. Rep. N. S. 526; 3 Asp. Mar. Law Cas. 147; 1 Q. B. Div. 244) is distinguishable. There the delay arose from bad weather, and there was no default on the part of the shipowners, or on the part of any persons for whom they were responsible. They also cited

Barrett v. *Dutton*, 4 Camp. 333;
Straker v. *Kidd*, 4 Asp. Mar. Law Cas. 34 n.; 3 Q. B. Div. 223;
Nelson v. *Dahl*, 41 L. T. Rep. N. S. 365; 4 Asp. Mar. Law Cas. 172, 393; 12 Ch. Div. 568;
Benson v. *Blunt*, 1 Q. B. 870;
Furnell v. *Thomas*, 5 Bing. 188;
Appleby v. *Myers*, 16 L. T. Rep. N. S. 669; L. Rep. 2 C. P. 651;
Morton v. *Lamb*, 7 T. R. 125.

Bucknill, Q.C. and *J. V. Austin* for the defendants.—In *Thiis* v. *Byers* (*ubi sup.*) it was held that, where the number of lay days are fixed, there is an absolute contract to unload within the prescribed time, and that the shipowner was entitled to demurrage, although the charterer had been prevented during a part of the time from unloading by bad weather. In the present case the delay was caused by a strike over which the shipowners had no control, and they are, therefore, entitled to demurrage under the contract. That some of the men who struck were employed by stevedores who were employed by the defendants does not make the defendants responsible for the strike, any more than the fact that some of the men who struck were employed by stevedores who were employed by the plaintiffs makes the plaintiffs responsible for it. Neither party was responsible for the strike, and it is, therefore, equivalent to the bad weather in *Thiis* v. *Byers*. They cited

Randall v. *Lynch*, 2 Camp. 352;
Leer v. *Yates*, 3 Taunt. 387;
Ericson v. *Barkworth*, 3 H. & N. 894;
Postlethwaite v. *Freeland*, 42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599;
Porteus v. *Watney*, 39 L. T. Rep. N. S. 195; 3 Q. B. Div. 534; 4 Asp. Mar. Law Cas. 34;
Brown v. *Johnson*, 10 M. & W. 331.

Cohen, Q.C., in reply.

Lord Esher, M.R.—In this case the defendants, who are shipowners, have defended an action brought against them by the merchant freighters of the ship to recover back a sum of money paid by the freighters under protest for demurrage; and the defendants rely on a stipulation in the bill of lading, which stipulation is a contract in writing by the merchants. The bill of lading contains many distinct and independent contracts, some of them independent contracts by the shipowners, others independent contracts by the freighters. The stipulation in question is an independent contract by the freighters to pay demurrage. The bill of lading is in the ordinary

form. This contract, therefore, is contained in a document which is in ordinary mercantile use, and which has been construed over and over again, consequently the construction of such a contract is well known. In the present case, inasmuch as the lay days are mentioned in number, it is a contract by the freighters that, if the ship is detained beyond those days, they will pay demurrage for every day during which the ship is so detained. If she is detained means if she is in such a condition that she cannot be handed over to the shipowner. It has been held that that is an absolute and independent contract. Mr. Cohen says that he does not know what an absolute contract means. This contract has, however. been so called by many learned judges. An absolute contract means one that is unconditional. The only condition here is, that the running days should have commenced and should have run out. That condition being fulfilled, the freighters are bound to pay, and there is no other condition. That is the contract. The judges, who have from time to time had to construe the stipulation in question, have looked at the words used, and have drawn the irresistible inference from them that that is the meaning of the contract. The rule of construction which they have applied is applicable to all contracts. If a man undertakes to do a certain thing within a specified time or to pay a sum of money when the specified time arrives, if he has not done the thing, his undertaking to pay is an absolute one. When the shipowners in this case had proved that the lay days began to run, that they had run out, and that the ship was not clear of cargo, they had proved their case. If there was any ground upon which, notwithstanding their breach of contract, the freighters would be excused, it rested on them to prove it. That is to say, in such a case, where the freighters have matter of excuse, they may confess and avoid their breach of contract. What is the excuse which, under any contract, whether maritime or not, will relieve a man from paying the money he has agreed to pay on the breach of the specified condition? It is where the other contracting party has so acted as to render it impossible for him to fulfil the condition. He is then excused, although he has broken his contract. If the shipowner has by any act of his prevented the cargo from being taken out of the ship within the running days, the freighter is excused from paying demurrage. It is no part of the contract that excuses him. It is an equity, which is also a rule of common law, founded on natural justice. It has been argued that that equity arises in the present instance, because it is said the delivery of the cargo is a joint act of the shipowner and the merchant freighter, and, if it is a joint act and the shipowner has not performed his part, he has prevented the cargo from being out of the ship within the specified days. It is true to say that the delivery of the cargo is a joint act of the shipowner and the freighter ; and it has been determined what, if nothing is said about it in the contract, are the particular parts of the joint act which are to be performed by each of them. If it is a simple contract for the delivery of cargo, the duty of the shipowner is to hand the cargo over the rail of the ship, and the duty of the freighter is to receive and carry it from the rail of the ship. But that is only in cases where there is nothing in the contract to the contrary. In the present case there is something to the contrary introduced into the contract by a custom which was proved. It is a custom in the case of grain cargoes, such as barley, which this was, for the freighters to do something before the delivery of the cargo over the side by the shipowners. It being the best thing for the freighter, in the case of grain cargoes, that the grain should be put into sacks before delivery over the side, the custom is for sacks to be supplied by the freighter, and the grain to be put into sacks by him while it is still in the hold of the ship. Then the shipowner has to hoist the sacks that have been filled by the freighter over the side of the ship, where they are received by the freighter. It is said that the shipowner has not performed his part of this joint act, and has thus prevented the freighter from discharging the cargo within the specified time. But for whose acts is the shipowner responsible? He is responsible for anyone who is there to represent him. Who are such persons? If the master does a wrongful act, the shipowner is responsible. I am not prepared to say that, if the crew refused to work, the shipowner would not be responsible. It is not necessary now to decide that question, and I do not express any opinion upon it. But I am clear as to this: that if the non-delivery of the cargo is caused by the wrongful act of persons not in the shipowner's employ, and over whose actions, therefore, he has no control, that is the same thing as if the non-delivery was caused by some physical misfortune over which he had no control, which it has been decided does not relieve the freighter from the liability to pay demurrage. For instance, non-delivery of the cargo owing to bad weather does not so relieve him. If the default of the shipowner arises from causes beyond his control, the freighter cannot excuse himself from paying demurrage on the ground that the shipowner has not done his part towards the delivery of the cargo. If the non-delivery of the cargo is caused by the default of persons over whose actions the shipowner had no control, the shipowner is not in default, and he not being in default the freighter has not made out the excuse that the shipowner has by his acts prevented the cargo from being taken out of the ship within the running days.

In cases similar to this there may some day be a nice question as to whether the lay days have begun to run. But that is wholly apart from the question which we have to consider. There is no question in this case that the lay days had begun to run. I think that the effect of what I have said in this case has been expressed in every judgment on the question of the demurrage contract. In those cases in which no limit of time for unloading is fixed, a further question may arise as to whether the ship was free of cargo within a reasonable time. The question in those cases depends upon the circumstances of each particular case. But in some of those cases in which the limit of time for unloading was not fixed, the principle is laid down which applies to cases where the limit is fixed. That principle has been laid down by Lord Ellenborough, Baron Martin, and many other judges down to the present time. Whatever may be a good definition of the circumstances under which the freighter is excused from paying demurrage, this is clear: that he is

not excused where the non-delivery is caused by some physical occurrence over which the shipowner has no control, or by something done by people over whose acts he has no control. Here Binnington and Co. employed a master stevedore, and the master stevedore entered into a contract with workmen. The stevedore carries out his contract in the way that he thinks right. He is not the shipowners' servant, and they cannot interfere in the carrying out of the contract. The shipowners do not select the workmen; they cannot give them orders; they cannot control their acts. It was the acts of the workmen, their breach of contract with the stevedore, that caused this ship not to be unloaded within the specified time. For their acts the shipowners were not responsible to anyone, as they had no control over them. As I have already pointed out, it is clear in this case that there was a breach by the freighters of their contract to pay demurrage, the only condition having been fulfilled by the lay days having run out, and the ship not being free from cargo at the end of the time. The only real question here was, whether the facts of this case could bring it within the principle of those cases where the shipowner's default has excused the freighter's breach of contract. I am of opinion that the facts do not bring this case within that principle; and that, the specified condition having been fulfilled, there was an independent and absolute contract by the freighters to pay demurrage. This appeal must, therefore, be dismissed.

Lindley, L.J.—I am of the same opinion, and have very little to add. The question in the case is an important one, because the answer to it will decide upon which of the two contracting parties the risk of strikes is to fall in contracts such as this. Nothing is said in the contract with reference to strikes. We must therefore determine the case on general principles. By the contract thirteen running days, Sundays excepted, were to be allowed the freighters for sending the cargo alongside and unloading; but in no case were more than seven running days, Sundays excepted, to be allowed for unloading, and ten days on demurrage over and above the said lay days, at 4*d.* per ton on the steamer's gross registered tonnage per running day. The stipulation as to unloading within the time is in terms unconditional. The learned judges in the court below have called it an absolute contract, which I understand to be the same thing as an unconditional contract. It is argued by Mr. Cohen that this is not an unconditional contract, because there is an implied condition that the shipowner must do his part in the unloading. But is that so? It appears to me that the cases of *Thiis* v. *Byers* (*ubi sup.*), *Porteus* v. *Watney* (*ubi sup.*), and *Straker* v. *Kidd* (*ubi sup.*) show that there is no such implied condition. It has been suggested that those cases were wrongly decided. I think that they were quite right. But, although there is no such implied condition in the contract, there is a condition of general application, the breach of which by one party exonerates the other contracting party from liability on his contract, that condition being that the shipowner shall not prevent the freighter from performing his part of the contract. In order to bring this case within that principle the appellants are compelled to argue that the shipowner is responsible for the dock labourers. That is entirely unwarrantable. He does not hire them; he cannot discharge them; and in no sense are they his servants. The shipowner has not, therefore, in this case, prevented the freighter from performing his part of the contract, so as to bring the case within the general principle that I have referred to. That general principle is applicable to all contracts, and will be found to be investigated and very well explained in the work by Sir Frederick Pollock, which was referred to in the course of the argument. The appeal must be dismissed.

Lopes, L.J.—This is an action by merchants against shipowners to recover back demurrage paid by the plaintiffs under protest. Three questions arise: First, what is the contract? Secondly, has there been a breach of it? And, thirdly, is that breach excused? The contract is an absolute and not a conditional one. It is a contract by the merchant to get the ship unloaded within a time fixed, unless there is default on the part of the shipowner. There is a broad distinction between cases where the lay days are fixed in number and cases where they are not so fixed. In the former cases after-circumstances are immaterial and must not be regarded; in the latter, the question whether the merchant has been duly diligent must be determined by reference to those circumstances. The contract where, as in the present case, the lay days are fixed is, to use the words of the Master of the Rolls in *Porteus* v. *Watney* (*ubi sup.*), "that if the ship is not able to discharge the whole of her cargo within the given number of days after she is at the usual place of discharge, the holder of that bill of lading will pay a certain sum for each day beyond those days, however the delay may be caused, unless it is by default of the shipowner." If that is the contract, it is clear that the plaintiffs have broken it. But it is said that the breach is excused, because it was occasioned by the default of the defendants. The facts are that the master of the ship selected a stevedore, and the stevedore selected dock labourers. Before the discharge of the cargo was completed the dock labourers struck. It is said that the shipowners are responsible for the conduct of those dock labourers, but I cannot agree to that. The strike was an unforeseen occurrence over which the shipowners had no control. It was an event which no reasonable care on the part of the master of the ship could have prevented. It was an unforeseen occurrence and nobody's fault, and, therefore, one of the risks which the merchant had contracted to bear, just as much as the crowded state of the port of discharge, in *Randall* v. *Lynch* (*ubi sup.*); or frost, in *Barrett* v. *Dutton* (*ubi sup.*); or bad weather, in *Thiss* v. *Byers* (*ubi sup.*); or acts of the Government, in *Barker* v. *Hodgson* (3 M. & S. 267), were held to be such risks. I can, therefore, find no fault in the shipowners which can excuse the breach of contract by the plaintiffs, and their appeal fails.

Appeal dismissed.

Solicitors for the plaintiffs, *Whites* and *Co.*, agents for *Henry Brittan* and *Co.*, Bristol.

Solicitors for the defendants, *W. A. Crump* and *Son.*

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Friday, May 2, 1890.

(Before COLERIDGE, C.J. and GRANTHAM, J.)

JONES AND ANOTHER (apps.) *v.* BENNETT (resp.). (*a*)

Pilotage dues—Port of Chester Act (16 *Geo.* 3, *c. lxi.*)—*Bye-laws—Merchant Shipping Act* 1854 (17 *&* 18 *Vict. c.* 104) — *Merchant Shipping* (*Pilotage*) *Act* (52 *&* 53 *Vict. c.* 68).

Where a public local Act, in force before the passing of the Merchant Shipping Act 1854 *and regulating a port, imposes a penalty on any unlicensed person taking upon himself to conduct or pilot any ship into or out of a port, pilotage is compulsory.*

Pilotage rates, fixed by bye-laws made by trustees under a local Act and under the Merchant Shipping Act 1854, *and duly sanctioned by Her Majesty in Council, may be sued for by a pilot who has rendered service as such.*

The Merchant Shipping Amendment Act 1889 (52 *&* 53 *Vict. c.* 68) *is retrospective, as it declares what the meaning of the principal Act of* 1854 *always has been, and by it the word "ship" in the Act of* 1854 *includes "foreign ship."*

THIS was a case stated under 42 & 43 Vict. c. 49, s. 33, by justices for the county of Flint, of which the material parts are as follows:—

The appellants are timber merchants trading at Rhyl; the respondent is a licensed pilot for the Chester pilotage district, which includes the port of Chester.

1. Upon the hearing of a complaint preferred by the respondent against the appellants under sect. 363 of 17 & 18 Vict. c. 104, in which it was alleged that the respondent was a duly licensed pilot for the Chester pilotage district, and that as such duly licensed pilot he on the 23rd April 1889 piloted a vessel called the *Orion*, bound from Norway to Rhyl, in the county of Flint, from outside the North-West Patch Buoy to the Wild Roads, and on the 28th April 1889 he piloted the same vessel from the Wild Roads to the sea. That under and by virtue of the bye laws for the regulation of pilots in the Chester pilotage district, duly made by the pilotage trustees and confirmed by order of Her Majesty in Council, the rate of pilotage for piloting the said vessel from outside the North-West Patch Buoy to the Wild Roads was 6*s.* per foot, amounting to 3*l.* 12*s.*, and the rate of piloting the said vessel from the Wild Roads to the sea was 4*s.* 6*d.* per foot, amounting to 2*l.* 14*s.* That the appellants were consignees or agents for the said vessel, and as such were liable to pay to the respondent the said sums of 3*l.* 12*s.* and 2*l.* 14*s.*, amounting together to 6*l.* 6*s.* for pilotage dues. And that on the 3rd Oct. 1889 a written demand of payment of the said pilotage dues amounting to the sum of 6*l.* 6*s.* was served on the appellants, and the said dues so demanded remained unpaid for seven days after the time of such demand being made, and still remained due contrary to the form of the statute in such case made and provided. We adjudged the appellants to pay the respondent the said sum of 6*l.* 6*s.* for debt, and the sum of 4*l.* 12*s.* for costs forthwith and in default of payment it was ordered that the sum due thereunder should be levied by distress and sale of the appellants goods.

2. The following facts were either proved to our satisfaction or admitted by both parties. The respondent was a licensed and qualified pilot for the port of Chester. On the 23rd April 1889 between 5 and 6 a.m., he sighted the Norwegian foreign sailing ship *Orion*, which had a cargo of timber, and which was out at sea three or four miles from the coast and outside the North-West Patch Buoy. The ship *Orion* when first sighted by the respondent was between the Great Orme's Head and the city of Chester and outside the port of Chester.

3. The ship was bound from Norway to the river Voryd (which lies between the Great Orme's Head and the city of Chester), but unable to get into Voryd in consequence of the neap tide, extensive sands, and shallow sea. The captain, who could speak English, told the respondent he wanted to go to the Wild Roads, which are within the port of Chester, to wait for sufficient water for the Voryd. There was no duly qualified or licensed pilot on board, nor any signal for a pilot given, but the respondent, in exercise of what he believed to be his right as pilot in the case of compulsory pilotage, took charge of the vessel and piloted her to the Wild Roads, where she came to an anchor, and where he left her. Five days afterwards, namely, on the 28th April 1889, the respondent, without any request on the part of the captain and against his wish, again went on board the *Orion*, which was still at anchor in the same place as he left her, there being then sufficient water for her to proceed to Rhyl. The captain told the respondent that he did not want his (the respondent's) assistance, but would pilot his own ship. The respondent replied he was there, and claimed the right to pilot her out, and would stay there until the ship went out of port. The ship was then towed out by the steamer *Albert*, on behalf of the appellants, and the respondent, unasked and of his own accord, gave orders to heave the chain short, and to be ready to start for the Voryd, and when the *Orion* started in tow of the steamer *Albert*, the respondent took the usual position of pilot on board in the bows, and without the captain's consent directed the course of the steamer *Albert* by signalling with his hands, and the steamer obeyed his signals. The respondent also directed the helm of the *Orion* by signalling in the same way to the man at the wheel on board the *Orion*, who also obeyed his signals. In this way they came from the Wild Roads to the sea outside the port of Chester. The respondent then gave up charge of the ship, which proceeded on her way to Voryd. The respondent admitted that owners of ships bound to Voryd objected to compulsory pilotage as well outwards as inwards from the Wild Roads; and that the captain objected to the respondent's right to board the *Orion* on the 28th April; also that the *Orion* gave no signal before the respondent boarded her. Dalpool, or Dawlpool, and Pargate, are on the N.E. or Chester side of the estuary of the Dee. The Wild Roads are on the S.W. or Flintshire side. The navigable channel now lies on the S.W. side. There is no channel to Pargate.

4. It was also proved to our satisfaction that the appellants were consignees or agents of the said ship *Orion*, and as such had made themselves

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

liable to pay charges on account of such ship in the port of her arrival and discharge, and in the port from which she cleared out, and that demand in writing had been made by the respondent for payment of the said pilotage dues previous to such complaint being made, and that such dues so demanded had remained unpaid for seven days after the time of such demand.

5. According to No. 33 of the bye laws for the regulation of ports (made by the trustees acting in pursuance of 16 Geo. 3, c. lxi., and a copy of which bye laws accompanies, and forms part of, this case), "Every licensed pilot employed in piloting vessels within the district shall be paid the pilotage rates and remuneration stated in the table" therein referred to. The sum of 6*l.* 6*s.* so claimed and adjudged as aforesaid is made up of the two sums of 3*l.* 12*s.* and 2*l.* 14*s.*, being the respective amounts payable according to the said table for piloting the *Orion* from outside the North-West Patch Buoy to the Wild Roads, and from the Wild Roads to the sea. Such bye law purports to have been made in pursuance of 16 Geo. 3, c. lxi. and 17 & 18 Vict. c. 104.

6. On the part of the appellants it was contended—(*a*) That there is nothing in the Act 16 Geo. 3, c. lxi. making pilotage compulsory within the Chester pilotage district except in the case of a ship inward bound to the port of Chester, or within the port to, or to a place beyond Dalpool or Pargate aforesaid. (*b*) That as there is nothing in the said Act (except as aforesaid) to make pilotage compulsory, the trustees acting under that Act had no power to make bye laws imposing dues for pilotage within the Chester pilotage district. (*c*) That the Merchant Shipping Act, 1854, sect. 333, does not make the employment of a pilot compulsory in any district in which there was no compulsory pilotage prior to the passing of that Act, and that Part V. of the Merchant Shipping Act, 1854, does not apply to foreign ships. (*d*) That the trustees acting in pursuance of 16 Geo. 3, c. lxi. and not the respondent (as pilot) are the proper persons to take proceedings.

7. We were of opinion that, as 16 Geo. 3, c. lxi. provides for compulsory pilotage into and out of the port of Chester, and as the respondent piloted the said ship *Orion* from outside the North-West Patch Buoy to the Wild Roads (within the port of Chester), and from the said Wild Roads to the sea, the appellants, as such consignees or agents as aforesaid, became liable to the payment to the respondent of the said dues, and that as the pilotage was compulsory before the passing of the said Merchant Shipping Act, 1854, the said trustees, by virtue of sect. 333, sub-sect. 5, of that Act and with the consent therein mentioned, and by virtue of the provisions of the Act 16 Geo. 3, c. lxi., had power to make the said bye laws, and to fix the rates to be demanded and received by pilots licensed by them; and that for the personal services rendered to the ship *Orion* by the respondent as pilot, he (and not the said trustees) was the proper person to make the complaint against, and to recover the dues therefor from, the appellants. We are also of opinion that, whatever doubt might formerly have existed as to the application of certain provisions of Part V. of the Merchant Shipping Act 1854 to foreign ships, such doubt has now been removed by 52 & 53 Vict. c. 68, s. 1, which enacts that, in the construction of such Part V., the expression "ship" shall include a foreign ship. We were also of opinion that the said ship *Orion* was not merely passing through the Chester pilotage district (of which the respondent was a pilot) on a voyage between two places situate out of such district, but that she entered such district for safety, and lay at anchor for several days therein. The questions for the opinion of the court are: 1. Whether the trustees, acting in pursuance of 16 Geo. 3, c. lxi., or the respondent (the pilot) are the proper persons to recover the aforesaid pilotage dues. 2. Whether under the circumstances the appellants are liable to pay the respondent for the aforesaid pilotage from outside the North-West Patch Buoy to the Wild Roads. 3. Whether under the circumstances the appellants are liable to pay the respondents for the aforesaid pilotage from the Wild Roads to the sea.

8. If the court should answer the first question in favour of the respondent, and the second and third questions in the affirmative, then the said order is to stand. If the court should answer the first question in favour of the respondent, the second in the affirmative, but the third in the negative, then the said order is to stand for 3*l.* 12*s.* and 4*l.* 12*s.* for costs. If the court should answer the first question in favour of the respondent, the second question in the negative, but the third in the affirmative, then the said order is to stand for 2*l.* 14*s.*, and 4*l.* 12*s.* for costs. If the court should find in answer to the first question that the said trustees, and not the respondent, are the proper persons to recover the aforesaid pilotage dues, or if the court should find that the said respondent is the proper person to recover the aforesaid pilotage dues, but should answer the second and third questions in the negative, then the said complaint is to be dismissed.

Hamilton opened the case, and stated the facts, and contended (1) that the Act gives the trustees no power to make pilotage compulsory, at any rate on a ship in such a case as this; (2) that the only mode of recovering these dues is that prescribed by the local Act of Geo. 3—*i.e.*, by distress—and that the Merchant Shipping Act of 1854 does not enable them to be recovered summarily; and (3) that, even if there is such a summary procedure before justices, it is the trustees that must proceed, and not the individual pilot who has done the service; further (4), that the Merchant Shipping Acts Amendment Act 1889 (52 & 53 Vict. c. 68) is not retrospective, and that therefore the term "ship" in the Merchant Shipping Act 1854 does not include a foreign ship, such as is the case here. By bye-law 33, made by the trustees of the Chester pilotage district, acting in pursuance of 16 Geo. 3, c. lxi., and confirmed by the Privy Council: "Every licensed pilot employed in piloting vessels within the district, shall be paid the pilotage rates and remuneration stated in the following table: . . . Any vessel from a foreign port putting into the Wild Roads for shelter, or any other purpose, is bound to take a Chester pilot, and liable to both inward and outward pilotage." No section in the local Act expressly gives the trustees power to make such a bye-law. The power to make bye-laws is given

by sect. 56 of the Act, which is as follows: . . . "It shall and may be lawful to and for the trustees appointed by this Act, or any nine or more of them, at any of their general quarterly meetings, to be held in pursuance of this Act, to make, ordain, and establish such rules, orders, bye-laws, and regulations for the better regulating and managing the said lighthouse, or lighthouses, lights, landmarks, buoys, and all other the works, matters, and things hereinbefore mentioned relating thereto, as to them shall seem proper and expedient, and also to make, ordain, and establish separate rules, orders, bye-laws, and regulations for the better governing and regulating of all such pilots so to be appointed and licensed as aforesaid . . ." This section is merely disciplinary, and was probably enacted in order to prevent interference with the trained and authorised body of pilots. The Act is *primâ facie* not directed against such an extreme case as this, where a vessel crosses the line of the port for any purpose. Sect. 34 enacts that: "If any person or persons not being licensed as aforesaid, shall, from and after the time that the said trustees shall have fixed a proper number of pilots, take upon him or themselves to conduct or pilot any ship or vessel into or out of the said port of Chester, or if any pilot so licensed as aforesaid shall, after the expiration of such his licence, continue to act as a pilot without the renewal of the same, every such person or persons shall, for every such offence, forfeit and pay the sum of 10*l*." And sect. 35: "That in case any pilot who shall receive such licence as aforesaid shall refuse or neglect to take the charge or conduct of any ship or vessel outward bound, upon proper notice being first given to such pilot, or if any such pilot shall be plying betwixt Dalpoole, in the county of Chester aforesaid, and westward of Chester Bar, and upon a gun being fired, or an ensign being hoisted in a raft or other usual signal given from any ship or vessel, shall refuse or neglect forthwith to board and take under his charge or care such ship or vessel, or if any such ship or vessel cannot be boarded without imminent danger, such pilot shall refuse or neglect to lead the way with his boat, every such pilot shall, for every such offence, forfeit and pay the sum of 10*l*." The former section does not apply to a captain or master of a ship who pilots his own ship. [GRANTHAM, J.—That seems contrary to the principle of the Merchant Shipping Act, from the language of which it is clear that a captain or master piloting his own ship infringes the rule that you must under certain circumstances take a pilot. This has been distinctly held, and surely a similar interpretation must be put on the local Act. *Beard*, for the respondent, drew the attention of the court to *Kimber* v. *Blanchard* (5 Burrows, 2602), and approved of in *Beilby* v. *Shepherd* (3 Exch. 40; 18 L. J. 73, Ex.), where a similar section was interpreted by Lord Mansfield against the contention of the appellants. GRANTHAM, J.—Surely we must be bound by that authority, and, if so, sect. 34 of the local Act is compulsory.] Those cases do not apply; they were decided on the construction of certain sections. I rely on the construction to be put upon the entire Act. [Lord COLERIDGE, C.J.—The Acts are not made solely for the benefit of pilots; they are made for the benefit of human life.] These are penal sections, and perhaps the proper remedy is to proceed against the master for the penalty. The other sections of the Act negative any inference as to compulsory pilotage. By sect. 37 a pilot, previous to taking charge of a ship outward bound, may demand a sufficient security from the master, commander, owner, or agent for payment of such pilotage, and in case of refusal to pay or give security the pilot may refuse to conduct or pilot such ship without being subject to any penalty. This points to an option to take a pilot at any rate outwards. [GRANTHAM, J.—Sect. 44 is against you, for it exempts the master of a coasting vessel; this is unnecessary if your contention is correct. The local Act, too, was passed in 1775, six years after the decision in *Kimber* v. *Blanchard*, and it is therefore scarcely likely that the Legislature were not aware of that case.] The other sections point to optional pilotage. [Lord COLERIDGE, C.J.—You cannot read these bye-laws without seeing that the intention of the Merchant Shipping Act and all similar ones is, with certain exceptions, that pilotage is to be compulsory; if otherwise, what would be the good of them?] The trustees have certainly acted on that assumption, but this case is implied by an exemption. [Lord COLERIDGE, C.J.—By sect. 332 of the Merchant Shipping Act 1854 pilotage authorities may make and extend exemptions from compulsory pilotage; it follows from that that persons not exempted are liable.] That is qualified by sect. 353. By sect. 48 of the local Act in certain cases ships at sea may take a Liverpool pilot up to Dalpoole. If the captain finds no Chester pilot there, what is he to do? [GRANTHAM, J.—It all comes back to sect. 34, which is against you.] Part V. of the Merchant Shipping Act 1854 does not apply, and consequently there is no procedure by summary remedy. [Counsel also referred to sect. 363 of that Act.] The term "any ship" does not include a foreign ship. [Lord COLERIDGE, C.J. — The Amendment Act has cleared that up by declaring the law to have always been to the contrary]. A pilot cannot sue under the local Act.

Beard, for the respondent, was not called on.

Lord COLERIDGE, C.J.—It seems to me that the magistrates were perfectly right in this case. The Act of Geo. 3, c. 61, is a public Act passed in a certain sense to affect only a certain portion of the kingdom, and amongst other parts of the kingdom which it affects is the port of Chester. The port of Chester, as is very common in this country, is very much larger than the mere harbour of Chester, if there be a harbour, which I really do not know, and it is much more than the portion of the Dee upon which Chester is built, and up to the bridge of which vessels can come, and within the port the Act enacts "that if any person who is not licensed as aforesaid shall from and after the time that the said trustees shall have fixed a proper number of pilots, take upon him or themselves to conduct or pilot any ship or vessel into or out of the said port of Chester, or if a pilot so licensed as aforesaid shall after the expiration of such his licence continue to act as a pilot without the renewal of the same, every such person or persons shall be subject to a penalty." The question is, does that make pilotage compulsory within the port of Chester. I should have thought that it would be difficult to frame words admitting of less

dispute. The penalty is inflicted on anybody—even on a licensed pilot if his licence has run out — who without a licence navigates a ship into the port of Chester. This person did navigate the ship, and he attempts to say that that Act does not compel him to take a pilot on board. I am clearly of opinion that it does. Then the Merchant Shipping Acts deal with the question of compulsory pilotage, and everybody knows that compulsory pilotage differs in its particular obligation according as it comes under one or more of the *quasi*-local Acts of Parliament, that is to say, general Acts of Parliament, but restricted and varying in their enactments as to particular portions of the coast. The Act of 1854 says, "That wherever pilotage has been compulsory before the Act, pilotage shall remain compulsory after the Act." Well, I have shown—at least, I have expressed my clear opinion—that by the 34th section of the Act of the 16 Geo. 3, c. 61, pilotage was compulsory in the port of Chester. It, therefore, remains compulsory after the Act of 1854, because it was so before. Then, if I am right about that, the first point is made out, that this is compulsory pilotage.

Then Mr. Hamilton says, that may be, but there is nothing to show that the pilot can recover these fees, which are fixed by the bye-laws. All, he says, that the Act of Parliament shows is, that if a man navigates (as this person navigated here), he is subject to a penalty. Well, that may be in a sense if it was not for the bye-laws. I am not sure it would be so, but it might be contended that, as to any individual pilot, there being no fixed rate given to him for which he could sue or endeavour to recover, the only mode would be to get hold of the master or owner and sue him for a penalty. Then the Act of Parliament—the Merchant Shipping Act—authorises local authorities in different parts of the country to pass bye-laws fixing the rates and stating the sums which are to be recovered for pilotage within the district in which they have authority. Those bye-laws, before they can come into operation, are by the Act of Parliament to be sanctioned by the Queen in Council, acting, as we know, upon advice as in all matters within our constitution Her Majesty does act. These bye-laws have been so sanctioned, and these bye-laws have fixed these rates. The bye-laws being properly passed, and being passed under the authority of the Act of Parliament, and with the power which the Act of Parliament confers upon that authority, are in fact, although in a somewhat circuitous form, parliamentary enactments, because they are enacted by the Act of Parliament which has given authority to enact them. Therefore it seems established, first, that this district is a district within which there is compulsory pilotage; secondly, that these dues are rightly and properly fixed by authority, and may be recovered by persons suing for them. Then it is said, "Oh, but this is a foreign ship, and the Act only says 'any ship' coming within the authority of this Act. This was a foreign ship, and 'ship' does not necessarily mean 'foreign ship.'" The answer to that Mr. Hamilton has very fairly supplied, because he cited to us an Act of Parliament of last year, as I understood, or quite recently, in which it has been not merely negatived, for there might be something to be said on that, although I do not think very much, but something might be said in favour of the retrospective effect of an Act of Parliament expressed in that way, but this is an Act of Parliament which declares and enacts, and every lawyer is familiar with the distinction. A declaratory Act means to declare the law, or to declare that which has always been the law, and there having been doubts which have arisen Parliament declares what the law is, and enacts that it shall continue what it then is. The thing is very familiar. In this very matter most of the Profession, I daresay, are aware that a great conflict of opinion existed as to the distance to which the territory of the Queen extended beyond low-water mark. I was one of those who thought that it extended a marine league out to sea; the majority—but a majority of one—were of a different opinion. But when Parliament came to declare, when it came to enact upon the matter, it declared and enacted—and declared adversely to the opinion of the majority, that that has always been the law of the country, that the marine league was the limit. Many Acts of late years have been passed which, because the words are not "from and after the passing of the Act be it enacted that" so and so, have sometimes inconveniently been held to be retrospective. There is nothing to show that this Act was not intended to be retrospective, but on the contrary, as I have shown, there is very good reason to say that it is retrospective. Therefore, all the matters fail, except the matter of procedure. It is quite clear that that stands or falls with the rest of the judgment. The statute of Geo. 3 is compulsory, and is still in force in the port of Chester, and gives the pilot a right to sue for the fees which are due to him. For all these reasons I think the judgment of the magistrates is correct, and must be upheld.

GRANTHAM, J.—I am of the same opinion.

Appeal dismissed with costs.

Solicitors for the appellants, *Williamson, Hill,* and *Co.*, for *E. Roberts*, Rhyl.

Solicitors for the respondents, *Field, Roscoe,* and *Co.*, for *Evan Morris* and *Co.*, Wrexham.

Nov. 25 and Dec. 9, 1890.

(Before CHARLES, J.)

HICK *v.* TWEEDY AND CO. (*a*)

Charter-party — Persons signing agreement — Liability as principals—"Ready to receive cargo" —Meaning of—Claim for loss of freight and for demurrage.

In an action for damages for loss of freight and for demurrage, it was proved that the defendants, who carried on business at O., made a contract with the agent of the plaintiff in L., in the form of a letter signed by the defendants and containing these clauses: "Steamer to load end of November or early December. Charterers having the option of cancelling if she is not ready to receive cargo by the 12th Dec. next. Steamer to be loaded on usual berth terms, 2 per cent. commission to us." The defendants had made contracts with merchants at O. for loading the vessel, the merchants having the power of cancel-

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

ling if the vessel was not ready to load on the 12th Dec., and the vessel was not to be considered ready to load until moored alongside the quay. The plaintiff had no notice of these contracts. The vessel arrived at O. on the 10th Dec., and her stern having been fastened to the breakwater, the captain gave the defendants notice that he was ready to receive cargo, but the merchants refused to take the notice that the vessel was "ready to receive cargo," until she was moored alongside the quay, which could not be done before the 18th Dec. Meantime the merchants cancelled their contracts with the defendants, and the vessel was loaded at a lower rate of freight than that specified in the contract.

Held, (1) *that the defendants were liable as principals, as they had contracted in their own names without any qualification, and* (2), *that the plaintiff was entitled to recover damages for the loss of freight, as the vessel was "ready to receive cargo" within the meaning of the contract, although not moored alongside the quay, and that the matter was not affected by an alleged custom at the port of O., that a vessel was not to be considered "ready to receive cargo" until moored alongside the quay; but* (3), *that the plaintiff was not entitled to damages for demurrage or detention of the vessel after the 12th Dec., as the contract came to an end on that date.*

FURTHER CONSIDERATION of an action tried by Charles, J., at Newcastle-upon-Tyne. The facts are fully set out in the judgment.

T. Atkinson, Q.C., *Robson*, and *A. Lennard*, for the plaintiff.

Lockwood, Q.C., *L. Walton*, Q.C., and *T. W. Chitty*, for the defendants.

Cur. adv. vult.

Dec. 9.—CHARLES, J.—In this case the plaintiff claimed damages from the defendants for breach of an agreement dated the 2nd Nov. 1888. The breach alleged was a refusal by the defendants to load a steamer, called the *Thorntondale*, at the port of Odessa. Damages were sought under two heads: first, the plaintiff sought to recover the loss of freight which he had sustained in consequence of the defendants' breach of contract; and, secondly, he claimed damages in the nature of demurrage, or damages for the detention of his ship for eight days at sixpence per gross register ton per day. With regard to the last clause I find that, if the plaintiff was entitled to recover at all, the evidence undoubtedly was that sixpence per ton is a reasonable sum.

The defence was two-fold. First, the defendants alleged that they were not contracting parties as principals, but that they were agents in the matter only; and, secondly, that if they were responsible as principals, they were entitled to cancel the contract if the vessel was not ready to receive cargo on the 12th Dec. 1888, and that she was not ready on that date to receive cargo. The plaintiff, Mr. Pentland Hick, was the owner of the *Thorntondale*. He carried on business at Scarborough, and Thomas Hick was his agent in London. The defendants carried on business at Odessa, and also had an agent in London, and the contract relied upon was made between the agents in London of the two parties respectively. It is in these terms, and is in the form of a letter addressed by Messrs. Tweedy and Co., the defendants, to Thomas Hick, Esq., and signed by Tweedy and Co., the defendants: "Dear Sir,—We confirm having this day fixed the s.s. *Thorntondale* (15,000 qrs. maxm. of 480 lbs.) for a full cargo of grain $\frac{\text{and}}{\text{or}}$ seed from Odessa to London, Hull, Rotterdam, or Bristol Channel, at 29 shillings, with the option of loading as much cargo at Nicolaieff as she can cross the bar with without lightening at 30 shillings and three pence. Steamer to load end of November or early December. Charterers having the option of cancelling if she is not ready to receive cargo by 12th December next. Steamer to be loaded on usual berth terms, 2 per cent. commission to us. We shall be glad if you will send us as soon as possible her dead weight and cubical capacity; also state present position. Steamer to be loaded at Odessa (full cargo) if Nicolaieff not open. Captain is to telegraph from his last port of outward discharge to Tweedy, Odessa, naming his probable date of readiness to receive cargo." Contemporaneously with this contract or before it, Messrs. Tweedy, in Odessa, had made various contracts with merchants for loading the *Thorntondale*, and had agreed with the merchants that they should have the power of cancelling their contracts if the vessel was not ready to load on the 12th Dec. Further, they had agreed with the merchants that the vessel is not to be considered ready to load or ready to receive cargo until or before she is found moored alongside the quay. The words were, "le vapeur n'est pas consideré pret a charger avant qu'il ne se trouve 'alongside' le quai." Of the terms of these contracts the plaintiff had no notice. The *Thorntondale* arrived at Odessa from Ancona on the 10th Dec., in ballast, and anchored at seven in the morning. Some three hours later the captain attended at the defendants' office, and was told to bring in the ship and make her stern fast to the outer breakwater. He did so, and gave the defendants notice that the ship was ready to receive cargo. On the 11th Dec. the defendants write to him this: "The merchants will not take your notice until the steamer is in berth alongside." It was impossible, owing to the crowded state of the port, for a loading berth to be secured before the 18th. In the meantime the merchants cancelled their contracts with the defendants, and the ship was eventually loaded at a much lower rate of freight than was specified in the contract of the 2nd Nov. The action was brought to recover the freight lost, and also demurrage or damages for eight days at Odessa, the rate of sixpence per ton per day.

Two defences, as I have said, were raised to the whole claim. First, the defendants alleged that they were not liable as principals, but that they had simply acted as the plaintiff's agents. Secondly, that the ship was not ready to receive cargo on the cancelling date, the 12th Dec. It was also contended that in any event damages for detention could not be claimed, With regard to the first point, it must be remarked that the signature to the contract of the 2nd Nov. is absolutely unqualified, "George Tweedy and Co.," and certainly would render the defendants personally responsible unless there is something in the body of the contract itself inconsistent with the existence of personal responsibility. The defendants may be agents in fact, and so *primâ facie* not contracting parties; but they have contracted

in their own names without qualification, and I see nothing in the language of the letter itself necessarily inconsistent with primary liability. It is true that there are indications of agency in the letter; the defendants speak of having "fixed" the vessel; of "charterers" having the option of cancelling, and they are to receive 2 per cent. commission. The last circumstance, however, is quite consistent with their having bound themselves personally to perform the contract, and the two phrases relied on are, in my opinion, by no means sufficient to exclude a personal liability. They fall far short of the unequivocal language necessary to negative the inference which is otherwise to be drawn from an unqualified signature. It is true that the correspondence shows that the plaintiff's agent at one time considered that the defendants were agents only, but that impression was not shared by the plaintiff himself. Their true position was that of agents for freighters as well as agents for the plaintiff; but, in my opinion, they have by their signature to the letter of the 2nd Nov. incurred a personal and primary liability. With regard to the second point, it was contended that by the custom or usage of the port of Odessa the words, "ready to receive cargo" have a particular signification, and are not satisfied by a ship being in the port ready, so far as her equipment and condition are concerned, to receive cargo, but only by a ship ready in herself and also alongside a loading berth. Much evidence was given, chiefly taken on commission, on this head. The captain, who was orally examined, denied any knowledge of the custom, and stated that he heard of it for the first time when the defendants in December showed him their engagement notes, and told him that fresh rules had been made in Odessa, to the effect that a ship was not considered ready to load until in a quay berth. It was proved that such rules had been drawn up by a body of merchants called the Odessa Exchange Committee, but it was not argued that these rules would simply as rules bind shipowners who had not assented to them, and it was insisted that the rules did no more than declare the custom of the port. In the engagement notes the words "pret à charger" are so defined. The engagement note in its original shape contained a clause giving a power of cancellation if the vessel had not arrived in ballast on a particular day. In the notes signed by the defendants this clause is altered, and the cancelling date was fixed with reference to "readiness to load." The cancelling date was, of course, admitted to be in each case a matter of special agreement; but it was contended that, if the parties choose to make "readiness to receive cargo" the governing consideration in fixing the cancelling date, those words must receive the interpretation conferred on them by the usage of the port. Now, I think, the alleged usage is proved to this extent, that for the purpose of calculating loading days, in other words, for the purposes of demurrage and damages for detention, a ship is not considered ready to receive cargo or ready to load until she is in berth alongside the quay. There is some variation in the mode in which the custom is stated, but not enough to make it bad for uncertainty. The substance of it is this, that the ship must be in a quay berth, whether whole length on or not does not seem to me to be material, so long as she can take in cargo from the quay direct.

I may here refer briefly to the evidence on this point. It draws the distinction between chartered steamers and steamers not chartered, and confines the alleged custom to the latter class, that is to say, to general ships. [His Lordship then referred to the evidence]. But I now arrive, having referred to the evidence taken upon commission, at the real difficulty in the case. Do these words "ready to receive cargo" mean, in the letter of the 2nd Nov., what by usage they mean in Odessa? I have indicated the extent to which I think the usage proved. Can I apply the same meaning to the words when used in a contract made in London to fix a cancelling date as they bear in a foreign port to fix the date of the commencement of the lay days? I do not feel it possible to do so, having regard to the language of the contract itself. The words "readiness to receive cargo" occur in the last clause, and there can be no doubt at all about their meaning in that clause. The captain is to telegraph his probable date of readiness to receive cargo from his last port of outward discharge. These words can only refer to the date of his probable arrival at Odessa and the readiness of the ship in herself. They cannot refer to a probable date of his getting alongside the quay, a matter as to which he could form no opinion whatever. I see no reason why I should construe the words in the earlier part of the section differently. It is suggested that the words "steamer to be loaded on usual berth terms, 2 per cent. commission to us" favour the defendants' contention. But in my opinion these words clearly point only to the usual berth terms for loading; that is, rather to the amount to be loaded on each day and to the amount of commission payable to the defendants, or merely to the 2 per cent. commission. I prefer myself the latter construction. But whichever be adopted they do not seem to me to alter the meaning which the previous words "ready to receive cargo" naturally bear. It will be seen, therefore, that, in my judgment both defences fail. The question of damages remains to be considered. Two separate sums were claimed: first, the freight lost; and secondly, damages for the detention of the ship. To the first head the plaintiff is clearly entitled. To the second, in my opinion, he is not. Even supposing the contract had continued to exist, I do not think the defendants would have been responsible. They were under no obligation to load in any definite number of days; all they would have been bound to do would have been to load with despatch, having regard to the existing condition of the port. This appears to me to be the effect of the decisions in *Rodgers* v. *Forresters* (2 Camp. 483); *Strahan* v. *Gabriel* (cited in Maude & Pollock on Shipping, 4th edit. p. 407 in the note); and *Postlethwaite* v. *Freeland* (42 L. T. Rep. N. S. 845; 4 Asp. Mar. Law Cas. 302; 5 App. Cas. 599). It was indeed pointed out that, inasmuch as "usual berth terms" obliged the merchant to load at least 2000 chetwerts per day, the number of loading days really was fixed, and therefore the charterer must be held responsible for delay in securing a berth: (see *Davies* v. *McVeagh*, 41 L. T. Rep. N. S. 308; 4 Asp. Mar Law Cas. 149; 4 Ex. Div. 265.) The answer to this argument is that in my view the berth term as to

loading at a particular rate is not incorporated in the letter of the 2nd Nov. In the present case, however, the contract really comes to an end on the 12th Dec., and it seems to me, therefore, on that ground impossible for the plaintiff to claim damages for the detention of his ship until the 18th, as money due to him in the nature of demurrage. The damages under this head were also put as expenses necessarily incurred in minimising the defendants' loss, and I think this is the only way in which they can be properly put. But regarding them in this light I do not feel able to award them. The correspondence shows that what was done after the merchants had refused to hold to their engagement notes was done by arrangement between the captain and the defendants, and under circumstances which do not warrant me in holding the defendants liable in damages for the delay which took place before a loading berth was secured. In the result my judgment will accordingly be for the plaintiff, with costs, for 1154*l.* 6*s.* 7*d*, being the difference between the freight under the contract and the freight earned, deducting balance of commission due to the defendants on the gross freight earned.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Downing, Holman, and Co.*, for *Pinkney* and *Bolam*, Sunderland.

Solicitors for the defendants, *Stocken* and *Jupp*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Saturday, July 12, 1890.

(Before BUTT, J., assisted by TRINITY MASTERS.)

THE TALABOT. (*a*)

Collision—River Scheldt—Rounding point.

Where two steamships going in opposite directions in the Scheldt sight one another, one above a point and the other below it in the river, and if both keep on they will meet at the point, it is the duty of the steamer navigating against the tide to wait until the other steamer has passed clear.

THIS was a collision action instituted by the owners of the steamship *Trevethick* against the owners of the Norwegian steamship *Talabot*.

The collision occurred on the 22nd Jan. 1890, at about 6.30 p.m., off a point in the river Scheldt.

The facts alleged by the plaintiffs were as follows:—Shortly before 6.30 p.m. on the 22nd Jan. the *Trevethick*, a steamship of 488 tons register, was whilst proceeding up the river Scheldt on a voyage to Antwerp, laden with coal, in the reach between Lillo and Fort de la Croix. The tide was first quarter ebb of little force, and there was a freshet running down the river at about the rate of two knots. The *Trevethick* was in the reach between Lillo and Fort de la Croix. She was to the southward of mid-channel, and was making about seven and a-half knots through the water. As she neared a point in the river on the south side those on board of her saw the red and masthead lights of a steamship which proved to be the *Talabot*, about four points on the starboard bow, and distant from one and a-half to two miles. The engines of the *Trevethick* were slowed for another steamer, and as the *Trevethick* approached the point her helm was ported. The *Talabot* approached, drawing from the *Trevethick's* starboard bow to ahead, still showing her red and masthead lights. When ahead she sounded one short blast on her whistle. The *Trevethick* sounded one short blast in reply, and her helm was hard-a-ported, and her engines were put full speed ahead to help her round the point. Shortly afterwards two short blasts were heard from the *Talabot*. The *Trevethick* replied with one blast, put her engines full speed astern, and kept her helm hard-a-port, but the *Talbot* approached, having shut in her red light and opened her green light, and with her port bow struck the port bow of the *Trevethick*.

The facts alleged by the defendants were as follows:—On the 22nd Jan. the *Talabot*, a Norwegian steamship of 1047 tons register was in ballast, proceeding down the river Scheldt in charge of a pilot on a voyage from Antwerp to Blyth. She was in mid-channel making about five or six knots. In these circumstances those on board of her saw the masthead light of a steamship which proved to be the *Trevethick*, distant two to three miles, and bearing about three points on the port bow. Shortly afterwards the green light came into view, when the *Talabot's* engines were put to slow, her helm was ported, and she was brought as close as possible to the north bank of the river, and proceeded down along that bank. As the vessels approached, the whistle of the *Talabot* was blown a single blast, to which the *Trevethick* replied, but her green light still remaining open on the *Talabot's* port bow, the *Talabot's* engines were stopped and then immediately after reversed, but the *Trevethick* came on, and with her stem struck the port bow of the *Talabot*.

It appeared that it was the practice in the Scheldt for steam-vessels navigating against the tide, before rounding the point in question, to wait till a steamer meeting them had passed clear.

The defendants (*inter alia*) charged the plaintiffs with improperly attempting to pass the *Talabot* at the point, and with improperly neglecting to wait below the point till the *Talabot* had passed clear.

Rules and Bye-laws for the Navigation of the River Thames:

Art. 23. Steam-vessels navigating against the tide shall, before rounding the following points, viz., Coalhouse Point . . . and Blackwall Point, ease their engines, and wait until any other vessels rounding the point with the tide have passed clear.

Barnes, Q.C. and *Pyke* for the plaintiffs.

Sir *Walter Phillimore* and *J. P. Aspinall* for the defendants.

BUTT, J.—The collision in this case occurred at night in the river Scheldt, a little below Antwerp. The *Trevethick* was bound up, and the *Talabot* down the river. There was a tide or current, described as a freshet, running down at the rate of about two knots. The *Trevethick* therefore had the tide against her, and the *Talabot* had the tide with her. The place of collision is near a buoy on the river, a little above the Kriusschans Lighthouse, to which reference has been made in the course of the case. The Lighthouse and buoy in question are at a strong bend of the river, the

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

two reaches being at right angles the one to the other. In the river Thames there is a well-recognised rule, viz., art. 23 of the Thames Conservancy Rules, providing that in the event of vessels approaching one another at points, it is the duty of the one having the tide against her to ease her engines and wait until the other vessel has passed. There is, so far as appears from the present case, no such positive rule printed and circulated with regard to the navigation of the Scheldt; but the pilots agree that the practice of navigation is really the same as that prescribed by the Thames Rules. The vessel having the tide against her is to wait until the vessel coming in the opposite direction has cleared her at the bend. It is quite certain that the *Trevethick* disregarded that practice, and I have no hesitation in saying that she was to blame for so doing. Nay, more, if there had been no such practice on the river Scheldt, both I and the Trinity Brethren are of opinion that it was bad navigation for the vessel with the tide against her to proceed as she did under the circumstances. It certainly does not weaken these observations to know that the man in charge of her was reprimanded by the local authorities for not having obeyed the recognised practice.

In the river Scheldt, as in other narrow channels, there is a further rule that vessels approaching in opposite directions shall pass one another port side to port side, and that, in order to do this, each shall keep to that side of mid-channel which is on her starboard hand; in other words, each has about half the channel devoted to her as her own water. There is no doubt that one or other of the steamers in the present case had got across into the water of the other. Which it was is in dispute. We are of opinion that the *Trevethick* got from her own water, on the south side, into the water which belonged to the *Talabot*. There are many considerations leading to that conclusion; the chief being, that almost immediately after the collision the *Talabot* went aground on that side. But, in navigating a narrow channel such as this at night, a pilot might without negligence or default get his vessel out of her own water. I should not necessarily impute blame to him for that. It is not, however, necessary from my point of view to decide that question, the chief and all-important point being, that at such a marked bend in the river it was the imperative duty of the *Trevethick* to ease and to wait for the *Talabot* to round the point. As to speed, we think that both vessels acted properly in going slowly, and in stopping and reversing when the collision became imminent. I, therefore, hold the *Trevethick* alone to blame on the ground I have stated.

Solicitors for the plaintiffs, *Gellatly* and *Warton*.
Solicitors for the defendants, *Botterell* and *Roche*.

Tuesday, Aug. 5, 1890.

(Before the Right Hon. Sir JAMES HANNEN and BUTT, J.)

THE QUICKSTEP. (*a*)

Collision — Tug and tow—Master and servant—Costs.

Whether a tow is liable for the negligence of the tug which causes a collision is a question of fact in each case, and depends upon whether, in the circumstances, those in charge of the tug were so far under the control of the master of the tow as to be the servants of the owners of the tow.

Where a hopper barge in charge of two men which had no motive power but which was provided with a rudder, was, by the negligence of her tug, towed into collision with another vessel, it was held that the owners of the tow were not liable for the negligence of the tug.

THIS was an appeal in a collision action *in rem* from a decision of the judge of the County Court of Durham.

The collision occurred on the 4th Jan. 1889 about 7.20 a.m. in the river Tees between the steamship *Charles Dickens* and a hopper barge, which at the time was in tow of the steam-tug *Quickstep*.

The action was in the first instance instituted by the owners of the *Charles Dickens* against the owners of the hopper barge, and subsequently the owners of the *Quickstep* were added as defendants.

At the time of the collision the *Quickstep* was only carrying one masthead light instead of two, as she ought to have done. It was admitted that the two men on the hopper barge in no way interfered with the navigation. She had a rudder but had no motive power.

The County Court judge found that the collision was solely caused by the negligent navigation of the *Quickstep*, but gave judgment against both defendants on the ground that in law the owners of the tow were liable for the negligence of the tug.

Both defendants appealed, and on the merits the court held that the collision was caused by the joint negligence of the *Charles Dickens* and *Quickstep*, and found that there was no negligence on the part of the hopper barge, and adjourned the question as to whether, in the circumstances, the owners of the barge were liable for the negligence of the tug.

April 29.—*F. W. Raikes* and *Lennard* for the owners of the tow.—In the circumstances of this case the tow was not responsible for the negligence of the tug. The relationship of master and servant did not exist. It may be that, in many cases, the control of the navigation is in the tow, but in all cases it is a question of fact whether it is or not. In the present case, the tow was a hopper barge without any motive power, and in charge of two men, who never control or interfere with the navigation of the tug. If in all cases the tow is responsible, it follows that, where a tug is towing several barges owned by different owners, each barge owner is responsible for the negligence of the tug, and it also follows that the control is in each tow. In the present case the barge is analogous to cargo, but instead of being on the ship towing it is put astern of her:

Quarman v. *Burnett*, 6 M. & W. 499;
Jones v. *Mayor of Liverpool*, 14 Q. B. Div. 890
The Julia, Lush. 224;
The American and The Syria, 31 L. T. Rep. N. S. 42; L. Rep. 6 P. C. 127; 2 Asp. Mar. Law Cas. 350;
The Stormcock, 53 L. T. Rep. N. S. 53; 5 Asp. Mar. Law Cas. 470;

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

The Isca, 55 L. T. Rep. N. S. 779; 12 P. Div. 34; 6 Asp. Mar. Law Cas. 63;
The Niobe, 59 L. T. Rep. N. S. 257; 13 P. Div. 55; 6 Asp. Mar. Law Cas. 300;
The Ticonderoga, Swa. 215;
Westrup v. *The Great Yarmouth Steam Carrying Company Limited*, 61 L. T. Rep. N. S. 714; 6 Asp. Mar. Law Cas. 443; 43 Ch. Div. 241;
Sturgis v. *Boyer*, 24 Howard's Rep. 110;
Parsons on Shipping, p. 536, n.

Bucknill, Q.C. and *L. E. Pyke*, for the plaintiff, *contrâ*.—In the Admiralty Court tug and tow have always been looked upon as one for many years past, and the court ought not after so long a lapse of time to overrule the decisions supporting that principle. Even assuming it to be a question of fact in each case as to who has the control of the navigation, the presumption is strongly in favour of the control being in the tow. Hence, in the present case, the owners of the tow are responsible:

The Cleadon, 4 L. T. Rep. N. S. 157; Lush. 160; 14 Moo. P. C. 92; 1 Mar. Law Cas. O. S. 41;
The Ticonderoga (*ubi sup.*);
The Mary, 41 L. T. Rep. N. S. 351; 5 P. Div. 14; 4 Asp. Mar. Law Cas. 183;
The Sinquasi, 43 L. T. Rep. N. S. 768; 5 P. Div. 241; 4 Asp. Mar. Law Cas. 383;
The Kingston-by-Sea, 3 Wm. Rob. 152;
The Gipsy King, 2 W. Rob. 537;
The Giraffe. 1 Pritchard Ad. Dig. 3rd edit. 235;
The Bianca, 48 L. T. Rep. N. S. 440; 8 P. Div. 91; 5 Asp. Mar. Law Cas. 60;
The Two Ellens. 26 L. T. Rep. N. S. 1; L. Rep. 4 P. C. 161; 1 Asp. Mar. Law Cas. 208;
Smith v. *The Creole*, 2 Wallace, jun. Rep. 485.

In the present case the owners of the tow are also liable for neglecting to employ a tug properly equipped for the undertaking. She had only one masthead light instead of two.

Raikes in reply. — The tug was properly equipped. She had two lights, and it was only in consequence of the negligence of her master that they were not both exhibited.

Cur. adv. vult.

Aug. 5.—Judgment of the court was delivered by

BUTT, J.—This action was brought in the County Court of Durham by the Tees Conservancy Commissioners, the owners of the steam-tug *Charles Dickens*, against Cochrane and Co., the owners of a hopper barge which, at the time of the collision, was in tow of the steam-tug *Quickstep* in the River Tees. Subsequently, Wm. Duncan and Charles Chrystal Duncan, the owners of the *Quickstep*, were added as defendants. At the trial the learned judge found that the collision was caused by the negligence of those on board the *Quickstep*, and that there was no negligence on the part of those in charge of the *Charles Dickens* or of the barge; but he held the owners of the barge, as well as the owners of the *Quickstep*, liable, on the ground that those on board the *Quickstep* were the servants of the owners of the barge which had employed the tug. On a former day, after hearing counsel on the facts, we decided that the *Charles Dickens* and the *Quickstep* were both in fault, but we agreed with the learned judge in absolving the barge from blame. The question as to the liability of the owners of the barge for the negligence of the crew of the *Quickstep* was subsequently argued before us, and it is that question which we now have to decide. It is clear that, although there were men on board the barge, the navigation was in the hands of the master of the tug, and the bargemen could do nothing to avoid the collision. No doubt, in many cases of towage, the negligence relied on as making the owners of the vessel in tow liable for a collision has been the negligence of those on board the tug; and where, as in most of such cases, the navigation was under the direction of those on board the vessel being towed, such negligence has been rightly held to be in law the negligence of her owners. In one or two cases in the Court of Admiralty, Dr. Lushington seems to have intimated that the inexpediency of having a divided command and direction of the vessels would in itself be a sufficient reason for attaching liability to the vessel in tow. In all such cases, however, the real question is whether or not the relation of master and servant exists between the defendants, the owners of the vessel towed and the persons in charge of the navigation of the steam-tug. Unless that relation exists, considerations of expediency cannot avail to impose liability on the owners of the vessel in tow. It is the practice on the Tees, as in many of our rivers, for steam-tugs to tow several barges at the same time. The barges frequently belong to different owners. In such cases whose servants are the crew of the tug? Supposing barges A, B, and C, each belonging to a different owner, to be in tow of one steam-tug and damage to be caused to another vessel by the negligence of the master of the tug, is each of the owners of the barges to be held liable for the damage done on the ground that the crew of the steam-tug are his servants? If so, it would follow that if, by the negligence of those on board the tug, barge A is brought into collision with another vessel, the owners of barges B and C would each be liable for the damage so caused—a conclusion which would not seem consistent with reason or with good sense. The truth is, no general rule can be laid down. The question whether the crew of the tug are to be regarded as the servants of the owner of the vessel in tow must depend upon the circumstances of each case. There would seem to be no better reason for holding the master of the tug in the present case to be the servant of the owners of the barge, than there is in saying that the master of a ship engaged in carrying cargo is the servant of the charterer, and so may render the latter responsible for a collision caused by the negligence of the master of the vessel.

It would be a hopeless task to attempt to reconcile the numerous decisions bearing on the subject in our English courts. Nor are the American cases more uniform in their result. We think that the right view of the law is that stated by Lord Tenterden and Littledale, J. in the case of *Laugher* v. *Pointer* (5 B. & C. 547), adopted and approved by the Court of Exchequer in *Quarman* v. *Burnett* (6 M. & W. 499). Both those cases were actions for negligence in driving a carriage. In the earlier case Lord Tenterden said: "If the temporary use and benefit of the horses will make the driver answerable, and there be no reasonable distinction between driving them with or without a carriage, must not the person who hires a hackney coach to take him for a mile or other greater or less distance, or for an hour or longer time, be answerable for the

conduct of the coachman? Must not the person who hires a wherry on the Thames be answerable for the conduct of the waterman? I believe the common sense of all men would be shocked if anyone should affirm the driver to be answerable in either of these cases. If the case of a wherry on the Thames does not furnish an analogy to this subject, let me put the case of a ship hired and chartered for a voyage on the ocean to carry such goods as the charterer may think fit to load and such only. Many accidents have occurred from the negligent management of such vessels, and many actions have been brought against their owners; but I am not aware that any has ever been brought against the charterer, though he is to some purposes the *dominus pro tempore*, and the voyage is made not less under his employment and for his benefit, whether he be on board or not, than the journey is made under the employment and for the benefit of the hirer of the horses. Why, then, has the charterer of the ship or the hirer of the wherry or the hackney coach never been thought answerable? I answer, because the shipmaster, the wherryman, and the hackney coachman have never been deemed the servants of the hirer, although the hirer does contract with the wherryman and the coachman and is bound to pay them, and the pay is not for the use of the boat or hores or carriage only, but also for the personal service of the man." In conformity with this Mr. Justice Clifford, in delivering the judgment of the Supreme Court of the United States of America in the case of *Sturgis* v. *Bowyer* (24 Howard's Reps. 110), says: "But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such employment, undertakes to transport another vessel which for the time being has neither her master or crew on board from one point to another over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels. . . . Assuming that the tug is a suitable vessel properly manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow on the ground that the motive power employed by them was in an unseaworthy condition, the tow under the circumstances is no more responsible for the consequence of a collision than so much freight; and it is not perceived that it can make any difference in that behalf that a part or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug was a seaworthy vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking and the usual course of conducting it, the master and men of the tow were not expected to participate in the navigation of the vessel." In a note on p. 536 of his work on shipping, Mr. Parsons, after reviewing the cases decided in the United States, says: "It seems to be well settled law that canal boats and barges in tow are considered as being under the control of the tug, and the latter therefore is liable." We think that both reason and authority are in favour of holding the owners of the barge exempt from liability for the negligence of the crew of the *Quickstep*. The result is, that we pronounce the *Charles Dickens* and the *Quickstep* both to blame, and dismiss the claim against the owners of the tow with costs here and in the court below, to be paid by the plaintiffs.

Hurst, on behalf of the owners of the *Quickstep*, asked for the costs of the appeal.

L. E. Pyke, for the plaintiffs, *contrâ*, cited the *Hector* (48 L. T. Rep. N. S. 890; 8 P. Div. 218; 5 Asp. Mar. Law Cas. 101).

The PRESIDENT.—As our decision is that both the *Quickstep* and the *Charles Dickens* are to blame, the rule laid down in *The Hector* (*ubi sup.*) will be followed. There will be no costs here or below as between the owners of those two vessels. The costs of the owners of the hopper barge we have already dealt with.

Solicitors for the appellants, the owners of the hopper barge, *Hollams, Son, Coward* and *Hawksley*.

Solicitors for the defendants, the owners of the *Quickstep*, *Thomas Cooper* and *Co.*

Solicitors for the respondents, the owners of the *Charles Dickens*, *Clarkson, Greenwells*, and *Co.*

Tuesday, Nov. 4, 1890.

(Before BUTT, J.)

THE THOMAS JOLIFFE. (*a*)

Collision—Damages—Tug and tow—Joint tort feasors—Contribution.

In a collision action in rem, where a tug and tow are both pronounced to blame for a collision with another vessel, the owner of the latter vessel may enforce the judgment for the whole of his damages against either or both the defendants, and the defendants are not entitled to have the decree so drawn up that half only of the total damages is recoverable from each defendant.

THIS was a motion by defendants in a collision action *in rem*, asking the court to order the registrar to amend the decree entered therein.

The action was instituted by the owners of the steamship *Alaska* against the owners of the steam-tug *Thomas Joliffe*, and against the owners of the sailing ship *Avon*. The collision occurred on the 25th Dec. 1889, at the entrance to the Penarth Dock, Cardiff. The *Avon* was at the time in tow of the *Thomas Joliffe*, both of which vessels collided with the *Alaska*, and did the damage complained of.

At the trial the learned judge (Butt, J.) found the *Thomas Joliffe* and the *Avon* both to blame, and concluded his judgment with these words: "The whole accident was brought about by the improper attempt of the tug and the *Avon* to go in without a tug behind. I must therefore pronounce them both to blame."

In these circumstances the following decree was drawn up by the registrar:

The judge, being assisted by Captain E. P. Nisbet and Captain A. E. Barlow, two of the Elder Brethren of the Trinity Corporation, and having heard counsel on all sides, pronounced the collision in question in this action to have been occasioned by the fault or default of the master and crew of the ship *Avon*, and by the fault or default of the master and crew of the steam-tug *Thomas Joliffe*, and for plaintiffs' claim for damages in consequence thereof, and he condemned the owners of the ship *Avon* and their bail, and also the owners of the

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

steam-tug *Thomas Joliffe*, in the said damages and in costs, and referred the said damages to the registrar assisted by merchants to assess the amount thereof.

The plaintiffs having sought payment of the damages from the owners of the *Thomas Joliffe*, they, the owners of the *Thomas Joliffe*, now moved as follows:

To amend the form of the decree dated the 6th Nov. 1889, entered in this case, by providing by the said decree that the owners of the ship *Avon* and the owners of the steam-tug *Thomas Joliffe* and their respective bail be condemned severally, each for one half of the entire damages, and that any balance of such half which the plaintiffs shall not be able to enforce against either vessel shall be paid by the other vessel or her bail, or that such other amendment be made as in the circumstances is just.

Kennedy, Q.C. and *Pyke* in support of the motion.—The decree should be amended as asked. In America the decree goes against each defendant for half the damages:

The Sterling and The Equator, 16 Otto, 647;
The City of Hartford and The Unit, 7 Otto, 323;
Marsden's Law of Collisions, 2nd edit. 198.

In *The Milan* (5 L. T. Rep. N. S. 590; Lush. 388; 1 Mar. Law Cas. O. S. 185) the loss was divided between both wrongdoers. Lord Esher, M.R. has indicated that the decree should be for half the damage against each wrongdoer:

The Bernina, 56 L. T. Rep. N. S. 258; 12 P. Div. 58; 6 Asp. Mar. Law Cas. 75;
Chartered Mercantile Bank of India v. *Netherlands Steam Navigation Company*, 48 L. T. Rep. N. S. 546; 10 Q. B. Div. 521; 5 Asp. Mar. Law Cas. 65;
Black Book of the Admiralty, p. 109.

Bucknill, Q.C. and *John Mansfield*, for the tug; and *Raikes*, for the plaintiffs, were not called on.

BUTT, J.—This decree has to my mind been drawn up in the proper form. It may be that the law as administered in the United States directing the recovery of damages in the way pointed out by Mr. Kennedy is calculated to work out in the end more equal justice than results from the application of the law of England as it exists; but I have no power to deal with the matter in the way suggested by the American authorities if in so doing I contravene the law of this country. I am very clearly of opinion that I should be contravening the law of England were I to direct this decree to be amended in the way suggested. Every one who has sustained damage by the joint act of two individuals, and who recovers judgment against them in tort, has the right to enforce that judgment by execution against one or the other or both of those defendants. That I conceive to be the right of a plaintiff in ordinary cases, and I do not know why it should be different in an Admiralty case. I do not agree at all that we have anything to do in this case with what is known as the Admiralty rule as to division or apportionment of damages where both ships are to blame. There seems to me to be no authority whatever for limiting the right of the plaintiffs in this suit in the manner suggested by Mr. Kennedy. I must therefore refuse this application.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitor for the tug, *J. Woodburn*.
Solicitors for the tow, *Stone*, *Fletcher*, and *Hull*.

Monday, Nov. 10, 1890.

(Before the Right Hon. Sir JAMES HANNEN and BUTT, J.)

THE COUNTY OF DURHAM. (*a*)

Charter-party — County Court — Venue — County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *ss.* 3 *and* 21—*County Courts Admiralty Jurisdiction Amendment Act* 1869 (32 *&* 33 *Vict. c.* 51), *ss.* 1 *and* 2.

Shipowners may institute an action in personam against charterers for breach of charter-party, under sect. 2 *of the County Courts Admiralty Jurisdiction Amendment Act* 1869, *in the County Court having Admiralty jurisdiction within the jurisdiction of which their vessel is at the commencement of such proceedings.*

THIS was an appeal by the defendants in an action for breach of charter-party from the decision of the judge of the Newcastle County Court.

The action was instituted *in personam* on the Admiralty side of the Newcastle County Court, by the owners of the steamship *County of Durham* against her charterers to recover compensation for damage sustained by the *County of Durham* taking the ground at the defendants' wharf at Poole.

The plaintiffs, who were the assignees of the charter-party in question, resided in the district of the Newcastle County Court. The defendants resided at Poole.

At the time of the commencement of the action, the *County of Durham* was within the jurisdiction of the Newcastle County Court.

The defendants moved the County Court judge to dismiss the action for want of jurisdiction. The learned judge refused to do so, and his judgment, so far as it is material, is as follows:—

"So far as the plea of want of jurisdiction may be said to depend upon the general Admiralty Jurisdiction of County Courts over a charter-party of this description, no difficulty exists. The difference which prevailed a few years ago between the High Court of Admiralty and the Courts of Common Pleas and Exchequer on the one hand, and the judges of the Privy Council on the other, as to whether County Courts in Admiralty have not, under recent legislation, a more extensive jurisdiction in certain matters than the High Court has been finally set at rest by the decision of the Court of Appeal in the case of *The Alina* (42 L. T. Rep. N. S. 517; 4 Asp. Mar. Law Cas. 257; 5 Ex. Div. 227). This case, and that of *The Cargo ex Argos* (28 L. T. Rep. N. S. 745; L. Rep. 5 P. C. 134; 2 Asp. Mar. Law Cas. 6) are direct authorities for the proposition that an action on a charter-party, by the owner or charterer of a ship, is an action on an agreement, made in relation to the use or hire of a ship within sect. 2 of the County Courts Admiralty Jurisdiction Amendment Act 1869, and that that Act has given a jurisdiction to the County Courts which the High Court of Admiralty did not possess. The omission of any form applicable to the present case from the 'statutory forms' given under the Act of 1868 may be explained, therefore, by assuming that the latter were no doubt compiled from those in use in the High Court, which

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

had jurisdiction in the cases mentioned in that Act; but, not having jurisdiction in cases like the present, necessarily supplied no forms applicable to the case before me. The only ground, therefore, upon which a plea in denial of the jurisdiction of the court can prevail, is that to which the defendants have mainly limited their contention, viz., that the present action has been entered in the wrong district. In the Act of 1869 there is no express clause defining or limiting the district in which proceedings are to be commenced; but by sect. 1 of the Act of 1869 the two Acts of 1868 and 1869 are to be read and interpreted as one Act. Turning, then, to the Act of 1868, sect. 21, it is provided that, 'Proceedings in an Admiralty cause shall be commenced: (1.) In the County Court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings; and (2.) if the foregoing rule be not applicable, then in the County Court having Admiralty jurisdiction in the district of which the owners of the vessel or property to which the cause relates or his agent in England resides . . .' It has been strongly contended and urged with much ability and great reliance upon the forms and procedure in Admiralty, that the words 'vessel to which the cause relates' can only mean the ship or vessel of the defendant. It is clear that, until the passing of the Act of 1869, the jurisdiction of the County Court over claims for salvage, towage, necessaries, or wages, or for damage to cargo or damage by collision, were all in their nature proceedings for services rendered to or injury done by the ship or vessel of the defendant, and in any proceeding *in rem* the only ship in the contemplation of the parties would naturally and logically be the ship of the defendant; but now, by sect. 2, sub-sect. 1, of the Act of 1869, a County Court with Admiralty jurisdiction can try any claim arising out of any agreement made in relation to the use or hire of any ship, and the present action is a proceeding *in personam* under a charter-party for the use or hire of the plaintiffs' ship and complaining of damage resulting from breach of that agreement. It has been argued that the present is not properly a cause relating to a ship; but I do not agree with that view. The expression cause relating to a ship only differs from cause relating to the use or hire of a ship as the greater differs from the less. If an action on a charter-party which, *ex concessis*, is an action upon an agreement relating to the use of a ship, is not an action relating to a ship, it seems difficult to admit that an action for towage or wages is an action relating to a ship. To what ship then does the present cause relate? The proceeding, itself, is not *in rem*, but *in personam*, and the only ship indicated is the ship which is the subject of the agreement of hire for breach of which this action is brought. There is nothing in the words themselves, 'vessel or property to which the cause relates,' which involves any violence of construction in holding them to be applicable to the ship either of plaintiff or defendant as the case may be. I hold, therefore, that the present cause does relate to the plaintiffs' vessel; and, as that vessel was within my jurisdiction at the time the cause was entered, I decide against the application, and I hold that I have jurisdiction to try this action. I may add that sect. 4 of the Act of 1869, which extends the jurisdiction of County Courts in Admiralty to all claims for damage to ships, whether by collision or otherwise, when the amount claimed does not exceed 300*l.*, is plainly intended to cover cases in which damage may be occasioned in many other ways besides collision, and in which the only vessel to which the cause could be said to relate would be the damaged vessel for which the plaintiff brought his action. Whether, upon the hearing of this cause, it may appear to me more convenient and proper that it should be tried within the jurisdiction of the County Court at Poole, is a matter which I may have to consider hereafter; but for the present I dismiss the defendants' application with costs."

From this decision the defendants now appealed.

The following Acts of Parliament are material to the decision:—

County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71):

Sect. 3. Any 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): (1.) As to any claim for salvage, any cause in which the value of the property saved does not exceed one thousand pounds, or in which the amount claimed does not exceed three hundred pounds; (2.) As to any claim for towage, necessaries, or wages, any cause in which the amount claimed does not exceed one hundred and fifty pounds; (3.) As to any claim for damage to cargo or damage by collision, any cause in which the amount claimed does not exceed three hundred pounds.

Sect. 21. Proceedings in an Admiralty cause shall be commenced: (1.) In the County Court having Admiralty jurisdiction within the district of which the vessel or property to which the cause relates is at the commencement of the proceedings; (2.) If the foregoing rule be not applicable, then in the County Court having Admiralty jurisdiction in the district of which the owner of the vessel or property to which the cause relates, or his agent in England, resides, or if such owner or agent does not reside within any such district, then in the County Court having Admiralty jurisdiction the district whereof is nearest to the place where such owner or agent resides; (3.) If for any reason the last foregoing rule is not applicable or cannot be acted on, then in such County Court having Admiralty jurisdiction as general orders direct.

County Courts Admiralty Jurisdiction Amendment Act 1869 (32 & 33 Vict. c. 51):

Sect. 1. This Act may be cited as the County Courts Admiralty Jurisdiction Amendment Act 1869, and shall be read and interpreted as one with the County Courts Admiralty Jurisdiction Act 1868.

Sect. 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 carried in any ship, provided the amount claimed does not exceed three hundred pounds.

J. P. Aspinall, for the defendants, in support of the appeal.—The Newcastle County Court judge has no jurisdiction to entertain this cause. Sect. 21 of the County Courts Admiralty Jurisdiction Act 1868 has no application to this case. The causes of action, to which that section is applicable, are contained in the preceding sect. 3, and are all cases in which the shipowner is defendant. That provision is somewhat analogous to the usual County Court rule that the residence or place of business of the defendant fixes the dis-

trict. The County Court Admiralty Jurisdiction Amendment Act 1869, under which the present action is instituted, contains no provisions as to where such an action is to be commenced. It is necessarily an action *in personam*, and presumably ought to be commenced where the defendant resides or carries on business. Whilst it is true that both Acts are to be read together, only such provisions of the Act of 1868 are to be read into the Act of 1869 as are consistent therewith. The vessel spoken of in the Act of 1868 is the vessel of the defendant. In the present case it is the vessel of the plaintiff. Therefore the provisions as to district in the Act of 1868 have no application to the present case. No general orders have been made, and the present is, probably, a *casus omissus*, and therefore the plaintiff should follow the general rule of seeking the defendant's forum.

Boyd for the plaintiffs.—The two Acts are to be read as one, and therefore the provisions of the Act of 1868 are applicable to the causes of action enumerated in the Act of 1869. [He was stopped by the Court.]

Sir JAMES HANNEN.—I have nothing to add to the judgment of the County Court judge. It all turns upon the provisions of sect. 1 of the Act of 1869 that the two Acts are to be read as one. If the language of the earlier Act does not apply, the effect of the later Act is to extend the meaning of that language, and so give the jurisdiction.

BUTT, J.—I agree, though, if it had not been that the Acts are to be read as one, I should have had some doubt whether there was jurisdiction.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Thomas Cooper* and *Co*.

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